Insight

IN-DEPTH DISCUSSION

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Ninth Circuit is the First Appellate Court to Rule on "Extraneous Text" in a FCRA Background Check Disclosure

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On January 20, 2017, the U.S. Court of Appeals for the Ninth Circuit became the first appellate court to rule on the lawfulness of a liability waiver in a Fair Credit Reporting Act (FCRA) disclosure. In *Syed v. M-I*, the Ninth Circuit ruled that an employer acted willfully in violation of the FCRA when it included a liability waiver in its FCRA disclosure.

The FCRA is the federal law that regulates employer use of "consumer reports," more commonly known as "background checks" or "background reports." Before an employer may obtain a consumer report from a consumer reporting agency, typically the employer must make a "clear and conspicuous" written disclosure to the consumer, in a document consisting "solely" of the disclosure, that a consumer report may be obtained. The applicant or employee must provide written authorization before the employer may obtain a consumer report for employment purposes.

During the last few years, the number of federal class action lawsuits against employers alleging hyper-technical non-compliance with the FCRA has skyrocketed. The class action suits challenging the employer's background check disclosures tend to target disclosures that are included within the employer's job application, or if separate from the job application, that include alleged impermissible ("extraneous") text, such as a release of liability in favor of the employer, the background company, or both.

Federal district courts have not been able to agree on when the inclusion of such text in the disclosure is unlawful and, if so, whether the plaintiff can clear the next hurdle of proving a willful theory of liability. The latter is important because if a plaintiff can show the employer acted "willfully,"

then the plaintiff does not have to prove "actual damages," which makes it easier for the plaintiff to attempt to certify the case as a class action. Thus, many FCRA litigators have been waiting for a federal appellate court to weigh in.

The Decision

The named plaintiff applied for a position with the employer in 2011. As part of his application process, the plaintiff signed a "Pre-employment Disclosure Release," which advised him that his credit history and other information could be collected and used as a basis for the employment decision. The document also authorized the employer to order the plaintiff's background report and stated that the plaintiff was waiving his rights to sue the employer and its agents for violations of the FCRA. The plaintiff signed the document and later brought suit after learning that the employer had ordered his background report.

The employer moved to dismiss the case, asserting that the plaintiff's lawsuit failed to allege facts establishing a willful violation. The employer argued that the legal standard for willfulness requires a violation of an unambiguous statutory requirement, and that the section of the FCRA requiring the disclosure was too uncertain to sustain such a violation. The trial court agreed with the employer that the law was uncertain and dismissed the plaintiff's lawsuit against the employer. The trial court also denied the plaintiff's motion to reconsider its ruling.

The Ninth Circuit reversed the judgment and reinstated the lawsuit. The court first addressed a question not even addressed by the trial court: whether the employer's disclosure violated the FCRA. The court ruled that it did violate the FCRA, finding that including the liability waiver together with the disclosure violated the statute's requirement to present the disclosure in a document consisting "solely" of the disclosure.

The court then ruled this textual requirement was unambiguous and, thus, that the employer's violation, whether or not deliberate, was willful (i.e., that merely by presenting the disclosure to the plaintiff, the employer ran an "unjustifiably high risk" of violating the FCRA). The court reached the conclusion about how the statute is unambiguous even though in 2012 a trial court judge in North Carolina had upheld an employer's disclosure that included a liability release. The court disregarded that prior opinion as unpersuasive and contrary to the statute's plain terms.

The Ninth Circuit's holding is unremarkable because a number of trial court rulings have already reached this same conclusion in cases with similar facts (i.e., a liability release presented together with the disclosure). More surprising is how in ruling on willfulness the Ninth Circuit ignored the undeniable fact that learned federal judges have disagreed, and continue to disagree, on what form of disclosure complies with the FCRA, let alone willfully violates the statute. Although the court addressed the 2012 opinion from North Carolina, no mention is made of recent opinions from Texas, Florida and Minnesota.

Recommendations for Employers in 2017

Employers should arrange for a privileged review of their background check consent forms. A thorough review of these forms may help avoid the types of claims raised in an emerging line of cases that take issue with an employer's inclusion of text beyond the minimum necessary for FCRA disclosures.[1]

1 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

In addition to the disclosure and authorization requirements, the FCRA requires employers to follow certain requirements if it intends to take "adverse action" against the applicant or employee based in whole or in part on the contents of the report.[2] Employers should implement procedures to help ensure that adverse action notices are timely sent. Employers should also consider how to best record personnel decisions such that, if necessary, the employer can prove that the reason an applicant was rejected was entirely because of a poor interview, failure to provide requested follow-up information, a positive drug test, dishonesty in the application process, etc., rather than based—even in part—on the background report itself.

Employers also should continue to be mindful of their obligations under state and local ban the box laws.[3]

2 *See* Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016).

3 *See* Jennifer Mora, Rod Fliegel and Christina Cila, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law*, Littler Insight (Dec. 9, 2016); *Philip Gordon and Jennifer Mora, Austin Becomes the First City in Texas to "Ban the Box"*, Littler Insight (Mar. 25, 2016); Jennifer Mora and Stephen Fuchs, *Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law*, Littler Insight (Feb. 25, 2016); Jennifer Warberg and Philip Gordon, *Portland, Oregon Bans the Box*, Littler Insight (Dec. 3, 2015); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (Jun. 12, 2015) (among others which can be found in these Insights).