

# Insight

## IN-DEPTH DISCUSSION

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### FTC Issues "Advice" on Background Check Disclosure and Authorization Forms

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On April 28, 2017, the Federal Trade Commission (FTC) issued a blog article entitled "Background checks on prospective employees: Keep required disclosures simple."<sup>1</sup> The FTC is one of the two federal agencies with oversight of the Fair Credit Reporting Act (FCRA); the other one is the Consumer Financial Protection Bureau (CFPB). The FCRA imposes specific obligations on employers that order background checks from vendors (known as consumer reporting agencies), including the obligation to obtain informed authorization from job applicants for background checks. To obtain such authorization, the FCRA directs employers to make a "clear and conspicuous" written disclosure to the job applicant about the background check, in a document that consists "solely" of the disclosure.

Vigorous disputes over what wording and format satisfies the FCRA have spawned innumerable lawsuits, including dozens of massive nationwide class action lawsuits against employers of all sizes throughout the country.<sup>2</sup> Federal judges (even some presiding over cases within the same jurisdiction) disagree on how to interpret the statutory mandate. Against this backdrop, the FTC's cursory blog article falls far short of any serious effort by the regulator to help bring clarity to an uncertain and important area of the law. The article serves, on the other hand, to remind employers that "less is more" when it comes to drafting background check disclosure and authorization forms. This is true even though an advisory blog article is an informal publication entitled to little or no legal deference.

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1 The article is available on FTC's website at <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/background-checks-prospective-employees-keep-required>

2 See Jennifer Mora and Rod Fliegel, *Ninth Circuit is the First Appellate Court to Rule on "Extraneous Text" in a FCRA Background Check Disclosure*, Littler Insight (Jan. 25, 2017); 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 Insight (Aug. 1, 2014); Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014).

## The FTC's Blog Article

This is not the first advisory guidance from the FTC on this topic. None of the previous guidance documents have been particularly helpful to employers in terms of providing specific details rather than broad generalizations.<sup>3</sup> Also, no model form has ever been offered. The blog article is, unfortunately, no different.

First, the FTC notes the statute's requirement of a "clear and conspicuous written disclosure" that the employer intends a background screen and the need for an authorization. While the FTC acknowledges that the disclosure and authorization may be in the same document, it cautions to "be sure to use clear wording that the prospective employee will understand." What is "clear wording" according to the FTC? The article does not specifically say. But the FTC has listed certain examples of information it thinks "shouldn't be in this simple document." They are:

- "legal jargon";
- "adding extra acknowledgments or waivers," including "language that claims to release you from liability for conducting, obtaining, or using the background screening report";
- "a certification by the prospective employee that all information in his or her job application is accurate";
- "any wording that purports to require the prospective employee to acknowledge that your hiring decisions are based on legitimate non-discriminatory reasons"; and
- "overly broad authorizations that permit the release of information that the FCRA doesn't allow to be included in a background screening report – for example, bankruptcies that are more than 10 years old."

The FTC opines that this "extra stuff ... makes it harder for the prospective employee to understand the main purpose of the document," and may violate the FCRA. If the employer wants to include a release of liability or other disclosures, the FTC recommends that these be placed in a "separate document," apart from the disclosure about, and authorization for, the background check. As for the authorization portion of the form, the FTC says that this should be "in plain language," but does not provide an example of an acceptable authorization clause.

Summarizing, the FTC recommends that employers "keep it simple" and limit disclosures to a "few sentences" of a "simple, easy-to-understand notification that you will obtain a background screening report, perhaps with a simple explanation of what information will be included in the report."

## Recommendations for Employers

While employers are right to be mindful of compliance with the ever-expanding patchwork of criminal background check laws throughout the country, including the unrelenting rollout of so-called "ban the box" laws,<sup>4</sup> the FCRA's hyper-technical disclosure and authorization requirements remain a significant source of litigation risk for employers. Across all industries, in-house attorneys and human resources professionals should assess the need for an updated and privileged review of a company's background check program by a subject-matter expert, including a review of all forms and information that are presented to applicants in an on-line format.

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<sup>3</sup> See Rod Fliegel, Philip Gordon and Jennifer Mora, [FTC Releases Updated FCRA Guidance On Background Checks](#), Littler ASAP (May 11, 2016); Rod Fliegel and Jennifer Mora, [The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers](#), Littler Report (Dec. 11, 2011).

<sup>4</sup> See Jennifer Mora, Rod Fliegel, Allen Lohse, and Christina Cila, [City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law](#) (Dec. 9, 2016).