LEGAL UPDATES

Back to Basics: Are Your Background Check's Consumer Report Disclosures FCRA Compliant?

Employers that fail to provide their employee or applicant with a written consumer report disclosure before conducting a background check expose themselves to significant liability.

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If you use a consumer reporting agency or third-party vendor to conduct a background check on an employee or applicant, you must comply with the Fair Credit Reporting Act (FCRA) by first providing the employee or applicant with a written consumer report disclosure. Employers that fail to do this or do it incorrectly expose themselves to significant liability.

FCRA class actions are more popular than ever thanks to several Ninth Circuit decisions, which have focused on what constitutes a compliant "consumer report disclosure" and which have imposed very specific requirements. These lawsuits are fueled, in part, by the FCRA's favorable penalty provision: a company's willful or reckless violation of the FCRA will automatically generate a penalty of at least $100 (and up to $1,000) per violation, plus attorneys' fees and even the potential for punitive damages. They also benefit from a two-year statute of limitations, and a five-year statute of repose, making companies with high employee turnover particularly vulnerable to these claims.

The good news is that complying with the FCRA's consumer report disclosure requirements is relatively easy. The bad news is that it's also surprisingly easy to violate those requirements, and relying on forms you obtained from your consumer reporting agency or background check vendor is no defense. Indeed, many such agencies and vendors specifically put the responsibility of assuring legal compliance on the employer, and consider their forms to be "templates" with no assurance of legal compliance. You should not assume that such templates are accurate, and review each of them yourself or have employment counsel review them for you.

So what constitutes a compliant consumer report disclosure? There are three basic requirements: (1) it must tell the employee or applicant that "a consumer report may be obtained for employment purposes"; (2) it must be "clear and conspicuous"; and (3) it must be in "a document that consists solely of the disclosure."

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"Clear and conspicuous"

"Clear" means "reasonably understandable." The disclosure should not be filled with legalese or jargon, and it must be grammatically correct and avoid confusing punctuation.

By way of example, the Ninth Circuit held in *Gilberg v. Cal. Check Cashing Stores, LLC* that the following sentence was not clear and thus did not comply with the FCRA because it used a semi-colon after "all-encompassing" instead of a comma:

The scope of this notice and authorization is all-encompassing; however, allowing [the consumer reporting agency] to obtain from any outside organization all manner of consumer reports and investigative consumer reports now and, if you are hired, throughout the course of your employment to the extent permitted by law.

"Conspicuous" means readily noticeable to the employee or applicant. For example, the disclosure must be legible, it should avoid small or cramped font, it should appear on the front of a page (as opposed to the opposite side of another page in a packet), and it should have headings that help the employee or applicant understand the purpose of the form.

"A document that consists solely of the disclosure"

"Solely" means that the disclosure must contain nothing more than the disclosure itself and avoid any extraneous information.

If your consumer report disclosure contains anything in addition to the bare essentials (*i.e.*, "[The Company] may obtain a consumer report about you from a third party consumer reporting agency for employment purposes"), there is a chance it is not compliant with the FCRA.

Importantly, there are some very limited exceptions to this "solely" requirement under the current law. For example, the disclosure can identify the name and contact information for the consumer reporting agency that will be procuring the report for the company; it can include very brief explanations about what a "consumer report" entails, how it will be "obtained," and for which type of "employment purposes" it may be used; and it can combine its consumer reporting disclosure with a simplified version of an investigative consumer report disclosure.

However, the more you add, the greater the risk that an applicant or employee (or, more likely, their attorney) will argue that your disclosure is noncompliant with the FCRA, whether or not the additional language falls into these limited exceptions.

You should also be on the lookout for these common consumer disclosure report red flags:

- Liability waivers, releases, or related language
- References or checkboxes concerning state law, even if they relate to consumer report disclosures
- References to extraneous documents such as a "Notice Regarding Background Investigation" or a "Summary of Your Rights Under the Fair Credit Reporting Act"
- Language similar to the following: "You may inspect [the consumer reporting agency's] files about you (in person, by mail, or by phone) by providing identification to [the consumer reporting agency's]. If you do, [the consumer reporting agency] will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification."
- Language similar to the following: "If [the consumer reporting agency] obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation performed."

If your consumer report disclosure contains any of the above red flags, you should have your form reviewed by counsel as soon as possible.

What Should Employers Do Now?

- Employers using third parties to perform background checks on applicants or employees should review their FCRA consumer report disclosure to ensure they are clear, conspicuous, and provide only the required information. Extraneous and supplemental information, even if it is added to help clarify the disclosure, risks creating liability and should generally be left for a separate document whenever possible.

- Employers that are uncertain whether language in their disclosure forms is necessary versus "extraneous" or whether they are "clear and conspicuous" should consult with counsel to ensure compliance with the FCRA's strict requirements.

- Employers with decentralized background check procedures, such as where each department, branch, or region oversees their own background checks for new applicants, should ensure compliant forms are being used across the entire organization.

If you have questions regarding background checks, the hiring process, or any other issue related to employment law, please contact one of our attorneys.