

## Publications

### *Labor and Employment Alert: Ninth Circuit Prohibits Liability Waivers in Fair Credit Reporting Act Disclosures*

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CLIENT ALERT | 2.2.2017

In a case of first impression, the Ninth Circuit Court of Appeals recently determined whether an employer may satisfy the Fair Credit Reporting Act's (FCRA) disclosure requirements by providing a job applicant with a disclosure for consumer report that also served as a liability waiver for the employer. In *Syed v. M-I, LLC*, the Court held that an employer violates the FCRA when it procures a consumer report if it includes a liability waiver in the same document as the statutorily mandated disclosure.

### The FCRA's Disclosure and Authorization Requirement

The FCRA's disclosure and authorization provision requires a prospective employer to disclose that – with the applicant's authorization – it may obtain the applicant's consumer report for employment purposes. This means the employer may not procure a consumer report for employment purposes unless:

- a clear and conspicuous disclosure has been made in writing to the consumer before the report is procured, in a document that consists **solely** of the disclosure, that a consumer report may be obtained for employment purposes; and
- the consumer has authorized procuring that report in writing; this authorization may be made on the document referred to above.

The FCRA provides a private right of action against those who violate its statutory requirements in procuring and using consumer reports. The affected individual is entitled to actual damages for a negligent violation. For a willful violation, the individual may recover statutory damages ranging from \$100 to \$1,000, punitive damages, and attorney's fees and costs.

## The Ninth Circuit's Decision

Syed applied for a job with M-I and was provided a document labeled "Pre-employment Disclosure Release." The disclosure release informed him that his credit history and other information could be collected and used as a basis for the employment decision and authorized M-I to procure his consumer report. The disclosure release also said that, by signing it, Syed was waiving his rights to sue M-I for violations of the FCRA. Thus, Syed's signature served simultaneously as an authorization for M-I to procure his consumer report and as a broad release of liability.

Syed claimed that the disclosure release failed to satisfy the FCRA's mandated disclosure requirements. In particular, he argued that including the liability waiver violated the statutory requirement that the disclosure document consist "solely" of the disclosure itself. He filed a class action lawsuit seeking statutory and punitive damages. However, he did not seek actual damages, which would have required proof that he was actually harmed by M-I's inclusion of the waiver.

The Ninth Circuit noted that neither the Supreme Court nor any circuit court of appeals had addressed whether an employer may satisfy the FCRA by providing a disclosure on a document that also includes a liability waiver. The Court found that the FCRA "unambiguously requires a document that 'consists solely of the disclosure.'" At the same time, the Court explained that allowing a consumer to "authorize in writing" procuring a consumer report on the same document as the disclosure itself does not undermine the requirement that the document consist "solely of the disclosure." On the contrary, Congress intended the two provisions work together: "Congress reasonably could have concluded that permitting the consumer to provide an authorization on the same page as the disclosure would enhance the effectiveness of each clause."

The Court then found that M-I had willfully failed to comply with the FCRA by including a liability waiver on the same document as the statutorily mandated disclosure. M-I argued that its interpretation was objectively reasonable given that no federal court of appeal had ruled on the issue, nor had any administrative agency promulgated authoritative guidance. In rejecting this argument, the Court held that M-I's interpretation was unreasonable. This was not a "borderline case" because the FCRA "unambiguously bars" a prospective employer from including a liability waiver on a disclosure document provided to a job applicant. M-I "ran an unjustifiably high risk of violating the statute," so its actions were willful under the FCRA.

This case reminds employers to strictly comply with the FCRA's requirements (especially those employers doing business within the Ninth Circuit – Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington). Employers should review their paper and online background check forms to ensure they comply with the FCRA's authorization and disclosure requirements. Employers must also be mindful of state and local ban-the-box laws that limit or restrict when backgrounds checks may be conducted and what type of information may be considered in evaluating whether to hire an applicant. Contact your Vorys lawyer if you have questions about the FCRA or best practices for conducting background checks.