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Electronic Alert

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Ninth Circuit Further Clarifies FCRA Requirements

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In a recent decision, the Ninth Circuit further clarified the requirements for presenting an employee with a disclosure and obtaining authorization for a background check under the Fair Credit Reporting Act (FCRA).

As a reminder, the FCRA regulates at a federal level the performance of background checks by third parties. The Act only allows for soliciting a background check for a "permissible purpose," laying out the permissible reasons for seeking such information, including "employment purposes." The FCRA requires that before an employer may have a background check run on an employee or prospective employee by a third party (a "consumer reporting agency"), the employer must make a "clear and conspicuous" written disclosure to the employee or prospective employee that a report will be obtained, and the disclosure must be in a document that consists "solely" of the disclosure. The prospective employee must then authorize *in writing* the procurement of that report.

These requirements are deceptively simple, and previously two Ninth Circuit decisions had decided that the disclosure given to the employee had to be carefully crafted and consist only of the required information under FCRA and nothing else. In 2017, the Ninth Circuit decided in *Syed v. M-I, LLC* that an employer willfully violated the FCRA when any additional terms were included in the disclosure and authorization (in that case, a broad liability release was included in addition to all the necessary terms). Then, in 2019, the Ninth Circuit decided *Gilberg v. Cal. Check Cashing Stores, LLC*, where the Court held that an employer included the necessary disclosure, but that the disclosure disclosed *too much*; the employer had included the necessary federal disclosures, but had also included disclosures required by state credit reporting laws.

Following up on these ideas, the Ninth Circuit clarified today that the statue means what it says and says what it means, no more and no less – that is, that although the disclosure had to consist of a stand-alone document, that document could be presented to the employee as part of a packet of application materials. In *Luna v. Doc Kes Hansen & Adkins Auto Transp.*, the court held that an employer adequately satisfied the requirements of the FCRA when it provided a disclosure form (which consisted only of the FCRA-required disclosures and the employer's logo) even though it was a part of a larger application packet that had other pages.

Furthermore, the Court clarified that while the FCRA requires a disclosure to be a stand-alone document, that same requirement does not apply to an authorization, in which the FCRA requires an authorization to be "in writing." Therefore, an authorization form need not be a stand-alone document. That part of the process just needs to be written.

It's important to remember that the state laws regarding background checks aren't necessarily simple to comply with. While a state may not have any additional requirements, many have passed their own laws to add requirements or restrictions they feel are important or necessary.

For questions regarding background checks or if you would like assistance drafting the necessary forms, contact Paula Barran or Wilson Jarrell at 503-228-0500, or at pbarran@barran.com or wjarrell@barran.com.