

Your Background Check Documents May Be At Risk Under A New Ninth Circuit Ruling

On January 20, 2017, in a case of first impression among the appellate courts, a panel of the Ninth Circuit concluded in *Syed v. M-I, LLC* (Case No. 14-17186) that an employer violates the Fair Credit Reporting Act (FCRA) when its background check disclosure/authorization document includes a sentence that releases the employer, the consumer reporting agency (the vendor), and their agents from liability for any violations of the FCRA. The Ninth Circuit held that such a “liability waiver” cannot be included in the background check disclosure form because the disclosure -- which informs applicants that the employer intends to obtain their consumer report -- must stand alone.

The Ninth Circuit further concluded that combining the disclosure and liability waiver in a single document constitutes a “willful” violation of FCRA, which exposes the employer to statutory and punitive damages, rather than actual damages. In light of this unprecedented decision, employers should carefully review their background check disclosure and authorization documents, including disclosure documents provided by third-party consumer reporting agencies.

The Fair Credit Reporting Act Requirements

The FCRA imposes strict requirements on employers that conduct background checks through the use of third-party consumer reporting agencies. For example, an employer must comply with the following procedures before obtaining a background check report:

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person. 15 U.S.C. § 1681b(b)(2)(A).

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

The Facts in Syed

In *Syed*, the company provided the job applicant (Syed) with a "Pre-Employment Disclosure & Release." The Disclosure & Release informed Syed that his credit history and other information could be collected and used as a basis for the employment decision, authorized the company to procure Syed's consumer report, and stipulated that, by signing the document, Syed was waiving his rights to sue the company and its agents for violations of the FCRA. The liability waiver read as follows:

I understand the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release and indemnify prospective employer, PreCheck, Inc. their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

As the Ninth Circuit explained, Syed's signature on the background check disclosure/authorization document "served simultaneously as an authorization for [the employer] to procure his consumer report, and as a broad release of liability."

Syed filed a putative class action, alleging that the company's inclusion of the liability waiver violated the statutory requirement that the disclosure document consist "solely" of the disclosure. Syed sought statutory and punitive damages only, not actual damages (which would have required proof of actual harm). The district court dismissed Syed's complaint without leave to amend for failure to state a claim.

The Ninth Circuit's Decision

The Ninth Circuit reversed the district court's decision, holding that the inclusion of a "liability waiver" on the same document as the disclosure constitutes a violation of FCRA because the statute plainly states that the disclosure document "consist[] solely of the disclosure."

Although the Ninth Circuit acknowledged that no other appellate court had yet to address this issue, the panel concluded that the company's violation of the statute was "willful," holding that the company's interpretation of the statute was not "objectively reasonable." According to the Ninth Circuit, a lack of guidance from courts and administrative agencies did not render the company's interpretation reasonable. Moreover, the Ninth Circuit found that it was immaterial whether the company actually believed its interpretation was correct because it concluded that "the term...is not subject to a range of plausible interpretations." Therefore, according to the panel, the company willfully violated the statute.

Employer Take Away

In light of this decision, employers should review their background check disclosure and authorization documents closely, including disclosure documents provided by third-party consumer reporting agencies.