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Ninth Circuit Adopts New, Stricter Interpretation of FCRA Requirement for Standalone Background Check Disclosure

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The federal Fair Credit Reporting Act protects the rights of employment candidates and employees when the employer seeks a consumer report, commonly known as a background check, conducted by a third-party investigator. Many states have similar protective laws, such as the California Investigative Consumer Reporting Agencies Act.

The FCRA requires employers seeking a background check to provide the applicant or employee with a "clear and conspicuous disclosure" that the prospective employer may obtain a consumer report for employment purposes. The employer's disclosure must be "in a document that consists solely of the disclosure," although the law permits the individual's signed authorization to be included in the document.[1] Courts have found that including job application-type inquiries, or a liability waiver, defeated the "consists solely" standard and were impermissible.

On January 29, 2019, the Ninth Circuit ruled that the FCRA prohibits any extraneous information within the required disclosure, even information about the individual's rights or "other, state-mandated disclosure information" that may assist the individual in understanding the employer's intentions and their rights. *Gilberg v. Cal. Check Cashing Stores*, 9th Cir. No. 17-16263. This amounts to a stricter interpretation that likely will require most employers to review and possibly revise their disclosure and authorization forms.

The plaintiff in *Gilberg* applied for a position with the defendant, and as is customary, her prospective employer sought to obtain a background check. The defendant provided her with a document entitled "Disclosure Regarding Background Investigation," which informed the plaintiff that it intended to obtain a background check and provided a space for her to sign and authorize such action. The disclosure also provided the plaintiff with information required by ICRAA, including the purpose, nature and scope of the background check, the identity and contact information of the investigator, and her legal rights regarding any consumer report about her, including her right to obtain a copy. The disclosure also referenced a separate summary of her rights under the FCRA. After providing her authorization and beginning work for the employer, the plaintiff filed a class action under the FCRA and California law.

The Ninth Circuit was confronted with two issues: "(1) whether a prospective employer may satisfy the FCRA's standalone document requirement by providing job applicants with a disclosure containing extraneous information in the form of various state disclosure requirements, and (2) whether the specific disclosure provided by the employer in this case satisfied the clear and conspicuous requirement."

The Ninth Circuit answered both questions in the negative. In a previous decision, *Syed v. M-I, LLC*, the court held that the statute meant what it said and the required disclosure must be in a document that "consist[s] 'solely' of the disclosure."[2] The employer in *Gilberg* argued that this case was distinguishable from *Syed* because the information contained in the disclosure furthered the FCRA's purpose as it informed the applicant of her federal and state law rights. The court disagreed, finding no implied exception to the standalone disclosure requirement, even for purposes purporting to be beneficial to the individual.

The court further found that the presence of extraneous information, even if the information related to the FCRA or other state-mandated disclosure information, "is as likely to confuse as it is to inform" and "does not further the FCRA's purpose." In addition, the Ninth Circuit found that the inclusion of the information regarding the legal rights afforded to a job applicant in other states, combined with the FCRA-mandated disclosure, would "confuse a reasonable reader" and thus violated the requirement that the disclosure be clear.

The court also found that, because the standalone document requirements are identical under the FCRA and

ICRAA, the disclosure violated ICRAA as well.

Recommendations for employers post-*Gilberg*

Combining both state and federal background check disclosure requirements in the same document has been a common practice and has now been found to constitute a violation under both the FCRA and ICRAA. Employers subject to the FCRA should review their background check forms with counsel. Employers that use vendor-provided forms should consult with the vendor regarding whether forms will be updated in light of *Gilberg*.

Notes

1. 15 U.S.C. § 1681b(b)(2)(A)(i),(ii).
2. 853 F. 3d 492 (9th Cir. 2017) (included liability waiver)

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Key Contacts

Wendy Brenner **Palo Alto**	**brennerwj@cooley.com** **+1 650 843 5371**
Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704

Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

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