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Federal Court of Appeals Clarifies Background Check Disclosure Requirements for Employers

Does your company still perform background checks on employees? If you answered yes, then the Ninth Circuit's recent ruling on background check disclosures applies and you should *review your company's background check disclosures immediately*.

The Fair Credit Reporting Act ("FCRA") requires employers to provide each applicant with a "clear and conspicuous" disclosure that the employer will perform a background check on the applicant. This disclosure must be a standalone document that is separate and distinct from any other application paperwork. Employers can include some minor additional information in the notice, like a brief description of the nature of background reports, but only if it does not confuse or detract from the notice. Various states also have particular disclosure requirements in addition to the FCRA. Often, the various state disclosures are included in the same "standalone" FCRA disclosure document on forms provided by consumer reporting agencies.

In *Gilberg v. Cal. Check Cashing Stores*, the Ninth Circuit clarified that the FCRA "standalone disclosure" requirement prohibits inclusion of state-specific disclosures on the same form. The court considered forms used by Cal. Check Cashing Stores, which included multiple state and federal disclosures all within the same document, and concluded that the disclosure violated both federal and California law. The Ninth Circuit clarified that "standalone" under the FCRA means that the disclosure form consists solely of the FCRA disclosures that apply to that applicant. Including notices for various states that do not apply, or including the disclosure form in an application packet, is likely to confuse the applicant, and violates the FCRA and California's Investigative Consumer Reporting Agencies Act.

To comply with the FCRA, a background disclosure must include a disclosure that the consumer report may be used for employment purposes. The disclosure may also ask for the applicant's basic identifying information, and require their signature authorizing procurement of an investigative report. However, including extraneous information, such as state-specific disclosures, or requesting applicant input other than basic identifying information, violates the FCRA. While the Ninth Circuit does not explicitly prohibit including *all* state notices, even applicable state-specific disclosures (in this case, CA), we recommend keeping all state-mandated disclosures separate from the FCRA disclosure.

We recommend that employers review their current disclosure forms or any disclosure forms they receive from third-party background check agencies to ensure they meet the "standalone disclosure" requirement. If the background check disclosure form includes information regarding other state disclosures, or if the form is provided to applicants as part of an application packet, the form likely violates the FCRA and should be modified immediately.

Questions? Contact Stokes Wagner.