JONES DAY

COMMENTARY

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IN SHORT

The Situation: The United States Court of Appeals for the Ninth Circuit considered whether an employer's consumer report disclosure form, which contained a combination of disclosures mandated by the Fair Credit Reporting Act ("FCRA"), the California Investigative Consumer Reporting Agencies Act ("CICRAA"), and other analogous state laws violated the FCRA and CICRAA.

The Result: The court held that combining FCRA and state disclosures into one notice violates the FCRA and the CICRAA.

Looking Ahead: This ruling may encourage additional litigation under the FCRA, the CICRAA, and analogous state laws. Employers should review their background check disclosures and ensure that the disclosures required by the FCRA and each applicable state law are provided separately.

Under the FCRA, an employer may not run a background check on a prospective employee without first providing "a clear and conspicuous disclosure . . . in a document that consists solely of that disclosure, that a consumer report may be obtained for employment purposes." For efficiency, many employers include all federal and state-mandated disclosures in the same document. But in *Gilberg v. California Check Cashing Stores, LLC*, Case No. 17-16263 (9th Cir. Jan. 29, 2019), the Ninth Circuit concluded that combining FCRA and state disclosures into one notice violates the FCRA as well as the CICRAA, a law which the parties agreed contains an identical "standalone document" provision. Thus, to comply with the FCRA and the law of California, along with potentially other state laws with standalone document requirements, employers should put the required FCRA and state disclosures into separate documents.

The facts in *Gilberg* were not unusual. Desiree Gilberg applied for, and was offered, a position with CheckSmart in California. As part of the hiring process, Gilberg was required to sign a disclosure notice ("Disclosure") giving CheckSmart the ability to perform a background check. The Disclosure included information required by the FCRA and information required by similar state laws in California, New York, Maine, Oregon, and Washington. Gilberg worked for CheckSmart for five months before voluntarily resigning, then sued CheckSmart for violating the FCRA and CICRAA. She asserted, on behalf of herself and all other similarly situated employees, that CheckSmart's Disclosure violated the FCRA and California law because it did not consist "solely" of the requirements in the FCRA or California law. The Ninth Circuit ruled that inclusion of the "various state disclosure requirements" in CheckSmart's Disclosure constituted "extraneous information," and therefore did not comply with the FCRA because it did not consist "solely" of the information required by the FCRA. The court likewise found that the Disclosure did not comply with California law as it included extraneous information concerning the FCRA and other state laws.

> Thus, to comply with the FCRA and the law of California, along with potentially other state laws with standalone document requirements, employers should put the required FCRA and state disclosures into separate documents.

While the Ninth Circuit is the first Circuit Court of Appeals to address this specific issue, district courts in the majority of other circuits have reached similar results with respect to the FCRA, holding that it means what it says: an FCRA disclosure must be clear, conspicuous, and on a document that contains nothing but the required disclosure. See, e.g., *Robrinzine v. Big Lots Stores, Inc., 156 F. Supp. 3d 920* (N.D. Ill. Jan. 19, 2016). Under *Gilberg*, a disclosure is clear if it is "reasonably understandable" and is conspicuous if it is "readily noticeable to the consumer."

TWO KEY TAKEAWAYS

1. Employers should review their background check disclosures to ensure that applicants and employees are provided disclosures that set forth the requirements of the FCRA and each applicable state law separately.

2. Employers should ensure that their disclosures meet the FCRA's "clear and conspicuousness" requirement. An FCRA disclosure should be in plain language, clearly titled, and structured with headings in bold or underlined—or both—font. The chosen font should be of a size and style that are reasonably readable. The Ninth Circuit found in *Gilberg* that size 8 Arial Narrow font was sufficient despite being "inadvisably" "small and cramped."


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