
Employers Violate the Disclosure Requirements of the FCRA if They Include Anything More Than the Disclosure Itself

By Stephanie K. Rawitt / Jan 26, 2017

On January 20, 2017, in a case of first impression, the Ninth Circuit Court of Appeals ruled that a prospective employer violates Section 1681b(b)(2)(A) of the Fair Credit Reporting Act (FCRA) when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure. The Court held that "in light of the clear statutory language" the disclosure document must consist solely of the disclosure, and an employer's violation is "willful" when it includes terms in addition to the disclosure before procuring a consumer report. *Syed v. M-I, LLC, et al.*, No. 14-17186, D.C. No. 1:14-cv-00742-WBS-BAM (January 20, 2017).

Congress enacted the FCRA in 1970 in response to the "increasingly sophisticated use of consumers' personal information in making credit and other decisions" and recognized the need to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." Congress thus required the use of reasonable procedures in "procuring and using a consumer report" in establishing a consumer's eligibility for credit or insurance, employment, or any other purpose authorized under the statute. Accordingly, employers who procure background checks or consumer reports from a third party as part of a pre-employment or employment screening process, are obligated to abide by the terms of the FCRA.

In the instant action, Lead Plaintiff Samad Syed applied for a job with Defendant M-I, LLC in 2011, and signed a document entitled "Pre-Employment Disclosure Release" which informed Syed that M-I, LLC would collect and use his credit history and other information as a basis for the employment decision, authorized M-I, LLC to procure Syed's consumer report, and stipulated that, by signing the document, Syed was waiving his rights to sue M-I, LLC and its agents for violations of the FCRA. Accordingly, Syed's signature served simultaneously as an authorization for M-I, LLC to procure his consumer report, and as a broad release of liability.

The liability waiver at the heart of the dispute 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 any reasons of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

Syed maintained that the Disclosure Release violated the FCRA because of the inclusion of the release language. He argued that the inclusion of the liability waiver violated the statutory requirement that the disclosure document consist "solely" of the disclosure.

The Ninth Circuit Court of Appeals agreed with Syed's argument. The three-Judge panel found that the FCRA specifically requires companies to tell applicants if they intend to obtain their consumer report and allow them to refuse. The court noted that the disclosure provision "says what it means and means what it says" and that it clearly bars the inclusion of a liability waiver or anything else on the same document. as the disclosure.

The *Syed* case serves as a reminder to employers who procure consumer reports during pre-employment screens or at any other time - it is imperative to comply with the FCRA. Employers should make certain that their disclosure documents comply with the plain meaning of the FCRA. Specifically, employers should review their Disclosure Form to ensure it does not contain any provision other than the information mandated by the regulation.

If you have any questions about an employer's obligations under the FCRA, please contact Stephanie K. Rawitt at (215) 640-8515 | srawitt@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.