

Ninth Circuit Confirms FCRA Disclosure Cannot Include Liability Waiver

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Earlier this month, the Ninth Circuit further confirmed the importance of strict compliance with the Federal Credit Reporting Act's (FCRA) disclosure requirements. In *Syed v. M-I, LLC*, the Ninth Circuit held that the employer willfully violated the FCRA by including a liability waiver in its disclosure form. The FCRA specifically requires an employer to provide a disclosure form to a prospective employee consisting "solely of the disclosure" in advance of the background check if the results of the background check will be used or considered for "employment purposes." The FCRA separately provides that the disclosure form may also include the employee or applicant's written authorization, which the employer must also obtain in advance of the background check. As detailed in an earlier post, the simpler the form, the more likely the form is compliant with the FCRA's technical requirements.

The employer argued that because the FCRA allows a disclosure form to include an employee authorization, the term "solely", as used in the statute, did not really mean *solely*, and thus the disclosure could also include a liability waiver signed by the employee. The court explicitly rejected this argument, and highlighted the fact that the FCRA expressly provides for a singular exception to include the employee authorization in the disclosure form, which reflected Congress's intent to exclude any implied exceptions. The court further determined that the inclusion of a liability waiver in the disclosure form constituted a willful violation of the FCRA, which exposes an employer to punitive damages in addition to damages assessed per violation (per employee or applicant receiving a defective disclosure form), plus attorneys' fees.

Although *Syed* is a case of first impression, the decision confirms the strict approach district courts across the country have taken in interpreting the provisions of the FCRA. Seemingly innocent violations of the FCRA—such as extraneous language in the FCRA-mandated disclosure form—can expose an employer to extensive liability. Employers cannot simply rely on the forms provided to them by consumer reporting agencies, and should consult legal counsel for a review of their processes related to background checks.

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