

Client Alert

Does Your Fair Credit Reporting Act Disclosure Form Contain a Liability Waiver?

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In a case of first impression, the Ninth Circuit held in *Syed v. M-I, LLC* that an employer violates the Fair Credit Reporting Act (FCRA) when it procures a job applicant's consumer report after including a liability waiver in the disclosure form mandated by the FCRA. The Court also held that including a liability waiver in the disclosure form amounts to a willful violation of the FCRA, thereby subjecting the employer to statutory damages, punitive damages, attorneys' fees and costs.

As a result, all employers who rely on background checks to make employment decisions (e.g. hiring, promoting, firing, etc.) should take the time to review their disclosure forms related to those checks for compliance with the FCRA in light of the recent guidance in *Syed*.

Background on the FCRA

Before obtaining a consumer report, the FCRA requires employers who use consumer reports in making employment decisions to obtain the applicant or employee's written authorization to access the consumer report and clearly and conspicuously notify applicants or employees that the employer may use information in their consumer report for decisions related to their employment. The notice must be in writing and in a **stand-alone** format consisting solely of the disclosure notice. However, the applicant or employee's written authorization may be included in the same document as the disclosure notice.

Damages for a violation of the FCRA vary depending upon whether the employer acted negligently or willfully in violating the FCRA. The



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FCRA allows for applicants or employees to recover actual damages and attorneys' fees and costs for negligent violations. For willful violations (and each time the non-compliant disclosure form is given is a separate violation), the FCRA allows for actual damages, not less than \$100 and not more than \$1000, punitive damages, and attorneys' fees and costs.

Ninth Circuit Finds Liability Waiver is a Willful FCRA Violation

In *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), M-I provided Syed with a document labeled "Pre-employment Disclosure Release" after Syed applied for a job with the company. The Disclosure informed Syed that his credit history may be collected and used as a basis for M-I's employment decision and authorized M-I to procure Syed's consumer report. The Disclosure also provided that, by signing the Disclosure, Syed was waiving rights to sue M-I and its agents for violations of the FCRA:

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 reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

The Ninth Circuit analyzed the language of the FCRA set forth in 15 U.S.C. § 1681b(b)(2)(A) and determined that the statute unambiguously requires a document that "consists solely of the disclosure" and does not authorize the inclusion of a liability waiver in the document. Further, the court found that irrespective of M-I's subjective interpretation of the statute or actual belief, M-I acted in reckless disregard of a statutory duty by including the waiver because the FCRA unambiguously bars it from including a liability waiver in the disclosure. Therefore, the court deemed M-I's violation willful.

In recent years, courts have grappled with what it means for a document to consist "solely of the disclosure" and what language may and may not be included in a FCRA disclosure as a result. In light of the Ninth Circuit's decision in *Syed*, it is now clear, at least for employers in the Ninth Circuit, that liability waivers may not be included. Employers should review their FCRA disclosures to ensure that a liability waiver along with any extraneous information is not included in the disclosure. If a waiver is included, the employer should immediately cease using those forms. If extraneous information is included, consider removing that information and putting it on another document. The Federal Trade Commission advises on its website that employers "can include some minor additional information in the notice, like a brief description of the nature of consumer reports, but only if it does not confuse or detract from the notice."