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Employers Beware: Deceptive Background Check Requirements Spell Trouble

By Paula Barran

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It isn't unusual for employers to need or want background checks as part of their hiring process. A recent (July 2017) report of a survey of more than 1500 human resources professionals conducted by HR.com and sponsored by the National Association of Professional Background Screeners reported that such checks are "nearly universal" and that public safety was "overwhelmingly" the primary reason. Some employers can check with their own internal resources, but it is a complicated process and many (maybe most) need to use a third party to gather necessary information. Depending on the job, an employer might need only a quick reference check, or might need a comprehensive review including criminal or credit histories.

In general, background checks performed by a third party are subject to regulation through the federal Fair Credit Reporting Act (FCRA), and the laws of many individual states as well. Those laws require employers to introduce and maintain processes that support accuracy and reliability, and provide transparency through advance notice and later disclosures. Some restrict the ways in which an employer can obtain background information, the type of information it can consider, or when it can consider it.

Where there are laws, there are compliance obligations, and where there are compliance obligations, there can be penalties for non-compliance. Furthermore, two recent cases from the federal Ninth Circuit Court of Appeals demonstrate that federal law requires meticulous compliance with the Fair Credit Reporting Act's detailed requirements to avoid large monetary penalties.

Federal law defines the "permissible purposes" for securing a background check in the first place (in the statute it is a "consumer report"). For example, you can't just ask for one on your new neighbor or on your teenager's new significant other, but you can secure one for statutorily identified permissible reasons including "for employment purposes," as long as you also follow the statutory procedures to the letter. Under federal law, those are deceptively simple: that the reporting agency obtains a certification from the employer, and that the applicant must receive "a clear and conspicuous disclosure" in advance of the employer requesting the report "in a document that consists solely of the disclosure", that a report may be obtained for employment purposes, AND that the applicant has authorized procuring the report, in writing. In statutes, text and context are important, so the pertinent sections are reproduced at the end of this article. Here, "pertinent" also means that these sections are an excerpt. The full text of the law is available online and for free. An excellent resource for that exercise is the Legal Information Institute.

Back to those two recent cases. Both of them dealt with the part of the law that requires an employer to provide the applicant a clear and conspicuous disclosure that consists *solely* of the disclosure. As it turns out, "solely" isn't really the right word since the law allows employers to tack the employee's authorization onto the disclosure – but that is an exception that the statute allows.

In 2017, the Ninth Circuit Court of Appeals issued a decision in *Syed v. M-I, Ltd. Liab. Co.* and held that "in light of the clear statutory language that the disclosure document must consist 'solely' of the disclosure, a prospective employer's violation of the FCRA is 'willful' when the employer includes terms in addition to the disclosure, such as the liability waiver here, before procuring a consumer report or causing one to be procured." The applicant had been provided a disclosure which had the necessary information, but which had an added release of claims. When that additional language was tucked into the disclosure, the applicant signed to authorize the background check, but also (and this is the bad part) signed the broad liability release.

In 2019, the Ninth Circuit decided another "clear and conspicuous" case, but this one was a little harder to predict. In *Gilberg v. Cal. Check Cashing Stores, Ltd. Liab. Co.,* the issue was not that the employer included a release. Here, the problem arose because the employer's "disclosure" included too much information. It had the necessary language from federal law, and it included the information required by the applicable state laws also. The opinion reinforces that "a prospective employer violates FCRA's standalone document requirement by including extraneous information relating to various state disclosure requirements in that disclosure. We also hold that the disclosure at issue here is conspicuous but not clear." Think Goldilocks. Not too much, not too little. Make it just right.

Federal law establishes federal requirements. This is one of those areas in which the federal law apparently doesn't regulate quite enough to meet the needs of some states, so many states have passed their own laws. Those laws acknowledge the federal regulation but add things that are important to the state. Some of them require disclosure of how to get a copy of the report. The importance of the *Gilberg* decision is this: **Do not clutter up the federal disclosure with state information. If you do that, you aren't helping Goldilocks.**

Employers who do background checks should be careful about the words they use and read their own disclosure and consent forms. A fair reading of the *Gilberg* decision suggests that employers need to go through (a) the federal disclosure + authorization routine, and then follow up with (b) any applicable state requirements. Some state laws may permit disclosures from multiple states on the same page, but that isn't the federal rule.

This leads to the question of which state law is going to apply. The answer seems easy if the applicant and the employer are in the same state, but that isn't always the case. It might be a prudent choice to provide the necessary forms for the employer's state AND for the applicant's state.

Here are those federal excerpts:

The language that describes the employer's certification to the reporting agency says:

Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal

employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title [15 USCS §§ 1681 et seq.], as prescribed by the Bureau under section 609(c)(3) [15 USCS § 1681g(c)(3)].

Those references to paragraphs (2) and (3) are to the employer's responsibilities:

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3) [15 USCS § 1681m(a)(3)]; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the Consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).

For specific guidance on your company's background check procedures, disclosure forms, or any other employment-related inquires, contact Barran Liebman attorney, Paula Barran, at (503) 228-2143 or pbarran@barran.com.