

When a Disclosure Form Must “Stand Alone”: Recent Cases Hold Companies Liable for Including Too Much on FCRA Disclosures

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Let's face it. The hiring process involves mounds of regulations, disclosures, authorizations, and then more disclosures. The last thing an employer - or applicant - wants to see is a higher stack of documents filled with legal jargon. ***Should employers then consolidate disclosures and authorizations to simplify the hiring process?***

Not when doing a credit check pursuant to the Fair Credit Reporting Act (FCRA). Recent cases emphasize the importance of employers allowing disclosures to obtain background checks from consumer reporting agencies to “stand alone” from every other document.

The FCRA mandates that employers who seek to procure a consumer report must present “clear and conspicuous” disclosures that are contained in a document that consists solely of the disclosure. This is known as the “stand alone” requirement.

While the FCRA allows the disclosure form to also include an authorization - which is also required before procuring a report - Courts have recently cracked down on employers who include anything extraneous.

For instance, in *Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017), the Ninth Circuit Court of Appeal held that the inclusion of a liability waiver in the same document as the FCRA disclosure violated the FCRA’s “stand alone” requirement.

The Ninth Circuit further held that violation of this technical requirement is enough of a “concrete harm” to allow the case to proceed in Federal Court where the plaintiff alleged he was confused about the excess language and would not have signed the disclosure otherwise.

In *Poinsignon v. Imperva, Inc.*, No. 17-cv-05653-EMC, 2018 U.S. Dist. LEXIS 60161 (N.D. Cal. Apr. 9, 2018), a District Court recently held that a FCRA disclosure that included references to state law, a URL link to a privacy policy, and an acknowledgment of another document – the “Summary of Rights under FCRA” – violated the FCRA’s “stand alone” requirement.

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The Court in *Poinsignon* underscored the importance of “[p]resenting the disclosure in a separate stand-alone document free from the clutter of other language” to call “consumers’ attention to their rights and to the significant of their authorization.”

And in *Lagos v. Leland Stanford Junior Univ.*, No. 5:15-cv-04524-PSG, 2015 U.S. Dist. LEXIS 163119 (N.D. Cal. Dec. 4, 2015), a District Court held that inclusion of seven state law notices and a sentence stating, “I also understand that nothing herein shall be construed as an offer of employment or contract for services,” plausibly violated the FCRA’s “stand alone” requirement.

Against this backdrop, there has been a considerable uptick in FCRA litigation in recent years. In 2017, FCRA litigation increased over 9% from the prior year.

So far in 2018, FCRA related filings are on pace to increase further.

Employers have also been recent targets of FCRA class action lawsuits alleging violation of the FCRA’s “stand alone” requirement.

For example, on April 20, 2018, Petco Animal Supplies, Inc., asked a Federal Court in the Southern District of California to approve a class-wide settlement of a 2016 lawsuit based on allegations that its web based application contained a FCRA disclosure containing a broad authorization for “any person” to provide “any and all information” to the consumer reporting agency, in addition to information relating to the laws of seven different states. Petco agreed to pay \$1.2 million to resolve the claims of approximately 37,000 individuals.

And on April 12, 2018, Frito-Lay, Inc., asked a Federal Court in the Northern District of California to approve a class-wide settlement of a 2017 lawsuit based on allegations that Frito-Lay violated the FCRA’s “stand alone” requirement by including additional language in its FCRA disclosure form including, among other things, a statement that “I have been given a standalone consumer notification that a report will be requested and used [.]” Frito-Lay agreed to a settlement of about \$2.4 million to resolve the claims of roughly 38,000 class members.

2018 marks a new opportunity for employers to review and update their hiring forms to ward off FCRA lawsuits.