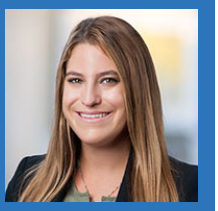
Nothing More, Nothing Less: Ninth Circuit Limits the Acceptable Format of and Language in Background Check Disclosure Forms Given to Job Applicants

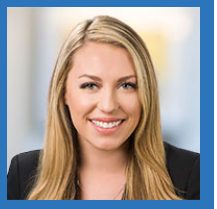
April 29, 2019

Authors

Nancy A. Bertrando
310.201.7483
nbertrando@ggfirm.com



Lauren R. Fishelman
310.785.6886
lfishelman@ggfirm.com



Kelly M. Raney
310.201.7409
kraney@ggfirm.com

The federal Fair Credit Reporting Act ("FCRA") prohibits employers from obtaining consumer reports (which may include credit reports, criminal and civil court records and judgments) on job applicants without appropriate disclosures. California has similar disclosure requirements pursuant to the Investigative Consumer Reporting Agencies Act ("ICRAA"). Liability for violations of the FCRA and the ICRAA can be substantial.

Disclosure forms are often simplified to combine the disclosure requirements of both the FCRA and the ICRAA into a single disclosure consent form. However, in the recent case of *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019), the Ninth Circuit has effectively ended this practice. Instead, employers must now provide two separate forms – one for the FCRA disclosure and one for the ICRAA disclosure.

In *Gilberg*, the plaintiff was hired after a criminal background report was obtained, but shortly thereafter voluntarily terminated her employment. She had signed a pre-employment consumer report disclosure and authorization form in connection with her job application which consolidated the dissemination of required federal and state disclosures. She subsequently filed a class action suit against her former employer, alleging that the disclosure form violated fundamental FCRA and ICRAA requirements. The Ninth Circuit agreed, reasoning that the employer's disclosure form was not clear because, among other things, it combined federal and various state disclosure requirements. (The court also found that the form contained typographical errors).

As a result of the Ninth Circuit's decision, employers must now use separate federal and state disclosure forms, and each disclosure must include only the required statutory language, in clear and simple form, without any additional, extraneous references or information.

Guidance for Employers Post-*Gilberg*

In light of the *Gilberg* decision, we recommend that our clients carefully review all background check disclosure and consent forms, including any such forms provided or used by their vendors, to ensure that they are compliant with the *Gilberg* decision. Separate forms must be utilized for state and federal disclosure notices, and they should include only statutorily required disclosure language. Federal disclosure forms should not reference state disclosure requirements, and vice versa. Neither form should include any extraneous information, and all disclosure documents should be carefully reviewed for any

typographical or grammatical errors. Finally, the language of any disclosure document should contain a legible font and simple and clear language, such that a reasonable person could understand its meaning.

We encourage you to contact us if your current employment application forms contain combined disclosure notices and to review the consent forms that your background investigation vendors are providing to you for your applicants to sign, to ensure that they comply with the *Gilberg* ruling.

***

Please reach out to a member of the Employment Law Group with any questions or concerns.