

Disclosures for Background Checks: A Cautionary Tale

Background checks are oftentimes a condition of employment. Employers who seek to perform background checks must comply with applicable state and federal law before they can obtain such information. This generally includes statutory disclosures and obtaining authorization from the applicant. Employers who fail to comply with the letter of the law can be sued for violation of the statutory requirements, even when the employee has not suffered any actual damages from noncompliance.

Syed v. M-I, LLC (2017) 853 F.3d 492 is instructive. The employer was sued under the federal Fair Credit Reporting Act ("FCRA") because its disclosure document for seeking a background check on applicants did not comply with the FCRA. The FCRA requires a clear and conspicuous written disclosure before a background check can be performed for employment purposes. The statute also requires a written authorization for the background check, and permits the authorization to appear in the same document as the disclosure. The problem in this case was that the disclosure document contained too much information. Besides the disclosure and the authorization, the employer also included a release of liability. The court of appeal determined that the FCRA was not ambiguous in its requirement of a document consisting "solely" of the disclosure. The only exception was for the authorization to be included as part of the disclosure document, so by including the release despite the statute's unambiguous language, the employer willfully violated the FCRA.

Notably, the employee did not claim that he suffered any actual damages in his lawsuit. After all, he was hired. He subsequently learned of the error when he reviewed his personnel file and saw the release that he signed when he was as an applicant. Nevertheless, he was still able to sue his employer for statutory and punitive damages, and could seek to recover his attorney fees. This case is a lesson to employers of the importance of getting it right, particularly in an area so heavily regulated by statute as are background checks. Errors in records can stick around for quite some time, and employers may face lawsuits for seemingly harmless errors. Employees may even have help in looking for and finding problems because the FCRA, like numerous employment statutes, allow employees to recoup their attorney fees when they prevail on their statutory claims.