

Liability Waiver In Pre-Employment Disclosure Form Is Unlawful, Says Ninth Circuit

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In *Syed v. M-I, LLC*, the U.S. Court of Appeals for the Ninth Circuit recently held that a prospective employer violated the disclosure requirements of the Fair Credit Reporting Act (FCRA) by including a liability waiver in a job applicant's pre-employment form. The provision of the FCRA at issue – 15 U.S.C. § 1681b(b)(2)(A) – requires prospective employers to disclose “in a document that consists *solely* of that disclosure” that they may obtain a job applicant's consumer report as part of the employment application process, and provide the means by which the prospective employee might withhold such authorization. (Emphasis added.) Syed, a job applicant, was provided a disclosure release form as part of his application to M-I. Along with providing the required disclosure pursuant to the statute, the form included an additional liability waiver, which stipulated that, by signing the document, Syed was waiving his rights to sue M-I and its agents for violations of the FCRA. The Ninth Circuit ruled that this simultaneous inclusion of the liability waiver was unlawful because the statute “unambiguously” required that the form only contain the disclosure without additional terms, such as a liability waiver. Because this language was so clear, the court determined M-I's inclusion of the waiver was made in “reckless disregard of its statutory duty.” This finding of a willful violation subjected M-I to statutory damages, punitive damages, and attorney's fees and costs. In light of the Ninth Circuit's ruling, employers should be aware that when it comes to making statutory disclosures under the FCRA's § 1681b(b)(2)(A) in pre-employment applications, form over substance matters – and employers may be best served by including separate forms for additional disclosures.

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