

Federal Court Further Defines Requirements for FCRA Disclosure Notices

Ellen Aldridge

There's an old saying: "What you don't know, can't hurt you." In the employment context, recent federal court cases have sometimes called for that phrase to become, "What you do know *can* hurt you"—especially if you ask the wrong questions and uncover information you shouldn't have! Background checks help ensure you have all relevant information when making a hiring decision. Any good nonprofit conducts background checks on applicants for employment or volunteer positions as part of due diligence and risk management.

Unfortunately however, the patchwork of laws that regulate certain aspects of background screening have the potential for creating liability if the process your nonprofit uses does not comply with legal mandates. In this article, we explore how a recent case from the Federal 9th Circuit Court of Appeals, [Gilberg v. Cal. Check Cashing Stores](#), raises a criminal records check compliance issue for employers.

Fair Credit and Reporting Act

Credit reporting agencies and law enforcement maintain databases that are full of inaccuracies due to identity theft, data inputting errors, and consumers with similar names. We've all experienced getting incorrect information from a database at one time or another!

To protect consumers from misinformation and to enhance privacy, the federal [Fair Credit and Reporting Act \(FCRA\)](#) requires giving specific disclosures and notices to consumers, thereby creating a process to challenge incorrect data maintained in these public and private databases. A few states, including California, have similar laws employers must follow when collecting personal information on employment applicants.

Gilberg v. Cal. Check Cashing Stores

Under FCRA, prior to allowing a third party to obtain a 'consumer report' on a prospective employee or volunteer, an employer needs to provide the applicant a FCRA-mandated disclosure called "Notice Regarding Background Investigation" and a "Summary of Your Rights Under the Fair Credit Reporting Act." A 'consumer report' encompasses data about credit history and medical history as well as criminal history data compiled by courts or law enforcement.

In a 2017 case, [Syed v. M-1 LLC](#), the 9th Circuit Court held that FCRA contains "clear statutory language that the disclosure form must consist solely of the disclosure." At issue in *Syed* was the employer's inclusion of a liability waiver, which the applicant signed as part of the disclosure form and authorization to conduct the background check.

In [Gilberg](#), the court expanded the *Syed* decision, finding that the prospective employer violated FCRA's standalone document requirement by including what the court deemed extraneous information. The employer used a format common in legal notices, drafted for a national audience, that included several separate sections comprising state-specific disclosures following the federal FCRA disclosure. The court held that presenting these state-specific disclosures on the same document meant the FCRA disclosure was not the sole disclosure in the notice—which is a violation of the applicable statute.

Checking Pre-Hire Documentation

The take-away for all employers is to evaluate your pre-hire documentation and confirm that your FCRA disclosure is up-to-date and a standalone document. The Federal Trade Commission publishes compliant [FCRA disclosure notices](#). Any other pre-hire paperwork must be a separate document. Documents sent electronically should be maintained as separate e-documents. If your nonprofit uses an on-boarding web portal or app, confirm that the FCRA notice is maintained as a separate e-document in that system.

Even employers who use third-party background check vendors must review the documentation used to confirm compliance, since these vendors typically include liability disclaimers and notices alerting users to have their legal counsel review the documents. Most litigation in this area involves large employers sued in class-action lawsuits: Walmart is facing a [FCRA class action](#) involving up to 5 million plaintiffs.

However, plaintiffs' attorneys who evaluate potential legal claims of a failed employment candidate or of a terminated employee could potentially add a FCRA cause-of-action in any employment-related lawsuit filed. FCRA has [statutory penalties](#) of \$100-\$1,000 per incident for the failure to provide appropriate notice, regardless of the plaintiff proving damages, making these claims fertile ground for class action lawyers.

FCRA Overlap with “Ban the Box” Laws

Compliance concerns don't end with background check disclosure notices. Many states and cities have adopted “Ban the Box” laws that prohibit employers from asking about criminal history on job applications. These laws also create a process for the employer to notify the applicant if any adverse action is proposed because of the applicant's criminal history. Some “Ban the Box” laws have exceptions when the law already mandates criminal background screening for certain type of workers.

FCRA and similar state laws also have an adverse action notice that employers must send to applicants if the employer deems the criminal history unacceptable. Because both FCRA and “Ban the Box” laws each have their mandatory process for notifying the applicant of a potential adverse action, employers must confirm that the adverse action notice complies with all the requirements of these laws. For example, an employer in San Francisco would have to make sure its applicant background records check and adverse action process complies with [San Francisco Fair Chance Ordinance](#), [California Ban the Box](#), [California's Investigative Consumer Reporting Act \(ICRA\)](#), and FCRA.

While compliance can be complicated, reviewing your pre-hire documentation is key to mitigating risk. You and your nonprofit are protecting yourselves by performing background checks. But what you don't want is to ask questions and, by asking too much, find out information that subjects your nonprofit to liability and potential attorney's fees! In this situation, knowing too much—and even asking the questions—can hurt you.

The Nonprofits Insurance Alliance has negotiated significant discounts on background checks for our members through IntelliCorp, a nationwide provider of screening services. For more information on this member resource, please contact memberservices@insurancefornonprofits.org or visit the Services section of the Member Resources area of our [Member Portal](#).