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California Courts (Again) Provide Guidance on What Qualifies as a "Standalone Disclosure" for FCRA Purposes

Kevin Coy, Erin Doyle, Montserrat Miller

Arnall Golden Gregory LLP

A recent case out of the Northern District of California serves as a reminder to employers and background screening vendors that the disclosure form required by the Fair Credit Reporting Act ("FCRA") to be presented to job applicants prior to conducting a background check for employment purposes cannot contain any "extraneous information."

In *Arnold, et al. v. DMG Mori USA, Inc.,*[1] the plaintiffs, former employees of DMG Mori USA, Inc. ("DMG"), filed a class action claiming that in the course of obtaining background reports about them, DMG presented them with a disclosure form that violated the FCRA. Under the FCRA, a disclosure for employment screening purposes must (i) be "clear and conspicuous," and (ii) "in a document that consists solely of the disclosure." This second requirement is referred to as the "standalone disclosure requirement."

The District Court in *Arnold* concluded that DMG's disclosure form did not meet the FCRA requirements because (i) it included a description of consumer rights under California, Maine, Minnesota, New York, Oklahoma, Oregon, and Washington state consumer reporting laws; and (ii) even after the form was revised to omit the references to state law, it still violated the standalone disclosure requirement because it contained information about applicants' right to request whether a consumer report has been run about them and to request a copy of their report.

In *Arnold*, the court granted summary judgment for the plaintiffs, and further, and most problematically, it found that DMG's violations were "willful." The court referred the parties to schedule a settlement conference, the outcome of which will include damages ranging from $100 to $1,000 per class member. The decision is not clear as to the precise number of class members, but it appears there are between 668 and 1,138 members.

Comparison to Other FCRA Cases from the Ninth Circuit

Arnold relies heavily on Ninth Circuit precedent, *Gilberg*[2] and *Walker*.[3] *Gilberg* held that when "a disclosure form does not consist solely of the FCRA disclosure, it does not satisfy the standalone document requirement." Just like the disclosure forms provided by DMG, the

disclosure forms at issue in *Gilberg* contained state law disclosures which rendered them in violation of the FCRA standalone disclosure requirement.

In *Walker*, the employer's disclosure form included the following statement to the consumer:

> "You may inspect [our background screening vendor's] files about you (in person, by mail, or by phone) by providing identification [to our background screening vendor]. If you do, [they] will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification. If [our background screening vendor] obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation performed."

The *Walker* court held that such language, while likely included in good faith to provide useful information to the consumer, violates the FCRA standalone disclosure requirement. Similarly, DMG's disclosure form included the following statement to the consumer:

> "[You have] the right, upon written request made within a reasonable time, to request whether a consumer report has been run about you and to request a copy of your report."

In concluding that this language violates the FCRA standalone disclosure requirement, the court in *Arnold* cited to *Walker* stating, "[o]ur circuit has concluded that substantially similar language, even if presented "in good faith," is inconsistent with the standalone document requirement."

Practical Implications

Key takeaways for employers:

1. The responsibility to provide a legally sufficient disclosure and authorization under the FCRA falls on the user of the background check report. In this case, on the employer who is requesting the background check from their background screening vendor. While background screening vendors may provide template forms for use, any template should be reviewed by counsel for legal sufficiency.

2. The requirement to provide a legally sufficient disclosure and authorization under the FCRA is heavily litigated and such forms should be reviewed at least annually by legal counsel versed in the FCRA. Since 2019, there have been a number of important decisions from the Ninth Circuit alone providing guidance on what constitutes a legally sufficient disclosure and authorization, and what the courts consider extraneous language, including *Gilberg*, *Walker*, and now *Arnold*.

3. The key with the disclosure and authorization form is brevity.

[1] *Steven Arnold, et al., v. DMG MORI USA, Inc.* No. 18-CV-02373-JD, 2021 WL 1222160 (N.D. Cal. Mar. 31, 2021).

[2] *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019).

[3] *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1087 (9th Cir. 2020).

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Arnall Golden Gregory LLP

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