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Is It Time to Revise Your Pre-Employment Background Screening Disclosure? Attempts to *Waive* Liability in a Fair Credit Reporting Act Disclosure May Have the *Opposite* Effect

Authors

Douglas R. Christensen
Joel O'Malley

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Employers who attempt to insulate themselves from liability in connection with their background screening disclosures by including in the disclosures a release of liability may be violating the Fair Credit Reporting Act, according to a recent court decision. That decision, the first to address this issue, held that including a liability release in a FCRA disclosure willfully violated FCRA's requirement that the disclosure consist solely of notice that a consumer report may be obtained for employment purposes. Employers should consider revising their FCRA disclosures in light of this decision.

Many employers use pre-employment background checks performed by professional third-party screening companies in order to avoid potential future improper conduct by newly hired employees. The Fair Credit Reporting Act requires specific disclosures be made to job applicants when a background check is used in the employment process. The statute specifically requires an employer to provide an applicant with a "clear and conspicuous disclosure," found "in a document that consists ***solely*** of the disclosure [] that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis supplied).

Contrary to the statute's express requirement for the disclosure's narrow scope, many employers have used the disclosure as an opportunity to seek a liability waiver in connection with the background screening process. Some employers ask applicants to waive liability against just the employer, while others expand the waiver to include both the employer and the screening company (often as a result of an agreement with that company). Whatever the form, a liability waiver's inclusion may have the opposite than intended goal – rather than protect the employer from liability, the waiver may open employers up to serious liability risks. So says the court in the recent decision of *Singleton v. Domino's Pizza, LLC*, Civil Action No. DKC 11-1823, 2012 WL 245965 (D. Md. Jan. 25, 2012).

In *Singleton*, a group of pizza delivery drivers filed a putative class action against Domino's alleging, among other claims, that the company's background screening disclosure violated FCRA by including a liability release, and by including the disclosure among other papers in the employment application packet. The disclosure read, in part:

> I release, without reservation, you and any person or entity which provides information pursuant to this authorization, from any and all liabilities, claims or causes of action in regards to the information obtained from any and all of the above reference sources used. I acknowledge that this is a standalone consumer notification informing me that a report will be requested and that the information obtained shall be used solely for the

> purpose of evaluating me for employment, promotion, reassignment, or retention as an employee.

Domino's moved to dismiss the claim, arguing FCRA was ambiguous as to whether an employer's disclosure could include additional information like a liability release. The Court disagreed. It held the statute's use of the term "solely" really did mean solely, in that a disclosure must be a standalone document telling the job applicant only that a consumer report may be obtained for employment purposes. Including a liability waiver in that disclosure did not meet this "solely" requirement. Domino's attempt to shield itself by including in the disclosure the statement that it was "a standalone consumer notification" did not help the employer's cause, but actually served to demonstrate a willful violation of the statute (see below), because it showed Domino's knew of the statute's requirements. In addition, because the court held the disclosure itself violated FCRA, it did not rule on whether it was improper for Domino's to provide to applicants the FCRA disclosure among other employment application forms. At least two other courts, however, have certified class actions based on this type of allegation, suggesting that employers are at risk for doing so, even if the FCRA-mandated disclosure is otherwise properly drafted.

So why does this matter? Isn't it worth the risk of including a liability waiver, given the obvious potential benefits of having applicants potentially release claims against the employer in connection with the screening process? Probably not. This answer results from the damages flowing from a willful violation of FCRA (multiplied in a class action lawsuit), and the *Singleton* court's broad holding of what constitutes willfulness. The statute outlines stiff fees and penalties for violations due to willful noncompliance. A violation becomes willful when an employer knowingly or recklessly disregards the statute. In other words, if an employer is merely aware of FCRA (including from in-house or outside counsel) but fails to comply with its strict requirements, the violation can be deemed willful. More troubling, the *Singleton* court held that because the statute is so clear on its face, an employer's interpretation that including more information on a form than "solely" the FCRA-mandated disclosure is objectively unreasonable and demonstrates willful violation.

Fees and penalties for a willful violation may consist of any real damages a job applicant suffered caused by the employer's failing to comply, or, more likely (since a job applicant probably does not suffer actual damages from a disclosure including a waiver), an amount between $100 and $1,000 for each infraction. In addition, punitive damages in any sum may be awarded, plus attorney's fees and costs. Apply these statutory damages to the applicant pools of a large employer and add attorney's fees, and a class action lawsuit for improperly including a liability waiver could create huge potential damages.

In conclusion, FCRA requires an employer to disclose in a separate document that the employer may obtain a background check for employment purposes. Based on the recent *Singleton v. Domino's* decision and prior cases, an employer that includes a liability waiver in its FCRA disclosure or that provides the disclosure to applicants in the general employment application packet runs a serious risk of liability (up to $1,000 per violation plus attorney's fees) for willfully violating FCRA.