



An Emerging Human Capital Risk: Increased EEOC & CFPB/FTC Scrutiny of Employment Background Screening Programs

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About Danny Pack

- ❑ 25+ years of experience as a risk management professional
- ❑ Currently, SVP, Risk Management at Loomis US
- ❑ Former Director of Loss Prevention
- ❑ University of Houston graduate
- ❑ Southwestern College graduate

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About Vince Pascarella

- ❑ Attorney, SPHR, FCRAA
- ❑ Employment screening, risk management, loss prevention industry executive since 1998
- ❑ Former general counsel (in-house)
- ❑ 2-term Co-Chair NAPBS Best Practices Committee
- ❑ JD, University of Colorado Law School
- ❑ BA, Magna Cum Laude, Long Island University

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About Steve Yesko

- ❑ Background in Risk Management Information System (RMIS), Claims Administration Systems, Disability Case Management, Agent/Broker Systems, Knowledge Management Solutions, and related Data Management and Consulting Services
- ❑ 20+ years of experience within the risk management and insurance industries
- ❑ Associate in Risk Management (ARM); RIMS Fellow Candidate
- ❑ MBA, Executive Management, St. John's University
- ❑ BS, The Pennsylvania State University

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Presentation Overview

- ❑ Your Human Capital Risk
- ❑ The CFPB's & FTC's FCRA Enforcement Activities
- ❑ Title VII and the EEOC 2013-2016 Strategic Enforcement Plan

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Your Human Capital Risk

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Your Human Capital Risk

Why Background Screening?

- ❑ Lower Turnover
- ❑ Reduce Occupational Fraud
- ❑ Avoid Catastrophic Workplace Events
- ❑ Mitigate Negligent Hiring and Retention Losses

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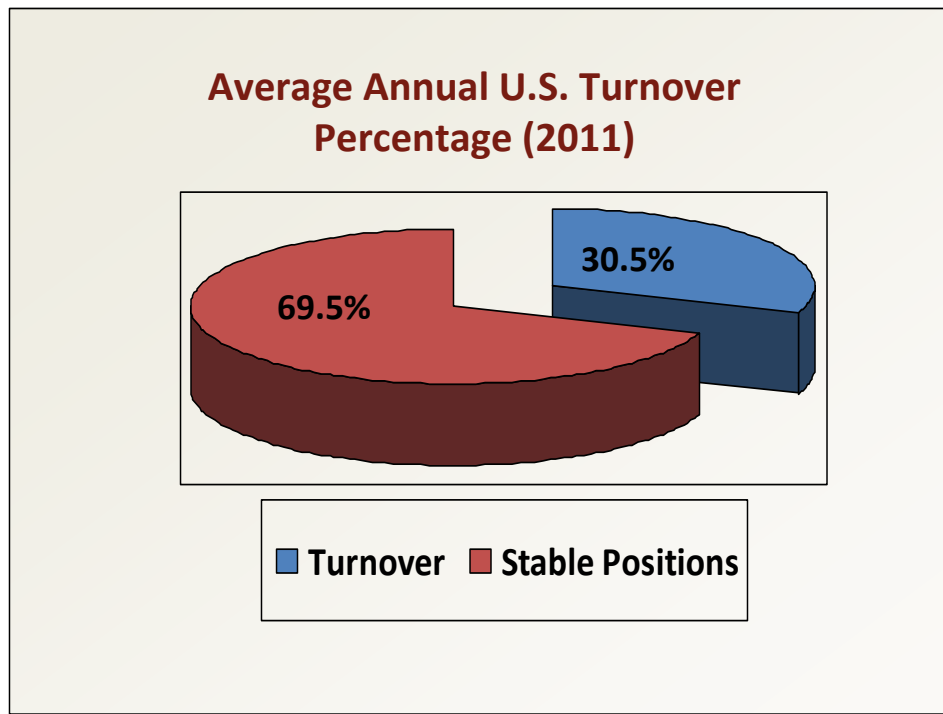
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Turnover

For 2011 the annual average total employment for the United States was approximately 140 million workers, with a total separations (turnover) rate of 30.5%, resulting in 42.7 million position turnovers.

Source: Bureau of Labor Statistics



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Occupational Fraud

"The use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets."

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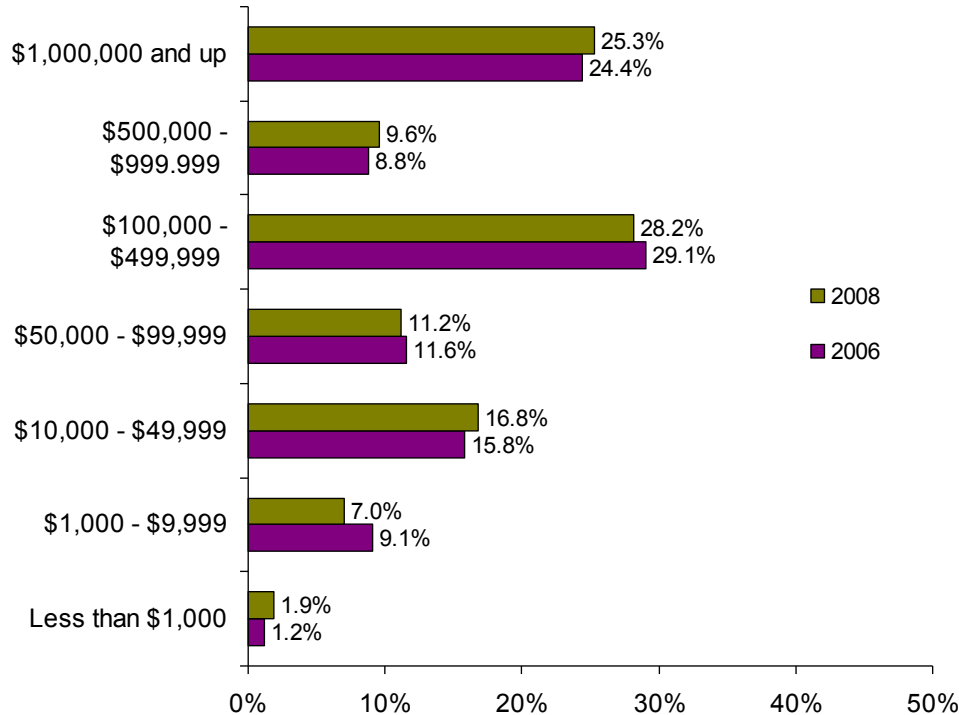
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Fraud Statistics

Distribution of Dollar Losses



- The median loss for all schemes was \$175,000
- More than one-fourth of all cases involved losses of at least \$1 million
- More than 60% of schemes caused the victim organization to suffer a loss of at least \$100,000

Source: 2012 Association of Certified Fraud Examiners (ACFE) Report to the Nations

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What Fraud Costs

Direct losses (on average, including undetected losses)	\$3,242,095
❑ Management costs (on average)	\$550,356
❑ Damage to the brand	88% of cases
❑ Damage to staff morale	88% of cases
❑ Damage to external business relations	84% of cases
❑ Costs of dealing with the regulator	84% of cases
❑ Damage to relations with the regulator	80% of cases
❑ Damage to share value	69% of cases

Source: PWC 6th Biennial Global Economic Crime Survey, 2011

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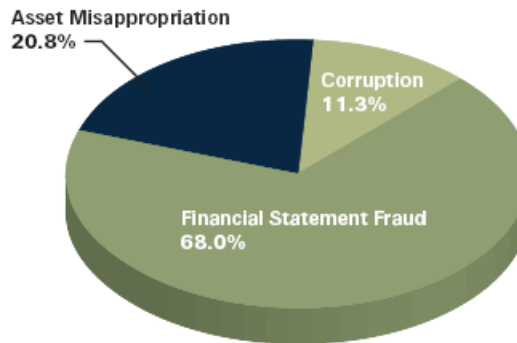
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Significant Losses from Fraud

- In the U.S., fraud losses are estimated at -
 - 5-7% of businesses annual Revenue, or
 - Approximately \$994 Billion (based on U.S. GDP)
 - However, claimed net losses were approx. \$18 Billion

Percent of Total Reported Dollar Losses



Source: 2012 Association of Certified Fraud Examiners (ACFE) Report to the Nation

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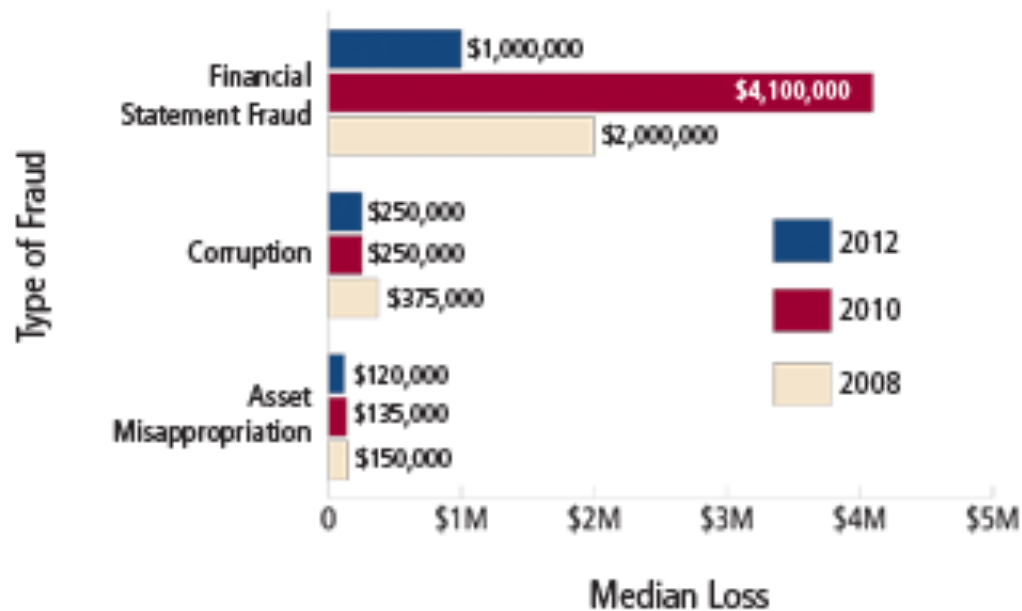
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Types of Fraud

Breakdown by category

Occupational Frauds by Category - Median Loss



Source: ACFE.

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Departmental Breakdown

Department of Victim Organizations (Sorted by Frequency)			
Department	# of Cases	% of Cases	Median Loss
Accounting	231	28.9%	\$200,000
Executive/Upper Level	142	17.8%	\$853,000
Operations	129	16.1%	\$80,000
Sales	93	11.6%	\$106,000
Customer Service	49	6.1%	\$45,000
Finance	31	3.9%	\$252,000
Warehousing/Inventory	24	3.0%	\$100,000
Purchasing	22	2.8%	\$600,000
Manufacturing & Production	19	2.4%	\$100,000
Information Technology	16	2.0%	\$93,000
Marketing/Public Relations	8	1.0%	\$80,000
Legal	8	1.0%	\$1,100,000
Board of Directors	8	1.0%	\$93,000
Human Resources	7	0.9%	\$325,000
Research & Development	7	0.9%	\$562,000
Internal Audit	6	0.8%	\$93,000

- Accounting, Operations and Executives represents 63% of the cases.
- While frauds committed by those in the highest age groups were the most costly on average, over 60% of the frauds reported were committed by employees in the 31-50 age group.
- Most of the perpetrators were either employees (39.7%) or managers (37.1%), with owner/executives at 23.3%.

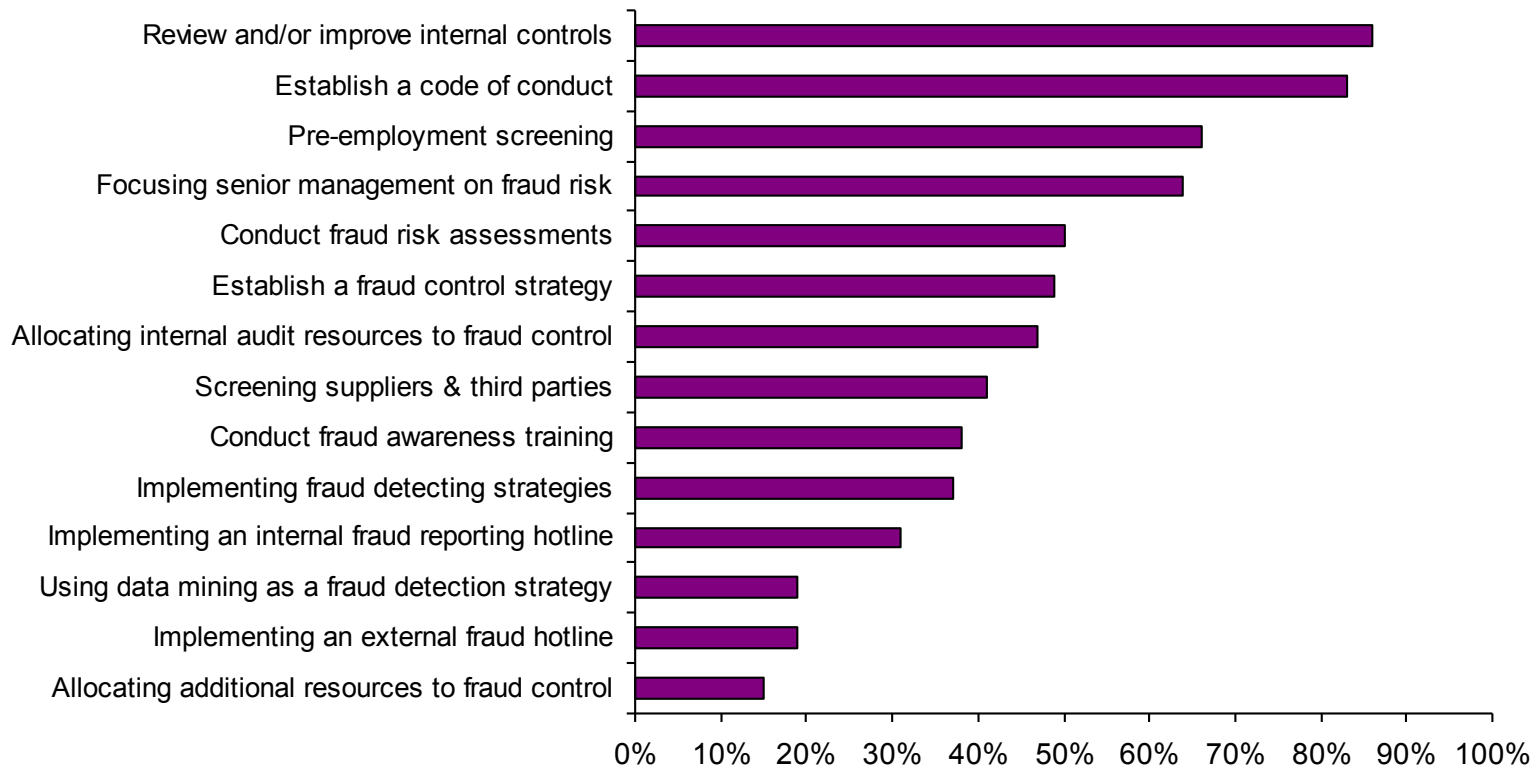
Source: 2012 Association of Certified Fraud Examiners (ACFE) Report to the Nations

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Managing the Risk



Source: KPMG Fraud Risk Management Survey, 2009

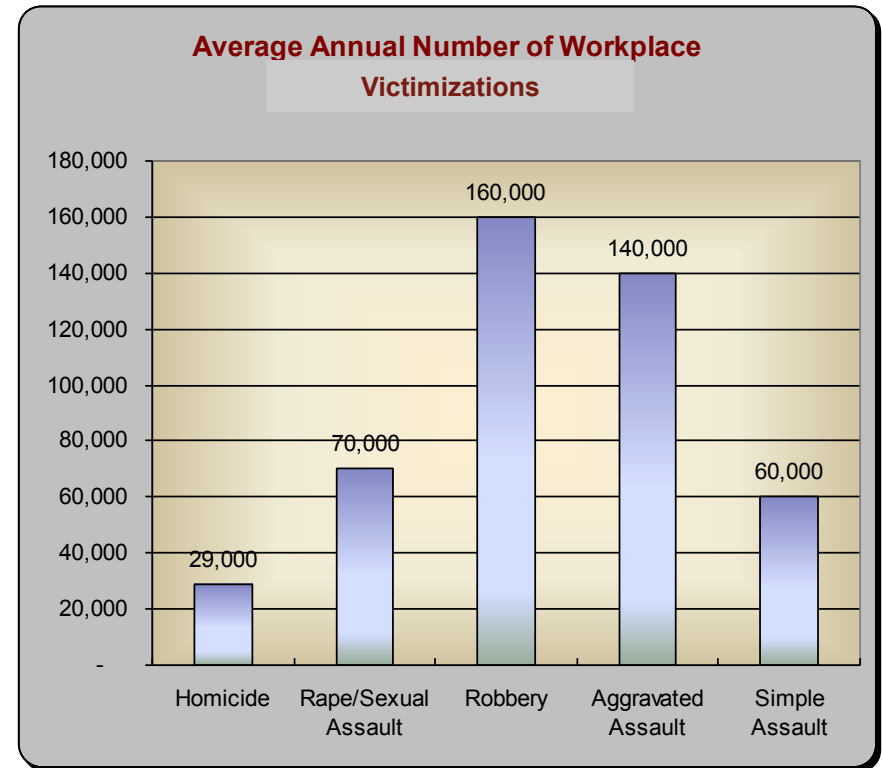
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Catastrophic Events

- ❑ Catastrophic events include workplace violence, theft, sexual harassment, drug-related activity, and accidents
- ❑ Compounding these events are the resultant negligent hiring/retention lawsuits that often follow on



Source: US DOJ Office of Justice Statistics

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Negligent Hiring & Retention

Hiring or retaining an employee where:

- ❑ Employer knew, or should have known, employee was dangerous, unfit, or not qualified, and
- ❑ Foreseeable injury or harm could result



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Negligent Hiring & Retention

Heyl Logistics, LLC

- ❑ Truck driver coming off a crystal methamphetamine high and falling asleep at the wheel killed other driver
- ❑ Transportation broker, employer, and driver found liable
- ❑ \$5,200,000 jury verdict

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Negligent Hiring & Retention

The Nurse Connection, Inc.

- ❑ Home health care worker murdered patient
- ❑ Prior burglary conviction
- ❑ Prior for-cause termination
- ❑ \$40,000,000 payout

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Negligent Hiring & Retention

- Average settlement - \$1,000,000

Source: Human Resources Management

- Employers lose 79% of negligent hiring cases

Source: Fortune



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Background Screening

- ❑ Powerful human capital risk mitigation tool
- ❑ Highly regulated industry with increased regulatory scrutiny
- ❑ Can unwittingly create new risk exposure if done improperly or unlawfully

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The CFPB's & FTC's FCRA Enforcement Activities

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The CFPB & FTC

CFPB - Consumer Financial Protection Bureau

- ❑ Created by The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)
- ❑ Now the FCRA interpreter and primary enforcer
- ❑ Has Exclusive rulemaking authority under the FCRA
- ❑ Seem to be gearing up to undertake an active supervisory and enforcement role under the FCRA

FTC - Federal Trade Commission

- ❑ Former interpreter and sole enforcer of FCRA; now joint enforcement authority with CFPB
- ❑ No past or present rulemaking authority under FCRA; formerly issued opinion letters and guidance

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Fair Credit Report Act (FCRA)

Employer Obligations Overview

- ❑ Employer FCRA & EEO Compliance Certification to Background Check Provider (aka Consumer Reporting Agency or CRA)
- ❑ Applicant Disclosure and Authorization Requirements
- ❑ Adverse Action Requirements



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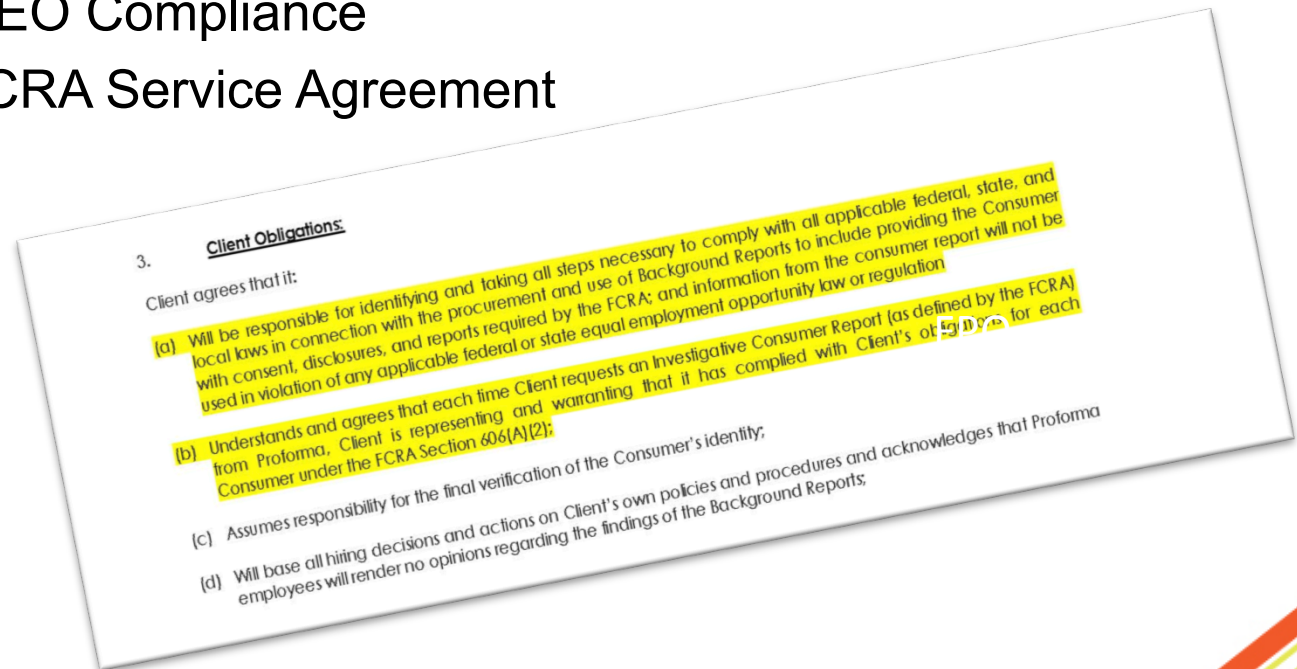
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FCRA

Employer FCRA & EEO Compliance Certification to CRA

- ❑ FCRA § 604(b)(1)(A)
 - Certify FCRA Compliance
 - Certify EEO Compliance
- ❑ Typically in CRA Service Agreement



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FCRA

Applicant Disclosure & Authorization Requirements

- FCRA § 604(b)(2)(A)
 - Prior to ordering background check
 - Disclosure and Authorization
 - Disclosure stand alone document/screen
 - Can be combined with Authorization, only

- Sample from CRA

The image shows a sample of a "Disclosure & Authorization" form from Proforma Screening Solutions. The form is titled "Disclosure & Authorization" and includes a box for the client name, labeled "[CLIENT]". The text on the form explains that Proforma Screening Solutions is a consumer reporting agency and will be obtaining information from various sources, including educational institutions, government agencies, and former employers. It states that the information obtained will be used to determine eligibility for employment and will be held in the confidence of such records. The form also includes a section for the applicant to certify that the information provided is true and accurate, and a section for the applicant to consent to the release of their information to the employer. The form is dated and includes a signature line and a printed name line. The footer of the form includes the company name, address, phone number, fax number, and website.

Proforma Screening Solutions
[CLIENT]

Disclosure & Authorization

Proforma Screening Solutions, a consumer reporting agency, will be obtaining information to be contained in a consumer report and/or investigative consumer report. This information may include information about your character, general reputation, personal characteristics, and/or mode of living. This information may be obtained from educational institutions, government agencies, companies, corporations, credit reporting agencies, law enforcement agencies and the federal, state or county level, former employers and military institutions. I specifically authorize that this information may be sought and agree to release from any liability the agencies prior employers, individuals or other entities which provide the information to the extent that the information given is true and accurate. I understand that some or all of this information may be transmitted electronically and authorize such transmission.

I understand that this information will become part of my personnel record at [CLIENT] and will be held in the confidence accorded all such records.

I understand that the information obtained may be used by [CLIENT] in its sole discretion and without liability to determine eligibility for initial or continued employment, to grant or deny me permission to enter onto employer property, or that of its affiliated companies.

I understand that this authorization applies whether I am a current employee, a candidate for employment, or seeking to provide services as an independent contractor. If hired, my consent will apply throughout my employment unless I revoke or cancel by sending a signed letter to [CLIENT].

I certify that all statements and answers set forth on the application, resume and/or authorization form are true and complete to the best of my knowledge, and I understand that if subsequent to employment any such statements and/or answers are found false or information has been omitted, such false statements or omissions will be just cause for termination of my employment. Further by requesting this information no promise of employment is being made.

I consent to the release of consumer and/or investigative consumer reports to [CLIENT].

I understand that a photocopy of this authorization is to be accepted with the same authority as the original.

I acknowledge that I have read and understand this information, and the rules governing its collection and use, as pursuant to the Fair Credit Reporting Act, amended by the Consumer Reform Act of 1996, and that any adverse action based on this information will be communicated to me in accordance with the Act.

I have carefully read and understand the authorization form. By my signature, I agree with all information contained in the above form.

Signature _____
Printed Name _____ Date Signed _____

Sample Version
F.O. Box 2423 - Portsmouth, VA 20132
800-274-6161 Fax 703-993-1266
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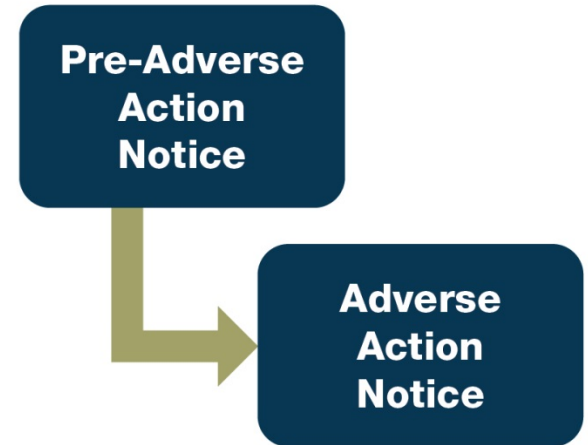
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FCRA

Adverse Action Requirements

- ❑ FCRA §604(b)(3)(A)
- ❑ FCRA § 615(a)
- ❑ Adverse Action 2-Step
- ❑ Can be Outsourced to CRA



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FCRA

FTC Adverse Action Enforcement

- Kmart (2013)
 - \$3M

- Quality Terminal Services/Rail Terminal Services (2009)
 - \$77K

- Imperial Palace (2004)
 - \$325K

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Title VII and the EEOC 2013-2016 Strategic Enforcement Plan

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Title VII of the Civil Rights Act of 1964

- ❑ Prohibits employment discrimination based on race, color, religion, sex, national origin
- ❑ Private employers, and federal, state, and local governments



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EEOC

2013-2016 Strategic Enforcement Plan

Eliminating Barriers in Recruitment & Hiring

- ❑ Target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities; and
- ❑ Target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that impact particular groups.



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EEOC

Facially neutral recruitment and hiring practices that impact particular groups -

- ❑ 2012 Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (“EEOC 2012 Guidance”)

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EEOC 2012 Guidance

April 25, 2012 – New Guidance Issued

- ❑ Consolidates and “updates” 1987/1990 Guidance
- ❑ Effective immediately upon issue
- ❑ Comply now



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EEOC 2012 Guidance

- ❑ Arrests versus convictions
- ❑ Disparate treatment
- ❑ Disparate impact
- ❑ Effect on conflicting Federal and state law
- ❑ EEOC's Best Practices for Employers



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EEOC 2012 Guidance

Arrests vs. Convictions

- ❑ Use of arrest is per se disparate impact
- ❑ Not job related or consistent with business necessity
- ❑ Burden shift
- ❑ Can base decision on underlying conduct
 - Investigate
 - Talk to individual (individualized assessment)
- ❑ Pending cases not distinguished

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EEOC 2012 Guidance



Disparate Treatment

- ❑ Treat criminal history differently based on race or national origin of applicant/employee

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EEOC 2012 Guidance

Disparate Impact

- ❑ Neutral policy with disproportional impact based on race and national origin
- ❑ National data supports basis for investigation
- ❑ Guidance presumes disparate impact unless employer can show evidence to the contrary



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EEOC 2012 Guidance

Disparate Impact

- ❑ Job related, and
- ❑ Consistent with business necessity
- ❑ No less discriminatorily impactful alternative
- ❑ Green v. Missouri Pacific Railroad, 523F.2d 1290 (8th Cir., 1975)
 - Nature and gravity of offense
 - Time since conviction/completion of sentence
 - Nature of job sought or held



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EEOC 2012 Guidance

Green factors - with new Guidance details

- ❑ Nature and gravity of offense
 - Harm caused
 - Legal elements of crime
 - Classification (F/M)

- ❑ Time since conviction/completion of sentence
 - Recidivism evaluation

- ❑ Nature of job sought or held
 - Not just job title
 - Specific duties, essential functions, environment



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EEOC 2012 Guidance

Job related and consistent with business necessity met by -

- ❑ Validation, or
- ❑ Targeted screen with individualized assessment

No bright line rules



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EEOC 2012 Guidance

Validation

- ❑ Academic studies and expert testimony
- ❑ Correlating specific past criminal conduct to position-specific subsequent workplace performance or behavior
- ❑ Uniform Guidelines on Employee Selection Procedures
- ❑ Safety, security, and risk
- ❑ Recidivism



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Targeted Screen

□ Green Factors

- Nature and gravity of offense
- Time since conviction or completion of sentence
- Nature of job sought or held



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EEOC 2012 Guidance

Individualized Assessment

- ❑ Case-by-case, applicant-by-applicant analysis
- ❑ Whether the policy as applied to the individual, is job related and consistent with business necessity



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Individualized Assessment

- ❑ Not required by Title VII
- ❑ Recommended by EEOC
- ❑ Criminal offense must have “demonstrably tight nexus to the position in question” to circumvent individualized assessment

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EEOC 2012 Guidance

Individualized Assessment

- ❑ Facts/circumstances surrounding
- ❑ Number of convictions
- ❑ Age at time of offense or release
- ❑ Rehabilitation
- ❑ Bonding
- ❑ Length/consistency of employment before and after
- ❑ Evidence same type of work post conviction without evidence of criminal behavior

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No bright line rules

- ❑ No absolute bar
- ❑ “Ban the box” – recommended by EEOC



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EEOC 2012 Guidance

Federal law generally withstands Guidance

State and local law preempted

- Compliance problem for employers in state regulated industries
 - e.g., law enforcement, fire and emergency services, schools, healthcare, eldercare, etc.

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EEOC 2012 Guidance



EEOC's Best Practices for Employers

- ❑ No bright line policies
- ❑ Narrowly tailored written policy on use of criminal records, including matrices
- ❑ Document justification for policy and procedures, consultation, and research
- ❑ Train hiring staff on Title VII discrimination and requirements
- ❑ Inquire only about past convictions that are job-related and consistent with business necessity
- ❑ Maintain confidentiality of criminal record information

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Recent EEOC Title VII Investigations

- **Pepsi settlement (2012)**

- \$3.13M use of criminal records in hiring

- **Freeman lawsuit (2009)**

- Pending in MD
- Use of criminal records (and credit reports) in hiring

- **Peplemark lawsuit (2011)**

- EEOC ordered to pay nearly \$800K

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Questions or Feedback?



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