

# How to Find (& Keep) Your Ideal Candidates

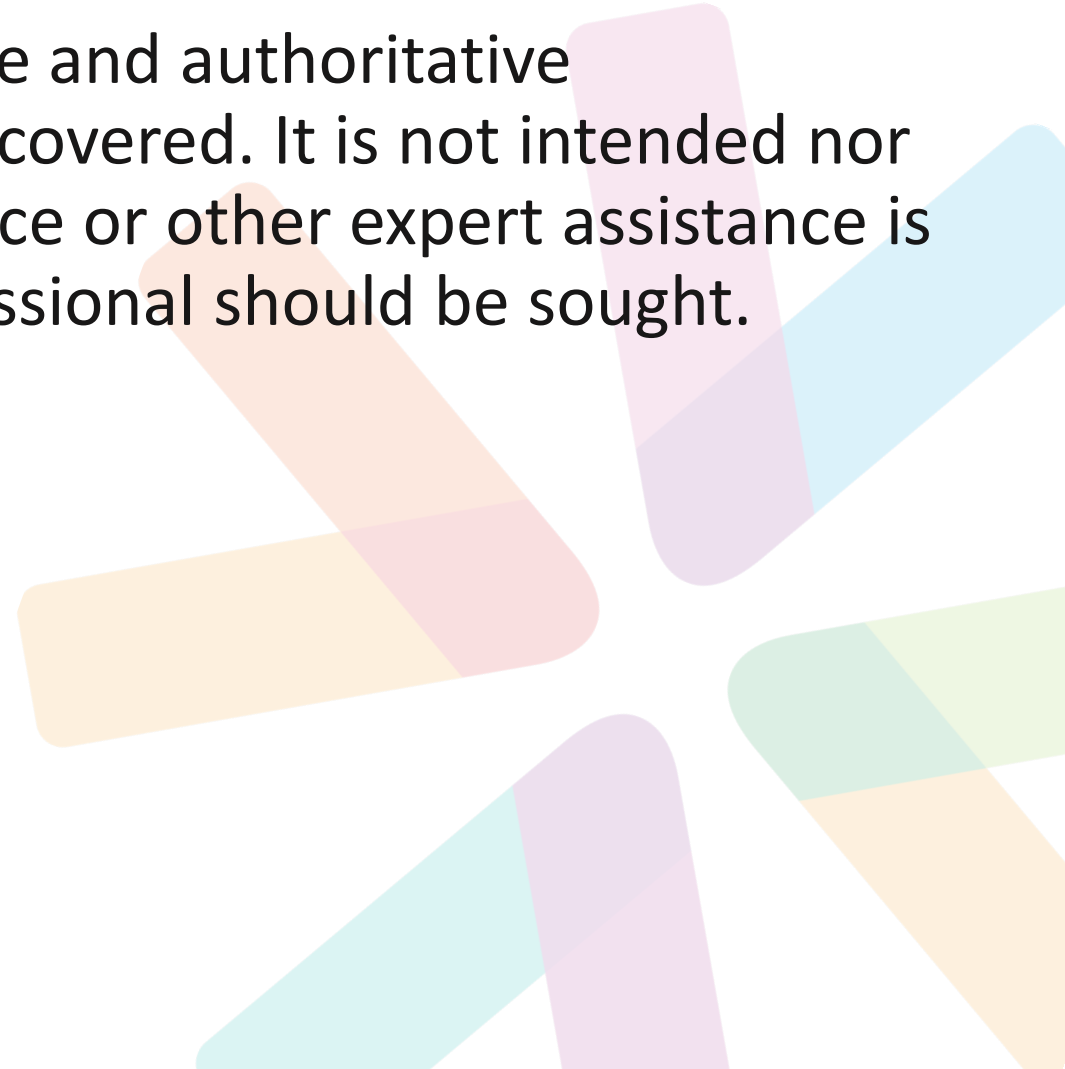
Background screening do's and don'ts

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- This program is designed to provide accurate and authoritative information in regard to the subject matter covered. It is not intended nor designed to render legal advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.



# Trends with Background Checks

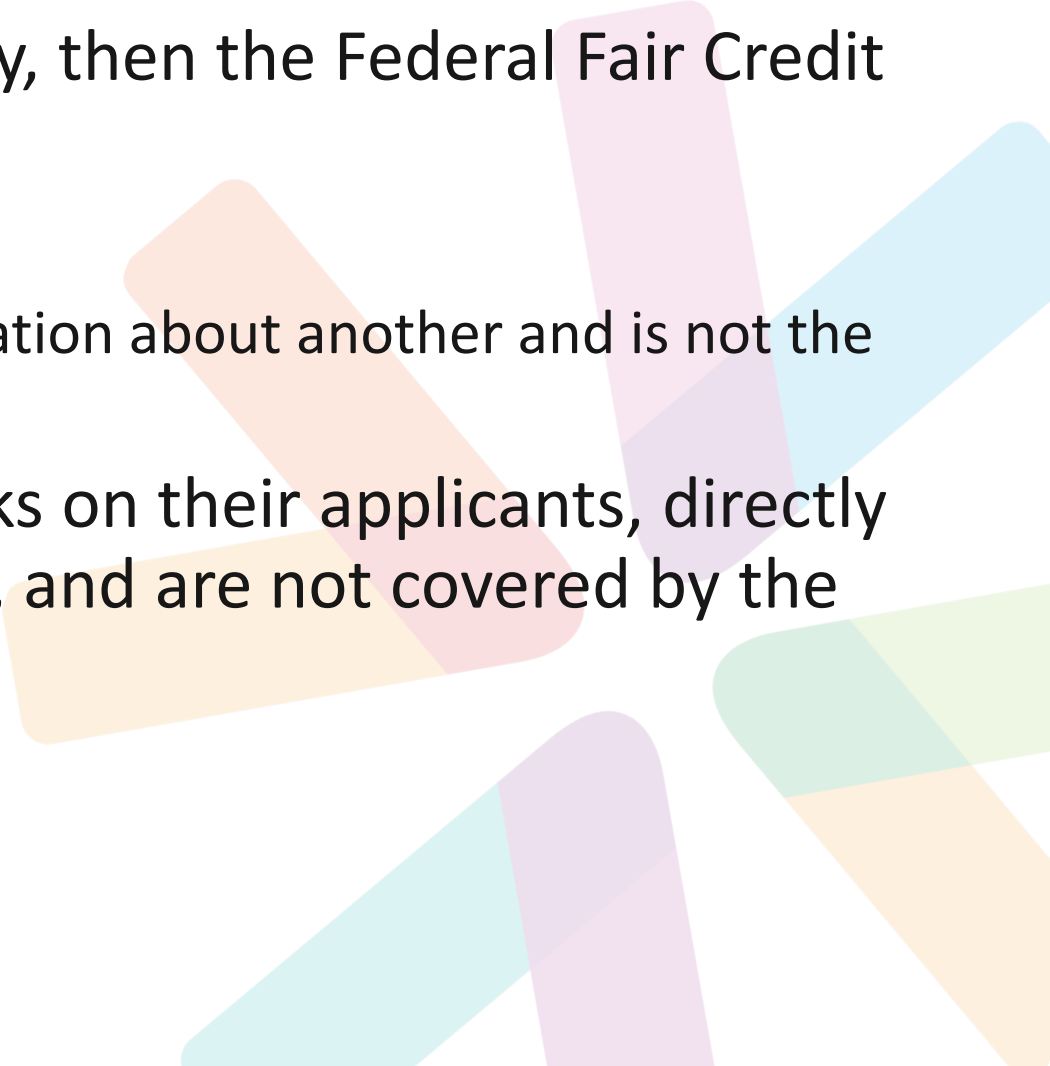
- FCRA
- EEOC
- Tight Labor Market
- Things to Watch
- Questions



# What is the FCRA?

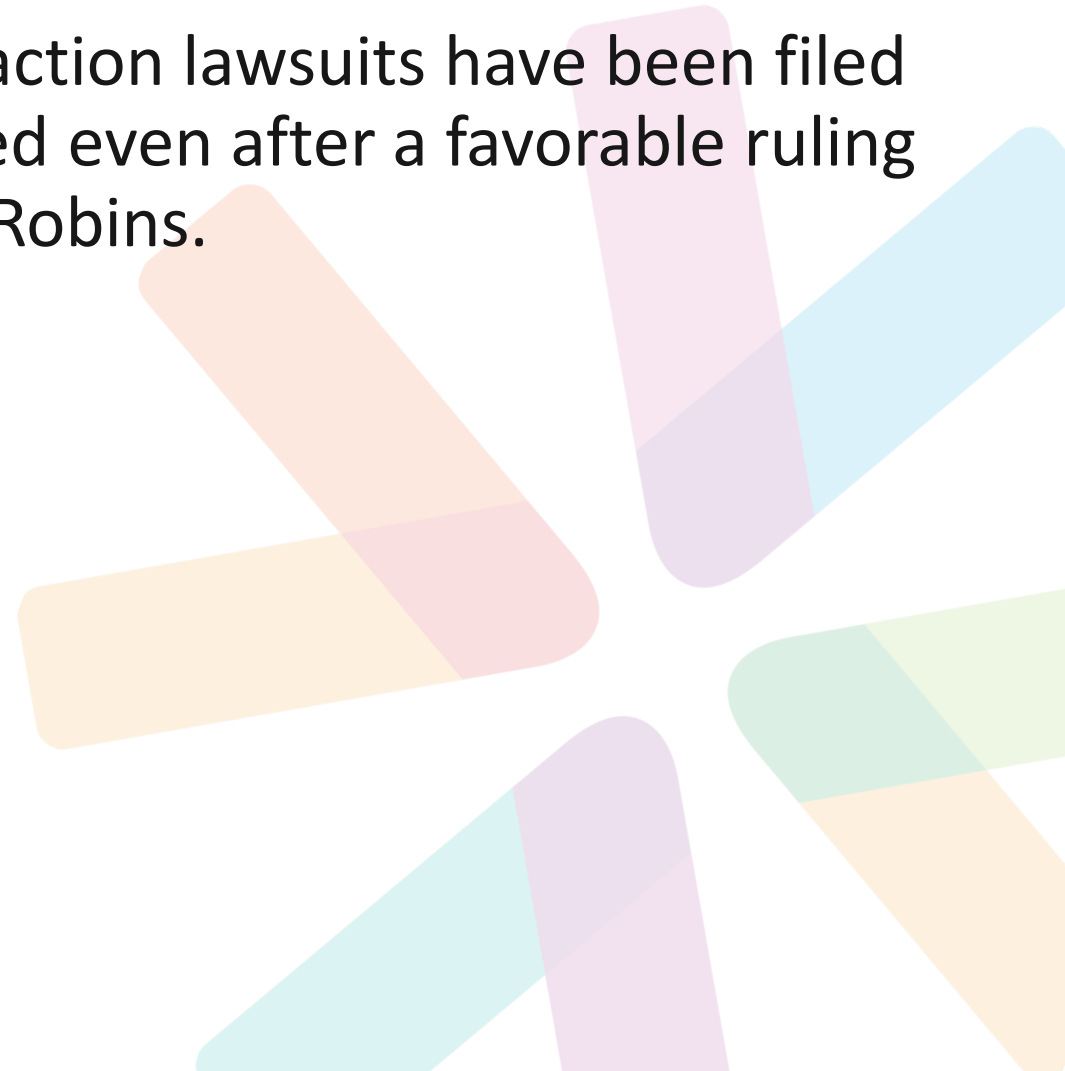
- The Federal Fair Credit Reporting Act (FCRA) is a law that enables a consumer (applicant) a chance to verify information, compiled by a Consumer Reporting Agency (third party), about them before it has a negative impact on them (i.e. employment). The FCRA covers more than financial information.
- See <https://www.ftc.gov/legal-library/browse/statutes/fair-credit-reporting-act>.

# Who is covered?

- If the information is provided by a third party, then the Federal Fair Credit Reporting Act applies.
  - Consumer Reporting Agency (CRA)
    - Is any company or person who compiles information about another and is not the end user.
  - If the company (***not an agent***) is doing checks on their applicants, directly with the primary source, they are not a CRA, and are not covered by the FCRA.
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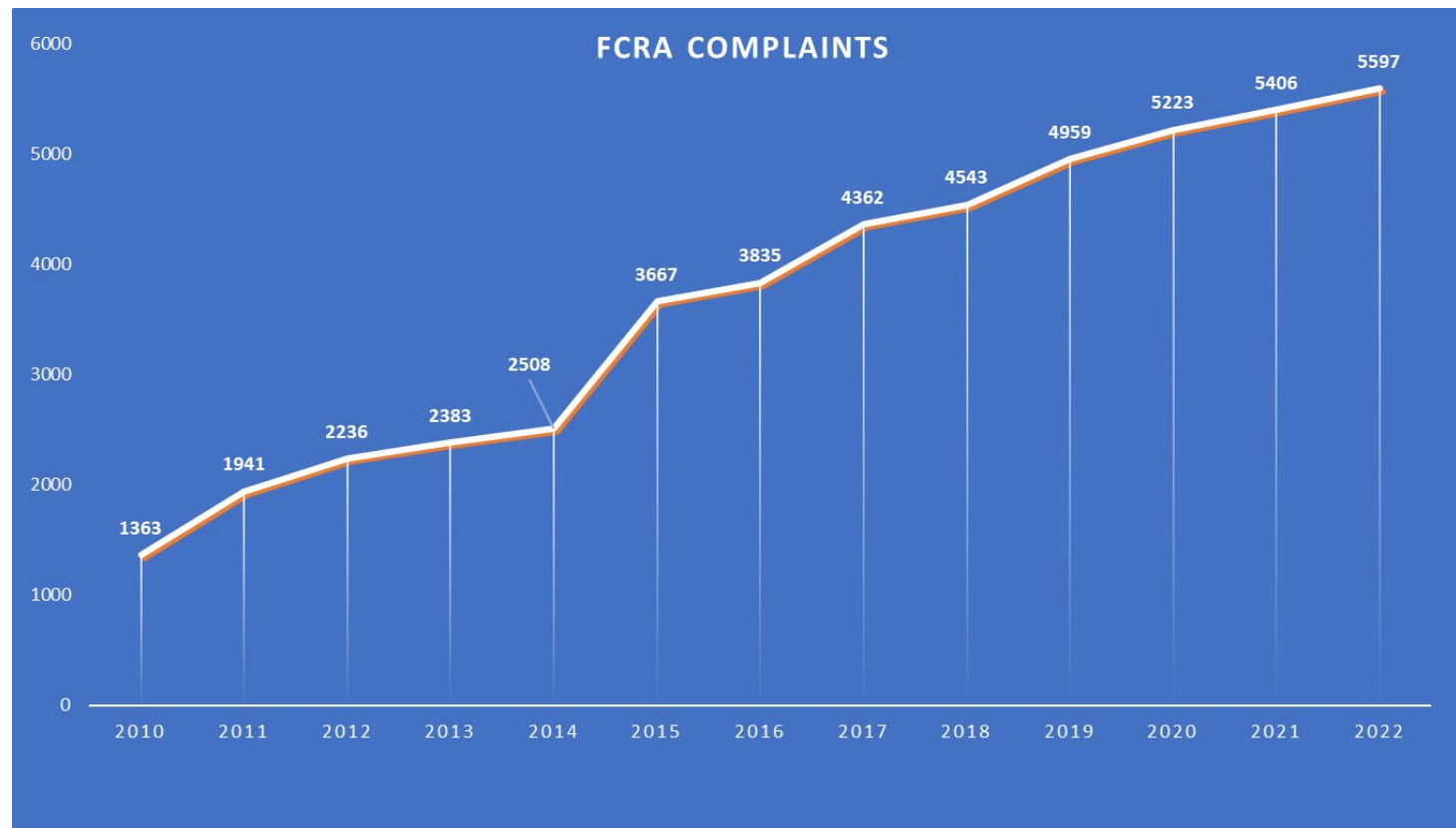
## Trends with the FCRA

- For the last several years, nationwide class action lawsuits have been filed at an alarming rate. This trend has continued even after a favorable ruling for employers by the SCOTUS in *Spokeo vs. Robins*.



# Trends with the FCRA

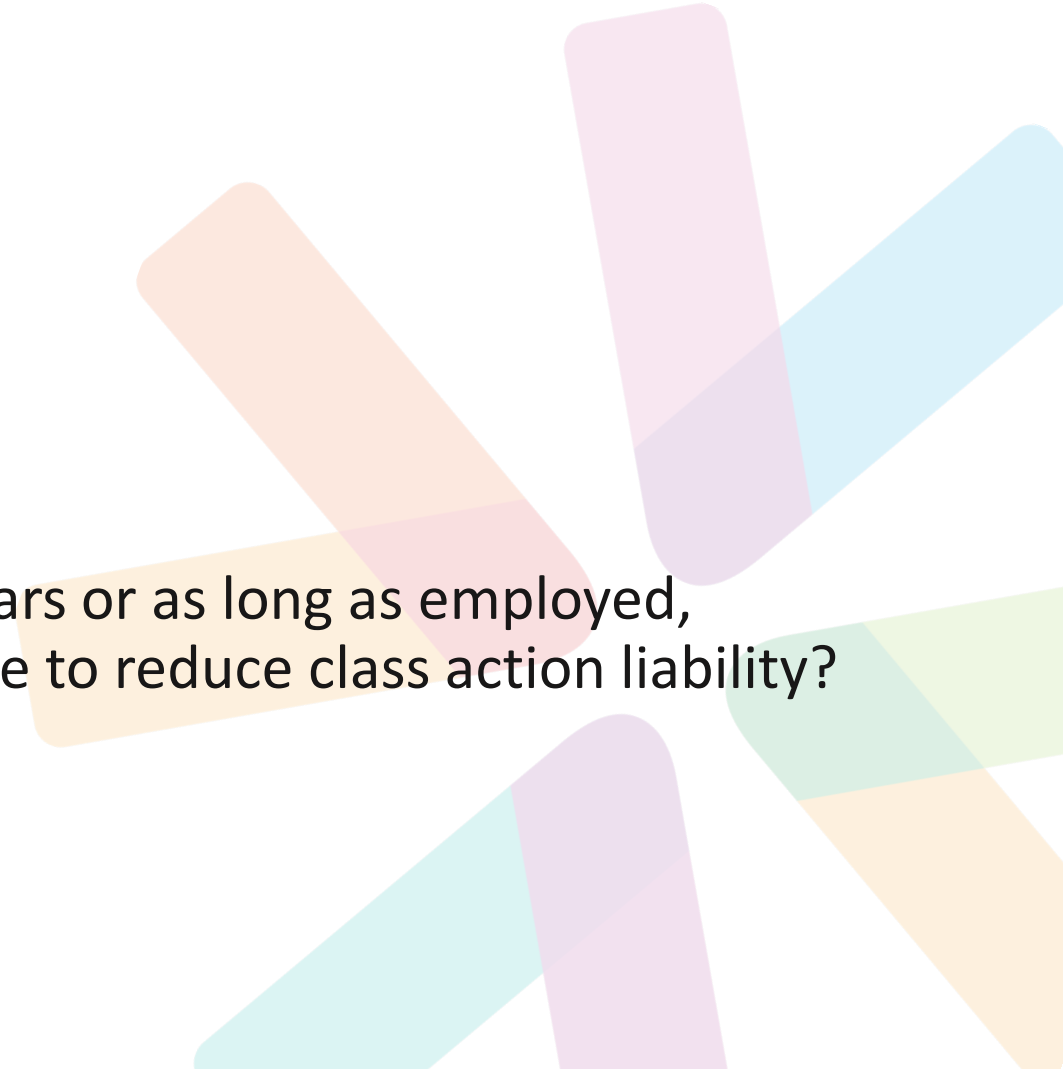
- *For 2022, WebRecon reported that FCRA lawsuits continued to rise.*



# FCRA Basics

## PRE-CHECK

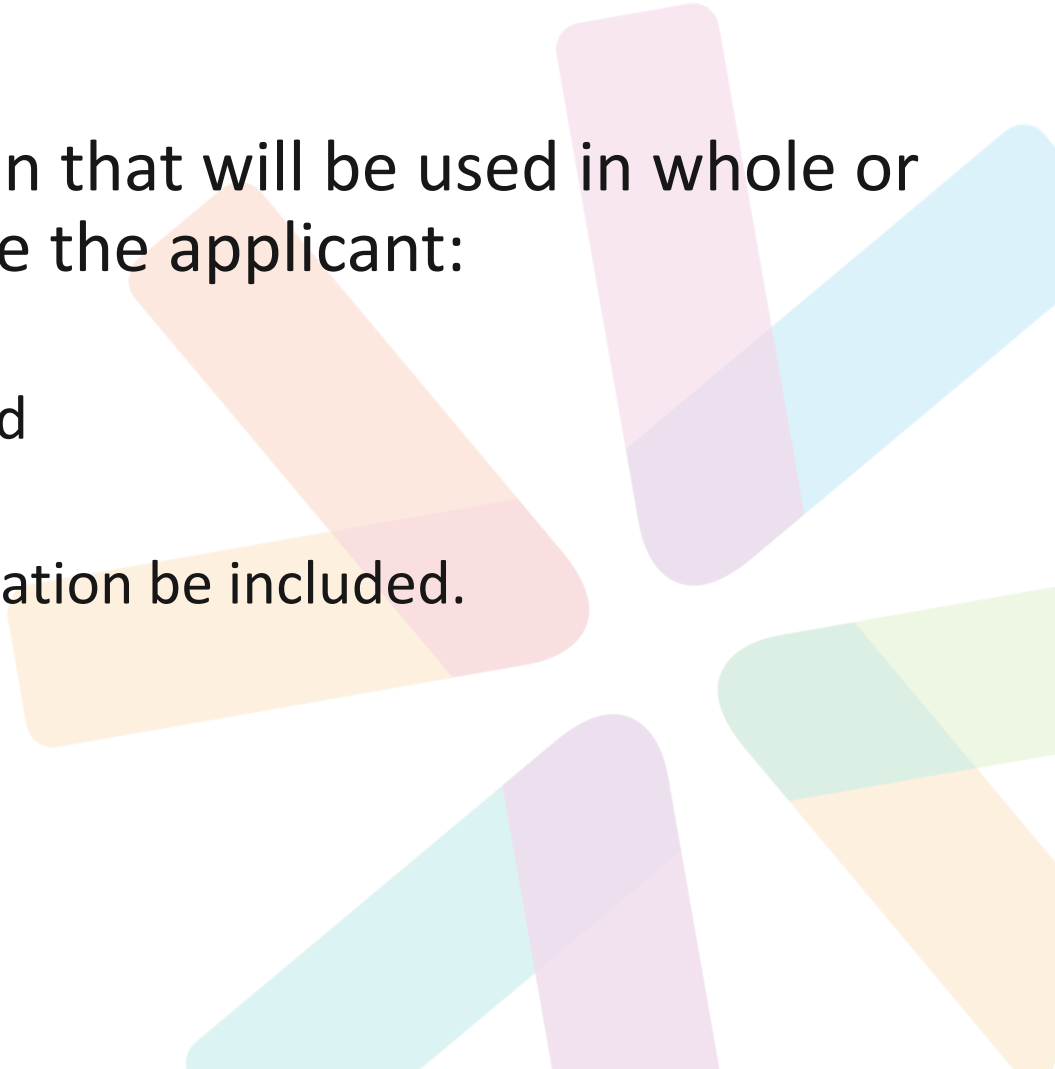
- Permissible Purpose
  - Employment
- Signed Authorization
  - Disclosure and Authorization
    - One document or two or more?
  - Keep releases for non-hires six years, hires 6 years or as long as employed, whichever is longer. Do you keep them less time to reduce class action liability?





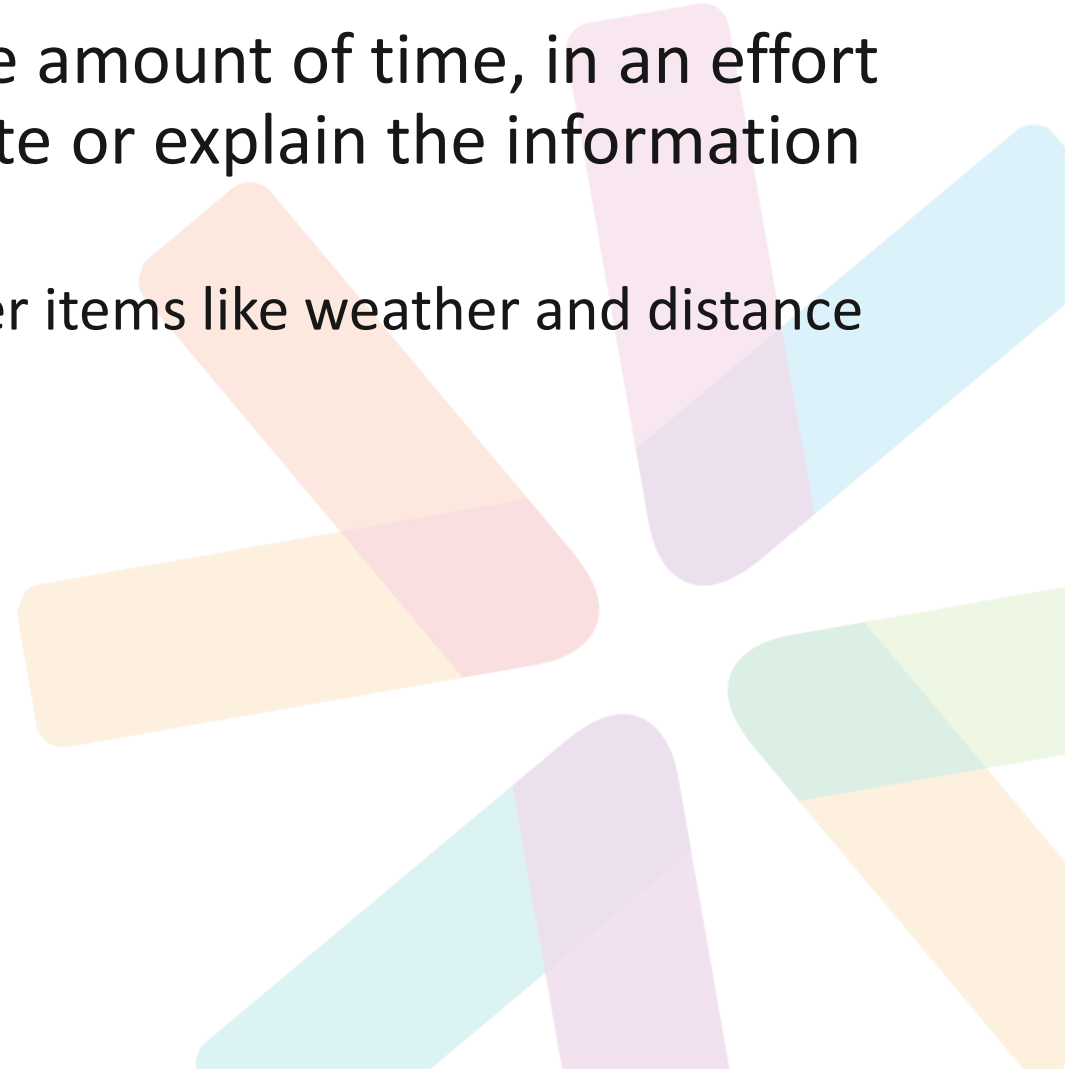
# FCRA Basics

## POST-CHECK

- If the background check provides information that will be used in whole or in part, then you (the end user) must provide the applicant:
    - a copy of the report, and
    - a summary of his/her rights under the FCRA, and
    - a Pre-Adverse Action Letter
    - Some states/locations require additional information be included.
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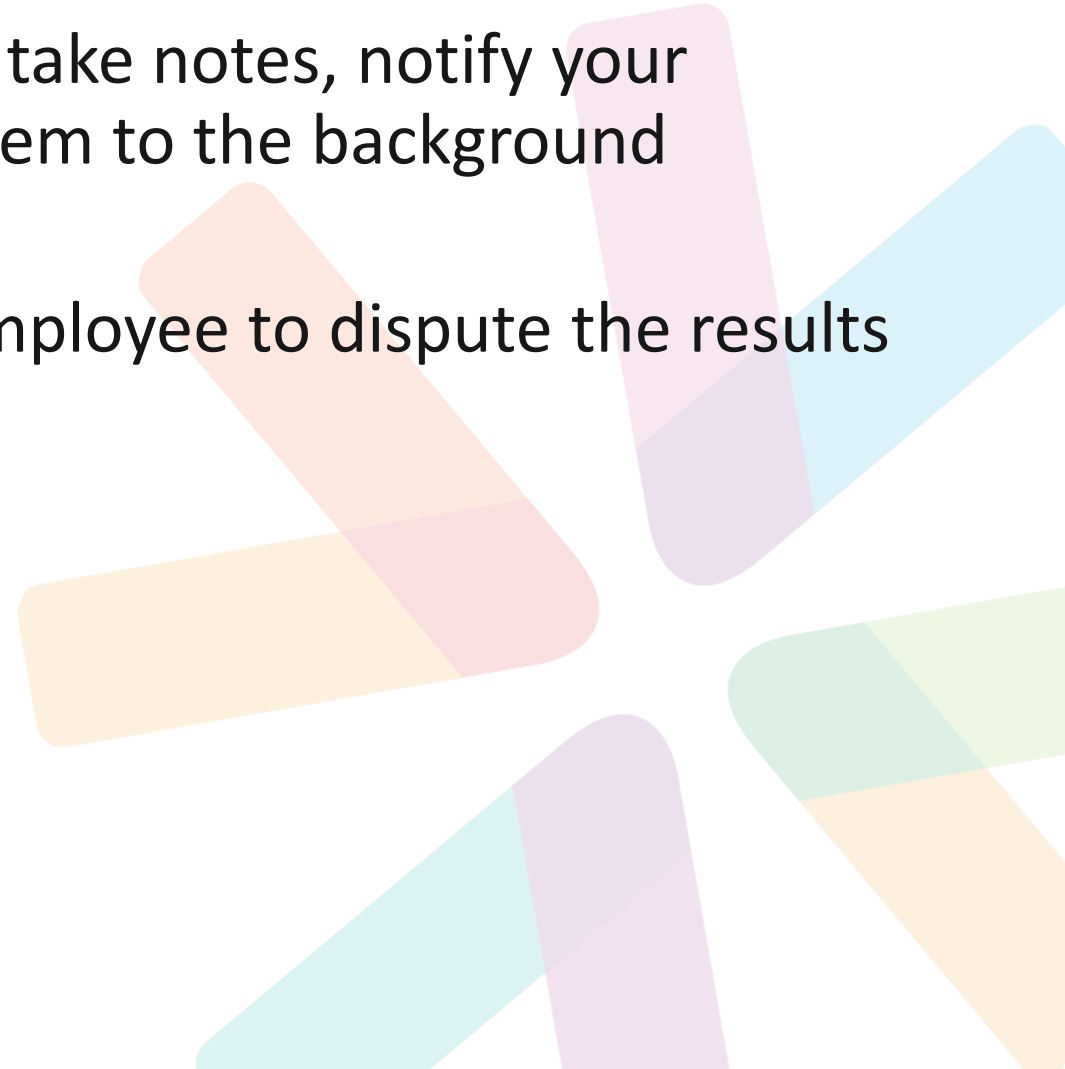
# FCRA Basics

- You must hold the job open for a reasonable amount of time, in an effort to allow the applicant to respond and dispute or explain the information contained in the report.
  - We recommend 5 business days; however, other items like weather and distance should be considered.



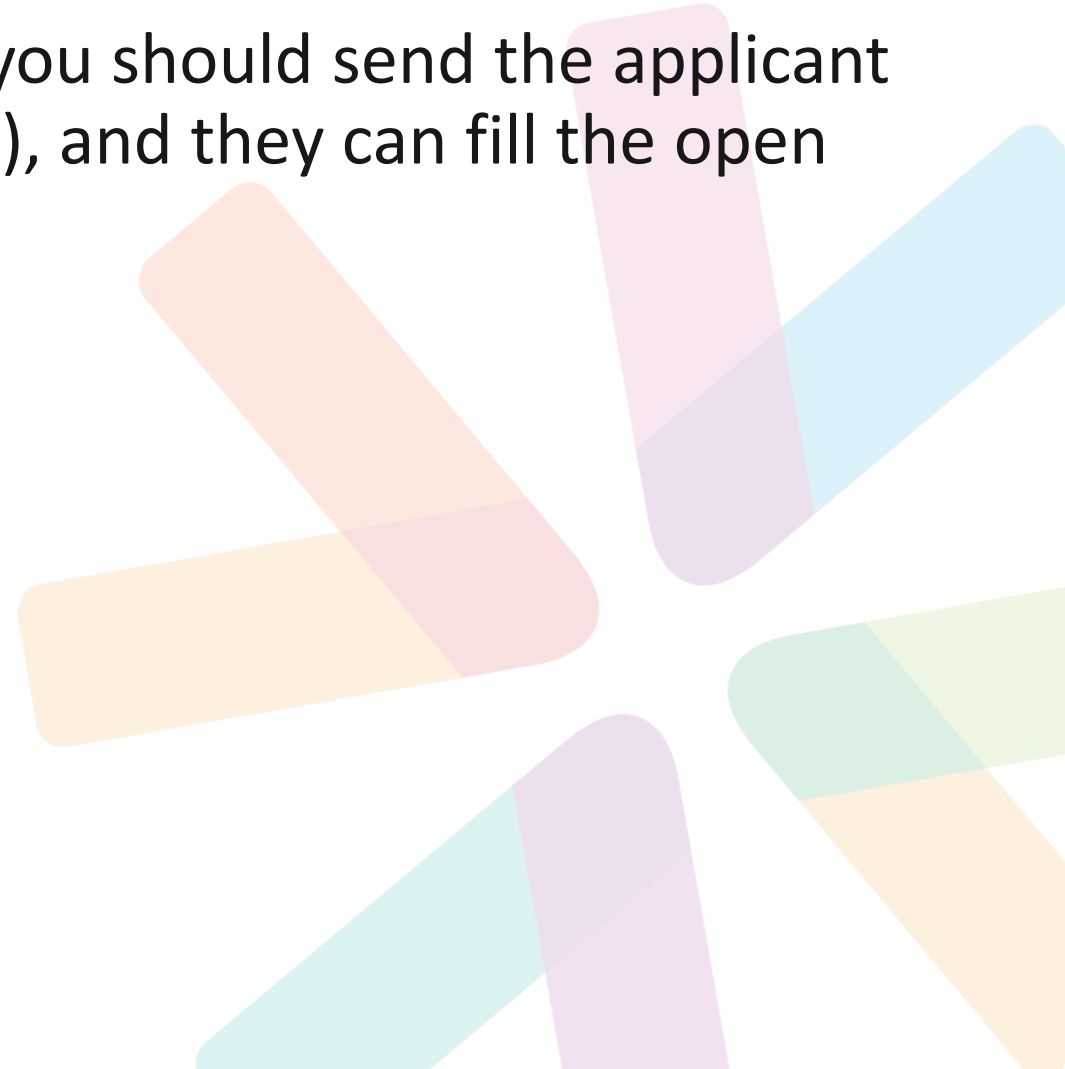
# FCRA Basics

- If the employee disputes something to you, take notes, notify your background checking company, and refer them to the background checking company.
- Do not make it hard for your applicant or employee to dispute the results of a report.



# FCRA Basics

- After the reasonable amount of time, then you should send the applicant an Adverse Action Letter (Declination Letter), and they can fill the open position.



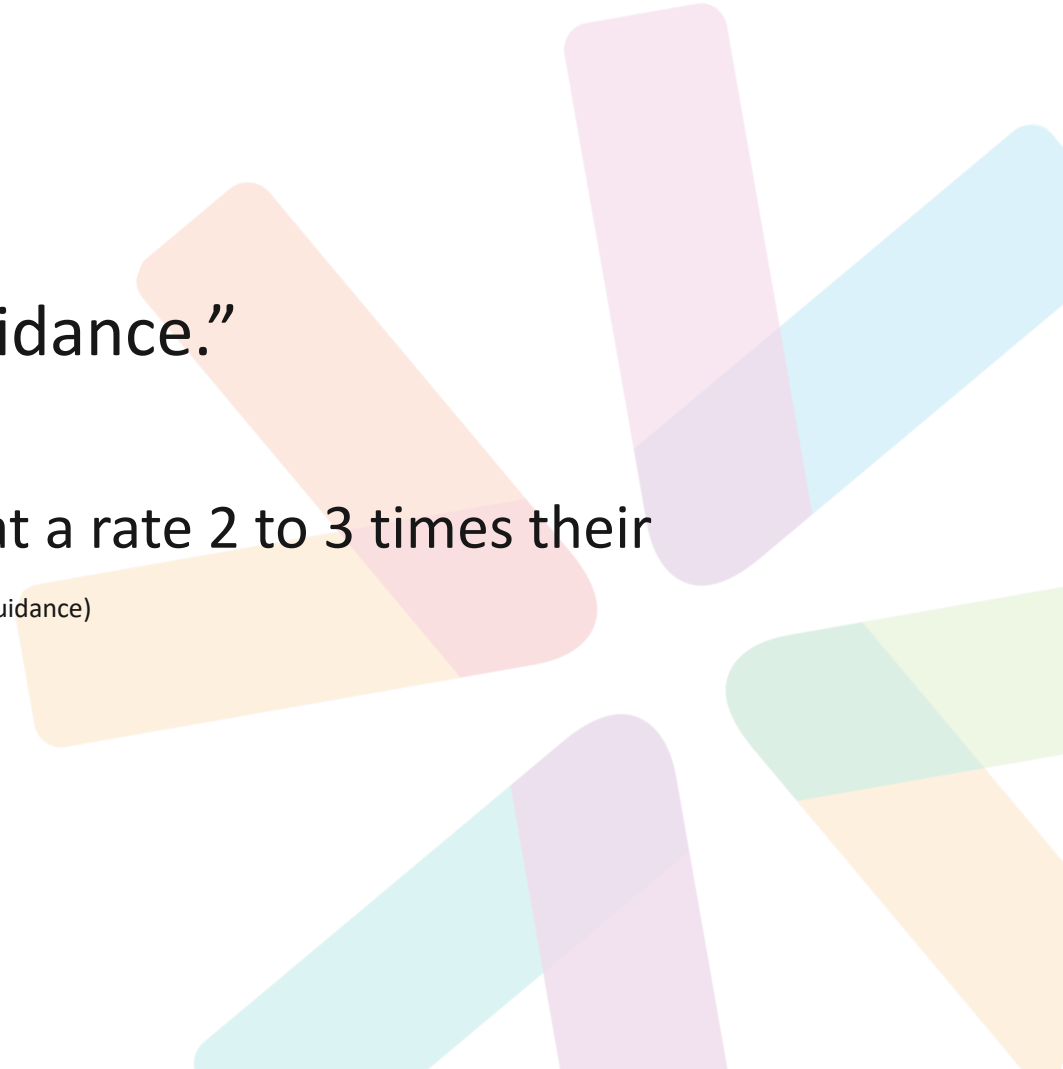
# FCRA Basics

- Do not clutter your release form:
  - The signature on the application ***is not a valid substitute.***
  - “the form should not contain any extraneous information” FTC Opinion letter.
  - 9<sup>th</sup> Circuit of Appeals rules on extraneous items.
  - Stand Alone.



# EEOC History

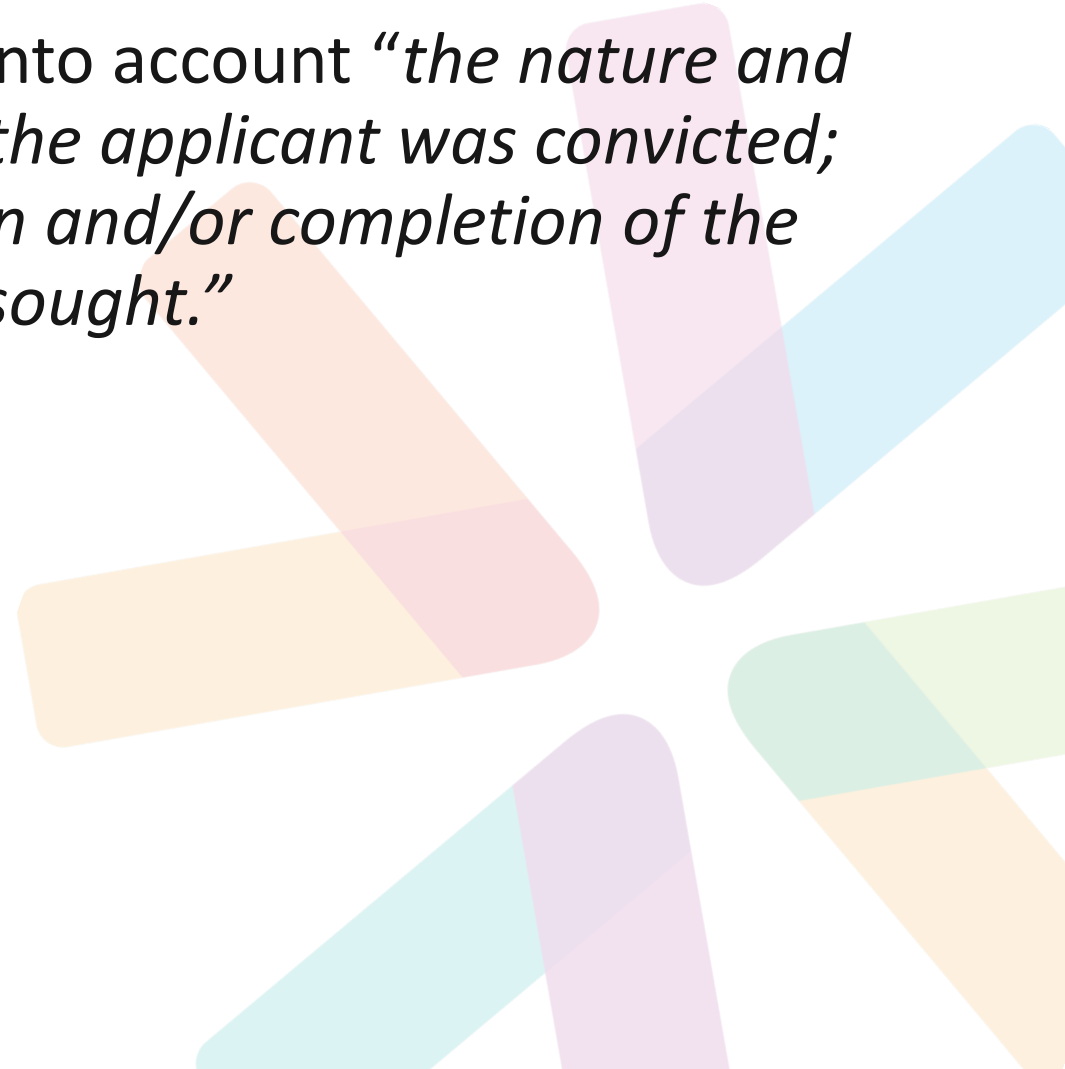
- Title VII of the Civil Rights Act of 1964.
  - Disparate Treatment.
  - Disparate Impact.
- April 25, 2012 issued new “Enforcement Guidance.”
- Unemployment and the EEOC.
  - “African Americans and Hispanics are arrested at a rate 2 to 3 times their proportion of the general population.” (page 3 from the Guidance)



# EEOC History

- The EEOC has long said that you must take into account “*the nature and gravity of the offense or offenses for which the applicant was convicted; the time that has passed since the conviction and/or completion of the sentence; and the nature of the job held or sought.*”

(<http://www.eeoc.gov/policy/docs/convict1.html>)



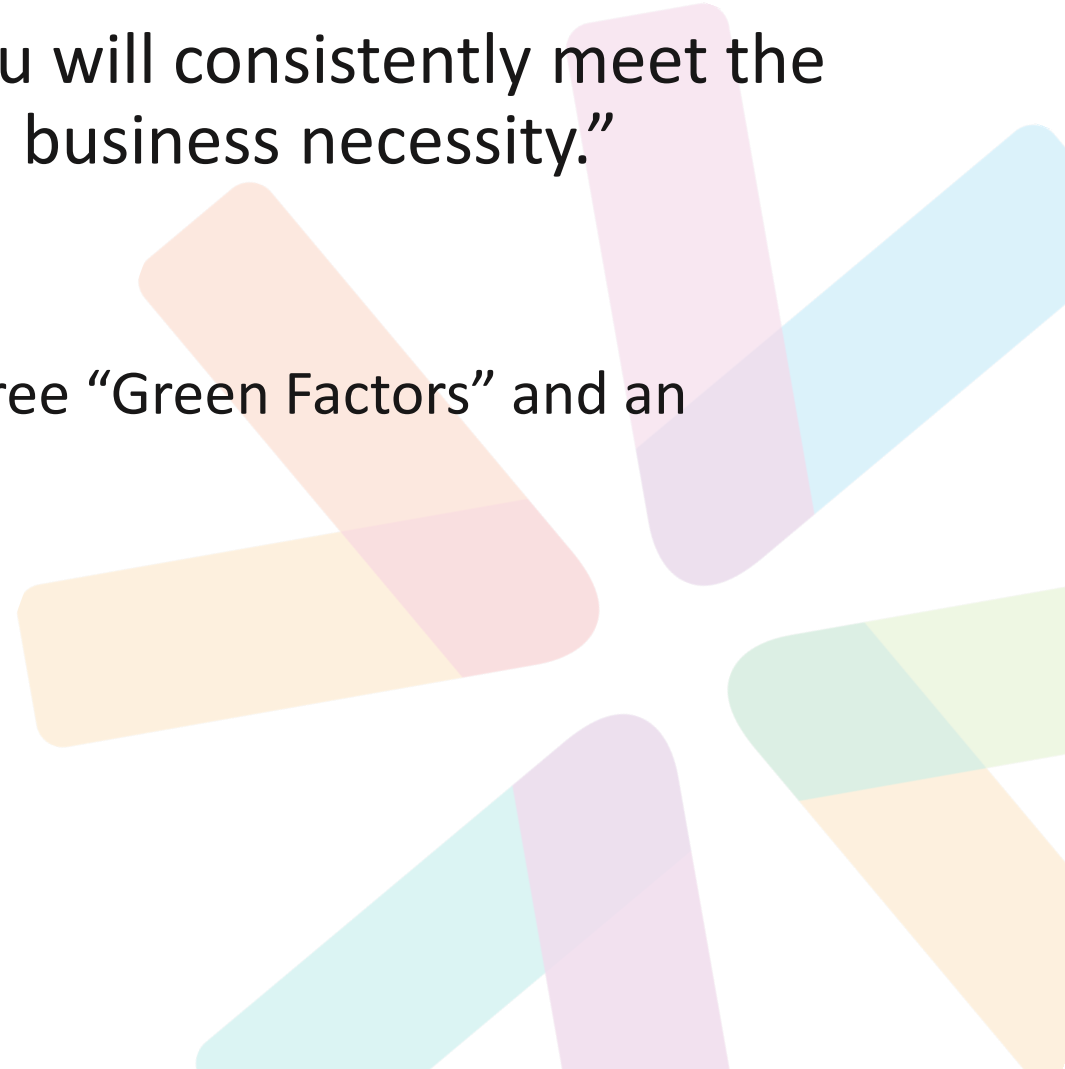
# EEOC History

- “Is it Job Related” comes from a 1975 case in the Eighth Circuit; *Green v. Missouri Pacific Railroad*. It provides three basic points for you to consider when making a hiring decision based upon a background check.
  - The nature and gravity of the offense or conduct;
  - The time that has passed since the offense or conduct and/or completion of the sentence; and
  - The nature of the job held or sought.

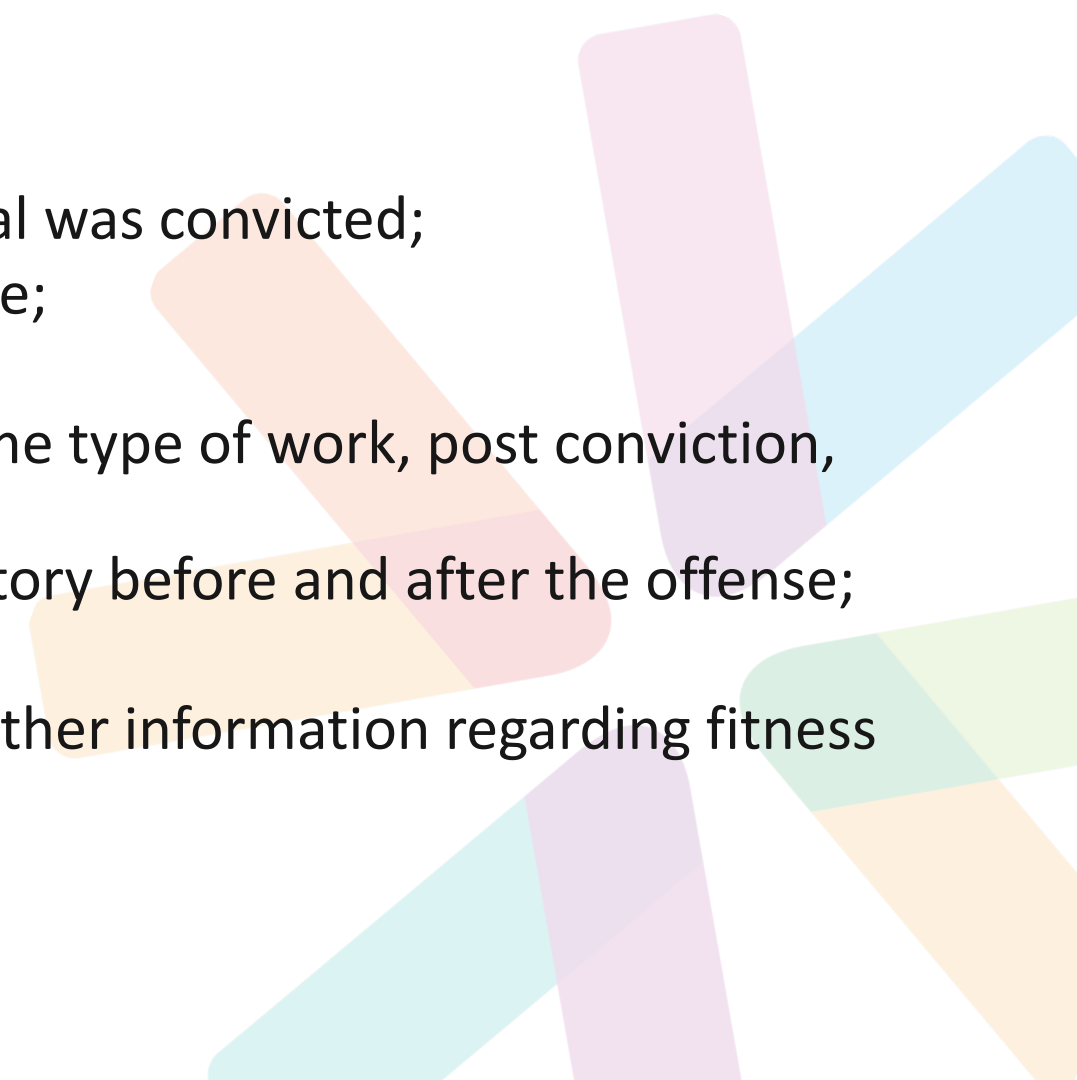


# EEOC Guidance Enforcement

- The EEOC sees two circumstances where you will consistently meet the defense for “job related and consistent with business necessity.”
  - The employer validates the criminal conduct.  
or
  - You develop a targeted screen— includes the three “Green Factors” and an individualized assessment.



# EEOC Guidance Enforcement

- Individualized Assessment:
    - The record really belongs to your applicant;
    - The number of offenses for which the individual was convicted;
    - The facts or circumstances surrounding the case;
    - Age at time of conviction;
    - Evidence that the individual performed the same type of work, post conviction, w/o criminal activity;
    - The length and consistency of employment history before and after the offense;
    - Rehabilitation efforts;
    - Employment or character references and any other information regarding fitness for a particular position;
    - Whether the applicant is bonded.
- 

# Credit Files

- 10 states have outlawed the use from employment purposes; *HI, WA, IL, OR, MD, CT, VT, CA, CO, NV plus DC and PR (also DE for public employers)*. Otherwise should ask:
  - is a managerial position which involves setting the direction or control of the business;
  - involves access to customers', employees' or the employer's personal or financial information other than information customarily provided in a retail transaction;
  - involves a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, transfer money or enter into contracts; or
  - provides an expense account.

# Parting Thought on EEOC

- Is it Job related and consistent with business necessity?
  - Look at all aspects of your process, and ask is it job related...




# Talent Shortage



8 of 10 Accounting or Finance Managers are concerned about retaining employees. Why? Low morale and heavy workloads seem to be the main reason for attrition.

# Talent Shortage

- In an attempt to overcome staff shortages, many companies have implemented or are considering alternative standards to their normal criteria.
  - There are several strategies that can be used to broaden your candidate pool without sacrificing quality or safety.
  - Maybe you could consider:
    - Using transferrable skills to replace industry experience.
    - Work experience to replace education.
    - Look at “home grown” talent, internships and apprenticeship
    - Second Chance programs.
- 



Expand your  
candidate pool?



# Talent Shortage

- May 2023 Jobs Report –Unemployment 3.7%, near lowest since May 1969.
  - Payrolls increased by 339,000, far higher than the 190,000 estimate
  - Strong job growth despite concerns about the economy.
- Talent shortages in U.S. have more than quintupled in the last ten years<sup>1</sup>
  - 75% of employers struggling to fill positions, up from 14% in 2010
- By 2030 - Global talent shortage of 85.2 million people<sup>2</sup>
- Affecting most industries. In many cases the talent just doesn't exist!

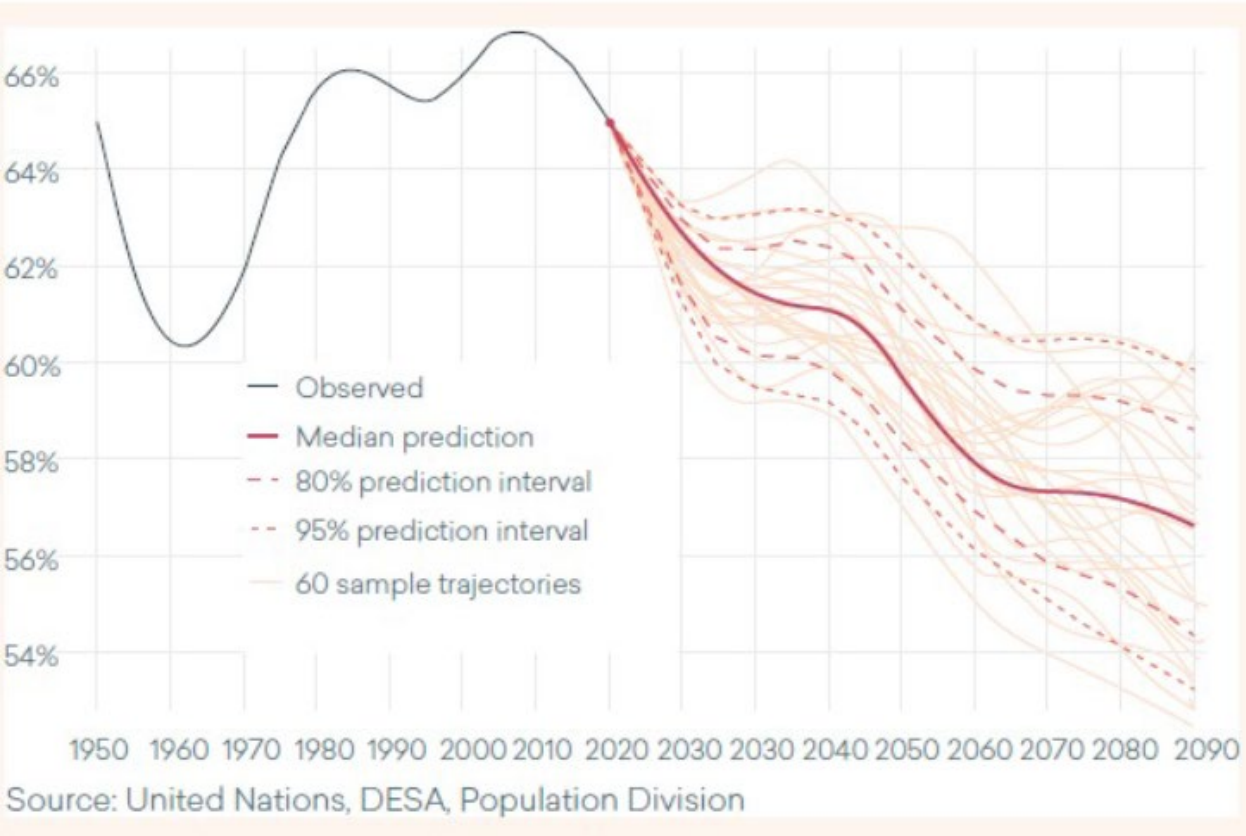
<sup>1</sup> ManpowerGroup 2022 Survey

<sup>2</sup> Korn Ferry

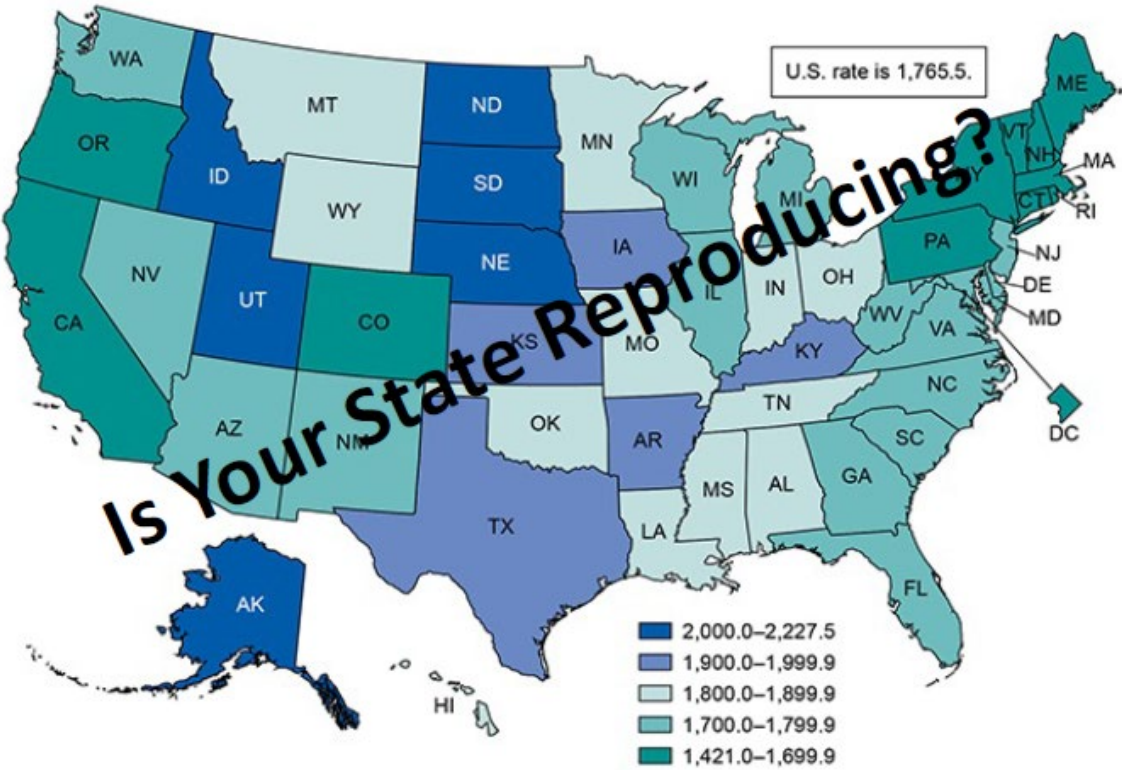


# It's Demographics...

## U.S. Population 15-64



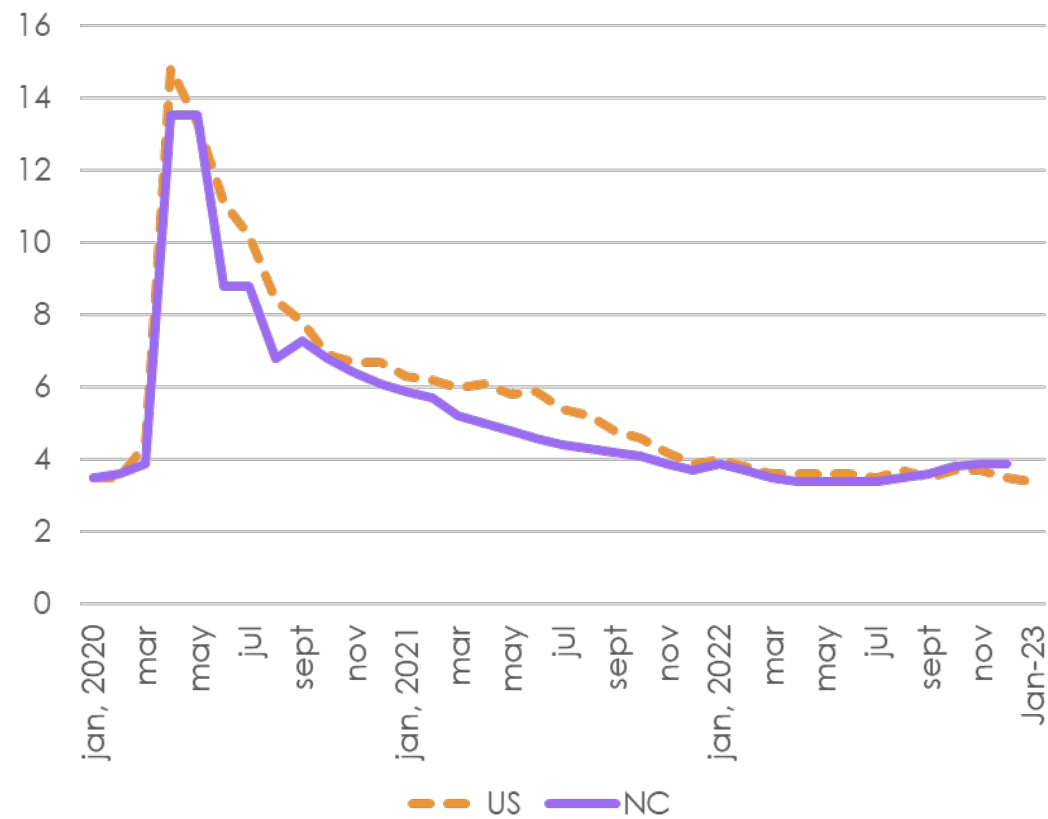
## Fertility



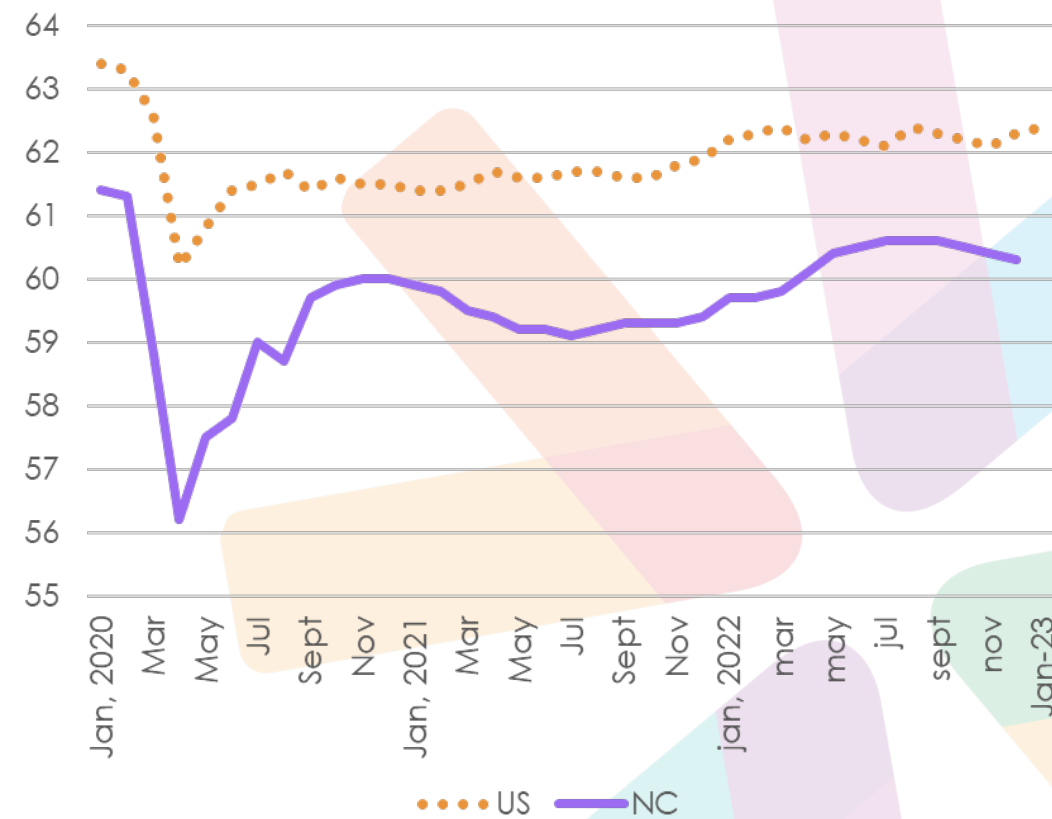
49 of the last 50 years *BELOW* replacement level

# Labor Force Data

UNEMPLOYMENT RATE, %



LABOR FORCE PARTICIPATION RATE



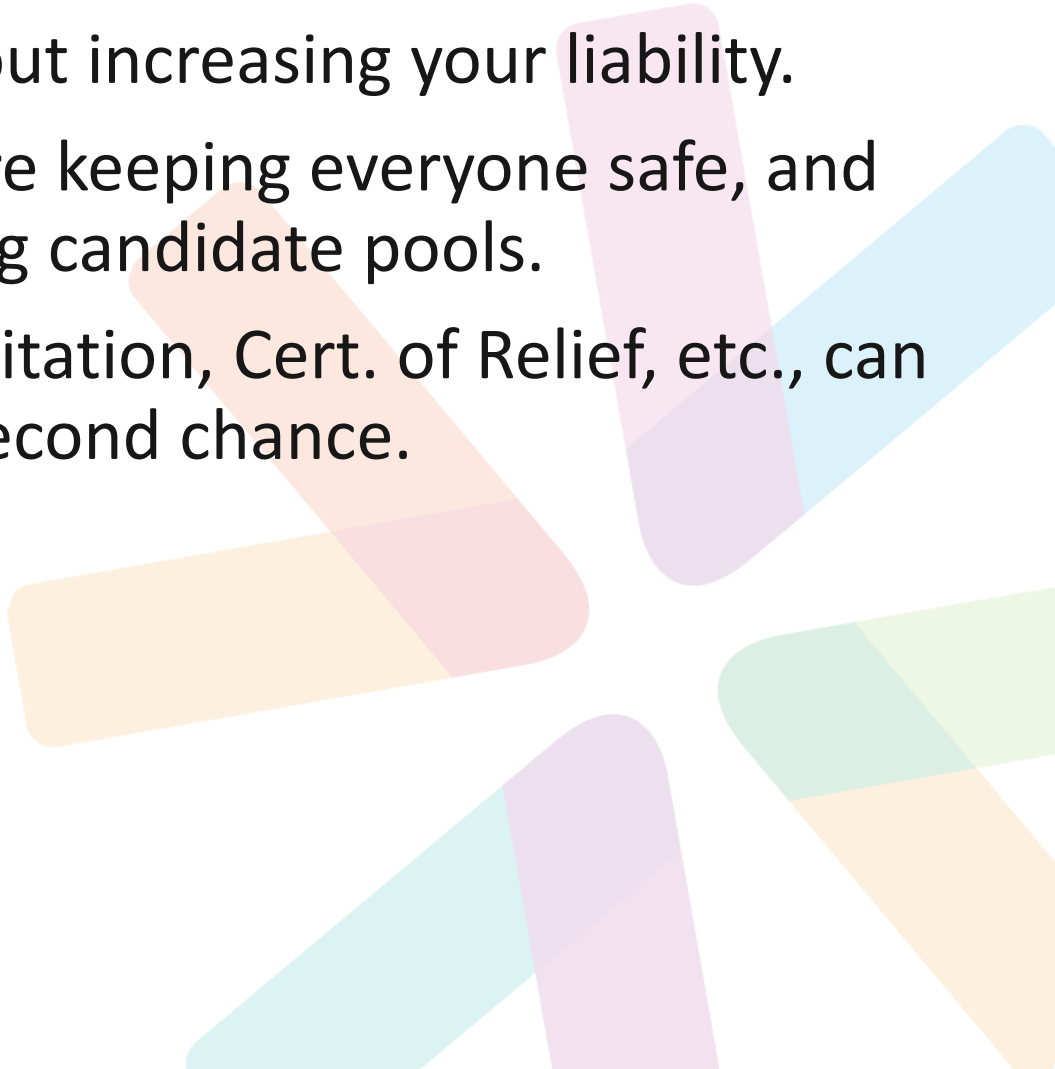
# The Talent Problem Summarized

- Low population growth / fertility
- Aging population
- Decline in elderly workforce participation
- Young people declining labor force participation
- Upskilling of workers during Covid
- Lack of interest in skilled jobs
- Competition from other industries

**Bottom line – talent is now a scarce resource**



# Talent Shortage

- There are avenues to relax some rules without increasing your liability.
  - EEOC is also a good guide to ensuring you are keeping everyone safe, and at the same time not unnecessarily excluding candidate pools.
  - Letters of recommendation, proof of rehabilitation, Cert. of Relief, etc., can help relieve your heartburn when giving a second chance.
- 



# INCREASING YOUR CANDIDATE POOL

*"People are not your most important asset.*

*The right people are."*

*Jim Collins*



# Tight Labor Market

- When you make a bad hire:
  - Their poor performance felt throughout the company
  - They are more likely to file claims
  - You'll spend 80% of your time "dealing" with them
  - They'll create lower morale
  - They'll drain efficiency & profitability
  - Eventually they will drive away good employees
- What if we weed out the poor choices...

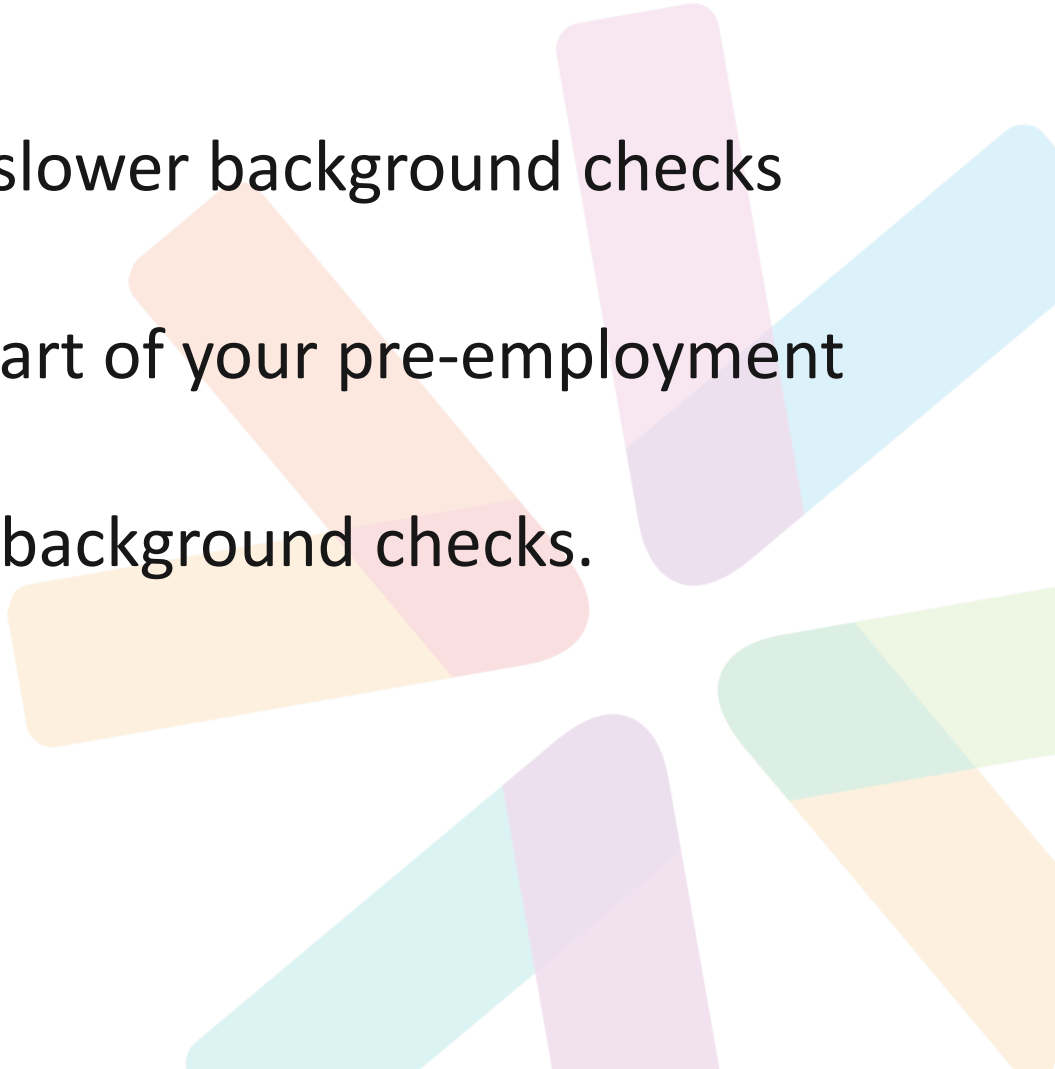


# Things to Watch

- Top topics:
  - Validity of Release Form(s)
    - One or two parts?
    - State requirements?
  - Pre-Adverse Action Packets
    - You vs. BGC Company?
    - When in the process?
  - Disputed info by your applicant/employee.
    - Your BGC Company, you, both?
  - Adverse Action Letter
    - How long to wait?




# Things to Watch

- More re-entry type **Second Chance** rules.
  - Greater restriction on “**PII**” that will lead to slower background checks (e.g. RI, NC, UT, MI, & CA, etc.).
  - Growing ban on **salary** related inquiries as part of your pre-employment screening– this year more than doubled.
  - More regulations requiring specific types of background checks.
- 



# Things to Watch

- Background Checking Accuracy...
  - CFPB has issued a “white paper” on the background checking industry.
  - CFPB has just released a new Summary of Rights that has replaced the 2018 version, effective April 2023.
  - August 15, 2023, the CFPB issued a press release announcing the future release of new regulations to protect the “consumer.”
- 

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# Contact Information

Kevin W. von der Lippe

336-899-1150

[kevin.vonderlippe@letscatapultorg](mailto:kevin.vonderlippe@letscatapultorg)

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