

Legal Risks of Social Media in Hiring

*Everyone's Online, and
It's Not the Wild West Anymore*

Scott P. Horton

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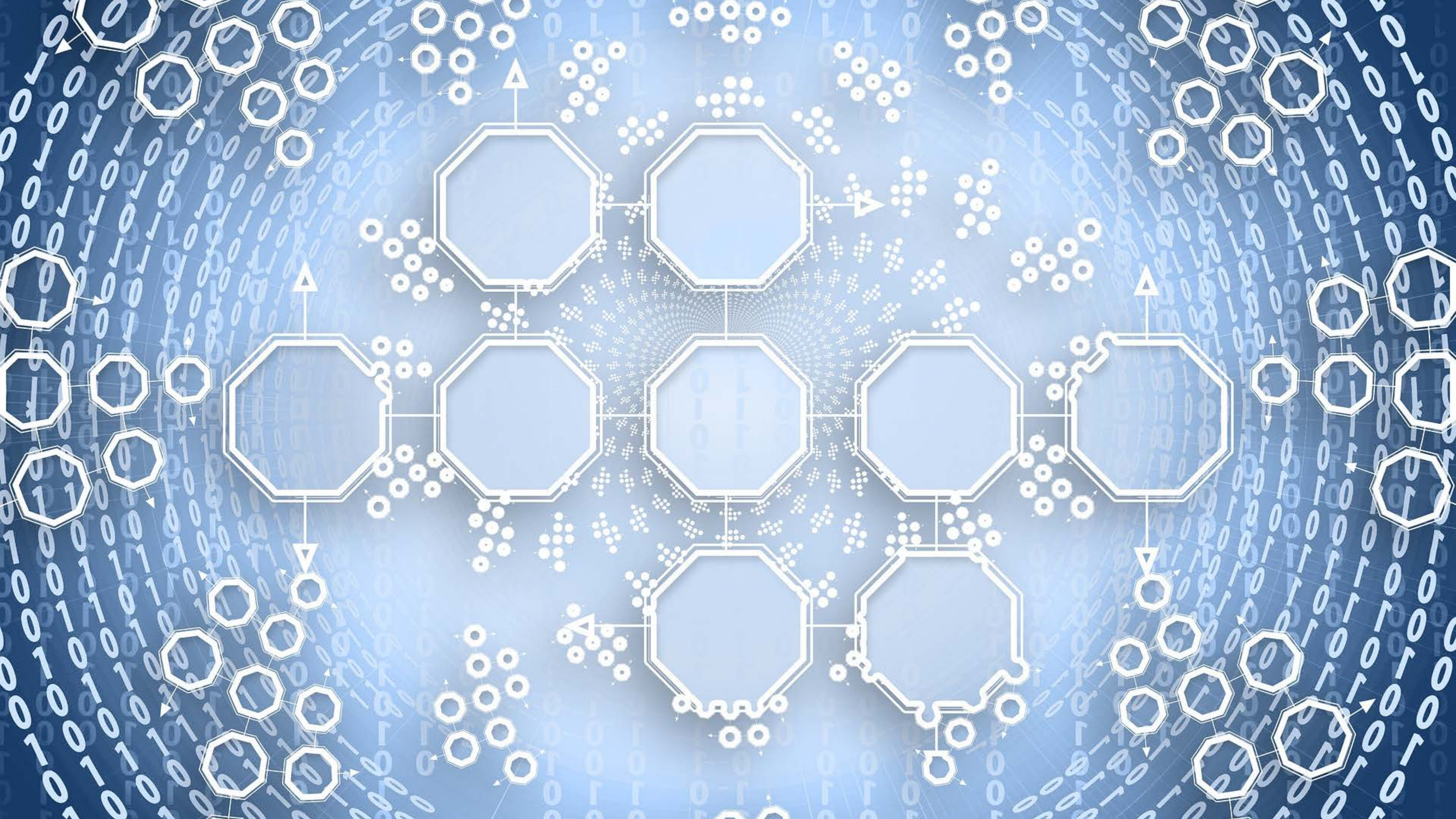
HORTON
Management Law



Finding Candidates

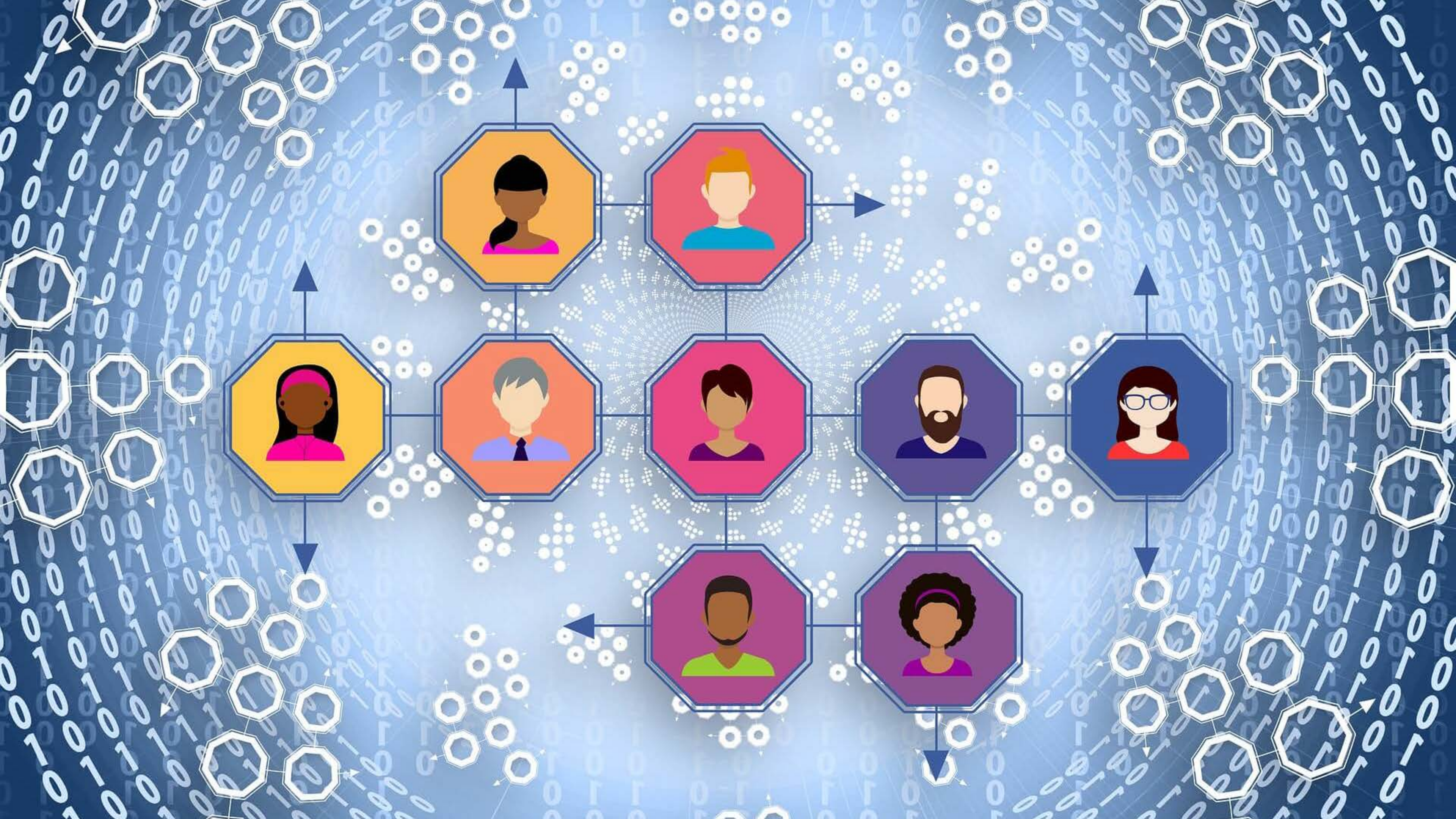
Researching Applicants

Keeping Track











CWA v. T-Mobile et al.

United States District Court for the Northern District of California Case No. 17-cv-07232 (Filed 12/20/17)

“In this action, the Communications Workers of America (“CWA”), Linda Bradley, Maurice Anscombe, and Lura Callahan (collectively, “Plaintiffs”) seek to vindicate the rights of older workers to be free of age discrimination in employment advertising, recruitment, and hiring. They bring this action against T-Mobile US, Inc. (“T-Mobile”), Amazon.com, Inc. (“Amazon”), Cox Communications, Inc., Cox Media Group, LLC (collectively, “Cox”), and a Defendant Class of hundreds of major American employers and employment agencies that, upon information and belief, routinely exclude older workers from receiving their employment and recruiting ads on Facebook, and thus deny older workers job opportunities. These companies eliminate older workers from receiving job ads by specifically targeting their employment ads to younger workers via Facebook’s ad platform.”

Named Defendants

Communications Workers of America v.

- 1 T-Mobile US, Inc.
- 2 Amazon.com, Inc.
- 3 Cox Communications, Inc.
- 4 Cox Media Group, LLC

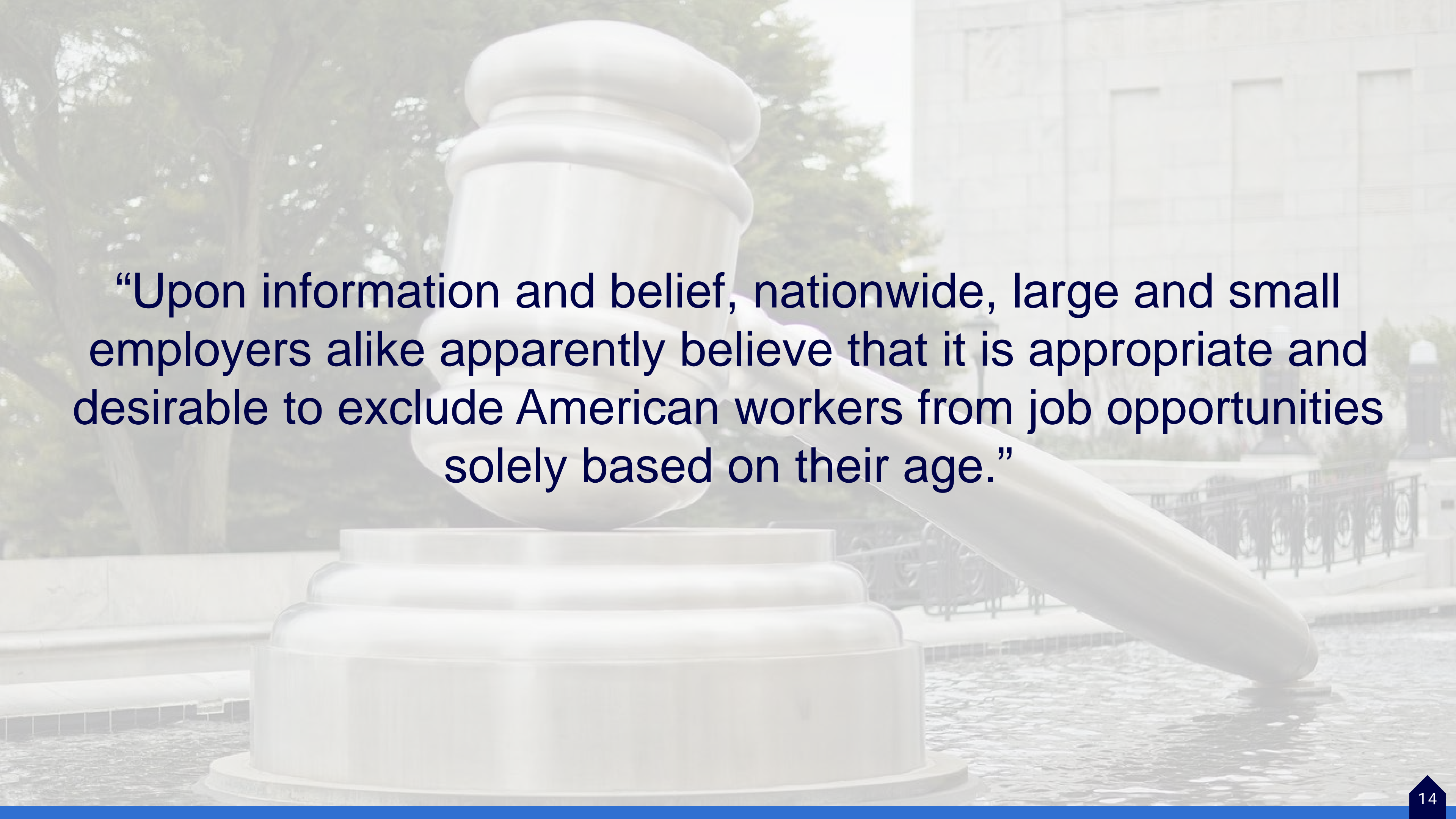
Additional Defendants

» Similarly situated employers and employment agencies, DOES 1 through 1,000:


All employers or employment agencies who annually employ at least 2,500 employees or annually refer for employment at least 2,500 employees, and have purchased or sent employment-related Facebook advertisements that placed an upper age limit on the population of Facebook users that was eligible to receive an advertisement, at any time from the earliest date actionable under the limitations period applicable to the given claim, until the date of judgment in this action.

A white gavel is positioned on a white, tiered pedestal in a courtyard. The gavel is angled towards the right. In the background, there is a large, light-colored building with many windows and some trees. The scene is brightly lit, suggesting a sunny day.

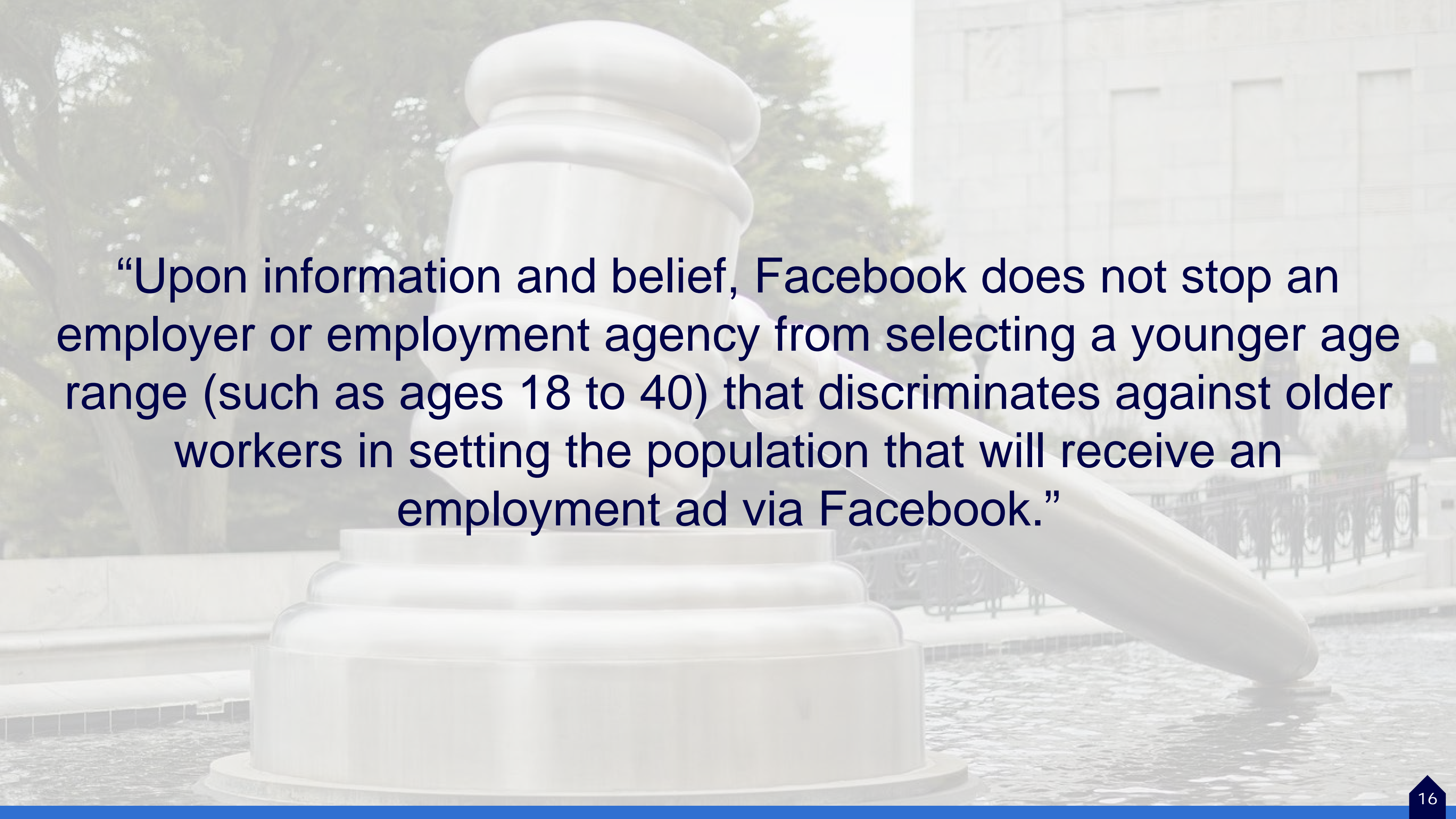
“These companies eliminate older workers from receiving job ads by specifically targeting their employment ads to younger workers via Facebook’s ad platform.”

A white gavel is positioned diagonally across the frame, resting on a white, tiered pedestal. The background is a blurred outdoor scene featuring a large, light-colored building with many windows and some greenery. The overall image has a soft, slightly desaturated appearance.

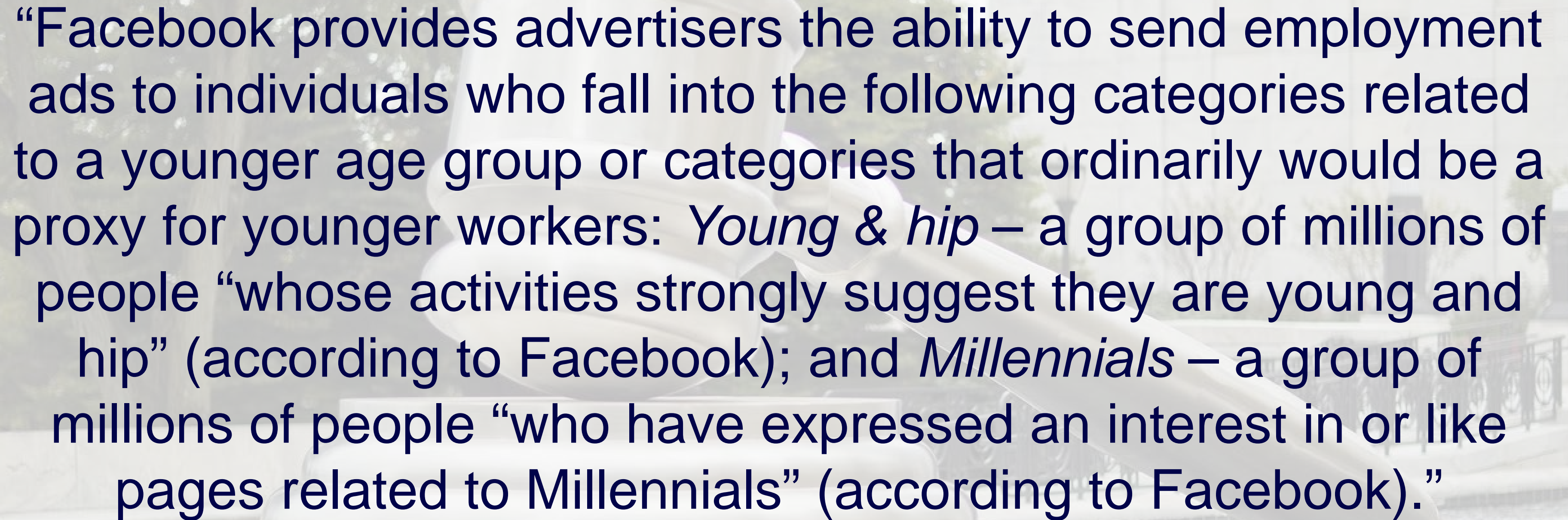
“Upon information and belief, nationwide, large and small employers alike apparently believe that it is appropriate and desirable to exclude American workers from job opportunities solely based on their age.”

A white gavel is positioned diagonally across the frame, resting on a white, tiered pedestal. The background is a blurred outdoor scene featuring a large, light-colored building with many windows and some greenery. The overall image has a soft, slightly desaturated appearance.

“When selecting the population of Facebook users who will receive employment ads, employers and employment agencies routinely focus their ads on prospective applicants who are in age bands that exclude many workers who are 40-years-old or greater.”



A white gavel is positioned diagonally across the frame, resting on a white, tiered pedestal. The background is a blurred outdoor scene with a building and trees. The text is overlaid in the center of the image.

“Upon information and belief, Facebook does not stop an employer or employment agency from selecting a younger age range (such as ages 18 to 40) that discriminates against older workers in setting the population that will receive an employment ad via Facebook.”




“Facebook provides advertisers the ability to send employment ads to individuals who fall into the following categories related to a younger age group or categories that ordinarily would be a proxy for younger workers: *Young & hip* – a group of millions of people “whose activities strongly suggest they are young and hip” (according to Facebook); and *Millennials* – a group of millions of people “who have expressed an interest in or like pages related to Millennials” (according to Facebook).”

Suggested Post ⋮

 **T-Mobile Careers**
Sponsored • 




LIKE PAGE




Become an Expert!




Launch a Customer Care career with the Un-carrie...
ecentralmetrics.com

APPLY NOW

   35 5 Comments • 3 Shares

 Like  Comment  Share

← Why am I seeing this ad? 🔍



One reason you're seeing this ad is that [T-Mobile Careers](#) wants to reach people interested in [Customer service](#), based on activity such as liking Pages or clicking on ads.

There may be other reasons you're seeing this ad, including that T-Mobile Careers wants to reach **people ages 18 to 38 who live or were recently in the United States**. This is information based on your Facebook profile and where you've connected to the internet.



Facebook Careers

Sponsored · 🌐



Wonder what it's like to work on the Facebook recruiting team? Meet a few of our recruiting leaders and learn about our work, culture, and opportunities. We're hiring!

#FacebookLife #FBRecruiting #Careers
#JoinUs



Inside Facebook Recruiting: It All Starts Here

Facebook's mission is to bring the world closer together...
facebook.com

👍❤️😄 2.1k

192 Comments · 145 Shares



Like



Comment




Share



Why am I seeing this ad?



One reason you're seeing this ad is that

 Facebook Careers wants to reach **people who may be similar to their customers**. Learn more.

There may be other reasons you're seeing this ad, including that Facebook Careers wants to reach **people ages 21 to 55 who live or were recently in the United States**. This is information based on your Facebook profile and where you've connected to the internet.

Mobley v. Facebook, Inc.

United States District Court for the Northern District of California Case No. 16-cv-06440 (Filed 11/3/16)

“This is a civil action for declaratory relief, injunctive relief, penalties, and monetary damages under the Fair Housing Act, as amended, (42 U.S.C. §§ 3601 et seq.), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) to redress discrimination based on race, color, religion, sex, familial status, and national origin.”

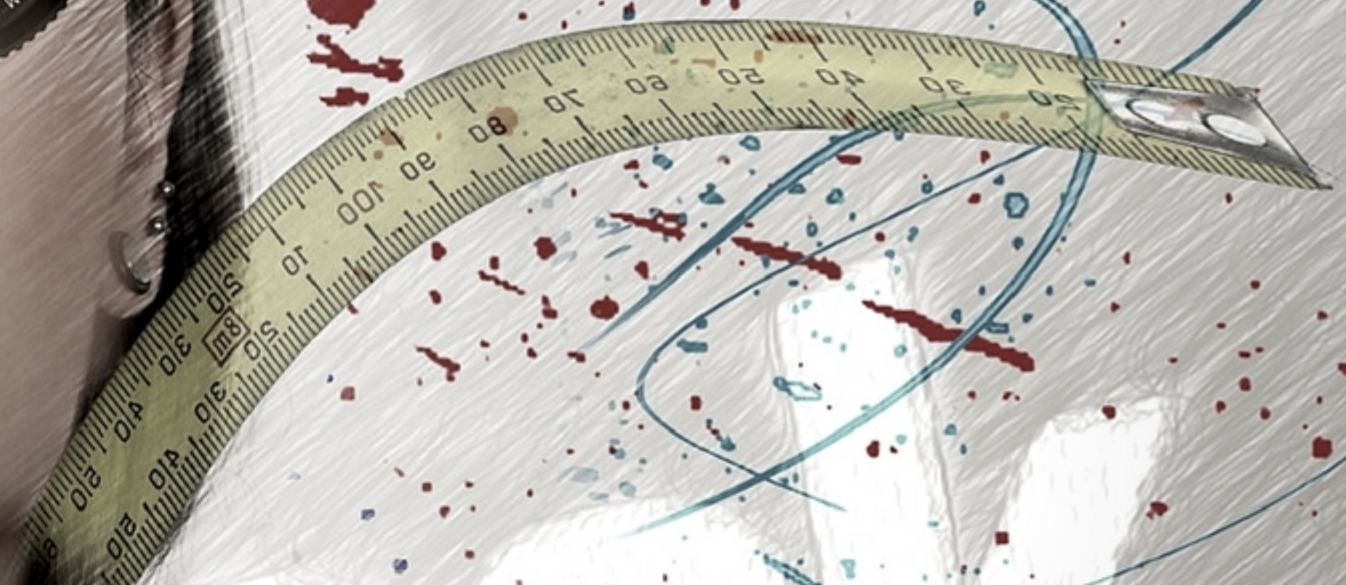
“Defendant Facebook is a social-networking site that boasts more than one billion users worldwide, making it the largest online social network in the world. As alleged more fully below, Facebook has operated and is operating an advertising platform (“Ad Platform”) that publishes, and causes to be published, discriminatory and illegal housing and employment advertisements. By clicking on a button labeled “Exclude People,” ad buyers—here Doe Defendants 1-9,999—can prevent their ads from being displayed to users matching characteristics such as “African American(US),” “Asian American (US),” or “Immigrant.””

Title VII

It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

ADEA

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.



Discrimination Law

NY Human Rights Law

Title VII

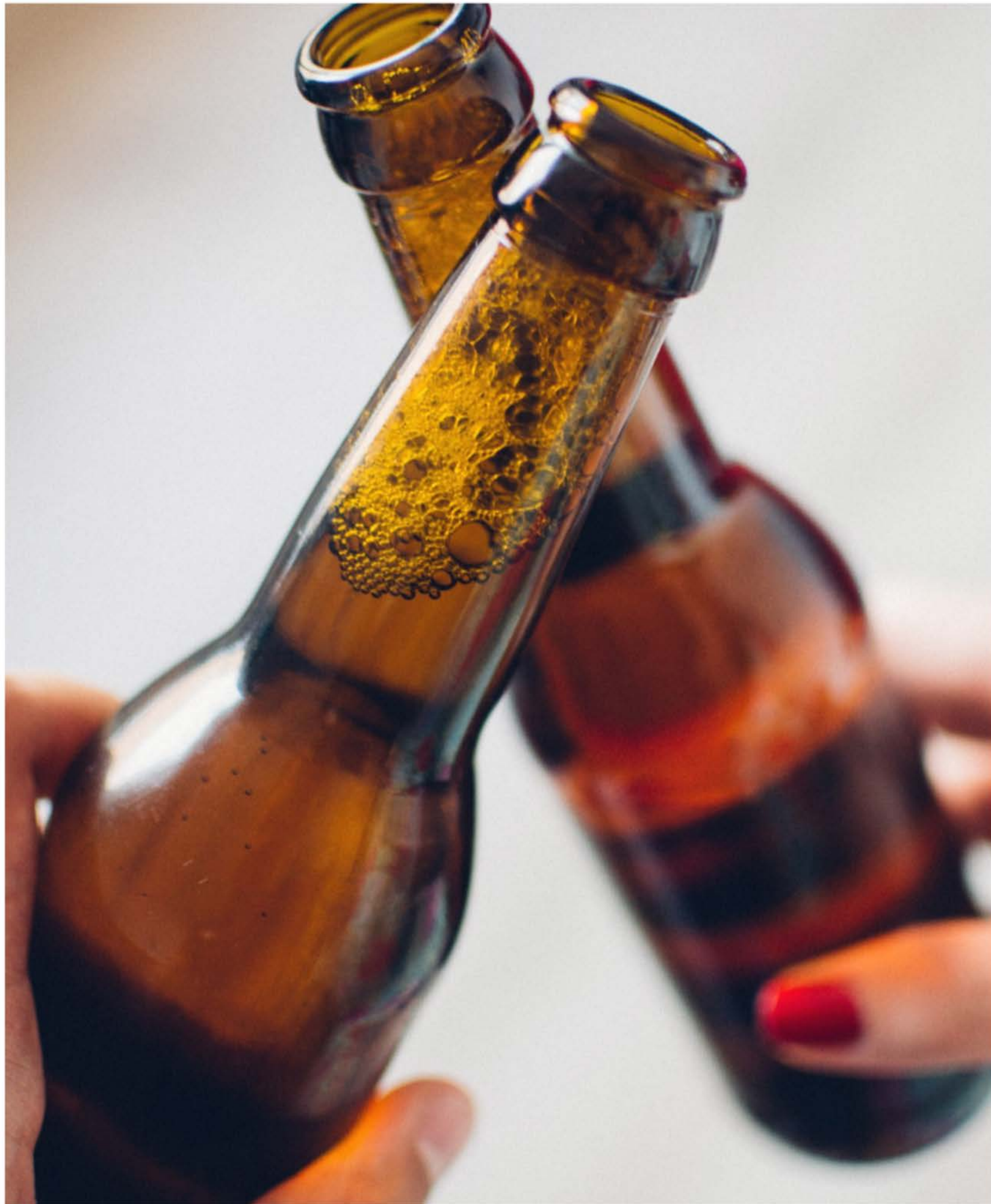
ADEA

ADA

NY Labor Law 201-d

GINA





Protected Off-Duty Conduct

Political Activities

Running for Office, Campaigning, Fundraising

Use of Consumable Products

Alcohol, Cigarettes, Chewing Tobacco

Recreational Activities

Sports, Hobbies, Reading, Watching Television

Union activity

Membership, Exercise of NLRA/Taylor Law Rights

Genetic Information Nondiscrimination Act (GINA)

- Prohibits employers from requesting, requiring, or purchasing genetic information with respect to an employee/applicant or a family member of the employee/applicant.
- “Request” includes “conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information.”



Genetic Information

Includes Family Medical History

Family member includes the employee or applicant's parents, siblings, children, (great) (great-great) grandparents, (great) (great-great) grandchildren, (great) uncles, (great) aunts, nephews, nieces, first cousins, and first cousins once-removed. And it also includes all of those relatives of the individual's dependents, which could include step-children and adopted children. Hence, an employee's genetic information could include information that has absolutely no genetic relationship to them personally!



Fair Credit Reporting Act

“Spokeo, Inc., a data broker that compiles and sells detailed information profiles on millions of consumers, will pay \$800,000 to settle Federal Trade Commission charges that it marketed the profiles to companies in the human resources, background screening, and recruiting industries without taking steps to protect consumers required under the Fair Credit Reporting Act. This is the first Commission case to address the sale of Internet and social media data in the employment screening context.”

FTC Press Release, June 12, 2012

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Recordkeeping

Source: EEOC regulations under federal employment discrimination laws (29 CFR Part 1602)

All Personnel and Employment Records made or used (including, but not limited to, requests for reasonable accommodation, application forms submitted by applicants, and **records dealing with hiring**, promotion, demotion, transfer, lay-off or termination, rates of pay, compensation, tenure, selection for training or apprenticeship, or other terms of employment) must be preserved for the following periods:

- Private employers must retain such records for **one year** from the date of making the record or the personnel action involved, whichever occurs later.
- Educational Institutions and State and Local Governments must retain such records for **two years** from the date of the making of the record or the personnel action involved, whichever occurs later.

Uniform Selection Guidelines

- “Each [employer] should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . in order to determine compliance with these guidelines.”

- Employers with 100+ employees “should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity.”

- Employers with <100 employees need only retain records showing the:
 - number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;
 - number of applicants for hire and promotion by sex and where appropriate by race and national origin; and
 - selection procedures utilized (either standardized or not standardized).

Federal Contractors

- Affirmative Action requirements administered by the Office of Federal Contract Compliance Programs (OFCCP)
- Covered employers must identify applicants and preserve records and data about them, including race, ethnicity, sex, veteran, and disability status
- Specific guidelines for “Internet Applicants”

“Internet Applicants”



- 1 Submitted expression of interest through Internet/email
- 2 Considered for employment in a particular position
- 3 Possessed the basic qualifications for the position
- 4 Didn't withdraw from consideration

“Basic Qualifications”

Either advertised to potential applicants or established by the employer in advance

» Noncomparative features of a job seeker

Example: 3 years' experience in a particular position, rather than a comparative requirement such as being one of the top 5 among the candidates in years of experience

» Objective

Example: Bachelor's degree in accounting, rather than “a technical degree from a good school”

» Relevant to performance of the particular position



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Thanks for your time!

Questions?

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