

# The Debate on Age Bias in a Hot Jobs Market

## Labor & Employment Law Update

on June 19, 2019

The *New York Times* recently published an article discussing trends in the area of unlawful age discrimination occurring at a time when the U.S. has the lowest unemployment rate in half a century. *New York Times* writer Patricia Cohen details, how despite a scramble to lure applicants to alleviate a massive shortage of workers, many workers over 50, and now even over 40, appear to find that they are considered too old for a new position. The allegations of age discrimination have unleashed a wave of litigation. Notably, in a settlement with various plaintiffs groups, Facebook agreed to remove the ability of advertisers to screen out minority groups, women and older groups from seeing particular job listings.

However, age discrimination is difficult to prove and litigation costs are high. The United States Court of Appeals for the Seventh Circuit recently ruled in a case titled *Kleber v. CareFusion Corp.* that some recruiting practices that very likely have the effect of screening out older applicants, such as ads that cap an applicant's experience (say, for example, "3 to 7 years of experience"), do not violate the law. In legal terms, the Seventh Circuit held that the federal Age Discrimination in Employment Act's (ADEA) disparate impact protections that typically shield older workers against the unfair effects of otherwise neutral practices do not apply to outside job applicants. The plaintiff in *Kleber* has requested that the U.S. Supreme Court review the case.

For employers on the hunt for talent in the current market, it helps to stay focused on the applicant's talent, skills and relevant job experience. With very limited exception, job postings should be age-neutral and requests for birthdays and graduation/degree years should be eliminated from application forms. Practices and phrases that have come under scrutiny in job postings and recruiting materials include using ad targeting tools to limit the age range of individuals that see the ad, using phrases such as "new graduates" or "recent graduates," and having materials only showing younger employees. Additionally, all employees involved in the hiring process should be trained on age discrimination laws, and ensure that hiring criteria do not directly or indirectly exclude older workers. Lastly, if in doubt, it is always best to seek advice from legal counsel to help put a good process in place and to provide guidance and representation when problems occur.