

March 29, 2019

Facebook Settlement over Discriminatory Housing Ads May Cause Unintended Consequences for Seniors Housing Marketing

Seniors housing providers who rely on Facebook to advertise their communities should pay special attention to a new settlement agreement announced March 19, 2019 between several civil rights organizations and Facebook. This settlement is the result of a complaint alleging Facebook's online housing advertisements were discriminatory. At issue is Facebook's online advertising platform that allows marketers the ability to "include" or "exclude" certain people from receiving their ads using pre-populated list of characteristics developed by Facebook. This allowed advertisers to exclude Facebook users from receiving ads based on their sex or age, or based on interests, behaviors, or demographics that allegedly relate to or are associated with race, national origin, sex, age, disability, or family status, otherwise protected classes within the Fair Housing Act.

To prevent future discriminatory practices, the settlement prohibits the use of audience selection tools in these categories, regardless of whether the intent is to block the protected audience classifications from receiving the advertising, or to target those audience classifications to sell a product or service tailored to their needs. It creates a new portal for housing, employment and credit advertising ("HEC") on Facebook, Instagram, and Messenger that will have limited targeting options.

If no longer allowed to target users by age, the new policy will most certainly impact the ability of seniors housing companies to direct ads to prospective residents and their adult children on Facebook if the prohibitions fail to recognize the Fair Housing Act's exemptions for housing for older persons. Importantly, the settlement ignores that seniors housing providers are required under the Fair Housing Act to screen applicants by age, and allowed to exclude residents based on familial status. It is clear that target selection based on health care needs will also be prohibited on Facebook.

ASHA will pursue clarification in this area if necessary. It is clear this complaint and subsequent settlement was directed at addressing Facebook's filtering capabilities to screen for protected classes of people such as by ethnicity, sex, disability and families with children. However, in doing so, it may have created an unintended consequence that limits the ability for seniors housing communities to target their communities to seniors who may desire the assistance and social benefits offered in senior living.

Specific terms of the settlement include:

- Gender, age, and multicultural affinity targeting options will not be available when creating Facebook ads.
- HEC ads must have a minimum geographic radius of 15 miles from a specific address or from the center of a city. Targeting by zip code will not be permitted.
- HEC ads will not have targeting options that describe or appear to be related to personal characteristics or classes protected under anti-discrimination laws. This means that targeting options that may relate to race, color, national origin, ethnicity, gender, age, religion, family status, disability, and sexual orientation, among other protected characteristics or classes, will not be permitted on the HEC portal
- Advertisers will be asked to create their HEC ads in the HEC portal, and if Facebook detects that an advertiser has tried to create an HEC ad outside of the HEC portal, Facebook will block and re-route the advertiser to the HEC portal with limited options.
- Facebook's "Lookalike Audience" tool, which helps advertisers identify Facebook users who are similar to advertisers' current customers or marketing lists, will no longer consider gender, age, religious views, zip codes, Facebook Group membership, or other similar categories when creating customized audiences for HEC ads.
- They will create a page where Facebook users can search for and view all housing ads that have been placed by advertisers.

ASHA will be exploring the application of this new Facebook policy with its members and other interest groups to seek an interpretation that will not unduly hinder senior living providers from advertising in a manner that is consistent with their rights and obligations under the fair housing and licensure laws.

NOTE: In a separate but related action, HUD also announced today it has filed a complaint against Facebook alleging the company engaged in discriminatory housing practices in violation of the fair Housing Act. Much of the complaint is focused on the same advertising platform capabilities and practices.