



THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
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BY EMAIL AND OVERNIGHT DELIVERY

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Re: LinkedIn Should Disable Its “Diversity In Recruiting” Feature

Dear Messrs. Roslansky and Lawit:

We write to follow up on our letter of April 25, 2023, in which we called on LinkedIn Corp. (“LinkedIn”) to disable the “Diversity in Recruiting” (“DIR”) feature on its platform. The DIR feature utilizes the personal demographic information of LinkedIn users to “surface qualified members” in order to “diversify the group of candidates displayed to recruiters from companies that have made public commitments to diversity, equity, and inclusion.”¹ To date, we have received no response from you, and the DIR feature appears to remain in use by LinkedIn.

¹ See <https://tinyurl.com/yfpm4n2> [https://archive.is/Rd2PV] (accessed on July 1, 2023).

We once again call on LinkedIn to disable the DIR feature, particularly in light of the U.S. Supreme Court’s recent decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, ___U.S.___ (2023) (“*Students for Fair Admissions*”). In *Students for Fair Admissions*, the Supreme Court reaffirmed that drawing “[d]istinctions between citizens solely because of their ancestry” is “odious to a free people whose institutions are founded upon the doctrine of equality,” and declared that preferences based on racial classifications constitute invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment, which the Court noted would also constitute a violation of the Civil Rights Act of 1964 (Majority Op. at n.2). It therefore is more imperative than ever that LinkedIn discontinue the use of the DIR feature.

In addition to legal requirements, LinkedIn has made contractual promises of non-discrimination that are consistent with *Students for Fair Admissions*. Yet your platform contradicts those promises by embedding racial and other protected classifications into the job recruiting process through the use of algorithms that drive the DIR feature. In light of the Supreme Court’s pronouncement in the *Students for Fair Admissions* cases that “[e]liminating racial discrimination means eliminating all of it,” we again call on LinkedIn to disable the pernicious DIR feature.

LinkedIn’s Collection And Use Of Members’ Demographic Information

As shown in the screenshot below from LinkedIn’s website, LinkedIn states that the demographic data utilized through the DIR feature includes each LinkedIn user’s race and ethnicity, gender and gender identity and sexual orientation.²

Which of the following best describes your racial or ethnic identity?
Select all that apply

- Asian
- Black, including African American
- Hispanic, Latino/a or Latinx
- Middle Eastern or North African
- Native American or Alaska Native
- Pacific Islander, including Native Hawaiian
- White or Caucasian
- Prefer not to say

[+ Add other race or ethnicity](#)

² <https://www.linkedin.com/mypreferences/d/demographic-info-copy> [https://archive.is/bPH1O] (accessed on July 1, 2023). Users must be logged in to the LinkedIn platform to view these screens in their native format.

Which of the following best describes your gender?

- Woman
- Man
- Nonbinary
- Prefer not to say
- Self describe

Do you identify as transgender?

- Yes
- No
- Prefer not to say

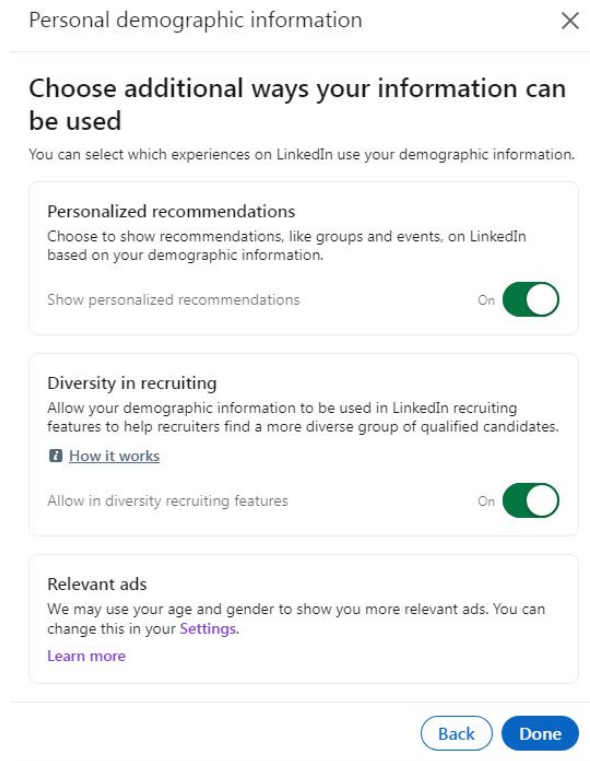
Which of the following best describe your sexual orientation?

Select all that apply

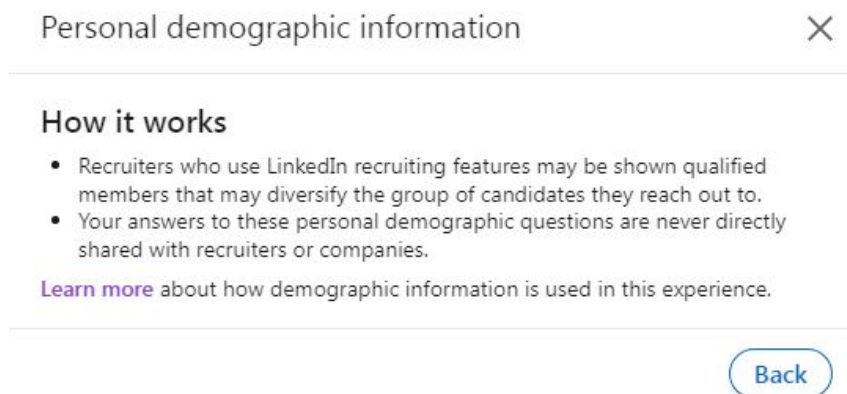
- Asexual or ace
- Bisexual or bi
- Gay
- Heterosexual or straight
- Lesbian
- Pansexual
- Queer
- Prefer not to say

[+ Add other sexual orientation](#)

According to LinkedIn, once a user's demographic information is provided to the platform, LinkedIn uses that data "to help recruiters find a more diverse group of qualified candidates."



In explaining the DIR feature and “how it works,” LinkedIn explicitly states that job recruiters who use LinkedIn “may be shown qualified members that may diversify the group of candidates they reach out to.” In other words, LinkedIn promotes the qualifications of candidates who meet its criteria for “diversity” and thereby throttles the visibility of applicants who do not.



On a page of the LinkedIn website entitled “How LinkedIn uses your personal demographic data,” LinkedIn further explained that each subscriber’s personal demographic information could be used “in recruiting features” to “surface qualified members that may diversify the group of candidates displayed to recruiters from companies that have made

public commitments to diversity, equity, and inclusion.”³ A screenshot of the relevant portion of that webpage as it existed at the time of our prior letter is reproduced below:

For diversity in recruiting: LinkedIn may use your personal demographic information in recruiting features to surface qualified members that may diversify the group of candidates displayed to recruiters. This would include your profile among those shown to recruiters from companies that have made public commitments to diversity, equity, and inclusion. Your answers to these personal demographic questions are never directly shared with recruiters or companies. You can opt out of this use of your personal demographic information in your settings.

Since we sent our initial letter, LinkedIn added a sentence to this paragraph making clear that its “hiring products do **not** have filters that enable our customers to filter out candidates on the basis of sensitive or protected categories of personal demographic data (including race/ethnicity, gender, having a disability, sexual orientation or transgender status)” (emphasis in original).⁴ A screenshot of the paragraph with the amended language is reproduced below:

For diversity in recruiting: LinkedIn may use your personal demographic information in recruiting features to surface qualified members that may diversify the group of candidates displayed to recruiters. This would include your profile among those shown to recruiters from companies that have made public commitments to diversity, equity, and inclusion. Your answers to these personal demographic questions are never directly shared with recruiters or companies. Our hiring products do **not** have filters that enable our customers to filter out candidates on the basis of sensitive or protected categories of personal demographic data (including race/ethnicity, gender, having a disability, sexual orientation or transgender status). You can opt out of this use of your personal demographic information in your settings.

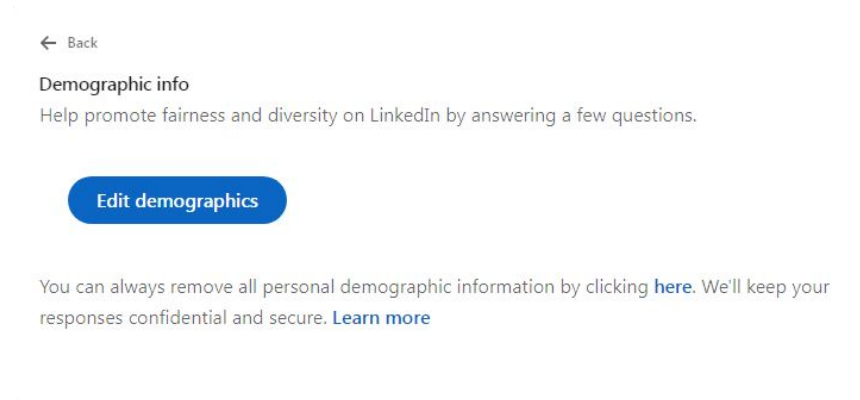
While we are pleased to learn that LinkedIn changed its language in response to our prior letter, and that LinkedIn now asserts that potential employers are unable to screen candidates on the basis of protected categories, LinkedIn’s pledge on that score does not go far enough. Assuming the platform now does not allow employers to filter job candidates by protected demographic categories, LinkedIn is doing that filtering for employers, so the result is the same. LinkedIn, by the terms explained on its website, is making candidates more visible to potential employers based on the candidate’s race, ethnicity, gender, gender identity and sexual orientation. This results in a manipulated pool of candidates which discriminates against candidates who do not meet the diversity requirements.

It is no defense that candidates elect to use the DIR feature. The DIR feature affects all candidates – those who opt in potentially get a boost if they meet the diversity requirements, while those who do not opt in obtain no advantage. Either way, diversity candidates are advantaged. The entire recruitment process thus is impacted by the DIR feature for those who participate and those who do not.

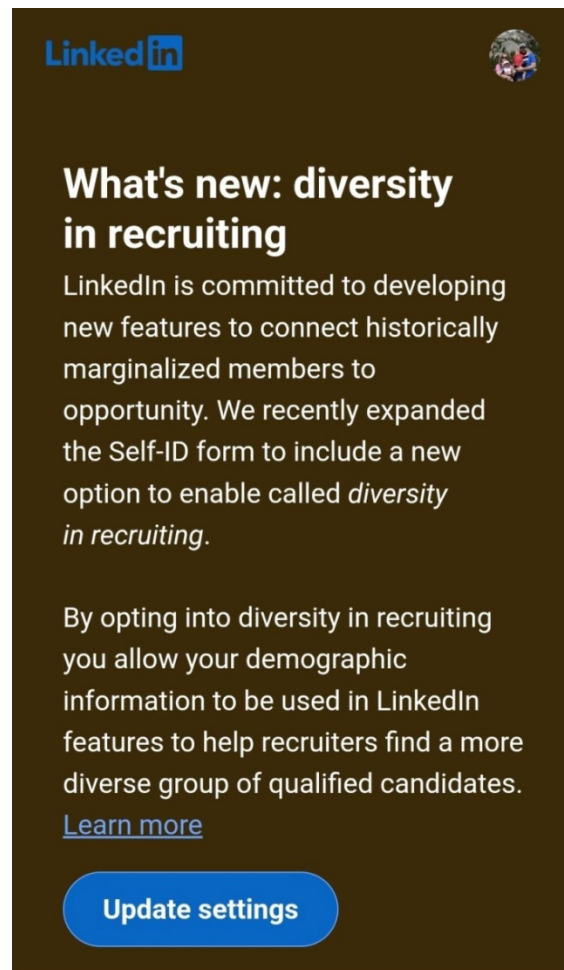
³ See <https://archive.is/Rd2PV> (accessed on July 1, 2023).

⁴ See <https://tinyurl.com/yfpm4n2> [<https://archive.is/iJ4Ht>] (accessed on July 1, 2023).

The filtering and manipulation of candidate pools appears to be exactly what LinkedIn is doing based on other entries on its website. For example, LinkedIn asserts that it adopted the DIR feature to “help promote fairness and diversity” in the competition for jobs.



And, in an email reportedly sent by LinkedIn to its users, the platform admits that by “diversity,” it means those members who have been “historically marginalized.”⁵



⁵ See <https://tinyurl.com/34djzxd> [https://archive.is/YIyl1] (accessed on July 1, 2023).

LinkedIn also maintains that the DIR tool will use members' demographic information to "identify and address potential bias" in hiring decisions by employers who use LinkedIn to find new employees.

Your demographic information

Your responses are kept confidential, secure, and private to you. We'll use your information to:

- Understand and improve how different people experience LinkedIn
- Identify and address potential bias
- Provide workforce insights on what we've learned

It is unclear from the website how LinkedIn obtains this information about employers, and LinkedIn did not provide that explanation in response to our prior letter. LinkedIn also has not explained what role, if any, employers have in the process. Are recruiters and employers aware that they are receiving a manipulated pool? The website is far from transparent on that point, and its ambiguous language could reasonably be interpreted to suggest that potential employers are made aware that LinkedIn is suppressing "non-diverse" job applicants and "surfacing" the "diverse" ones. While this would be troubling – indeed, as mentioned in our initial letter, it could trigger liability against LinkedIn for violating state and federal civil right laws under an aiding and abetting theory – it would be just as bad if LinkedIn is, in fact, concealing its filtering and manipulation of the candidate pools from the recruiters and employers who are simply looking for the best qualified job applicants. LinkedIn needs to be transparent about its process.

Either way, the DIR feature does not promote fairness or address bias, but itself appears to be engaging in discrimination on the basis of protected categories.

The DIR Feature Violates LinkedIn's Own Non-Discrimination Policies

In several places on LinkedIn's platform, the company commendably asserts a commitment to non-discrimination. We call upon LinkedIn to live up to these promised non-discrimination principles.

For instance, LinkedIn's policy regarding the substance of job listings that are advertised by third-party employers on the platform provides that "LinkedIn prohibits discrimination in job posts based on protected characteristics, including age, gender, gender identity, religion, ethnicity, race, national origin, disability, sexual orientation, and any other basis protected under law."⁶

⁶ <https://www.linkedin.com/help/linkedin/answer/a1335725> [https://archive.is/XeuXT] (accessed on July 1, 2023); <https://www.linkedin.com/legal/ads-policy> [https://archive.is/VIv4g] (accessed on July 1, 2023).

Job post discrimination

Last updated: 5 months ago

LinkedIn prohibits discrimination in job posts based on protected characteristics, including age, gender, gender identity, religion, ethnicity, race, national origin, disability, sexual orientation, and any other basis protected under law; however, in a jurisdiction where it is legally permissible to do so, LinkedIn may permit language in posts expressing preference for members of certain groups historically disadvantaged in hiring in that location.

You can report any job post on LinkedIn that you believe may be discriminatory. We review jobs that have been flagged and if they are found to violate our policies, they will be removed.

In addition to our policies, job posts must also comply with applicable local laws and regulations. Job posters should consult local agencies and local legal counsel to understand applicable laws and regulations relating to discrimination. In some cases, practices allowed by local law may still be prohibited on LinkedIn.

And, as shown in the following screenshot, LinkedIn’s “Professional Community Policies” webpage declares that the site prohibits content that “incites or threatens ... discriminatory action against individuals or groups because of their actual or perceived race, ethnicity, national origin, caste, gender, gender identity, sexual orientation, religious affiliation, age, or disability status.”⁷

Do not be hateful. We don't allow content that attacks, denigrates, intimidates, dehumanizes, incites or threatens hatred, violence, prejudicial or discriminatory action against individuals or groups because of their actual or perceived race, ethnicity, national origin, caste, gender, gender identity, sexual orientation, religious affiliation, age, or disability status. Hate groups are not permitted on LinkedIn. Do not use racial, religious, or other slurs that incite or promote hatred, or any other content intended to create division. Do not post or share content that denies a well-documented historical event such as the Holocaust or slavery in the United States.

LinkedIn’s Equal Employment Opportunity (“EEO”) statement also claims that the company stands firmly against discrimination in its own hiring decisions, asserting that it “considers qualified applicants without regard to race, color, religion, creed, gender, national origin, age, disability, veteran status, marital status, pregnancy, sex, gender expression or identity, sexual orientation, citizenship, or any other legally protected class.”⁸

⁷ <https://www.linkedin.com/legal/professional-community-policies> [https://archive.is/6MxhM] (accessed on July 1, 2023).

⁸ <https://tinyurl.com/ekccjaz8> [https://tinyurl.com/ekccjaz8] (accessed on July 1, 2023).

Equal Employment Opportunity (EEO) Statements

US Equal Employment Opportunity Statement

LinkedIn is committed to diversity in its workforce and is proud to be an equal opportunity employer. LinkedIn considers qualified applicants without regard to race, color, religion, creed, gender, national origin, age, disability, veteran status, marital status, pregnancy, sex, gender expression or identity, sexual orientation, citizenship, or any other legally protected class. LinkedIn is an Affirmative Action and Equal Opportunity Employer as described in our [equal opportunity statement here](#).

LinkedIn is committed to offering an inclusive and accessible experience for all job seekers, including individuals with disabilities. Our goal is to foster an inclusive and accessible workplace where everyone has the opportunity to be successful.

LinkedIn's EEO statement further provides that "each member of [its] leadership team strongly supports ... non-discrimination," and that LinkedIn's commitment to non-discrimination "applies across all of our employment policies and practices, from recruiting and hiring to training and career development."⁹



OUR COMMITMENT TO EQUAL EMPLOYMENT OPPORTUNITY

At LinkedIn, our vision is to create economic opportunity for every professional in the world, and that starts here, with our own employees. That's why each member of our leadership team strongly supports equal employment opportunity, non-discrimination, and our affirmative action programs.

Integrity is a core part of our culture, and LinkedIn is committed to equal employment opportunity for all qualified individuals -regardless of race, color, religion, creed, gender, national origin, age, disability, veteran status, marital status, pregnancy, sex, gender expression or identity, sexual orientation, citizenship, or any other legally protected class. This commitment applies across all of our employment policies and practices, from recruiting and hiring to training and career development.

This also means that we absolutely prohibit sexual, racial, religious, and all other forms of unlawful discrimination and harassment, as detailed in LinkedIn's Policy Prohibiting Harassment, Discrimination, and Retaliation. If you have any questions about our discrimination or harassment policies, we want to know about it. If you have other concerns, please reach out to your HR Business Partner, Employee Relations, or you may submit your concern anonymously via our Integrity Helpline at <https://app.convercent.com/en-us/LandingPage/39af0eee-9737-e411-80ef-00155d620d58> or 1-844-804-LNKD (5653) (find more information at go/integrity). LinkedIn will not tolerate any intimidation, threats, or retaliation against anyone for reporting concerns in good faith, or for participating in any related investigation.

Given LinkedIn's repeated contractual commitments to non-discrimination and its public vow that "[i]ntegrity is a core part of [its] culture," LinkedIn's adoption, implementation and promotion of the DIR feature is particularly troubling.

⁹ <https://tinyurl.com/4zftuf9> [<https://archive.is/NP0wT>] (accessed on July 1, 2023).

The DIR Feature Constitutes or Enables Discrimination Based On Protected Categories

As you know, the law forbids discrimination based on numerous protected categories in every aspect of employment. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers and employment agencies to discriminate because of “race, color, religion, sex, or national origin.” 42 U. S. C. § 2000e-2(a)(1), (b). State and local laws across all of the jurisdictions where LinkedIn has an online presence are even more protective.

The term “employer” has been interpreted to be “sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an employer of an aggrieved individual as the term has generally been defined at common law.” *Spirit v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated on other grounds by Long Island Univ. v. Spirit*, 463 U.S. 1223 (1983). The definition of “employer” is thus broad enough to encompass LinkedIn’s activities.

Similarly, Title VII prohibits “employment agencies” from engaging in discriminatory practices, and makes it unlawful for an employment agency to “fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(b). Under Title VII, an employment agency includes “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.” 42 U.S.C. § 2000e(c). *See, e.g., Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp. 2d 311, 316, 319 (S.D.N.Y. 2002) (a county personnel office qualifies as an “employment agency” under Title VII because it “provided employers with names of potential employees, based on certain criteria . . . and thus . . . it exercised significant control over potential employees’ opportunities for employment and access to those opportunities”) (citation and internal quotation marks omitted).

LinkedIn’s DIR function, as described on LinkedIn’s website, segregates the applicant pool into “diverse” and “non-diverse” groups, and promotes the former over the latter. Because this “significantly affects access of individuals to employment opportunities,” it creates serious Title VII concerns.

Further, courts have held that where a non-employer discriminates against an employee, and the discrimination has the effect of restricting the employee’s access to employment, the non-employer may be held liable for employment discrimination. *See Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *accord Association of Mexican-American Educators v. California*, 231 F.3d 572 (9th Cir. 2000); *Alexander v. Rush N. Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 202 (3d Cir. 1994); *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 876-77 (6th Cir. 1991); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722 (D.C. Cir. 1978); *Axness v. Aqreva LLC*, 118 F. Supp. 3d 1144, 1156 (D.S.D. 2015).

Indeed, the Ninth Circuit¹⁰ has held that an entity that is not the direct employer of a Title VII plaintiff nevertheless may be liable if it “interferes with [the] individual’s employment opportunities with another employer.” *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983) (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 n.3 (9th Cir. 1980)); *Association of Mexican-American Educators*, 231 F.3d at 580 n.4 (collecting cases). The Third Circuit¹¹ also has adopted the “interference” theory, finding that a non-employer defendant can be held liable under Title VII if it “had the ability to directly affect the plaintiff’s employment opportunities.” *Charlton*, 25 F.3d at 198 n.4. LinkedIn’s creation and use of the DIR feature on its platform exposes it to legal risk under the “interference” theory, as well.

LinkedIn’s User Agreement¹² also makes California law applicable to all legal disputes arising out of its members’ use of the platform. Having chosen California law to apply, LinkedIn must abide by California law – specifically, California’s Fair Employment and Housing Act (“FEHA”), which makes it illegal for employers of five or more employees to discriminate against job applicants because of a protected category. Cal. Gov. Code §§ 12926(d), 12940 *et seq.* Notably, FEHA also makes it unlawful “to aid [or] abet” such unlawful discrimination by others. Cal. Gov. Code § 12940(i).

Putting aside any potential legal liability of LinkedIn, the DIR feature can only serve to facilitate invidious discrimination. That alone should suffice for LinkedIn to live up to its non-discrimination policies and legal obligations.

LinkedIn Should Adhere To Its Own Policies And The Law And Disable The DIR Function

Information obtained and requested through the pre-employment process should be limited to information essential to determine if a person is qualified for the job – race, ethnicity, gender and sexual orientation are irrelevant to such determinations as a matter of LinkedIn policies and the law. Such discrimination simply cannot be justified as job-related or consistent with business necessity. That was the law prior to *Students For Fair Admissions*, and if there were the slightest doubt, the Supreme Court once and for all settled the issue. LinkedIn should take notice and adhere.

We call on LinkedIn to live up to its own non-discrimination policies and the law, and to immediately disable the “Diversity in Recruiting” feature. Please confirm LinkedIn’s intention to do so.

¹⁰ LinkedIn’s corporate headquarters are located in Sunnyvale, CA, which is within the Ninth Circuit.

¹¹ LinkedIn is incorporated in Delaware, which is within the Third Circuit.

¹² <https://www.linkedin.com/legal/user-agreement> [https://archive.is/VIIIX] (accessed on July 1, 2023).

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We appreciate your attention to this important matter. Please let us know LinkedIn's intentions upon receipt of this letter.

Respectfully submitted,

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