

An Employment Lawyers' Perspective on Age Discrimination in Silicon Valley

The tech industry's well document bias against women and people of color expands to include everyone past the age of 40 or so.

Image credit: 10'000 Hours | Getty Images



Scott Cole

GUEST WRITER
CEO of Scott Cole & Associates



Scott Cole is an attorney and the founder of Scott Cole & Associates, a California-based law firm devoted to worker's rights litigation. He has represented countless workers in single party and class action employment matters. He is also the author of scores of articles as well as the book *Fallout*.

October 26, 2018

7 min read

Opinions expressed by *Entrepreneur* contributors are their own.

With oftentimes high salaries at their disposal, most of Silicon Valley's over-50 workforce can appreciate that fine wine gets better with age. And yet, as to their personal job security and marketability, nearly 90 percent of those in this age demographic worry that they will not. This article examines why.

Professionals in most industries -- medicine, law, education -- tend to wear their advanced years and refined skill sets as badges of honor. They, their colleagues and those to whom they give service generally equate age with wisdom, a reason to trust their judgment, grounds to feel safe with their financial affairs, sometimes even their lives. However, recent studies and a proliferation of age-bias lawsuits demonstrates that the pursuit of youthful exuberance and thinkers uninhibited by what their senior counterparts would tout as "perspective" has dominated hiring and retention decision-making in Silicon Valley for years, propelling it like an aircraft carrier through a vast sea of tech talent, leaving fear, job dissatisfaction and countless older workers in its wake.

Under [California's Fair Employment and Housing Act \(FEHA\)](#) and the federal Age Discrimination in Employment Act (ADEA), workers over the age of 40 are considered a "protected" category. Adverse employment decisions against this class of workers, whether based solely or even substantially on age, is unlawful and carries high potential consequences, including awards of back and future pay and benefits, damages for emotional distress, the recovery of legal fees and costs of suit and, in some situations, the imposition of punitive damages. Although rarer, when brought as class actions, as in the case of oft-suspect Reductions

in Force (“RIFs”), the aggregate effect of joining numerous claims together can threaten the solvency of even the biggest tech sector players.

Studies such as [ProPublica’s analysis](#) of elderly worker cuts at IBM (an estimated 20,000+ persons), ageism complaints against [Google, Hewlett-Packard](#) and other tech giants -- even director Shawn Levy’s motion picture “The Internship” -- are suggestive of a troubling trend, and yet, are just a few bright points on a very long and spotted line. Indeed, since 2008, over 250 age discrimination charges were filed with California’s Department of Fair Employment and Housing against the Valley’s 150 largest tech companies, with dozens of those administrative charges advancing to litigation in state and federal courts. Beyond that, hundreds more never made their way into the public eye or court dockets by virtue of severance packages and hush-money paid to thwart lawsuits.

That the leading basis of discrimination in California’s tech culture is ageism (e.g., a whopping 28 percent higher than those based upon race) is consistent with this author’s experience. That the [average tech worker age is five years younger](#) than in most other industries is glaring. That statistic, coupled with this author’s own representation of workers in this sector for decades, suggests that ageism, most heavily in Silicon Valley’s hiring practices, is alive and well.

But just examining statistics doesn’t fully capture the cancerous effects of this form of bias. Sure, the numbers exhibit its prevalence, but its effect on productivity and morale, and the inevitable degeneration of what we might term the Spirit of Innovation is immeasurable. California’s claim to tech fame was born out of a willingness to share ideas, a synergy that stretches imaginations, and not just those of a narrow segment of the work population. Messaging that older workers can’t contribute to that process or that what they offer won’t be well-received, broadcasts a notion that ingenuity has a limited shelf life; that’s a stifling message which can make for some pretty boring in-house creative sessions. Sit with that visual for a moment and you can easily imagine the ripples in terms of employee morale and productivity, the uptick in stress-related claims, even the reluctance by some to pursue careers within an industry seemingly-relegated to the young. The ripples are near-endless, and they’re not good.

Viewed in this way, one might even argue that whether age discrimination is thriving in the Valley is secondary to the *perception* that it is. And it is so perceived. According to a 2018 [Dice Diversity and Inclusion report](#), nearly two-thirds of tech workers aged 40-45 worry their age will hurt their continuing career, a number that skyrockets to nearly 90 percent for those over the age of 50. From a pure workforce productivity standpoint, therefore, the effect of this may not immediately be obvious, but is equally damaging, as are all forms of discrimination: workers of all ages want to feel their employment opportunities are merit-based, that hard work pays off.

Their innate sense of justice tells them that ethically-bereft employers don’t deserve their workers’ best efforts. Countless industrial psychologists have studied this, and the results are consistently what you’d expect: the mere *belief* that bias (e.g., ageism) is an impediment to job security breeds conservatism, a reluctance to “stick one’s neck out.” That mode of thinking squelches innovation --perhaps in ways not readily calculable, but at a cost that is unquestionably enormous.

So, moving forward, what's the plan? Well, understanding the hidden effects of discrimination is only a start, followed closely by strict enforcement of workplace anti-discrimination policies -- all great bandages, but not terribly effective on a gaping wound. Arguably, a better return on worker investment, and a better insurance policy against litigation for tech employers, is a forced reboot of attitudes, perhaps with reminders that imagination is not synonymous with adolescence.

When sexual harassment lawsuits started appearing on [front pages](#) with regularity, nearly every major employer sent their management teams to anti-discrimination seminars and enrolled their offenders in "sensitivity training" programs. Can't more be done to mirror those efforts today to combat ageism and the perceptions that promote it?

And, while tech employers are beefing up these messages of equality vis-a-vis third party educators, shouldn't more be done to facilitate communication between workers of diverse age groups? Silicon Valley is full of business incubators, think tanks and hives, and some are excellent generators of ideas through the use of facilitators and moderators. And some aren't. For those who think this structured approach is a frivolous expense, think again. Teasing out everyone's ideas, no matter what you presume they can offer, is essential to the lively discourse that leads to invention. It's the stuff of which the greatest ideas are made.

And, finally, tech employers would be smart to recognize that the application of experiential knowledge -- the kind only derived through trial and error -- doesn't have to stifle the creative process. It actually serves as an excellent cross check against chasing impractical ideas that can otherwise cost businesses dearly. Sure, enrolling workers in anti-discrimination training, using facilitators to promote full participation, comes at some cost, but so does defending against protracted litigation; that, this author knows all too well. In the end, whether the impetus for embracing wisdom as an asset is forced or not, providing a more receptive audience in Silicon Valley for older workers is bound to yield a great return on investment.