

## Tech Companies Settle Age Bias Suits

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Recent settlements of age discrimination suits filed against major tech companies highlight a growing effort in the last few years to combat age discrimination in the technology sector.

Last month, Google agreed to pay \$11 million to settle a class-action age discrimination lawsuit brought by over 200 job applicants over the age of 40, who were denied positions with the company. The [Age Discrimination in Employment Act \(ADEA\)](#) bars discrimination based on age against workers over 40. The lawsuit alleged that the applicants had been denied engineering positions based on their age and that Google's workforce, which was made up mostly of workers under the age of 40, was grossly disproportionate to the average age of workers in those positions, based on U.S. Department of Labor statistics. As part of the settlement, Google also agreed to a number of internal changes, including conducting age bias trainings, creating a subcommittee in its recruiting department to focus on age diversity in engineering positions, ensuring its marketing materials reflect age diversity, ensuring that internal age bias complaints are investigated, and surveying departing employees about potential discrimination.

### Research Highlights Age Bias in the Tech Sector

Although Google denied wrongdoing in that matter, this recent legal challenge to its hiring practices reflects concerns over a broader trend of age discrimination in Silicon Valley and the technology industry generally. According to a [2018 survey](#) of over 500 tech startup founders, 89 percent agreed that older workers faced age discrimination in the industry. On average, respondents said that ageism starts at age 46, with a quarter of respondents saying that age bias starts as young as 36. According to a [2017 report](#), the tech industry on average hires a higher proportion of younger workers and a smaller proportion of older workers than non-tech industries, and the average tech worker is 5 years younger than the average non-tech worker. Recruitment ads in this industry frequently indicate that being a "[digital native](#)" is an important qualification, and that terminology is widely recognized as a not-so-subtle reference to a preference for workers born after the 1980s.

### Age Discrimination in Digital Advertising Platforms

In March 2019, Facebook announced that it had reached settlements with a number of civil rights organizations and labor groups that filed five separate lawsuits all alleging that Facebook's advertisement platform allowed advertisers to target who could view employment, housing, or credit advertisements based on a number of protected classes, including age, race, national origin, sex, and religion. The lawsuits came in the wake of a [2016 ProPublica story](#) explaining how advertisers could target their Facebook ads by "ethnic affinity." The lawsuit asserting [age discrimination claims](#) alleged that businesses – including tech giants Amazon, Cox Communications, and Facebook itself – used Facebook's ad system to target job postings based on age. As part of the settlements, Facebook agreed to overhaul its advertising policies and mechanisms, including by removing the option to target by age and other protected statuses when creating Facebook ads for housing, employment, or credit. Facebook also agreed to provide educational materials to advertisers about anti-discrimination laws and require advertisers to certify that they are complying with both Facebook's discrimination policies and applicable law.

## **Steeper Burdens for Plaintiffs Filing Age Discrimination Claims under the ADEA**

Both inside and outside of the tech industry, plaintiffs face steeper burdens to proving discrimination under the ADEA than they face under other civil rights laws. Under a decade-old Supreme Court ruling, an ADEA plaintiff must establish that age was the “but for” cause for the discrimination, rather than the less burdensome “motivating factor” standard allowed under Title VII of the Civil Rights Act of 1991. See *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009). Moreover, earlier this year, [the Seventh Circuit joined](#) the Eleventh Circuit in holding that the ADEA does not permit job applicants to challenge employer hiring practices under a theory of disparate impact. See *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019); *Villareal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 964 (11th Cir. 2016) (*en banc*). In those jurisdictions, a job applicant cannot challenge a hiring policy that is facially neutral but disproportionately impacts applicants over 40 – such as a job requirement that places a cap on years of experience.

Despite the challenges would-be plaintiffs face to bringing successful ADEA claims, the recent settlements demonstrate at least an ostensible willingness on the part of some companies to settle large age discrimination suits and modify their practices to reduce age discrimination. It remains to be seen, however, whether the companies’ promised policy changes will effect meaningful change both internally and throughout the industry.