

Campaign Trail Barbs Show Societal Acceptance Of Age Bias

By Anne Cullen

Law360 (January 22, 2024, 1:01 PM EST) -- Age-related criticism weathered by President Joe Biden and former President Donald Trump as they campaign for the White House in 2024 exemplifies how age discrimination is considered more acceptable than other types of bias, experts said.

Biden, who is 81, has been taking more heat for his age as he seeks a second term, but his probable rival, the 77-year-old Trump, has also been criticized for not making room for younger candidates.

A poll released in August by the Associated Press-NORC Center for Public Affairs Research found nearly 80% of those surveyed said Biden was too old to effectively serve another term, while over half said the same of Trump.

Trump's barbs about Biden's ability to use the stairs or find his way off a stage have drawn laughs at campaign events. Meanwhile, the other GOP hopeful, Nikki Haley, has been calling for term limits and mental competency tests for politicians over the age of 75.

Age discrimination is one of the last socially acceptable forms of bias, according to the American Psychological Association, a contention employment law experts back up.

"Age discrimination is one of the most rampant forms of discrimination that people seem to think is OK and even lawful, when, of course, it's illegal," said worker-side attorney Peter Romer-Friedman, founder of public interest law firm Peter Romer-Friedman Law PLLC.

Age bias in workplaces has long been barred under the Age Discrimination in Employment Act, but experts told Law360 that the familiarity everyone has with aging, including anecdotes about family members who may have struggled as they got older, may be the reason this prejudice is less taboo than other forms of discrimination.

"People often describe it as kind of the acceptable prejudice, unlike racism or sexism, where people speak up against it," Joann M. Montepare, a Lasell University psychology professor who directs the RoseMary B. Fuss Center for Research on Aging and Intergenerational Studies, said of age bias.

Because age-related jokes and stereotypes are so commonplace — think of birthday cards, Montepare noted — she said people's age is often cited as an explanation for actions or conduct when there are other variables in play.

"When we see former President Trump slur words or President Biden trip, we'll say, 'See, it's because of their age,'" Montepare said. "And we don't look for information that disconfirms it, like Trump slurred his words, but he just spoke for an hour-and-a-half, and Biden may have tripped, but he just spent eight hours negotiating across teams."

Like voters, employment lawyers said company leaders often take these kinds of mental shortcuts, and consider sidelining older workers because they're thought of as less capable.

"It happens more often than really any other form of discrimination than I can think of," said Michael Schulman, a partner in the Morrison Foerster LLP's employment and labor group. "I've had quite a few employers call and tell me that an employee is getting up there in age and is not able to do their job as a result."

Worker-side attorneys also said age-related prejudice pops up often when they speak with potential clients.

"We do see in our practice people who want to work and who are able to work, but whose employers make assumptions about them based on age, such as that they are either not capable or don't want to, or want to retire or have plans to retire," said Amy F. Shulman, a partner at Outten & Golden LLP.

"These are decisions that the employer is making based on ageist stereotypes," Shulman added. "They're basically using their judgment instead of the objective evidence as to what an employee is functionally able to do and wants to do."

Age bias charges at the U.S. Equal Employment Opportunity Commission have declined in recent years, but the 11,500 claims the EEOC took in 2022 represented more than 10% of the agency's caseload. Shulman said these claims represent a significant chunk of her firm's workload, too.

"It's certainly a frequent issue that we see," she said.

Pigeonholing older workers can run afoul of age bias law, but also the Americans with Disabilities Act.

The ADA bans bias against disabled workers, as well as those perceived as disabled. Shulman said older workers who experience a health issue often get shorter shrift than their younger counterparts.

"If somebody has a medical event after they reach a certain age, a lot of times I see situations in which an employer is assuming there will be more medical issues, that the employee will be physically unable to do their job or that they're going to want to take it slower," she said. "We see the combination of these stereotypes."

To do right by workers and avoid breaking the law, employment attorneys said managers and others who evaluate subordinates must focus on how someone is doing the job, and be careful not to jump to the conclusion that a potential misstep is connected with someone's age.

"We always encourage our employers to document performance issues, and what we look for in that documentation is facts — not opinions, not characterizations," said management-side attorney Patricia M. Prezioso, who chairs Sills Cummis & Gross PC's employment and labor practice.

Phrases that don't specifically mention age can still function as code for saying someone is "too old,"

Prezioso said, citing the phrase "exhibits a lack of energy" as an example. If the "lack of energy" characterization stems from an employee missing deadlines, note those unmet due dates instead, Prezioso said.

"Be factual, be specific," she said.

Unfair assumptions can unfairly disadvantage older workers, as well as political candidates, according to Prezioso.

"It's not beyond possible that voters have seen things that give them pause about abilities, and they're couching it as, 'he's too old for the role,'" she said. "Just like in the employment sphere, it's easy to accidentally jump to a characterization relating to age."

--Editing by Neil Cohen and Roy LeBlanc.