

AARP Public Policy Institute

Reassessing the Age Discrimination
in Employment Act

David Neumark

Department of Economics

University of California at Irvine

Research Report

AARP[™]

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David Neumark
Department of Economics
University of California at Irvine

AARP's Public Policy Institute informs and stimulates public debate on the issues we face as we age. Through research, analysis and dialogue with the nation's leading experts, PPI promotes development of sound, creative policies to address our common need for economic security, health care, and quality of life.

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FOREWORD

In 2007, the Age Discrimination in Employment Act (ADEA) turned 40. This seems to be an appropriate time to take a look at how successful the law has been in meeting its objectives—“to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.” In 2007, more than 80 million persons aged 40 or older—the age group covered by the ADEA—were in the labor force. That number is sure to grow; the only question is by how much. The Bureau of Labor Statistics (BLS) projects an increase to more than 88 million persons by 2015.

BLS projections could well underestimate both the number of older labor force participants and the labor force participation rate for the older population if boomers, in particular, act on their intent to work in retirement. Eight in 10 boomers have said they expect to work in retirement, both because they will need the money and because they find work fulfilling and often fun. Inadequate retirement savings, a lack of pension coverage, and uncertainty about returns to 401(k) plans among those who have them could encourage millions of boomers to push back the date of retirement. A sizable body of literature underscores the contribution that longer worklives make to retirement income security. According to the Congressional Budget Office, continuing to work and delaying receipt of Social Security benefits until age 70 would result in a Social Security benefit that is 90 percent larger than it would be if taken at age 62 (*Retirement Age and the Need for Saving*, available at <http://www.cbo.gov/ftpdocs/54xx/doc5419/05-12-RetireAgeSaving.pdf>). An additional eight years of work might be an unreasonable expectation for the majority of workers, but even an additional year on the job can have a positive impact on finances.

If boomers are going to remain in the workforce later in life, appropriate jobs must be available; workers must be available for those jobs; and employers must be willing to hire and retain older workers. Although there are legitimate reasons why particular workers and jobs or employers might not be suitable for one another, age is generally not one of those reasons. Yet many older Americans perceive age discrimination in employment as a problem—in AARP’s 2002 *Staying Ahead of the Curve: The AARP Work and Career Study*, two-thirds of workers aged 45-74 responded affirmatively to the question that “based on what you have seen or experienced, do you think workers face age discrimination in the workplace today?”

Perceived discrimination is one thing, actual discrimination is quite another and is often very difficult to detect except “in cases of overt expressions of discriminatory intent,” as David Neumark of the Department of Economics of the University of California at Irvine writes in this report. Written at the request of AARP’s Public Policy Institute, Neumark provides a critical review of the existing research literature on age discrimination in employment and assesses how successful the ADEA has been in achieving its goals. He notes that to date, ADEA enforcement has focused on terminations resulting for the most part from layoffs or reductions-in-force; this has had a positive impact on long-term employment relationships.

For various reasons, however, enforcement related to hiring has lagged, but as Neumark suggests, this might need to change if increasing older worker employment is a societal goal. Boomers are moving inexorably toward retirement age, and growing numbers will be interested in moving from long-term career jobs to part-time work or partial retirement with new employers. Neumark warns that “potential problems stemming from age discrimination in hiring may become more important” as the flood of boomers seeks post-retirement employment.

Reassessing the Age Discrimination in Employment Act also examines (1) evidence on the effectiveness of state age discrimination laws; (2) the types of charges filed with and the level of enforcement activity by the Equal Employment Opportunity Commission, the agency with jurisdiction over the ADEA; and (3) the challenges to older worker employment that can be expected in coming years, including the issue of health care costs and the potential combined impact of the Americans with Disabilities Act and the ADEA.

Sara E. Rix, Ph.D.
Strategic Policy Advisor
AARP Public Policy Institute

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EXECUTIVE SUMMARY

BACKGROUND

The Age Discrimination in Employment Act (ADEA) became law in 1967. The original act prohibited discrimination on the basis of age for persons aged 40-65. Subsequent amendments raised the upper age limit to 70 in 1978 and eliminated it altogether in 1986, in so doing eliminating mandatory retirement for nearly all workers. A great deal of research has focused on assessing the effectiveness of the ADEA in combating age discrimination in the labor market in decades past. This research has highlighted both strengths and weaknesses of the ADEA.

In coming decades, the challenges that need to be met by the ADEA and the ADEA's effectiveness may change in fundamental ways because of the aging of the population. In general, because of this aging, U.S. public policy must be increasingly concerned with trying to induce higher employment among older individuals. Higher employment rates among older workers imply lower dependency ratios, greater income, more tax revenues, and decreased public expenditures on health insurance, retirement benefits, and income support. The ADEA has the potential to encourage the continued employment of older Americans who desire to keep working, and conversely, to discourage discriminatory behavior that might reduce the employment of these individuals.

PURPOSE OF THIS REPORT

In addition to taking stock of how successful the ADEA has been at achieving its intended goals, it is even more important, perhaps, to try to anticipate important changes in the context in which the ADEA will operate in coming decades, to assess how well the ADEA will *continue* to achieve its goals in that changing context, and to contemplate how it might be made more effective.

This report pursues these goals, based mainly on a critical review of the existing research literature, as well as some projection and speculation about the evolving labor market in which the ADEA will operate. It considers the role that the ADEA—perhaps with some adaptation—might play in meeting the challenges of an aging population.

FINDINGS

In recent years, the largest group of Americans protected by the ADEA has been members of the baby boom generation passing through the prime ages of adulthood. From 1990 to 2000, the share of the aged 20 and over population in the 45-64-year-old age range grew from about 26 percent to 31 percent; the share in this age group was larger than in the group aged 65 and over. At present, the ADEA may be particularly important to persons aged 45-64, about three-fourths of whom are in the labor force.

In coming decades the share of the aged 20 and over population that is aged 45-64 will decline slightly (to 30 percent by 2050), while that aged 65 and over will rise sharply (from 17 percent in 2000 to 28 percent in 2050). The two shares will approach equality by the middle of the century.

These shifts in the age structure of the population suggest that to the extent that the ADEA has a role to play in maintaining or encouraging the employment of older

workers, its impact on those beyond what has, at least until recently, been considered the “normal” retirement age of 65 will become relatively more important than it has been. This has important implications for thinking about age discrimination policy.

In particular, given that ADEA enforcement has tended to focus on terminations, which typically arise in cases of layoffs or “reductions-in-force,” it seems likely that, in recent decades, the ADEA’s impact has been more on the continued employment of those younger than the normal retirement age (i.e., age 65). If age discrimination plays any role in suppressing the employment of those older than age 65, then figuring out how the ADEA can contribute to rooting out discrimination against these older individuals becomes of prime policy importance.

A significant consideration with regard to the employment of persons aged 65 and over is that a sizable share of the higher employment among these individuals is likely to come not from continued employment in long-term careers, but rather from part-time or shorter-term jobs, perhaps with subsequent employers, in the form of what has sometimes been labeled “partial retirement” or “bridge jobs.” If older individuals are likely to look for bridge jobs after leaving full-time careers, then the focus of ADEA enforcement efforts on terminations might not serve the nation as well going forward. Instead, it might become relatively more important to figure out how to ensure that age discrimination also does not deter the hiring of older individuals after leaving long-term, full-time work.

Equal Employment Opportunity Commission (EEOC) statistics demonstrate the focus of ADEA enforcement activity on terminations and the lack of activity related to hiring. Among ADEA-related charges received by the EEOC in 2006, 40 percent dealt with discrimination in discharge or layoff decisions, while only 8.4 percent pertained to hiring. Similarly, among age-based cases litigated by the EEOC, discharge and layoff cases constituted 65 percent of the total, versus 23 percent for hiring cases.

One possible explanation for the relative paucity of hiring relative to discharge cases is that most age discrimination may actually concern the latter, and that there may not be much age discrimination in hiring. There is evidence consistent with discrimination in layoffs of older workers and some evidence pointing to age discrimination in hiring, although in both cases the evidence is potentially open to other interpretations.

The lack of hiring discrimination enforcement activity may also reflect the consequences of the legal framework set up to pursue age discrimination claims, which makes hiring discrimination cases harder to prove than termination cases, and likely to result in lower damages. As more workers reach age 65 and over and take jobs after long-term careers, these barriers to pursuing claims of hiring discrimination become potentially quite important. If so, the ADEA may become a less useful tool than it has been in the past as more protected workers leave their career jobs to take bridge jobs prior to retirement. Policymakers may want to think about how the ADEA might be modified to provide more protection against age discrimination in hiring.

Other changes associated with population aging may pose challenges to the effectiveness of the ADEA in coming decades. The relentless increase in health care costs and the costs to employers of providing health insurance are well known. Health insurance costs are even higher for older individuals, which could make employing them less attractive. With an increasing share of the population aged 65 and over, it is clear that if employers could hire older workers and cover their health insurance through Medicare, this would reduce

some of the problems posed by the rising cost of insuring older workers. A recently published EEOC regulation makes it possible to incorporate Medicare into health insurance packages for *retirees* without running afoul of ADEA requirements. It is possible that similar EEOC rules (if upheld) for *workers* eligible for Medicare would provide an incentive for hiring older workers. On the other hand, current law allows companies to offer health insurance to full-time but not to part-time workers (working fewer than 20 hours per week). To the extent that older workers looking for employment subsequent to their career jobs are looking only for part-time work and have Medicare coverage, rising costs to employers of providing health insurance may not prove too problematic. Regardless, however, rising health care costs coupled with difficulties of wrapping health insurance plans around Medicare will likely pose increasing problems for long-term career workers who reach age 65 and want to continue in their jobs.

Another potential problem posed by population aging is that as individuals age, the incidence of work-limiting disabilities rises. One consequence of the overlap between age and disability is that many aggrieved older workers may have the option of pursuing discrimination claims under either the ADEA or the Americans with Disabilities Act (ADA). Claims filed under the ADA may be more successful than those filed under the ADEA. In particular, the ADA may offer greater protection to older workers suffering from age-related disabilities that, under the ADEA, might be grounds for discharge or failure to hire but still be judged as amenable to “reasonable accommodation” by employers in the language of the ADA.

There is, though, a potential downside from the likelihood that being able to file suit under the ADA increases with age. In particular, the increased likelihood of an ADA claim, coupled with the possibility of greater success under the ADA than under the ADEA, may deter employers from hiring older workers even if they are not disabled at the time of hire, out of a fear that they will subsequently become disabled and impose firing costs. Thus, the aging of the population, along with the protections afforded by the ADA, could either enhance or diminish the effectiveness of the ADEA in encouraging employment among older individuals. There is some limited evidence exploring these questions, but it does not establish the answer.

CONCLUSION

This report leads to a number of key conclusions regarding the past 40 years of ADEA enforcement and to a number of conjectures and questions regarding how well the ADEA can help address the problem of population aging in coming decades—complementing other public policies aimed at increasing the employment of older individuals.

Looking back at the effectiveness of the ADEA over recent decades, one finds evidence suggesting that discrimination against older individuals in hiring and promotions continued after enactment of the ADEA, but the evidence of continuing discrimination is not decisive. Age discrimination laws—both state laws and the ADEA—boosted the employment of older protected workers, although there is no evidence that this came about via increased hiring. Indeed, some evidence suggests that the principal effect of the ADEA has been to strengthen the bonds leading to long-term employment relationships by reducing the incentives for firms to terminate older employees who might be at the part of the employment relationship where pay is higher than productivity.

Looking forward, the share of the population aged 65 and over will increase in coming decades, and many older workers will leave their longer-term career employment and move into part-time or shorter-term jobs. As a consequence, potential problems stemming from age discrimination in hiring may become more important than they have been in past decades, when the baby boom generation was moving through the 40-64 age range. The evidence on both the enforcement and the effectiveness of the ADEA suggests that the ADEA may be relatively ineffective with regard to the hiring of older workers. There may be limitations on how well the regulatory and legal systems address discrimination in hiring, and it would be useful to consider whether this effectiveness can be increased. On the other hand, in crafting any policy changes intended to boost the hiring of older workers, it is important to be mindful of the underlying economic barriers to this hiring and to try to focus on rooting out only the discriminatory behavior.

Population aging poses some other future challenges. With a rising share of the population aged 65 and over, a growing proportion of workers will be eligible for Medicare. Increasing the ability of employers to rely on Medicare for health insurance for eligible workers seems sure to make workers aged 65 and over more attractive. In addition, because disability rates rise with age, the aging of the population implies that an increasing share of workers covered by the ADEA may also experience work-limiting disabilities. Hence, employers may have to be concerned with discrimination claims brought under the ADA as well as the ADEA, especially because ADA claims may be more successful. If the combined impact of workers being protected by both laws is to reduce employment, then the implication is that the ADA may to some extent hamper the ability of the ADEA to help meet the challenge of trying to increase employment among older individuals.

Finally, it is important to emphasize that efforts to reduce age discrimination contrast with other policy responses to an aging population in an important way. In particular, policies that reduce incentives for retirement, increase retirement ages by fiat, and reduce the value of private and public pensions (especially after some retirement-related decisions have been made) will likely result in reduced economic well being for older persons. In contrast, to the extent that age discrimination acts to deter the employment of older individuals, efforts to reduce its influence—assuming that they do not impose undue costs—can increase the welfare of those who wish to keep working and are enabled to do so, while at the same time helping to achieve the broader goal of keeping Americans at work longer (not to mention protecting the civil rights of older workers). Moreover, the ability of older people to respond to *other* policy changes intended to increase incentives for employment—such as an increased age of normal retirement under Social Security—will be enhanced to the extent that discrimination that otherwise deters this employment can be reduced. This implies that more effective efforts against age discrimination may enable policymakers to meet the challenges of an aging population with less drastic changes in retirement policies and incentives.

INTRODUCTION

The Age Discrimination in Employment Act (ADEA) became law in 1967. The original act prohibited discrimination on the basis of age for those aged 40-65. Subsequent amendments raised the upper age limit to 70 in 1978 and eliminated it altogether in 1986, in so doing eliminating mandatory retirement for nearly all workers. The ADEA was crafted in response to specific issues arising in a particular historical context.¹ It is therefore useful to take stock of how successful the ADEA has been at achieving its intended goals. It is also worthwhile to anticipate important changes in the context in which the ADEA will operate, to assess how well the ADEA will *continue* to achieve its goals in that changing context, and to contemplate how it might be made more effective.

In this report, all of these goals are pursued, based mainly on a critical review of the existing research literature, as well as on some projections and speculation about the evolving labor market in which the ADEA will operate. The report, in particular, focuses on the challenges posed by an aging population in the United States. The role that the ADEA—perhaps with some adaptation—might play in meeting these challenges, as well as the potential consequences of an aging population for the effectiveness of the ADEA, is considered. In reviewing what we know from existing research about the efficacy of the ADEA, the report focuses on the issues that seem most relevant to the law's effectiveness in the context of an aging population.²

The considerations discussed in the following sections frame the issues to think about in analyzing the research literature on the impact of age discrimination laws, including both the ADEA and, where appropriate, state laws. In addition to reviewing the larger literature for what is known about age discrimination and the effects of these laws, the discussion focuses on the ADEA in light of the contemporaneous and future challenges posed by an aging population. Most important, it is difficult to provide any meaningful assessment of the effectiveness of the ADEA, whether in the past or the future, without taking a stand on what the literature tells us about the existence of age discrimination. Where the longer-standing issues involved in assessing the ADEA are covered, the report provides a brief summary of earlier evidence and emphasizes what we have learned from research in the past few years.

The report begins with an overview of population aging in the United States and a discussion of the likely increased policy focus on older worker employment resulting from this development. The next section highlights a number of key issues important to a full understanding of the ADEA. This is followed by some simple descriptive information on the types of age cases that arise and the level of enforcement activity by the Equal Employment Opportunity Commission, the agency with jurisdiction over the ADEA.

Next is an overview of what is known about age discrimination in labor markets. Also addressed are some of the difficulties inherent in determining whether or not age

1 A more complete discussion of the ADEA, its history, and the relevant case law is provided in Neumark (2003).

2 A broader review of age discrimination laws in the United States and related research is provided in Neumark (2003); here, subsequent newer research is emphasized.

discrimination has occurred. In the section that follows, particular attention is paid to the evidence on the effectiveness of the ADEA and state age discrimination laws. The literature on the latter topic is quite controversial, sometimes suggesting unintended adverse effects due to the increasing costs of employing older workers, and sometimes even arguing that the ADEA simply has delivered a windfall to older workers by enabling them to remain at work past the mandatory retirement age without actually combating discrimination. Obviously, trying to resolve these issues is critical in assessing the effectiveness of the ADEA.

The following section examines two relatively recent changes in the interpretation of the ADEA that may be particularly significant for future developments and influence how well the statute serves the nation's needs in coming decades. This section also looks at health care costs and age and disability—two issues that seem likely to become increasingly important with respect to older worker employment discrimination.

Conclusions about the effectiveness of the ADEA to date and a summation of how age discrimination laws might help meet some of the challenges likely to arise from an aging population are the focus of the final section of the report.

THE ADEA IN AN AGING AMERICA

The aging of the population in the United States will pose fundamental social, economic, and public policy challenges over the next few decades. Most significantly with regard to the ADEA, the changing population structure and slowing labor force growth mean that public policy must be increasingly concerned with the employment of older individuals. Continued employment implies lower dependency ratios,³ greater income, more tax revenues, and decreased public expenditures on health insurance, retirement benefits, and income support. This concern has been most strongly reflected in issues regarding the solvency of the Social Security system and Medicare. One approach to improving Social Security solvency is to raise the normal retirement age (NRA), or the age of eligibility for full benefits,⁴ which led to phased-in increases in the NRA from 65 to 67.⁵ Although changes in Social Security are controversial, and such policy changes have effects that vary across the population, increases in the retirement age seem to be a natural response to rising life expectancies (American Academy of Actuaries, 2002) and have occurred in other industrialized countries as well.

In light of these concerns, perhaps the most important lens through which it is useful to view the ADEA is its potential to encourage the continued employment of older Americans who desire to keep working, or, conversely, to discourage discriminatory behavior that might reduce the employment of these individuals. The potential for the latter type of discrimination is real, although as discussed in greater detail later in the report, harder to establish in fact. It is sufficient to note briefly here two relatively recent

3 A dependency ratio is the ratio of nonworking (i.e., “dependent”) persons to the economically active.

4 To the extent that later retirement keeps older workers on private insurance instead of Medicare, it may also contribute to Medicare solvency. However, because medical costs are higher at older ages, the contribution is likely to be only marginal.

5 See, e.g., American Academy of Actuaries (2002) and Munnell, et al. (2004). This increase in the normal retirement age also results in a reduction in benefits available at the “earliest eligibility age” for retirement at 62, since benefits at this age are adjusted to be actuarially fair relative to benefits at the NRA. This has led to proposals to increase the earliest eligibility age as well, in part to ensure adequate benefits for those choosing this option.

studies that at least suggest that age discrimination experienced by older individuals either leads workers to withdraw from the labor market or deters the hiring of older workers. First, Adams (2002) studied data from the Health and Retirement Study (HRS) and found that workers who believe their firms discriminate against older workers in promotion subsequently experience lower wage growth and are more likely to separate or to retire.⁶ And second, in a study of fictitious job applicants, Lahey (forthcoming (a)) presents evidence of discrimination against hiring older women relative to younger women.

In recent years, the largest group of Americans protected by the ADEA has been members of the baby boom generation passing through the prime ages of adulthood. From 1990 to 2000, the share of the aged 20 and over population in the 45-64-year-old age range grew from about 26 percent to 31 percent; the share in this age group was larger than for the group aged 65 and over (Figure 1). The ADEA may be particularly important to persons aged 45-64, about three-fourths of whom are in the labor force. In coming decades there will be a slightly declining share of the 20 and over population that is aged 45-64 (falling to 30 percent by 2050) and a rapidly increasing share aged 65 and over (rising from 17 percent in 2000 to 28 percent in 2050), with the two shares approaching equality by the middle of the century (Figure 2).

What these shifts in the age structure of the population suggest is that to the extent that the ADEA has a role to play in maintaining or encouraging the employment of older workers, its impact on persons beyond what has been considered the “normal” retirement age of 65 will become relatively more important than it has been in the past. This has significant implications when thinking about age discrimination policy.

First, as indicated in Figure 3, the employment rates of those under age 65 are already quite high compared to people aged 65 and over. Thus, if the ADEA has the potential to boost or maintain the employment of older individuals, its greatest impact is going to be among those past the normal retirement age, both because of the population shift into this age group, and because of its low baseline employment rate.

Second, given that ADEA enforcement has tended to focus on terminations (Neumark, 2003, Table 2 and additional evidence presented below), which typically arise in cases of layoffs or “reductions-in-force,” it seems likely that in recent decades the ADEA’s impact has centered more on the continued employment of those younger than the NRA. Without suggesting that this is becoming less important, it seems clear from the figures presented in this report that if age discrimination plays any role in suppressing the employment of those older than age 65, then figuring out how the ADEA can contribute to rooting out discrimination against older individuals becomes of prime policy importance.

One important consideration with regard to the employment of those aged 65 and over, however, is that a sizable share of the employment is likely to come not from continued employment in their long-term careers, but rather from part-time or shorter-term jobs, perhaps at subsequent employers, in the form of what has sometimes been labeled “partial retirement” (e.g., Gustman and Steinmeier, 2000) or “bridge jobs” (e.g., Cahill,

⁶ Adams also includes regression controls to account for possible biases in reported age discrimination.

Giandrea, and Quinn, 2005).⁷ If, as Cahill, Giandrea, and Quinn predict, older individuals are increasingly likely to look for different jobs after leaving their full-time careers,⁸ then the focus of ADEA enforcement efforts on terminations might not serve the nation well going forward. Instead, it might be more important to figure out how to ensure that age discrimination does not deter the hiring of older individuals seeking employment after leaving long-term, full-time work.⁹

Abraham and Houseman (2005) present evidence that older workers face difficulties in moving from longer-term career jobs to partial retirement, and may consequently end up retiring before they might otherwise have done. Specifically, their evidence suggests that among older workers who plan either to reduce their hours of work or to change jobs in the near future, more end up stopping work altogether than realizing their plans. Furthermore, the greater likelihood of stopping work than reducing hours is concentrated among employees with only one job, who work fewer than 48 hours per week, and who report that their employer would not allow reduced hours. If these people want to continue to work they would most likely have to change jobs. Abraham and Houseman do not necessarily attribute these problems to age discrimination in hiring, but they do suggest that it may be a contributing factor.

Further, efforts to reduce age discrimination contrast with other policy responses to an aging population in an important way. In particular, policies that would decrease the incentives for retirement, increase retirement ages by fiat, and reduce the value of private and public pensions (especially after some retirement-related decisions have been made), would likely result in reduced economic well being for older individuals. Some of these changes may be necessary, and this report does not take a stand on these questions.

In contrast, efforts to reduce the influence of age discrimination on employment—assuming that these efforts do not impose undue costs—can increase the welfare of those individuals who wish to keep working. Moreover, the ability of older people to respond to policy changes intended to increase incentives for employment will be enhanced if discrimination can be reduced. This implies that more effective efforts against age discrimination may enable policymakers to make less drastic changes in retirement

7 For example, Haider and Loughran (2001) report (based on Health and Retirement Study [HRS] data from 1998) that workers aged 65 and over prefer to work under 30 hours, which indicates a desire for part-time work. They also report that, in wave 1 of the AHEAD data (fielded in 1993), of those aged 70 or older who are employed, just more than half are not working in the “longest” job (defined as a job that lasts for at least 10 years, with a wage that peaks after age 45 and after 1963). Gustman and Steinmeier (2000) discuss related statistics on different patterns or “definitions” of partial retirement (also based on HRS data). Wiatrowski (2001) reports that the share of individuals in the labor force working full time declines from 83 percent among those aged 55-64 to 49 percent among those aged 65 and older.

8 Cahill, Giandrea, and Quinn (2005) report that one-half to two-thirds of HRS respondents take on bridge jobs between leaving their full-time career jobs and exiting the labor force, and predict that this will become more common, based on evidence that younger respondents in the HRS are more likely to do this.

9 A related concept is that of “phased retirement” (see, e.g., Wiatrowski, 2001), whereby older employees continue with their current employer but are rehired as consultants or part-time/seasonal workers, reduce their hours, enter job-sharing arrangements, or move to less stressful jobs, etc. Penner, Perun, and Steuerle (2002) suggest that murkiness in the ADEA’s treatment of retirement benefits could deter employers from implementing phased retirement that allows workers to reduce their work commitments and draw partially on their pensions. However, they focus more explicitly on how the Employee Retirement Income Security Act (ERISA) regulations may deter this. But they do note that the EEOC makes clear to employers that just because pension plans (and changes therein) are legal under ERISA and the tax code does not mean they are lawful under the ADEA. They conclude that “Until there is more guidance on the extent to which benefit plans that satisfy the tax code and ERISA must be changed to comply with the ADEA, employers will be reluctant to adopt phased retirement plans, largely because of their legal exposure” (p. 67).

policies and incentives. There are, therefore, a number of reasons to believe that the ADEA has an important role to play in addressing the challenges of an aging population in the coming decades, if it can effectively increase employment by rooting out age discrimination.

On the other hand, the ADEA also has its critics. Some charge that age discrimination is overstated and that the ADEA instead simply benefits older workers at the expense of other workers. Others stake out a less extreme view, but nonetheless argue that the ADEA has some adverse unintended consequences.¹⁰ These more critical perspectives suggest that an aging population may exacerbate the problems generated by the ADEA, in which case it could become more of a hindrance than a help in coming decades. But criticism of the ADEA does not necessarily imply that an aging population can only make things worse. Given the changes in the population structure that the nation will experience, the effectiveness of the ADEA depends, in part, on whether some of the alleged adverse consequences of the age discrimination law are more relevant for workers in their 40s and 50s (and perhaps have more to do with the retention of workers in their career jobs), or instead whether the adverse consequences are more important for workers past the normal retirement age and thus more likely to pertain to hiring.

¹⁰ For an earlier view, see Friedman (1984).

KEY ISSUES IN INTERPRETING THE ADEA

Age discrimination law has evolved over time, reflecting both regulatory developments and judicial interpretation. The ADEA, however, presents particular complexities for two reasons that have been long recognized.

First, unlike race or gender, a worker's age is not immutable. Research in the industrial gerontology literature illustrates how productivity changes with age, with some evidence pointing to either flat or slightly declining productivity in certain jobs as workers age, and other evidence pointing to declines in acuteness of vision or hearing, memorization, finger dexterity, and computational speed. On the other hand, there may be offsetting increases in skills based on accumulated knowledge, and in communications skills, leadership ability, maturity, and loyalty. At the same time, there is far more variation within than between age groups, so blanket statements about declines with age will, of course, often be inapplicable to individuals.¹¹

Because age is not immutable, the law has had to struggle with sorting out discriminatory behavior based on a worker's age from legitimate business or safety concerns in some jobs, which the ADEA does through allowing exceptions in circumstances in which age is a "bona fide occupational qualification" (BFOQ). BFOQ exceptions are also allowed under Title VII of the Civil Rights Act, but with regard to race, sex, etc., these exceptions are very narrowly construed (for example, such decisions are allowable for locker room attendants or in hiring actors and actresses). In age cases, BFOQs are construed more broadly, with safety-related concerns being a prime example. Of course the law tries to root out subterfuges for age discrimination. When safety is an issue, the employer must also prove that the age limit serves the safety goal and that there is no acceptable alternative that would have less of a discriminatory impact.¹²

The ADEA also recognizes that, because of age-related changes, some costs associated with employing older versus younger workers may differ. For example, health insurance costs can differ based on age. The law allows employers to offer lower benefit levels to older workers, as long as the costs of the benefits to the employers are the same; however, casual observation suggests that this is not done much in practice.¹³ In contrast,

11 Neumark (2003) provides numerous citations to the literature, as does the more recent work of Johnson and Kawachi (2007).

12 *Code of Federal Regulations (CFR)*, Title 29, Section 1625.6. Quoting from the Supreme Court ruling in *Western Air Lines, Inc. v. Criswell, et al.*, 471 U.S. 400 (1985): "The relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by safety interests are whether the job qualification is 'reasonably necessary' to the overriding interest in public safety, and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification validated in the first inquiry. The latter showing may be made by the employer's establishing either (a) that it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with the older employees on an individualized basis." (See <http://supreme.justia.com/us/472/400/case.html>, viewed October 22, 2007.)

13 See www.eeoc.gov/abouteeo/overview_practices.html (viewed September 15, 2007), which reads "An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers." This does not apply to retirement plans, however (Penner, Perun, and Steuerle, 2002, p. 67). It is a little unclear how the EEOC policy on health benefits squares with the *Internal Revenue Code* (Title 26, Section K, of the *CFR*), which specifies that for favored tax treatment, group health benefits cannot deem employees ineligible because of health, disability, etc. (although age is not mentioned explicitly); see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+26USC9802, viewed September 15, 2007.

no differentiation would be allowed in vacation days, for example, which should not pose different costs to employers based on the ages of the workers.¹⁴

The second complexity with respect to age that the law recognizes is that employers and workers enter into long-term employment relationships. These relationships may involve differences in how workers are treated based on seniority, and, naturally, older workers tend to be those who have accumulated greater seniority. Because of this, the ADEA expresses narrower coverage than does Title VII of the Civil Rights Act in permitting “otherwise prohibited [actions] where the differentiation is based on reasonable factors other than age.”¹⁵

14 *CFR*, Title 29, Section 1625.10.

15 In addition, there are exceptions for highly paid (with regard to pensions) and executive and high policy-making positions, which is, of course, unique to age discrimination law.

AGE CLAIMS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

The EEOC is responsible for federal enforcement of the ADEA.¹⁶ Most claims of age discrimination come from individuals. A person wanting to pursue a claim must first file a charge with the EEOC (or at the state level in states with similar statutes and Fair Employment Practices [FEP] commissions or agencies).¹⁷ The EEOC may choose to investigate based on the facts presented, or to dismiss the case if there is no perceived violation of the law. For charges not dismissed, the EEOC can seek a settlement or mediation. If these are unsuccessful, the agency may choose to file suit, which happens in a very small share of cases (in general, for larger cases likely to involve a sizable class). The individual retains the right to sue after the EEOC process has run its course, regardless of whether the agency investigation establishes that discrimination occurred. Information on charges brought to the EEOC, on how they are resolved, and on litigation provides some idea of the landscape of enforcement of the ADEA, and how it compares to other anti-discrimination laws.¹⁸

Table 1 reports on cases resolved in 2006 (many of which may have been carried over from previous years).¹⁹ There are roughly equal numbers of ADEA cases and cases filed under the Americans with Disabilities Act (ADA)—around 14,000 to 15,000. By comparison, there are nearly four times as many Civil Rights Act Title VII cases, which perhaps is not surprising since Title VII covers race, sex, national origin, and religion. When looking at the different types of resolutions, one sees that the distribution is very similar across claims brought under the different statutes. Note that a relatively high share (ranging around 60 percent) of all charges are deemed to not have reasonable cause. Of the remainder, just under half (or about 16 percent to 19 percent of the total) result in administrative closure, meaning the resolution cannot be classified.²⁰ About 15 percent of the total are resolved in some other way with benefits to the claimant bringing the charge (“settlements” or “withdrawal with benefits”). Finally, about 4 percent to 6 percent of charges are not resolved but are deemed to have reasonable cause. Among these,

16 For the following details, see www.eeoc.gov/charge/overview_charge_filing.html and www.eeoc.gov/charge/overview_charge_processing.html, viewed October 22, 2007.

17 According to agency regulations, when there is a state age discrimination law, the charge is “dual filed” with the EEOC if the individual files a charge with the state Fair Employment Practices (FEP) commission or agency, and vice versa. The intent is to reduce duplication of effort. However, the charge is usually retained by the jurisdiction in which the charge is filed. (See www.eeoc.gov/charge/overview_charge_filing.html, viewed October 23, 2007.) Because of differences in state laws, there may sometimes be a better chance of prevailing by filing under a state law. For example, in some states age discrimination is covered under a human rights statute with no provision for a defense that outcomes correlated with age are based on “reasonable factors other than age” (www.dorsey.com/publications/legal_detail.aspx?FlashNavID=pubs_legal&pubid=188061603, viewed October 23, 2007).

18 Of course, EEOC litigation represents only a fraction of the total number of discrimination-related lawsuits—a much larger number are brought by private attorneys. However, according to the EEOC, the success rate of their lawsuits is far higher than that in suits brought by private attorneys (www.eeoc.gov/press/8-13-02.html, viewed August 23, 2007), which likely reflects the EEOC choosing the strongest cases that it thinks it can win, as well as perhaps the greater difficulty of prevailing against the EEOC.

19 Cases can be filed under multiple statutes, such as the ADEA and the ADA; the overlap is not reported.

20 For example, administrative closure can occur because the charging party did not provide required information, there was closure of related litigation, the EEOC did not have jurisdiction, etc.

conciliation is successful in about one-third of cases. The remaining charges are potentially eligible for litigation by the EEOC.

The row labeled “merit resolutions” gives the total share that is viewed as favorable to the claim—either resolved with benefits, or not resolved and viewed as having reasonable cause. This share is a bit lower for ADEA cases than for others—3.6 percentage points or 15.4 percent lower than for ADA cases, and 2.7 percentage points or 12 percent lower than for Title VII cases. In other words, a slightly higher share of age discrimination charges are viewed as not supporting the claim than is the case for disability or Title VII cases, which might reflect a slightly higher share of age claims being without merit. However, the differences are small, and monetary benefits in cases not litigated are about the same for ADEA and ADA cases—and higher per claim in ADEA cases compared to ADA cases and especially Title VII cases. If the monetary benefits are viewed as having some relation to the merits of the case, then there is no strong indication that there is much difference in the merits of cases brought under different statutes. The monetary benefits in cases litigated (in the previous year) are lower in ADEA than ADA cases, and both are much lower than in Title VII cases.²¹ However, these numbers are on a per-case rather than on a per-claim basis and hence are not comparable across statutes as the sizes of the classes in these suits can vary.

Tables 2 and 3 give information on the types of discrimination that are alleged. Table 2 reports the breakdown of bases alleged in charges in total and under the ADEA, ADA, and Title VII. Table 3 gives similar information on the types of discrimination alleged in suits brought by the EEOC in 2006. Note that Table 3 is grouped not by statute, but by the type of discrimination alleged. (A suit may allege both age and race discrimination, for example.)

Table 2 shows that charges related to discharges and layoffs are more common in ADEA cases than in Title VII cases, and Table 3 shows that they are also more common in age cases than in race or sex cases that are litigated. Charges related to involuntary retirement, while not common, are largely confined to ADEA claims.

The tables also show that hiring cases, in general, are much less common than discharge or layoff cases, although they do constitute a larger share of ADEA charges than of ADA or Title VII charges, or of issues alleged in race and sex cases that are litigated. The relative paucity of hiring cases compared to discharge or layoff cases could reflect the actual nature of the types of discrimination being experienced. But it may also reflect consequences of the legal framework set up to pursue age discrimination claims. First, hiring cases are more difficult to prove because it is more difficult to identify a class of affected workers. In contrast, in discharge or layoff cases the class typically consists of a group of workers employed (or previously employed) at a firm. Second, damages may be considerably higher in discharge or layoff cases, since workers lose jobs (and for older workers the job may have been relatively high paying) and there is evidence of difficulties in finding a new job (discussed below). In addition, there can be substantial lost pension wealth accruals. In contrast, damages in a hiring case may be quite small, because an individual not hired by one employer has a reasonable expectation of being

²¹ Under the 1991 Civil Rights Act, which amended Title VII as well as the ADEA and the ADA, compensatory and punitive damages can be awarded if there was intentional discrimination, although punitive damages are not available from federal, state, or local governments. There are some exceptions under the ADA (www.eeoc.gov/facts/qanda.html, viewed September 1, 2007).

hired later by another employer. Finally, injunctive relief in hiring cases—hiring the worker who filed the claim—is unlikely to be attractive to a plaintiff.²²

These barriers to pursuing claims of hiring discrimination are potentially quite important in light of the evidence that workers aged 65 and over, often working in jobs following long-term careers, are an increasing source of potential employment growth. The distribution of cases under the ADEA may reflect problems with the legal structure set up to pursue age discrimination claims that make it difficult to combat age discrimination in hiring compared to discharges. If the legal structure has these problems, then the ADEA may become a less useful tool in the future than it was when the bulge of protected workers was in the age range in which they were likely to be employed in—and perhaps fired from—their career jobs. This is perhaps the most important issue that arises out of this overview of ADEA enforcement, and it will be revisited below.

²² For discussion of these issues, see, e.g., Bloch (1994); Issacharoff and Harris (1997); and Posner (1995).

EVIDENCE ON AGE DISCRIMINATION

If the ADEA has successfully removed age discrimination from the labor markets, and if in so doing it has rooted out the negative (and incorrect) stereotypes about older workers that the Department of Labor originally identified as the rationale for the ADEA (U.S. Department of Labor, 1965), then there may be no more need to enforce this law. If, instead, the policy has been effective but negative stereotypes persist, which would again adversely affect older workers if enforcement waned, then continued vigilance is needed. There is research that contends that enforcement of the ADEA has had some harmful effects for older workers and for economic efficiency generally—and in the extreme suggests that the ADEA does more harm than good. Thus, in assessing the effectiveness of the ADEA, one must focus on both the need for policies to combat age discrimination, in principle, and on the effectiveness of these policies (if they are needed), in practice. In this section the evidence on age discrimination, and hence on the continued need for policies like the ADEA, is considered. The next section focuses on the actual effects of laws prohibiting age discrimination.

DEFINING DISCRIMINATION

Before discussing evidence on age discrimination, it is necessary to define what is meant by the term. Economic theory, beginning with Becker (1957), holds that a group suffers from discrimination if employers, other workers, or consumers have distaste for contact with the group, which ends up being reflected in market transactions. Thus, for example, if consumers value interactions with young workers more than with older workers, older workers will be hired at lower wages or will be less likely to be hired. Discriminatory tastes like these are interpreted as “animus” toward a group. An alternative definition that may have similar observable consequences, but that might be more relevant to the case of older workers, is that economic agents—most likely employers—hold incorrect negative stereotypes about the ability of older individuals to perform on the job.²³

PRE-ADEA AGE DISCRIMINATION

Both of the above definitions of discrimination were cited in the debate in the U.S. Congress over the passage of the ADEA in 1967 (Crawshaw-Lewis, 1996). However, the original Department of Labor report arguing for the enactment of the ADEA emphasized that incorrect negative stereotypes exist.²⁴ Evidence of the specific role of negative stereotypes about older workers that could influence human resource decisions is reported in studies such as Rosen and Jerdee (1977), who presented managers with hypothetical decisionmaking in response to scenarios in which age was manipulated as a

23 The issue of stereotypes arises in models of statistical discrimination, in which employers cannot observe all of the relevant productivity-related characteristics of a potential employee and therefore rely on easily observable characteristics—of which age would be one—and impute to the individual some estimate of the group average. If the averages are correct, then this type of discrimination need not, on the whole, disadvantage any particular group. But if the stereotype is incorrect, the group can be disadvantaged. See Coate and Loury (1993).

24 The report argued that age discrimination was not driven by animus toward older workers, but rather by assumptions “about the effect of age on [workers’] ... ability to do a job when there is in fact no basis for those assumptions” (p. 20).

variable. That research found adverse outcomes for older workers based in part on negative stereotypes.²⁵

In the pre-ADEA period, two sets of facts were emphasized that pertained to age discrimination in hiring. First, Miller (1966) viewed information on unemployment rates as suggesting that older workers who lost their jobs had more difficulty finding new jobs than did prime-age workers, with both higher unemployment rates and longer durations of unemployment. Second, Miller cited evidence from the late 1950s of the widespread prevalence of upper age limits for new hires.²⁶ Ironically, this emphasis on discrimination in hiring contrasts with the enforcement-related emphasis on terminations that subsequently evolved.

POST-ADEA AGE DISCRIMINATION

The enactment of the ADEA has surely resulted in the elimination of explicit upper age limits for jobs. Have longer unemployment durations for older individuals disappeared? Bureau of Labor Statistics data indicate that older workers are still considerably more likely than younger workers to have long unemployment durations (U.S. Department of Labor, 2007). Of course, longer durations do not necessarily reflect simply discrimination against older workers. Moreover, unemployment *rates* of older individuals are lower than those of other age groups and substantially lower than those of young people, although it is possible that some older individuals do not show up as unemployed because they face poor job prospects and therefore simply decide to retire.

It is a bit harder to establish what has happened with respect to negative stereotypes about older workers. There is a large body of research on whether there are negative stereotypes about older workers that appear to adversely affect them in the labor market, with many researchers concluding that there is such evidence.²⁷ More recent work, however, suggests that negative age stereotypes may have declined. For example, a meta-analysis of studies published through 1999 by Gordon and Arvey (2004) finds bias against older workers but also suggests that “age bias may actually be less of a problem today than it was in previous decades” (p. 485). According to Gordon and Arvey, this could be due to EEOC policy²⁸ and to the improved relative performance of older workers among more recent cohorts.

If EEOC policy has helped to break down negative stereotypes, perhaps by leading to more objective appraisals of workers, then one might conclude that the law has become less necessary, unless in its absence employers would resort to using age as a screening device. Although it would be less accurate, it might be a very cheap screen.²⁹ However, it is not clear that negative stereotypes about the oldest workers (i.e., 65 and over) have

25 This research design has many parallels with audit studies, discussed below (including criticism of this research strategy for studying age discrimination).

26 See also U.S. Department of Labor (1965).

27 See, for example, Finkelstein, Burke, and Raju (1995) and Kite, et al. (2005).

28 Gordon and Arvey (2004) write that “the impact of EEOC guidelines in the areas of selection and performance appraisal may be a key factor in the observed decrease in age bias found in the present data” (p. 486).

29 Holzer and Neumark (2000) discuss a similar issue in the context of affirmative action in the hiring of minorities. They find that firms using affirmative action search more widely and use more screening methods. This kind of searching may cost more than using race as a cheap screen, but it may also reduce statistical discrimination against minorities.

declined. Consequently, if past policy has done little to address stereotypes about this older group, then negative stereotypes may still play an important role moving forward, given that a larger share of potential workers will be in the 65+ age category in coming decades.

Ultimately, though, negative stereotypes are important only insofar as they affect labor market outcomes. Moreover, age differences in labor market outcomes do not necessarily imply age discrimination. In addition, there may be reasons for age discrimination other than negative stereotypes. Thus, to learn something more decisive about the role of age discrimination in labor markets, either more direct tests for discriminatory behavior or more sophisticated analyses are required to account for non-discriminatory explanations of observed age-related differences.

Research on discrimination in hiring is particularly important in light of the aging population, which will likely see many individuals seeking employment in new jobs after leaving their career jobs. However, it is important to point out that the existing research does not focus explicitly on hiring discrimination for workers aged 65 and over, and therefore it does nothing to establish that this older age group is particularly prone to experience this type of discrimination.

Hutchens (1988) presents evidence based on 1983 Current Population Survey (CPS) data showing that newly hired older workers were clustered in a smaller set of industries and occupations than were either newly hired younger workers or older workers in general. He suggests that this clustering likely reflected hiring discrimination when considered in combination with some of the pre-ADEA research discussed above. Hirsch, Macpherson, and Hardy (2000) present more recent analyses suggesting that some occupations appear to be more closed to older workers. They also report only a slight improvement over time in the occupational segregation facing “new older hires,” and hence suggest that the problem did not diminish in the period they studied.

In research on sex and race discrimination “audit studies” are used in which pairs of job applicants matched on all characteristics except sex or race are sent to apply for jobs, and outcomes are compared. Under quite reasonable conditions, differential treatment of the applicants—for example, a greater hiring rate for whites, or a higher share of pairs in which only the white person is offered a job—can be viewed as direct evidence of discrimination. A closely related method is a “correspondence study,” which relies instead on sending out resumes and measuring outcomes in terms of being invited in for an interview or other expressions of interest in hiring.³⁰ More recently, researchers have tried to use this approach to study age discrimination.

Bendick, Jackson, and Romero (1996) completed a nationwide correspondence study of hiring in three white-collar occupations, and Bendick, Brown, and Wall (1999) conducted an audit study in the Washington, DC metropolitan area of hiring in entry-level management and sales positions. Both studies found strong evidence consistent with age discrimination against older workers. In the correspondence study (1996), the authors estimated that of the pairs of resumes with at least one positive response (e.g., a message

30 See Fix and Struyk (1993) for a discussion of audit studies. See Heckman (1998) for a discussion of conditions under which audit studies can give misleading evidence of race discrimination. See Riach and Rich (2002) for a comprehensive review of international evidence from these types of “field experiments.”

to call to discuss the application further), the younger applicant received a more favorable response in 43 percent of the cases, compared with 16.5 percent for the older applicant, a difference of 26.5 percentage points. In the audit study (1999), the younger applicant received a more favorable response in 42.2 percent of cases, versus only 1 percent of cases for the older applicant. This difference was largely confined to the pre-interview stage, rather than the interview and job offer stage (where there was still a difference favoring younger applicants, but it was not statistically significant).

However, a fundamental problem with using these methods to study age discrimination is that there is no natural way to make older and younger workers look identical in all respects other than age.³¹ One would naturally expect older workers to have more experience than younger workers. If the information on the resumes or conveyed by the testers revealed this, then we might expect more favorable outcomes for the more-experienced workers in the absence of age discrimination, at least for some jobs. To account for this the authors tried to hold human capital constant by giving the older and younger applicants (aged 32 and 57) the same number of years (10) in the occupation for which they were applying. The researchers had the older applicants indicate that they had been out of the labor force raising children or working as a high school teacher, depending on the particular job opening (in the correspondence study),³² or in the military or teaching (in the audit study). The problem is that we really have no idea how this other fictitious experience affects the employer's assessment of the applicants. It is entirely possible that either type of fictitious experience will be viewed negatively, as perhaps suggesting that interests lie elsewhere, work is not a priority, etc., and that this could explain the adverse outcomes for older applicants.

A more recent correspondence study by Lahey (forthcoming (a)) focuses on women in two urban labor markets. She also finds evidence of age discrimination, with older women (aged 50-62) significantly less likely to get a positive response or an interview than younger women (aged 35-45). Lahey attempts to address the difficulty by making older and younger applicants alike in a number of ways. First, the resumes she uses include only a 10-year job history, which she suggests is the "current resume standard." Does this help? Suppose that all an employer ever sees are resumes with 10-year job histories. Then the interviewer can only make assumptions about what the older applicant was doing in the long period not covered by the job history. If the employer assumes that the applicant was working, then the presumption might be that she has more experience, perhaps a plus for the older applicant. On the other hand, if the employer assumes that the applicant was not working, this could be viewed as a negative signal about productivity. Nonetheless, if it is true that an employer never sees information beyond a 10-year work history, then the absence of an earlier history is less likely to be viewed as negative. Moreover, Lahey studies women, for whom, she suggests, time out of the labor force (even if only inferred by the employer) is less likely to be a negative signal of ability, motivation, etc., than for men. She also studies entry-level jobs (really the only possibility in a correspondence study), so that one might think that previous experience is a bit less of an issue.

31 For an extensive discussion, see Riach and Rich (2002).

32 For one of the occupations—executive secretary—only women applied, and this was the occupation for which older applicants indicated that they had been out of the labor force raising children.

Alternatively, if an employer expects a longer job history for an older applicant, then its absence may be viewed as a negative signal about the older job seeker. I am not convinced that the absence of a longer work history for the older applicant is irrelevant. Lahey cites conversations with three human resource managers, stating: “They all said that ten-year histories are the current gold standard for resumes, although they get many resumes that do not look like the standard” (p. 11). This does not establish that earlier job history information would not convey useful information, or that its absence could be perceived negatively. Moreover, since younger individuals are much more likely to be applying for jobs than older workers, perceptions regarding the so-called “gold standard” for resumes may be shaped by the fact that the sample of resumes tends to be biased toward younger applicants who rarely *have* more than 10 years of experience.

As this discussion illustrates, there are inherent limitations in using audit studies to examine age discrimination. This is not to argue that the problems with audit studies of age discrimination in hiring necessarily bias the results towards finding evidence of discrimination against older workers. As noted above, there are also arguments why the reverse might in fact be more plausible in some instances. It seems that we just cannot be sure. However, it is fair to say that Lahey has wrestled with these issues as well as may be possible. The audit/correspondence studies should probably be viewed as providing at most suggestive evidence of age discrimination in hiring.

Although the empirical work has focused on hiring, it is clear from ADEA enforcement activity that there are also at least allegations of age discrimination based on discharges, layoffs, promotions, and other outcomes. There is limited evidence in the research literature testing for these forms of discrimination. Adams (2002) tries to assess how discrimination in promotions affects workers. Using self-reported information on perceived age discrimination in the Health and Retirement Study, he finds that older workers reporting that their employer gives preference to younger workers in promotions have lower wage growth and a reduced expectation of working past the early or normal Social Security retirement ages. Of course self-reports can reflect negative outcomes other than discrimination, which Adams tries to account for by including controls for the perceived work environment and fairness of pay. Although the evidence from self-reports is far from decisive, this research suggests that employers may discriminate in promotions with deleterious effects on older workers, including leaving the labor force.³³

SUMMARY

Overall, it is not easy to establish the existence of age discrimination, except in cases of overt expressions of discriminatory intent—such as the types of advertisements for hiring with explicit age criteria that prevailed in the pre-ADEA period. This is little different from the case for race and sex discrimination, about which labor economists (and others) still argue. And detecting evidence of age discrimination is a bit more difficult because there are legitimate, non-discriminatory reasons why age may affect labor market outcomes, such as declining investment in skills (general human capital) as workers get nearer the end of their working lives (Becker, 1974; Mincer, 1974), rising benefit costs, and seniority systems.³⁴

33 Johnson and Neumark (1997) also studied how self-reported age discrimination was related to labor market outcomes.

34 These issues are discussed in more detail in Neumark (2003).

This report is not the place for a thorough review or resolution of the literature on age discrimination. However, the combined evidence seems to show that it is likely that labor markets were—and still are—characterized by discrimination against older workers. As a consequence, the evidence on the effectiveness of age discrimination laws can be assessed, in part, by whether these laws help to reduce age disparities in labor market outcomes.

THE EFFECTS OF THE ADEA AND STATE AGE DISCRIMINATION LAWS

If the evidence above is interpreted as indicating continuing age discrimination since the ADEA was enacted, the question naturally arises as to how effective the law has been. Of course, the simple answer is that in many cases we do not necessarily expect a law to completely eliminate the behavior it seeks to regulate. An analogy can be made to speed limits. Although many drivers frequently go above the speed limit and rarely get ticketed, the existence of these laws probably inhibits many speeders. The chance of getting stopped and assessed a heavy fine if one far exceeds the limit is an effective deterrent. Thus, evidence of continuing age discrimination does not in itself establish that the law has been ineffective.

THE EFFECTS ON EMPLOYMENT, RETIREMENT, AND HIRING

Neumark and Stock (1999) studied the effects of both the federal ADEA and state laws barring age discrimination.³⁵ If there was a federal law only, it would be difficult to disentangle the effects of that law from other time-series changes (such as changes in Social Security, pensions, and health) impacting older versus younger individuals in the same period. However, some states had enacted age discrimination laws prior to the ADEA. The effects of these state laws can be inferred from changes in states where laws are passed or take effect relative to changes in other states in the same period. This would also control for nationwide changes in the behavior of older workers.³⁶

A potential limitation of this approach is that state laws and the federal law may not necessarily have the same effects. However, the results of Neumark and Stock suggest—as do those of Adams (2004) (discussed below)—that quite similar answers can be obtained by examining variations in the state and federal laws. One issue that neither study addresses, however, is how the effects of laws change over time.

Using decennial census data covering the 1940-1980 period for white men, Neumark and Stock's analysis leads to two key findings regarding employment. First, age discrimination laws boost employment rates of the entire group of protected workers, but only slightly. However, the employment rates of protected workers aged 60 and over were increased substantially (by about 6 percentage points). Second, prohibitions against mandatory retirement did not boost the employment rates of older workers. This could be because the data were relatively uninformative about this question, or because mandatory retirement really was not that important in determining the retirement age (a point that will be revisited later).

Adams (2004) uses a similar research design, focusing on the mid-1960s when a number of states passed age discrimination statutes, and then the federal legislation took effect. He also examines white men, using Current Population Survey data, although he looks at a richer set of outcomes. Adams finds somewhat larger overall employment effects for

35 Some attention is also given to mandatory retirement, although there is very limited information on variation in mandatory retirement in the period studied.

36 Neumark and Stock (2006) follow a similar strategy in estimating the effects of race and sex discrimination laws.

protected workers, with an increase of 2.75 percentage points in their employment rate. When he focuses on either those aged 60 and older or 65 and older, he finds more substantial effects of around 3.6 to 4.1 percentage points. These results emerge both for the state experiment based on state anti-discrimination statutes prior to the ADEA, as well as the federal experiment based on federal legislation.

Adams also uses this approach to study how age discrimination laws affect hiring, although there are some limitations to this analysis because the data are not truly longitudinal. His best evidence examines how age discrimination laws affect the probability that individuals not employed at some time during the previous year, but looking for work, are employed in the current year. The results point to negative effects on hiring, although they are not significant. Moreover, when Adams examines workers covered under the ADEA in different age categories, the data suggest that the negative hiring effect is stronger for the oldest protected individuals, with a significant (at the 10 percent level) and quite large (16 percentage point) decline for individuals aged 65 and over. Adams cannot draw any strong conclusions concerning the impact of age discrimination laws on hiring but argues that “One thing is clear ... There is no evidence that suggests that there are positive effects for protected workers” (p. 237). On the other hand, he finds that age discrimination laws are associated with lower probabilities that older protected individuals are retired.

Lahey (forthcoming (b)) revisits the effects of age discrimination laws, focusing on state laws, but in her case in the period when the ADEA was in effect. She argues that her evidence shows that age discrimination laws deter the hiring of older workers. Why might these adverse unintended consequences arise? The idea is that because the ADEA may make it difficult to terminate the employment of older workers, it ends up deterring their hiring in the first place. Another factor contributing to this possibility is that it may be quite difficult to bring a lawsuit over age discrimination in hiring, whereas it is easier to do so with respect to terminations.

Looking in the period prior to 1979, when the Department of Labor gave administrative responsibility for ADEA enforcement to the EEOC, Lahey finds little evidence that state laws affected older workers. In the subsequent period, however, she interprets her data as indicating that state age discrimination laws reduced weeks worked of white men older than 50 years of age, made such individuals more likely to be retired, and reduced hiring of them (which she measures better than Adams [2004] by using matched CPS files). Note that the employment (actually, weeks worked) results and the retirement results are the opposite of those in Adams’s work, and the employment results also contrast with those in Neumark and Stock (1999). In addition, the conclusions about adverse hiring effects are stronger than those Adams draws. What explains the differences? Should the strong critique of the ADEA implied by Lahey’s results be given credence?

The key difference in Lahey’s study is the source of the information for identifying the effects of age discrimination laws. The evidence in Adams (2004) and in Neumark and Stock (1999) is based on the across-state variation in age discrimination laws caused first by adoption of age discrimination laws in some states prior to the ADEA and then subsequently by the spread of age discrimination protections to the remaining states when the ADEA was passed. Lahey (forthcoming (b)), in contrast, studies data from the 1968-1991 period, and in particular two subperiods—1968-1977 and 1978-1991. Since these years are after the enactment of the ADEA, what is the source of policy variation?

Lahey argues that workers in states with anti-age discrimination laws are protected by stronger provisions than workers in states with only ADEA coverage. Thus, her empirical strategy is to estimate the effects of state age discrimination laws compared to the federal age discrimination law, identifying their effects from states that switch to having their own laws. The reasons state laws are stronger, she suggests, are that: (1) in states with their own laws workers have longer to file age discrimination claims;³⁷ and (2) Fair Employment Practices (FEP) agencies in these states may be able to process claims more quickly than the EEOC, although she presents no evidence that states do not have their own backlogs. It is not entirely clear, however, that state laws are in some sense more effective than the federal law. And there does not seem to be any direct evidence on this point. Moreover, what Lahey is calling an effect of an age discrimination law might more correctly be thought of as an effect of lengthening the period during which one can file an age discrimination claim (and having the option to file with the state as well), which simply may not be the same thing.

Lahey characterizes the period before 1978 as one in which the ADEA had little effect, which is why she splits the sample into a pre-1978 period and the subsequent period. However, the results in Neumark and Stock indicated little difference between the effects of the ADEA on employment of older covered workers in the pre-1978 and post-1978 periods, with at most slightly larger impacts in the latter, so there does not seem to be a strong basis for treating the ADEA as ineffective prior to 1979. Nonetheless, if Lahey's characterization of the federal law is accepted as becoming effective (to a large extent) in 1978, then there is an important source of identifying information that she ignores—namely, the extension of the federal law to states without anti-discrimination laws. Moreover, her evidence suggests that, in states with their own age discrimination laws, the employment of workers over 50 years of age was no different from that of those 50 and under in the pre-1978 period, but was lower in the 1978-1991 period. This suggests that when the federal law became more effective, employment of those older than age 50 *increased* precisely in the states that did not previously have state age discrimination laws, which would seem to imply that age discrimination laws—at least the federal law—boosted the employment rate of protected workers.

Overall, then, one should not regard Lahey's study as indicating that age discrimination laws act to deter the hiring of older workers. However, this conclusion is based on the strength of the evidence that Lahey presents, rather than the logic of her argument. The hypothesis that age discrimination laws deter the hiring of older workers may in fact be correct. And recall that the evidence in Adams (2004) does not suggest any beneficial hiring effects of age discrimination laws, and perhaps the opposite, especially for those aged 65 and over.³⁸

37 In particular, in states that do not have their own statutes, a worker must file a claim with the EEOC within 180 days. In contrast, when the state has its own statute and an FEP commission or agency, the worker has 300 days to file. Lahey argues that that law has permitted workers to file with both the EEOC and the state FEP agency within 300 days. However, some states have shorter filing deadlines, and it is not apparent that a claim filed after the state deadline will be considered by the state FEP agency.

38 Lahey (forthcoming (b)) also presents evidence, based on the same research design, suggesting that state age discrimination laws increase the retirement of older covered workers. However, these results are not as strong statistically. This could, in principle, come from reduced hiring, or from the direct steps employers take to induce retirement, such as how employers structure incentives. Note, though, that these results contrast with those in Adams (2004). In addition, Lahey's employment (weeks worked) effects contrast with those in both Adams and in Neumark and Stock (1999)—both of the latter studies find positive effects. Author's note: For the same reasons I was critical of Lahey's findings on hiring, I am critical of these findings. And given the

This evidence regarding hiring is discouraging for two reasons. First, as noted earlier, the clearest indications of age discrimination prior to the ADEA and during the period it has been in effect concern hiring discrimination. Yet the evidence points to no impact of age discrimination laws with regard to hiring, and possibly even adverse effects. Second, the evidence on changing population structure and the labor force behavior of older individuals suggests that the most significant challenge in coming decades concerns barriers to the hiring of older workers and eliminating whatever role discrimination might play. If, in fact, age discrimination laws—and the ADEA in particular—seem to *deter* the hiring of older workers, then it seems difficult to see how the ADEA, at least as it is currently implemented and enforced, is going to help solve this problem. Moreover, even if the ADEA (and state discrimination laws) do not deter the hiring of older workers, they may do little to encourage such hiring, or to break down discriminatory barriers to such hiring.

AN ALTERNATIVE PERSPECTIVE ON AGE DISCRIMINATION

Another perspective on age discrimination—based neither on animus nor stereotypes—comes from the model developed by Lazear (1979). In Lazear’s model, in some types of firms it is difficult or costly to monitor workers’ effort continuously and hence it is efficient to use pay schemes to create incentives to work hard (with some probability that a worker not exerting enough effort is caught and fired). In this case, workers and firms enter implicit (i.e., unwritten) long-term contracts that pay workers wages lower than their productivity when they are young in order to motivate them to work hard, and make up the shortfall by paying workers wages higher than their productivity when they are older (more tenured).³⁹

A key implication of Lazear’s original model is that mandatory retirement arises as an outcome of firms and workers solving the incentive problem. At the mandatory retirement age the present discounted value of earnings over tenure with the employer equals that of productivity, and current wages are higher than current productivity, so the employment relationship has to be terminated. Moreover, this is acceptable *ex ante* to workers. However, Lazear’s model demonstrates that this mandatory retirement will arrive when the wages that workers are paid exceed the value of their leisure time, so despite facing mandatory retirement workers would like to continue working. As a result, from the perspective of these workers mandatory retirement is undesirable *ex post*.

Part of the delayed payments in Lazear’s implicit contracts may come in the form of a pension upon retirement—best thought of as a defined benefit (DB) pension plan. Indeed, the model predicts that even in the last period of employment some delayed payment is required to deter shirking, so in some sense there is always some pension in these

contrary evidence (in contrast to the issue of hiring, on which there is not much other evidence), I am more willing to simply conclude that she gets the wrong answer, at least insofar as her estimates are intended to be interpreted as measuring the effects of age discrimination laws. Finally, the same view of the change in the results from the 1968-1977 period to the 1978-1991 period indicates that older workers covered by state laws were more likely to be retired in the latter period, but not in the earlier period. Paralleling the earlier argument, this implies that the retirement of older workers rose more in states with their own laws when the federal law was “extended” to (more strongly enforced in) other states, consistent with a relative decline in retirement in the states that had not had age discrimination laws and hence with the opposite conclusion.

³⁹ Given a popular perception that workers no longer stay with firms for long parts of their careers, one might think the Lazear model is of diminishing importance. However, as documented in numerous studies in Neumark (2000), changes in job stability through the 1990s were not large. More recent evidence confirms little change in overall job attachment among older men between 1969 and 2002 (Stevens, 2005).

contracts. More generally, the back loading of DB pension plans provides a way to delay compensation. DB pension plans are also significant because they can be used to induce mandatory retirement. Lazear (1979) originally argued that mandatory retirement is used to enforce termination of the employment relationship at the appropriate time. Later, though, he noted that a DB pension plan could be structured in such a way that would induce retirement at the same date as would otherwise be caused by mandatory retirement by setting the maximum present value of the pension to peak at that date (Lazear, 1995).⁴⁰

The significance of the Lazear model (1979) is that it suggests a reason why employers may want to terminate the employment of older workers. In particular, there is a temptation for the firm to “renege” on the implicit long-term contract with older workers, firing them during the age range when the worker is receiving wages in excess of current productivity in return for working hard earlier, but before the mandatory retirement date. Reneging on the contract would increase the firm’s profits in the short run, although it may have adverse longer-run consequences as future cohorts of young workers no longer see the long-term implicit contract as credible. Lazear does not explicitly label reneging on long-term implicit contracts as “age discrimination.” But he explicitly discusses this issue in terms of the firm’s incentive to “cheat” older workers, promising a worker a particular wage stream over a certain period, but then dismissing the worker before the period is up. Moreover, this kind of firm cheating has been characterized as discrimination in other work such as that of Gottschalk (1982), who explores the conditions under which this is more (or less) likely to occur, and Cornwell, Dorsey, and Mehrzad (1991), who focus on age discrimination in terminations. Mandatory retirement may also appear to be discriminatory because it terminates a worker based on age. However, the model suggests that this may be the wrong way to think about the issue given that mandatory retirement is acceptable to workers *ex ante*.

The Lazear model (1979) is significant for two reasons. First, it raises questions about what is meant by age discrimination. For example, reneging on a long-term implicit contract based on a worker’s age (or closely related seniority) would appear to be something that should be interpreted as discriminatory behavior. On the other hand, if mandatory retirement really is part of a long-term implicit contract that is *ex ante* acceptable to workers, then it would seem odd to view the implementation of mandatory retirement as discriminatory. Second, in using his model to think about the effects of the ADEA, Lazear (1979) focused on amendments that raised the age of mandatory retirement and subsequently eliminated it. As a result, he conjectured that the ADEA would serve mainly to give a windfall to older workers through the elimination of mandatory retirement—which was not discriminatory in the first place—while imposing longer-run efficiency costs.

Neumark and Stock’s (1999) research on age discrimination laws re-examined this critique of the ADEA. They begin by considering the other problem posed by Lazear contracts—specifically, that firms have an incentive to renege on these long-term

40 There is a good deal of research documenting evidence consistent with Lazear’s model, including evidence presented in his original paper, as well as in Lazear and Moore (1984); Hutchens (1987); Kotlikoff and Gokhale (1992); and Hellerstein and Neumark (2007).

contracts when workers are relatively older.⁴¹ They argue that the main effect of the ADEA may have been to deter this kind of renegeing, which in fact *strengthens* the ability of workers and firms to take advantage of these contracts.⁴² Indeed, Neumark and Stock suggest that firms would not necessarily have been opposed to this function of the ADEA, as it provided them with a credible way to make the promises implicit in Lazear-type long-term incentive contracts to retain older workers even when their current earnings rose above their current marginal product.⁴³ They present evidence suggesting that this was the effect of age discrimination laws, in the form of steepening earnings profiles for cohorts entering the labor market subsequently.⁴⁴ Thus, the evidence presented in Neumark and Stock (1999) casts the effects of age discrimination laws in a more favorable light, arguing that such laws help to resolve problems with respect to terminations on career jobs.

This research also helps to establish that Lazear contracts are an important feature of labor markets, which may aid in understanding hiring difficulties faced by older workers following their career jobs. In jobs in which effort-related incentives are important and Lazear-type long-term incentive contracts may be used, the hiring of older workers may be deterred. First, in order to create sufficient back-loading of pay to elicit effort from a worker, an older worker seeking a new job may need to be paid much less than the wage on a longer-term career job that he or she may have recently left. However, the worker—especially a person in his or her 60s, for example, who might have considerable uncertainty about how long he or she will keep working—may not be willing to accept such a low wage. Moreover, with a relatively short expected tenure at the new job, losing the job may not be very costly to the worker, which implies that it may be difficult to create effort-related incentives without paying a very low wage initially with a very steep wage profile. This can explain why certain jobs may not be amenable to the hiring of older workers, and indeed Hutchens (1986) presents evidence suggesting that jobs with characteristics associated with Lazear-type contracts are, in fact, less likely to be those in

41 Cornwell, Dorsey, and Mehrzad (1991) present evidence that this type of renegeing associated with reducing pension liabilities is not widespread, but does occur when pension losses for firms rise unexpectedly. As they put it, “there is a brake on cheating. The brake is not perfect, however ...” (p. 722).

42 Neumark and Stock (1999) contend that the increase in the mandatory retirement age was less important, based on earlier work suggesting that it had little effect on retirement behavior. Von Wachter (2002) takes issue with this earlier work, based on evidence on changes in mandatory retirement induced by the ADEA and subsequent amendments. Von Wachter focuses explicitly on the differential changes in retirement for workers covered (or not covered) by mandatory retirement, although he has to rely on predicted coverage by mandatory retirement to implement this procedure using Current Population Survey data, which constitutes his main analysis. However, von Wachter also reports that evidence from the National Longitudinal Survey (NLS) of Older Men revealed no effect of raising the mandatory retirement age on retirement behavior. He dismisses this evidence based on the small samples and the sample period not extending long enough. With regard to the latter point, though, the sample does extend to 1983, and the CPS data show evidence of an apparent decline in retirement associated with mandatory retirement as early as 1979 (see his Figure 2). As Neumark and Stock (1999) discuss, there was state and federal variation in mandatory retirement laws in the 1970s; but because their analysis used decennial census data, they could not study this variation. It would perhaps have been instructive to use the yearly CPS data that von Wachter studied to estimate the impact of the state changes and subsequent federal changes.

43 Jolls (1996) makes a similar argument.

44 A limitation of this research is that the Lazear model applies to tenure-earnings profiles, whereas with the census data used by Neumark and Stock (1999), only age-earnings profiles can be studied. Von Wachter (2002) also presents evidence that changes in mandatory retirement do not seem to have been associated with these types of changes in earnings profiles (again, looking across workers with different predicted probabilities of coverage by mandatory retirement provisions). This may constitute additional evidence that it was the age discrimination provisions that prevented renegeing on implicit contracts, rather than the abolition of mandatory retirement, that had more significant effects on the employment relationship.

which older workers get hired.⁴⁵ Thus, Lazard contracts may pose additional obstacles to the hiring of older workers, which could be a problem in light of the anticipated need to increase the hiring of older workers in coming decades.

Another issue related to Lazard contracts stems from the change in the types of pensions used in U.S. labor markets. In particular, a sea change in pension provisions that has occurred since the early 1980s has been the shift from defined benefit (DB) to defined contribution (DC) pension plans.⁴⁶ For example, Papke (1997) reports that for single-employer pension plans with 100 or more participants, the number of DB plans fell from more than 22,000 in 1980 to 17,000 in 1992, and the number of active participants declined from 21.9 million to 19.8 million. At the same time, the number of DC plans rose from 13,000 to 38,000, and the number of participants from 15 million to 29 million, while the number of 401(k) plans and participants grew even more. And Friedberg and Webb (2003) report that the percentage of pensioned full-time employees with DC plans rose from 40 percent to 79 percent between 1983 and 1998, while the percentage covered by DB plans fell from 87 percent to 44 percent over the same period.⁴⁷

If it is true that employers previously used DB pension formulas to induce mandatory retirement, then as more workers approach retirement age with DC plans, employers may find it more difficult to induce older workers to leave employment. Thus, with the shift toward DC pension plans there may be a need for increased vigilance regarding age discrimination in terminations of older workers. This has to be weighed against any other possible reasons for shifting the focus of age discrimination enforcement toward the hiring side. That is, the aging of the population—which this report emphasizes—is not the only change buffeting U.S. labor markets, and attention must be paid to other trends that have implications for age discrimination law and enforcement.

PROTECTING WORKERS OF ALL AGES

Another issue regarding the effectiveness of laws prohibiting age discrimination is the consequence of extending these laws to cover younger people. This does not apply to the ADEA, which originally protected workers aged 40-65 and later had the upper age limit raised and then removed, with no change in the lower age limit. However, many states have lower age limits ranging from 21 to unspecified (that is, the law covers all ages). These state laws parallel the current evolution of age discrimination legislation in Europe, where the European Council adopted a directive (2000/78) mandating that European Union member countries adopt age discrimination laws by 2006.⁴⁸ This directive prohibits age discrimination regardless of age, rather than specifying that individuals above a certain age are protected. Discussion of age discrimination in the context of this directive refers to protecting both younger and older workers from age discrimination

45 Consistent with this, Hirsch, Macpherson, and Hardy (2000) also find that the occupations that appear to be more closed to older workers have steeper earnings growth with experience and a higher prevalence of pensions.

46 Defined contribution plans include 401(k) plans.

47 Neumark (2006) discusses some of the hypotheses regarding why this change occurred.

48 See Hornstein (2001) for details.

(e.g., O’Cinneide, 2005). Indeed, the United States appears to be rather unique in protecting older individuals only (Hornstein, 2001).⁴⁹

Does the extension of age discrimination protections to younger workers weaken the protections given to older individuals? This question should be of considerable interest to countries adopting laws paralleling the European directive, especially since many of these countries have more rapidly aging populations than the United States.⁵⁰ And ironically, in light of their aging populations, despite some ambiguity it appears that the directive allows European Union members to retain mandatory retirement ages (Hornstein, 2001, p. 82; O’Cinneide, 2005). The state-level variation in age ranges covered by age discrimination laws in the United States may provide a unique opportunity to study the question of how the effectiveness of age discrimination provisions is influenced—if at all—by extending coverage to young workers.⁵¹

49 There is evidence from the United Kingdom suggesting that being either old or young may adversely affect employment opportunities, although the reasons could well differ for the two groups. A survey of senior human resources managers in U.K. establishments (Metcalf and Meadows, 2006) finds that respondents in 21 percent of establishments (covering 19 percent of workers) believed that some jobs in their businesses were more suitable for certain ages. With regard to the largest occupation in the establishment, the youngest (under age 25) and oldest (aged 50 and over) were identified as the most suitable age group least often (with the number lowest for younger workers). The most common reason given for this suitability was age, which is likely to explain why the young were viewed as less suitable, and may explain results for the older workers. But other reasons reported with high frequency included “job normally done by a certain age group” and “job not appropriate for someone older/younger,” both of which may capture age stereotypes.

50 For example, the United Nations projects that in the United States the percentage of the population aged 65 and over will grow from 12.3 percent to 21.1 percent from 2000 to 2050. Comparable numbers for some European countries are: Italy, 18.1 percent to 35.9 percent; Germany, 16.4 percent to 31 percent; United Kingdom, 15.8 percent to 27.3 percent; and France, 16 percent to 26.7 percent (United Nations, [not dated]).

51 A useful starting point would be information on age discrimination lawsuits brought by younger individuals under state laws that allow this. Such information does not seem to have been compiled. A remaining question is how age discrimination laws covering young workers will account for the skill differences between very young and other workers, which are widely acknowledged by labor economists.

LOOKING TO THE FUTURE OF THE ADEA

RECENT DEVELOPMENTS IN INTERPRETING THE ADEA

Two relatively recent changes in the interpretation of the ADEA may be particularly significant for future developments and influence how well the statute serves the nation's needs in coming decades. First, the law has recently evolved to clarify the interaction of age with the coordination of private and public benefits. In particular, employers had sometimes reduced health benefits for retirees once the workers became eligible for Medicare (at age 65). But in *Erie County Retirees Association v. County of Erie*, the Third Circuit Court of Appeals issued a ruling that was perceived as making it quite difficult to reduce health insurance for retirees upon eligibility for Medicare. In response, in 2004 the EEOC proposed a rule that eased the restrictions imposed by this decision, allowing employers to more easily coordinate retiree health benefits with Medicare. The commission cited fears expressed by both employer and labor organizations that this complexity would lead employers to eliminate coverage rather than run the risk of violating the ADEA.⁵² AARP subsequently challenged the regulation in court, but the EEOC was upheld in 2007 (*AARP v. Equal Employment Opportunity Commission*).

Although this ruling applies to retirees, related issues regarding coordinating health benefits with Medicare can arise for employees aged 65 and over who are eligible for Medicare. Currently, EEOC regulations allow employers to coordinate their health packages with Medicare, as long as doing so does not result in a reduction of benefits of any type.⁵³ However, as indicated by the difficulties to which the EEOC responded after the *Erie* decision, employers may be wary of trying to wrap private insurance around Medicare for employees aged 65 and over. This issue is discussed further below.

Second, because of the “reasonable factors other than age” exception, which recognizes that other factors can lead to the appearance that age has driven an employment-related decision, a sequence of court rulings—most notably the U.S. Supreme Court in *Hazen Paper Co. v. Biggins* in 1993—had made it considerably more difficult to use “disparate impact” as the basis of age discrimination claims;⁵⁴ indeed the different circuit courts were divided on this issue.⁵⁵ However, in *Smith v. City of Jackson* (2005), the Supreme Court ruled that the ADEA allows disparate impact claims. The standard for such claims is higher than in Title VII cases (requiring that plaintiffs also be able to identify specific practices that have had an adverse impact on older workers), and it puts less of the burden of proof on the defendant to establish that there is a business justification for the practice (as established in *Wards Cove Packing Co., Inc. v. Antonio*, 1989).⁵⁶

52 See www.eeoc.gov/policy/regs/retiree_benefits/qanda-retireehealthbenefits.html, viewed August 15, 2007.

53 *CFR*, Title 29, Section 1625.10 (“Costs and Benefits under Employee Benefit Plans”).

54 “Disparate impact” refers to practices that may not have discriminatory intent but have an unjustified adverse impact on members of a protected class.

55 See the discussion in Dale (2005) and Spero (2006).

56 Note that some state laws, such as in Minnesota, explicitly allowed disparate impact cases before (see www.humanrights.state.mn.us/rsonline7/overview.html, viewed August 29, 2007).

It is likely that the decision in *Smith v. City of Jackson* will make it easier for plaintiffs to pursue age discrimination claims, although the impact may not be large. As Spero (2006) notes, “While *Smith v. City of Jackson* opened the door for ADEA plaintiffs to recover when a policy or practice disparately impacts members of their age group, it does nothing to help them through that door” (p. 190). With regard to the issue of hiring and employment of individuals in the older age ranges that will see growth in the decades ahead, there may be some impact given that hiring cases are likely to be argued based on disparate impact. How difficult it will be to prevail in a disparate impact case will turn on the Court’s future decision in *Meacham v. Knolls Atomic Power Laboratory*—and on impending regulations by the EEOC concerning burden of proof and what factors should be considered when determining whether the factor the employer relied on that caused the adverse impact on older workers was “reasonable.”

AGE DISCRIMINATION CHALLENGES ON THE HORIZON

This section touches briefly on two key issues that are likely to become increasingly important with respect to employment and age discrimination laws. It focuses in large part on persons aged 65 and over.

Health Care Costs. The relentless increase in health care costs and the costs to employers of providing health insurance are well known. Health insurance costs are higher for older people (Lahey, 2007; Sheiner, 1999) and they seem poised to become an increasing drag on the employment of older workers.⁵⁷ Of course decoupling health insurance from employment would eliminate the disparity of these costs between younger and older workers on their employers.

As just discussed, the EEOC regulation published in December 2007 made it easier for employers to coordinate Medicare with health insurance benefits for *retirees* without running afoul of the ADEA. The EEOC regulation was implemented in response to employer concerns that reducing health care benefits or wrapping these packages around Medicare for retirees aged 65 and over would violate the ADEA. It seems reasonable to speculate that with the growing share of the population (and hence the workforce) aged 65 and over in coming decades, similar fears regarding health insurance for older *employees* may become more relevant. And with rising health insurance costs, being able to employ older workers and cover them through Medicare obviously becomes increasingly attractive.

One option worth considering is to extend EEOC rules regarding retirees to employees who are eligible for Medicare, making it easier for employers to cover workers eligible for Medicare under a combination of their own group health plans and Medicare, even if that might sometimes entail reductions in benefits and almost certainly would generate some differences in health insurance benefits for older and younger workers. Current rules stipulate that for employers with 20 or more employees, if workers are covered by employer-sponsored group health plans, the group plan is the primary payer and Medicare is the secondary payer covering expenses not covered by the group plan.⁵⁸

57 On the other hand, increases in (1) state health insurance mandates (such as coverage for infertility treatments) or (2) policy changes (such as the introduction of pure community rating [Adams, 2007]) may prevent insurance carriers from charging different premiums based on the ages of a firm’s workforce.

58 In contrast, for retiree health plans Medicare is the primary payer.

Thus, under present Medicare rules employers could mainly cut health insurance costs for Medicare-eligible workers only by reducing group health benefits offered to older workers and letting Medicare pay these instead. A simpler solution would be to make Medicare the primary payer, in which case group health plans would not have to delineate benefit differences between those eligible and those not eligible for Medicare, and indeed as long as the group health plan paid any benefits not covered by Medicare that would be paid to younger workers, issues of differences in treatment of younger and older workers would not arise. The alternative is to continue to insist on equal benefits paid by employers, which could either reduce offerings of health insurance by employers that employ an older workforce, or simply discourage the employment of workers aged 65 and over.⁵⁹ With the shifting age composition of the population along with a public policy goal of encouraging the employment of older individuals, the latter outcome could be quite counterproductive.⁶⁰

On the other hand, the current law allowing companies to offer health insurance to full-time but not to part-time workers (working fewer than 20 hours per week) might help mitigate the effects of rising costs to employers of providing health insurance, among older workers looking for employment subsequent to their career jobs, who are largely looking only for part-time work and have Medicare coverage. At the same time, the ability to avoid providing health insurance to part-time workers might lead to more part-time work as health insurance costs rise (Baicker and Chandra 2005), including among older workers. But rising health care costs coupled with the difficulties of wrapping health insurance plans around Medicare will likely pose increasing problems for long-term career workers who reach age 65 and seek to remain in these jobs.

Age and Disability. It is a simple fact that work-limiting disabilities rise with age. For example, Stock and Beegle (2004) report that in 1980 and 1990 census data, more than 30 percent of those aged 65-70 report a work-limiting disability. This is recognized in the Americans with Disabilities Act (ADA), which notes that the number of disabled “is increasing as the population as a whole is growing older.” One consequence of the overlap between age and disability is that many aggrieved older workers may have the option of pursuing discrimination claims under either the ADEA or the ADA. Scholars have argued that claims filed under the ADA may be more successful because the law does not include an exception for bona fide occupational qualifications (BFOQs). That is, the ADA may offer greater protection to older workers suffering from some of the milder adverse consequences of aging that, under the ADEA, might be grounds for discharge or failure to hire (Posner, 1995). Further, the grievance might still be judged as amenable to “reasonable accommodation” by employers in the language of the ADA. Thus, the ADA—perhaps in conjunction with the ADEA—may provide more protection for older workers. Moreover, because of the relationship between age and disability, as the

59 Scott, Berger, and Garen (1995) present evidence from the 1979-1991 period that firms offering health care plans were less likely to hire workers aged 55-64. See also Goda, Shoven, and Slavov (2007), who suggest that the Medicare as Secondary Payer rule leads to lower wages for workers aged 65 and over, which in turn reduces labor supply substantially.

60 Research by Adams (2007) suggests that changes in health insurance costs for older (compared to younger) workers lead to adjustments in wages (to compensate for the changes in insurance costs) rather than adjustments in employment. However, Adams uses an upper age range of 64 and is therefore probably studying the effects among workers attached to their long-term career jobs. For those aged 65 and over and eligible for Medicare, employment is likely to be more responsive to higher labor demand stemming from reductions in employers' costs of providing health insurance to this group.

population ages more of those individuals protected by the ADEA are also likely to come under the protection of the ADA.

There is, though, a potential downside. In particular, some research has suggested that the ADA has reduced employment among disabled individuals (Acemoglu and Angrist, 2001; Deleire, 2000). This may stem from both the firing costs associated with wrongful termination suits, along with difficulties in reducing discrimination in hiring (as already discussed with respect to the ADEA), or from the costs of accommodating disabled workers. With age, the likelihood of disability—and the possibility of filing lawsuits under the ADA—increases. As mentioned above, because there is no BFOQ exception under the ADA, employers may be deterred from hiring older workers even if they are not disabled at the time of hire, out of a fear that the workers will subsequently become disabled and impose firing costs. Thus, the aging of the population, coupled with the protections afforded by the ADA, could either enhance or diminish the effectiveness of the ADEA in encouraging employment among older individuals. However, there is only limited information available to assess which of these scenarios is more likely.

Most of the analysis of the ADA considers its effects in isolation. Both of the studies above claiming adverse employment effects identify the effects of the ADA from time-series changes in the employment of the disabled (relative to the non-disabled). With this identification strategy, however, different trends in the employment rates of these groups can incorrectly be attributed to the effects of the ADA. As in other areas of policy research, it is preferable—when possible—to examine sub-national variation in laws, using developments in the states that do not pass laws as controls for the states that do, within the same time period. Beegle and Stock (2003) do this with state laws barring discrimination against the disabled, which were passed at different times between 1970 and 1990.⁶¹ They do not find that these laws reduce employment of the disabled (nor do they find positive employment effects).⁶² They also seek to identify the incremental effect of “reasonable accommodation” provisions in state laws, and find none.

Subsequently, Jolls and Prescott (2005) explore these issues further, exploiting the variation in state regimes when the ADA was passed to identify the “reasonable accommodation” and firing cost effects of the ADA. For example, because of state variation, the ADA added the reasonable accommodation provision in some states but not others. The analysts’ conclusions are a bit more mixed, finding that the reasonable accommodation provision does reduce employment, but only in the short term.⁶³ On the other hand, Jolls and Prescott find no evidence of a “disemployment” effect from the more traditional anti-discrimination provisions that parallel the ADEA (and Title VII). Jolls and Prescott suggest that the effects of the reasonable accommodation provision may fade over time because of an increased flow of disabled workers into the workplace as attitudes change, declining costs of accommodation due to technological change and

61 Beegle and Stock (2003) also point out that when the ADA was enacted all but two states had laws barring discrimination against the disabled, although there was heterogeneity in these laws. This raises questions about what is identified from time-series changes in employment of the disabled and non-disabled around the passage of the ADA.

62 Beegle and Stock (2003) look at employment, while Acemoglu and Angrist (2001) study weeks worked. Kruse and Schur (2003) present additional evidence raising doubts about the conclusions from the time-series approach, showing that the answer differs depending on how disability is defined.

63 The Jolls and Prescott (2005) paper has a relatively lengthy discussion that tries to explain the differences in conclusions relative to Beegle and Stock (2003).

judicial refinements of the ADA's requirements, and more enforcement regarding discrimination in hiring based on accommodation costs some time after the law was passed. Thus, for the longer-term effects that are more relevant, the conclusions they reach are similar to those of Beegle and Stock in suggesting that there is little evidence of adverse employment effects of the ADA.

Overall, then, there is not evidence at this point to suggest that the increasing ability of workers protected by the ADEA to rely on the ADA as well, as they age, will lead to more deleterious employment effects for older individuals who can file charges under both statutes. And for legal reasons coverage by both the ADA and ADEA may be helpful. However, there are some limitations on what the evidence can tell us. First, the research on disability laws does not focus on workers aged 65 and older.⁶⁴ Thus, the research results may speak more to the consequences of disability-related discrimination laws for those with "traditional" disabilities rather than to those that are more the result of aging. Second, what will be faced in the future, of course, is the existence of both age discrimination and disability discrimination laws, and the research discussed above does not estimate their joint impact. Using state laws, Stock and Beegle (2004) do this, however, and find that for disabled individuals aged 40-64, when the two types of laws are combined, the employment effect is negative (i.e., reduces employment) compared to an age discrimination law alone.⁶⁵ Again, though, workers aged 65 and over are not examined. However, Stock and Beegle present results for this age group that do *not* distinguish the disability status of the individual, and here they find marginally significant evidence of employment reductions overall and relative to 40-64 year-olds. Thus, there is some likelihood that the increasing share of older and disabled individuals in the population, coupled with the availability of disability-related discrimination claims for a growing share of workers protected under the ADEA, could undermine some of the potentially beneficial effects of the ADEA as the population ages.

64 Beegle and Stock use an age cutoff of 64, and Jolls and Prescott use a cutoff of 58.

65 And in a more restrictive specification, Stock and Beegle (2004) conclude that the overall employment effect of both laws for this age group is negative.

CONCLUSIONS AND DISCUSSION

A number of conclusions can be drawn from the existing research on the effectiveness of the ADEA, although the evidence is by no means always decisive. These conclusions pertain both to the problems that the ADEA was intended to address, as well as its effectiveness:

- There is little doubt that the ADEA was a response to age discrimination. This discrimination was more likely due to negative stereotypes about older workers than “animus” (distaste) towards older workers that affected hiring. It may also have reflected employers’ incentives to renege on long-term commitments to workers.
- Older workers are unemployed for a longer period of time than younger workers, which was cited as evidence of age discrimination in the run-up to the ADEA. There is still some evidence of negative age stereotypes, although they may have diminished. Presumably explicit age limits are never expressed anymore in “Help Wanted” advertisements.
- Age discrimination claims are frequently filed with the EEOC—around 14,000-15,000 per year recently, which is on a par with the ADA and about one-fourth of the total for Title VII cases. Unless one adopts a cynical view of the anti-discrimination policy apparatus, this level of activity suggests continuing age discrimination.
- Enforcement of the ADEA has focused on terminations much more than on hiring. This likely reflects the difficulties and potential rewards with regard to claiming discrimination in terminations compared to hiring. On the other hand, there is reason to believe that there has been discrimination—as defined by the law—with respect to terminations.
- There is evidence of continued discrimination against older individuals in hiring, although it is not decisive. Evidence based on the self-reported experiences of age discrimination also suggests continuing adverse effects of age discrimination on workers’ promotion opportunities, which seems to encourage labor force exits.
- Age discrimination laws—both state laws and the ADEA—boost the employment of older protected workers. Although there is some contrary evidence on this point, it is less convincing. Some research suggests that banning mandatory retirement had little effect on the employment of older workers, but it is not conclusive. Finally, there is some evidence that age discrimination laws reduced retirement, although there is disagreement as to whether this was spurred by banning mandatory retirement.
- There is no evidence indicating that the ADEA increased employment through more hiring, and it is possible that it has reduced the hiring of older workers, perhaps because of the greater costs of terminating such workers.
- Finally, the principal effect of the ADEA may have been to strengthen the bonds leading to long-term employment relationships by reducing the incentives for firms to terminate older employees whose pay might be higher than productivity.

The assessment of the ADEA summarized thus far is retrospective. This report has also focused on the future, exploring how well the ADEA is likely to help to address upcoming challenges, most notably the aging of the population. This assessment and related considerations leads to the following conclusions and some discussion on how age discrimination law might help meet the challenges likely to arise from an aging population:

- The share of the population aged 65 and over will increase in coming decades. Many workers in this age range will leave their longer-term career employment and move into part-time or shorter-term jobs. As a consequence, problems stemming from age discrimination in hiring may become more important than in past decades when the baby boom generation was 40-64 years old.
- The evidence on both the enforcement and the effectiveness of the ADEA suggests that the law may be relatively ineffective with regard to the hiring of older workers. In contrast, in the past couple of decades the ADEA may have helped target the age discrimination problem more likely affecting the baby boomers—terminations among workers in the 40-64 age range, frequently in their career jobs. There may be limitations on how effectively the regulatory and judicial systems address discrimination in hiring, and it would be useful to consider whether this effectiveness can be increased. The structure of civil rights laws and regulations provides not only for the same legal remedies available for age discrimination, but also for affirmative action intended to encourage the hiring of groups that have experienced discrimination in the past. Although controversial, this does at least provide an example of how hiring discrimination can be addressed more directly. On the other hand, in crafting any policy changes intended to boost the hiring of older workers, it is important to remember the underlying economic barriers to this hiring, and to focus on rooting out only the discriminatory behavior.
- With a larger share of the population aged 65 and over, an increasing number of workers will be eligible for Medicare. Coupled with rising health insurance costs, increasing the ability of employers to rely on Medicare for health insurance seems sure to make workers in this age group more attractive. The recent EEOC regulation has made it easier to wrap health insurance benefits around Medicare for retiree health plans. There may be some merit to extending this to current employees eligible for Medicare. However, if most workers in this age group seek and can find part-time work without health insurance benefits, then the problem may be mitigated.
- Because disability rates rise with age, an older population implies that an increasing share of workers covered by the ADEA may also experience work-limiting disabilities. Hence employers may have to be concerned with discrimination claims brought under the ADA as well as the ADEA, especially because claims brought under the ADA may be more successful. There is some evidence that the combined impact of workers being protected by both laws is to reduce employment, although there is limited research on those aged 65 and over. If the combined impact is to reduce employment, though, this implies that the ADA may to some extent put a brake on the ability of the ADEA to help meet the challenge of trying to increase employment in an aging population. There may be no simple way out of this conundrum, but if further investigation reveals it to be a real problem, then an important challenge will be thinking creatively about how to continue to protect the aged and disabled from employment discrimination while not scaring employers away from hiring older workers who are relatively likely to experience some disability as they age.

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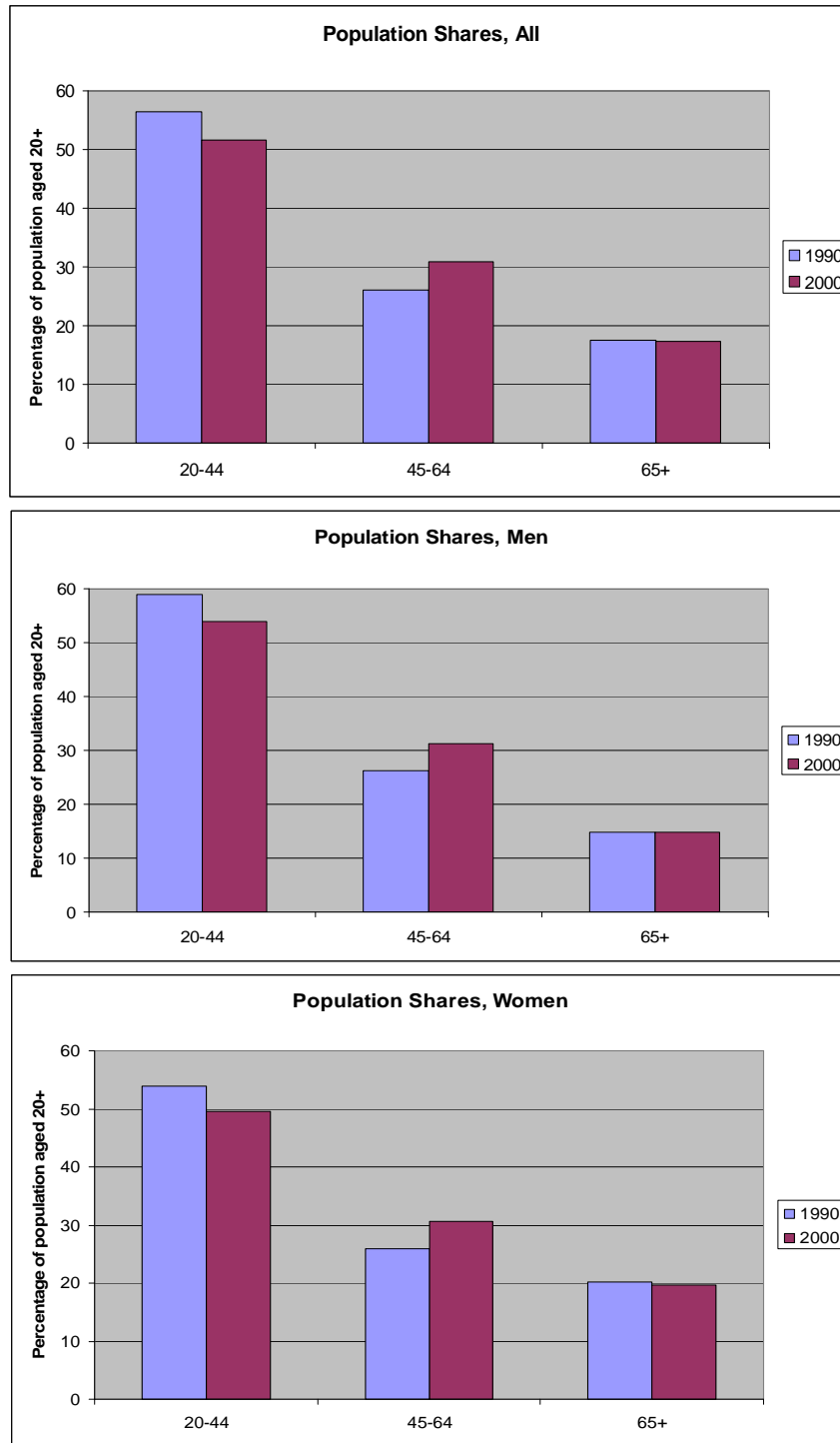
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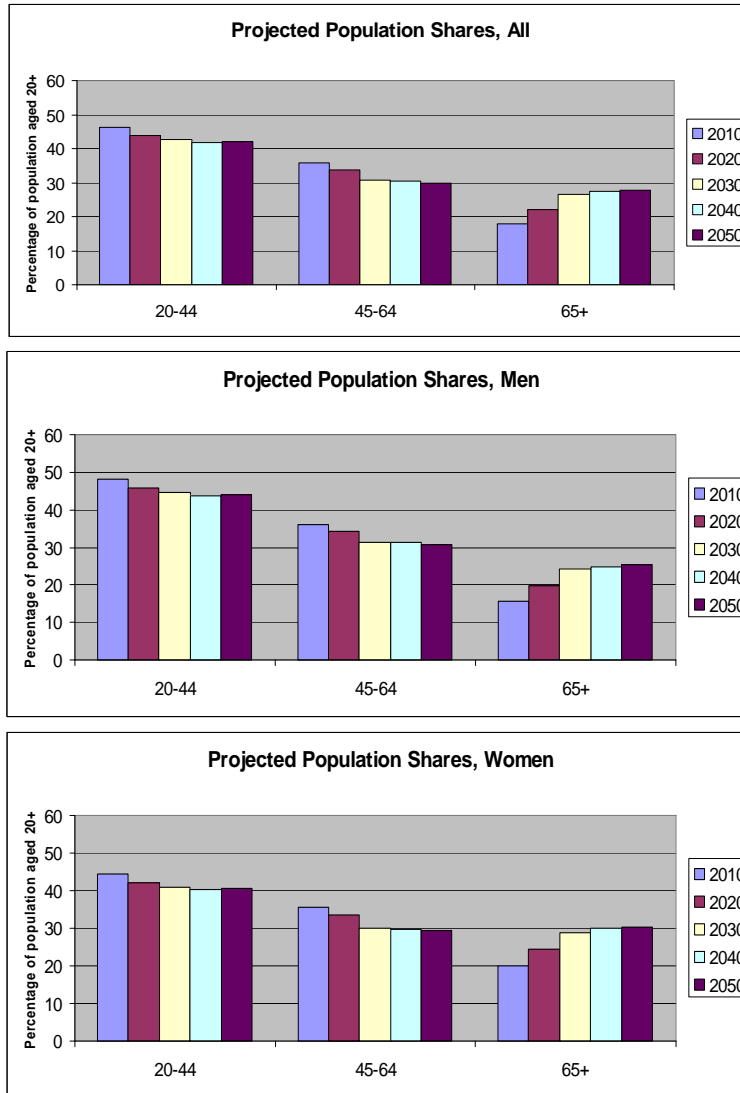
TABLES AND FIGURES

Figure 1
Population Shares of Persons Aged 20+ by Age and Sex, 1990 and 2000



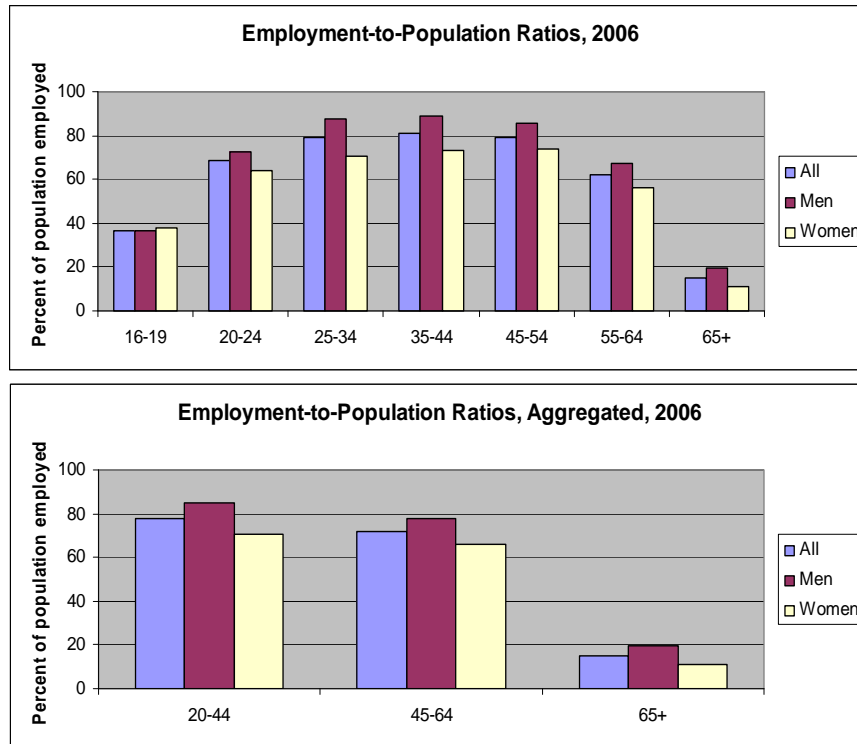
Source: U.S. Census Bureau Population Estimates (www.census.gov/popest/archives/1990s/nat-agesex.txt, viewed August 13, 2007), and U.S. Census Bureau Interim Projections (www.census.gov/ipc/www/usinterimproj, viewed August 8, 2007).

Figure 2
Projected Population Shares of Persons Aged 20+
by Age and Sex, Selected Years 2010-2050



Source: U.S. Census Bureau Interim Projections
 (www.census.gov/ipc/www/usinterimproj, viewed August 8, 2007).

Figure 3
U.S. Employment-to-Population Ratios by Age and Sex, 2006



Source: Employment and Earnings (www.bls.gov/cps/home.htm#annual, viewed August 8, 2007).

Table 1
EEOC Resolution of Charges, 2006 Fiscal Year

	ADEA (1)	ADA (2)	Title VII (3)	All Statutes (4)
Total number of resolutions	14,146	15,045	46,885	74,308
<i>Resolutions by type</i>				
Settlements	10.0%	12.0%	11.7%	11.4%
Withdrawals with benefits	5.4%	5.8%	5.4%	5.5%
Administrative closures	18.7%	16.3%	16.2%	16.6%
No reasonable cause	61.8%	60.3%	61.4%	61.2%
Reasonable cause	4.3%	5.6%	5.5%	5.3%
<i>Breakdown of reasonable cause determinations</i>				
Successful conciliations	1.3%	2.2%	1.4%	1.5%
Unsuccessful conciliations	3.1%	3.5%	4.1%	3.8%
Merit resolutions	19.8%	23.4%	22.5%	22.2%
Monetary benefits (excluding litigation) (millions)	\$51.5	\$48.8	\$126.5	\$229.9
Monetary benefits from litigation	\$5.1	\$2.8	\$34.3	\$44.3

Source: EEOC website (<http://www.eeoc.gov/stats/enforcement.html>, viewed May 5, 2008). "ADA" refers to charges under the Americans with Disabilities Act, and Title VII of the Civil Rights Act to race, gender, ethnicity, etc.

Table 2
EEOC Receipt of Discrimination Charges by Type, 2006 Fiscal Year

	Total ^a (1)	ADEA (2)	ADA (3)	Title VII (4)
Total number of allegations^b	143,686	22,931	23,708	96,070
<i>Issues alleged (percent)^c</i>				
Benefits	0.9	1.5	1.4	0.7
Demotion	1.8	2.7	1.4	1.7
Discharge	31.6	36.8	35.9	29.5
Discipline	5.3	4.8	4.1	5.7
Harassment	16.1	8.6	8.0	20.0
Hiring	4.2	8.4	4.9	3.1
Layoff	1.6	3.6	1.7	1.2
Promotion	4.6	6.0	1.7	5.0
Reasonable accommodation	3.3		18.3	0.5
Retirement—involuntary	0.2	.6	.2	.04
Severance pay denied	.05	.1	.08	.03
Terms/conditions	13.1	12.4	9.3	14.3
Wages	4.1	3.3	1.3	4.2
Waivers	.09	.15	.13	.06
Other	13.1	11.2	11.6	14.0
Discharge + layoff %	33.2	40.4	37.6	30.7

Source: Data supplied by the EEOC.

a Total also includes Equal Pay Act and a handful of unspecified charges.

b Total allegations can exceed the number of charges, because a charge can include allegations under more than one statute.

c All issues that appear for age cases, as well as “Reasonable accommodation,” are shown.

Table 3
EEOC Litigation Activity, 2006 Fiscal Year

	Total (1)	Bases alleged ^a			
		Age (2)	Disability (3)	Race (4)	Sex (5)
Merit filings^b					
Total	383	43	49	81	180
Individual	244				
Class	139				
Issues alleged^c					
Benefits	5	4			
Demotion	9	3		1	2
Discharge	239	24	28	32	61
Discipline	15	1	2	5	
Harassment	160	7		37	105
Hiring	50	10	10	7	20
Layoff	14	4		3	6
Promotion	22	5	2	10	5
Reasonable accommodation	29		19		
Retirement—involuntary	2	2			
Severance pay denied	1	1			
Terms/conditions	33	4		12	13
Wages	13			5	
Waivers	3	1			7
Other	39		3	9	6
Discharge + layoff %	66%	65%	57%	43%	37%
Hiring %	13%	23%	20%	9%	11%

Source: Data supplied by the EEOC.

- a There are also numerous “retaliation” cases, which charge discrimination “against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding” (www.eeoc.gov/types/retaliation.html).
- b Merit filings include mainly direct lawsuits, and a handful of other interventions and actions to enforce conciliation agreements.
- c All issues that appear for age cases, as well as “Wages” and “Reasonable accommodation,” are shown.



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