

NOVEMBER 2020

# Strengthen age discrimination protections to help confront the challenge of population aging

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## STATEMENT OF INDEPENDENCE

The author did not receive financial support from any firm or person for this article or from any firm or person with a financial or political interest in this article. He is not currently an officer, director, or board member of any organization with an interest in this article.

## ACKNOWLEDGEMENTS

I am grateful for research collaborations on much of the research referenced in this paper with Ian Burn, Patrick Button, Nanneh Chehras, Joanne Song McLaughlin, and Wendy Stock.

## ABSTRACT

One key policy imperative in response to the aging of the U.S. population is to increase employment among older workers. However, there is ample evidence of age discrimination, especially in hiring, that can impede efforts to encourage or induce older people to work longer and inhibit working longer more generally. I review the evidence on the presence of age discrimination and the effectiveness of age discrimination laws, as well as recent court rulings that have affected the strength of these laws. Based on this review, I propose the following steps to reduce age discrimination in hiring, to help confront the challenges of population aging.

First, we would amend the Age Discrimination in Employment Act (ADEA) as follows: (a) increase damages under the ADEA to match the larger damages that some states allow; (b) amend the ADEA to clarify that disparate impact claims are allowed in hiring discrimination cases; (c) amend the ADEA to clarify that the standard for establishing discrimination is not “but for” age, putting the ADEA on par with protections afforded other groups under Title VII of the Civil Rights Act; (d) amend the ADEA to allow intersectional claims, in particular, regarding discrimination against older women. Second, we would extend affirmative action for federal contractors to older workers. And finally, we would consider closer integration of the ADEA and the Americans with Disabilities Act (ADA).

## Introduction

One key policy imperative in response to the aging of the U.S. population is to increase employment among older workers. There is ample evidence of age discrimination, especially in hiring, that can impede policymakers' efforts to encourage or induce older people to work longer, and that inhibit working longer more generally.

The United States has federal legislation to prohibit age discrimination—the Age Discrimination in Employment Act (ADEA), passed in 1967. The ADEA has many parallels to anti-discrimination laws based on race, sex, ethnicity, and religion enshrined in Title VII of the Civil Rights Act of 1964, although the ADEA differs slightly in recognizing that sometimes age can play a legitimate role in labor market decisions and outcomes. For example, the ADEA originally allowed mandatory retirement to continue, while pushing the age from 65 to 70, before eventually prohibiting it for most workers. The other major federal antidiscrimination legislation is the Americans with Disabilities Act (ADA), passed in 1990; the ADA extends discrimination prohibitions to people with disabilities, as defined by the federal law. In addition, many states have their own age (and disability) discrimination laws that can strengthen federal laws (see, e.g., Neumark and Stock 1999, 2006). While the ADEA is obviously most relevant to the question of discrimination based on age, the interrelationships between all these antidiscrimination laws are potentially important in protecting older workers from discrimination, for reasons I explain.

There is evidence that both federal and state age discrimination laws are effective at boosting employment of older workers. More specifically, there is evidence that enacting the ADEA (and earlier state age discrimination laws) improved labor market outcomes for older workers, and more-contemporaneous evidence that stronger age discrimination laws in some states have increased the effectiveness of policies intended to induce workers to continue working until an older age. At the same time, some recent court rulings have weakened the ADEA.

Although age discrimination can potentially affect many margins of the employment relationship, I focus on age discrimination in hiring for a number of reasons. First, most people do not just retire from their career job, but instead take bridge jobs or move to partial retirement, sometimes in part due to declining health (Cahill, Giandrea, and Quinn 2006; Johnson 2014; Johnson, Kawachi, and Lewis 2009; Maestas 2010). Partial retirement will surely become even more common if people work until older ages, since many older workers move from their career jobs to jobs that are less physically demanding. Second, the most rigorous evidence we have establishing age discrimination concerns discrimination in hiring. Third, both empirical evidence (Adams 2004; Neumark and Stock 1999) and the workings of age discrimination enforcement suggest that, at present, the ADEA is more effective at reducing age discrimination in terminations than in hiring (Neumark 2009). And fourth, there appears to be more scope for policy to reduce age discrimination in hiring, especially in light of recent court rulings.

These considerations lead me to propose the following steps to reduce age discrimination in hiring to help confront the challenge of population aging:

1. Increase damages under the ADEA to match the larger damages that some states allow.
2. Amend the ADEA to clarify that disparate impact claims are allowed in cases of hiring discrimination.
3. Amend the ADEA to clarify that the standard for establishing discrimination is not “but for” age.<sup>1</sup>
4. Amend the ADEA to allow intersectional claims, in particular those regarding discrimination against older women.
5. Extend affirmative action for federal contractors to older workers.
6. Consider closer integration of the ADEA and the ADA.

My proposals can be viewed as complementing other recent proposals in the New Approaches to Retirement Security project. Clark and Shoven (2019) focused on strengthening labor supply incentives in Social Security and Medicare; those incentives are usually related to changing policy to increase the effective posttax wage of older workers. Munnell and Walters (2019) suggest stronger labor supply incentives via expanding the Earned Income Tax Credit, as well as raising the retirement age and providing more information about retirement finances. They also suggest trying to increase demand for older workers by means of education, and by restoring mandatory retirement to forestall employer concerns of having to retain newly hired older workers for too long (although mandatory retirement seems likely to have effects in the opposite direction as well).

In line with the papers just described, most of the attention of researchers and policymakers on working longer has focused on supply-side incentives. But in the presence of age discrimination, demand-side approaches can also help encourage work at older ages—and could be even more effective if the labor market is characterized by very low demand for workers; that is, increased incentives to work are ineffective if few employers want to hire older workers. In addition, reductions in discriminatory demand-side barriers can enhance the effects of supply-side policies, because older people who have been induced to work longer, in part by moving to different jobs prior to retirement, would more easily find work. In other words, policies to address age discrimination may be a necessary complement to supply-side approaches to working longer.

## Why is it important that older people work longer?

There are two key reasons policymakers should be seeking ways to encourage working longer. First, working longer can contribute to old-age financial security. While there is

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1. This would put the ADEA on par with protections afforded other groups under Title VII of the Civil Rights Act.

much encouragement to start saving earlier and saving more, working longer and deferring dipping into retirement savings (as well as letting those savings grow for longer) is a far more effective way to increase postretirement wealth (Bronshtein, Scott, and Shoven 2019). And to the extent that working longer and deferring savings withdrawals comes about because of reductions in age discrimination, those actions can only be viewed as removing constraints and, hence increasing individual welfare.

Second, higher employment at older ages can help address financial challenges to Social Security solvency owing to population aging. Social Security finances would be improved by higher employment at older ages because older workers would pay Social Security taxes for additional years (Maestas and Zissimopoulos 2010).

## The potential problem from age discrimination

Age discrimination can diminish the capacity of older people to work longer. That is, age discrimination can erect a barrier to work in addition to the barriers of physical limitations or work impairments that may increasingly constrain work for some people as they age. With regard to the role of working longer in enhancing financial security, age discrimination against women, who on average live longer than men, might be particularly problematic.

Age discrimination could be particularly problematic if it frustrates the supply-side reforms we have relied on so far to confront the challenge of population aging. These supply-side reforms sometimes reduce benefits available at younger retirement ages. For example, 1983 Amendments to the Social Security Act lowered benefits to age 62 while raising the full retirement age, which is the age at which beneficiaries do not face a reduction for early benefit claiming (American Academy of Actuaries 2002; Munnell et al. 2004). In addition, there have been changes to reduce the marginal tax rate on earnings of older workers, including lowering the marginal tax rate on earnings of Social Security recipients in excess of the earnings cap, increasing the exempt amount of earnings (the cap), and broadening the ages not subject to the earnings test (Friedberg 2000).<sup>2</sup>

If age discrimination is important, then these supply-side reforms may be pushing on a string. Reforms that try to induce working longer by lowering taxation imply that policymakers might cut taxation more aggressively in the hopes of inducing the desired labor supply response. To the extent that age discrimination inhibits this labor supply response, lowering age discrimination might enhance the ability of smaller tax cuts to generate the needed employment response.

Even more problematic are the potential implications of age discrimination for supply-side reforms that entail reduced benefits for those retiring early. In the face of age discrimina-

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2. For an overview, see Coile (2018).

tion that limits the employment response to such reforms, policymakers might feel compelled to adopt harsher supply-side reforms—such as further benefit cuts to early retirees.<sup>3</sup> But such changes can impose severe costs on older people who face physical challenges to working longer. In contrast, reducing age discrimination can be viewed as a way of increasing opportunities for continuing to work for those who can, and hence might help induce the desired employment response without concentrating costs as sharply on those less able to continue working.

## Evidence of age discrimination in hiring

Economists and other social scientists are typically more cautious than are more-casual observers of the labor market about drawing inferences of discrimination. In particular, an observed difference in outcomes—for example, longer unemployment durations for older job seekers than for younger job seekers—does not necessarily imply hiring discrimination against older workers. Such evidence is consistent with age discrimination, but it could have another, nondiscriminatory explanation stemming from differences among older and younger job seekers regarding which job offers they accept. There is occasionally, but rarely these days, blatant and direct evidence of discrimination. Usually the evidence document is indirect, which makes drawing conclusions potentially more ambiguous. As a result, economists and others have pursued more-rigorous ways of testing for discrimination, including experimental as well as other approaches.

### Direct evidence on age discrimination

Direct evidence on age discrimination—by which I mean clear evidence of discriminatory intent—is rare. The most systematic direct evidence of age discrimination comes from the period prior to the passage of the ADEA, when explicit age restrictions in hiring were frequent. Miller (1966) cites surveys from New York in the late 1950s that find that 42 percent of firms would not hire workers over 50 years old. And in a survey conducted prior to the ADEA in five cities whose states did not have age discrimination laws, the U.S. Department of Labor (1965) found that nearly 60 percent of employers imposed upper age limitations, usually between ages 45 and 55.

While this is unambiguous evidence of age discrimination, such direct manifestations of age discrimination are far less likely today because of the ADEA. Thus, we need to turn to other kinds of evidence.

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3. For discussion of such policy options, see, e.g., Congressional Budget Office (2018); and Favreault and Johnson (2010).



## Indirect observational evidence on age discrimination

Indirect evidence on age discrimination is based on comparing observed behavior (i.e., from surveys or other means of collecting data) of older workers to younger workers, or the behavior of other agents regarding older versus younger workers.

The prime example is the evidence that workers in their 50s and early 60s have long had lengthier unemployment durations than many other age groups, which is consistent with a greater reluctance of employers to hire older workers. These longer unemployment durations of older workers have persisted into recent years (Neumark and Button 2014). While the longer unemployment durations of older workers are potentially attributable to age discrimination, they could also be attributable to other factors. For example, older workers might be searching among a narrower subset of jobs that have fewer physical demands, or maintain a higher reservation wage (the minimum wage at which they would accept a new job) to match wages they earned on a previous job, or because they are less interested in working at some jobs.

Another type of indirect evidence of age discrimination is negative stereotypes regarding older workers. These are typically measured in studies in which respondents are presented with hypothetical scenarios and decisions that explore the connections between attitudes or stereotypes regarding older workers, sometimes tying those stereotypes to decisions about older workers that may be adverse (Gordon and Arvey 2004; Kite et al. 2005). The limitation of this evidence is that it is difficult to tie these stereotypes directly to adverse outcomes in the actual labor market.<sup>4</sup>

## Experimental evidence

In light of these empirical challenges, researchers have turned to experimental methods, called audit or correspondence (AC) studies, to test for age discrimination in hiring. AC studies of discrimination in hiring are generally viewed as the most reliable means of inferring labor market discrimination (e.g., Fix and Struyk 1993). Observational studies on discrimination typically start out with some observed difference between groups, such as

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4. Another potential issue regarding these stereotypes is that even if they adversely impact older workers as a group (e.g., reducing hiring because employers anticipate that older workers will stay on the job for less time, hence making investments in their training less worthwhile) the stereotypes could be true. That is, a stereotype is an average characteristic attributed to a group, and in some cases, it is true and not exaggeration. For example, it is true that the health of older people will eventually decline. However, discrimination based on these kinds of stereotypes, which economists call statistical discrimination, is illegal under U.S. law. Equal Employment Opportunity Commission (EEOC) regulations state, "An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information" (EEOC n.d.). Making it clear that employers must evaluate people as individuals and not on their group membership, the regulations state, "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group" (U.S. Department of Labor n.d., § 1604.1).

the longer unemployment durations of older workers; they then ask whether other factors that differentiate older and younger workers can explain the observed difference. An inference of discrimination is often drawn if those factors cannot explain the difference. In contrast, AC studies create artificial job applicants in which there are no average differences by group, and hence no reason for employers to treat the applicants differently other than different tastes for hiring from different groups of workers or different assumptions about those workers that are not justified based on any information employers have. Thus, if there are differences in outcomes, they likely reflect discrimination.

Audit studies use actual applicants coached to act alike, and measure discrimination as differences in job offer rates. Correspondence studies create artificial applicants (on paper or, in recent decades, electronically) and capture callbacks for job interviews. Correspondence studies can collect far larger samples of job applications and outcomes; because of the time costs of interviews, even large-scale, expensive audit studies typically have sample sizes only in the hundreds. Correspondence studies also avoid experimenter effects that can influence the behavior of the actual applicants used in audit studies (Heckman and Siegelman 1993). Correspondence studies have the disadvantage of not capturing actual job offers, but instead just callbacks. However, there is evidence that callbacks capture most of the relevant discrimination.<sup>5</sup>

In a recent work, Neumark, Burn, and Button (2019) conducted a large-scale correspondence study that was carefully designed to provide the best possible evidence on age discrimination in hiring, in part by overcoming potential biases in past studies. For example, we used specifically crafted variations on résumés that older workers actually present, including one that showed the common path of moving to a lower-skilled job later in life (think, somewhat stereotypically, of store greeters at Walmart). The study focused on ages near retirement, at which policymakers are trying to strengthen incentives to work longer.

We created fictitious but highly realistic résumés for young (aged 29–31), middle-aged (aged 49–51), and older (aged 64–66) job applicants. We then submitted these résumés in response to ads for jobs in categories that employ large numbers of fairly low-skilled workers of all ages, and that do at least some hiring of both older and younger workers. The jobs included administrative assistants and secretaries (to which we sent female applicants), janitors and security guards (male applicants), and retail sales (applicants of both genders). Note that the experiment covers jobs that require fairly low skills. That is because labor economists using AC study methods believe that realistic responses to fictitious job applications are less likely in labor markets that require higher skills, where employers are more likely to be familiar with job applicants.

We leveraged technology to conduct our study on a far larger scale than ever used before. In the end, we sent triplets of otherwise identical young, middle-aged, and older fictitious

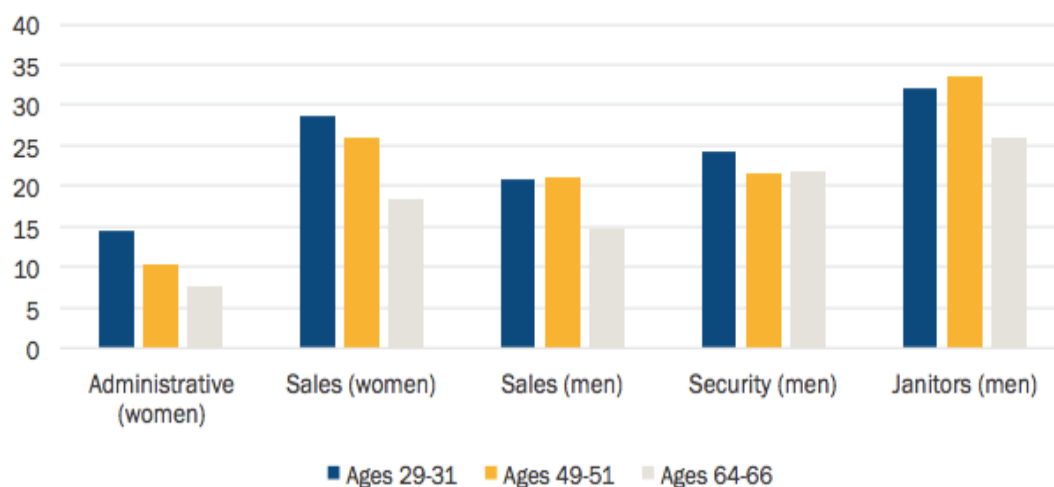
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5. For example, Riach and Rich (2002) discuss evidence from studies by the International Labour Organization indicating that 90 percent of the discrimination that is detected in these studies occurs at the stage when applicants are selected for interview; Neumark (1996) reports similar evidence. This makes sense, since discrimination at the callback stage is less likely to result in a paper trail of applicants called in for an interview who were not hired.

applications to more than 13,000 positions in 12 cities spread across 11 states (more than 40,000 applicants).

Overall, across all five sets of job applications, the callback rate was higher for younger applicants and lower for older applicants, consistent with age discrimination in hiring. However, there are some important differences. The first two sets of bars in figure 1 show the callback rates for female job applicants, first to administrative jobs and then to sales jobs. In both cases there is distinct pattern of the callback rates being highest for the young applicants (ages 29–31), lower for the middle-aged applicants (ages 49–51), and lowest for the old applicants (ages 64–66). Relative to the young applicants, old female applicants for administrative jobs had a callback rate that was lower by 47 percent (7.58 percent vs. 14.41 percent). In sales, the difference was a bit smaller: a 36 percent lower callback rate (18.43 percent vs. 28.68 percent).

**Figure 1. Callback rates by age, sex, and sector**



Source: Neumark, Burn, Button, and Chehras, 2019

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For male job applicants in sales, security, and janitor jobs, there is also, in general, a lower callback rate for older men. But in this case the age pattern is not as consistent or pronounced. For sales jobs, for which we have a direct comparison with women, the difference in callback rates between old and young applicants is more modest (14.70 percent vs. 20.89 percent, or a 30 percent difference). And in none of the three cases is there a clear monotonic decline in callback rates from young to middle-aged to old applicants, in contrast to the evidence for women.

The results in figure 1 indicate that women face worse age discrimination than men. In sales, where we could directly compare results for both genders, we found a sharper drop-off in callback rates with age for women than for men. And for the janitor and security jobs to which we submitted applications from males, the pattern of lower callback rates for older

applicants was less clear than for the older versus younger female applicants to administrative or sales jobs.

Our study contains several more-sophisticated statistical analyses, including a number of analyses intended to test whether employers might be making fewer callbacks to older applicants because of their assumptions about differences between younger and older applicants. For example, employers might assume that younger applicants have weaker technological skills or that there are differences between a younger applicant just starting out in a fairly low-skilled job and an older applicant who is still in the labor market for these kinds of jobs. However, these analyses support the same three conclusions. First, there is evidence of age discrimination in hiring for both women and men. Second, while both middle-aged and older applicants experience discrimination relative to younger applicants, older applicants, meaning those near the age of retirement, experience more age discrimination. And third, women experience more age discrimination than men do.

Two additional points are important. First, although this study improves on past research, the findings are consistent with earlier AC studies of age discrimination (Bendick, Brown, and Wall 1999; Bendick, Jackson, and Romero 1997; Lahey 2008a; Riach and Rich 2006, 2010) and with one recent study (Farber, Silverman, and von Wachter 2017), all of which find evidence of age discrimination in hiring. Thus, there is sizable body of work pointing to the same conclusion. Moreover, while not contrasting men and women, the Lahey (2008a) and the Farber, Silverman, and von Wachter (2017) studies focus on women and find strong evidence of age discrimination against older women.

There are potentially important policy implications of this difference between the evidence for older women and for older men. First, if older women suffer from discrimination because of both age and sex, antidiscrimination laws might be less effective than previously thought. Because Title VII of the Civil Rights Act, which prohibits discrimination on the basis of sex, is separate from the ADEA, intersectional claims of age discrimination against older women are difficult to bring before the courts (McLaughlin 2019). As discussed in McLaughlin (2019), while courts have been mixed on such claims under Title VII, they have unambiguously not recognized such claims under the ADEA. McLaughlin (2018) presents evidence that this problem is empirically important. She studies changes in state and federal age discrimination laws in the 1960s and finds that these laws did far more to increase employment of men than employment of women and lowered the retirement rate only for men. This was true even for single women, whose behavior would not have been indirectly impacted by the effects of age discrimination laws on their husbands (e.g., single women would not exit the labor force in response to increased employment and hence higher income of men).<sup>6</sup>

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6. Delaney and Lahey (2019) discuss the issue of intersectional claims with respect to age and race. But here the evidence base for differences in discrimination by age and race is weaker and is limited to laboratory evidence (Lahey and Oxley 2018).

Second, reducing age discrimination against older women could be particularly important for financial security at older ages. Many women outlive their husbands and end up impoverished (Gornick et al. 2009; Smeeding and Sandstrom 2005). This is true both because women tend to live longer and because they might have worked less outside the home, and so accumulated less wealth in their younger years.<sup>7</sup>

These two issues reinforce the points made earlier about the potential harm from focusing only on supply-side incentives to work longer. If we do not also combat age discrimination, perhaps in particular discrimination against older women, so that women find it easier to stay in or return to the workforce, policy incentives to retire later could reduce older women's retirement benefits without doing much to increase their employment, ultimately doing more harm than good. Moreover, enabling women to work longer will help ease the postretirement financial straits in which many older women find themselves today.

## Can public policy reduce age discrimination?

Research suggests that age discrimination laws have been effective at improving labor market outcomes for older workers. For example, Adams (2004) found that the advent of state and then federal age discrimination laws boosted the employment of older workers, and Neumark and Stock (1999) showed that these laws strengthened the employment relationship between older workers and firms; we interpret that as evidence that age discrimination laws made it harder for employers to fire older workers who had worked for the employer for a long time.

However, neither of these studies relates to age discrimination in hiring which, as noted earlier, is my particular interest. On this score, there is a potentially troubling hypothesis that stronger age discrimination protections can actually have the unintended consequence of reducing hiring. In particular, age discrimination laws can be quite effective at reducing discriminatory terminations, but less effective at reducing discrimination in hiring, because in hiring cases it is difficult to identify a class of affected workers and economic damages are smaller than in termination cases. As a result, it is possible that age discrimination laws mainly raise the costs of terminating older workers, and hence end up deterring employers from hiring those workers (Adams 2004; Bloch 1994; Lahey 2008b; Posner 1995). This argument about age discrimination laws deterring hiring has been made generally with respect to antidiscrimination laws, and some assume that it applies to older workers as well (e.g., Lahey 2008b). The argument, however, could have less force for older workers. Even if age discrimination laws increase termination costs, such costs may not weigh heavily in employers' decisions because many older workers might not plan on remaining

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7. For example, for the cohort born in 1960 (hence turning 60 in 2020), life expectancy at age 65 is 77.8 for men and 80.8 for women (Centers for Disease Control and Prevention n.d.). And in 2018 the poverty rate for women aged 65 and older was 11.1 percent, versus 8.1 percent for men at those ages (Semega et al. 2019).

in a particular job for very long. Given these considerations, evidence on the effects of age discrimination laws on hiring of older workers is particularly important.

There are two earlier studies of how age discrimination laws affect hiring: Adams (2004) and Lahey (2008b). Adams (2004) does not find any evidence that age discrimination laws increase hiring of older workers, but in fact they might do the opposite, especially for those aged 65 and over. However, the data he uses are not well suited to measuring hiring because they are not longitudinal, and hence do not permit direct measurement of the impact of age discrimination laws on workers entering new jobs, whether from nonemployment or from another job. Thus, while he finds some evidence potentially consistent with hiring declines, he more cautiously concludes that he cannot detect evidence of a positive hiring effect.

The paper that most strongly counters the conclusion that age discrimination laws help older workers is probably Lahey's (2008b) study of the effects of state age discrimination laws. She argues that workers in states with their own age discrimination laws are protected by stronger laws than are workers in states without such laws, for two reasons. First, in states with their own laws, workers have more time to file age discrimination claims.<sup>8</sup> And second, Fair Employment Practices agencies in these states might be able to process claims more quickly than the Equal Employment Opportunity Commission (EEOC) can do.

Looking first at the period prior to 1978, which is the year the Department of Labor gave administrative responsibility for ADEA enforcement to the EEOC, Lahey (2008b) finds little evidence that state laws affected older workers. In the period from 1978 to 1991, however, her evidence suggests that state age discrimination laws reduced employment of white men older than 50 years of age, reduced their hours (including zero hours for the nonemployed), made it more likely that these older men had retired, and reduced their hiring.<sup>9</sup> She suggests that, because the ADEA makes it difficult for employers to fire older workers, it ends up deterring their hiring in the first place. This reluctance to hire could be exacerbated by the difficulty of bringing suit over age discrimination in hiring, as discussed above.

The evidence is less than clear-cut, however. Lahey (2008b) characterizes the pre-1978 period as one in which the ADEA had little effect, which is why she splits the sample into the pre-1978 and subsequent periods. If we accept Lahey's characterization of the federal law 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 that do not have their own antidiscrimination laws. Her evidence shows that between the pre-1978 and the 1978–91 periods, hiring and hours of workers over 50 years of age *fell* in states

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8. In particular, in states that do not have their own statutes, workers must file a claim with the EEOC within 180 days; conversely, in states that have their own statutes as well as a Fair Employment Practices commission or agency, the worker has 300 days to file a claim under federal law with the state's Fair Employment Practices agency or the EEOC.
9. Note that the employment (actually, weeks worked) results and the retirement results are the opposite of those in Adams (2004), 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, although Lahey (2008b) measures hiring better than Adams does by using matched Current Population Survey data files.



with their own age discrimination laws relative to states without their own laws; there was no such change for those aged 50 and under. In other words, where age discrimination laws became more effective—turning on in the states that did not previously have state age discrimination laws—employment and hiring of those older than age 50 increased in relative terms. This would seem to imply that age discrimination laws, or at least federal age discrimination laws, boosted employment of protected workers, contrary to Lahey’s conclusions. In other words, Lahey is identifying the effects of age discrimination laws post-1978 from the differences between states with and states without their own laws. But if the more important source of variation in the potency of age discrimination laws is the strengthening of the federal legislation post-1978, and the catching up of the strength of age discrimination laws in states that did not previously have their own laws to those that did, then the evidence points to the opposite conclusion.

In more-recent work, Neumark and Song (2013) studied responses to the changes in Social Security implemented in 2003–8 that, beginning with the 1938 birth cohort and phased in over six years, lowered benefits at the early retirement age of 62 by 20 percent and increased the full retirement age from 65 to 66.<sup>10</sup> We found that the responses of older workers, both by working longer and by claiming Social Security benefits later, was larger in states that had stronger age discrimination laws. Most importantly, larger damages were available in age discrimination lawsuits, and in some cases coverage of age discrimination protections extended to smaller firms. In particular, there was increased employment between age 65 and the new, higher, full retirement age, which is exactly the age range for which the Social Security reforms were intended to boost employment and delay retirement. Moreover, the evidence suggests that the effects arise through a positive impact on hiring older workers.<sup>11</sup> In addition to providing further evidence that stronger age discrimination laws boost employment of, and delay retirement of, older workers, this study points more directly to policy complementarities between supply-side incentives to induce older workers to work longer, and demand-side efforts to reduce age discrimination.

Other evidence also suggests that when state age discrimination laws allow larger damages, age discrimination is lower. Neumark, Burn, Button, and Chehras (2019) extend the correspondence study from Neumark, Burn, and Button (2019) to cover retail hiring in all U.S. states. We then studied the relationship between state age discrimination laws and the experimental measures of age discrimination.<sup>12</sup> In our preferred estimates, which we weighted to be representative of the workforce, we find evidence that there is less discrimination against older men and women in states where age discrimination law allows larger

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10. See Neumark and Song (2013, Table 1) for details.

11. Finally, note that the evidence in Lahey (2008a) focuses on a feature of state laws—the longer time to file a claim (statute of limitations)—that the evidence in Neumark and Song (2013) suggests does not matter.

12. We also study state disability discrimination laws; that evidence is discussed below.

damages.<sup>13</sup> This evidence even more strongly counters the idea that stronger age discrimination laws ultimately have adverse effects on the hiring of older workers.

There is some contrary evidence reported by Neumark and Button (2014). In particular, we find very little evidence that stronger age discrimination protections helped older workers weather the Great Recession relative to younger workers in terms of employment rates, unemployment rates, and unemployment durations. The evidence sometimes points in the opposite direction, with stronger state age discrimination protections (including larger damages and lower firm-size minimums) associated with more-adverse effects of the Great Recession on older workers. We suggest that, during an experience such as the Great Recession, severe labor market disruptions make it difficult to discern discrimination, weakening the effects of stronger state age discrimination protections. Alternatively, higher termination costs associated with stronger age discrimination protections might do more to deter hiring when future product and labor demand is highly uncertain.

However, these latter results are specific to a highly unusual labor market period. Thus, they do not undermine my overall view that stronger state age discrimination laws generally help older workers. Even more strongly, the evidence does not support the contention that stronger age discrimination laws have the unintended consequence of reducing hiring of older workers; in that sense, one might argue, at a minimum they do no harm.

## Recent legal rulings weaken age discrimination protections

My policy proposals are based in large part on the evidence reviewed above. They are given greater urgency, in my view, because recent legal rulings likely *weaken* the ADEA's protections against age discrimination, and specifically weaken protections against age discrimination in hiring. As discussed in Button (2019) and McCann (2018), these court decisions weaken the applicability of ADEA to hiring by interpreting the ADEA to provide less protection than Title VII affords groups that fall under its protections (e.g., racial minorities).

*Gross v. FBL Financial Services Inc.* raises the bar for proving age discrimination. In particular, the Supreme Court's 2009 ruling implies that proving age discrimination requires showing that age was *the* determining reason, and not just *a* reason, for an employment decision that was adverse for older workers. That is, it raises the bar for age to be a "but for" cause of the employment decision. This of course makes it more difficult to prove age discrimination because it is more difficult to rule out other factors than to establish that age was a factor in the decision. The Court's reasoning was that Congress explicitly amended Title VII to recognize mixed-motive claims but did not do so for the ADEA (McCann 2018).

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13. Note that this study also confirms the finding of age discrimination in hiring, and somewhat stronger evidence for discrimination against older women than against older men.



In a case more narrowly decided with regard to hiring, in 2019 the 7th Circuit Court of Appeals ruled, in *Dale E. Kleber v. CareFusion Corporation*, that the ADEA did not authorize job applicants to bring disparate impact claims against prospective employers.<sup>14</sup> This ruling was based on the argument that the law’s recognition of disparate impact claims was meant to apply only to current employees. It clearly weakens protections against age discrimination in hiring by appearing to rule out the possibility of bringing hiring discrimination claims over employer policies that cannot be proven to be intentionally discriminatory but that have an adverse impact on older applicants (e.g., stereotyped language that discourages older workers from applying, or advertising or otherwise recruiting in a way that reduces contacts with older applicants). This interpretation is particularly striking in the context of *Kleber* (2019), in which the job description required applicants to have “3 to 7 years (no more than 7 years) of relevant legal experience,” a description that gets about as close to “Older workers need not apply” as one can imagine.

## Proposed policy changes

The preceding evidence and legal considerations inform the policy changes I am proposing to make it easier for older people to continue working, in part by being able to make transitions to new jobs on a later and/or longer glide path to retirement. My prior discussion of the evidence was meant to give an accurate assessment of what we can learn from the data, and I sometimes pointed out where the evidence was weaker or contradictory. In this final section I return to the six specific policy proposals outlined in the introduction. With the review of the evidence now also in hand, I try to clarify where there is a strong research evidence base for the proposed policy changes, and where I am engaging more in what one might call informed opining about policy changes. Moreover, I want to emphasize, though without repeating the findings here, that the evidence generally does not support the idea that increasing age discrimination protections will have the unintended consequence of deterring hiring of older workers, which makes it harder to argue for downside risks from strengthening age discrimination protections.

### 1. Increase damages under the ADEA to match the larger damages that some states allow.

My first proposal is to increase damages under the ADEA to match the larger damages that some states allow. I believe this proposal rests on a strong base of research evidence that larger damages reduce age discrimination, and, even more specifically, that larger damages can increase the impact of supply-side policy reforms intended to encourage people to work longer. The latter point is particularly important because it implies that larger damages could enable us to achieve increases in the longevity of work with supply-side incentives

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14. Broadly speaking, disparate impact claims are based on a practice or procedure that may not be intentionally discriminatory but results in an adverse impact on a protected group. The other type of claim is disparate treatment—or intentional discrimination.

that are less extreme. Less-extreme supply-side incentives are important for two reasons: First, they can imply less lost tax revenue to the extent that we try to encourage working longer by reducing taxation on income of older workers or by subsidizing their earnings; and second, they can imply less-punitive benefit reductions for retiring earlier than the Social Security full retirement age.

## 2. Amend the ADEA to clarify that disparate impact claims are allowed in cases of hiring discrimination.

My second proposal is to amend the ADEA to clarify that disparate impact claims are allowed in cases of hiring discrimination. There is, as yet, no direct evidence on the impacts of the court rulings that have chipped away at ADEA protections, which these proposals are intended to address. I have argued, however, that there is persuasive evidence of age discrimination, especially in hiring, and I cannot think of a valid reason for protections against discrimination in hiring based on age to be weaker than those based on race, sex, ethnicity, and religion.

## 3. Amend the ADEA to clarify that the standard for establishing discrimination is not “but for” age.

My third proposal is to amend the ADEA to clarify that the standard for establishing discrimination is not “but for” age, putting the ADEA on par with protections afforded other groups under Title VII of the Civil Rights Act.<sup>15</sup> Repeating the argument for my second proposal, but applying it here to all dimensions of discriminatory behavior and not just hiring, I cannot think of a valid reason for antidiscrimination protections based on age to be weaker than those based on race, sex, ethnicity, and religion. I recognize that this is a philosophical rather than an empirical argument, except insofar as the problem of population aging and the need to increase employment among older workers factors into decisions about antidiscrimination laws.

In my view, the only possible reason for different protections with regard to age is for some circumstances where the ADEA recognizes explicitly that age may play a legitimate role in labor market decisions, such as bona fide seniority systems. But I do not see why these circumstances pertain to differences in the applicability of disparate impact claims to hiring discrimination, or differences in whether a “but for” or mixed-motive criterion applies. That is, there may well be some decisions employers make based on age that we, as a society, decide should be allowable whereas they would not be based on membership in other protected groups. But that is a very different issue from the standards we set for establishing discrimination in decisions that we do not want to allow based on age or based on membership in the groups protected by Title VII.

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15. Note that the U.S. House of Representatives recently passed the Protecting Older Workers Against Discrimination Act (H.R. 1230), which would accomplish this exact purpose.

#### 4. Amend the ADEA to allow intersectional claims, in particular those regarding discrimination against older women.

My fourth proposal is to further amend the ADEA to allow intersectional claims, in particular those regarding discrimination against older women. The evidence establishing that intersectional claims are problematic for older women is based on evidence from a much earlier era, which may not provide much guidance as to what the effect would be of changing current law along this dimension. However, in light of the contemporaneous evidence that age discrimination is more severe for older women than it is for older men, and in light of the implications for their financial security of age discrimination against older women, there is a good case for recognizing discrimination claims brought specifically by older women.

#### 5. Extend affirmative action for federal contractors to older workers.

My fifth proposal extends affirmative action for federal contractors to older workers. It stems from the evidence that age discrimination in hiring is a particularly serious problem, and a particularly important part of the solution to population aging. I have also taken the position that age discrimination protections should be on par with protections based on race, sex, ethnicity, and religion. I thus propose that the president extend prior Executive Orders establishing affirmative action for federal contractors to cover age as well.<sup>16</sup> There is evidence that affirmative action worked to boost employment of covered groups; see the earlier evidence reviewed in Holzer and Neumark (2000), and recent evidence in Kurtulus (2012).

#### 6. Consider closer integration of the ADEA and the ADA.

Finally, my most speculative proposal is to consider closer integration of the ADEA and the ADA.

We know that, empirically, disabilities that can limit work, and hence that also likely limit major life activities and trigger protection by disability discrimination laws, rise steeply with age, especially past age 50 or so (e.g., Rowe and Kahn 1997).<sup>17</sup> From this we can infer two things. First, it is reasonable to assume that employers might project some future costs to hiring older workers, based on a probability that rises with age that the worker will de-

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16. The key prior Executive Orders (EOs) with regard to hiring and employment include EO 10925 (1961), instructing federal contractors to “take affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin”; EO 11246 (1965), requiring all government contractors to take affirmative action to expand employment opportunities for minorities, establishing the Office of Federal Contract Compliance; and EO 13672 (2014), amending EO 11246 to cover sexual orientation or gender identity.

17. Much of this discussion comes from Neumark, Burn, Button, and Chehras (2019).

velop a disability in the future, coupled with the ADA requiring employers to make reasonable accommodations for workers with disabilities. Second, disability protections could come to play an increasingly important role in protecting older workers from age discrimination as people work to older ages. Indeed, disability discrimination laws could do more to protect many older workers than do age discrimination laws. Some ailments associated with aging have become classified as disabilities (Sterns and Miklos 1995), and hence these ailments can sometimes give older workers an option of pursuing discrimination claims under either the ADEA or the ADA (or corresponding state laws). In addition, the ADA does more to limit defenses against discrimination claims because of the ADA's reasonable accommodations requirement and because the ADA does not include an exception for bona fide occupational qualifications.

However, the definitions of disability vary quite a bit between federal and state laws. Most states adopt the ADA definition under which plaintiffs need to prove that they have a condition that “substantially limits one or more major life activities” (42 U.S. Code §12102 (1)). Often it has been difficult for plaintiffs to prove they have such a condition, leading many to lose their cases (Colker 1999).<sup>18</sup> However, some states use a laxer definition, changing a key part of the definition of disability from “substantially limits one or more major life activities” to either “materially limits” (Minnesota) or just “limits” (California) (Button 2018). Other states vary the definition of disability by requiring that the disability be “medically diagnosed” without regard to whether the impairment limits major life activities (Long 2004); the disability definition in these other states is the broadest.

Adopting a definition of disability under the ADA that recognizes physical limitations that arise in the normal course of aging, but that do not necessarily substantially limit one or more major life activities, could provide an implicit integration of age and disability discrimination protections that ensure that older workers are not shut out of the labor market, and that aging in its natural course—and not just the development of more-serious disabling conditions—does not foreclose work opportunities, as long as employers can reasonably accommodate these disabling conditions. Alternatively, extending protection for workers with physical limitations that arise in the normal course of aging could be done by modifying the ADEA.

Similar to age discrimination laws, there is evidence that disability discrimination protections help workers who are disabled (Beegle and Stock 2003; Hotchkiss 2004; Kruse and Schur 2003). In addition, research on the possibility that stronger disability protections (such as the differences in definitions discussed above) have the unintended consequence of deterring hiring of older workers has not found evidence of such an effect (Neumark, Burn, Button, and Chehras 2019; Neumark, Song, and Button 2017).

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18. Even with the broadening of the definition of disability with the ADA Amendments Act of 2008, proving coverage is not easy for many conditions.

## Conclusion

Taken individually, but even more so together, these reforms would reduce age discrimination against older workers, in particular age discrimination in hiring, which can sharply limit the ability of older workers to transition to jobs more compatible with their age, preferences, and health. As such, these reforms would reduce demand-side barriers to older people working longer, helping to meet the fiscal challenge of population aging, and improving financial security in old age. Reducing demand-side barriers from age discrimination would also complement existing and future supply-side reforms intended to encourage working longer, thus increasing the impact of supply-side reforms, and in so doing helping policymakers avoid harsher supply-side reforms that could be punitive for some older people.

It is likely unavoidable that we will have to adopt additional supply-side policies that induce older people to work longer than they might like to. But it seems inarguable that we should try to get as much mileage as we can from policies that weaken barriers that age discrimination poses to those already trying to work longer, as well as barriers to making our supply-side reforms as effective as possible.

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