

HOW DO AGE DISCRIMINATION LAWS AFFECT OLDER WORKERS?

By Joanna N. Lahey*

INTRODUCTION

The federal Age Discrimination in Employment Act (ADEA) prohibits age-based discrimination against older workers through hiring, firing, layoffs, compensation and other conditions of employment. The law covers most workers age 40 and older in firms with 20 or more employees. The question is whether the ADEA and similar state laws have helped or hurt older workers. On the one hand, the legislation may have prevented companies from unfairly dismissing older workers. On the other hand, the fear of lawsuits may have dissuaded employers from hiring older workers. If so, the law would benefit “insiders” who already have jobs but harm “outsiders” seeking employment. This *brief* discusses the history, mechanics, and impact of age protection laws in the United States. It summarizes previous research and presents new findings using data from the *Current Population Survey*.

HISTORY OF THE ADEA

Explicit age discrimination in the workplace was relatively common until recent decades. For example, in the first half of the 20th century, job advertisements often specified the age of prospective applicants, and firms frequently set formal age limits for hiring or promotion. In addition, less than 30 years ago, mandatory retirement was a fact for most professions.

Concern over the economic and social costs of broad-based age discrimination gradually led to legislative action. By 1960, several states had adopted age discrimination laws. In 1965, a U.S. Department of Labor report assessing the need for federal legislation concluded that age limits upon new hires hurt the rights and opportunities of older workers.¹ The report argued that age discrimination was based on stereotypes unsupported by fact, that arbitrary removal of older workers was generally unfounded, and that performance of older workers was at least as good as that of younger workers. In addition to the negative impact on older workers, the report concluded that

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age discrimination hurt the economy by keeping productive workers from producing. Similar arguments are still heard today.

In the wake of the Labor Department report, the federal government enacted the Age Discrimination in Employment Act (ADEA) in 1967. The ADEA prohibited age-based discrimination against most people aged 40-65 in firms with 20 or more workers.² It passed with little controversy — only four House members and seven Senators voted against it.³ In 1978, Congress extended the protected age group to 40-70 and eliminated mandatory retirement for most federal employees. In 1979, the Labor Department gave administrative responsibility for enforcing the ADEA to the U.S. Equal Employment Opportunity Commission (EEOC), which increased resources for enforcement.⁴ The ADEA was also strengthened in the 1978 amendment by a provision allowing those bringing lawsuits based on age the right to a jury trial. Juries are more likely than judges to find for the plaintiff than for the defense in these cases.⁵ Finally, in 1986, Congress amended the ADEA to eliminate the upper limit on the protected age range, effectively ending mandatory retirement for all.⁶

INFLUENCE OF CASE LAW ON THE ADEA

Case law has affected the interpretation of the ADEA by addressing two major points of contention: 1) whether or not disparate impact cases should be allowed; and 2) who bears the burden of proof. Disparate impact and disparate treatment cases involve whether a policy impacts a protected group differently than the unprotected group. A common example in the gender literature would be a height requirement that has a disparate impact on women, who are shorter than men on average. For age, these questions usually involve decisions based on seniority or wages, for example, firing those who have the highest salaries or who have been with the firm the longest. Burden of proof cases generally revolve around the question of whether the plaintiff has to prove that a policy was intentionally discriminatory, or whether the defendant has to prove that the policy had a bona fide business rationale.

**THE ADEA MAY HELP “INSIDERS” WITH JOBS,
BUT HURT “OUTSIDERS” SEEKING JOBS.**

In the 1971 case of *Griggs vs. Duke Power Co.*, the Supreme Court decided that intelligence tests that had a negative disparate impact on African-Americans could not be used for employment purposes unless the company could show that the tests were directly related to the specific jobs at hand. Thus the burden of proof was shifted to the employer in cases of disparate impact. In 1976, *Mastie vs. Great Lakes Steel Corp.* specifically allowed employers to look at wages and benefits in firing decisions as long as decisions are made on an individual basis and not across the board. However, in 1987, *Metz v. Transit Mix, Inc.* determined that replacing an employee based on cost of employment could violate the intent of the ADEA. In 1993, the courts shifted again and *Hazen Paper Co v. Biggins* found that although making firing decisions based on age stereotypes was not allowed, making firing decisions based on seniority was. Most recently, the Supreme Court has determined in *Smith v. City of Jackson* that older workers can sue in federal court over claims of disparate impact.

ADEA PROCEDURE

The procedure for filing a claim under the ADEA differs between states with and without their own age discrimination laws. Because the EEOC has a large backlog of cases, it rarely prosecutes claims itself. Instead, if a state has its own age discrimination statute, which today includes most states, then the ADEA requires the claimant to file with the state Fair Employment Practices (FEP) office within 300 days. In states without statutes, the claimant must file with the EEOC within 180 days. The EEOC can either dismiss the claim, at which point the claimant may pursue a civil action in court, or the EEOC can seek to settle or mediate. If the settlement or mediation is unsuccessful, the EEOC can then sue, or if it chooses not to sue, the claimant may sue.⁷ Over 95 percent of employment discrimination cases are brought by private attorneys, not the EEOC.⁸

Awards are limited to “make whole” status and lawyers’ fees, that is, the award returns the plaintiff to where he would have been had he not been the subject of discrimination. These awards include hiring, reinstatement or promotion, back pay and restoration of benefits, and lawyers’ fees. Unlike race cases cov-

ered by the Civil Rights Act, additional damages are not awarded except in cases involving willful violation of law, and these are limited to twice the amount of actual damages.⁹

WHO USES THE ADEA?

The majority of people who sue under the ADEA are white, male, middle managers or professionals over the age of 50, a point at which employers may perceive workers as less attractive than their younger counterparts.¹⁰ At the beginning of EEOC enforcement, 14 percent of claimants were women. By 2002, this number had risen to 35 percent.¹¹ Women may not be as likely to sue under the ADEA because historically they have had lower wages than men so they do not stand to gain as much from an ADEA lawsuit.

Employment termination in the form of wrongful discharge and involuntary retirement, not differential hiring, is the basis for most suits.

For example, 31 percent of cases brought under the ADEA before 1981 involved involuntary retirement.¹² Laid-off older workers may use these laws as a sort of insurance against labor market fluctuations. One study found that employment discrimination cases filed during recessions are more likely to settle after firing and are less likely to be won by plaintiffs than those filed when the economy is strong.¹³ Alternatively, when economic times are good, people encounter less discrimination and seek remedies outside the legal system.

Employers win most age discrimination cases fought in court. It is likely that when the plaintiff has a strong case the company will choose to settle out of court. Government-initiated cases also have succeeded more often than individual cases.¹⁴ Again, this difference could be because the government only chooses to initiate lawsuits where the outcome is likely to be in favor of the plaintiff.

DOES THE ADEA HELP OR HURT OLDER WORKERS?

The ADEA and similar state laws can either help or hurt older workers by affecting employer decisions on firing, hiring and retirement incentives. First, a firm affected by these laws will be unlikely to fire an older

worker outright for fear of a lawsuit. However, it is very difficult to prove or even detect discrimination in hiring, and thus employers may choose not to hire older workers who will be difficult to fire.¹⁵ Finally, because the line between unemployment and retirement blurs for older workers, firms that wish to avoid being sued may rely on retirement incentives for these workers (rather than fire them outright), thus decreasing the employment of older workers.¹⁶ On first examination, increasing retirement incentives seems to benefit both the workers and the company. However, if the incentives are coupled with a greater threat of layoffs, then the resulting increase in retirement may not be entirely voluntary. Because it is difficult for older workers to find new employment, the possibility of losing one's job without the retirement package is a worse prospect for older workers than for younger workers.¹⁷

For older workers who are not induced to leave by retirement incentives, evidence suggests that the end of mandatory retirement in 1986 and 1994 has

contributed to longer careers. One study looks at the shift of mandatory retirement to age 70 in 1978 and its end in 1986 using imputed probability of being covered by mandated retirement and finds that the labor force participation of workers age 65 and older increased by 10 to 20 percent in 1986.¹⁸ Another study shows that the abolition of retirement for college professors in 1994 reduced retirement for those aged 70 and 71.¹⁹

As noted above, significant changes in the late-1970s affected the legal environment for older workers. In 1978, the publicity that accompanied the expansion of the ADEA raised the profile of age discrimination as an important public concern. And the additional resources that the ADEA received in 1979 made it easier to enforce the law. Therefore, it is useful to compare the impact of age discrimination laws before and after this period.

IMPACT OF AGE DISCRIMINATION LAWS BEFORE 1978

Before 1978, state age discrimination laws may have helped older workers in general. One study finds a small positive effect from the introduction of these laws and of the federal ADEA.²⁰ It shows that employment increases for older workers in the protected

*AGE DISCRIMINATION LAWS RECEIVED
REAL TEETH IN THE LATE 1970S.*

age range and decreases for those older than the protected range. The study does not find an increase in hiring of protected workers.²¹

The federal law and state laws could have had only a modest effect before 1978 for a number of possible reasons. One reason is that people may not have known about them. The 1978 law passed with much more publicity than earlier laws had. Additionally, many people may not have used the law before 1978 because Social Security and pension incentives and social norms of the time encouraged retirement at exactly age 65.²² Because everyone expected workers to leave at age 65, firms could plan around that time period and just wait out a worker who cost the firm more than he produced. A survey of employers conducted in the 1980s found that the ADEA had little effect on the retirement rates in their companies because most people retired before age 65 anyway.²³ Today Social Security rules have changed so that they do not penalize work as much, and people are both living longer and will need to work longer due to pressure on the retirement income system.

IMPACT OF AGE DISCRIMINATION LAWS SINCE 1978

In order to determine the impact of age discrimination laws since 1978, this study uses the *Current Population Survey* to explore the ADEA's impact on employment levels, hiring, firing, and retirement for white male workers.²⁴ It distinguishes between states with and without their own age discrimination laws. The assumption is that it is easier for workers to sue, and thus to enforce age discrimination laws, in states that have their own laws than in states with no laws.²⁵

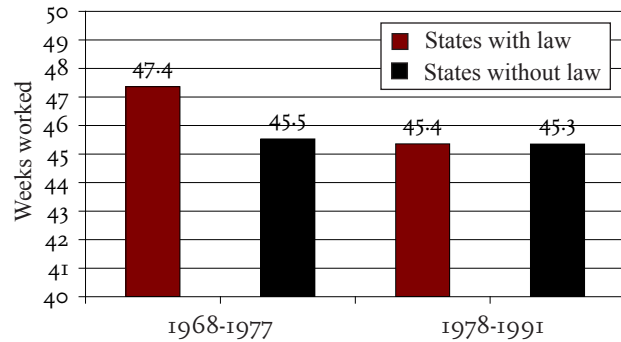
The basic equation used is similar for the various analyses. For example, a simplified form of the equation addressing employment levels — defined as the number of weeks worked — is:

$$\text{Weeks worked} = f(\text{over } 50 * \text{law, age, state, law, time, demographics})$$

The first coefficient of interest is an interaction term in which “over 50” refers to workers over age 50 and “law” refers to states with age discrimination laws. Other terms are as follows: “age” is a worker’s age; “state” is a worker’s state of residence; “law” indicates whether a state has its own age discrimination law; “time” is the year of the observation; and “demographics” are control variables such as marital status and education.²⁶

Simply looking at the descriptive statistics shows that employment of white men over age 50 has dropped since 1978.²⁷ The drop is greater for men

FIGURE 1. AVERAGE WEEKS WORKED PER YEAR BY WHITE MEN OVER THE AGE OF 50, PRE- AND POST-1978

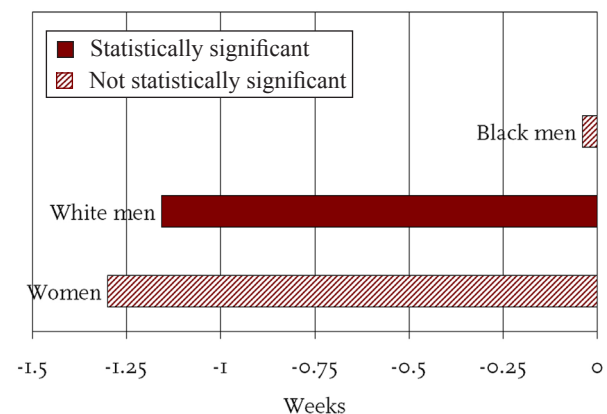


Source: Author's calculations from U.S. Bureau of the Census (1969-1992).

in states with their own age discrimination laws (see Figure 1). Results from the equation described above tell a similar story; they show that older male workers in states with laws worked between 1 and 1.5 fewer weeks per year than those in states without laws. On average, older white men in states with laws work 26.7 weeks per year and all workers in those states work 45.5 weeks per year for a difference of 18.8 weeks. Given that the presence of the age discrimination laws is associated with 1-1.5 fewer weeks of work, the laws account for 5-8 percent of the gap between older workers and the general population (i.e. $1/18.8 = 5$ percent and $1.5/18.8 = 8$ percent).

In contrast to the impact on white men, age discrimination laws had no significant effect on either black men or on women (see Figure 2). Black men

FIGURE 2. CHANGE IN WEEKS WORKED IN STATES WITH LAWS, BY RACE AND GENDER, 1978-1991



Source: Author's calculations from U.S. Bureau of the Census (1979-1992).

have greater protection under the Civil Rights Act than the ADEA, so employers may be more concerned about a lawsuit on civil rights, rather than age discrimination, grounds. Older women are less likely to sue and they tend to have weaker attachment to the labor force, which means that they may leave a job before a lawsuit becomes an issue.

The results also show that age discrimination laws have had a statistically significant negative impact on hiring — older workers in states with laws are 0.2 percentage points less likely to be hired than workers in states without laws. And retirement has increased for these workers — they are 0.3 percentage points more likely to consider themselves retired than are workers in states without laws.

Not all workers are equally hurt by the laws; because the laws do seem to decrease firing, “insiders” may gain some rent. Job separations for older workers with stronger protection have dropped, though not at a significant level. It is likely that outright firing has decreased for these workers, but retirement incentives have increased.

CONCLUSION

While the intention of the ADEA is to prevent age discrimination in the workplace, in practice it may have only limited benefits and significant costs. Although the laws as they currently exist provide a boon for older men who remain in their jobs and are more difficult to fire, they harm those seeking new employment.

What can be done to combat this problem? It would be difficult to go back to the world prior to the ADEA, with hard age limits in advertisements and mandatory retirement strictly enforced. Even removing the federal law and placing the responsibility for enforcement at the state level would be unlikely to change how firms respond to age laws at this point.

One possibility to combat age discrimination at the hiring level would be to perform professional or governmental audits on hiring or to bring forth highly publicized class action lawsuits combating hiring discrimination. Publicity surrounding such acts could make firms less likely to feel that they could discriminate in hiring decisions with impunity.

ENDNOTES

- 1 U.S. Department of Labor (1965).
- 2 Firms are exempt if they can prove a bona-fide occupational qualification (BFOQ) that is directly related to age (for example, an acting position), or if the position is a high-salaried policy-making position.
- 3 Friedman (1984); and Halpern (1978).
- 4 Neumark (2001).
- 5 Hersch and Viscusi (2004).
- 6 Exceptions to this elimination included BFOQs and cases where the existence of job tenure would impose an undue hardship on the employer, such as for professors. Mandatory retirement was phased out for tenured positions by 1993.
- 7 Neumark (2001).
- 8 Gregory (2001).
- 9 Gregory (2001); Levine (1988); and O'Meara (1989).
- 10 Schuster and Miller (1984) found that 55 percent of plaintiffs they studied from 1968-1981 were aged 50-59. An EEOC study looking at different data from 1979-1983 found similar results by age (O'Meara 1989). Psychology studies suggest that firms most value workers in their 30s and chief executive officers surveyed have responded that, on average, age 43 represented the "peak productivity" year (Munk 1999; and Nelson 2002).
- 11 Donohue and Siegelman (1991); Gregory (2001); Schuster and Miller (1984); and National Partnership for Women and Families (2004).
- 12 Schuster and Miller (1984).
- 13 Siegelman and Donohue (1995).
- 14 Schuster and Miller (1984).
- 15 Donohue and Siegelman (1991); and O'Meara (1989).
- 16 For more on the blurring of unemployment and retirement, see Choi (2002).
- 17 Lahey (2005).
- 18 von Wachter (2002).
- 19 Ashenfelter and Card (2002).
- 20 Adams (2004).
- 21 As part of the new study described in this *brief*, the author found that age discrimination laws had no negative effects on labor market outcomes before the 1968 federal law was enforced (Lahey 2006).
- 22 Halpern (1978).
- 23 LaRock (1987).
- 24 For the full version of this study, see Lahey (2006). The *Current Population Survey*, administered jointly by the U.S. Bureau of Labor Statistics and the U.S. Bureau of the Census, provides annual information on labor force participation and earnings.
- 25 The rationale for this assumption is that, because of the EEOC backlog for addressing claims at the federal level, workers in states with their own age discrimination laws are more likely to be affected by the federal ADEA law. Under this law, workers in states with laws have almost twice as long to file. Additionally, states may be able to process claims more quickly than the EEOC.
- 26 Standard errors are adjusted to account for correlation between observations within states.
- 27 The period studied was 1978-1991. The analysis is limited to 1991 because the introduction of the Americans with Disabilities Act provides new protection to older workers.

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