

March 2012

Employer Strategies for Responding to an Aging Workforce

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Executive Summary

According to a Government Accountability Office (GAO) report issued in 2006, the number of workers over age 55 is projected to increase significantly over the next 20 years, with this demographic group projected to comprise as much as one-fifth of the nation's workforce by 2015. The unprecedented aging of the world's population and the strong correlation between aging and disability challenges many institutions, labor markets, and public pension programs.

The John J. Heldrich Center for Workforce Development at Rutgers, The State University of New Jersey issued a subcontract to Cornell University, ILR School, Employment and Disability Institute, to conduct research to explore how public- and private-sector employers are preparing for an increasingly older workforce that is likely to be a workforce with more disabilities. This work has been conducted on behalf of the NTAR Leadership Center, a technical assistance and research center housed at the Heldrich Center and supported by the U.S. Department of Labor's Office of Disability Employment Policy.

In meeting the objectives associated with this project, the research team reviewed select recent academic, legal, and related literature on public- and private-sector employer strategies to prepare for an aging workforce. The team also interviewed national experts and thought leaders in the field of employer strategies for addressing an aging workforce, as well as specific public- and private-sector employers recommended by the national experts. The interviews contained questions about promising employer strategies to recruit, retain, train, and promote and enable bridges to retirement for older workers with disabilities. The report also provides numerous examples of successful public- and private-sector retention initiatives that suggest a needed policy platform to facilitate replication.

This literature and legal review, along with the recommendations gathered through individual interviews with leading, national experts on the aging workforce, gives credibility to the dialogue currently under way in Congress and in the media about the viability of the Social Security system given the large number of retired Americans and the number projected to retire within the next 10 to 20 years. Experts recommend that both public and private research efforts be directed to investigate the impact of changes in public policy (i.e., increasing the minimum retirement age, providing incentives to older workers to remain employed longer, and offering employers payroll incentives to hire and retain older workers). Understanding the high correlation between aging and disability, experts also suggest examining and documenting the cost, provision, and efficacy of accommodations from the business perspective.

Introduction

Scope of Work

The John J. Heldrich Center for Workforce Development at Rutgers University issued a subcontract to Cornell University, ILR School, Employment and Disability Institute, to conduct research to explore how public- and private-sector employers are preparing for an increasingly older workforce that is likely to be a workforce with more disabilities. Information and evidence to complete this review was gathered by:

1. Conducting a review of recent academic literature and other published reports around public- and private-sector employer strategies to prepare for an aging workforce, including the use of disability management strategies;
2. Interviewing national experts and thought leaders in the field of employer strategies for addressing an aging workforce, including employer and human resources associations (the Society for Human Resource Management [SHRM], the U.S. Chamber of Commerce, and the Conference Board), workforce development, education and training, and aging and disability research and advocacy organizations (American Association of Retired Persons [AARP], Virginia Commonwealth University [VCU], Work and Families Institute, FedExExperience/Partnership for Public Service, Georgetown University Workplace Flexibility 2010, and Corporate Voices for Working Families); and
3. Interviewing specific public- and private-sector employers recommended by the national experts regarding promising employer strategies to recruit, retain, train, and promote and enable bridges to retirement for older workers with disabilities.

A legal review was also conducted, focusing on the nine U.S. Supreme Court cases decided within the past decade that affect the Age Discrimination in Employment Act (ADEA). It is notable that the Supreme Court decided so many cases involving age discrimination within a relatively short and recent period of time.

Objectives/Goals

The goals of this research report were to:

1. Explore how public and private employers are preparing for an increasingly older workforce likely to be comprised of more persons with disabilities;
2. Identify promising business and industry practices on all aspects of recruiting, hiring, retaining, and accommodating older workers and workers with disabilities; and
3. Develop short- and long-term recommendations to address the gaps in research, policy, and practices that would support the adoption of employer strategies to hire and retain an older workforce with disabilities.

Summary of Findings

Public and Private Employer Concerns Regarding the Aging Workforce

This section reviews recent labor market demographics, trends in the employment of older workers, and challenges and concerns employers have raised regarding the aging workforce. It also looks at the limited extent to which employers have undertaken preparations for responding to the aging workforce.

The Demographic Landscape

Employment among people aged 55 and older has increased to an all-time high of 40.4 percent (Bureau of Labor Statistics, 2010). Data from the U.S. Census Bureau suggest that, by 2016, one-third of the total U.S. workforce will be age 50 or older, and will increase to 115 million by 2020 (U.S. Census Bureau, 2010). The growing number of older people, in concert with the trend to continue working at older chronological ages, is resulting in a shift in workforce demographics. In 2003, 13 percent of the workforce was age 55 or older, and this was projected to increase to 17 percent and 19 percent in 2010 and 2050, respectively (Bureau of Labor Statistics, 2010; Fullerton & Toossi, 2001). This increase comes at a time when the entry-level workforce is in rapid decline, and the age of retirement is increasing from 65 to 70 years (Bureau of Labor Statistics, 2010). During this same time period, labor force participation is expected to decline or remain the same in the 16 to 54 age group, with the growth in the labor force coming from the increased participation of persons age 65 and older (Eyster, Johnson, & Toder, 2008). These demographic trends are even more pronounced in Europe and Japan (Nyce, 2007).

As the workforce ages, the incidence of disability rises (Bruyère, 2006; Kampfe, Wadsworth, Mamboleo, & Schonbrun, 2008). The strong correlation between age and disability is clearly demonstrated in the findings of a University of Wisconsin, Trace Center study (2001) that shows that the incidence of disability among working-age Americans is: 9.5 percent for workers in the 18- to 24-year-old range, 20+ percent for workers in the 45- to 54-year-old range, and approximately 42 percent for workers in the 65+ age range. Older people are also more likely to have multiple disabling conditions and to have chronic disabling conditions (Kampfe et al., 2008).

Research shows that employers and maturing workers may benefit from strategies designed to keep people with disabilities on the job (Mitchell, Adkins, & Kemp, 2006). Many common accommodations for employees with disabilities would also be useful in retaining older workers. Although many older people are likely to have one or more conditions associated with a disability, these conditions do not prevent them from working (Kampfe, Harley, Wadsworth, & Smith, 2007). However, the perception that such conditions are age related, and perhaps a natural and unavoidable result of aging, has been found to deter employees from requesting accommodations, and to negatively influence the decision to provide accommodation (McMullin & Shuey, 2006). Job retention can be achieved by providing accommodations and other interventions to prevent early retirement.

Older Workers and Engagement

Several studies have found that a majority of older workers indicate that they plan to work past the traditional retirement age. This trend can be attributed, in part, to the reduced value of retirement portfolios/income and improved health/consequent increased life expectancy, and is expected to continue (Administration on Aging, 2007). But older workers also work because they want to — because they are highly engaged in their work,

satisfied with their jobs, and committed to their organizations (Galinsky, 2007). Pitt-Catsoupes and Matz-Costa (2009) define “engagement” as “a positive, enthusiastic, and affective connection with work that motivates an employee to invest in getting the job done, not just ‘well’ but ‘with excellence’ because the work energizes the person” (p. 7), and find that older workers have consistently higher levels of engagement. Engaged employees use less health care, take fewer sick days, are more productive, have longer tenure, and create stronger customer relationships (Pitt-Catsoupes and Matz-Costa, 2009).

New perceptions about the aging workforce demographic are leading the way to viewing this age cohort as a more productive and resourceful population than was perceived in the past (Meyers & Degges-White, 2007). In recent years, the traditional view of retirement as a total cessation of work has evolved to include employment opportunities with variability as the foundation of the employment choices due to older adults’ desire and need to work (Kampfe et al., 2007). Terms such as successful aging, resourceful aging, healthy aging, and positive aging are now being used rather than terms associated with decline (Angus & Reeve, 2006). In Europe, where historically there has been pressure for older workers to exit the workforce early, enforced with mandatory retirement policies in some countries, there is growing concern about the need to reverse this trend (Taylor, 2007).

Loss of Expertise: The “Brain Drain”

By 2020, 25 million Baby Boomers, who make up more than 40 percent of the U.S. labor force, will be exiting the workforce in large numbers and leaving many jobs to be filled. With their departure, the work characteristics that define the Baby Boomer generation — results-driven, ambitious, idealistic, competitive, optimistic, and people-oriented — may be lost unless companies creatively develop strategies to simultaneously retain older workers and transition their knowledge to younger workers (Morton, Foster, & Sedlar, 2005). These workers will also take decades of accumulated organizational knowledge with them, and this “brain drain” could result in the loss of key information about customers or practices that could be devastating to organizations (Pitt-Catsoupes & Matz-Costa, 2009).

In an article, “Recognizing the Value of Older Workers,” that appeared in the November 2011 issue of the *AARP Bulletin*, the University of Massachusetts Medical School reported losing 10 percent of its employees over 50 years of age every year. To address this concern, the Medical School implemented several strategies to retain older workers and avoid the loss of institutional knowledge over the next 10 years. The loss of expertise through retirement is further compounded by the projected job change patterns among current workers. Estimates show that Boomers (46- to 64-years-old) will have four to six jobs over their working life, Gen X’s (30- to 45-years-old) will have 10 to 12 jobs over their working life, and members of Gen Y (15- to 29-years-old) will change jobs every one to two years. The projected high rates of turnover are cause for serious concern among businesses that will see their profits significantly reduced by the costs associated with filling vacant positions. According to a recent article by Allen (2010), the cost of turnover ranges from 25 percent to 250 percent of the position’s annual salary, depending on the skill requirements of the job.

In interviews conducted with recognized national experts on this subject, it was found that companies are struggling with the large numbers of older workers who are retiring, and that the brain drain is a matter of concern to many. Older workers are individuals who, for the most part, are in senior staff/management positions, and whose retirement represents a tremendous loss of institutional memory and knowledge of proprietary practices. Companies are increasingly using workplace flexibility as an incentive to hire and retain the best talent, including older workers. While the loss of experienced staff is a challenge that all companies must address, technology has improved the workplace and the work environment by enabling workers of all ages to complete work from other locations (Giandomenico, personal communication).

Perceptions of the Older Worker

Evidence shows that ageism, stereotypes, and misinformation about mature persons continue to be issues across all segments of society, including the workplace. Dennis and Thomas (2007) cite a series of studies by AARP that identify the perceptions held by managers about employees age 50 and older. These studies revealed that the positive perceptions characteristic of older workers held by managers include their experience, knowledge, work habits, attitudes, commitment to quality, loyalty, punctuality, even-temperedness, and respect for authority. These same studies also reveal some negative perceptions held by managers about the mature worker: inflexibility, unwillingness or inability to adapt to new technology, lack of aggression, resistance to change, complacency, and the presence of physical limitations that increase the cost of health insurance. Specifically, they cite a 1995 AARP study that found that the traits most admired about older workers (experience, judgment, commitment to quality, low turnover, good attendance, and punctuality) were not highly valued by employers. While the results of these findings may appear confusing or contradictory, they clearly focus on the precise and delicate balance between positive and negative perceptions that, depending on the industry or work environment, may affect a manager's decision to hire, retain or advance an older worker. According to James, Swanberg, and McKechnie (2007), additional obstacles result from perceptions among younger co-workers and managers that older employees are not as capable as younger employees.

Employers cite the higher compensation (both in wages and the increased cost of health insurance) and the expense required to train older workers in new technologies as obstacles to hiring and retaining older workers (Taskforce on the Aging of the American Workforce, 2008). Other negative stereotypes include the belief that older workers produce lower-quality work than younger employees, that they are less productive, and that they are resistant to change (Taskforce on the Aging of the American Workforce, 2008). A belief among employers and managers is that older workers are not current on required skill sets and that their skills are dated. Further, older workers may not appear to be as connected to social media, which makes it more challenging for employers to reach them. Another concern is the stereotype that older workers are less mobile than younger workers because they have established roots in their community and equity tied up in home ownership (Miranda, 2011, personal communication).

Employer Responses to the Aging Workforce

Despite the wealth of information regarding the aging of America's workforce, a Society for Human Resource Management study (2003) shows a majority of companies surveyed have made no special provisions for older workers. This finding illustrates the lack of attention to the critical mass of workers whose impending retirement will dramatically affect business productivity and profits and points to the need to develop strategies that will encourage older workers to remain in the workforce. This finding was substantiated by the National Study of Business Strategy and Workforce Development, conducted by the Sloan Center on Aging and Work (Pitt-Catsouphes, Smyer, Matz-Kosta, & Kane, 2007). The study found that 25.8 percent of employers stated their organizations had not analyzed their workforce demographics at all, while only 12 percent had done so "to a great extent." Over a third (36.7 percent) had made no projections about retirement, 29.5 percent had done so "to a limited extent," 24.1 percent felt they had done this "to a moderate extent," and only 9.7 percent had done so "to a great extent." Less than one-third (30.7 percent) of the employers surveyed had adopted practices to recruit employees of diverse ages to a "great extent," while 16.5 percent had not done so at all (Pitt-Catsouphes, Smyer, Matz-Costa, & Kane, 2007).

Potential Legal Liabilities

This lack of preparation for an aging workforce, when combined with the negative perceptions held by younger workers about their older co-workers, can greatly influence workplace dynamics and may contribute to an increase in age-related discrimination lawsuits (Bjelland, Bruyere, von Schrader, Houtenville, Ruiz-Quintanilla and Webber, 2010). Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA) charges have remained relatively constant, at about 4.3 ADEA claims per 10,000 people in the protected class and 81.6 ADA claims per 10,000 people with disabilities. As the relative share and participation rates of older workers, with and without disabilities, in the workforce increases those numbers can be expected to rise. Termination-related issues make up the majority of both ADA and ADEA filed charges, suggesting that companies should pay heed to the possibility that their policies and practices are pushing older workers out of the workforce. Often, simple accommodations can address the needs of these workers, but the failure to provide reasonable accommodation is the second most common issue cited in these charges (Bjelland et al., 2009). This finding is consistent with the results of an earlier study by McMahon, Shaw, and Jaet (1995) citing the large proportion of ADA claims were due to age-related issues regarding reasonable accommodations for individuals already employed.

Employer Practices to Respond to the Aging Workforce

This section describes practices that organizations might use, or are actively using, to respond to the issues raised in the previous section. It describes methods recommended by experts and researchers to attract and retain older, experienced workers and provides specific examples that have been successfully implemented by employers. These strategies include methods for conducting workforce assessments, disability management, retention, training, workplace flexibility, and reducing the likelihood of discrimination. Several noteworthy international examples are included.

Workforce and Workplace Assessments

It is important for employers to begin the older worker policy development process with a firm understanding of the situation within their organization. Assessment of the number of workers approaching retirement age and the potential impact of the loss of their knowledge, expertise, and productivity is vital (Hursh, Lui, & Pransky, 2006).

To help employers understand the state of their own workforce, the employer resource section of the AARP Web site offers a workforce assessment tool¹ for human resource managers. This tool allows companies to:

1. Assess how retiring workers will affect their organization,
2. Address skill shortage challenges due to staff attrition,
3. Create a work environment that attracts qualified workers of all ages,

4. Manage a multi-generational workforce, and
5. Build an employer brand that attracts and retains top talent.

To respond to the findings of any workforce assessment, companies must implement measures to address the issues identified. According to the Sloan Center on Aging and Work's National Study of Business Strategy and Workforce Development (Pitt-Catsouphes, Smyer, Matz-Costa, & Kane, 2007), companies can take three actions to address the changing age demographics of their labor force:

1. *Recruitment* - Employers should take full advantage of the opportunities to select individuals with specific talents, experiences, and perspectives from diverse age groups. Less than one-third of businesses surveyed for the national study adopted practices to include age diversity in their recruitment strategy. While approximately 25 percent of companies have adopted policies to hire retirees, 52 percent indicated their practice of rehiring retirees in the absence of any formal policy. Competitive benefits are an important component of any organization's recruitment package designed to address both the financial concerns and benefit utilization among older workers.
2. *Engagement* - Employee participation is essential to employee performance. The Sloan Center study cites three critical employee engagement elements: employee participation in decision-making that affects their work; opportunities for employees, of all ages, to develop new skills and competencies; and access to flexible work options are especially important to older workers.
3. *Retention* - More than one-third of the employers participating in the national study stated that they had adopted strategies to encourage aging employees to work past the traditional retirement age. Essential to retaining workers, of all ages, is the organization's ability to recognize the strengths of a multi-generational workforce and the supervisor's ability to manage the dynamics that may occur in a diverse work environment.

In a rapidly changing economic environment, businesses must continually assess the nature of the work to be done, and how this translates to needed workforce skill sets and the technical infrastructure to remain competitive. To effectively utilize its human capital, an organization also needs to understand the nature of its workplace, as well as the composition of its workforce. Changing business practices to respond to environmental economic changes is imperative, yet companies must also look inside to identify areas where attention to workforce needs can maximize productivity to respond to external competition demands. An example is the inevitable changes in the workforce that will occur with aging; a proactive policy and practice response is crucial to the success of retention of seasoned talent. An ergonomic approach to minimizing the gap between job demands and worker capabilities will ensure greater productivity and lower risk of injuries (Perry, 2010). Companies can anticipate the changing needs of an aging workforce through job analyses to target specific activities or work functions that may be modified to accommodate physical or cognitive demands of the work activity (Hursh, Lui, & Pransky, 2006). Employers must be aware of the issues faced by older employees and how to accommodate them.

Assessing workplace accessibility and conducting job analyses, and then making accommodations available to all workers reduces the stigma associated with needing assistance (i.e., electric doors, ergonomic mouse pads, ergonomic office chairs, computer programs, etc.). Employers that integrate universally designed workplaces and implement universal strategies in their policies and practices offer the flexibility needed to address the preferences of workers of all ages. Many companies allow employees to make adaptations to their job roles and responsibilities, which gives the workers the opportunity to demonstrate not only their specific skills but also their preferred work tasks and environments. To achieve this flexibility, businesses can utilize the services of community rehabilitation providers to specifically support workers with disabilities by providing technical assistance employers need to customize positions and capitalize on the strengths and creativity of their workforce (Fesko, 2007). A Customized Employment approach offers many benefits to employers who want to retain older workers, as cited in a National Center on Workforce and Disability/Adult summary report to ODEP (2007):

1. Using Customized Employment strategies can assist employers to retain valuable staff,
2. Customized Employment offers a targeted approach to matching skill sets with a business need, and
3. Customized Employment can assist employers to address specific conditions within their businesses that require attention.

Disability Management

Disability management, in the context of the aging workforce, has been defined as a “collaborative process that utilizes assessment, planning, implementation, communication, coordination, and evaluation in the provision of preventive and remedial services to minimize the impact and cost of disability, to enhance productivity, and to promote maximum recovery and function” (Goodwin, Taylor, Chan, & Currier, 2000). It is well documented that proactive disability management with older workers addresses issues of disability prevention, skill improvement and productivity, and quality of overall work life. The potential benefits for both older workers and employers include longer and more successful participation in the workforce, a reduction in economic and personal costs related to injury and disability, increased productivity and work performance, and a transition from work to retirement that integrates economic and health management issues (Hursh, Lui, & Pransky, 2006).

As mentioned above, McMullin and Shuey (2006) found that when an employer believes a worker’s limitations are due to “natural aging,” accommodation is less likely. Tepas and Barnes-Farrell (2002) suggest that employers will need to improve their ability to assess the impact of aging on workers, and to do this by not thinking of “old age” as disabling in itself, but rather as a set of functional limitations, many of which can be accommodated with good ergonomic redesign or new training. Accommodating these functional limitations has been shown to help retain older workers — research by Burkhauser, Butler, and Weathers (2002) suggests that “workers who were accommodated following the onset of a disability were significantly less likely to apply for SSI benefits within three years.”

Hursh, Lui, and Pransky (2006) report that the following prevention strategies will minimize declines in work performance resulting from age-related physical, cognitive, or sensory disabilities:

1. *Ergonomic design* for older workers can prevent injury/disability and should be individualized;
2. *Job analysis* examining specific functions that result in increased injury;
3. *Assistive technology* devices to increase, maintain, or improve the functional capacity of a worker both low and high tech;
4. *Job accommodations* involving changes to the work site or work process;
5. *Training initiatives* to upgrade and maintain skills; training should provide for multiple, shorter training sessions, mixed training formats (i.e., tell-show-do, direct/immediate application of new skills to current job), small group training formats, extra time and slower pace, distraction-free practice of new skill, link new learning to current work, early error correction, self-paced/directed learning, training environments that minimize noise or provide other accommodations for hearing/vision impaired; and
6. *Wellness and integrated health promotion* such as smoking cessation, exercise, and weight management can lower health care utilization and costs.

Engaging Older Workers Helps Retain Them

Looking at continued employment from the older worker perspective, an international survey identified the following factors that influence older workers' decisions to remain on the job (Barusch, Luptak, & Hurtado, 2009):

1. Employment policies that accommodate the needs of older workers,
2. Laws that prohibit discrimination against older adults in employment,
3. Government incentives for employers to hire older workers,
4. Older people enjoy working,
5. Economic necessity drives older people to work,
6. Employers' preference for keeping or hiring older workers,
7. Public health insurance for older workers,
8. Government training programs for older workers, and
9. Government job referral programs for older workers.

The same survey identified employer unwillingness to hire older workers, the lack of training opportunities for older workers, and the lack of part-time jobs or flexible hours as critical barriers to continued labor force participation (Barusch, Luptak, & Hurtado, 2009).

Workers who do not feel respected or valued have lower levels of engagement. Many of the stereotypes of older workers are negative. Combating those stereotypes by showing respect for the experience and contributions of older workers will be necessary to encourage workers to delay retirement or return to the workforce after retirement. Research has found that older workers identify receiving recognition for their contributions and being treated with respect as the most important human resources practices influencing their decision to remain in the workforce (Armstrong-Stassen, 2006). Older workers want the respect of their co-workers, and want to be valued by their managers and supervisors (Piktialis, 2007).

The Sloan Center on Aging and Work survey of worker engagement (James, Swanberg, & McKechnie, 2007) found that the major drivers of engagement for workers over 55 were similar for both professional and hourly workers; older workers want input into their schedules, flexibility in the workplace, the opportunity for development, to have a job that is a good fit with their skills, and to be treated fairly as compared with younger workers.

Training Needed for Older Workers

One of the major perceptions employers have of older workers is that they are resistant to change, or unable to adapt to new technologies. This highlights the importance of ongoing training targeted at older workers with the goal of keeping their skills and knowledge up-to-date and in line with that of younger workers.

It is well documented that older workers are often denied access to training (Armstrong-Stassen & Templer, 2005) and affirmed by the Sloan Center's national study on this subject. Employers were more likely to report offering on-the-job training and career counseling to early-career and mid-career employees (Pitt-Catsouphes, Smyer, Matz-Costa, & Kane, 2007). Armstrong-Stassen and Templer (2005) also identify three key areas of concern to companies seeking to build training programs relevant and useful to older workers: providing access to training, use of training methods, materials, environments suitable to the aging workforce, and training managers of older workers on effective utilization of older workers' skills and talents.

Training is a critical component of any plan to retain or attract older workers, and a successful training program should (Koc-Menard, 2009a):

1. *Adopt a targeted approach* - Identify workers who would most benefit, identify workers who would like to continue working, and tailor training products and techniques to the needs of older employees.
2. *Renew critical skills* - Build on workplace assessments to ensure that the skills and knowledge the company relies on are being renewed in older workers and transmitted to newer ones.
3. *Offer new challenges* - Older workers may need to be redeployed in new positions, or may desire to spend late-career years developing new abilities, and skill development programs can support these goals.

4. *Integrate training into recruitment* - Organizations can develop learning initiatives for experienced job seekers to train highly qualified candidates who lack specific skills or knowledge.

Workplace Flexibility

Across all the literature surveyed, the most common theme, echoed time and time again, is flexibility. Flexible schedules, flexible work options, and flexible retirement options all help recruit seasoned workers, keep them functional and productive, and encourage their full engagement in the workplace and desire to remain employed. The willingness of business to offer these flexible arrangements is essential to the success of any strategy (Koc-Menard, 2009b).

Flexible work arrangements appeal to older adults who no longer wish to work traditional full-time schedules, either because of additional personal obligations (aging parents, spouses, and grandchildren), worsening health, declining physical energy, or simply a preference to trade some income for more control over their time without giving up paid employment entirely). While many older workers report wanting to extend their work life, many of them also express a wish to move away from the standard nine-to-five, five-day work week (Pitt-Catsouphes & Smyer, 2005). According to Eyster, Johnson, and Toder (2008), “An important benefit of flexible work arrangements is that it enables employees to extend their careers with the same employer or in the same occupation or industry instead of moving to self-employment or to different occupations or sectors where part-time work schedules are more common, i.e., retail.”

Research has documented the strong correlation between aging and disability; likewise, the flexible strategies and techniques to include/retain workers with disabilities and older workers are essentially the same. Workplace flexibility was the subject of a joint forum conducted by the U.S. Department of Labor’s Office of Disability Employment Policy and the Women’s Bureau (2011) at which the range of flexible work arrangements was expanded to include “flexibility around task,” a technique used to customize employment for employees with disabilities. This strategy offers a blend of services and supports designed to increase employment options for job seekers with complex needs.

The Sloan Center on Aging and Work also offers a perspective on workplace flexibility, and categorizes flexible work arrangements as follows (Pitt-Catsouphes, Matz-Costa, & Besen, 2009):

1. *Work hour flexibility* (e.g., reduced hours, job sharing, phased retirement, part-year);
2. *Work schedule flexibility* (e.g., flex schedule, annualized hours, compressed work week);
3. *Career flexibility* (e.g., on/off ramps that include leaves, reduced responsibilities, job change/occupation shift, and phased retirements);
4. *Flexibility of place* (e.g., remote work, work from more than a single location);

5. *Flexibility in the employment relationship* (e.g., project work, consultant, temporary work); and
6. *Benefit flexibility* (e.g., cafeteria plan, benefits during retirement, etc.).

Examples of the wide range of workplace flexibility strategies include:

WORK HOUR FLEXIBILITY

Part-time employment helps employees balance demands of work and personal life. According to AARP (2003), 7 in 10 workers who have not yet retired plan to work into their retirement years or never retire. While older workers have many reasons to want to work part time, a potential issue is the impact on pension, health, and other employee benefits (Eyster, Johnson, & Toder, 2008).

Job sharing often benefits employers from the enhanced skill sets that often result when two people share a single job. It requires clear delineation of work responsibility as well as frequent communication among the job sharers and their manager. If one job sharer leaves, the other may be forced to return to full-time work or lose his/her job unless another suitable job sharer can be found. Job sharing is another important retention strategy (Eyster, Johnson, & Toder, 2008). Several examples of successful job sharing experiences that make it possible for valued older employees to retain their jobs with public- and private-sector employers include:

1. *Abbot*. Older workers are encouraged to use job sharing in conjunction with other flexible work options so that they can stay on the job longer and better achieve a work-life balance.
2. *Unified School District of Wichita, Kansas*. District offered a job-sharing program for teachers 55+ to avoid laying off teachers with less seniority. The older workers sharing jobs work half time, but maintain full-time pension contributions.
3. *Lancaster Labs*. Offers both formal and informal job-sharing opportunities and arrangements to all employees on a temporary or permanent basis ranging from a few days per week to a few hours per day. The company encourages older workers to participate in this job-sharing program and provides opportunities for more than two employees to share a job if that arrangement fits into a 40-hour workweek.

WORK SCHEDULE FLEXIBILITY

Flexible work schedules (private sector) - Flexible schedules allow workers to determine the time of the workday (flextime) or the workweek or longer periods (compressed work schedules) with the consent of their employer. Flexible work schedules are more common among whites and Asian Americans than among African Americans and Hispanics, and more prevalent in managerial and professional occupations and among sales and office workers than in construction, natural resource industries, and transportation (Eyster, Johnson, & Toder, 2008). According to a Bureau of Labor Statistics report (2005), while more than 25 percent of workers had flexible work schedules, only about 10 percent were enrolled in formal, employer-sponsored flextime programs. The following examples of flexible schedules in the private sector are drawn from AARP's Annual Older Worker Employer Awards (2007):

1. *Volkswagen of America*. Flextime, compressed work schedules, job sharing, and telecommuting; retirees are hired back for part-time jobs, consulting, and/or short-term assignments.
2. *Mercy Health System*. Weekend-only work, work at home opportunities, and seasonal work that allow employees to take extended leave.
3. *Lee Memorial Health System*. All of the above flexible schedules plus phased retirement, and seasonal-months-off program up to six months during slow season for full- and part-time employees; allows employees to work reduced schedules for up to six months without losing benefits (Eyster, Johnson & Toder, 2008).

Alternative work schedules (public sector) - As a public-sector employer faced with large numbers of potential retirees, the federal government Office of Personnel Management (OPM) has implemented alternative work schedules, comparable to those offered by private-sector employers, which facilitate flexible and compressed work schedules. This strategy allows employees to fulfill their 80 hour/2-week work commitments in fewer than 10 days by working more than 8 hours per work day (Eyster, Johnson, & Toder, 2008, p. 10).

CAREER FLEXIBILITY

Changing jobs within the company - Some employers allow employees to change jobs within the company. As a way to facilitate shifts to part-time work, this option can also offer new opportunities to older employees who have become less motivated in their existing position and are seeking new challenges or change to positions that are better suited to their changing capabilities or preferences. Companies that implement job change as a retention strategy include:

1. *Dow Chemical Company*. Allows older workers to move into less intense positions that involve mentoring younger workers or teaching courses. This is designed for older workers who may be required by government regulations to retire from a particular job to move into different positions within the company rather than leave.
2. *Duke Power*. Allows employees, with supervisor approval, to swap jobs with others at the same pay scale.
3. *Bell Canada and CNA Insurance*. Allow workers to swap jobs and allow employees with sufficient tenure to do so without manager approval.
4. *Deloitte Consulting*. Senior Leaders program allows employees, nominated by a committee, to redesign their role in the company and customize a new, second career within the firm. This work redesign usually includes flexible hours, alternative work locations, and special projects (Eyster, Johnson, & Toder, 2008).

FLEXIBILITY OF PLACE

Work from home/telework - Eyster, Johnson, and Toder (2008) report that in 2006, "More than 28.7 million private-sector workers worked from home at least one day/month." Arrangements allow employees to work either from home or from teleworking centers closer to home than their normal workplace. The main benefit is that

it saves commuting time and is a way of accommodating workers with disabilities and persons who might need to perform personal chores or schedule appointments during the day. People working from home must have dedicated workspace with telephone, computer, and Internet access. Full-time telework allows employees to complete most or almost all of their duties outside a traditional office setting. This group often includes people who live far from the office. Part-time telework is work from home on a regularly scheduled basis, while episodic telework includes work from home periodically to complete specific projects or to accommodate short-term personal needs. Examples of telework practices in specific companies follow:

1. Companies offering telework include *Quest Diagnostics, IBM, and ARO, Inc.* (Eyster, Johnson, & Toder, 2008).
2. An example of telework in the private sector includes a strategy implemented by *AT&T's* health and safety group to adopt a virtual office policy that permitted workers to work from remote locations. The success of the virtual office led AT&T to expand its policy to include management staff, which has now grown to 41 percent of employees working from home two days per week. AT&T reports the advantages to this program include cost savings and improvements in business continuity (during bad weather or disasters) and improved employee performance and retention (Dychwald, Erickson, & Morison, 2006).
3. The *U.S. federal government* has adopted telework as a strategy to accommodate and retain older workers under the U.S. Department of Labor and Related Agencies Appropriation Act. An example is the *U.S. Patent and Trade Office*, which has a broad policy to address work-life balance issues and to help with recruitment but requires telecommuters to come into the office once a week from wherever they live in the nation. The agency provides its employees with interchangeable laptops and technical services and reimburses Internet service costs. In 2007, the U.S. Patent and Trade Office had more than 800 employees participating in its telework program and expects to increase that number by 500 in the future.

Snowbird programs - These innovative programs enable employees to shuttle between two locations seasonally, appealing to older workers who seek warmer climates in the winter months and cooler climates in the summer. This program also appeals to some college students and parents with preschool-age children. Snowbird programs are economically viable for organizations in the retail and health care service sectors in which the customer base also migrates from north to south in the winter months. Snowbird programs are an innovative solution for companies with regionally shifting employment needs during the year, allowing them to meet their staffing needs while accommodating the preferences of many older workers who no longer wish to remain in a single location for the entire year.

1. Companies with active snowbird programs include: *Home Depot, Carondelet Health Network, and CVS/Caremark Pharmacies*. CVS, the innovator of the snowbird program, employs many older workers in its northern retail outlets in the summer and its southern stores in the winter. Approximately 300 workers participate in the program each year, and this resulted in a 10 percent increase in the number of older workers in just one year (7 percent to 17 percent, 2005-2006) (Steve Wing, personal communication).

FLEXIBILITY IN THE EMPLOYMENT RELATIONSHIP

Deferred Retirement Option Plans (DROPS) - Another incentive to retain older workers, DROPS allow workers who reach retirement age to continue working and while receiving contributions to a retirement fund equal to the pension benefit they would receive, if retired. The employer contributes the amount to the DROP account

that accrues interest. Upon final retirement, the individual will receive his/her full pension and can withdraw the money in the DROP account in lump sum or as an actuarially equivalent retirement annuity. The *City of Philadelphia* offers another DROP option to older workers with 10 years of credited pension service and who reach normal retirement age to accumulate their monthly service retirement benefit in an interest-bearing account for up to four years and remain employed with the city.

Retiree independent contractors - Rehiring retired employees as independent contractors is another well-documented strategy that enables companies to retain the knowledge and talent of their older workers. As an alternative to paying pension benefits to active employees, an organization may terminate employment and then rehire the former employee as a consultant or independent contractor. While independent contractors do not receive employee benefits, this status enables them to receive full retirement benefits while working for their previous employer.

1. Companies that hire former employees as independent contractors include: *Hoffman-LaRoche, Inc., Principal Financial Group, SC Johnson, and Busch Entertainment Corporation* (AARP, 2007).
2. *The Aerospace Corporation* (2007) allows employees to work part time or take a leave of absence before retirement and rehires retirees on a temporary basis. In addition, retirees are able to return to work for less than 1,000 hours each year as casual employees. These options allow retirees to collect full benefits while working.
3. *Massachusetts Institute of Technology* allows employees who wish to phase into retirement to reduce scheduled hours in their current jobs and then apply for part-time positions as they become available.
4. *Polaroid* allows its employees to test retirement with six months of unpaid leave; approximately 50 percent of those who utilized the trial retirement resumed full-time employment (Crampton, Hodge, & Mishra, 1996).

FLEXIBILITY AROUND TASK

Job-task negotiation has been identified as a strategy for individuals with the most significant disabilities and complex employment situations, including older workers. As noted by the Office of Disability Employment Policy on the meaning and use of customized employment, the goal of the negotiation is to create a personalized job description that meets both the business needs of the employer and the goals of job seekers with disabilities and mature job applicants/employees. Implementation of flexibility around job tasks should be based on an assessment of skills that each person brings to the organization. The results of each assessment can then be used to construct a job description based on the alignment of discrete tasks with employee skill sets and conditions of employment.

BENEFIT FLEXIBILITY

Phased retirement - These programs allow employees to move from full-time to part-time work without changing employers. Greater use of phased retirement arrangements will lead some people to extend their working lives instead of leaving work completely. Those who take phased retirement have higher levels of education, household income, and wealth than those who do not take phased retirement. Employers are often willing to

work out phased retirement on an informal basis; only 30 percent of companies surveyed offer formal phased retirement programs (Eyster, Johnson, & Toder, 2008). They continue to be more the exception than the rule, largely because of legal and regulatory restrictions (Piktialis, 2007). Phased retirement plans are less likely to be available in unionized and larger organizations where collective bargaining agreements are in place or where a significant need for consistency is necessary among a large number of employees. They are also found less often in organizations with defined benefit plans that offer older workers strong economic incentives to retire from their current jobs (as compared with defined contribution plans that incent older workers to remain on the job while receiving retirement payments).

Eyster, Johnson, and Toder (2008) cited a number of employers that pay pension benefits to partially retired workers, including:

1. *Bon Secours Richmond Health System* has a policy allowing employees who are age 65+ to work up to 24 hours per week and receive the same benefits they would get if fully retired (Malone, 2007).
2. *First Horizon National Corporation*, a financial services company, permits individuals to reduce their hours to 20 to 32 hours per week, while still receiving health and other employment-related benefits.
3. *Mitretek* allows employees to work part time and collect partial benefits on a case-by-case basis (AARP, 2007).

Piktialis (2007) also identified a selection of employers offering phased retirement, including:

1. *The Aerospace Corporation* permits older workers, often talented scientists or engineers, to continue working as employees or consultants with reduced schedules.
2. *CVS/Caremark* actively recruits older workers for entry-level positions and offers them part-time, flexible schedules.
3. *Lincoln Financial Services* created a paid time-off bank to offer more flexibility for older workers to take time off for medical care or to care for a parent or spouse.
4. *Baptist Health Systems* now allows employees with at least 10 years with the company who are 59 ½ years or older to begin to draw on their pension and still work part time. Older workers who decide to retire can return to the company within five years without losing their benefits.

Other U.S. and Foreign Employer Strategies to Retain or Transition Older Workers

The need for talent is hitting the federal government particularly hard as more than half a million federal employees will leave their jobs in the near future. Considering the high skill levels and experience required to successfully perform these jobs, the federal government is dramatically changing its current outreach, recruitment, and hiring practices through its *Partnership for Public Service FedExperience Program*. The program is designed to reach out to the millions of highly skilled and experienced older workers, from the private sector,

who are approaching retirement age, or are already retired. The Partnership for Public Service will: help promote job opportunities for older workers at federal agencies; match skill sets and experience; streamline the hiring processes, when possible; provide career transition resources, such as how-to guides and networking events; encourage flexible work arrangements; and help establish mentoring programs and other employee-friendly on-boarding practices (Partnership for Public Service, 2011).

Eyster, Johnson, and Toder (2008) cite other examples of good practices to retain or transition older workers, across a wide range of industries:

1. *Days Inn* reports that 25 percent of its reservation sales staff is 65+ years of age; the performance indicators were problematic for older workers (three-minute sales calls vs. six-minute sales calls for older workers). Increasing the allowable call time kept turnover among older workers to 2 percent vs. 70 percent among younger workers, reducing its annual training and recruitment costs by 40 percent (Crampton, Hodge, & Mishra, 1996).
2. *Travelers* set up a pool of workers comprised of their older and semi-retired workers to fill in during vacation or busy times (Crampton, Hodge, & Mishra, 1996).
3. *Busch Entertainment* established a Legends Ambassador Program where teams of workers (55+) were selected each year and stationed at each park to ensure quality employment and job satisfaction among their older employees.
4. *MITRE Corporation* developed a phased-retirement plan under which retirees from the company could be recalled for up to 1,000 hours per year of work on projects that require their expertise while receiving full benefits.
5. *Proctor & Gamble*, *Siemens*, and *GE* each offer reverse mentoring programs where younger employees teach managers and executives, who tend to be mid-career or older workers, about new technologies.

Comparing international practices to U.S. practices is complicated because of the differences that exist in areas such as mandatory retirement ages and the availability of government-provided pensions and health care. However, here are some examples from other countries that may be of interest.

1. In Italy, *The L'Incontro Initiative* is a nonprofit, social cooperative that recruits older workers. It recruits older recently retired maintenance workers to work as instructors in protected job centers (Naegele & Walker, 2006).
2. The Dutch financial service company *Achmea* conducts training and career development over the life course. Career advice is provided to an employee every five years after they have reached 45 years of age. Older workers are given up to 10 days of paid leave to study to maintain their employability and improve their promotion or transfer chances (Naegele & Walker, 2006).

3. *Gereng Hout en Beton*, a Dutch construction enterprise, has implemented age-aware human resources policies. Different worker capacities are taken into account in task planning, where older and more experienced workers are perhaps given more complex tasks, while younger workers might be given the more physically demanding tasks (Naegele & Walker, 2006).
4. *The UK Oil Company* is working to retain older workers despite the physical demands of its workplace. It offers workplace health assessments to resolve common issues such as back pain and has on-site doctors to review existing health problems and intervene when serious issues arise. It also offers annual medical exams for workers aged 50 and over (Naegele & Walker, 2006).
5. UK-based *Firstgroup*, a surface transportation company, has a “Flexible Decade Program,” which aligns work arrangements with pension schemes, offering older workers the option of part-time work while drawing a reduced pension or continuing to work full time or part time while continuing pension contributions (Koc-Menard, 2009b).

Best Practices to Avoid Discrimination Complaints

In addition to the strategies described above, U.S. employers can also create positive work environments and conditions for aging workers by incorporating best practices that help them avoid Age Discrimination in Employment Act (ADEA) complaints. The following recommendations were identified by Cornell University’s legal consultant for this project from a review of ADEA decisions by the Supreme Court:

1. *Data collection policies.* Employers should not collect information about age and should not stereotype employees based on age.
2. *Job descriptions and evaluations.* Employers must carefully craft fact-specific job descriptions and include measurable expectations for every position. Employees should be evaluated at regular intervals and the results should be well documented.
3. *Layoffs, terminations, and advancements.* Decisions about layoffs, terminations, or advancement in the organization should be based upon the objective evidence in personnel records. Any employer who conducts a layoff should evaluate its impact on protected groups, including older workers. Employers should periodically collect and analyze data regarding the impact of employment conditions upon older and younger workers.
4. *Reducing compensation and benefits.* Employers should explore whether they can retain older workers whose salaries and/or benefits are more consistent with those paid to younger workers to avoid adversely affecting older workers because of expense.
5. *Employment decisions based upon subjective criteria.* Employers should strive to maintain accurate and comprehensive records of factors considered in the decision-making process since the employer may need to provide such records as proof that the factor was justified (i.e., not age related).

A full report of the consultant’s review of the Supreme Court’s decisions appears in Appendix B.

Recommendations

The information gathered by the literature and legal reviews, along with the recommendations obtained during in-depth interviews with leading, national experts on the aging workforce, verify the criticality of examining and documenting needed modifications to both policy and practice that will encourage and support business efforts to retain the talent represented by an aging and diverse workforce.

Research Recommendation

Create opportunities for the utilization of research findings as the basis of essential implementation strategies to benefit the employer, the older worker, government programs, and the U.S. economy through publicly and privately funded initiatives.

Once the economy recovers and older workers who delayed retiring consider leaving their jobs or reducing their work schedules, companies will face a labor and skill shortage that will affect their ability to successfully compete in the marketplace. While this study identified successful practices that have enabled some visionary businesses to implement strategies designed to retain and/or transfer the skill and knowledge among their older workers, insufficient information exists to support any attempts to replicate their efforts on a larger scale. Further study of current practices is needed in the following areas:

1. Investigate the match between the skills required by growth industries (Administrative Services, Professional/Technical Services, Educational Services, and Health Care and Social Assistance) and the job skills among older workers and workers with disabilities (Adler & Hilber, 2008). The results of this study may have implications for the transfer of skills that will enable older workers to extend their careers to industries where job growth is projected. This valuable information can also be used to develop job training programs for older workers and workers with disabilities.
2. Evaluate and document the costs associated with maximizing older workers' productivity and knowledge compared with the costs of hiring younger workers who do not need accommodations or additional training, but do not have as much experience and knowledge (Head, Baker, Bagwell, & Moon, 2006).
3. The findings associated with the research recommendations made by John Kregel, Virginia Commonwealth University (personal communication) suggest that keeping people employed through early intervention would represent a huge cost savings for government and taxpayers. Specifically, results of studies conducted suggest that further research is needed that:
 - a. Determines the variables and compare the rates at which older workers (>50 years) on long-term disability (LTD) and younger workers (<50 years) on long-term disability move on to Social Security Disability Income (SSDI). The results of this research may suggest the development of different strategies that will reduce the number of workers dependent on SSDI (i.e. incentivizing employers to retain workers by linking the amount of their payroll taxes to the number of employees who moved on to SSDI, suggesting that their payroll taxes would be reduced if they had fewer people on SSDI).

- b. Reviews early intervention demonstrations and tracking the government's reduced expenditure for SSDI entitlements, based on the findings of the investigation described in 3a (above). The authors recommend that the results of this study be incorporated into policies promulgated by the federal government designed to reduce the rate at which people are moving from LTD to SSDI.
- c. Examines workplace interventions that might maximize retention by reviewing demonstrations of technical assistance in the areas of retention specialists; expanding company retention policies.
- d. Surveys employers regarding their policies to maintain people in employment, including persons with disabilities, by looking at their approach to accommodations.
- e. Answers the question as to whether there is an approach to providing accommodations where funds and/or sources of accommodations are centralized and examines the impact of this approach when department managers are held harmless for the cost of the accommodation.

Technical Assistance and Training Recommendation

Utilizing the results of the research recommended in the previous section, the appropriate federal agencies should authorize and support the development and provision of technical assistance and training to incent and assist companies in addressing the retention of older workers and workers with disabilities.

Several sources have confirmed that a majority of companies have made no special provisions for older workers and are unaware of the impact that the increasing age of the workforce will have on their recruitment, retention, and management policies and practices. Organizations that fail to understand the complexities or recognize the opportunities associated with an aging workforce may jeopardize their ability to maintain competitiveness in a marketplace that continues to reward innovation and responsiveness (SHRM, 2003).

Utilizing existing technical assistance available through a range of public and private resources, employers of all sizes should be encouraged to initiate a process that will help them to understand how many workers are approaching retirement age; the potential impact of the loss of knowledge, expertise, and productivity; and the development of plans to simultaneously retain older workers and transition their knowledge to younger workers. Collaborative technical assistance efforts to assist companies in identifying and developing appropriate policies and interventions should be carried out via a multi-agency effort on the federal level (U.S. Department of Labor/Employment and Training Administration, U.S. Department of Justice/Equal Employment Opportunity Commission, and U.S. Department of Education/Rehabilitation Services Administration) through their existing networks of employer/business education and training providers that include: the Job Accommodation Network (JAN), the ADA National Network (formerly called DBTACs), One-Stop Career Centers, AARP, SHRM, and others. Training goals should assist companies to achieve the following objectives:

1. Assess the number and impact of retiring workers on their business (i.e., skill sets);
2. Promote the development of flexible employment policies and practices that will increase the retention and employment of older workers;

3. Develop and offer appropriate, flexible work, and other reasonable accommodations that will encourage continued employment of skilled, older workers; and
4. Develop skill transition plans, based on industry, that will facilitate the transfer of knowledge from older to younger workers.

Policy and/or Legislative Recommendations

Establish and fund public and private research efforts to investigate the impact of changes in public policy that will incentivize the employer to retain aging workers to continue working beyond the traditional retirement age.

1. Examine ways to eliminate the early retirement incentive of defined benefit plans to encourage continued employment in the public sector (Johnson, Davidoff, & Perese, 2003).
2. Investigate the impact of the Supreme Court ruling in July 2007 on ADEA that does not prohibit employers from favoring older workers over younger workers even while the younger workers in question are age 40 or older (Eyster, Johnson, & Toder, 2008).
3. Investigate the impact of changes in Internal Revenue Service (IRS) regulations needed to maintain/retain older workers by eliminating payroll taxes for workers over 65 years of age and disseminate the results through widely distributed government publications.
4. Assess and disseminate information about the potential impact of suggested changes (listed below) that will incent both employers and older workers to establish and/or continue their working relationships.
 - a. Allow workers aged 65 and older to simultaneously receive salaries for partial work while receiving partial retirement benefits (Hudson & Gonyea, 2007),
 - b. Adjust defined benefit plans for increased life expectancy,
 - c. Adjust Social Security for increased life expectancy,
 - d. Issue an EEOC guidance re: ADA that specifies the need for accommodations that result from age-related limitations,
 - e. Make Medicare the primary insurer for workers aged 65 and older to reduce the cost to employers,
 - f. Address other ways to reduce the cost of health benefits for older workers,

- g. Raise the early Social Security Administration retirement age from 62 to 63 (Turner, 2008), which may force/induce older adults to continue working (Hudson & Gonyea, 2007), and
 - h. Increase exempt earnings without reducing Social Security Administration benefits for older workers (Hudson & Gonyea, 2007).
5. Using an international survey of government policies affecting older workers, compare U.S. effectiveness in:
- a. Raising awareness of the concerns and diversity of older workers,
 - b. Implementing enforcement of antidiscrimination measures,
 - c. Establishing financial incentives for older workers to remain in the workplace, and
 - d. Measuring the success of government programs to support older workers (retraining and job referral programs) (Barusch, Luptak, & Hurtado, 2009).

Conclusion

In exploring how public- and private-sector employers are preparing for an increasingly older workforce that is likely to be a workforce with more disabilities, Cornell University's Employment and Disability Institute gathered and reviewed academic and legal literature and other published reports on the subject; conducted in-depth interviews with national experts and thought leaders in the field of employer strategies to address an aging workforce; and developed recommendations to address the gaps in research, public policy, and technical assistance that will support employer efforts to retain or hire older workers and workers with age-related disabilities.

The literature review and interviews with leading experts provided information about the priority companies assigned to hiring older workers and the strategies that facilitated their ability to retain them. The literature review also cited the composition of the current U.S. workforce, of which more than 40 percent are 55 years of age and older. Significant factors that contribute to the large number of older workers include: changing demographics, the economic downturn and its impact on the value of retirement portfolios, the concern for escalating health care costs, the stability of the Social Security and Medicare systems to support large numbers of beneficiaries, the lack of qualified replacement workers, the improved health and increased longevity among older workers, and the desire among older Americans to remain active and engaged in the workforce. In reviewing and gathering information on this topic, it is interesting to note the disparity that exists among companies engaged and concerned about retaining the skills and talents of older workers compared with the lack of concern about retaining and accommodating the aging workforce that exists among many U.S. companies. The United States does not lack innovation: the literature review documents the creative and resourceful ways in which companies, across a range of industries, address the talent retention issue they confront as their workforce ages.

The results of this research point to several areas in need of further investigation that include: the expansion and support of flexible work arrangements among U.S. employers; changes in pension laws and other public policies that will enable companies to retain older workers; and the education, training, and experience necessary to change the attitudes and work conditions that will better support and accommodate the talent that exists among workers of all ages, both those with and those without disabilities.

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Interviews Conducted

Steve Wing, Corporate Voices for Working Families, Project Survey, April 20, 2011.

John Kregel, Virginia Commonwealth University, Project Survey Interview, April 19, 2011.

Dominic Giandomenico, U.S. Chamber of Commerce, Project Survey Interview, April 26, 2011.

Steve Miranda, Society for Human Resource Management Project Survey Interview, April 21, 2011.

Appendix A: Interview Questions

During the interview phase of the project, respondents addressed the following questions:

1. How would you define “older workers”?
2. What do you see as the biggest challenges for employers/workplaces in hiring:
 - a. older workers?
 - b. older workers with age-related limitations or disabilities?
3. What do you see as the biggest challenges for employers/workplaces, in retaining:
 - a. older workers?
 - b. older workers with age-related limitations or disabilities?
4. Are there promising strategies, practices, or programs for helping each of these groups to remain employed that you recommend we review?
 - a. promising strategies/practices or programs for older workers?
 - b. promising strategies/practices or programs for older workers with age-related limitation or disabilities?
5. What actions in the area of public policy, further research, and/or areas for enhanced technical assistance and training would you recommend be established that would help improve employment opportunities for older workers, especially those with age-related limitations or disabilities?

Appendix B: Full Report of the Consultant's Review of the Supreme Court's Decisions

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MEMORANDUM

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RE: ADEA Research

DATE: March 15, 2011

Over the past decade, the Supreme Court has decided a number ADEA issues, and these decisions provided the starting point of my examination of the current state of the ADEA and its application in Federal Court. Four of those cases stand out due to the debate that they have generated in the legal profession: *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 [2008]; *Gross v. FBL Financial Services* (129 S. Ct. 2343 [2005]), *Meacham v. Knolls Atomic Power Laboratory*, (128 S. Ct. 2395 [2008]) and *Smith v. City of Jackson* (544 U.S. 228 [2005]). These cases represent areas of uncertainty in the application and interpretation of the ADEA.

May Age Be Used as a Condition of Pension Eligibility?

In *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), the State of Kentucky offered a unique retirement plan to its state and county employees who occupied "hazardous positions" (which included active duty law enforcement officers, firefighters, paramedics and workers in the corrections system). Benefits for both those employees in hazardous positions as well as those in normal positions were determined by multiplying the number of years of service by 2.5% times the final preretirement pay. If a hazardous position worker injured in the line of duty were ineligible to receive a pension at the time of the injury/disability, however, the State of Kentucky would "impute [] years of service" to that employee's actual years of service so that the hazardous employee would immediately become eligible for "normal retirement" benefits.

In practice, this plan treated employees disabled in the line of duty, but not yet eligible for a pension, differently than those employees who were already eligible for a pension because it gives pension eligibility to some employees who otherwise would not be pension-eligible workers.

The Supreme Court identified the issue in this case as whether “a plan that (1) lawfully makes age in part a condition of pension eligibility, and (2) treats workers differently in light of their respective pension status, (3) automatically discriminates because of age.”²

The majority opinion in this case concluded that the differences between the pension-eligible and ineligible employees were not “‘actually motivated’ by age,” but rather by pension status. The Court listed six circumstances in support of its holding that the disparate treatment was not motivated by age:

- (1) Age and pension status are “analytically distinct” concepts;
- (2) The employment decision here involves pensions, not wages, which the ADEA “treats somewhat more flexibly and leniently in respect to age;”
- (3) The plan imputes only the number of years of service to a disabled worker’s total years of service as would be needed for that worker to reach 20 years of service or the age of 55, and, thus, the imputation of years of service is a “non-age-related rationale.” Age factors into the equation only because normal retirement rules themselves “permissibly consider age;”
- (4) Although in this case the plan worked to the advantage of workers younger than the plaintiff, it could just as well work to the advantage of older workers;
- (5) The assumptions involved in the plan (that a worker disabled on the job will not continue working beyond the point that she is disabled and pension eligible) does not involve age-related stereotypes;
- (6) The objective of the hazardous position plan is to provide each disabled worker with sufficient retirement benefits, and the fact that it would be difficult to remedy the disparity between the plaintiff and disabled workers while preserving this objective suggests that this objective, not age, actually motivated the plan.

IMPLICATIONS: Critics of this case argue that the decision flies in the face of prior ADEA and Title VII cases decided by the Supreme Court that require an employer to “ignore an employee’s age (absent a statutory exemption or defense).”³ Instead, the ruling suggests that the protected class of “age” differs from other protected classes with respect to disability retirement policies because the Court allowed the defendant to defend claims of discrimination on the ground that its “facially age-conscious employment policy is not actually motivated by age.”⁴ The dissent in *Kentucky Retirement Systems* criticized the majority opinion for suggesting that an employer is free to discriminate based on a protected trait provided that the protected trait is “one of among many variables.”⁵ Additional criticism focuses upon the Court’s examination of the employer’s motive, which, if benign, should not have the power “to render lawful an otherwise discriminatory employment action.”⁶

The application of this decision in future Federal court decisions should be closely scrutinized.

How Can a Plaintiff Prove that Her Employer Has Discriminated Against Her on the Basis of Age?

While the ADEA is a law separate and apart from Title VII of the Civil Rights Act, it contains similar language prohibiting employment discrimination and thus courts often rely upon Title VII case law when interpreting the ADEA. Courts generally divide discrimination cases arising under Title VII into two categories: (1) disparate treatment, and (2) disparate impact. The disparate treatment theory of discrimination involves a case in which the employer intentionally treats a member of a protected class (e.g., a person of a particular race, religion, gender) differently. In a disparate impact case, however, an employer has adopted a neutral employment practice that disparately impacts a protected class of people. Thus, disparate impact cases are used to overcome policies that may appear to be legal at first glance, but, upon greater examination, reveal discriminatory effect. An important difference in proving these two categories of discrimination is that a plaintiff must prove that the employer acted with a discriminatory motive in any disparate treatment case, but no proof of motive is required in a disparate impact case.

Standard used to Prove a Disparate Treatment Mixed-Motive Case

In a few cases, employers will make an employment decision on the basis of one factor alone. More often, however, employers and their agents will base their employment decisions upon a combination of factors. If a plaintiff then claims that the employer discriminated against him because of a protected factor, the issue of causation—whether the employer made the adverse employment decision because of the illegitimate motivating factor or the legitimate one(s)—can be problematic. Courts needed a standard to apply in cases where the illegitimate protected factor (race, gender, etc.) was a motivating factor for the adverse employment action in conjunction with other legitimate factors (such as poor performance or inadequate experience).

In 1991, Congress amended Title VII and to set forth a specific standard that courts should apply when evaluating whether a plaintiff has made the disparate treatment discrimination case in a mixed-motive situation.

(1) First, the plaintiff must demonstrate that the defendant (employer) has engaged in an illegitimate act that gave rise to an adverse employment action (this is often referred to as a “prima facie case of discrimination”).

(2) If the plaintiff shows that the defendant did, in fact, discriminate against him or her on the basis of the protected characteristic (e.g., race, sex, religion), the “burden of proof” shifts from the plaintiff to the defendant. The defendant then must prove that it would have made the same employment decision even if the protected characteristic had not played a role in its decision.

(3) If the defendant makes that showing, the burden of proof switches finally back to the plaintiff. The plaintiff may overcome the defendant’s case by showing that the defendant’s legitimate reason for taking the adverse employment decision was mere pretext for discrimination.

This framework is often referred to as the “Price Waterhouse” (the name of the case in which this framework was developed) or “pretext” burden-shifting framework.

The above-mentioned 1991 amendment to Title VII did not affect the ADEA. Thus, courts did not know for certain whether the Price Waterhouse framework should be used in ADEA disparate treatment cases. Many courts did borrow the Price Waterhouse framework and apply it to ADEA mixed motive cases,⁷ but that practice ended in 2009 when the Supreme Court decided *Gross v. FBL Financial Services* (129 S. Ct. 2343) in 2009. In *Gross*, the Supreme Court completely rejected the application of the Price Waterhouse burden-shifting framework to the ADEA.

This means that in an ADEA mixed motive case, the burden of proof never shifts from the plaintiff to the defendant. Instead, the plaintiff must prove that, but for his or her age, the defendant would not have made the adverse employment decision affecting the plaintiff. In other words, in order to prevail, the plaintiff must prove not only that age motivated the employer's decision, but also that the employer would not have taken the same adverse action if it had not engaged in age discrimination. As one legal scholar explained in testimony before the Judiciary Committee of the House of Representatives last year, "[b]earing the burden of proving what the employer would not have done in such an imaginary scenario is especially difficult for the plaintiff, as the defendant obviously has greater access to information about its state of mind in such a situation."⁸

IMPLICATIONS: With respect to mixed-motive cases, age discrimination is more difficult to prove than Title VII discrimination.⁹ Some likely unanticipated results have arisen as a result of the decision in *Gross*. Some courts have applied the *Gross* decision even more stringently, by interpreting "but for" causation to mean that the discrimination on the basis of age must be the "sole" cause of discrimination.¹⁰ In other words, some courts believe that ADEA plaintiffs cannot *ever* prevail in a mixed motive case because, if an employer's motive is mixed, then discrimination on the basis of age is not the sole cause of the adverse action. This interpretation of the meaning of "but for" causation leads to a strange result—a situation in which any plaintiff whose job is terminated on the basis of age *and* another protected category (race, for example) cannot recover relief on both grounds because age discrimination is not the sole cause of her job loss, no matter how rampant the age discrimination or damaging the loss.

Other courts have extended the *Gross* rationale to other Federal antidiscrimination and/or anti-retaliation cases. This has changed the law as applied to the Americans with Disabilities Act,¹¹ protected speech under 42 U.S.C. § 1983,¹² pension rights under ERISA,¹³ and the Jury Systems Improvement Act.¹⁴ Courts have also speculated about whether the *Gross* rationale applies to other bodies of law such as the Family and Medical Leave Act or 42 U.S.C. § 1981.¹⁵ Thus, *Gross* has left Federal Courts with unanswered questions regarding a mixed-motive discrimination case that should be continued to be monitored and analyzed going forward.

Disparate Impact (Reasonable Factor Other Than Age)

In 1993, the Supreme Court recognized in *Hazen Paper v. Biggins* (507 U.S. 604, 611) that disparate treatment cases certainly exist under the framework of the ADA, but that it had not yet decided whether a disparate impact theory of liability is available under the ADEA (and it declined to make any such ruling). After that ruling, some courts refused to recognize an ADEA disparate impact theory of discrimination,¹⁶ leading to discrepancies nationwide among Federal Court rulings. The Supreme Court finally settled this question in 2005 when it concluded definitively in *Smith v. City of Jackson* (544 U.S. 228 [2005]) that the disparate impact theory exists under the ADEA as well as under Title VII. The Court in *Jackson* also addressed employers defense to a disparate impact claim—the employer can avoid liability if it relied upon a reasonable factor other than age ("RFOA") when making the adverse employment decision.¹⁷

In *Meacham v. Knolls Atomic Power Lab.* (128 S. Ct. 2395 [2008]), the Court decided one additional factor in an ADEA disparate impact case—that the defendant (employer), rather than the plaintiff, has the burden to prove that it relied upon a RFOA. This is considered a win for the plaintiff, as it places that burden on the party who has control of the evidentiary material (the business records) to prove whether a legitimate reasonable factor existed.

Regarding the definition of what constitutes a RFOA, the Court did not provide any precise definition. Rather, it implied that it is easy for most defendants to prove a RFOA defense (*Meacham*, 128 S. Ct. at 2406-07), suggesting that RFOA is rather broad defense to charges of ADEA disparate impact discrimination. Indeed, the Court stated in *Meacham*: “Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, ‘significantly narrow[ing] its coverage.’”¹⁸ It is therefore not surprising that, during the years since the Supreme Court confirmed the RFOA defense, Federal courts have held that the following factors are reasonable, even despite their close correlation with age: high salary, high health care costs, the cost of salaries and benefits, the desire to attract new workers, the desire to lose as few employees as possible during a reduction in force, and retirement status.¹⁹

IMPLICATIONS: Some legal scholars also complain that the RFOA defense is so easy for a defendant employer to establish that an employer’s proffer of reasonableness is “virtually impenetrable,”²⁰ and disparate impact theory under the ADEA is “ero[ding] to near nonexistence.”²¹ Scholars also question whether the *Meacham* decision will lead to any future decisions ruling that employers do not violate the ADEA if they terminate employees based upon high levels of compensation or benefits.²² Application of the *Meacham* decision by Federal courts should also be closely examined.

Additional Issues Decided by Supreme Court

Other issues settled by the Supreme Court over the last ten years and some implications thereof follow:

(1) In *General Dynamics Land Sys. v. Cline* the court ruled that the ADEA does not include a cause of action for reverse discrimination.²³ Professor D. Aaron Lacy has since argued that the Supreme Court’s decision is wrong. He argued that the Court should have (a) adopted a plain meaning interpretation of the statute, (b) upheld the regulation promulgated by the EEOC prior to the Cline ruling that allowed for members of the protected class of 40 and above to bring an ADEA claim against another class member, and (c) finally established the ability of an older protected worker (e.g. age 60) to claim discrimination under the ADEA if he or she is displaced in favor of a younger protected worker (e.g. age 42).²⁴

IMPLICATION: I wonder about the intersection of this decision (the ruling against reverse discrimination) and the increasing median age of workers in the U.S. labor pool. As more older workers remain in the workforce, more U.S. workers fall within the class of workers protected by the ADEA (over 40). As such, I would want to know how many older workers experience an adverse employment action on the basis of age, but cannot succeed in court because the worker succeeding him or her, though a decade or more younger, a member of the same protected class. I suspect that this gap in protection against age discrimination will become more problematic if the median age of U.S. workers remains high and/or continues to increase.

(2) According to *Gomez-Perez v. Potter*, public sector employees have the right to bring a cause of action against employers for retaliatory discrimination as part of an ADEA claim, even though the language of the ADEA does not specifically address retaliatory discrimination claims.²⁵ The majority of Supreme Court Justices agreed that Civil Rights statutes should be interpreted broadly to encompass relief from discrimination in the form of retaliation for federal employees as well as employees in the private sector. It is important to note that the Court rejected any argument that it should apply a standard of interpretation that favors a plain reading of textual language (statutory language that does not mention retaliation) over the legal principle of “*stare decisis*” (respect for precedent).

(3) In *Federal Express Corp. v. Holowecki* the Court laid out a standard for establishing whether an employee’s submission to a public agency constitutes a charge of discrimination. The Court favored a more flexible standard for determining whether a submission to a federal agency (e.g., the EEOC) seeks agency involvement and intervention. Charges of discrimination under the ADEA are valid if the charge (a) is written, (b) names the respondent, (c) generally alleges the discriminatory act, and (d) can be reasonably construed as a request for the EEOC to take action to protect the claimant’s rights or otherwise settle a dispute.²⁶

IMPLICATION: I do not foresee this decision having a major affect on ADEA claims, because it appears that the greatest hurdle for claimants/plaintiffs trying to exercise the protections of the ADEA is not in bringing a proper ADEA claim, but in proving such claim in light of, (1) with respect to pension cases, the difficulty that plaintiffs will have in attempting to prove that an employer’s actions in making distinctions facially based on age were actually motivated by age (the *Kentucky Retirement Systems* decision), (2) the difficulty many plaintiffs experience in proving “but for” causation in any ADEA case involving mixed motives (the *Gross* decision), (3) the ease with which an employer can establish the RFOA defense to an ADEA disparate impact claim (the *Meacham* and *City of Jackson* decisions).

Federal Express Corp. v. Holowecki could have positive implications, however, with respect to the formulation of claims under other discrimination laws if there exists uncertainty among other laws or regulations as to what the enforcement and processing agency requires for an individual’s claim to be sufficient. One commentator suggests that “[p]ublic interest lawyers should scour *Holowecki* ²⁷ for similarities between EEOC’s ADEA charge processing system and the procedures of other agencies to which a client has been denied access for failure to meet the agency’s jurisdictional standard.”

(4) Under *14 Penn Plaza LLC v. Pyett*, the arbitration of an individual’s rights under the ADEA may be decided by the terms of a collective bargaining agreement, provided that the terms of the collective bargaining agreement contain a clear and unmistakable waiver of the right to litigate.²⁸

IMPLICATION: When examined in light of the recent high unemployment in the United States, this decision leads me to wonder whether the ability of a collective bargaining agreement to foreclose an employee’s right to a civil rights trial constitutes a voluntary and knowing waiver of a constitutional right. In bad economic times, I suspect that prospective employees will accept the terms of a proposed employment as is, and may have (or believe that they have) little or no bargaining power with respect thereto because of the scarcity of other available comparable employment opportunities.

(5) The Supreme Court ruled in *Sprint/United Management Co. v. Mendelsohn* that the testimony of employees other than the plaintiff who claim that they too suffered age discrimination at the hand of defendant (a.k.a. “me too” evidence) is neither per se admissible nor per se inadmissible.²⁹ This ruling suggests that courts should avoid applying rigid rules regarding the inclusion or exclusion of evidence. This ruling tends to benefit plaintiffs in ADEA cases, who bear the burden of proving discrimination and must assemble evidence to support their claims. Relevancy of evidence “is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”³⁰

IMPLICATION: This ruling may help plaintiffs meet their burden of proving discrimination on the basis of age and also under other Federal discrimination laws.

Best Practices

(1) Data collection policies

Employers should not collect information about age and not stereotype employees based on age.

(2) Job descriptions and evaluations

Employers must carefully craft job descriptions, and include measurable expectations for every position. Employees should be evaluated at regular intervals and the results of such evaluations should be well-documented. The more fact-specific job descriptions and evaluations are, the less subjective any subsequent adverse employment action will be.

(3) Layoffs, terminations and advancements

Decisions about layoffs, terminations, or advancement in the organizations should be based upon the objective evidence in personnel records. Any employer who conducts a layoff should evaluate its impact on protected groups, including older workers.

Although a disparate impact claim under the ADEA may be difficult for a plaintiff to prove, that does not mean that employers should overlook employment practices that have a significant disproportionate impact on older workers and, thus, may violate the ADEA under the disparate impact theory. Instead, employers should periodically collect and analyze data regarding the impact of employment conditions upon older and younger workers. In so doing, employers can identify problems early and either: (a) make certain that the implementation of such employment condition is based upon a well-documented RFOA, or (b) make necessary changes to that employment condition.

(4) Reducing compensation and benefits

Employers should explore whether they can retain older workers whose salaries and/or benefits are more consistent with those paid to younger workers to avoid adversely impacting older workers because of expense.

(5) Employment Decisions based upon Subjective Criteria

Any employment decision, particularly an adverse employment decision, based upon subjective criteria should be scrutinized. Employers should strive to maintain accurate and comprehensive records of factors considered in the decision-making process since the employer may need to provide such records as proof that the factor was justified (i.e., not age related).

Endnotes

1. Visit <http://www.aarpworkforceassessment.org> to see the full workforce assessment tool.
2. See *Kentucky Retirement Systems*, 128 S. Ct. at 2367.
3. *Kentucky Retirement Systems*, 128 S. Ct. at 2377 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 [1993], and *Lorillard v. Pons*, 434 U.S. 575 [1978]).
4. Daniel B. Kohrman, *The ADEA at 40: The U.S. Supreme Court Confronts Old Age*, 42 CLEARINGHOUSE REV. 463, 473 (2009).
5. *Kentucky Retirement Systems*, 128 S. Ct. at 2376.
6. Kohrman, *supra* note 3, at 471 (discussing the dissent in *Kentucky Retirement Systems*).
7. See e.g. *Erickson v. Farmland Indus.*, 271 F.3d 718 (8th Cir. 2001).
8. Hearing on H.R. 3721 before the Subcomm. on Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary, Serial No. 111-108 (June 10, 2010), available at <http://judiciary.house.gov>.
9. See *Bolmer v. Oliveira*, 594 F.3d 134, 148-49 (2nd Cir. 2010); *Fuller v. Casgate Tech.*, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009). Some courts have actually retained the Price Waterhouse burden shifting framework with respect to ADEA mixed-motive cases. See e.g. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 (2d Cir. 2010). Obviously, discrepancies among the Federal Circuit Courts regarding the interpretation of the ADEA continue.
10. *Whitaker v. Tennessee Valley Author. Bd. of Directors*, 2010 WL 1493899 *9 (M.D. Tenn. 2010) (“Here, plaintiff has not presented a jury question on whether his age was the sole reason for his non-selection. . . . Post-Gross, it is incongruous to posit such alternate theories because the very presentation of different reasons for an action suggests that age was not the sole reason for the action.”). *Culver v. Birmingham Bd. Of Education*, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009) (“Gross holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old was the only or the but for reason for the alleged adverse employment action. The only logical inference to be drawn from Gross is that an employee cannot claim that age is a motive for the employer’s adverse conduct and simultaneously claim that there was any other proscribed motive involved.”). *Wardlaw v. City of Philadelphia*, 2009 WL 2461890 at *7 (E.D. Pa. 2009) (“The

Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for discrimination. Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination and retaliation she alleges to have experienced. . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination.”).

11. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010). This ruling applied to the Americans with Disabilities Act prior to the effective date of the ADA Amendments Act. See also *Everson v. Leis*, 2011 Fed. App'x 0089N (6th Cir. 2011); *Bolmer v. Oliveira*, 594 F.3d 134, 148 (2d Cir. 2010) (recognizing open question regarding *Gross*'s extension to ADA claims); *Crouch v. J.C. Penney Corp.*, 337 Fed App'x 399, 402 n.1 (5th Cir. 2009) (unpublished decision).

12. *Fairley v. Andrews*, 578 F.3D 518, 525-26 (7th Cir. 2009).

13. *Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010).

14. *Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D. D.C. 2009).

15. *Brown v. J. Kaz., Inc.*, 581 F.3d 175 187 (3rd Cir. 2009) (Jordan, J., concurring); *Crouch v. J.C. Penney Corp., Inc.*, 337 Fed. App'x, 399, 402 n.1 (5th Cir. 2009) (unpublished decision).

16. See e.g. *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996) and *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001).

17. Title VII does not contain this “reasonable factor” language. Instead, the test is whether the employer took the adverse employment action out of business necessity, which is a more difficult bar to hurdle than “reasonable factor.”

18. *Meacham*, 128 S.C. 2406 (quoting *City of Jackson*, 544 U.S. at 233).

19. See *Townsend v. Weyerhaeuser Co.*, No. 04-563, 2005 WL 1389197 (W.D. Wis. June 13, 2005); *Silver v. Leavitt*, No. 05-0968, 2006 WL 626928 (D. D.C. Mar. 13, 2006); *Rollins v. Clear Creek Indep. Sch. Dist.*, No. 06-081, 2006 WL 3302538 (S.D. Tex. Nov. 13, 2006); *Aldridge v. City of Memphis*, No. 05-2966, 2008 WL 2999557 (W.D. Tenn. July 31, 2008).

20. Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment*, 46 AM. BUS. L.J. 607, 620-621 (2009).

21. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'YREV. 95, 115 (2006).

22. Stephen G. Wood, et al., *The American Experience with Age Discrimination Through the Lens of Nine Supreme Court Cases* (2004-2009), 58 AM. J. COMP. L. 377 (2010).
23. 540 U.S. 581 (2004).
24. 26 Berkeley J. Emp. & Lab. L. 363 (2005).
25. 128 S. Ct. 1931 (2008).
26. 128 S. Ct. 1147 (2008).
27. Kohrman, *supra* note 3, at 473.
28. 129 S. Ct. 1456 (2009).
29. 128 S. Ct. 1140 (2008).
30. *Id.* at 1147.

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Acknowledgments

The authors would like to acknowledge the contributions of Maria Heidkamp from Rutgers, The State University of New Jersey, and Anne Linn and Margaret Waelder from Cornell University, in the identification of appropriate resources for review in the formulation of this report.

About ODEP

The Office of Disability Employment Policy (ODEP) provides national leadership on disability employment policy by developing and influencing the use of evidence-based disability employment policies and practices, building collaborative partnerships, and delivering authoritative and credible data on employment of people with disabilities.

About the NTAR Leadership Center

Founded in 2007 under a grant/contract with the Office of Disability Employment Policy at the U.S. Department of Labor, the NTAR Leadership Center's mission is to build capacity and leadership at the federal, state, and local levels to enable change across workforce development and disability-specific systems that will increase employment and economic self-sufficiency for adults with disabilities.

This report was published by the NTAR Leadership Center, funded by a grant/contract from the U.S. Department of Labor, Office of Disability Employment Policy (Number OD-16563-07-75-4-34). The opinions expressed herein do not necessarily reflect the position of policy of the U.S. Department of Labor. Nor does mention of trade names, commercial products, or organizations imply the endorsement of the U.S. Department of Labor.

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