

ARTICLES

INCREASING EMPLOYMENT FOR OLDER WORKERS WITH EFFECTIVE PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION

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Employment discrimination contributes significantly to depressing labor force participation and employment rates of older workers. Actual discrimination reduces employers' demand for older workers' labor, while older workers' perception of workplace and labor market discrimination reduces their willingness to supply their labor, especially given the availability of alternative income sources. Actual and perceived discrimination combine to drive older workers out of employment and the labor market when they would be better off earning wages or salaries that would both support them as they grow older and allow them to improve the adequacy of their retirement savings.

Age discrimination persists, in part, because weak antidiscrimination laws, lack of transparency in some mechanisms for enforcing those laws, and low union-density rates make it more difficult for older workers to remedy discrimination and to trust that discrimination will be remedied. This Article proposes four solutions: (1) increase the effectiveness of the Age Discrimination in Employment Act (ADEA) to protect older workers from employment discrimination; (2) prohibit employers from mandating their employees sign contracts with predispute arbitration provisions covering age and disability discrimination claims, effectively barring them from litigating their claims in state and federal courts; (3) require employers to disclose the number and results of their interactive processes with older workers with disabilities about workplace accommodations under the Americans with Disabilities Act (ADA) and Rehabilitation Act § 503; and (4) enact comprehensive labor law reform so that more older workers will be protected against discrimination by collective bargaining agreements and union representation.

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INTRODUCTION

Observers of older workers’ economic conditions in the United States quickly encounter a paradox. On the one hand, the labor force participation rate among workers aged fifty-five and older (hereafter “older workers”) is roughly half the rate of prime-age workers (aged

twenty-five to fifty-four).¹ Their employment rate is also far lower.² On the other hand, many older workers lack sufficient savings to continue their preretirement standard of living in retirement.³ The paradox is that many older workers, including many without sufficient retirement savings, are not engaged in the principal activity that facilitates more retirement savings: continued employment.

The consequences of this paradox become more ominous when put in the context of a yawning pension gap that has widened over the past forty-five years. Social Security benefits, on average, replace only about 40% of preretirement income.⁴ So, older workers seeking to sustain their preretirement lifestyles need more retirement income. Employer-provided retirement plans are one important source of that income; however, these plans have changed in a way that makes it more difficult for older workers to ensure they will have adequate retirement income.⁵ Employers have largely migrated from defined-benefit (or pension) plans, which provide regular, reliable payments to retirees in predictable amounts for the rest of their lives, to defined-contribution plans, like 401(k) plans, which do not.⁶ Defined-contribution plans merely give participants the opportunity to save amounts of money they choose (influenced by capped tax protection) that may be augmented by an employer match.⁷ Participants invest their own savings, either actively or by default, and bear the risks, including the risks of outliving their money or precipitous market declines like those associated with the recent coronavirus pandemic.⁸ Most important, defined-contribution plans do not guarantee suf-

¹ *Civilian Labor Force Participation Rate by Age, Sex, Race and Ethnicity*, Table 3.3, U.S. BUREAU LAB. STAT., <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm> (last visited Aug. 29, 2020).

² *Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race*, Table 3, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/cpsaat03.pdf> (last visited Oct. 23, 2020).

³ See James M. Poterba, *Retirement Security in an Aging Population*, 104 AM. ECON. REV. 1, 14 (2014).

⁴ See Alicia H. Munnell, *Social Security's Real Retirement Age Is 70*, CTR. FOR RETIREMENT RES. BOS. C. 5 (Oct. 2013), http://crr.bc.edu/wp-content/uploads/2013/10/IB_13-15.pdf. Munnell's study estimates that workers who retire at age seventy will receive Social Security benefits replacing 43% of their income, workers retiring at sixty-five will receive 31% replacement income, and workers retiring at sixty-two will receive 24% replacement income. *Id.*

⁵ Roughly three-quarters of U.S. employees have access to an employer-provided retirement plan, although only slightly more than half of all employees are enrolled in a plan. See *Retirement Benefits: Access, Participation, and Take-up Rates*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm> (last updated Mar. 2018).

⁶ Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007).

⁷ *Types of Retirement Plans*, U.S. DEPT. OF LAB., <https://www.dol.gov/general/topic/retirement/typesofplans> (last visited Aug. 29, 2020).

⁸ See Merton C. Bernstein, *ERISA: How It Came to Be; What It Did, What to Do About It*, 6 DREXEL L. REV. 439, 445 (2013) ("The successors of defined benefit plans, defined

efficient savings or produce a predictable and protected lifetime income stream, like a pension would.⁹

In 1975, about 32% of employees in the United States (about 29% of the total U.S. civilian labor force) had private-sector pension plans.¹⁰ In 2016 slightly more than 9% of active employees (9% of the total workforce) had private-sector pensions.¹¹ If American private-sector employers had provided pensions to the same percentage of their employees in 2016 as they had in 1975, almost 51 million employees in the United States would have had pensions—roughly 37 million more workers than have pensions today.¹² This is the pension gap.

The need for a reliable lifelong income supplement to Social Security is apparent to anyone planning for retirement. One obvious hedge against the risks created by the lack of protected lifetime retirement income would be for older workers to earn and save more by continuing to work later in life. Yet that has not been their response, at least to scale. Older workers' labor force participation rate grew from the mid-1990s until the Great Recession,¹³ but not enough to fill the pension gap, much less to help the majority of workers who could not have expected to receive pensions even when they were most common.¹⁴ For example, from 1998 to 2018, the number of older workers participating in the labor force grew by only 9.6 million¹⁵—roughly one-quarter of the number

contribution plans—largely 401(k)s and IRAs—are not designed to protect beneficiaries against risk. When the markets come down with colds, beneficiaries find their plans afflicted by pneumonia.”).

⁹ David John, William Gale, J. Mark Iwry, & Aaron Krupkin, *From Saving to Spending: A Proposal to Convert Retirement Account Balances into Automatic and Flexible Income*, BROOKINGS INST. 2 (July 2019), <https://www.brookings.edu/research/from-saving-to-spending-a-proposal-to-convert-retirement-account-balances-into-automatic-and-flexible-income/>.

¹⁰ Fed. Reserve Bank of St. Louis, *Table A-1. Employment Status of the Civilian Population by Sex and Age*, STLOUISFED.ORG, <https://fred.stlouisfed.org/release/tables?rid=50&eid=463&od=2016-12-01> (last visited Aug. 29, 2020) (based on author's calculations); see also *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2017*, U.S. DEPT. OF LAB. 9–10 (Sept. 2019), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> (based on author's calculations).

¹¹ *Id.*

¹² *Id.*

¹³ See Nicole Maestas & Julie Zissimopoulos, *How Longer Work Lives Ease the Crunch of Population Aging*, 24 J. ECON. PERSP. 139, 145–49 (2010) (discussing factors that drove this growth).

¹⁴ See Martin Neil Baily & Benjamin H. Harris, *Working Longer Policies: Framing the Issues*, BROOKINGS INST. 7 (Jan. 2019), <https://www.brookings.edu/research/working-longer-policies-framing-the-issues/>.

¹⁵ *Civilian Labor Force, by Age, Sex, Race, and Ethnicity*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/emp/tables/civilian-labor-force-summary.htm> (last visited Aug. 29, 2020) (based on author's calculations); *Civilian Labor Force Participation Rate*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/charts/employment-situation/civilian-labor-force-participation-rate.htm> (last visited Aug. 29, 2020) (based on author's calculations). Between 2008 and 2018 the labor-force participation rate of workers aged 55 and older remained essentially un-

of workers trapped in the pension gap. Intriguingly, the steepest decline in labor force participation among older workers occurs around age sixty-five when the day-to-day economics of retirement should be apparent.¹⁶

We are left with the question begged by our paradox: Why have many millions of older workers not continued to work or returned to work so they might earn more and save adequately for retirement?

This Article will argue that older workers act rationally when they exit employment and the labor force because they are escaping employment discrimination that significantly reduces the economic returns from employment and labor market participation. In this Article, “employment discrimination” means any employer’s decision—for example, hiring, discharge, compensation, promotion, training, and discipline—that disadvantages an older worker, whether intentionally or unintentionally, “because of such individual’s age.”¹⁷

Section I will describe how statutory protections against discrimination for older workers in the ADEA, including as interpreted by the Supreme Court, are weaker than protections in Title VII of the Civil Rights Act against race, sex, and other forms of employment discrimination. It also will discuss how problems with the interactive process for satisfying the ADA’s reasonable accommodation mandate erect a barrier to the employment and labor force participation of older workers with disabilities. Section II will cite evidence that most older workers perceive that they face employment discrimination (“perceived discrimination”). This section also will describe evidence that these perceptions are often reality—that is, there is widespread actual discrimination against older workers facilitated, in part, by weak age and disability discrimination laws. Perceived discrimination and actual discrimination combine to pressure older workers to abandon their search for employment and exit the labor market. Statutory weaknesses not only permit employment discrimination to persist unremedied, but also validate older workers’ perceptions that employment discrimination against them will continue unchecked.

Section III proposes four solutions: (1) increase the effectiveness of laws protecting older workers from employment discrimination, including the ADEA and ADA; (2) prohibit employers from requiring their employees to sign predispute agreements mandating arbitration of age

changed, but the population grew by 5.73 million, so more older workers participated. The demographics of older workers puts downward pressure on the group’s labor force participation. This population segment is older today, on average, than it was in the past. Since workers participate less in the labor force as they age, even within the group of older workers, we would expect the aging of older workers to reduce the group’s overall labor force participation rate. See Baily & Harris, *supra* note 14, at 13.

¹⁶ See Baily & Harris, *supra* note 14, at 9–10.

¹⁷ 29 U.S.C. § 623(a)(1) (2018).

and disability discrimination claims; (3) require employers to disclose the number and results of their interactive processes with older workers with disabilities regarding workplace accommodations; and (4) enact comprehensive labor law reform so that collective bargaining agreements and union representation will protect more older workers against discrimination.

I. EXISTING LAW PROVIDES WEAKER PROTECTIONS AGAINST ACTUAL AGE DISCRIMINATION

Three laws are relevant to any discussion of employment discrimination against older workers: Title VII of the Civil Rights Act of 1964 (Title VII),¹⁸ the ADEA,¹⁹ and the ADA.²⁰ Title VII prohibits employment discrimination because of race, sex, color, national origin, and religion.²¹ Title VII does not protect specified classes of workers; rather, it prohibits classifications of workers based on the listed characteristics.²² For example, both men and women may bring sex discrimination lawsuits under Title VII not just women.²³ Neither age nor disability is a prohibited classification under Title VII; however, the ADEA's prohibition on age discrimination was drawn verbatim from Title VII's antidiscrimination provision.²⁴ Also, courts' interpretations of Title VII heavily influenced ADEA jurisprudence.²⁵ So, understanding Title VII helps to explain the ADEA, and comparisons to Title VII will help expose the ADEA's weaknesses.

Unlike Title VII, the ADEA and ADA both protect defined classes: respectively, workers aged forty or older, and workers with a "disability."²⁶ The ADA defines "disability" to mean "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."²⁷ According to the Bureau of Labor Statistics, which uses a different but related definition of "disability," almost 70% of American adults with disabilities are aged fifty-five

¹⁸ 42 U.S.C. §§ 2000e–2000e–17 (2012).

¹⁹ 29 U.S.C. §§ 621–634 (2018).

²⁰ 42 U.S.C. §§ 12101–12213 (2012).

²¹ 42 U.S.C. § 2000e–2(a) (2012).

²² *Id.*

²³ Affirmative action, which complicates this story to some degree, is beyond the scope of this Article.

²⁴ See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting the similarities between Title VII and the ADEA in both their goals and their formulation).

²⁵ See *id.* at 580–81.

²⁶ 29 U.S.C. § 631(a) (2018); 42 U.S.C. § 12101(b)(1) (2012).

²⁷ 42 U.S.C. § 12102(1) (2018).

or older.²⁸ These workers may be able to bring claims under both the ADEA for age discrimination and the ADA for disability discrimination, just as older women might bring claims under both the ADEA for age discrimination and Title VII for sex discrimination.²⁹

Older workers seeking to remedy employment discrimination can bring three types of legal claims. Two categories of claims are drawn from Title VII jurisprudence: disparate treatment claims and disparate impact claims.³⁰ This section will show that the legal standards imposed on older workers for disparate treatment claims are more difficult to satisfy than those applied to Title VII claims. Also, it will explain that employers have a defense to disparate impact claims under the ADEA that is easier to satisfy than the comparable defense under Title VII.

In addition to disparate treatment and disparate impact claims, the ADA authorizes claims based on an employer's failure to provide a reasonable accommodation to a worker with a disability.³¹ This section will raise questions about the effectiveness of the interactive process, which is the ADA's mechanism for satisfying this reasonable accommodation mandate. It will also examine how employers' ability to mandate that employees agree to arbitration of age and disability discrimination claims before these claims arise leaves discrimination unremedied. Finally, it

²⁸ *Table 1. Employment status of the civilian noninstitutional population by disability status and selected characteristics, 2019 annual averages*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/disabl.t01.htm> (last modified Feb. 26, 2020) (based on author's calculations). The Bureau of Labor Statistics asks people aged sixteen and older the following six questions to determine if they have a "disability":

- Is anyone deaf or does anyone have serious difficulty hearing?
- Is anyone blind or does anyone have serious difficulty seeing even when wearing glasses?
- Because of a physical, mental, or emotional condition, does anyone have serious difficulty concentrating, remembering, or making decisions?
- Does anyone have serious difficulty walking or climbing stairs?
- Does anyone have difficulty dressing or bathing because of a physical, mental, or emotional condition?
- Does anyone have difficulty doing errands alone such as visiting a doctor's office or shopping?

Frequently asked questions about disability data, U.S. BUREAU LAB. STAT., https://www.bls.gov/cps/cpsdisability_faq.htm (last modified Aug. 26, 2015).

²⁹ The nuanced and important topic of intersectionality is largely beyond the scope of this Article. Intersectionality is discrimination associated with two or more of a worker's personal characteristics. For example, the age and sex discrimination that some older women experience may be tightly intertwined, which can add complexity to the social and economic analysis as well as any legal claims. The only intersectional issue this Article will address, and only in a limited way, is the relationship between age and disability. For a fuller discussion of the intersectionality of gender and age, *see, e.g.*, SUSAN BISOM-RAPP & MALCOLM SARGEANT, *LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE* 33–59 (2016).

³⁰ *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

³¹ 42 U.S.C. § 12112(b)(5) (2018).

will explore how low union density deprives some older workers of important workplace protections against age discrimination.

A. *Disparate Treatment*

Disparate treatment claims allege that an employer has made employment-related decisions “with the intent to treat or affect the employee differently” because of a prohibited classification or because the employee is in a protected class.³² Under the ADEA, plaintiffs bear a burden of proving that their age was a “but-for” cause of the challenged employer decision.³³ In other words, the plaintiff must prove that absent age considerations, the employer would not have made the decision. This is a more difficult substantive standard than the standard applied to Title VII disparate treatment claims. Title VII plaintiffs bear a burden of proving that the prohibited classification (e.g., race, sex) was merely “a motivating factor” in the employer’s decision.³⁴ The employer bears the burden of proving that it had multiple and mixed motives and the decision would have gone forward absent the discriminatory motive.³⁵ These disparate treatment cases are also known as “mixed motive” cases.³⁶

As noted, the ADEA language banning age discrimination was drawn verbatim from Title VII: discrimination “because of” race or age is unlawful. For this reason, prior to the Supreme Court’s intervention, many lower courts considering ADEA mixed motive cases applied the Supreme Court’s reasoning in *Price Waterhouse v. Hopkins*,³⁷ the leading sex discrimination case allowing mixed motive claims under Title VII.³⁸ Simply, these courts concluded that the same language in the two statutes should be interpreted in the same way; therefore, courts’ interpretation of the ADEA followed the *Price Waterhouse* Court’s interpretation of Title VII. *Price Waterhouse* as applied to the ADEA required plaintiffs to show that age was a motivating factor in the employer’s decision.³⁹

³² See JODY FEDER, CONG. RESEARCH SERV., RL34652, THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA): A LEGAL OVERVIEW 8 (2010); see also Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (explaining the nature of disparate treatment claims).

³³ See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177–78 (2009).

³⁴ See *Desert Palace v. Costa*, 539 U.S. 90, 101 (2003).

³⁵ See *id.* at 93.

³⁶ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). Alternatively, the employer might seek to prove that it did not have any discriminatory motive. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

³⁷ *Price Waterhouse*, 490 U.S. at 258.

³⁸ Christine R. Lewis, *A Gross Injustice: Proving Age Discrimination by Federal Employers under the ADEA in the Wake of Gross v. FBL Financial Services, Inc.*, 87 ST. JOHN’S L. REV. 271, 277 (2013).

³⁹ See *id.* at 276–77.

The Supreme Court upset this symmetry in *Gross v. FBL Financial Services*.⁴⁰ The *Gross* Court inferred a difference between Title VII and ADEA disparate treatment claims from a provision in the Civil Rights Act of 1991.⁴¹ The 1991 Civil Rights Act partly ratified and partly modified the *Price Waterhouse* framework for mixed motive cases under Title VII. In particular, the Act ratified “a motivating factor” as the appropriate standard of proof.⁴² However, the 1991 Civil Rights Act was silent about the standard that should be applied to ADEA mixed motive cases, although it did address other ADEA issues.⁴³ The *Gross* Court read Congress’s silence to imply that disparate treatment cases brought under the two statutes should be treated differently.⁴⁴ Specifically, ADEA plaintiffs would be subject to the more challenging “but-for” standard.⁴⁵ The Court could have easily reached the opposite conclusion—that is, reading Congress’s silence on the ADEA disparate treatment cases as an implicit endorsement of the *status quo* because Congress offered no signal of an intent to disrupt courts’ reliance on *Price Waterhouse* in ADEA cases. Instead, the *Gross* Court chose to make older workers’ standard of proof more difficult.

Legal scholar Michael Foreman predicted *Gross*’s result: “But-for causation may largely nullify the ADEA, limiting relief to only the most extreme cases of discrimination.”⁴⁶ Requiring a plaintiff to show that age was *determinative* in an employer’s decision making may be impossible because “evidence of the employer’s intent is usually within the sole control of the employer.”⁴⁷ Because *Gross* allows age to be considered in employment-related decisions, employers can evade liability for discrimination simply by providing—or creating—some other motivating factor that caused or substantially contributed to its decision.⁴⁸ In sum, *Gross* allows some age-conscious, discriminatory employer decision making to continue unremedied.

⁴⁰ 557 U.S. 167, 177–78 (2009).

⁴¹ *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009). Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991).

⁴² Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991).

⁴³ *See Gross*, 557 U.S. at 174.

⁴⁴ *See id.* at 174–75.

⁴⁵ *See id.* at 177–78.

⁴⁶ Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!*, 40 U. MEM. L. REV. 681, 692 (2010); *see also* Patrick Button, *Population Aging, Age Discrimination, and Age Discrimination Protections at the 50th Anniversary of the Age Discrimination in Employment Act 19* (Nat’l Bureau of Econ. Research, Working Paper No. 25850, 2019).

⁴⁷ Foreman, *supra* note 46, at 692.

⁴⁸ *Id.*

B. *Disparate Impact*

Plaintiffs may bring disparate impact claims under Title VII when a facially neutral employer practice has a disproportionately adverse effect on a group because of a prohibited classification (e.g., race, sex).⁴⁹ The Supreme Court interpreted the ADEA to allow disparate impact claims in *Smith v. City of Jackson*,⁵⁰ but distinguished the ADEA from Title VII. Specifically, it read the ADEA as providing employers with a powerful defense that is not available to Title VII defendants.

Similar to Title VII plaintiffs, ADEA disparate impact plaintiffs must prove that a particular employment practice adversely impacts older workers (i.e., the *prima facie* case).⁵¹ After the plaintiff establishes this *prima facie* case, the defendant can offer an affirmative defense.⁵² The 1991 Civil Rights Act required Title VII defendants to bear the burden of proof that the particular employment practice is job-related and consistent with business necessity.⁵³ This is an exacting standard requiring that the employment practices have valid goals, as well as proof that no other means would achieve those goals without also producing the same degree of disparate impact on the affected class of workers.⁵⁴ By contrast, after the *City of Jackson* decision, the ADEA's affirmative defense requires that defendants bear the burden of proving only that their practices are based on any "reasonable factor other than age" (RFOA).⁵⁵ In the *City of Jackson* Court's view, this different defense is mandated by the ADEA's text, which states that an employer's conduct is not unlawful "where the differentiation is based on reasonable factors other than age."⁵⁶ The result is a defense to ADEA disparate impact claims that is significantly easier for employers to prove than the defense in similar Title VII cases.

The difference can be summarized as follows: in a Title VII disparate impact case, if a defendant proves that its employment practice is reasonable, the plaintiff's response that other practices would accomplish the same goals with a less adverse impact or no impact is sufficient to prove that the employer-defendant's practice is unlawful. In an ADEA

⁴⁹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing the disparate impact cause of action).

⁵⁰ See *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

⁵¹ See *id.* at 236–38 (adopting *Griggs*).

⁵² See *id.* at 233.

⁵³ See Donald O. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 494–95 (1992).

⁵⁴ See *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

⁵⁵ See *Smith*, 544 U.S. at 239 (noting RFOA provision of the ADEA and precluding liability in cases involving disparate impact claims "if the adverse impact was attributable to a nonage factor that was 'reasonable.'").

⁵⁶ See 29 U.S.C.A. § 623(f)(1); see also *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101–02 (2008) (establishing that RFOA is an affirmative defense).

case, this plaintiff's response alone would not establish that the employer's practice was *unreasonable* and, therefore, unlawful.⁵⁷ In post-*City of Jackson* decisions, courts have held that valid RFOAs include a list of age-related or age-correlated factors, including an employee's proximity to retirement, salary level, number of years employed, higher health-care costs, and prior retirement.⁵⁸ In the words of one commentator, "What is this but allowing blatant age discrimination to be a RFOA?"⁵⁹ One study of ADEA cases found that a sizable percentage of disparate impact plaintiffs' prima facie cases fail; however, even when plaintiffs satisfy the prima facie case, "most courts" find that the employer-defendant has successfully established a valid RFOA defense.⁶⁰ Exacerbating this result, some courts of appeals have held recently that ADEA disparate impact claims are not available to job applicants.⁶¹

C. ADA Failure to Provide Reasonable Accommodation

The ADA defines discrimination to include an employer failing to provide "reasonable accommodations" to "qualified individuals" with disabilities that would allow these individuals to perform the "essential functions" of their jobs or, for job applicants with disabilities, would "enable [those] qualified . . . to be considered for the position they desire," unless the accommodation would create an undue hardship for the employer.⁶² A "qualified individual" is a worker capable of performing the "essential functions" of a job either with or without a reasonable accommodation.⁶³ Accommodations encompass a wide range of adjustments to workplace conditions, but largely fall into two categories: alteration of the physical plant or equipment (e.g., ramps for wheelchair users, the location where work is performed), and alteration in how or when jobs are performed.⁶⁴

⁵⁷ *Meacham*, 554 U.S. 84 at 96.

⁵⁸ Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49, 49–50 (2009).

⁵⁹ *Id.* at 83.

⁶⁰ See Carla J. Rozycki & Emma J. Sullivan, *Employees Bringing Disparate-Impact Claims Under the ADEA Continue to Face an Uphill Battle Despite the Supreme Court's Decisions in Smith v. City of Jackson and Meacham v. Knolls Atomic Power Laboratory*, 26 ABA J. LAB. & EMP. L. 1, 9–15 (2010). One fruitful area of further research would be to analyze disparate impact cases decided since 2010 when this study was conducted.

⁶¹ See *Kleber v. CareFusion Corp.*, 914 F.3d 480, 488 (7th Cir. 2019); *Villareal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 970 (11th Cir. 2016).

⁶² 42 U.S.C. §§ 12111(8)–(9), 12112(b)(5); 29 C.F.R. §§ 1630.2 (o)(1)(i), (o)(4), (p).

⁶³ 42 U.S.C. § 12111(8).

⁶⁴ See Seth D. Harris & Michael Ashley Stein, *Workplace Disability*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 342 (Kenneth G. Dau-Schmidt, Seth D. Harris, & Orly Lobel eds., 2009). Early in the ADA's existence, several scholars published analyses suggesting the reasonable accommodations requirement resulted in a declining employment rate for workers with disabilities. A larger subsequent body of work demonstrated that these early

Whether older workers with disabilities receive the accommodations they need to overcome barriers to employment and labor force participation is a potentially important and underappreciated question hidden within the larger challenge of low participation rates among older workers. In 2018, people with disabilities⁶⁵ were 56% of the civilian noninstitutional population aged fifty-five or older. This group of older Americans with disabilities had only a 13% labor force participation rate.⁶⁶ Americans with disabilities were 16% of the population aged forty-five to sixty-five, and this group of older individuals with disabilities had only a 28.5% participation rate.⁶⁷ These strikingly low participation rates among these older workers with disabilities drive down the overall labor force participation rate of older workers as a group. As a result, addressing the larger labor force participation challenge may require significantly reducing barriers to job searches and employment of older workers with disabilities. Appropriate workplace accommodations for employees and job applicants are one means toward this end.

The ADA requires employees with disabilities and their employers to engage in an interactive process to choose an accommodation.⁶⁸ Ideally, employees propose accommodations and employers either accept or offer alternatives. The employee and employer are expected to exchange information and possible solutions in a collaborative effort to find the least costly, most effective accommodation.⁶⁹ Each party has relevant information the other party does not—the worker about her disability and the employer about production processes and plans, among other things. Substantial obstacles to sharing this information can frustrate the interactive process.⁷⁰ To incentivize employer participation, employers engaged in good-faith interactive processes are exempted from compensatory and

analyses were flawed. The accommodations requirement did not cause a negative employment effect. *See id.* at 349–53.

⁶⁵ These data rely on the Bureau of Labor Statistics’ definition of disability, not the ADA’s definition. *See* U.S. Bureau of Labor Statistics, *supra* note 27. It is not possible to determine whether the definitional differences produce meaningfully different results, but there is enough similarity in the definitions to treat these data as relevant, if imperfect, estimates.

⁶⁶ *See id.*

⁶⁷ *Id.* (based on author’s calculations); and *Civilian labor force by age, sex, race, and ethnicity, 1998, 2008, 2018, and projected 2028 (Numbers in thousands)*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/emp/tables/civilian-labor-force-summary.htm>. (last updated Feb. 26, 2020) (based on author’s calculations).

⁶⁸ For a further discussion of these bilateral information asymmetries see Harris & Stein, *supra* note 64, at 345–46, and sources cited therein.

⁶⁹ *See* 29 C.F.R. § 1630.9 (2006) (EEOC interpretive guidance discussing the interactive process); S. REP. NO. 101-116, at 34 (1989) (Encouraging “a problem-solving approach . . . to identify the particular tasks or aspects of the work environment that limit performance . . . employers will first consult with and involve the individual with a disability in deciding on the appropriate accommodation”); accord H.R. REP. NO. 101-485, pt. 2, at 65 (1990).

⁷⁰ Harris & Stein, *supra* note 64, at 345–46.

punitive damages in any ensuing lawsuit.⁷¹ Employees' incentive is the removal of barriers to their success in the labor market or workplace.⁷²

The interactive process and its outcomes are entirely private. Employers are not obligated to report the number, frequency, or success of interactions with their employees with disabilities, or whether they provided an accommodation and, if so, what type.⁷³ Thus, older workers with disabilities cannot know which employers (including their own) may be amenable to providing accommodations in general, or the particular accommodations they may need to overcome particular barriers. Older workers, the public, and workplace disability law enforcement agencies like the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) cannot know whether employers are engaged in good-faith efforts to comply with the law. My empirical study of EEOC mediations of ADA accommodations claims suggested there is cause for concern.⁷⁴ Negotiations over disabilities accommodations within the EEOC's mediation process were more difficult than negotiations over other discrimination issues, in part because of information asymmetries, but also because employers were biased against providing accommodations for disabilities.⁷⁵

The only existing remedy for failed interactive processes is for employees with disabilities to bring ADA lawsuits alleging their employers failed to provide reasonable accommodations, or any accommodation at all. Yet, ADA litigation has proven to be a problematic enforcement mechanism. Courts are hesitant to second-guess employers' managerial and personnel decisions.⁷⁶ For example, for more than 15 years after the ADA was enacted, courts evaded reaching the merits of cases by granting summary judgment⁷⁷ to employers on the grounds that employees were not "individuals with disabilities."⁷⁸ The ADA Amendments Act of 2008 (ADAAA)⁷⁹ sought to foreclose this judicial escape route by dramatically broadening and clarifying the definition of "disability" and ex-

⁷¹ 42 U.S.C. § 1981a(a)(3) (2000).

⁷² See 29 C.F.R. §1630.9.

⁷³ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002).

⁷⁴ Seth D. Harris, *Disabilities Accommodations, Transaction Costs and Mediation: Evidence from the EEOC's Mediation Program*, 12 HARV. NEGOT. L. REV. 1, 22–23 (2008).

⁷⁵ *Id.*

⁷⁶ Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 12–13 (2014).

⁷⁷ Summary judgment is a pretrial motion by a litigant arguing that the litigant "is entitled to judgment as a matter of law" and the case lacks genuine issues of material fact for a jury to decide. See FED. R. CIV. P. 56.

⁷⁸ See Porter (2014), *supra* note 76, at 10.

⁷⁹ ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008) (amending 42 U.S.C. § 12205a).

PLICITLY directing courts to focus on the merits of cases rather than on the disability issue.⁸⁰ An extensive case analysis by legal scholar Nicole Porter found evidence that, despite Congress’s explicit direction, some courts continued using the “not a disability” escape route.⁸¹ Congress seemingly could not legislate away courts’ skittishness around second-guessing managerial decisions.

Porter⁸² and legal scholar Stephen Befort⁸³ separately analyzed the ADAAA’s effects on litigation outcomes. Their studies reached partly inconsistent conclusions. Befort found that courts were more likely to hold that employees were not qualified individuals.⁸⁴ Porter also found an increase in the number of courts finding employees to be not qualified, but could not conclude “the number [of summary judgments] is high enough to warrant a conclusion that courts are using the qualified inquiry or reasonable accommodation issue to unduly restrict protection of the Act.”⁸⁵ She found that the type of job function at issue influenced the court’s decision.⁸⁶ These studies raise doubts that litigation is a successful strategy for ensuring accommodation of older workers with disabilities.

D. *Mandatory Arbitration Exacerbates the Failures of Age Discrimination Laws*

THE ADEA’s failure to protect older workers from employment discrimination is exacerbated by a series of Supreme Court decisions allowing employers to condition employment on workers’ acceptance of contracts with mandatory arbitration provisions.⁸⁷ These provisions compel employees who bring any legal claims against their employer, including age discrimination and other discrimination claims, to bring them to

⁸⁰ 42 U.S.C.A. § 12102 § 4(1)(A). *See also* Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 *Geo. J. Poverty L. & Pol.* 383, 384–85 (2019) (discussing the ADAAA’s “interpretive provisions” endorsing a broader notion of “disability” than prior courts had embraced).

⁸¹ *See* Porter (2019), *supra* note 80, at 411–12 (noting that many courts continue to rely on pre-ADAAA precedent for the disability determination, despite Congress’s clear instruction to abandon such methods).

⁸² *See* Porter (2014), *supra* note 76, at 19–46.

⁸³ *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 *WASH. & LEE L. REV.* 2027, 2049–57 (2013).

⁸⁴ *See id.* at 2036–37.

⁸⁵ *See* Porter (2014), *supra* note 76, at 67.

⁸⁶ *See id.* at 82.

⁸⁷ *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–19 (2001) (holding that employment contracts were subject to the Federal Arbitration Act); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009) (requiring employees to arbitrate ADEA claims per an arbitration clause in a collective bargaining agreement); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (holding that class waiver arbitration agreements are enforceable and do not violate the NLRA).

an arbitrator rather than to the EEOC or a court.⁸⁸ In reality, there is no meaningful negotiation over these provisions. A prospective employee's only alternative is to decline the job,⁸⁹ which is unrealistic for most workers, especially given the ubiquity of mandatory arbitration provisions in American labor markets. In 2018, dispute-resolution expert Alexander Colvin estimated that 60 million working Americans have signed agreements that include mandatory arbitration provisions.⁹⁰

Empirical studies by Colvin and Mark Gough, and by Colvin alone, disclosed the worse outcomes for workers and better outcomes for employers that result from replacing litigation with mandatory arbitration.⁹¹ Employees are less likely to secure an attorney for arbitration.⁹² Attorneys regard arbitration to have less adequate discovery of facts and due process.⁹³ Employees have been less likely to win when arbitrating than litigating, and, when they do win, the remedies (e.g., damages) are substantially smaller.⁹⁴ When employees win an arbitration award, they collect a smaller percentage of the award than plaintiffs collect from a litigation award. Probably as a consequence of lesser remedies and collections, settlement amounts are also significantly smaller.⁹⁵ Perhaps most telling, studies by legal scholar Cynthia Estlund⁹⁶ and Colvin and

⁸⁸ See, e.g., Alexander J. S. Colvin & Mark D. Gough, *The Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1040 (2015); ALEXANDER COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES 1, 5 (Cornell Univ. 2014) [hereinafter Colvin & Gough, *Arbitration and Litigation*]; Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) [hereinafter Colvin, *Inequality of Justice*]; Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6 (2011); Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

⁸⁹ These “contracts of adhesion” are enforceable even where the employee has no knowledge of the arbitration provision or where continued employment, not affirmative agreement, constitute “assent” to the provision. See *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 237 (3d Cir. 2012) (enforcing an arbitration provision contained in mandatory hiring forms and unknown to the plaintiff); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1374–76 (11th Cir. 2005) (finding enforceable an arbitration provision circulated to employees on instruction that continued employment would constitute their acceptance as a “written agreement” to arbitrate under the FAA).

⁹⁰ See Colvin (2018), *supra* note 88 at 10.

⁹¹ See Colvin & Gough (2015), *supra* note 88, at 1035–36; Colvin & Gough, *Arbitration and Litigation*, *supra* note 88, at 21–22; Colvin, *Inequality of Justice*, *supra* note 88, at 90; Colvin (2011), *supra* note 88, at 21; Colvin (2018) *supra* note 88, at 12.

⁹² See Colvin & Gough, *Arbitration and Litigation*, *supra* note 88, at 14–15.

⁹³ See *id.* at 18–20.

⁹⁴ See Colvin (2011), *supra* note 88, at 6–8.

⁹⁵ See Colvin & Gough, *Arbitration and Litigation*, *supra* note 88, at 21; see also Colvin, (2011), *supra* note 88, at 7–8.

⁹⁶ See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018).

Kelly Pike⁹⁷ estimated that hundreds of thousands of expected arbitration cases (i.e., cases that data patterns projected would be filed) were not filed by the workers involved. Workers know arbitration disadvantages them, they lack faith in arbitration, or both.

Colvin and Gough also found that employers' status as repeat players in arbitration, and repeat players with particular arbitrators, may influence outcomes.⁹⁸ Compared to first-time encounters, employees are less likely to win in arbitration if their employers have engaged either in multiple arbitrations or multiple arbitrations with the same arbitrator.⁹⁹ Employees' average remedies are lower in these cases, as well.¹⁰⁰ According to Colvin and Gough, these effects could result from arbitrator bias; alternatively, it might be "plausible that repeat employers accrue legitimate advantages by virtue of their larger size, greater resources, more sophisticated human resource policies, and experience."¹⁰¹ Legal scholars David Sherwyn, Michael Heise, and Samuel Estreicher have raised important critiques of these repeat-player effects, and argue that "the proper comparison for repeat-player employers in arbitration should be with repeat-player employers in litigation."¹⁰²

It is important not to read this analysis as an enthusiastic embrace of litigation as a dispute resolution strategy. Litigation can be costly, time-consuming, and contentious. As legal scholar Susan Bisom-Rapp and others have argued, a worker pursuing discrimination litigation can incur considerable economic and psychological costs.¹⁰³ Bisom-Rapp also notes that antidiscrimination jurisprudence consistently errs in favor of managerial prerogative and against plaintiffs.¹⁰⁴ Sherwyn and Zev Eigen have argued that arbitration can be more efficient, timely, and cost-effective than EEOC processes and litigation.¹⁰⁵ Yet, the trade-offs are problematic. It appears that workers pay for speed and lower costs with worse outcomes.¹⁰⁶ Also, litigation costs disincentivize employers from engag-

⁹⁷ See Alexander J. S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed*, 29 OHIO ST. J. ON DISP. RESOL. 59, 83 (2014).

⁹⁸ See Colvin & Gough (2015), *supra* note 88, at 1035–37.

⁹⁹ *Id.* at 1035.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1037.

¹⁰² Samuel Estreicher, Michael Heise, & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 386–87 (2018).

¹⁰³ Susan Bisom-Rapp, *What We Know About Equal Employment Opportunity Law After Fifty Years of Trying*, 22 EMP. RTS. & EMP. POL'Y J. 337, 342 (2018). See also *supra* text accompanying notes 64–73.

¹⁰⁴ Susan Bisom-Rapp, *supra* note 103, at 345.

¹⁰⁵ Zev J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J. L. & PUB. POL'Y 217, 268 (2016).

¹⁰⁶ See Colvin & Pike, *supra* note 97, at 79.

ing in or allowing discriminatory behaviors.¹⁰⁷ Reducing those costs by avoiding litigation may have the perverse effect of facilitating more discrimination.¹⁰⁸

Employers also benefit from arbitration's secrecy. Litigation is public, except in rare cases or when a settlement agreement mandates confidentiality.¹⁰⁹ Arbitration's secrecy allows employers to evade reputational harm and any public opprobrium that might flow from a public finding that they discriminate.¹¹⁰ This further reduces employers' incentives to comply with age discrimination laws. Finally, age discrimination law cannot evolve, and education about the law's interpretation and meaning is lost, when cases are resolved in secret and unreported arbitration proceedings.¹¹¹ Individual employment law arbitration decisions have no precedential effect and are irrelevant to courts interpreting the ADEA. They are also unknown to policymakers and legislators considering the ADEA's effectiveness and absent from the public debate.¹¹² Unlike litigation, arbitration does not assure older workers that any discrimination against them will be remedied reliably and honestly.

E. Law Union Density Deprives Some Older Workers of Important Workplace Protections Against Age Discrimination

Only 10.3% of American workers were union members in 2019; in the private sector, it was only 6.3%.¹¹³ Union density has declined steadily since it peaked at approximately 30% in 1954.¹¹⁴ One consequence of this decline is that most older workers do not benefit from protections against age discrimination in collective bargaining agreements (CBAs) and union representation. As a result, older nonunion workers are more likely to suffer unremedied actual discrimination.

CBAs typically contain at least four provisions that protect older workers from age discrimination. First, CBAs require "just cause" before

¹⁰⁷ Eigen & Sherwin, *supra* note 105, at 254.

¹⁰⁸ See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1332 (2015).

¹⁰⁹ *Id.* at 1324.

¹¹⁰ See Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1212 (2016) (discussing the disincentive of reputational harm companies face as information becomes public during litigation); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1262 (2003) (examining how stock prices and investor confidence are collaterally impacted by public litigation).

¹¹¹ See Estlund, *supra* note 96, at 679.

¹¹² See *id.* at 680.

¹¹³ *Union Members Summary*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/union2.nr0.htm> (last visited Aug. 26, 2020).

¹¹⁴ GERALD MEYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES (2004).

an employer may discharge an employee.¹¹⁵ These provisions supersede the default at-will employment rule in American law: an employer may discharge an employee for a good reason, a bad reason, or no reason at all, as long as the discharge does not violate a specific legal provision.¹¹⁶ Just-cause provisions require employers to show evidence that they have a legitimate reason for the discharge.¹¹⁷ This is a powerful prophylactic against age discrimination. Second, CBAs usually contain specific prohibitions against discrimination, including age and disability discrimination, that supplement and may afford greater protection than antidiscrimination statutes.¹¹⁸ These two CBA provisions significantly decrease the risk that older workers will lose their jobs to discrimination or face other discriminatory disadvantages. Further, they likely decrease perceived discrimination among older unionized workers and thereby make them more likely to supply their labor, at least to their unionized employer.¹¹⁹

Third, CBAs typically require employers to favor employees that have greater seniority (i.e., job tenure).¹²⁰ Older workers have substantially longer median job tenures than prime-age and younger workers;¹²¹ as a result, seniority provisions in CBAs tend to benefit older workers, for example, in decisions about promotions, better job assignments, opportunities to secure overtime work, and higher pay.¹²² Because of these benefits, seniority provisions make it more likely that older workers will remain employed by their unionized employers rather than leaving their jobs and, potentially, the labor market.

Finally, CBAs almost always include multistep grievance procedures for the resolution of workplace disputes, including disputes over just cause, discrimination, and seniority concerns.¹²³ Grievance procedures are private, inexpensive dispute-resolution tools that solve

¹¹⁵ See David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 740 (1973).

¹¹⁶ See Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 56 (2007).

¹¹⁷ See *id.* at 60–61 (discussing discrimination exceptions to the at-will rule).

¹¹⁸ See generally Denise Cortes, *Union Power Redefined: How Arbitrating Claims, Including Title VII, Benefits Racial Minority Union Workers*, 9 RUTGERS RACE & L. REV. 443, 445–58 (2008).

¹¹⁹ Union members generally have longer job tenures than nonunion workers. See Ryan Finnigan & Jo Mhairi Hale, *Working 9 to 5? Union Membership and Work Hours and Schedules*, 96 SOC. FORCES 1541, 1545 (2018).

¹²⁰ See Feller, *supra* note 115, at 737.

¹²¹ See *Table 1. Median Years of Tenure with Current Employer for Employed Wage and Salary Workers by Age and Sex, Selected Years, 2008–2018*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/tenure.t01.htm> (last visited Aug. 26, 2020).

¹²² COMMITTEE ON HEALTH & SAFETY NEEDS OF OLDER WORKERS, NAT'L RES. COUNCIL 152 (David H. Wegman & James P. McGee eds., 2004).

¹²³ Cortes, *supra* note 118, at 445.

problems where they arise—the workplace—and involve those most directly involved, usually without lawyers or litigation.¹²⁴ In virtually all CBAs, the final step of the process, if needed, is binding arbitration.¹²⁵

Grievance arbitration is qualitatively different from individual mandatory arbitration. Bias is less likely in the former because the employer and union typically share the cost of the arbitrator and both the employer and the union are repeat players.¹²⁶ The employee is represented by an experienced union grievance representative (at no additional cost) who advocates for the employee, but who also defends the CBA's protection of all covered employees.¹²⁷ Thus, there is no secrecy. Further, grievance procedures largely focus on interpreting the CBA's provisions and shaping the law of the workplace, not public law.¹²⁸ It is an extension of the collective bargaining process.¹²⁹ The arbitrator advances the intentions of the parties. Decisions can be precedential in the workplace, but rarely beyond.¹³⁰ The outcomes of individual grievances, therefore, are relevant to everyone the CBA covers and are important for the union.¹³¹ For all these reasons, grievance arbitration is an effective means to enforce critical CBA provisions that are likely to increase labor force participation among older workers, as well as to stem discriminatory decision making that depresses employer demand for older workers.

II. EVIDENCE AND ANALYSIS OF DISCRIMINATION AGAINST OLDER WORKERS IN U.S. LABOR MARKETS AND WORKPLACES

A. *Evidence of Perceived Discrimination and Its Effects*

Survey results offer persuasive evidence that older workers perceive pervasive age discrimination in American labor markets and workplaces. A 2017 AARP survey of Americans aged forty-five and older found that

¹²⁴ See Feller, *supra* note 115, at 743.

¹²⁵ See *id.* at 745.

¹²⁶ See Jacob P. Hart, *A Practical Guide to Grievance Arbitration*, 25 PRAC. L. 33, 37 (1979) (“The single most important difference between arbitration and courtroom litigation is the right of the parties to select their judge.”)

¹²⁷ Josh Bivens, et al., *How today's unions help working people*, ECON. POL'Y INST. (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>.

¹²⁸ See, e.g., 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) (requiring statutory claims under the ADEA to be resolved through arbitration per the CBA).

¹²⁹ See generally Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 588 (1990).

¹³⁰ See Hart, *supra* note 126, at 55; see also Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499–1500 (1959) (calling these interpretations the “common law of the shop”).

¹³¹ One potential risk is that the union controls the grievance, not the individual older employee-grievant. The union may resolve a dispute in a manner that does not satisfy the grievant. However, the union is subject to a duty of fair representation that limits its discretion. See 29 U.S.C. § 158(b)(1)(A) (2018).

61% of respondents reported having experienced or witnessed age discrimination at work.¹³² Discriminatory acts ranged from hiring discrimination to negative comments in the workplace to unfair layoff and promotion decisions.¹³³ Twenty percent of older workers feared losing their jobs, and one-third of this group feared losing their jobs *because of age discrimination*.¹³⁴ In a separate AARP/*The Economist* survey, almost 10% of retired men and 7.5% of retired women aged fifty and older reported they had retired because of age discrimination.¹³⁵ Perhaps reflecting a lack of faith in existing protections, only 3% of respondents to the 2017 survey reported filing a formal discrimination complaint.¹³⁶ Ninety percent of respondents supported stronger anti-age-discrimination laws.¹³⁷

The University of Chicago's Associated Press-NORC surveys found widespread perceptions of discrimination among workers aged fifty and older.¹³⁸ In the most recent study, 58% of respondents saw older workers facing discrimination in the workplace.¹³⁹ Seventy-five percent consider their own age to be a detriment when looking for a job.¹⁴⁰ Roughly one-in-five reported a belief that they had been passed over for promotion or raises due to their age.¹⁴¹ Lower income older workers, older workers without a higher education degree, and older workers of color are more likely to perceive that they have suffered age discrimination.¹⁴² In sum, older workers witness age discrimination and expect it could damage their employment prospects, up to and including losing their current jobs. This survey evidence of perceived discrimination is ratified by the continuing flow of age discrimination charges filed by older workers with the EEOC since the mid-1990s.¹⁴³

Perceived discrimination is not necessarily actual discrimination, yet it *is* evidence that some older workers consider employment discrimi-

¹³² See Rebecca Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists*, AARP RESEARCH 3 (July 2018), <https://doi.org/10.26419/res.00177.002>.

¹³³ See *id.* at 7.

¹³⁴ See *id.* at 8–9.

¹³⁵ AARP & The Economist Intelligence Unit, *The Economic Impact of Age Discrimination*, AARP 10 (Mar. 2020), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2020/impact-of-age-discrimination.doi.10.26419-2Fint.00042.003.pdf.

¹³⁶ See Perron, *supra* note 132, at 5.

¹³⁷ See *id.* at 10.

¹³⁸ Eric Young, *Most Older Americans Face Age Discrimination in the Workplace, New Survey Finds*, ASSOCIATED PRESS & NORC (May 23, 2019), https://workinglongerstudy.org/most-older-americans-face-age-discrimination-in-the-workplace-new-survey-finds/?doing_wp_cron=1584391678.7409110069274902343750.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See AARP & The Economist Intelligence Unit, *supra* note 135, at 11.

¹⁴³ See, e.g., Sarah von Schrader & Zafar E. Nazarov, *Trends and Patterns in Age Discrimination in Employment Act (ADEA) Charges*, 38 RES. ON AGING 580, 588 fig.1 (2016).

nation when deciding whether to supply their labor. As Clark and Shoven observed, decisions to leave the labor market “depend on whether employees can remain in their career jobs, on the availability of other jobs for individuals who have left career employment, and on the net earnings that older workers can achieve in the labor market.”¹⁴⁴ Perceived discrimination means older workers expect they may not be able to stay in their current jobs, replacement jobs will be less available to them (if at all), and any replacement jobs could be terminated prematurely.¹⁴⁵ Consequently, perceived discrimination causes older workers to expect their gross earnings to be reduced by discrimination if they should seek and obtain a job.¹⁴⁶ This is the first step in older workers’ calculation when deciding to leave the labor market.

Perceived discrimination likely causes older workers to anticipate higher job search costs, as well.¹⁴⁷ At worst, older workers might expect discrimination to entirely deprive them of job opportunities.¹⁴⁸ If so, any job search would be a sunk cost. At a minimum, hiring discrimination makes it less likely that older workers will get any particular job, which means they will have to search more widely for jobs than they would in a discrimination-free labor market or if they were younger. Experimental evidence confirms these discrimination-bloated job search costs.¹⁴⁹ Thus, older workers who perceive discrimination expect a reduction in net earnings because of higher job search costs.

It should be entirely unsurprising that older workers’ expectation of lower net earnings would cause them to participate in the labor market at lower rates. Older workers make a rational economic choice when they invest less time, effort, and money in an activity they expect to generate

¹⁴⁴ Robert L. Clark & John B. Shoven, *Enhancing Work Incentives for Older Workers: Social Security and Medicare Proposals to Reduce Work Disincentives*, ECON. STUD. AT BROOKINGS (Jan. 2019), https://www.brookings.edu/wp-content/uploads/2019/01/ES_20190124_Clark-Shoven-Retirement-Reform1.pdf.

¹⁴⁵ See Perron, *supra* note 132, at 8.

¹⁴⁶ See AARP & The Economist Intelligence Unit, *supra* note 134, at 5.

¹⁴⁷ These costs include any job training older workers might undertake in order to strengthen or modernize their skills to increase their appeal to employers.

¹⁴⁸ See Perron, *supra* note 132, at 8.

¹⁴⁹ Richard W. Johnson & Corina Mommaerts, *Age Differences in Job Displacement, Job Search, and Reemployment* 18 (Ctr. for Ret. Research Bos. Coll., Working Paper No. 3, 2011). The effect of discrimination generally, and its effects on job search costs in particular, may have been shown in a 2004 study conducted by Katharine Abraham and Susan Houseman. The study analyzed older workers whose transition into retirement included plans to reduce their work hours—that is, work part-time. The analysis found a strong correlation between workers having and implementing a part-time work plan with workers’ ability to reduce hours in their current jobs. Older workers who expected to have to change jobs to reduce work hours were the least likely to have plans and, if they had plans, were the least likely to follow them. Instead, these individuals were most likely to stop working entirely. See Katharine G. Abraham & Susan N. Houseman, *Work and Retirement Plans Among Older Americans* 29 (Upjohn Inst., Working Paper No. 04-105, 2004).

lower returns than they could reasonably expect when they were prime-age or younger workers, or in a discrimination-free environment. Beyond reduced net economic returns, older workers also report that working in an environment where they are unwelcome and perhaps even ridiculed is unpleasant. These attitudes further devalue older workers' net earnings just as they do for workers of color, female workers, and workers with disabilities.

Older workers' labor supply elasticities multiply the effect of these lower net earnings on older workers' labor market participation. Clark and Shoven surveyed the small number of relevant academic studies and found that older workers have substantially higher labor supply elasticities than younger workers.¹⁵⁰ Eric French found that workers aged sixty-five have labor supply elasticities that are ten times the level of elasticities for those aged forty.¹⁵¹ He estimated the multiple would be even higher for workers older than sixty-five.¹⁵² Hudomiet, Hurd, and Rohwedder ratified the finding of higher labor supply elasticities for older workers with a more limited experimental design.¹⁵³ This is consistent with the intuition that older workers' access to Social Security, Medicare, and pensions (in a small minority of cases) makes exiting the labor market more viable for them than for younger workers. As Clark and Shoven observed, "[older workers'] labor supply becomes much more sensitive to either explicit or implicit taxes as they age."¹⁵⁴ Employment discrimination imposes a tax which keeps or drives a sizable number of older workers out of the labor market.¹⁵⁵

B. Evidence of Actual Age Discrimination and Its Effects

Substantial evidence shows older workers' perceptions of discrimination are accurate: older workers encounter actual employment discrimination.¹⁵⁶ David Neumark reviewed experimental research into discrimination of varying sorts, including against older workers, and concluded that studies have commonly found evidence of actual age discrim-

¹⁵⁰ See Clark & Shoven, *supra* note 144, at 4.

¹⁵¹ See Eric French, *The Effects of Health, Wealth, and Wages on Labour Supply and Retirement Behavior*, 72 REV. OF ECON. STUD. 395, 411–12 (2005).

¹⁵² See *id.*

¹⁵³ See Peter Hudomiet, Michael D. Hurd, & Susann Rohwedder, *The Causal Effects of Economic Incentives, Health and Job Characteristics on Retirement: Estimates Based on Subjective Conditional Probabilities*, SIEPR STANFORD, 25–26 (Oct. 2018), <https://siepr.stanford.edu/system/files/The%20Causal%20Effects%20of%20Economic%20Incentives%20and%20Job%20Characteristics%20on%20Retirement.pdf>.

¹⁵⁴ Clark & Shoven, *supra* note 144, at 3.

¹⁵⁵ Future research should model this effect to estimate the number or percentage of older workers it causes to exit the labor market.

¹⁵⁶ David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. PUB. ECON. 1, 1–2 (2013) (citing studies).

ination regardless of the methodology employed.¹⁵⁷ For example, resumé-correspondence field experiments found that employers in many industries and occupations offered call-back interviews to older workers (indicated by reported school graduation year) at a significantly lower rate than they did to younger workers.¹⁵⁸ This is actual discrimination blocking entry to the hiring process. Scott Adams and Neumark also found numerous studies showing that employers consider age when weighing the relative worth of applicants for jobs and promotions.¹⁵⁹ They found that studies using data from EEOC discrimination charges under the ADEA, and the EEOC's merit determinations of these charges, offer evidence of ongoing actual discrimination against older workers.¹⁶⁰ This review also found studies linking age discrimination to comparatively worse labor market outcomes—longer unemployment duration, lesser probability of hiring, greater incidence of displacement, and worse reemployment earnings.¹⁶¹

The evidence is not merely experimental. Neumark's review also included studies showing discriminatory attitudes among participants in employer decision making about older workers, including personnel managers.¹⁶² Other studies confirm that managers believe derogatory stereotypes of older workers.¹⁶³ For example, older workers encounter expectations that they are disinterested in building their skills,¹⁶⁴ lack

¹⁵⁷ David Neumark, *Experimental Research on Labor Market Discrimination*, 56 J. ECON. LITERATURE 799, 843 (2018).

¹⁵⁸ See, e.g., David Neumark, Ian Burn, & Patrick Button, *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, 127 J. POL. ECON. 922, 948–51 (2019); Neumark (2018), *supra* note 157, at 844; Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination*, in HANDBOOK OF ECONOMIC FIELD EXPERIMENTS 309, 322–27 (North-Holland, 2017); MICHAEL FIX & RAYMOND J. STRUYK, CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Urban Institute Press, 1993).

¹⁵⁹ Adams and Neumark noted that some studies had difficulty isolating discrimination from other causes of these outcomes. See Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 203–04 (William M. Rogers III, ed., 2006); see also Neumark, Burn, & Button, *supra* note 158, at 923 (discussing the longer duration of unemployment older workers face).

¹⁶⁰ Adams & Neumark, *supra* note 159, at 187–95.

¹⁶¹ *Id.* at 195–99.

¹⁶² Neumark (2018), *supra* note 157, at 812–16.

¹⁶³ See, e.g., Richard A. Posthuma & Michael A. Campion, *Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions*, 35 J. MGMT. 158, 159, 162 (2009); Robert M. McCann & Shaughan A. Keaton, *A Cross Cultural Investigation of Age Stereotypes and Communication Perceptions of Older & Younger Workers in the USA and Thailand*, 39 EDUC. GERONTOLOGY 326, 335 (2013); Vincent J. Roscigno, Sherry Mong, Reginald Byron, & Griff Tester, *Age Discrimination, Social Closure and Employment*, 86 SOC. FORCES 313, 314 (2007); Gilbert C. Gee, Eliza K. Pavalko, & J. Scott Long, *Age, Cohort and Perceived Age Discrimination: Using the Life Course to Assess Self-Reported Age Discrimination*, 86 SOC. FORCES 265, 268 (2007).

¹⁶⁴ See Barbara Fritzsche & Justin Marcus, *The Senior Discount: Biases Against Older Career Changers*, 43 J. APPLIED SOC. PSYCHOL. 350, 352 (2013); see also Kevin J. Gibson,

ambition,¹⁶⁵ suffer physical and cognitive health challenges,¹⁶⁶ and lack flexibility.¹⁶⁷ Employers similarly make presumptions about older workers in comparison to younger workers that discourage hiring or retaining older workers. This includes assumptions that younger workers accept lower wages, have lower health insurance costs, are less likely to require sick leave, and are more likely to have longer job tenures.¹⁶⁸

Employer decisions based on these attitudes likely have three demand-side effects contributing to older workers' lower labor force participation and employment rates.¹⁶⁹ First, actual discrimination directly reduces employers' demand for older workers' labor.¹⁷⁰ Employers are less likely to hire or retain workers they consider less productive, disproportionately costly, and otherwise less valuable. With fewer job opportunities, older workers are less likely to find jobs and, therefore, more likely to exit the labor market in frustration. Second, there is reason for concern that employers invest less in older workers' skills training, mentoring, promotions, and transfers to jobs better matched to their skills, although such investments would help older workers to succeed in the workplace.¹⁷¹ If employers predict older workers will be less productive, shorter tenured, and more costly than younger workers, then employers would expect to receive comparatively lower returns on investments in older workers. With fewer opportunities to succeed, older workers are more likely to leave their jobs and either seek new jobs in a discrimination-tainted labor market or exit the labor market entirely.

Wilfrid J. Zerbe, & Robert E. Franken, *Employers Perceptions of the Re-employment Barriers Faced by Older Job Hunters*, 48 *INDUS. REL.* 321, 330 (1993).

¹⁶⁵ See Catherine E. Bowen & Ursula M. Staudinger, *Relationship between Age and Promotion Orientation Depends on Perceived Older Worker Stereotypes*, 68 *J. GERONTOLOGY, SERIES B* 59, 61 (2012).

¹⁶⁶ See Mary Lee Hummert, *Age Stereotypes and Aging*, in *HANDBOOK OF PSYCHOLOGY AND AGING* 249, 250 (K. Warner Schaie & Sherry L. Willis eds., Elsevier Inc 7th ed. 2011); see also Thomas W. H. Ng & Daniel C. Feldman, *Evaluating Six Common Stereotypes about Older Workers with Meta-Analytical Data*, 65 *PERSONNEL PSYCHOL.* 821, 832–36 (2012).

¹⁶⁷ See Fritzsche & Marcus, *supra* note 164, at 352.

¹⁶⁸ Roscigno, et al., *supra* note 163, at 315; see also Nicole Maestas & Julie Zissimopoulos, *How Longer Work Lives Ease the Crunch of Population Aging*, 24 *J. ECON. PERSP.* 139, 152 (2010). It is worth noting that evidence does not support the perception that older workers will have shorter job tenures than younger. Older workers have substantially longer median job tenures than prime-age and younger workers. See *Table 1. Median years of tenure with current employer for employed wage and salary workers by age and sex, selected years, 2008-2018*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/tenure.t01.htm> (last modified: Sept. 20, 2018).

¹⁶⁹ AARP estimates that age discrimination in 2018 cost the United States \$850 billion in GDP, and that “reducing involuntary retirement, underemployment, and unemployment duration among the 50-plus population could have driven an average increase of 4.1% in GDP in 2018.” AARP & The Economist Intelligence Unit, *supra* note 135, at 3, 12–14.

¹⁷⁰ Roscigno et al., *supra* note 163, at 315, 323–24.

¹⁷¹ See, e.g., U.S. DEP'T OF LAB., *REPORT OF THE TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE 2* (Feb. 2008).

Third, employers are more likely to perceive a gap in average pay between older and younger workers which they do not believe older workers' productivity offsets.¹⁷² This perception encourages employers to discharge or lay off older workers who, again, must choose between prolonged job searches in a tainted labor market or exiting the labor market.

Actual discrimination by employers also has two important and direct supply-side effects. First, workers who personally experience employment discrimination are more likely to leave their jobs and less likely to remain employed than other workers.¹⁷³ Second, the presence of actual discrimination fuels perceived discrimination.¹⁷⁴ As older workers experience or witness actual discrimination, their fears are validated, and the risks are heightened. In turn, this feeds the consequences described in the preceding subsection about older workers' labor supply choices.

III. SOLUTIONS

This section will propose four solutions to address discrimination-related barriers to older workers' labor force participation and employment detailed in the preceding sections. Specifically, this section will suggest how amendments to the ADEA and elimination of mandatory predispute arbitration can reduce perceived discrimination so older workers will more willingly supply their labor and reduce actual discrimination to increase employers' demand for older workers. This section will also suggest making the ADA's interactive process more transparent to increase the likelihood that older workers with disabilities receive the accommodations they need to succeed in the labor market and the workplace. Finally, this section will explain how to reverse the long-term decline in union density that has deprived too many older workers of important age-discrimination protections. Again, the results should increase labor supply among older workers and increase employer demand for older workers.

A. *Solution #1. Amend the ADEA to Treat Older-Worker Plaintiffs Like Other Discrimination Plaintiffs*

In 2020, the House of Representatives passed bipartisan legislation that would solve one of the ADEA's two principal weaknesses. The Protecting Older Workers Against Discrimination Act (POWADA)¹⁷⁵ was

¹⁷² See Pnina Alon-Shenker, *Nonhiring and Dismissal of Senior Workers: Is It All about the Money?*, 35 COMP. LAB. L. & POL'Y J. 159, 160 (2014).

¹⁷³ Richard W. Johnson & David Neumark, *Age Discrimination, Job Separations, and Employment Status of Older Workers: Evidence from Self-Reports* 25 (Nat'l Bureau of Econ. Res., Working Paper No. 5619, 1996).

¹⁷⁴ *Id.* at 23 (indicating that perceived discrimination increases a workers' likelihood to separate from their employer and not find new work).

¹⁷⁵ H.R. 1230, 116th Cong. (2019).

introduced in the House in early 2019 by Representatives Bobby Scott (D-Va.) and Jim Sensenbrenner (R-Wisc.), and in the Senate by Bob Casey (D-Pa.) and Chuck Grassley (R-Iowa).¹⁷⁶ POWADA overturns *Gross*'s requirement that plaintiffs prove age discrimination was a "but-for" cause of an employer's contested decision in ADEA disparate treatment cases.¹⁷⁷ ADEA claims would return to the more easily satisfied pre-*Gross* standard for mixed motive cases requiring only that age discrimination was a motivating factor in the employer's decision.¹⁷⁸ In essence, ADEA disparate treatment claims would be litigated using an evidentiary framework similar to Title VII disparate treatment claims.¹⁷⁹

Congress should also amend the ADEA to remove the disparate impact defense when an employer's decision based on any RFOA disproportionately harms older workers. Congress should replace this language with the 1991 Civil Rights Act's standard for Title VII cases prohibiting these employment practices unless they are "job-related and consistent with business necessity."¹⁸⁰ Congress also should amend the ADEA to allow disparate impact claims by job applicants. This will ensure that seemingly age-neutral policies or practices adversely impacting older job applicants, but not job-related and consistent with business necessity, may be challenged successfully in court. Again, ADEA disparate impact claims would be litigated using a framework similar to Title VII disparate impact claims.

POWADA needs only Senate passage and the President's signature. Fixing the disparate impact defense and making disparate impact claims available to job applicants will require drafting and passing a new bill in Congress. But even if Congress enacts both proposals, these ADEA amendments would not eradicate discrimination against older workers any more than Title VII has eradicated employment discrimination against workers of color and women. Some discrimination is never chal-

¹⁷⁶ HOUSE COMM. ON EDUC. & LABOR, *Scott, Sensenbrenner Lead Bipartisan Group of House Members to Introduce Bill Protecting Older Workers from Age Discrimination*, (Feb. 14, 2019), <https://edlabor.house.gov/media/press-releases/scott-sensenbrenner-lead-bipartisan-group-of-house-members-to-introduce-bill-protecting-older-workers-from-age-discrimination>.

¹⁷⁷ H.R. 1230, 116th Cong. (2019).

¹⁷⁸ H.R. Comm. On Educ. & the Workforce Democrats, Fact Sheet: Protecting Older Workers Against Discrimination Act (POWADA), <https://edlabor.house.gov/imo/media/doc/2017-05-25%20POWADA%20Fact%20Sheet.pdf>.

¹⁷⁹ See, e.g., *Babb v. Wilkie*, 140 S. Ct. 1168, 1177–78 (2020) (holding that the ADEA's federal-sector provision does not require a plaintiff to prove that age was a "but-for" cause of the challenged personnel action, although remedies may be limited absent this proof. The Court grounded the decision in the federal-sector provision's particular (and different) language rather than interpreting the ADEA to apply more broadly to antidiscrimination, given its mandate).

¹⁸⁰ 42 U.S.C. § 12112(d)(4)(A) (2012). Congress must act because the Supreme Court demonstrated its unwillingness to fix this problem with its denial of certiorari in *Villarreal v. R.J. Reynolds Tobacco Co.*, 137 S. Ct. 2292 (2017) (mem.) (denying cert.).

lenged. Some challenged discriminatory acts go unremedied because of failures of proof or the vagaries of the American litigation process. Simply, some employment discrimination against older workers will survive more exacting legal standards.

Nonetheless, these solutions, if implemented, will likely have three effects. First, older-worker plaintiffs should win at trial or secure more favorable settlements in a larger percentage of ADEA cases. The easier-to-satisfy substantive standard for disparate treatment plaintiffs and the higher standard for the disparate impact defense will result in a larger percentage of age discrimination claims receiving EEOC “merit resolutions” (i.e., favorable outcomes negotiated with claimants who are older workers).¹⁸¹ Outside the EEOC conciliation process, these amendments would allow plaintiffs’ claims to survive a larger percentage of employers’ pretrial motions to dismiss and motions for summary judgment. The survival of these claims could result in more trials, which older workers would be more likely to win, and more favorable settlements with employers seeking to avoid trial. Naturally, one could expect older workers to file meritorious complaints and lawsuits that they might not have filed under the ADEA’s disadvantageous litigation rules. Consequently, courts would remedy or, at least, address more employment discrimination against older workers.

Second, employers’ heightened litigation risks and costs will incentivize them to prevent age discrimination. If the incentives work, employers would police their decision making more closely and establish more effective internal reporting systems that surface and remedy problematic age-related decisions. Employers may train decisionmakers and older workers’ coworkers about the value of older workers to their organizations. Decision-makers and coworkers may then seek to communicate to older workers that they are welcome and valued. These behavioral changes would reduce actual discrimination against older workers and, contrary to theoretical claims of a disemployment effect addressed below, increase demand for older workers.¹⁸² They also would reduce perceived discrimination since older workers would experience and witness less discrimination, especially as employers take active measures to preempt and promptly correct age discrimination in their workplaces. The

¹⁸¹ See generally Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L. J. 671, 704–07 (2005) (stating workers who perceive that they have experienced employment discrimination must file a complaint with the EEOC or their state’s equivalent agency prior to filing a lawsuit).

¹⁸² See Scott J. Adams, *Age Discrimination Legislation and the Employment of Older Workers*, 11 LABOUR ECON. 219, 240 (2004).

result should be higher employment rates for older workers, as the empirical evidence cited below suggests.¹⁸³

Third, amending the ADEA will communicate to older workers that our society considers their discrimination claims equal to other workers' discrimination claims. These ADEA amendments will send a potent message that American society values older workers' labor. Over time, older workers will see the effects of improved litigation outcomes and changed employer behaviors in their workplaces and among their friends, peers, and coworkers. They may find it easier to find new jobs or keep the jobs they have, and employers will expose them to improved antidiscrimination messaging. These changes should dissipate perceived discrimination among older workers, at least to some degree. The result would be a greater willingness among older workers to supply their labor and, as a result, a higher labor force participation rate.

Some have advanced a counternarrative that stronger antidiscrimination laws will make it more difficult and costly to terminate older workers and generally increase the risk of lawsuits.¹⁸⁴ According to this argument, higher costs and heightened risks will meaningfully reduce employers' demand for older workers.¹⁸⁵ The empirical evidence weighs heavily against this argument—as a general matter, when age discrimination laws are strengthened, employment of older workers increases. As one literature review found, “[m]ost studies of age discrimination laws have found positive effects of the laws, while some have found no effects or negative effects.”¹⁸⁶ Among others, a 1999 study by David Neumark and Wendy Stock concluded that the ADEA positively affected the employment of older workers and found that age-earning profiles steepen with the introduction of age discrimination laws.¹⁸⁷ Scott Adams focused on the mid-1960s when a number of states enacted age discrimination laws, finding an increase in employment rates for protected workers and a larger increase for those aged sixty and older or sixty-five and older.¹⁸⁸ In 2013, Neumark and Joanne Song studied the employment effects of state age discrimination laws with features making them stronger and broader than the ADEA and found positive employment effects for protected workers.¹⁸⁹ One study purported to find inconclusive evidence of a

¹⁸³ See David Neumark & Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. POL. ECON. 1081, 1123 (1999).

¹⁸⁴ See, e.g., FARRELL BLOCH, *ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT: RECRUITMENT PRACTICES AND REGULATORY CONSTRAINTS 1* (Univ. of Chicago Press 1994).

¹⁸⁵ *Id.* at 1–4.

¹⁸⁶ See Button, *supra* note 46, at 15; see also Adams & Neumark, *supra* note 159, at 195; Adams, *supra* note 182, at 240.

¹⁸⁷ See Neumark & Stock, *supra* note 183, at 1123.

¹⁸⁸ See Adams, *supra* note 182, at 240.

¹⁸⁹ See Neumark & Song, *supra* note 156, at 15.

disemployment effect of stronger laws among older white men, but also found that strengthening age discrimination laws may *reduce* older workers' separation rates because firms increase retirement incentives.¹⁹⁰ Neumark reanalyzed this study's data and disagreed with its results. His analysis disclosed the same increase in employment among older workers resulting from age discrimination laws found in numerous other studies.¹⁹¹ In sum, and with limited exceptions, the evidence validates the intuition that stronger anti-age-discrimination laws increase employment among older workers.

B. *Solution #2. End Mandatory Arbitration of ADEA and ADA Claims*

While neither the ADEA nor the ADA has been the focus of legislative efforts around mandatory arbitration,¹⁹² two legislative proposals would end mandatory arbitration of ADEA and ADA claims, among others. The Forced Arbitration Injustice Repeal Act (FAIR Act)¹⁹³ passed the House of Representatives in September 2019.¹⁹⁴ The FAIR Act would prohibit predispute arbitration contractual mandates covering employment cases, civil rights disputes, and others.¹⁹⁵ Parties could enter into voluntary postdispute arbitration agreements, but an agreement to do so could not be a condition of employment. The FAIR Act also would retroactively invalidate existing agreements and leave concluded arbitrations in place.¹⁹⁶ The Restoring Justice for Workers Act of 2019¹⁹⁷ takes a similar approach by prohibiting employers from requiring employees to waive their right to engage in joint, class, or collective legal actions.

The FAIR Act would return ADEA and ADA (and Title VII) cases to the public forums of the EEOC and the courts. Added litigation and reputational costs alone should cause employers to be more vigilant

¹⁹⁰ See Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 J. L. & ECON. 433, 457–58 (2008).

¹⁹¹ David Neumark, *The Age Discrimination in Employment Act and the Challenge of Population Aging*, 31 RES. ON AGING 41, 56 (2009); but see David Neumark, Ian Burn, Patrick Button, & Nanneh Chehras, *Do State Laws Protecting Older Workers from Discrimination Reduce Age Discrimination in Hiring? Experimental (and Nonexperimental) Evidence* 26–27 (Mich. Retirement Res. Ctr., Working Paper No. 2017-360, Mar. 2017) (finding no evidence that stronger age discrimination laws increased *hiring* of older workers, but finding such an effect from stronger disability discrimination laws).

¹⁹² This is unlike the focus on sexual harassment cases. See Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong. (2019); S. 2203, 115th Cong. (2017).

¹⁹³ H.R. 1423, 116th Cong. (2019).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ H.R. 2749 116th Cong. (2019).

against actual discrimination.¹⁹⁸ If settlement amounts and damages awards increase for workers with successful age discrimination claims, the costs would further incentivize employers to prevent and rapidly remedy actual discrimination. Both effects would increase employer demand for older workers.

Increased employer demand and greater transparency around disclosing and remedying age discrimination would reduce perceived discrimination. We can expect two effects. First, older workers who may have previously avoided filing complaints for fear of a disadvantageous arbitration process might file when the EEOC and the courts become available again. Unchallenged and unremedied discrimination would be confronted and, at a minimum, the EEOC and courts could test whether it is actual or perceived. If it is actual discrimination, settlement or litigation would address it, and employer demand would likely further increase. Second, publicly addressing discrimination against older workers in a system that has integrity and public accountability, rather than behind closed doors in a process that many distrust, could cause older workers to be more willing to supply their labor.

As noted above, litigation is a costly and time-consuming process; however, litigation's arguably higher transaction costs do not justify maintaining a system that substantially disadvantages older workers and allows employment discrimination to persist. The current system amounts to little more than cost-shifting from employers to the victims of age discrimination.¹⁹⁹ Also, it is important to note that age discrimination plaintiffs are largely protected from excessive costs if they bring valid claims. For example, the ADEA provides that successful plaintiffs can receive reasonable attorney's fees from their employer-defendants.²⁰⁰ The proposed legislation banning mandatory arbitration would allow older workers concerned about litigation costs and delays to agree with their employers to arbitrate their claims *after their dispute has arisen*.²⁰¹ Further, early settlements are always an option for the parties to a litigation, and these settlements can take attorneys' fees and other costs into account. Of course, and as noted above, reforming arbitration law incentivizes employers to turn to the best means to minimize their litigation costs—to preempt and promptly correct age discrimination in their workplaces.

There is another low-cost, timely, effective, and efficient dispute resolution process that, unlike individual mandatory arbitration, produces

¹⁹⁸ See Shapira, *supra* note 110, at 1230, 1249 (discussing reputational effects on employees of discrimination litigation).

¹⁹⁹ See, e.g., Colvin (2018) *supra* note 88.

²⁰⁰ 29 U.S.C. § 216(b) (2018).

²⁰¹ H.R. 1423, 116th Cong. (2019).

fair results for older workers and employers: collectively bargained grievance procedures and grievance arbitration—Solution #4, below.

C. Solution #3. Require Employers to Disclose the Number and Results of Their Interactive Processes with Older Workers with Disabilities and Deepen Research Into the Interactive Process and ADA Litigation Results

Workers experience a multitude of impairments as they age that range from mobility limitations to vision- and hearing-related conditions to cognitive issues, among others.²⁰² Similarly, American jobs and workplaces are diverse and occupy a variety of physical environments. If the role of workplace accommodations is to help individual workers overcome the barriers created by the interplay of their impairments with their jobs and environments, the process of choosing the right accommodation necessarily requires an individualized process that directly involves the people who are closest to and most knowledgeable about the challenge. Also, there is good reason for concern that courts will continue to interpret the ADA in a manner that avoids putting them in a position to make decisions about which accommodations might be reasonable in specific workplaces. For these reasons, a promising path to better employment outcomes for older workers with disabilities would be to intervene before litigation arises by improving the interactive process.

Employers should be required to disclose anonymized information about their interactive processes with job applicants and employees with disabilities. In particular, they should report: the number, frequency, and success or failure of their interactive processes; whether the employer provided accommodations; the types of accommodations provided; and the marginal cost of the accommodation to the employer. Job applicants' or employees' personal and medical information need not and should not be disclosed.

There are two ways to impose this disclosure requirement. First, Congress could amend the ADA to require these disclosures to the EEOC, which would, in turn, publish the information to the public. All ADA-covered employers—that is, every U.S. employer with 15 or more employees—would disclose.²⁰³ Second, OFCCP could promulgate a regulation requiring these disclosures under Section 503 of the Rehabilitation Act, which it administers.²⁰⁴ Section 503 requires that all federal

²⁰² COMMITTEE ON THE HEALTH AND SAFETY NEEDS OF OLDER WORKERS, HEALTH AND SAFETY NEEDS OF OLDER WORKERS 102–03, 113–15 (David H. Wegman & James P. McGee eds., The National Academic Press, 2004).

²⁰³ 42 U.S.C. § 12111 (2012).

²⁰⁴ 29 U.S.C. § 793 (2018).

contractors engage in equal employment opportunity and affirmative action for workers with disabilities.²⁰⁵

This disclosure will create several benefits. First, the EEOC and OFCCP, as well as state antidiscrimination agencies, could use these disclosures to assess which employers regularly engage in good-faith efforts to comply with the ADA's reasonable accommodations requirement (and any state analogs), as well as to determine trends and norms across employers. The attendant greater risk that noncompliant employers will be subject to targeted enforcement efforts by these agencies will increase the likelihood that employers comply with the reasonable accommodations mandate. Thus, employer demand for these workers, and for other workers with disabilities, will increase. Second, engaging in the interactive process and providing accommodations will be normalized among employers as they gain greater visibility into their competitors' and other employers' outcomes and processes. Again, this should increase compliance and increase demand for older workers with disabilities.

Third, older workers with disabilities will have more information about which employers, potentially including their own, have previously provided accommodations in general and the specific type of accommodations they may need. Older workers with disabilities can use this information to better match themselves with employers who will accommodate them and keep them employed later in their careers.²⁰⁶ Finally, public disclosure will make the interactive process more salient to older workers with disabilities and give them greater confidence that they can secure a job and retain that job over a long enough period to make later-in-life employment worth the investment.

As legal scholar Sharona Hoffman suggested more than a decade ago, we need to learn a great deal more about the interactive process, accommodations practices, decisions around the hiring and retention of workers with disabilities, and litigation of these issues.²⁰⁷ The Labor Department's Office of Disability Employment Programs (ODEP) should fund research, in cooperation with the EEOC and OFCCP, that gathers better and more-extensive data and insights from employer surveys and other sources to help policymakers understand accommodation-related barriers to labor force participation and employment. Disability scholar Susanne Bruyère's 2000 survey and study may provide a starting place for this effort.²⁰⁸ ODEP and disabilities scholars also should undertake

²⁰⁵ *Id.*

²⁰⁶ See J. H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 935, 958 (2003).

²⁰⁷ See Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 307 (2008).

²⁰⁸ Susanne M. Bruyère, *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, CORNELL U., SCH. INDUS. & LAB. REL. EXTENSION DIVISION,

research into the broader question of how many older workers with disabilities are not employed, and how many are out of the labor market because of inadequate or a lack of accommodations. There is more work to be done to understand this policy problem and its sources.

D. Solution #4. Substantially Increase the Number of Older Workers Represented by Unions

Drastically increasing the number of older workers who benefit from union representation and CBAs is a long-term task—especially in the face of vigorous employer opposition to unions and frequent unremedied violations of labor law.²⁰⁹ Nonetheless, every long journey begins with a first step. In February 2020, the House of Representatives took that first step when it passed the Protecting the Right to Organize (PRO) Act, which is a comprehensive reform of American private-sector labor law.²¹⁰ The PRO Act would eliminate numerous legal barriers to workers organizing and unions bringing economic pressure on employers to allow organizing and to agree to CBAs.²¹¹ Just as important, the PRO Act would reduce and punish currently legal and illegal union avoidance and union-busting activities by employers.²¹²

It is impossible to predict with precision the PRO Act's effect on union density, especially among older workers. There is some circumstantial evidence: 48% of workers told MIT Sloan School surveyors in 2017 that they would join a union if they could—a 50% increase from 1995 and more than four times the percentage of employees currently represented by a union.²¹³ Intriguingly, 47% of respondents reported concerns about discrimination protections as a motivation for their interest in joining a union.²¹⁴ If the PRO Act is enacted, some sizable portion of these workers would organize unions and the union density rate in the

PROGRAM ON EMP. & DISABILITY 8–9 (2000), <https://digitalcommons.ilr.cornell.edu/edicollect/63/>.

²⁰⁹ Celine McNicholas et al., *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 51.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/>.

²¹⁰ H.R. 2474, 116th Cong. (2019).

²¹¹ The PRO Act would expand and clarify the definition of “employee” protected by the National Labor Relations Act, strengthen the effectiveness of union strikes, permit secondary boycotts, and streamline union representation and election procedures. It would also effectively reverse state “right-to-work” laws that prohibit “union security” clauses in collective bargaining agreements and depress union membership. See *Employer/Union Rights and Obligations*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/rights-we-protect/right/employer-union-rights-and-obligations> (last visited Aug. 25, 2020).

²¹² H.R. 2474, 116th Cong. (2019).

²¹³ Thomas Kochan, Duanyi Yang, Erin L. Kelly, & Will Kimball, *Who Wants to Join a Union? A Growing Number of Americans*, MIT INST. FOR WORK & EMP. RES. (Sep. 2, 2018), <https://gcgj.mit.edu/whats-new/blog/who-wants-join-union-growing-number-americans>.

²¹⁴ See *id.*

private sector would grow rapidly and significantly. The labor movement's limited resources to organize new members might slow the growth rate, and persistent employer opposition would certainly continue to play a role.²¹⁵

Some might argue that, rather than increasing older workers' labor force participation, unions decrease older workers' participation rate by facilitating older members' early retirements from some workplaces. Certainly, some unions facilitate their members' voluntary early retirements.²¹⁶ These early retirees leave their jobs and may leave the labor market entirely before some expected retirement age, such as Social Security's full retirement age. Yet, this argument strengthens rather than weakens the case for unions as a solution.

Early retirement implies some compensation that induces employees to leave their jobs, perhaps including enhanced benefits from a defined-benefit pension plan, which are substantially more common in unionized workplaces than they are in nonunion workplaces.²¹⁷ In fact, additional compensation is the defining distinction between voluntary early retirement and a layoff, which unions would certainly fight. Compensated voluntary early departure from employment should not concern us, even if the involved workers also leave the labor market. The goal of this project is not older workers' continued employment for its own sake, but rather ensuring older workers have the opportunity to continue to work or to find new employment *for the purpose of supplementing these workers' retirement savings*. If early retirement comes with more retirement benefits or some other form of separation-related compensation, the goals of enhanced worker opportunity, income, and retirement savings are achieved, not frustrated.

²¹⁵ Public-sector union density would rise significantly if Congress enacted the Public Service Freedom to Negotiate Act. This bill would guarantee that state and local government employees in all states have the right to bargain collectively. H.R. 3463, 116th Cong., § 1970 (2019). However, since states typically provide civil service protections to public-sector workers that guard against discrimination, some (but not all) benefits of union membership and collective bargaining are already available to older nonunion workers in the public sector. *See, e.g., State Universities Civil Service Act*, 110 ILCS § 70/36p (2020).

²¹⁶ James M. Raymo, John R. Warren, Megan M. Sweeney, Robert M. Hauser, & Jeong-Hwa Ho, *Precarious Employment, Bad Jobs, Labor Unions, and Early Retirement*, 66B(2) *J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SERVS.* 249, 257 (2011).

²¹⁷ Union members are substantially more likely than nonunion workers to have retirement benefits. *See* U.S. Bureau of Labor Statistics, *Union Workers More Likely than Nonunion Workers to Have Retirement Benefits in 2019*, *THE ECON. DAILY* (Oct. 25, 2019), <https://www.bls.gov/opub/ted/2019/union-workers-more-likely-than-nonunion-workers-to-have-retirement-benefits-in-2019.htm>.

CONCLUSIONS

For many workers, discrimination is a stubborn obstacle to success in the American workplace and labor markets. The task for public policy is to remove or shrink that obstacle to the extent possible. Laws and collective bargaining might not end discrimination, but they can limit it and ameliorate its effects. If reforms prohibited employers from taking age into account in their hiring and other employment-related decisions, and required them to provide accommodations for older workers' disabilities, their demand for older workers should increase. Equally important, older workers' trust that they will be protected from discrimination must be rebuilt before they will supply their labor to the same extent younger workers supply theirs. If older workers observe that illicit discrimination will be addressed fairly and remedied in appropriate cases, either by law or under a collective bargaining agreement, they will expect a greater return on their investment in employment and labor market participation, and their participation in the labor force should increase as a result.

Both Clark and Shoven,²¹⁸ and retirement scholars Alicia Munnell and Abigail Walters,²¹⁹ have advanced supply-side solutions to older workers' low labor-force participation and employment rates. These solutions include increasing older workers' returns from employment using mechanisms in the Social Security or tax systems.²²⁰ While these proposals are worthwhile, any assessment of them must begin with an understanding that age discrimination significantly devalues older workers' returns from employment.²²¹ The burden on advocates for these and related solutions is to demonstrate that the increase in older workers' wages or salaries is sufficient both to overcome the sizable discount imposed by actual and perceived discrimination and to create an incentive that changes older workers' behavior. Modeling the competing effects of discrimination and supply-side solutions on older workers' behavior would be a worthwhile project for future researchers.

This Article took a more direct approach. It advanced proposals that redress age discrimination to the greatest extent possible. These four proposals include a couple that are already a part of the public policy debate, although they are not part of the discussion around employment and retirement savings adequacy. For example, the House of Representative has already passed labor law reform legislation, but the role of unions and collective bargaining in protecting against age discrimination has not

²¹⁸ See Clark & Shoven, *supra* note 144, at 2.

²¹⁹ See Alicia H. Munnell & Abigail N. Walters, *Proposals to Keep Older People in the Labor Force*, BROOKINGS INST. (Jan. 2019), <https://www.brookings.edu/research/proposals-to-keep-older-people-in-the-labor-force/>.

²²⁰ *Id.*

²²¹ See Perron, *supra* note 132, at 10; Johnson & Mommaerts, *supra* note 149, at 18.

been a prominent part of that discussion. The House also passed legislation banning mandatory arbitration of employment disputes, but the ADEA and the ADA were not the most commonly cited examples of the arbitration system's challenges. Equally important, amendments to the ADEA have been proposed in Congress, but Congress is not considering all the amendments that are needed.²²²

Finally, this Article sought to focus greater attention on the role of disability in the work lives of older workers. Disability may be the most important untold story of these workers' low labor-force participation and employment rates. To do a better job telling this story, and to find the appropriate public policies, we need greater insight into the process for ensuring that older workers and others with disabilities receive the workplace accommodations they need. We also need more research into the effectiveness of the ADA's and the Rehabilitation Act's reasonable accommodations more broadly.

²²² See H.R. 1230, 116th Cong. (2019).