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Report

Increasing employment for older workers with effective protections against employment discrimination

Seth Harris Thursday, November 19, 2020

Editor's Note:

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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 55 and older (hereafter "older workers") is roughly half the rate of prime-age workers (aged 25 to 54).^[1] Their employment rate is also far lower.^[2] On the other hand, many older workers have insufficient savings to continue their preretirement standard of living in retirement.^[3] The paradox is that a large portion of 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 45 years. Social Security benefits, on average, replace only about 40 percent 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. 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. 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. 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. Most important defined-contribution plans do not guarantee sufficient savings or produce a predictable and protected lifetime income stream, like a pension would.

In 1975 about 32 percent of employees in the United States (about 29 percent of the total U.S. civilian labor force) had pension plans. In 2016 slightly more than 9 percent of active employees (9 percent of the total workforce) had pensions.^[5] If American 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. 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,^[6] 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.^[7] For example, from 1998 to 2018 the number of older workers participating in the labor force grew by only 9.6 million^[8]—roughly one-quarter of the number of workers trapped in the pension gap. Intriguingly, the steepest decline in labor force participation among older workers occurs around age 65 when the day-to-day economics of retirement should be apparent.^[9]

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 paper 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 paper, “employment discrimination” means any decision by an employer—for example,

hiring, discharge, compensation, promotion, training, and discipline—that disadvantages an older worker, whether intentionally or unintentionally, “because of such individual’s age.”[10]

Section I will describe how statutory protections against discrimination for older workers in the Age Discrimination in Employment Act (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 Americans with Disabilities Act’s (ADA) reasonable accommodation mandate erect a barrier to the employment and labor force participation of older workers with disabilities. Section II will cite evidence that large majorities of 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.

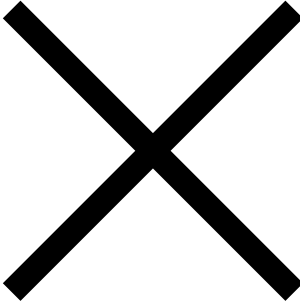
Section III proposes four solutions: (1) increase the effectiveness of laws protecting older workers from employment discrimination; (2) prohibit employers from mandating their employees engage in pre-dispute arbitration of age and disability discrimination claims rather than litigating them in state and federal courts; (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 more older workers will be protected against discrimination by collective bargaining agreements and union representation.

For a complete list of solutions, read the full report [here](#).

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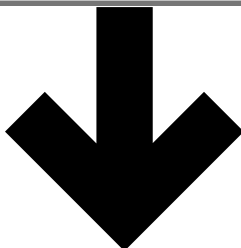
Footnotes

1. 1 U.S. Bureau of Labor Statistics, Civilian Labor Force Participation Rate by Age, Sex, Race and Ethnicity, Table 3.3. (Last Modified Sep. 4, 2019), <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>.
2. 2 Mira Toossi & Elka Torpey, U.S. Bureau of Labor Statistics, Older Workers: Labor Force Trends and Career Options. (Last Modified May 2017), <https://www.bls.gov/careeroutlook/2017/article/older-workers.htm>.
3. 3 See James M. Poterba, Retirement Security in an Aging Population, 104 Am. Econ. Rev. 1–30 (2014).
4. 4 See Alicia H. Munnell, Social Security’s Real Retirement Age Is 70, Center for Retirement Research at Boston College, 5 (Oct. 2013), http://crr.bc.edu/wp-content/uploads/2013/10/IB_13-15.pdf
5. 5 Author’s calculations based on U.S. Bureau of Labor Statistics, <https://fred.stlouisfed.org/release/tables?rid=50&eid=463&od=2016-12-01#>, and U.S. Department of Labor Employee Benefits Security Administration, <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> (Table E-7).
6. 6 See Nicole Maestas & Julie Zissimopoulos, How Longer Work Lives Ease the Crunch of Population Aging, 24 J. of Econ. Persp. 139 (2010) (discussing factors that drove this growth).
7. 7 See Martin Neil Baily & Benjamin H. Harris, Working Longer Policies: Framing the Issues 9–10 Brookings Institution (Jan. 2019), <https://www.brookings.edu/research/working-longer-policies-framing-the-issues/>.
8. 8 Authors’ calculations based on U.S. Bureau of Labor Statistics, <https://www.bls.gov/emp/tables/civilian-labor-force-summary.htm> and <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>. Between 2008 and 2018 the labor-force participation rate of workers aged 55 and older remained essentially unchanged, 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.
9. 9 See Baily & Harris, *supra* note 7, at 12. See Baily & Harris, *supra* note 7, at 10.
10. 10 29 U.S.C. § 623(a)(1) (1982).



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