

Increasing the Employment Rate of Older Workers^{*}

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The Communication from the European Commission entitled 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' includes the headline target of an employment rate of 75% of the population. This target employment rate is to be reached by, among others, increasing the involvement of older people in the work force and removing the obstacles to their employment. This article considers the employment rate of older workers, both from a historical and predictive standpoint. The makeup of the older European Union (EU) labour force and the types of work engaged in are discussed, with the United Kingdom and Italy as detailed examples. Initiatives at EU level are considered, including initiatives to tackle age discrimination at work and the call for more flexible labour markets. Consideration is then given to the United States as an example of a deregulated labour market. Trends in American older worker employment are examined. From this, the authors draw several lessons from the US experience and offer tentative conclusions about the way forward for the European labour market.

1. INTRODUCTION

The objective of this paper is to consider the position of older workers in the labour market. Our focus on the situation of older workers is justified by the fact that, in order to reach European Union (EU) targets, the employment rate of such workers needs to increase. Historically, the European Commission has failed to reach its overall targets for the employment of older workers so we look at the US model to see if any lessons can be learned.

Our concern is with the fastest growing group of the population, namely those over the age of 60 years, and the need for a focus on this group in order to help the EU achieve its future employment rate targets. The 2020 Communication¹ from the Commission notes that:

Demographic ageing is accelerating. As the baby-boom generation retires, the EU's active population will start to shrink as from 2013/2014. The number of people aged over 60 is now increasing twice as

^{*} This paper was presented at the Ninth International Conference in commemoration of Marco Biagi at the Marco Biagi Foundation, Modena, Italy, March 2011. The paper uses spelling associated with British rather than American English with few exceptions. For example, we use American English spelling when referring to American Government bureaus and their associated work product. Thus, while 'labour', as a general term, in this paper conforms to British English spelling, we use the American spelling for 'US Department of Labor'. Related to this, we use American English spelling when citing the titles of American scholarly articles and also the names of the journals in which they appear.

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¹ 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020.

fast as it did before 2007 – by about two million every year compared to one million previously. The combination of a smaller working population and a higher share of retired people will place additional strains on our welfare systems.

The precursor to the 2020 strategy, namely the Lisbon Strategy, had called for an increase in the total employment rate within the EU to 67% by 2005 and 70% by 2010. This included increasing the employment rate of older workers to 50% by 2010. Despite a re-launch in 2005, the Lisbon Strategy, in respect of older workers, failed to achieve its objectives. The overall employment rate for older workers (55–64 years) grew to an average of 46%.² Only eleven Member States had an employment rate that met the target of 50%, and nine Member States were more than 10% points short. These were Malta, Hungary, Poland, Slovenia, Luxembourg, Italy, Belgium, France, and Slovakia. In 2009, Malta had the lowest rate with just over 28% of the age group in employment.³

There is a steep fall in the employment rate after the age of 50 years, and the level of employment for those over 65 is really very low. For the EU as a whole, some 85% of men and 70% of women aged 50 years are in employment. By the age of 69 years for men and 66 years for women, these figures fall to less than 10%.⁴ The average age for exiting the labour force (whether voluntarily or involuntarily) is 61 years.⁵ The actual average ages of exit ranged from 56 years (Slovenia) to 63 years (Ireland, Cyprus, Latvia, Romania, and Sweden). There were eight Member States with an exit age below 60 years (Belgium, France, Luxembourg, Malta, Austria, Poland, Slovenia, and Slovakia). The exit age for Italy was recorded as 61 years and for the UK, 62 years. The individual Member States will, of course, have distinctive institutional and individual barriers to older workers continuing in employment. There are a variety of ‘push’ and ‘pull’ factors that influence the individual decision to retire.⁶ One of these will be the existence of mandatory retirement ages. This was effectively abolished in the UK in 2011 but still exists in some other Member States. Until this issue is seriously tackled, the potential for working after the state retirement age is inevitably limited.

The 2020 Communication from the Commission includes the headline target of an employment rate of 75% of the population. It also includes a statement about Europe’s structural weaknesses:

In spite of progress, Europe’s employment rates – at 69% on average for those aged 20–64 – are still significantly lower than in other parts of the world. Only 63% of women are in work compared to 76% of men. Only 46% of older workers (55–64) are employed compared to over 62% in the US

² Communication from the Commission, ‘Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth’, COM(2010) 2020.

³ European Commission, ‘The Social Situation in the European Union 2009’ (2010) and European Commission, ‘Employment in Europe 2010’ (2010).

⁴ European Commission, ‘Demography Report 2008’ (2009).

⁵ This figure was taken from European Commission, ‘Europe’s Demographic Future’ (2007); the age of 61 years was for twenty-five Member States in 2004/2005.

⁶ See, for example, J. Macnicol, *The Politics of Retirement in Britain 1878–1948* (Cambridge: Cambridge University Press, 1998) and M. Lyon Levine, *Age Discrimination and the Mandatory Retirement Controversy* (Baltimore, MD: John Hopkins University Press, 1998).

and Japan. Moreover, on average Europeans work 10% fewer hours than their US or Japanese counterparts.

One of the priorities for Europe 2020 is therefore ‘Inclusive growth – fostering a high-employment economy delivering economic, social and territorial cohesion’. One of the selected targets for this strategy is stated as:

The employment rate of the population aged 20–64 should increase from the current 69% to at least 75%, including through the greater involvement of women, older workers and the better integration of migrants in the work force.

2. AGE AND EMPLOYMENT RATES⁷

Despite the failure of Lisbon with respect to the overall target employment rate of older workers, there has been, within the EU as a whole, a large percentage increase in the employment rate of older workers when compared to other groups, as shown in Table 1.

The final figure is, of course, still considerably lower than younger age groups or than the overall employment rate.

The comparable figures for Italy and the United Kingdom are shown in Table 2.

Table 1 Employment Rates in the EU27 by Age

Age, years	2000	2004	2008	2009
15–64	62.2	63.0	65.9	64.6
25–54	76.0	76.7	79.6	78.2
55–64	36.9	40.7	45.6	46.0

Table 2 Employment Rates in Italy and the UK by Age (%)

Country	Age, years	2000	2004	2008	2009
Italy	15–64	53.7	57.6	58.7	57.5
UK	15–64	71.2	71.7	71.5	69.9
Italy	25–54	68.0	72.2	73.5	71.9
UK	25–54	80.2	80.9	81.4	80.2
Italy	55–64	27.7	30.5	34.4	35.7
UK	55–64	50.7	56.2	58.0	57.5

⁷ The following statistics are taken from European Commission, ‘Employment in Europe 2010’ (2010).

We are not here concerned with explaining the differences between Italy and the UK. What is important is the trend in employment rates over a number of years. Whereas in the EU27 and in both countries the overall employment rates have remained reasonably stable, there has been a large proportionate increase in the rate of employment of the oldest group. Interestingly, this trend has hardly been affected in the recessionary years.

It is interesting to contrast these figures with those for the youngest group of workers, aged 15–24 years. The figures for 2000 and 2009 reveal a different trend, as shown in Table 3.

This confirms the dire situation for young people in the EU, Italy, and the UK. In the UK, youth unemployment is running at record levels, with one in eleven university graduates from 2010 still unemployed six months after leaving the university.

3. REASONS FOR AND TRENDS IN THE INCREASE IN OLDER WORKERS' EMPLOYMENT RATES

Our focus here is on older workers, and perhaps, we need to ask why the employment rate of this older age group has increased over the years. For some, the insufficiency of pension systems may produce a strong financial imperative to continue working after retirement age. For others, changing norms surrounding aging may lead older workers to wish to continue leading economically engaged and productive lives. Another possible answer may lie in the way that the labour force is used. It is our hypothesis that this age group and, especially the older age group (those aged 65 years plus), constitute a flexible and contingent work force that is attractive to employers. On the part of individual workers, this flexibility may sometimes be by choice and sometimes by necessity.

We note in this regard a trend toward older workers working in non-standard positions – employed on a part-time or temporary basis or self-employed. There is enough evidence to show that the likelihood of being in full-time permanent employment decreases with age, so that older people are more likely to be self-employed or working part time than younger age groups. This phenomenon raises concerns that older workers may be a vulnerable working population. Indeed, older workers are more likely to be employed in precarious work.

Moreover, once unemployed, older workers over the age of 50 years tend to remain unemployed for longer than other age groups. Accounts indicate that many suffer from

Table 3 Employment Rates for Young People (15–24 Years) (%)

Place	2000	2009
EU27	37.5	35.2
Italy	26.4	21.7
UK	56.6	48.4

stereotyping and age discrimination; in the UK, this has traditionally included a mandatory retirement age.⁸

It is not particularly easy to obtain figures for flexible working in the EU as a whole, but the likelihood of working part time increases with age, as can be seen in the figures from the European Foundation (2008) shown in Table 4.⁹

The European Foundation reported that 'part-time work appears to be an involuntary choice for a considerable proportion of young and adult workers, whilst it seems to be much more of a voluntary choice for both older and female workers'. There appeared to be no gender differences among workers in the older age group in terms of the degree of voluntariness.

Self-employment is also more common among older workers than among the younger age groups. This is shown in Table 5.¹⁰

In all age groups, men are much more likely to work on a self-employed basis than women do. For those older than 55 years, 72.8% of the self-employed were men and 27.2% were women.

According to one study, in the UK, older women are more likely than older men to be in flexible work patterns.¹¹ This particularly applies to part-time work where there appears to be a correlation between age and the likelihood of working part time, as shown in Table 6.

Table 4 Workers on Part-Time Employment Contracts in the EU

Age, years	15–24	25–34	35–44	45–54	55+	Total
All	24.7	13.5	16.3	13.4	22.1	16.7
Men	19.8	5.2	3.8	3.8	12.0	7.1
Women	30.9	23.2	31.5	25.5	37.0	28.7

Table 5 Self-Employed People as a Percentage of Total Employees in the EU

15–24	6.6
25–34	13.6
35–44	16.3
45–54	17.5
55+	28.8
Total	16.4

⁸ See Malcolm Sargeant, 'The Default Retirement Age: Legitimate Aims, Disproportionate Means', *Industrial Law Journal* 39, no. 3 (2010): 244–263.

⁹ See <www.eurofound.europa.eu>.

¹⁰ European Foundation for the Improvement of Living and Working Conditions Dublin, 'Working conditions of an ageing workforce' (2008).

¹¹ Deborah Smeaton & Sandra Vegeris, *Older People Inside and Outside the Labour Market: A Review* (London: Equality and Human Rights Commission, 2009).

Table 6 Proportion of Employed Men and Women
Working Part Time, 2000 and 2007

Age, years	Men		Women	
	2000	2007	2000	2007
45–49	4	5	44	43
50–54	6	6	47	42
55–59	9	11	52	47
60–64	15	20	61	80

Older workers in the UK were also more likely to hold a temporary employment contract. Thus, some 10% of working men over the state pension age were in temporary employment compared with an average of 4% for the age groups below them. Similarly, about 9% of women over state pension age held temporary contracts compared with 6% of women between the ages of 25 and 49 years and 5% of those between 50 years and state pension age.¹² If one examines the type of temporary contract held, then it is apparent that the oldest workers are most likely to be employed in seasonal and casual work.¹³

Despite these figures, there is little evidence that older workers are more likely to be in flexible work patterns than other age groups,¹⁴ and it may be that there is a need to increase this flexibility in order to increase older workers' employment rates.

4. CONSIDERING THE OBSTACLES TO OLDER PEOPLE WORKING

It is certain that the obstacles to older people working need to be reviewed, such as early retirement, redundancy focused on older workers, and mandatory retirement policies. In this respect, Directive 2000/78/EC on establishing a Framework for Equal Treatment in Employment and Occupation and its interpretation by the European Court of Justice have been a disappointment. How is it possible to increase the employment rate of older workers when there is a compulsory retirement age in existence? Its very existence mitigates against the employment of older workers as employers see them as only having a short period of employment left to them.

The European Commission takes the view that it is taking the required action to remove the obstacles to employment, even if the Commission falls short of advocating the removal of state compulsion in retirement, when it stated that:

If employment levels of older workers are to maintained or increased, there is a need to keep them close to the labour market, and avoid measures that may alleviate their unemployment in the short

¹² Deborah Smeaton & Sandra McKay, 'Working after State Pension Age: Quantitative Analysis', Research Report No. 182, Department for Work & Pensions (2003), 29, Table 3.2.

¹³ *Ibid.*, at 31, Table 3.3.

¹⁴ See Smeaton & Vegeris.

run, but which compromise their potential employment in the longer run, such as early retirement or easier access to long-term sickness or disability schemes which are difficult to reverse. This requires better employment opportunities for older workers, supporting their skills' upgrading and improving incentives to continue working through the reform of pension systems.¹⁵

One assumes that these steps are to be taken with the eight common principles of flexicurity in mind, including the commitment to life-long learning, open and inclusive labour markets, and the promotion of a smooth transition between jobs.¹⁶ Yet despite adoption of the principles in 2008, flexicurity remains an imprecise concept, a 'contested term', as one scholar notes.¹⁷ The balance sought between flexibility and security, as described in the Commission report quotation above, is anything but clear. That said, references in the Europe Strategy 2020 to the American older worker employment rate indicate a desire, expressed at the supranational level, for increases in labour market flexibility such as one finds in the US. It thus makes sense to consider the conditions faced by older workers in that highly market-driven economy.

5. THE US AS A LABORATORY

Objectives, such as the Europe Strategy 2020 headline target of raising the employment rate, are affected by many factors. Among the most influential is the economy. As Roger Blanpain notes, the goal of a 75% employment rate may be unrealistic given the lingering effects of the global recession on European labour markets.¹⁸

Ironically, despite the emphasis of the Lisbon strategy on neoliberal principles, including labour market flexibility and deregulation, there is strong evidence that the world economic crisis would have been much worse for European workers had true neoliberalism reigned.¹⁹ Therefore, in assessing the prospects of the Europe Strategy 2020 and the mechanisms by which Member States hope to increase their employment rates, the lessons of the global economic crisis must be kept in mind. To that end, there is perhaps no better country than the US to look to for evidence of what happens to workers in a highly market-driven system during a sustained economic crisis for it is under such circumstances that a country's systems of employment promotion and social protection are truly tested.

Before turning to US labour market conditions and several trends adversely affecting older workers, it is worth noting that American labour law is far less protective of job security than are the systems of most developed nations. The Organization for Economic Cooperation and Development (OECD) ranks the US last among developed countries in

¹⁵ European Commission, 'Employment in Europe 2010' (2010).

¹⁶ Council of the European Union, 'Council Conclusions – Toward Common Principles of Flexicurity', adopted 5–6 Dec. 2007.

¹⁷ See Maarten Keune, 'Flexicurity: A Contested Concept at the Core of the European Labour Market Debate', *Intereconomics* (2008).

¹⁸ See Roger Blanpain, 'Decent Work in the European Union: Hard Goals, Soft Results', *Employee Rights and Employment Policy Journal* 15, no. 1 (2011 forthcoming).

¹⁹ See Paul de Grauwe, 'Flexibility Is Out: Now We See Rigidity's Virtues', CEPS Commentary, Centre for European Policy Studies, 2009, <www.ceps.eu/book/flexibility-out-now-we-see-rigidity-virtues>.

its rating of the strength of its members' protective employment laws.²⁰ Americans leave many facets of the employment relationship to the workings of the market.

The US flexible system of labour market regulation allows employers to treat non-unionized workers, with few exceptions, as expendable commodities. Employment discrimination, including discrimination on the basis of age, is prohibited, and compulsory retirement is illegal in most sectors in the United States.²¹ In addition, some terms and conditions of employment, such as minimum wages, are subject to statutory law. Nonetheless, the vast majority of American workers – those without trade union representation, working in the private sector – are employed at will. One employed at will may be terminated from employment, at any time, with or without cause, so long as no other employment prohibition, such as the ban on employment discrimination or a very limited number of other proscriptions, is violated. In many cases, no notice is required prior to termination.²² Nowhere in the United States, even in cases of mass redundancy or plant closings, is redundancy pay required for non-union workers.²³ Thus, it is easy and relatively inexpensive to dismiss workers.

This system, which produced such impressive employment rates and low unemployment rates in good economic times, created truly catastrophic conditions for millions of workers during the crisis and its aftermath. Whereas legal regulation might act as a brake on the shedding of workers by making dismissal costly or administratively time-consuming, as is the case in many EU countries, such regulation does not exist in the US. In short, law creates few incentives for employers to eschew dismissal. Thus, as the global economic crisis became apparent, decisions to dismiss workers were made in terms of the micro-economic conditions facing individual firms with minimal regulatory constraint.²⁴ Indeed, there is evidence that the labour force cuts that were made were far in excess of the financial hardship suffered by American corporations.²⁵ Many employers, concludes one study, used the recession as an opportunity for restructuring operations to maximize profits at the expense of workers.²⁶

²⁰ See 'How Do OECD Labour Markets Perform?', Table 8 (Employment Protection), 2010, <www.oecd.org/document/22/0,3343,en_2649_39023495_43221014_1_1_1_1,00.html>.

²¹ The Age Discrimination in Employment Act of 1967 protects persons 40 years and older from employment discrimination based on age. The Act's prohibitions apply to employers with twenty or more employees. Both employees and job applicants are protected by the statute.

²² Except for a federal statute requiring workers to be provided with sixty-day advanced notice of mass (large-scale) redundancies and plant closings and a few state statutes that mirror or build on its notice requirements, American non-union workers lack protection from economically based employer decisions. Moreover, the federal notice statute, the Worker Adjustment and Retraining Notification Act (WARN Act), only governs large employers – those employing 100 workers or more.

²³ Those working under collective bargaining agreements negotiated by trade unions are usually protected by severance pay provisions, which provide for pay in the event of redundancy. In the US, however, union membership in the private sector is very low. Most private sector workers are not covered by collective bargaining agreements. In 2010, the union membership rate in the private sector was 6.9%. See US Department of Labor, Bureau of Labor Statistics, Press Release, 21 Jan. 2011, <www.bls.gov/news.release/union2.nr0.htm>.

²⁴ See Michael J. Zimmer, 'Unions and the Great Recession: Is Transnationalism the Answer?', *Employee Rights and Employment Policy Journal* 15, no. 1 (2011 forthcoming).

²⁵ See Andrew Sum, *How the US Economic Output Recession of 2007–2009 Led to the Great Recession in Labor Markets: The Role of Corporate Downsizing, Work Hour Reductions, Labor Productivity Gains, and Rising Corporate Profits* (Center for Labor Market Studies, Northeastern University, 2010), <www.clms.neu.edu/publication/>.

²⁶ *Ibid.*

Table 7 *Employment Rates in the US by Age (%)*²⁷

Age, years	2000	2004	2008	2009	Change
15–64	74.1	71.2	70.9	67.6	–6.5
25–54	81.5	79.0	79.1	75.8	–5.7
55–64	57.8	59.9	62.1	60.6	+2.8

Below, we examine statistics for US workers generally and American older workers particularly as a point of comparison to their counterparts in Europe.

6. EMPLOYMENT AND UNEMPLOYMENT IN A FLEXIBLE LABOUR MARKET

We noted above that in Italy and the UK, and in the EU27, employment rates have remained reasonably stable save for employment rates of older workers, which increased significantly between 2000 and 2009. In contrast, the relative volatility of US employment rates is evident over the same period. More specifically, significant decreases in employment rates were produced in the US by the global economic crisis, except for older workers. Moreover, whereas American older worker employment rates increased between 2000 and 2009 (Table 7), as did older worker employment rates in the EU, Italy, and the UK, the increase was far less in the US. And although American older worker employment rates are significantly higher than in the EU overall and in Italy, there is less of a difference in the American and UK rates than one might expect.

In terms of unemployment, the Great Recession produced serious adverse effects for American workers of all ages. As seen with employment rates, volatility is evident in US unemployment statistics as well. Unemployment rocketed from a November 2007 pre-recessionary rate of 4.7% to a high of 10.1% in October 2009.²⁸ By December 2010, the overall unemployment rate was 9.4%, about where it has anemically hovered for months, representing 14.5 million people without work but actively searching for a job.²⁹

By some measures, US older workers are faring better than their younger counterparts. A closer inspection, however, shows that the global financial crisis has magnified older workers' existing vulnerabilities, especially with respect to job loss and reemployment prospects. In fact, the advantage older workers appear to possess over younger workers diminishes considerably when one considers additional facts.

²⁷ The following statistics are taken from OECD.StatExtracts, Labour Force Statistics by sex and age. <<http://stats.oecd.org/Index.aspx>>.

²⁸ See Richard W. Johnson & Corina Mommaerts, *Unemployment Statistics on Older Americans* (Urban Institute Program on Retirement Policy, 2010), Table 2, <www.RetirementPolicy.org>.

²⁹ See Sarah E. Rix, 'The Employment Situation, December 2010: Some Encouraging Signs for Older Workers, but Not All Indicators Are Positive', AARP Fact Sheet (2010).

First, US older worker unemployment reached record levels in 2009 and 2010. In raw numbers, in 2009, on average, 1.5 million employees aged 55 to 64 years were unemployed each month; the 2009 monthly figure for employees aged 65 years and older was 421,000.³⁰ In 2010, the annual average monthly unemployment rate for male workers aged 55 years and older was 7.7% and it was 6.2% for female workers. That these unemployment rates are lower than those for younger workers is not surprising. Research has shown that the job-protective effects of older age are due mainly to seniority and job tenure.³¹ The reason older workers lose their jobs at lower rates is their greater time on the job. One recent study found that when job tenure is held constant, older workers are no less likely to be displaced from their jobs than younger colleagues.³² As long-term employment relationships weaken, we are likely to see older workers' job loss advantage weaken further.

Second, since the global economic crisis began, unemployment has increased more for older workers than for their younger counterparts. In other words, the percentage increase in unemployment for older workers has been more dramatic than for younger or prime age workers. Between December 2007, the first month of the recession in the US, and December 2010, the unemployment rate for workers aged 55 years and older increased by 115.6%, as shown in Table 8.

Table 8 Unemployment Rates in the US by Age (%)³³

Age, years	December 2007	December 2010	% Change
16+	5.0	9.4	88.0
16–24	11.7	18.1	54.7
25–54	4.1	8.5	107.3
55+	3.2	6.9	115.6

Third, once unemployed, older American workers remain unemployed longer than their younger counterparts. Using data from October 2010, one recent study found that older workers endure bouts of unemployment on average of seven weeks longer than younger workers.³⁴ That same study found that among the unemployed, approximately 41% of workers aged 55 years and older were unemployed for over one year compared with 34% of workers aged 25–54 years.³⁵

³⁰ See Richard W. Johnson & Corina Mommaerts, *How Did Older Workers Fare in 2009?* (Urban Institute Program on Retirement Policy, 2010), <www.urban.org/publications/412039.html>.

³¹ Richard W. Johnson & Corina Mommaerts, *Age Differences in Job Loss, Job Search, and Reemployment* (Urban Institute Program on Retirement Policy, 2011), <www.urban.org/publications/412284.html>.

³² *Ibid.*

³³ See Sarah E. Rix, 'The Employment Situation, December 2010: Some Encouraging Signs for Older Workers, but Not All Indicators Are Positive', AARP Fact Sheet (2010) (based on US Department of Labor, Bureau of Labor Statistics, labour force statistics from the Current Population Survey).

³⁴ See Janemarie Mulvey, 'Older Unemployed Workers Following the Recent Economic Recession', *Congressional Research Service* (2011).

³⁵ *Ibid.*

Another recent study, using data for the period between mid-2008 and the end of 2009, found that unemployed workers aged 50–61 years were one-third less likely to find work within a year than unemployed workers aged 25–34 years.³⁶ Those aged 62 years and over fared even worse compared with their young colleagues; those oldest workers were only half as likely to find work within a year as compared to unemployed workers aged 25–34 years.³⁷ Overall, the likelihood of finding a job within a year was grim: only 36% of the unemployed aged 25–34 years found work within a year; the figure for those aged 50–61 years was only 24%; and for unemployed workers aged 62 years and older, only 18% found work within a year.³⁸

7. OBSTACLES CONFRONTING US UNEMPLOYED OLDER WORKERS

In order to increase the employment rate of older workers, the European Commission recommends policies that ‘keep them close to the labour market’.³⁹ In the US, as in the EU, this is easier said than done when an older worker loses an existing job. While the obstacles are many, two in particular merit mention here: (1) barriers, some clearly discriminatory, erected by employers, and (2) sub-optimal job search strategies pursued by older workers. Each is a topic of great interest in the US given its continuing weak labour market in the aftermath of the Great Recession. Although it is disheartening that serious difficulties face older workers, the good news is that the Obama administration is attempting to understand the problem’s parameters and to develop programmatic responses to it.

7.1. BARRIERS ERECTED BY EMPLOYERS

As to the first obstacle, employer-erected barriers, the Obama administration has evidenced obvious concern about how older workers are faring in tough economic times. The federal Equal Employment Opportunity Commission (EEOC), responsible for the enforcement of national equal employment opportunity laws, has held two public meetings on age discrimination in the current economy; the first meeting took place in July 2009 and the second, in November 2010. During the meetings, EEOC officials heard testimony from lawyers, human resource professionals, representatives of older worker advocacy groups, law professors, and others about current deficiencies in existing age discrimination law and legal strategies the EEOC might use to curb what appears to be a significant problem.⁴⁰ Additional concern by the government about age discrimination is demonstrated by a ‘Public

³⁶ Richard W. Johnson & Janice S. Park, *Can Unemployed Workers Find Work?* (Urban Institute Program on Retirement Policy, 2011), <www.urban.org/publications/412283.html>.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ ‘Employment in Europe 2010’, *supra*, n. 16.

⁴⁰ Indeed, in 2009, a total of 22,778 charges of age discrimination were filed with the Commission, representing 24.4% of all charges filed.

Briefing on Age Discrimination in Employment in the Context of the Economic Crisis', an event hosted by the US Civil Rights Commission in June 2010.

The public meetings reveal that part of the difficulty with prosecuting age discrimination claims is doctrinal. Recent US Supreme Court decisions have weakened the Age Discrimination in Employment Act's protections, making it more difficult to prove age discrimination than other forms of bias. The US Congress is presently considering legislation that would overrule some parts of the Court's decisions, but until Congress acts, and perhaps it might not, it is important to publicly discuss the law's present weaknesses and consider various strategies to cope with them.

The other difficulty related to prosecuting age discrimination claims of the unemployed is evidentiary. These cases generally involve hiring bias; many older workers who apply for and fail to obtain jobs have no idea why they were not successful or to whom the position was given. One lawyer suggested in a testimony that, unlike the private bar, the EEOC is well positioned with resources and broad investigatory powers to examine the problem and, where it is warranted, bring suit to end hiring practices that are systemic in nature.⁴¹

Connected to age discrimination is another barrier worthy of mention. On 16 February 2011, the EEOC held a public meeting to examine a newly emerging obstacle: the barring by some employers of the unemployed from job applicant pools. Beginning during summer 2010, reports began to surface of employers and employment agencies expressly and implicitly indicating that unemployed workers need not apply for job openings.⁴²

Requiring that applicants should be presently employed may be either a pretext designed to mask illegal discrimination – for example, age discrimination – or simply a screening device used to cut down the tremendous number of applications employers receive when advertising openings in a weak labour market. Even with the latter, however, the age implications are troubling. That older workers tend to be among those who have the longest term of unemployment indicates that they may be disproportionately affected by such blanket exclusions.⁴³

Among the outcomes of the public meeting on excluding the unemployed from applicant pools was a discussion of the practice's dimensions. Also important was testimony on the possible legal responses to it under existing anti-discrimination law.⁴⁴ The application of anti-discrimination law is uncertain since it is not currently unlawful to use present employment status as a criterion for hire. Where employer actions are mere

⁴¹ See written testimony of Mary Anne Sedey, Partner, Sedey Harper P.C., Meeting of 17 Nov. 2010 – Impact of Economy on Older Workers.

⁴² See written testimony of Christine L. Owens, Executive Director, National Employment Law Project, Meeting of 16 Feb. 2011 – EEOC to Examine Treatment of Unemployed Job Seekers.

⁴³ The blanket exclusions may also disproportionately impact other groups, such as racial minorities, women, and people with disabilities.

⁴⁴ See written testimony of Helen Norton, Associate Professor, University of Colorado School of Law, Meeting of 16 Feb. 2011 – EEOC to Examine Treatment of Unemployed Job Seekers.

pretext for direct age discrimination or represent indirect age discrimination, however, they may be prohibited under existing law.

Finally, as suggested at the public meeting, this new barrier for unemployed older workers may be a practice warranting legislative prohibition. In fact, one witness testified that the state of New Jersey is considering legislation that would prohibit the exclusion of the unemployed from employment opportunities.⁴⁵

7.2. SUB-OPTIMAL JOB SEARCH STRATEGIES

While extended discussion is beyond the scope of our paper, we do find instructive recent research indicating that older unemployed workers apparently use different job search tools than their younger counterparts, which may in part explain differential success in obtaining new work.⁴⁶ More specifically, a study by Heidkamp et al. compared older and younger job seekers' responses to a May 2010 national survey to determine whether there are differences in job search strategies between the groups.

One important finding is that far fewer of those aged 55 years and older, only 12%, took education and training courses after losing a job as compared with 20% of younger workers. In addition, a large percentage of older job seekers relied upon newspaper classified advertisements and job listings while younger workers more frequently found leads for new jobs by staying in touch with former employers. Both groups relied on the Internet in their job searches, but younger seekers used Internet social networking sites more frequently than older workers. In other words, older workers used open-access sites and bulletin boards while younger workers stayed connected through social networking and personal contact.

Such study results highlight the need for specialized job search services for older workers, something the US has lacked until recently. One new programme, launched by the US Department of Labor in 2009, may prove useful. The Aging Worker Initiative has provided ten grants of USD 1 million to organizations seeking to develop, document, and disseminate strategies that connect older job seekers to employment opportunities. Results of the programme are not yet available, but the hope is that new models to assist older workers will be developed under its auspices.

8. CONCLUSION

Without presuming to know what is best for each EU Member State, the lessons to be gleaned from the US experience are several, at least for the purposes of this paper. First, although highly flexible labour markets might in good economic times produce high employment and low unemployment rates, such systems are not stable. Moreover,

⁴⁵ See written testimony of Christine L. Owens, *supra*, n. 43.

⁴⁶ Maria Heidkamp et al., 'The New Unemployables: Older Job Seekers Struggle to Find Work During the Great Recession', *The Sloan Center on Aging & Work*, no. 25, Boston College, 2010.

volatility, while problematic for all workers, may be especially harmful to older workers who lose their jobs since older workers have greater difficulty finding replacement employment.

Second, although the elimination of compulsory retirement is necessary to ensure older workers equal employment opportunities and increase their employment rates, it is not sufficient. Much more is called for, including a careful assessment of the effectiveness of age discrimination law more generally and of additional job security protections, if they exist, for all employees. In addition, policymakers must be vigilant in order to identify any new trend that might adversely affect older workers, such as discrimination against the unemployed.

Finally, empirical examination of why older workers suffer significantly longer bouts of unemployment than younger workers is necessary to craft appropriate programmatic responses to older workers' lengthy unemployment experiences. By using the US as its laboratory, perhaps the EU may devise effective solutions to the problems that plague older workers on both sides of the Atlantic.