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DECENT WORK, OLDER WORKERS AND VULNERABILITY IN
THE ECONOMIC RECESSION: A COMPARATIVE STUDY OF
AUSTRALIA, THE UNITED KINGDOM, AND THE UNITED STATES

BY

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I. INTRODUCTION

The International Labour Organization (ILO) has made “decent work” the cornerstone of its recommended strategy for recovery from the global economic crisis.¹ Launched in 1999, years before the recession,² the ILO’s decent work agenda seeks for workers not only “the creation of jobs of acceptable quality”³ but also protection “from the vulnerabilities and contingencies which take people out of work, whether these arise from unemployment, loss of livelihood, sickness or old age.”⁴

This article is addressed to the final listed vulnerability – old age. In countries with aging populations, the global recession and its aftermath present unique challenges for older workers, and compels an assessment of how they are faring. To this end, the ILO’s concept of decent work provides a useful metric or yardstick.⁵ Decent work, a multifaceted concept, assists in revealing the interdependence of policy measures needed to secure human dignity across the course of working lives. With this in mind, in three English-speaking, common law countries – Australia, the United Kingdom (U.K.), and the United States (U.S.) – we consider several decent work principles applicable to older workers and provide evaluations in light of them. The three countries provide a useful comparison because all are “liberal market economies” with similarities in their patterns of labor

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1. See, e.g., International Labour Organization [ILO] Director-General, *Recovery and Growth with Decent Work* (2010), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_140738.pdf> [hereinafter *Recovery and Growth*]; ILO Director-General, *Tackling the Global Jobs Crisis: Recovery through Decent Work Policies* (2009), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_106162.pdf> [hereinafter *Decent Work Policies*]; RAYMOND TORRES, ET AL., INT’L INST. FOR LABOUR STUDIES, *THE FINANCIAL AND ECONOMIC CRISIS: A DECENT WORK RESPONSE* (2009), available at <http://www.ilo.org/public/libdoc/ilo/2009/109B09_59_engl.pdf> [hereinafter *A DECENT WORK RESPONSE*]; see also ILO, *Recovering From the Crisis: A Global Jobs Pact*, at 2 (June 19, 2009), available at <http://www.ilo.org/public/libdoc/ilo/2009/109B09_192_engl.pdf> (“Action must be guided by the Decent Work Agenda and commitments made by the ILO and its constituents in the 2008 Declaration on Social Justice for a Fair Globalization.”).

2. See Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization*, 20 EUR. J. INT’L L. 823, 838-39 (2009).

3. ILO Director-General, *Report of the Director General: Decent Work* (1999), available at <<http://www.oit.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> [hereinafter *Decent Work*].

4. *Id.*

5. See Juan Somavia, *Older Workers and the Crisis: Towards an Integrated and Decent Work Perspective*, THE JOURNAL: AARP INT’L, Summer 2009, at 36.

regulation, though pursued through different forms and traditions.⁶ Relevant to the analysis is the role workplace law plays in each country in ameliorating or exacerbating older worker vulnerability.

As initially articulated, decent work was an intentionally malleable construct, whose content remained purposefully vague.⁷ The decent work agenda enumerated four pillars – fundamental rights at work, fostering employment, expanding and improving social protection, and promoting social dialogue⁸ – but left it to national governments to determine their meaning.⁹ In 2008, the Declaration on Social Justice for a Fair Globalization reaffirmed support for the four pillars, reordering them and declaring them “inseparable, interrelated and mutually supportive.”¹⁰ In other words, ILO members must, in order to implement the agenda, pursue these inseparable objectives simultaneously since inattention to any one jeopardizes achievement of the others.¹¹

Reviewing the situation confronting older workers, however, three of the four objectives are especially pertinent: employment promotion, social protection, and fundamental rights. With respect to the first, Francis Maupain, former ILO legal advisor and key drafter of the 2008 Declaration, argues that member countries must foster conditions “for increasing the creation and development of work” in a way that enables individuals to benefit from “changing possibilities.”¹² To gauge the present status of older

6. See VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); Juan C. Botero et al., *The Regulation of Labor*, 119 Q.J. ECON. 1339 (2004); Meredith Jones & Richard Mitchell, *Legal Origin, Legal Families and the Regulation of Labour in Australia*, in VARIETIES OF CAPITALISM, CORPORATE GOVERNANCE AND EMPLOYEES 60, 86 (Shelley Marshall et al. eds., 2008) [hereinafter *Legal Origin*]; (arguing that despite its very different history of interventionist regulation, labor conditions in Australia are closer to those in liberal market economies than co-ordinated market economies). For critiques of the “legal origins” literature regarding labor law see Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?* 41 LAW & SOC’Y REV. 865 (2007); David E. Pozen, *The Regulation of Labour and the Relevance of Legal Origin*, 28 COMP. LAB. L. & POL’Y J. 43 (2007).

7. See Maupain, *supra* note 2, at 838.

8. See Gillian MacNaughton & Diane F. Frey, *Decent Work, Human Rights, and the Millennium Development Goals*, 7 HASTINGS RACE & POVERTY L.J. 303, 316-17 (2010).

9. Maupain, *supra* note 2, at 838. The ILO, however, has conducted significant research into and discussion of the methods by which member states can measure progress toward achieving decent work. See, e.g., ILO Tripartite Meeting of Experts on the Measurement of Decent Work, Geneva, Switz., Sept. 8-10, 2008, *Measurement of Decent Work: Discussion Paper for the Tripartite Meeting of Experts on the Measurement of Decent Work*, TMEWDW-R-[2008-08-0062-1]-En.doc/v2 (2008), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/---stat/documents/meetingdocument/wcms_100335.pdf>.

10. MacNaughton & Frey, *supra* note 8, at 321. The order of the objectives as set forth in the 2008 Declaration is: employment promotion; social protection; social dialogue; and fundamental rights. *Id.*

11. Maupain, *supra* note 2, at 838.

12. *Id.* at 834.

workers vis-à-vis this objective, we review data from Australia, the U.K., and the U.S. on employment, unemployment, and other measures of economic health or hardship, such as underemployment and worker discouragement. We also consider the extent of legal job security protection in each country, protections which might forestall rising unemployment and facilitate greater employment and income opportunities.

Regarding the second objective, ILO members have agreed, via the 2008 Declaration, to pursue measures of social protection – including sufficient unemployment insurance and income security in old age¹³ – which minimize the effects of unpredictable and traumatic events such as the global recession.¹⁴ This system of “positive social protection,” also called “dynamic security,” requires creating an environment whereby workers obtain “a fair share of the benefits of progress.”¹⁵ In assessing the condition of older workers with respect to this goal, we review information on retirement security and unemployment benefits.

Finally, on fundamental rights, this article is most concerned with the elimination of discrimination.¹⁶ The status of the prohibition on age discrimination as a fundamental right is unclear.¹⁷ International human rights instruments, including the ILO’s fundamental anti-discrimination instruments, Convention No. 111 (Discrimination (Employment and Occupation)) and Convention No. 100 (Equal Remuneration), do not expressly list age as a prohibited basis for differentiation.¹⁸ Yet age has been identified as an emerging new ground, and countries, including Australia, have in their adoption of Convention No. 111 added age as a prohibited basis via Article 1(1)(b) of that convention.¹⁹ To address the issue of age discrimination, this article reviews the legal protections against age bias in each of the three countries profiled.

13. See ILO Gender Promotion Programme, *Realizing Decent Work for Older Women Workers*, at 9 (2000), available at <http://natlex.ilo.ch/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_079196.pdf> [hereinafter *Decent Work for Older Women Workers*] (“Decent work . . . leads to basic security in old age and adversity.”); Somavia, *supra* note 5, at 39.

14. Maupain, *supra* note 2, at 835.

15. *Id.*

16. See Int’l Labour Conference, Declaration on Fundamental Principles and Rights at Work, International Labour Organisation [ILO], 37 I.L.M. 1233 (June 18, 1998) [hereinafter 1998 Declaration].

17. See Monika Schlachter, General Report to the XVIIIth International Congress of Comparative Law: The Prohibition of Age Discrimination in Labour Relations 4-5 (July 25-Aug. 1, 2010) (on file with author).

18. *Id.* at 4; see also *Decent Work for Older Women Workers*, *supra* note 13, at 37 (“Currently there exists no legally binding universal instrument calling for national policies to eliminate and outlaw discrimination in access to employment, training and work conditions on the grounds of age.”).

19. *Decent Work for Older Women Workers*, *supra* note 13, at 38.

In short, this article gauges how each of the three countries performed during the economic crisis in terms of employment promotion, social protection, and fundamental rights, with a particular focus on older workers. Although the recession affected each country to a different extent, and the response of national employers to the crisis varied significantly, the effects of the financial crisis on older workers are strikingly similar. The recession has affected the quality of work for older workers; for many, employment has become more fragile, inconstant, and insecure. Additionally, in all three nations, the recession compromised older workers' ability to plan for and secure a key decent work precept, a dignified retirement.

Greater national differences emerge when evaluating labor regulation affecting older workers. While all three countries prohibit age discrimination to varying degrees, during an economic crisis such prohibitions do not sufficiently contribute to employment security for older workers. General labor standards, like those restricting termination and layoff or requiring severance pay, and the provision of a robust safety net, are just as important in forestalling older worker vulnerability. While none of the three countries pursues its labor market policy with an eye toward achieving decent work, by using that ILO concept as a touchstone, and looking broadly at the intersecting factors that contribute to older worker insecurity, the outlines of needed policy reforms become clear. In particular, we conclude that market principles are a poor mechanism for pursuing decent work for older workers, a fact apparent in the U.S., for example, as the effects of the crisis have continued even though the recession technically ended in June 2009.

Before undertaking country-specific analyses, one should note that older worker employment has been growing in all three countries, though the increase over the last decade has been more notable in Australia and the U.K. than in the U.S. For example, in 1999, the percentage of the older population (ages fifty-five to sixty-four) in employment was in Australia, the U.K., and the U.S., respectively: 44.3, 49.4, and 57.7.²⁰ By 2009, the percentages in Australia, the U.K., and the U.S., respectively, had risen to: 59.0 (+14.7), 57.5 (+8.1), and 60.6 (+2.9).²¹ Thus, all three countries at the present time have comparable rates of older workers engaged actively in work.

20. See *How Do OECD Labour Markets Perform?*, OECD, <http://www.oecd.org/document/22/0,3343,en_2649_39023495_43221014_1_1_1_1,00.html> (last updated Jul. 6, 2010) (scroll to "employment to population ratios" table, second on the page).

21. *Id.*

Also noticeable, however, are dramatic differences in the overall unemployment rates of the three countries and their changes over time. Turning to 1999, the unemployment rates in Australia, the U.K., and the U.S., respectively, were: 7.0, 6.0, and 4.3.²² In 2009, the rates for Australia, the U.K., and the U.S. were: 5.7 (-1.3), 7.8 (+1.8), and 9.4 (+5.1).²³ Thus, while the global economic crisis affected all three countries, it affected U.S. workers much more severely in terms of job loss. To better understand why this is so and the particular conditions of older workers, this article continues in three discrete sections. Part II covers Australia, Part III describes conditions for older workers in the U.K., and Part IV reviews the U.S. The article concludes with Part V, which briefly reviews the decent work lessons gleaned from the economic downturn.

II. AUSTRALIA

From the mid-1990s until 2009, Australia experienced its longest-ever period of sustained economic growth, fuelled in large part by minerals exports to the growing Asian economies.²⁴ The Australian economy was virtually unaffected by the East Asian economic crisis of the late 1990s and the mild global downturn of the early 2000s. Between 2003 and 2007, Australia's economy clearly showed a new trajectory. Previously, the country's economic fortunes followed closely those of the western economies, particularly the U.S. However with the persistence of high growth, the view became widespread that Australia's economy had become "decoupled" from the western economies and was now strongly allied with East Asian growth. By 2006-07 sustained growth reached a point where capacity constraints became apparent, as infrastructure and investment were unable to meet the potential for growth. Between 2006 and 2008, the official unemployment rate fell from 4.6 percent to 3.9 percent, the lowest for thirty years and considered to be below the effective rate for full employment.²⁵ Reports of labor shortages became widespread in many

22. *Id.* (scroll to "unemployment rates and long-term unemployment" table, first on the page).

23. *Id.*

24. Australia's economy ranks as the thirteenth largest in the world, despite having a population of twenty-two million and a labor force of eleven million. See *GDP (current US\$)*, THE WORLD BANK, <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> (last viewed Mar. 4, 2011).

25. Alison Preston & Therese Jefferson, *Labour Markets and Wages in 2008*, 51 J. INDUS. REL. 313, 315 (2008). The non-accelerating-inflation rate of unemployment (NAIRU), the highest rate at which unemployment is supposed to occur without producing inflation, is currently estimated to be between 4.5 percent and 5 percent for Australia. See Steven Kennedy et al., *Examining Full Employment in Australia Using the Phillips and Beveridge Curves*, 41 AUSTL. ECON. REV. 286 (2008); G.C. Lim et al., *Phillips Curve and the Equilibrium Unemployment Rate*, 85 ECON. RECORD 371, 376 (2009).

industries, and inflation began to rise.²⁶ Governments and business gave increased attention to the need for more effective training schemes to meet the need for skilled labor.

The boom led to appreciation of the need for more effective workforce utilization, with attention being given to measures for increasing participation by older workers through delayed retirement and part-time work. The earlier publication of the Australian Treasury's *Intergenerational Reports* from 2002 onward²⁷ had brought the economic and social consequences of an aging population into public focus. While Australia's population is aging, this is happening more slowly than in comparable countries.²⁸ The age profile of Australia's population has been moderated by a historically high and increasing migration intake, drawn mainly from younger ages, and a rise in the domestic birth rate over the last decade.²⁹

Although Australia actually has a less age-skewed population profile than most other developed countries, the effect in particular of an aging workforce in reducing long-term labor force supply and participation prompted government and employer organizations to focus on the need for policies to increase employment participation among older workers by delaying retirement and greater use of part-time work.³⁰ Employers were repeatedly told from many quarters about the need to dismantle informal barriers preventing the hiring and retention of older workers in order to meet the anticipated gap in labor supply.³¹ However it was only with the labor shortage that age discrimination as a barrier to increased participation received close attention by policy-makers, with government and industry

26. Harry Perlich, *The Impact of the GFC on Australia as a "Dual Economy"*, J. AUSTL. POL. ECON., Dec. 2009, at 65, 73-78.

27. COMMONWEALTH OF AUSTL., INTERGENERATIONAL REPORT 2002-03 (2002), available at <http://www.budget.gov.au/2002-03/bp5/download/BP5_Combined_PDF.zip>. Since then, two further reports have been published: COMMONWEALTH OF AUSTL., INTERGENERATIONAL REPORT 2007 (2007), available at <http://www.treasury.gov.au/documents/1239/PDF/IGR_2007_final_report.pdf>; and COMMONWEALTH OF AUSTL., AUSTRALIA TO 2050: FUTURE CHALLENGES (2010), available at <http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf>; see also PRODUCTIVITY COMM'N, COMMONWEALTH OF AUSTL., ECONOMIC IMPLICATIONS OF AN AGEING AUSTRALIA: PRODUCTIVITY COMMISSION RESEARCH REPORT (2005), available at <http://www.pc.gov.au/_data/assets/pdf_file/0020/69401/ageing.pdf>.

28. See Maggie Walter et al., *Keeping Australia's Older Workers in the Labour Force: A Policy Perspective*, 43 AUSTL. J. SOC. ISSUES 291, 292 (2008).

29. See ACCESS ECON. PTY LTD., ACT AND REGION DEMOGRAPHICS AND TRENDS ii-iii, 3-5, 12-15 (2007), available at <http://www.cmd.act.gov.au/_data/assets/pdf_file/0009/119718/act-region-demographics-trends.pdf> (reporting on the population trends for the Australian Capital Territory and Australia as a whole).

30. Walter et al., *supra* note 28, at 292.

31. Derek Parker, *Skills Shortage: Crisis Ahead*, MGMT. TODAY, Aug. 2004, at 26-29; Walter et al., *supra* note 28.

programs being developed to promote recognition of the value of older workers among employers.³² Employers now realized that retaining and retraining older workers was one of the most important ways of overcoming skill shortages.³³

At the same time, November 2007 saw the election of a Labor government at the national level, one committed to the reintroduction of protective and collectivist labor legislation as well as interventionist industry policy and investment directed at “nation building” projects.³⁴ The new government was elected on a promise to dismantle the “WorkChoices” legislation which the conservative Howard government had implemented in 2006.³⁵ The conservative legislation had been designed to reduce both collective bargaining and the system of awards which set minimum wages and conditions across industries.³⁶ This legislation also significantly undermined the federal unfair dismissal provisions, implemented in 1994 and the only significant legal measure providing job protection. Up to 80 percent of the workforce was excluded from the coverage of the unfair dismissal legislation, while for the remainder of the workforce redundancies, known in the U.S. as “layoffs,” were made significantly easier to implement as employers could remove workers simply by citing “operational reasons” for their retrenchment.³⁷

The WorkChoices legislation began to be removed by a transitional system introduced by the Labor government in March 2008. It was followed by the *Fair Work Act 2009* which reinstated award protections against reduction of wages and conditions, while restoring coverage of the unfair dismissal provisions.³⁸ While some of the reforms had been implemented by transitional legislation which came into force at the end of 2008, the reintroduction of unfair dismissal and award protection did not commence until January 2010. However, the changes were publicized well in advance and may be regarded as having operated *de facto* from at least the middle of 2009, particularly as enforcement of labor standards had

32. Parker, *supra* note 31; Walter et al., *supra* note 28.

33. AUSTRALIAN INDUSTRIAL GROUP, SKILLING THE EXISTING WORKFORCE: FINAL PROJECT REPORT 7-8 (2008), available at <http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Publications/Reports/2008/skilling_existing_workforce.pdf>.

34. Andrew Stewart & Anthony Forsyth, *The Journey from Work Choices to Fair Work*, in FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY 1, 7-8 (Anthony Forsyth & Andrew Stewart eds., 2009).

35. *Id.* at 2-8.

36. *Id.* at 3-6.

37. *Id.* at 4.

38. Carolyn Sutherland, *Industrial Legislation in 2008*, 51 J. INDUS. REL. 297 (2009); Stewart & Forsyth, *supra* note 34, at 8-13.

already been strengthened by changes to legislation and policy since 2007.³⁹

A. The Australian Economy and the Recession

The emergence of the global financial crisis in mid-2008 therefore came at a time when Australia could not have been better placed to respond. The financial crisis was initially anticipated as likely to have a major impact on employment and living standards in Australia, with consequent increase in demand for government social services and assistance by charities.⁴⁰ Public expectations of economic performance and consumer spending declined markedly in the second half of 2008, and while spending had largely recovered by the middle of 2009, public perceptions remained pessimistic until the end of the year, particularly among older Australians.⁴¹ In 2008, economists were conservatively predicting that the unemployment rate would increase to 5.4 percent in 2009 and over 6 percent in 2010.⁴²

The financial crisis produced a brief economic downturn, with negative growth in late 2008 followed by low growth (1 percent) in 2009.⁴³ So, technically, Australia did not experience a recession, although the rapid slowing of growth affected many businesses and families. The decline in equity prices reduced the wealth of Australian households by nearly 10 percent by March 2009.⁴⁴ In one survey conducted in mid-2009, 43 percent of working respondents aged fifty-five and over reported that they were worse off financially compared with a year before.⁴⁵ Construction activity

39. Tess Hardy, *A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond*, in FAIR WORK, *supra* note 34, at 75; Tess Hardy & John Howe, *Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia*, 22 AUSTL. J. LAB. L. 306 (2009).

40. ACCESS ECONOMICS, THE IMPACT OF THE GLOBAL FINANCIAL CRISIS ON SOCIAL SERVICES IN AUSTRALIA (2008), available at <<http://www.accesseconomics.com.au/publicationsreports/getreport.php?report=183&id=235>>.

41. COMMONWEALTH BANK, VIEWPOINT: ECONOMIC VITALITY REPORT, Sept. 2010, at 5-6.

42. CONSENSUS ECONOMICS, ASIA-PACIFIC CONSENSUS FORECASTS, Nov. 2008; ACCESS ECONOMICS, *supra* note 40, at 11.

43. See *Statistical Tables: Output and Labour: Gross Domestic Product - G10*, RESERVE BANK OF AUSTRALIA, <<http://www.rba.gov.au/statistics/tables/xls/g10hist.xls?accessed=0803-09:02:30>> (last viewed Mar. 7, 2011).

44. AUSTL. BUREAU OF STATISTICS, 2009-10: YEAR BOOK AUSTRALIA 687 (2010) [hereinafter 2009-10: YEAR BOOK AUSTRALIA], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AC72C92B23B6DF6DCA257737001B2BAB/\\$File/13010_2009_10.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AC72C92B23B6DF6DCA257737001B2BAB/$File/13010_2009_10.pdf)>; Paul Bloxham & Thomas Betts, Reserve Bank of Austl., *The Composition and Distribution of Household Wealth in Australia*, RESERVE BANK BULLETIN, Apr. 2009, at 13, available at <<http://www.rba.gov.au/publications/bulletin/2009/apr/pdf/bu-0409-2.pdf>>.

45. Kate O'Loughlin et al., *Impact of the Global Financial Crisis on Employed Australian Baby Boomers: A National Survey*, 29 AUSTRALASIAN J. AGEING 88, 91 (2010) (calculated from tables 1 and

slowed considerably, however the economy as a whole experienced only a mild downturn. This was due to a combination of prompt economic stimulus by the federal government, sustained resource export demand, and only mild falls in consumer sentiment.

While job vacancies began to decline in the latter part of 2008, unemployment did not begin to rise until the following year. Official unemployment rates rose from 4.2 percent in May 2008 to a peak of 5.8 percent in August 2009, falling to 5.2 percent in May 2010.⁴⁶ This compared most favorably with an official unemployment rate of 10.5 percent at the peak of the previous recession in February 1993.⁴⁷ The overall employment rate (percentage of civilian population employed) declined from 64.5 percent at the end of 2008 to 63.1 percent in mid-2009, with a very slight pick-up in 2010.⁴⁸ By July 2009, employment was again rising, and it was appearing that the worst of the downturn had been weathered. However underemployment, gauged by labor utilization rates, increased more substantially from 8.9 percent in May 2008 to 11.5 percent in February 2010.⁴⁹

A key reason for the subdued rise in unemployment was a shift from full-time to part-time employment. Not only were most new jobs created during 2008-09 part-time, but part-time work replaced full-time work.⁵⁰

2).

46. See AUSTRALIAN BUREAU OF STATISTICS, 6202.0, LABOUR FORCE AUSTRALIA: MAY 2010, at 1, available at <[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/CBB5B08A0F9DF57FCA25773D00184AB4/\\$File/62020_may%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/CBB5B08A0F9DF57FCA25773D00184AB4/$File/62020_may%202010.pdf)>.

47. See AUSTRALIAN BUREAU OF STATISTICS, 6202.0 LABOUR FORCE AUSTRALIA: DECEMBER 1994 at 10 tbl 5 (seasonally adjusted revised estimate for February 1993) at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0Dec%201994?OpenDocument>>.

48. These figures were calculated by the authors using data from *GMI – Labour Force Status and Gross Changes (flows) by Sex, State, Age*. The data can be downloaded from 6202.0 – *Labour Force, Australia, May 2010*, AUSTRALIAN BUREAU OF STATISTICS (Oct. 6, 2010, 11:30 AM), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0May%202010?OpenDocument>> (scroll to the bottom of the page and select the “GMI – Labour Force Status and Gross Changes (flows) by Sex, State, Age” .srd file).

49. CTR. OF FULL EMP'T AND EQUITY, UNIV. OF NEWCASTLE, LABOUR UNDERUTILISATION 1-2 (May 2010), available at <http://e1.newcastle.edu.au/coffee/pubs/CLMI/2010/CLMI_total_May_2010.pdf>.

50. See, e.g., AUSTRALIAN BUREAU OF STATISTICS, 6202.0, LABOUR FORCE AUSTRALIA: JANUARY 2008, at 1 (Feb. 14, 2008), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C60CAE877261455CCA2573EE0018F63E/\\$File/62020_jan%202008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C60CAE877261455CCA2573EE0018F63E/$File/62020_jan%202008.pdf)> (reporting a monthly decrease in full-time employment of 7800 but an increase in part-time employment by 34,600); AUSTRALIAN BUREAU OF STATISTICS, 6202.0, LABOUR FORCE AUSTRALIA: DECEMBER 2008, at 1 (Jan. 15, 2009), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/81BA0B35D2A2009BCA25753E00136A35/\\$File/62020_dec%202008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/81BA0B35D2A2009BCA25753E00136A35/$File/62020_dec%202008.pdf)> (reporting a monthly decrease in full-time employment of 43,900 and an increase in part-time employment of 42,800); AUSTRALIAN BUREAU OF STATISTICS, 6202.0, LABOUR FORCE AUSTRALIA: DECEMBER 2009, at 1 (Jan. 14, 2010) [hereinafter LABOUR FORCE AUSTRALIA: DECEMBER 2009], available at <[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/3D60FEAFC4F51E5BCA2576AA001256B5/\\$File/62020_Dec_2009.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/3D60FEAFC4F51E5BCA2576AA001256B5/$File/62020_Dec_2009.pdf)> (reporting a monthly increase in full-time employment of 7300 but an increase in part-time employment 27,900).

Aggregate monthly hours worked in full-time employment fell by 3.3 percent between 2008 and 2009, while the decline in part-time hours was only 2.5 percent.⁵¹ However this was only a short-lived change: when the economy rebounded in 2010, full-time hours increased by 3.4 percent while hours worked part-time rose by only 2.6 percent.⁵² With the downturn expected to be short-lived, employer associations and consultants were widely reported as advising employers not to cut their workforces or else they would again face labor shortages when the downturn ended.⁵³ There were strong anecdotal reports that, rather than lose skilled workers, employers were reducing the hours worked. Many workplaces adopted the unusual approach of moving to a four-day week or shorter working days.⁵⁴ However a substantial part of the shift to part-time employment appears to have been the result of full-time workers being replaced by part-time or casual workers. This also produced a shift in the gender balance, with a net gain of jobs for women.⁵⁵

Survey research suggests that the decline in hours worked (2.3 percent between June 2008 and July 2009) was due more to a reduction in movement from part-time to full-time work as the economy slowed than to a downgrading of jobs from full-time to part-time. Workers seeking jobs with greater hours were less likely to find them, while new job-takers were more likely to find part-time than full-time employment.⁵⁶

Another significant factor which has been proposed is an increase in

51. See LABOUR FORCE AUSTRALIA: DECEMBER 2009, *supra* note 50, at 4.

52. See AUSTRALIAN BUREAU OF STATISTICS, 6202.0, LABOUR FORCE AUSTRALIA: MAY 2010, at 3 (June 10, 2010), available at <[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/CBB5B08A0F9DF57FCA25773D00184AB4/\\$File/62020_may%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/CBB5B08A0F9DF57FCA25773D00184AB4/$File/62020_may%202010.pdf)>. Part-time workers as a proportion of all employed persons rose from 28.4 percent in May 2008, to 29.3 percent in May 2009, and 29.7 percent in May 2010. See AUSTRALIAN BUREAU OF STATISTICS, 6105.0, AUSTRALIAN LABOUR MARKET STATISTICS: JULY 2010, at 34 tbl.1.1 (July 16, 2010) [hereinafter LABOUR MARKET STATISTICS: JULY 2010], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/549DB4631937A23DCA2577610014F952/\\$File/61050_july%202010.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/549DB4631937A23DCA2577610014F952/$File/61050_july%202010.pdf)> (providing the raw figures for the numbers employed full-time, part-time, and both). Part-time work is defined as normally working less than thirty-five hours per week. *Id.* at 99.

53. See MERCER, WORKPLACE 2012: BEYOND THE GLOBAL FINANCIAL CRISIS 2, 8, 11 (2008), available at <http://www.mercer.com.au/attachment.dyn?idContent=1329160&filePath=/attachments/English/Mercer_Au_Workplace2012_ResearchReportUpdate_Dec08.pdf> (recommending that employers work to retain older workers to counteract skills shortages).

54. Media Release, Australian Chamber of Commerce and Industry, Labour Market Flexibility Curtails Job Losses (Aug. 6, 2009) (on file with authors).

55. Guay C. Lim et al., *Review of the Australian Economy 2009-10: On the Road to Recovery*, 43 AUSTRALIAN ECON. REV. 1, 5-6 (2010); Guay C. Lim et al., *Review of the Australian Economy 2008-09: Recessions, Retrenchments and Risks*, 42 AUSTRALIAN ECON. REV. 1, 7 (2009).

56. Bruce Bradbury, *Are Employers Using Part-Time Work to Hang onto their Workers?*, CLUB TROPPO (Aug. 12, 2009, 12:15 PM), <<http://clubtropo.com.au/2009/08/12/are-employers-using-part-time-work-to-hang-onto-their-workers/>>.

workers taking paid leave.⁵⁷ When the financial crisis began, employers were advised to pressure workers into taking paid leave.⁵⁸ Since workers in Australia (particularly older workers, who are more likely to be in secure jobs with leave entitlements) tend to hoard their paid leave as a form of insurance against redundancy,⁵⁹ or layoff, the taking of paid leave represents a reduction of wealth by such workers and a decline in their longer-term income security.

The effect of the financial crisis on the labor force generally in Australia was therefore limited. The greatest effects were a decline in youth employment as new entry positions dried up, a reduction in average hours worked (particularly for full-time workers), and a shift in employment levels from full-time to part-time work.⁶⁰ The latter two effects actually improved the employment chances of older workers, who are more likely to work part-time;⁶¹ however this was at the cost of lower incomes and underemployment for many.

B. Older Workers Employment and Participation Rates

In common with other industrialized countries, older workers in Australia have experienced an increase in employment and participation in the last two decades, with increasing proportions in work, higher levels of hours worked and later average retirement ages. During the economic boom, participation rates for older workers in Australia increased at higher rates than for younger age groups (which had neared effective full employment), and this continued through the economic crisis. Labor force participation rates for older workers actually increased during 2008-09. Using the May quarter for each year (March-May), the average employment rate (labor force as a percentage of the civilian population) increased marginally for older age groups while declining slightly for younger ages.

57. BRIGID VAN WANROOY ET AL, AUSTRALIA AT WORK: IN A CHANGING WORLD 36 (Workplace Research Ctr., Univ. of Sydney, 2009), available at <http://sydney.edu.au/documents/future_students/1259186125-australia-at-work-in-a-changing-world.pdf>.

58. *See id.*

59. *See id.*

60. Michael Plumb et al., *The Labour Market during the 2008-2009 Downturn*, RESERVE BANK BULLETIN, March 2010, at 2-3, 5, available at <<http://www.rba.gov.au/publications/bulletin/2010/mar/pdf/bu-0310-1.pdf>>.

61. AUSTRALIAN BUREAU OF STATISTICS, 4102.0, AUSTRALIAN SOCIAL TRENDS SEPTEMBER 2010: OLDER PEOPLE AND THE LABOUR MARKET 1-2 (2010) [hereinafter OLDER PEOPLE AND THE LABOR MARKET], available at <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication29.09.104/\\$File/41020_OlderWorkers.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication29.09.104/$File/41020_OlderWorkers.pdf)>.

Table 1**Employment Rate by Age, May Quarter:
Labor Force as a Percent of Civilian Population⁶²**

Age Group	May 2007 Qtr	May 2008 Qtr	May 2009 Qtr	May 2010 Qtr
20-24	78.4	78.6	75.8	75.0
25-44	80.3	81.1	79.8	79.1
45-54	80.5	81.2	80.7	80.7
55-64	57.4	57.6	59.9	60.9
65+	8.8	9.7	10.9	11.1
all ages	63.5	64.3	63.5	63.2

This has been attributed to workers deciding to stay in the workforce longer in response to their shrinking retirement savings.⁶³ However the increase was in keeping with strong growth in employment participation by older workers which began earlier in the decade. The age-related changes in employment participation in Australia over the period of the recession are associated more with longer term changes in labor demand and attitudes of older workers than with fluctuations caused by economic downturn. Employment participation by older male workers has been increasing since the 1990s, reversing a previous trend towards earlier retirement.⁶⁴

One explanation for this change is that the destruction of low-qualification “blue collar” male jobs which began in the early 1980s reached its nadir and was eclipsed by the improved availability of jobs for older workers (as the youth workforce fell proportionately) in combination with government policies aimed at increasing incentives to work longer.⁶⁵

62. These figures were calculated by the authors using data from *GMI – Labour Force Status and Gross Changes (flows) by Sex, State, Age*. The data can be downloaded from *6202.0 – Labour Force, Australia, July 2010*, AUSTL. BUREAU OF STATISTICS (Aug. 12, 2010, 11:30 AM), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0Jul%202010?OpenDocument>> (scroll to the bottom of the page and select the “GMI – Labour Force Status and Gross Changes (flows) by Sex, State, Age” .srd file).

63. AUSTL. BUREAU OF STATISTICS, *6202.0, LABOUR FORCE AUSTRALIA: JULY 2010*, at 4 (Aug. 12, 2010), available at <[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/99D0F2ED2D274087CA25777C001734CC/\\$File/62020_jul%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/99D0F2ED2D274087CA25777C001734CC/$File/62020_jul%202010.pdf)>.

64. See *OLDER PEOPLE AND THE LABOR MARKET*, *supra* note 61, at 1.

65. Michael Keating, *Increasing Labour Force Participation*, in COMM. FOR ECON. DEVELOPMENT OF AUSTL., *GROWTH 51: AUSTRALIA’S AGEING POPULATION 66* (2004).

For older men, the improvement in job fortunes since the beginning of this century has involved a sharp rise in full-time participation; part-time employment for this group has been increasing at a steadier but much slower rate.⁶⁶ It appears that these changes are associated with shifting attitudes towards working patterns by the “baby boomer” generation, who tend to have longer participation in work (though at lower overall participation rates) than predecessor generations.⁶⁷

The greatest change in participation by older workers, however, has been among older female workers. This shift appears to be a long-term change, rather than one associated with a particular birth cohort or short-term economic impact: employment participation by women is increasing for all ages, but the increase is strongest among older age groups who have traditionally had the lowest levels of participation.⁶⁸ This change may itself be a reflection of vulnerability as older women have had relatively low income security in the form of accrued benefits and savings as a result of low participation in paid employment over the life-course. The “added worker effect” may also be involved, as older women take up jobs to replace the income of other household members who have lost work.⁶⁹ During the recession, part-time jobs replaced full-time jobs to some extent; and, because women workers predominate in the part-time job market, opportunities increased for women – including those seeking to replace the income lost by unemployed male partners.

Over the period of the economic crisis, the most significant short-term increase in participation has been among women aged sixty to sixty-four: between 2007 and 2010 their participation rate climbed from 46 percent to 52 percent, an increase of 12 percent.⁷⁰ Within the sixty to sixty-four age groups, women took up work at double the rate for men and accounted for over half the increase in employment.⁷¹ Within the fifty-five to fifty-nine

66. Steven Kennedy & Alicia Da Costa, *Older Men Bounce Back: The Re-Emergence of Older Male Workers*, AUSTL. TREASURY ECON. ROUNDUP, Spring 2006, at 32, 34, available at <http://www.treasury.gov.au/documents/1190/PDF/Economic_Roundup_Spring_2006.pdf>.

67. *Id.* at 39.

68. *Id.* at 36.

69. The “added worker effect” is not considered to be very strong in Australia. PRODUCTIVITY COMM’N, *supra* note 27, at 55.

70. Calculated from data on Labour Force Status by Social Marital Status, Age, and Sex, available for download from 6291.0.55.001 – *Labour Force, Australia, Detailed – Electronic Delivery, Jun 2010*, AUSTL. BUREAU OF STATISTICS, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.001Jun%202010?OpenDocument>> (last updated Aug. 18, 2010) (scroll to Time Series Spreadsheets and select “Table 01. Labour force status by Social marital status, Age and Sex” to download either the .xls or .zip file) (using May quarter averages).

71. Calculated from data on Labour Force Status by Social Marital Status, Age, and Sex, available for download from 6291.0.55.001 – *Labour Force, Australia, Detailed – Electronic Delivery, Jun 2010*, AUSTL. BUREAU OF STATISTICS, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.001Jun%202010?OpenDocument>> (last updated Aug. 18, 2010) (scroll to Time Series Spreadsheets and select “Table 01. Labour force status by Social marital status, Age and Sex” to download either the .xls or .zip file) (using May quarter averages).

age group, employment rose by 9 percent, with women making up two-thirds of the increase.⁷² Women now comprise 44 percent of the employed in the fifty-five to sixty-four age cohort.⁷³ In Australia, as in the U.K., the relatively strong employment participation of older workers, both during the recession and over the longer term, is due largely to increasing participation by older women in part-time employment.

C. Part-Time, Self-Employment, and Atypical Work

Other measures of employment vulnerability reveal few short-term changes among *employed* older workers in Australia which can be attributed to the recession. Although part-time employment increased overall at the expense of full-time jobs, there were only slight age-related variations in the part-time employment rate (as a percentage of all employed); nor were there any significant gender differences in the rate changes, although the differences between men and women remained substantial. The short-term changes were most noticeable for younger age groups, although there were significant increases in part-time employment rates among men aged sixty to sixty-four and women aged forty-five to fifty-four.⁷⁴ However these variations are most likely associated with longer-term patterns.

Older Australians are working part-time at increasing rates. This is a long-term trend towards a more gradual transition to retirement, particularly among older men (older women have long been concentrated

0.55.001Jun%202010?OpenDocument> (last updated Aug. 18, 2010) (scroll to Time Series Spreadsheets and select "Table 01. Labour force status by Social marital status, Age and Sex" to download either the .xls or .zip file) (using May quarter averages).

72. Calculated from data on Labour Force Status by Social Marital Status, Age, and Sex, available for download from 6291.0.55.001 – *Labour Force, Australia, Detailed – Electronic Delivery, Jun 2010*, AUSTRALIAN BUREAU OF STATISTICS, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.001Jun%202010?OpenDocument>> (last updated Aug. 18, 2010) (scroll to Time Series Spreadsheets and select "Table 01. Labour force status by Social marital status, Age and Sex" to download either the .xls or .zip file) (using May quarter averages).

73. Calculated from data on Labour Force Status by Social Marital Status, Age, and Sex, available for download from 6291.0.55.001 – *Labour Force, Australia, Detailed – Electronic Delivery, Jun 2010*, AUSTRALIAN BUREAU OF STATISTICS, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.001Jun%202010?OpenDocument>> (last updated Aug. 18, 2010) (scroll to Time Series Spreadsheets and select "Table 01. Labour force status by Social marital status, Age and Sex" to download either the .xls or .zip file) (using May quarter averages).

74. These figures were calculated by the authors using data from *GMI – Labour Force Status and Gross Changes (flows) by Sex, State, Age*, *supra* note 62. Between the May 2007 and May 2010 quarters, the part-time employment rate for prime-age men the rate fell very slightly (staying at around 7 percent for thirty-five to forty-four-year olds and 9 percent for forty-five to fifty-four-year olds). For older men aged sixty to sixty-four the part-time employment rate rose from 23.8 percent to 24.6 percent. Among women workers, part-time employment increased from 41.8 percent to 42.6 percent for women aged forty-five to fifty-four, but there were no significant changes for other age groups. *Id.*

in part-time work).⁷⁵ This trend toward part-time work has been developing over the last decade and is associated with higher labor force participation rates by older workers.⁷⁶ Most of this trend is voluntary: involuntary part-time employment declines with age from age fifty-five onwards and comprises less than one-quarter of such older workers.⁷⁷ An increasing proportion of older workers are deliberately moving into semi-retirement, taking part-time work to supplement their retirement savings and pensions. The economic crisis does not appear to have contributed to this shift to part-time work. However the shift towards part-time work is a sign of increased vulnerability among older workers. In Australia, part-time jobs tend also to be casual in status, and casual jobs are considerably more precarious than permanent ones: casual workers have no paid annual or sick leave and low job security; they also tend to be paid less than permanent workers. Over 58 percent of all part-time jobs have no paid leave entitlements, the usual definition of a casual job in Australia.⁷⁸ We should not assume, however, that casual status is invariably associated with precarious tenure. Casual status is a legal construct, the result of the award system, and about half of all casual workers are employed in ongoing positions with stable wages.⁷⁹ Older casual workers in particular tend to spend longer periods with their current employer than younger age groups.⁸⁰ However by comparison with the job security associated with full-time permanent employment, the shift to part-time casual work

75. JOHN SPOEHR ET AL., AUSTRALIAN INSTITUTE FOR SOCIAL RESEARCH, EXPERIENCE WORKS: THE MATURE-AGE EMPLOYMENT CHALLENGE 5 (2009), available at <http://www.productiveageing.com.au/userfiles/file/Experience%20works-full%20reportFINAL_web.pdf>; see also Joanna Abhayaratna et al., *Part-Time Employment: The Australian Experience* 119 (Austl. Productivity Comm'n Staff Working Paper, 2008), available at <http://www.pc.gov.au/_data/assets/pdf_file/0020/81065/part-time-employment.pdf>.

76. Kennedy & Da Costa, *supra* note 66, at 34-35; Andrew Frazer & Malcolm Sargeant, *Older Workers as Vulnerable Workers in the New World of Work*, Paper for the International Industrial Relations Association 15th World Congress: The New World of Work, Organisations & Employment 4 (Aug. 24-27, 2009), available at <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1070&context=lawpapers>>.

77. Abhayaratna et al., *supra* note 75, at 142-43. However a study based on a different survey sample found for older males aged fifty-five to sixty-four the probability of involuntary part-time work higher than for prime-age groups. See Roger Wilkins, *Personal and Job Characteristics Associated with Underemployment*, 9 AUSTL. J. LAB. ECON. 371, 379 (2006).

78. See AUSTL. BUREAU OF STATISTICS, 6359.0, FORMS OF EMPLOYMENT: NOVEMBER 2009, at 29 tbl.7 (Apr. 29, 2010) [hereinafter FORMS OF EMPLOYMENT: NOVEMBER 2009], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FFFDDE1422B6216ECA25771300111FC5/\\$File/63590_november%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FFFDDE1422B6216ECA25771300111FC5/$File/63590_november%202009.pdf)>.

79. Greg Murtough & Matthew Waite, *The Growth of Non-Traditional Employment: Are Jobs Becoming More Precarious?* 9 (Austl. Productivity Comm'n Staff Research Paper, 2000), available at <http://www.pc.gov.au/_data/assets/pdf_file/0009/8010/nontrademp.pdf>.

80. PRODUCTIVITY COMM'N, COMMONWEALTH OF AUSTR., THE ROLE OF NON-TRADITIONAL WORK IN THE AUSTRALIAN LABOUR MARKET 71-72 (2006), available at <http://www.pc.gov.au/_data/assets/pdf_file/0016/8431/nontraditionalwork.pdf>.

represents an increase in precariousness for many older workers.

Older workers tend to move from direct employment to self-employment as either independent contractors or business operators. At the end of 2009, only 67 percent of people working at age fifty-five or over were employees, compared with 82.9 percent of the prime-age workers aged twenty-five to forty-four.⁸¹ The shift to self-employed status is associated with vulnerability since self-employed workers must provide their own means of income security. The statistics on independent contractors and business operators show a decline in the proportion of older workers who were self-employed in 2008 and 2009 in some older age groups.⁸² This may be a reflection of the greater precariousness of the older self-employed in economic downturns, since such workers tend to leave the labor force rather than report as unemployed. The most significant change was a rise (from 45 percent to 48 percent) in the proportion of working people aged sixty-five and over who were employees. This suggests that some of the oldest group of workers may have remained in employment rather than become self-employed.⁸³

D. Unemployment, Underemployment and Discouraged Workers

Over the period of the crisis, older workers experienced an increase in unemployment similar to that for other adult age groups. Between 2007 and 2009, unemployment for men aged fifty-five to sixty-four rose from 2.6 percent to 3.9 percent, a 50 percent increase. The increase in the unemployment rate for men aged forty-five to fifty-four was slightly higher. Older women fared better, experiencing a lower proportionate rise than younger female workers.⁸⁴

81. See FORMS OF EMPLOYMENT: NOVEMBER 2009, *supra* note 78, at 17 tbl.3. Workers aged fifty-five and over comprised 26 percent of all independent contractors and 31 percent of all business operators. *Id.* at 6-7.

82. Compare AUSTL. BUREAU OF STATISTICS, 6359.0, FORMS OF EMPLOYMENT: NOVEMBER 2007, at 15 tbl.2 (Apr. 28, 2008) [hereinafter FORMS OF EMPLOYMENT: NOVEMBER 2007], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F8430DD3E08953CFA257435001196C9/\\$File/63590_nov%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F8430DD3E08953CFA257435001196C9/$File/63590_nov%202007.pdf)> with AUSTL. BUREAU OF STATISTICS, 6359.0, FORMS OF EMPLOYMENT: NOVEMBER 2008, at 18 tbl.2 (June 12, 2009) [hereinafter FORMS OF EMPLOYMENT: NOVEMBER 2008], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/8C62E3501983EC5BCA2575D2001B01AE/\\$File/63590_nov%202008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/8C62E3501983EC5BCA2575D2001B01AE/$File/63590_nov%202008.pdf)> and FORMS OF EMPLOYMENT: NOVEMBER 2009, *supra* note 78, at 17 tbl.3.

83. FORMS OF EMPLOYMENT: NOVEMBER 2008, *supra* note 82, at 18 tbl.2; FORMS OF EMPLOYMENT: NOVEMBER 2009, *supra* note 78, at 17 tbl.3. Comparable figures before 2008 are not strictly commensurable because of definitional changes after 2007.

84. LABOUR MARKET STATISTICS: JULY 2010, *supra* note 52, at 34 tbl.1.1. The raw data can be downloaded from 6105.0 – *Australian Labour Market Statistics, July 2010*, AUSTL. BUREAU OF STATISTICS, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6105.0July%202010?OpenDocument>> (last updated Oct. 7, 2010) (scroll to data cubes and select “Table 1.1. Extended labour

It is with the duration of unemployment where we see significant age-related effects. Long-term unemployment (over one year) remains markedly higher for older workers than for younger ages. The proportion of older unemployed who remain out of work for a year or more has been declining over the last decade: for the fifty-five and older group, the long-term proportion of total unemployed has decreased from 49 percent in 1999 to 25 percent in 2009.⁸⁵ However during the economic crisis we see the same pattern as for previous recessions: older workers who lost their jobs remained out of work for longer than younger workers, and their level of unemployment has remained high long after employment for the general workforce recovered. With the downturn, the older unemployed stayed out of work for longer than younger groups, and continued to do so after unemployment declined in 2010. Long-term unemployment for older workers has persisted after the recovery.

Table 2

Unemployment: Mean Duration of Unemployment, by Age Groups, 2007-10⁸⁶

	25-34	35-44	45-54	55+
2007	34	34	48	70
2008	30	44	54	51
2009	26	32	39	47
2010	33	31	48	59

force underutilization rate” to download the .xls file) [hereinafter Extended Underutilisation].

85. AUSTRALIAN BUREAU OF STATISTICS, 6105.0, AUSTRALIAN LABOUR MARKET STATISTICS: APRIL 2010, at 13 (Apr. 1, 2010), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/9E0CFE203CFECA18CA2576F700154B6B/\\$File/61050_apr%202010.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/9E0CFE203CFECA18CA2576F700154B6B/$File/61050_apr%202010.pdf)>.

86. LABOUR MARKET STATISTICS: JULY 2010, *supra* note 52, at 58 tbl.3.1 (reporting results for May); AUSTRALIAN BUREAU OF STATISTICS, 6105.0, AUSTRALIAN LABOUR MARKET STATISTICS: JULY 2009, at 67 tbl.3.1 (July 3, 2009) [hereinafter LABOUR MARKET STATISTICS: JULY 2009], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/CB629C2C74A77E1BCA2575E800229285/\\$File/61050_jul%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/CB629C2C74A77E1BCA2575E800229285/$File/61050_jul%202009.pdf)> (same); AUSTRALIAN BUREAU OF STATISTICS, 6105.0, AUSTRALIAN LABOUR MARKET STATISTICS: JULY 2008, at 79 tbl.3.1 (July 3, 2008) [hereinafter LABOUR MARKET STATISTICS: JULY 2008], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C13A89556EEE7941CA25747A00116F59/\\$File/61050_jul%202008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C13A89556EEE7941CA25747A00116F59/$File/61050_jul%202008.pdf)> (same); AUSTRALIAN BUREAU OF STATISTICS, 6105.0, AUSTRALIAN LABOUR MARKET STATISTICS: JULY 2007, at 53 tbl.3.1 (July 6, 2007) [hereinafter LABOUR MARKET STATISTICS: JULY 2007], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/808C70323C0E2B43CA25730F00177FF6/\\$File/61050_jul%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/808C70323C0E2B43CA25730F00177FF6/$File/61050_jul%202007.pdf)> (same).

Table 3

**Long-Term Unemployment:
Percent of Total Unemployed Who Were out of Work for Fifty-
Two Weeks or Longer, by Age Groups, 2007-10⁸⁷**

	25-34	35-44	45-54	55+
2007	14	16	25	27
2008	15	20	23	26
2009	15	17	17	22
2010	17	19	27	31

Labor underutilization – enforced idleness among those who would prefer to work more hours – is a growing problem in the Australian labor market.⁸⁸ While most strongly associated with younger workers, the problem has grown among the mature labor force as well. Underemployment (measured by the percentage of part-time workers who would prefer to work more hours) rose substantially (from 4.5 percent to 5.2 percent) for older workers between 2007 and 2009, and remains at this high level. Most of the increase was among men. However older workers did not experience greater proportionate increases in underemployment than other age groups.⁸⁹

Older workers have longer periods of underemployment. During the downturn, they experienced persistently higher levels of long-term underemployment than younger groups, with 45 percent of those aged fifty-five and over remaining underemployed for more than a year (compared with 35 percent for the prime thirty-five to forty-four age group), but the rate did not change over the period.⁹⁰ The median duration of insufficient

87. See LABOUR MARKET STATISTICS: JULY 2010, *supra* note 52, at 58 tbl.3.1 (reporting results for May); LABOUR MARKET STATISTICS: JULY 2009, *supra* note 86, at 67 tbl.3.1 (same); LABOUR MARKET STATISTICS: JULY 2008, *supra* note 86, at 79 tbl.3.1 (same); LABOUR MARKET STATISTICS: JULY 2007, *supra* note 86, at 53 tbl.3.1 (same).

88. Iain Campbell, *Pressing Towards Full Employment? The Persistence of Underemployment in Australia*, 61 J. AUSTL. POL. ECON. 136 (2008).

89. Calculated from the raw data available to be downloaded from 6202.0 – *Labour Force, Australia, July 2010*, *supra* note 62 (scroll down and select “Table 21. Labour Underutilisation by Age and Sex – Trend, Seasonally Adjusted and Original” to download either the .xls or .zip file).

90. AUSTL. BUREAU OF STATISTICS, 6265.0, UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2009, at 17 tbl.4 (Feb. 23, 2010) [hereinafter UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2009], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0234F5869C8CAAC0CA2576D20013A485/\\$File/62650_sep%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0234F5869C8CAAC0CA2576D20013A485/$File/62650_sep%202009.pdf)>; AUSTL. BUREAU OF STATISTICS, 6265.0, UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2007, at 19 tbl.5 (Feb. 25, 2008)

work for older workers actually declined (from fifty to thirty-four weeks) between 2007 and 2009, while remaining relatively constant for other adult age groups.⁹¹ This pattern of underemployment suggests that a “discouraged worker effect” is operating for older underemployed workers.⁹² In 2009, over half of all discouraged job seekers were aged fifty-five and over. Among the discouraged, 26 percent were aged fifty-five to sixty-four, a proportion which stayed constant between 2007 and 2009.⁹³ Total underutilization rates fell in 2008, but climbed again the following year, with the greatest impact felt among both younger and older groups.⁹⁴ The crisis seems therefore to have resulted in longer periods of underemployment for older workers, but no significant changes in the level of underutilization apart from a slight increase among the oldest group.

E. Labor Market Regulation Affecting Older Workers

Legislation prohibiting discrimination on the ground of age in employment (along with other areas) was introduced in the Australian states and territories progressively during the 1980s and 1990s.⁹⁵ The use of compulsory retirement ages by employers was specifically prohibited by legislation about the same time. By 1999 all states had prohibited both age discrimination and compulsory retirement.⁹⁶ A court decision had

[hereinafter UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2007], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A44F2FA22AAB4309CA2573F700102BC7/\\$File/62650_sep%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A44F2FA22AAB4309CA2573F700102BC7/$File/62650_sep%202007.pdf)>.

91. UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2009, *supra* note 90, at 17 tbl.4; UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2007, *supra* note 90, at 19 tbl.5.

92. UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2009, *supra* note 90, at 17 tbl.4; UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2007, *supra* note 90, at 19 tbl.5. The discouraged worker effect is supported by a 21 percent decline in the mean duration of underemployment for the fifty-five and older group over 2007-09, contrasted with an increase for all other age groups. UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2009, *supra* note 90, at 17 tbl.4; UNDEREMPLOYED WORKERS AUSTRALIA: SEPTEMBER 2007, *supra* note 90, at 19 tbl.5.

93. AUSTRALIAN BUREAU OF STATISTICS, 6220.0, PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2009, at 7, 14 tbl.3 (Mar. 24, 2010) [hereinafter PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2009], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/38F947FA13716DD2CA2576EF00159779/\\$File/62200_sep%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/38F947FA13716DD2CA2576EF00159779/$File/62200_sep%202009.pdf)>; AUSTRALIAN BUREAU OF STATISTICS, 6220.0, PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2007, at 16 tbl.3 (Mar. 25, 2008) [hereinafter PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2007], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4C2C7019CB72D012CA257412001A3216/\\$File/62200_Sep%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4C2C7019CB72D012CA257412001A3216/$File/62200_Sep%202007.pdf)>. The proportion of discouraged job seekers aged fifty-five and over actually fell from 63 percent in 2007. PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2009, *supra* at 19 tbl.7; PERSONS NOT IN THE LABOUR FORCE: SEPTEMBER 2007, *supra* at 21 tbl.7.

94. Extended Underutilisation, *supra* note 84. Total (extended) underutilization includes unemployed, underemployed, discouraged job-seekers and those with marginal attachment to the labor force (i.e. engaged in intermittent work). 2009-10: YEAR BOOK AUSTRALIA, *supra* note 44, at 258.

95. Sol Encel, *Age Discrimination in Law and in Practice*, 3 ELDER L. REV. 13 (2004).

96. *Id.*

previously held that the use of gender-differentiated retirement ages constituted unlawful sex discrimination.⁹⁷ In 2004 the Australian federal parliament passed the *Age Discrimination Act*, which operates alongside the state and territory legislation and which prohibits discrimination on the ground of age.⁹⁸ However this legislation was not much used because, unlike other anti-discrimination legislation, it required that the complainant prove that age was the dominant reason for his or her adverse treatment.⁹⁹ This was altered by legislation in 2009 so that age need now only be shown to be an operative cause of the treatment.¹⁰⁰

Despite this legislation, there is considerable anecdotal and survey evidence of widespread continuing discrimination against older people in Australia in the field of employment. There is statistical evidence that compulsory retirement policies persisted at many workplaces for at least five years after they became unlawful, and it is still common for older workers to be pressured to retire at or before the traditional age of sixty-five.¹⁰¹ Discrimination based on age is particularly prevalent in recruitment.¹⁰² Because such discrimination is usually covert or unconscious, it is difficult to measure its extent or changes over time. Research conducted before the global financial crisis found that older Australian workers have much more pessimistic expectations about their ability to find another job following redundancy than do younger workers: the average perceived probability of finding a similar job was over 50 percent for prime age workers but fell to 36 percent for those aged fifty-five to sixty-four.¹⁰³ In early 2009, 20 percent of unemployed workers aged forty-five and over reported being “considered too old by employers” as the main reason for difficulty in finding work, and this was by far the most

97. *Allders Int'l Pty Ltd v Anstee* (1986) 5 NSWLR 47 (Austl.).

98. *Age Discrimination Act 2004* (Cth) s 18.

99. *See Act 68 of 2004* (Cth) s 16, available at <<http://www.comlaw.gov.au/Details/C2004C01379>>.

100. *Age Discrimination Act 2004* (Cth) s 16.

101. Rachael Patterson, *The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern*, 3 ELDER L. REV. 1, 8 (2004). A survey of workers who retired in 1997 showed that 18 percent of workers aged sixty to sixty-four, and 65 percent of workers aged sixty-five and over gave the reason for their retirement as “reached compulsory age.” AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2000, at 131 (2000), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0061403922BF6F55CA2569110080BA2C/\\$File/41020_2000.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0061403922BF6F55CA2569110080BA2C/$File/41020_2000.pdf)>.

102. Lynne Bennington, *Prime Age Recruitment: The Challenges for Age Discrimination Legislation*, 3 ELDER L. REV. 27 (2004); Sol Encel & Helen Studencki, *Older Workers: Can they Succeed in the Job Market?* 23 AUSTRALASIAN J. AGEING 33 (2004); Chris Kossen & Cec Pedersen, *Older Workers in Australia: the Myths, the Realities and the Battle over Workforce “Flexibility”*, 14 J. MGMT. & ORG. 73 (2008).

103. Jeff Borland, *What Happens to the Australian Labour Market in Recessions?*, 42 AUSTL. ECON. REV. 232, 240 (2009).

common reason given in that age group.¹⁰⁴ Similarly, 20 percent of people not in the labor force reported that being “considered too old” was the main reason for their not looking for work: more than those who reported that they did not need to work or had retired.¹⁰⁵

In the three largest jurisdictions over the period of the financial crisis, there was a significant increase in both the number of formal complaints concerning age discrimination in employment, and an increase in the proportion which such complaints contributed to all discrimination complaints in the area of employment.

104. AUSTL. BUREAU OF STATISTICS, 6222.0, JOB SEARCH EXPERIENCE: JULY 2009, at 19 tbl.7 (Dec. 21, 2009), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C7F8B45F33DBEFEFCA257690000F114A/\\$File/62220_jul%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C7F8B45F33DBEFEFCA257690000F114A/$File/62220_jul%202009.pdf)>. The proportion fluctuated from 24 percent in 2007 to 16 percent in 2008. AUSTL. BUREAU OF STATISTICS, 6222.0, JOB SEARCH EXPERIENCE: JULY 2008, at 19 tbl.7 (Jan. 12, 2009), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FB963D6DCA437057CA257539000D1844/\\$File/62220_jul%202008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FB963D6DCA437057CA257539000D1844/$File/62220_jul%202008.pdf)>; AUSTL. BUREAU OF STATISTICS, 6222.0, JOB SEARCH EXPERIENCE: JULY 2007, at 20 tbl.7 (Dec. 7, 2007), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AAF26AF7A7E83A05CA2573A9001B46AA/\\$File/62220_jul%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AAF26AF7A7E83A05CA2573A9001B46AA/$File/62220_jul%202007.pdf)>

105. AUSTL. BUREAU OF STATISTICS, 6239.0, BARRIERS AND INCENTIVES TO LABOUR FORCE PARTICIPATION: JULY 2008 TO JUNE 2009, at 27 tbl.7 (Dec. 8, 2009), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7E777A58003E9246CA25768500158F23/\\$File/62390_jul%202008%20to%20jun%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7E777A58003E9246CA25768500158F23/$File/62390_jul%202008%20to%20jun%202009.pdf)>. This was a decline from the previously reported rate of 27 percent in 2007. *See* AUSTL. BUREAU OF STATISTICS, 6239.0, BARRIERS AND INCENTIVES TO LABOUR FORCE PARTICIPATION: JULY 2006 TO JUNE 2007, at 26 tbl.7 (Dec. 19, 2007), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AF76E535F8283C0DCA2573B5000A775C/\\$File/62390_jul%202006%20to%20jun%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AF76E535F8283C0DCA2573B5000A775C/$File/62390_jul%202006%20to%20jun%202007.pdf)>.

Table 4

**Age Discrimination in Employment Complaints:
Commonwealth, New South Wales and Victoria,
2006-07 to 2008-09¹⁰⁶**

Year	Age Complaints in Employment	Age as a Percent of All Employment Complaints
2006-07	219	5.5%
2007-08	285	6.7%
2008-09	265	5.7%

Because formal complaints are only a small fraction of the discrimination actually experienced, it is notable that the number of informal inquiries made to the federal agency concerning older age discrimination and compulsory retirement peaked in 2007-08, increasing by 13 percent over the previous year before declining to previous levels in 2008-09.¹⁰⁷

106. AUSTL. HUMAN RIGHTS COMM'N, ANNUAL REPORT 2008-09, at 78-80 (2009) [hereinafter AHRC, ANNUAL REPORT 2008-09], available at <http://www.hreoc.gov.au/pdf/about/publications/annual_reports/2008_2009/ar09_complete.pdf>; AUSTL. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2007-08, at 74-76 (2008) [hereinafter AHRC, ANNUAL REPORT 2007-08], available at <http://www.hreoc.gov.au/about/publications/annual_reports/2007_2008/AR_2007_2008_complete.pdf>; AUSTL. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2006-07, at 80-81 (2007) [hereinafter AHRC, ANNUAL REPORT 2006-07], available at <http://www.hreoc.gov.au/about/publications/annual_reports/2006_2007/pdf/hreoc_ar2006-07.pdf>; ANTI-DISCRIMINATION BD. OF NEW S. WALES, ANNUAL REPORT 2008-09, at 16 (2009) [hereinafter ADBNSW ANNUAL REPORT 2008-09], available at <[http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport0809.pdf/\\$file/ADBAnnualReport0809.pdf](http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport0809.pdf/$file/ADBAnnualReport0809.pdf)>; ANTI-DISCRIMINATION BD. OF NEW S. WALES, ANNUAL REPORT 07-08, at 18 (2008) [hereinafter ADBNSW ANNUAL REPORT 2007-08], available at <[http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport0708V2.pdf/\\$file/ADBAnnualReport0708V2.pdf](http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport0708V2.pdf/$file/ADBAnnualReport0708V2.pdf)>; ANTI-DISCRIMINATION BD. OF NEW S. WALES, ANNUAL REPORT 2006-07, at 16 (2007) [hereinafter ADBNSW ANNUAL REPORT 2006-07], available at <[http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport06-07.pdf/\\$file/ADBAnnualReport06-07.pdf](http://www.ipc.nsw.gov.au/lawlink/adb/ldb.nsf/vwFiles/ADBAnnualReport06-07.pdf/$file/ADBAnnualReport06-07.pdf)>; VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMM'N, ANNUAL REPORT 2008/09, at 16-17 (2009) [hereinafter VEOHRC ANNUAL REPORT 2008-09], available at http://www.equalopportunitycommission.vic.gov.au/pdf/2008_09_annualreport/files/annual_report_200809_final.pdf>; VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMM'N, ANNUAL REPORT 2007/2008, at 25 (2008) [hereinafter VEOHRC ANNUAL REPORT 2007-08], available at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&task=download&id=436&Itemid=690>; VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMM'N, ANNUAL REPORT 2006/2007, at 36 (2007) [hereinafter VEOHRC ANNUAL REPORT 2006-07], available at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&task=download&id=424&Itemid=690>.

107. See AHRC, ANNUAL REPORT 2008-09, *supra* note 106, at 65; AHRC, ANNUAL REPORT 2007-08, *supra* note 106, at 60-61; AHRC, ANNUAL REPORT 2006-07, *supra* note 106, at 67-68. A similar pattern was observed for the NSW agency, though not for the Victorian agency. See NSWADB ANNUAL REPORT 2008-09, *supra* note 106, at 15; NSWADB ANNUAL REPORT 2007-08, *supra* note

Australian federal labor legislation has also prohibited dismissal on the ground of age since 1993, when the *Industrial Relations Act 1988* was amended to cover unfair and unlawful termination of employment, implementing ILO Convention 111 on Discrimination in Employment and Occupation.¹⁰⁸ Although, as noted in the Introduction, age is not covered by the ILO Convention, Australia exercised its power to include age as an additional ground of discrimination under the convention. The prohibitions applied to all employees in Australia. While the federal labor statute has been amended many times since then, often drastically, the prohibitions on discriminatory termination have always been retained and now reside in the *Fair Work Act 2009*.¹⁰⁹ Although the discriminatory termination of employment provisions were rarely used in the courts, their emphatic nature has probably made them more effective than anti-discrimination law.

The current federal labor legislation also includes protection against discriminatory adverse treatment extending beyond dismissal.¹¹⁰ Although untested as yet, this protection seems to provide significant advantages over the anti-discrimination legislation. These “general protection” provisions allow for complaints to be investigated and pursued by the Fair Work Ombudsman (a proactive regulatory agency), and allow direct access to the federal courts which are able to issue more comprehensive remedies than under the anti-discrimination legislation.¹¹¹ A reverse onus of proof also applies, so that an employer must show that the “adverse action” was founded on reasons which did *not* include a discriminatory basis.¹¹²

Apart from age-specific provisions, regulation of labor conditions has been strong in Australia, although still consistent with a liberal market economy.¹¹³ Traditionally, labor regulation in Australia was conducted

106, at 17; NSWADB ANNUAL REPORT 2006-07, *supra* note 106, at 15; VEOHRC ANNUAL REPORT 2008-09, *supra* note 106, at 13; VEOHRC ANNUAL REPORT 2007-08, *supra* note 106, at 23; VEOHRC ANNUAL REPORT 2006-07, *supra* note 106, at 35. The variations in enquiries and complaints at the federal level were before the amendments to the *Age Discrimination Act* were introduced, so cannot be explained by a change in the regulation regime.

108. *Industrial Relations Reform Act 1993* (Cth), inserting s 170DF(1)(f). Earlier protections against discriminatory dismissal, which were included as standard provisions in awards from 1984, did not include age as a prohibited ground. *Termination, Change and Redundancy Case, Supplementary Decision* (1984) 9 Indus R 115, 118 (Austl. Conciliation & Arbitration Comm'n).

109. *Fair Work Act 2009* (Cth) ss 351, 772.

110. *Id.* ss 153, 195, 351.

111. *Id.* ss 537-39, 682, 715-16, 779.

112. *Id.* ss. 351, 772; see Carol Andrades, *Intersections between “General Protections” Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandries* (Ctr. for Emp't & Labour Relations Law, Univ. of Melbourne, Working Paper No 47, 2009).

113. Jones & Mitchell, *supra* note 6. On recent history of labor law changes, see Richard Mitchell et al., *The Evolution of Labour Law in Australia: Measuring the Change*, 23 AUSTL. J. LAB. L. 61

through specialist tribunals responsible for settling collective labor disputes through processes of compulsory conciliation and arbitration. Through compulsory arbitration, the tribunals made legally enforceable awards which set minimum labor standards for minimum wages, conditions and standard hours on an industry-wide basis. Since a system of “enterprise bargaining” was introduced in the early 1990s, awards have operated as a minimum “safety net” and agreements (which do not require collective representation) may be made at the enterprise or works level which can depart from award standards provided they do not disadvantage workers on an overall basis.¹¹⁴

At the same time, the role of trade unions in securing minimum conditions through collective bargaining or advocacy in award hearings has been reduced.¹¹⁵ The effectiveness of regulation in guaranteeing decent work has declined with a series of changes designed to “deregulate” working conditions.¹¹⁶ Most recently, the WorkChoices legislation allowed for a lowering of minimum standards by employers by effectively removing the requirement for enterprise agreements to be approved by an industrial tribunal, while relaxing the extent to which agreements could undercut established standards.¹¹⁷ The introduction of the Labor government’s “Forward with Fairness” policy, culminating in the *Fair Work Act 2009* (which came fully into force in January 2010), has reversed this deregulation to only a limited degree.¹¹⁸

Although there are now national minimum award standards, which are strongly enforced, the range of matters which are regulated has contracted. Many award restrictions, gained by unions and designed to ensure decent working conditions, have been removed or reduced to a common minimum. The growth of atypical forms of labor, especially casual and part-time work, has significantly dampened the impact of labor regulation,

(2010); Andrew Stewart, *Work Choices in Overview: Big Bang or Slow Burn?*, 16 *ECON. & LAB. REL. REV.* 25 (2006). For comparative measures of employment protection (showing that Australia has low levels of protection, comparable to the U.K. and U.S.), see *How Do OECD Labour Markets Perform?*, *supra* note 20 (scroll down to the fourth table, “Annual hours worked and averages annual wages”).

114. See ROSEMARY OWENS & JOELLEN RILEY, *THE LAW OF WORK* 115-19, 334-37 (2d ed. 2011).

115. Andrew Frazer, *Individualism and Collectivism in Agreement-Making under Australian Labour Law*, in *COLLECTIVE AGREEMENTS AND INDIVIDUAL CONTRACTS OF EMPLOYMENT* 49 (Michal Sewerynski ed., 2003).

116. Colin Fenwick, *How Low Can You Go? Minimum Working Conditions Under Australia’s New Labour Laws*, 16 *ECON. & LAB. REL. REV.* 85 (2006); Jill Murray, *Submission to the Senate Committee on Employment, Workplace Relations and Education on the Workplace Relations Amendment (WorkChoices) Bill 2005*, available at <http://celrl.law.unimelb.edu.au/files/jill_s_submission_nov_051.pdf> (last viewed Mar. 9, 2011).

117. *Workplace Relations Amendment (Work Choices) Act 2006* (Cth).

118. *Fair Work Act 2009* (Cth), s123.

resulting in increased wage dispersion and scope for exploitative employer practices. Casual workers, who comprise nearly one-quarter of all employees, face ready reduction in hours and are not entitled to redundancy payments or notice payments on termination.¹¹⁹ For workers over twenty-five, casualization rises steadily with age and increases substantially after age sixty when it reaches 25 percent of all employees; for those aged over sixty-five, 42 percent of all employees are casual.¹²⁰ About 35 percent of workers aged fifty-five and older in “transition jobs” prior to retirement (usually part-time) were forced to move to casual or contract work.¹²¹ Some 65 percent of older workers changed their employer when moving to part-time “transition jobs,” most commonly because part-time jobs were not available with their former employer.¹²² The resultant broken employment would have affected the leave and redundancy entitlements of nearly all such workers.

F. Income and Retirement Security

State-provided social security in Australia pre-dates the modern concept of the welfare state, adopting what one leading social welfare historian has described as “the wage-earner’s welfare state” in recognition of the reliance on fair minimum wages (and employer-provided benefits like sick leave) to minimize poverty.¹²³ Beginning with the age pension, introduced nationally in 1909, state benefits have until recently tended to be universal but at minimal levels. While available to most workers, the age pension was intended to be supplemented by private savings, usually in the form of home ownership (Australia has traditionally had one of the highest home ownership rates in the world, at around 70 percent).¹²⁴ In the 1980s the then-Labor government introduced more targeted welfare support which introduced means-testing based on wealth and income. Subsequent changes by the Howard conservative government shifted the

119. *Id.*

120. FORMS OF EMPLOYMENT: NOVEMBER 2007, *supra* note 82, at 15 tbl.2. More recent breakdowns by age are not publicly available.

121. Diana Warren, *Retirement Expectations and Labour Force Transitions: the Experience of the Baby Boomer Generation* 18 (Melbourne Inst. of Applied Econ. & Soc. Research Working Paper 24/08, 2008).

122. Abhayaratna et al., *supra* note 75, at 125.

123. FRANCIS G. CASTLES, *THE WORKING CLASS AND WELFARE* 103 (1985); Robb Watts, *Ten Years On: Francis G. Castles and the Australian “Wage-Earners’ Welfare State”*, 33 *AUSTL. & N.Z. J. SOC. I* (1997).

124. Allan Borowski, *Back at the Crossroads: The Slippery Fish of Australian Retirement Income Policy*, 43 *AUSTL. J. SOC. ISSUES* 311, 313 (2008); AUSTRALIAN BUREAU OF STATISTICS, 2008 YEAR BOOK AUSTRALIA 312, 313 tbl.10.5 (2008), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/8D6ED0E197FE38A6CA2573E7000EC2AD/\\$File/13010_2008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/8D6ED0E197FE38A6CA2573E7000EC2AD/$File/13010_2008.pdf)>.

emphasis from entitlement to “mutual obligation” and in 2005 introduced more stringent work requirements for long-term benefit recipients.¹²⁵ Nonetheless, elements of universalism remain for the sick, aged, and long-term disabled which particularly benefit older workers.

In the last two decades, security for older workers and the retired has been shifting away from universal pensions towards employer-funded defined contribution benefits and tax concessions. Revenue-funded universal health care remains but is increasingly supplemented by private health insurance, which is also subsidized by the state.¹²⁶ So while most social security provision has remained linked to employment, it has been imposed through legislated employer obligations and taxation transfers rather than collective bargaining or individual contributions. This approach may be described as a system of “occupational welfare” in which social protection is addressed by removing barriers to workforce participation.¹²⁷ These measures, when coupled with the abolition of compulsory retirement, have provided most older Australian workers with increased freedom and security in the transition to retirement. However, since most of this security is job-linked, the benefits have been skewed against poorer workers or those prematurely forced out of work, while contributing to greater inequality in wealth and income.¹²⁸

The age pension, which is provided to all permanent residents over sixty-five¹²⁹ is not a form of social insurance and is not dependent on participation in work or calculated by individual contributions. While modest and now regarded as a “safety net” for those unable to provide for their own retirement, its value has increased in recent years and is currently worth 32 percent of average take-home pay.¹³⁰ While the rate of benefit for

125. Terry Carney, *Neoliberal Welfare Reform and “Rights” Compliance under Australian Social Security Law*, 12 AUSTL. J. HUM. RTS. 223 (2006); Francis G. Castles, *A Farewell to Australia’s Welfare State*, 31 INT’L J. HEALTH SERVICES 537 (2001); Philip Mendes, *From the Wage Earners Welfare State to the Targeted Welfare State: The Social Welfare Policies of the Australian Labor Party, 1983-97*, 52 AUSTL. SOC. WORK 33 (1999).

126. See Francesco Paolucci et al., *Subsidising Private Health Insurance in Australia: Why, How, and How to Proceed?* 1-2 (Austl. Ctr. for Econ. Research on Health Working Paper No. 2, 2008), available at <http://www.acerh.edu.au/publications/ACERH_WP2.pdf>.

127. Francis G. Castles, *The Wage Earners’ Welfare State Revisited: Refurbishing the Established Model of Australian Social Protection, 1983-93*, 29 AUSTL. J. SOC. ISSUES 120, 128, 135, 138 (1994).

128. LISA MARRIOTT, *THE POLITICS OF RETIREMENT SAVINGS TAXATION: A TRANS-TASMAN COMPARISON 197-98* (2010); Borowski, *supra* note 124, at 325-26.

129. The pension eligibility age is progressively being raised, and will be available at age sixty-seven for those born after 1957. See *Payments: Eligibility: Age Pension Age*, AUSTL. GOV’T CENTRELINK, <http://www.centrelink.gov.au/internet/internet.nsf/payments/age_eligible.htm> (last viewed Mar. 10, 2011).

130. The pension is indexed at 25 percent of the average wage but is not taxed unless additional income is earned. The after-tax equivalent is calculated from the Australian Tax Office, *Simple Tax Calculator*, AUSTL. TAXATION OFFICE, <<http://calculators.ato.gov.au/scripts/asp/simpletaxcalc/main>>.

the age pension is reduced according to recipient assets and income, approximately 70 percent of persons aged over sixty-five receive a pension, 63 percent at the full rate.¹³¹

About 4.3 percent of the Australian age-eligible population (eighteen to sixty-four) receives a Disability Support Pension, 42 percent of whom are aged fifty-five to sixty-four, with a further 27 percent aged forty-five to fifty-four.¹³² This pension, which has a disability test but no work requirements, has often been seen as a “dumping ground” for long-term unemployed older workers. Compared with all other age groups, workers aged fifty-five and over (particularly male workers) have a significantly higher probability of remaining on the disability support pension, a lower level of return to employment, and a higher likelihood of returning to the pension after leaving it for a job.¹³³ The disability support pension, then, often operates as a transitional step from work to retirement. Since the benefit amount received is the same as for the age pension, it provides government with a flexible means for responding to an increasing population of older workless in times of high unemployment. At several times in recent years, concern has been expressed at the ballooning cost of the disability pension, and eligibility was restricted through imposition of an “ability to work test” in 2006. However, entitlement is largely determined by an assessment of disability by private medical practitioners, and there appears to some acceptance by government of the inevitable growth in the number of older disabled recipients.¹³⁴

asp> (last viewed Mar. 10, 2011), using average weekly ordinary time earnings for May 2010, AUSTL. BUREAU OF STATISTICS, 6302.0, AVERAGE WEEKLY EARNINGS AUSTRALIA: MAY 2010, at 1 (Aug. 19, 2010), available at <[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/80EDDA7AFB6E2C6DCA257783001B8EF3/\\$File/63020_may%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/80EDDA7AFB6E2C6DCA257783001B8EF3/$File/63020_may%202010.pdf)>

131. A part pension is currently available to someone with regular income up to 62 percent of average weekly earnings (single rate: lower amounts per person apply to couples). See Austl. Dep’t of Families, Housing, Cmty. Servs. & Indigenous Affairs, *Statistical Paper No. 4: Income Support Customers: A Statistical Overview 2005* (2009), available at <http://fahcsia.gov.au/about/publicationsarticles/research/statistical/Documents/stp4/stat_04.pdf>; Jeff Harmer, Austl. Dep’t of Families, Housing, Cmty. Servs. & Indigenous Affairs, *Pension Review Report 149* (2009) [hereinafter *Harmer Report*] available at: <http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/pension/Documents/Pension_Review_Report/PensionReviewReport.pdf>. Since this report, income thresholds and payment rates were increased in the 2009 budget.

132. AUSTL. DEP’T OF FAMILIES, HOUSING, CMTY. SERVS. & INDIGENOUS AFFAIRS, CHARACTERISTICS OF DISABILITY SUPPORT PENSION RECIPIENTS: JUNE 2008, at 7 (2008), available at <http://www.facs.gov.au/sa/disability/pubs/policy/DSP_rpt_2008/Documents/DSP_character_rtp_2008.pdf>.

133. Lixin Cai & Bob Gregory, *Unemployment Duration and Inflows onto the Disability Support Pension Program: Evidence from FaCS LDS Data*, 38 AUSTL. ECON. REV. 233 (2005); Lixin Cai et al., *Disability Support Pension Recipients: Who Gets Off (and Stays Off) Payments?*, 40 AUSTL. ECON. REV. 37(2007).

134. AUSTL. INST. OF HEALTH & WELFARE, AUSTRALIA’S WELFARE 2009, at 176 (2009), available at <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442452909&libID=6442452909>>.

Retirement incomes in Australia are increasingly dependent on private pensions, known as superannuation.¹³⁵ In 1992, amid concern at the aging population and the state's inability to fund future aged pension obligations, a national system of employer-funded retirement schemes was introduced.¹³⁶ The Superannuation Guarantee scheme requires employers to deposit an amount equating to 9 percent of each employee's annual wage into a government-approved superannuation fund.¹³⁷ Originally the funds were all industry-based and non-profit, with union representation on the governing boards, but recent changes designed to promote choice have led to a growth in private for-profit and self-managed funds. There are considerable tax benefits for workers who make contributions to their own superannuation accounts, although most workers continue to rely only on the compulsory employer contributions.¹³⁸

Government policies in recent years have been designed to encourage participation in work by older Australians and reduce the incentives to cease working early. These incentives also encourage semi-retirement by allowing workers to draw from their superannuation while working part-time from age fifty-five, and recent taxation changes encourage workers to wait until sixty before drawing on their accumulated superannuation. Additional changes have encouraged people to continue working after sixty-five, by allowing them access to a part pension.¹³⁹ These changes appear to have been effective in keeping older people in work and encouraging them to manage their gradual transition to retirement.¹⁴⁰ However, since a substantial number of older workers retire due to involuntary reasons (principally retrenchment and ill-health), work for many in this transition phase is precarious due to unplanned circumstances.

The effect of the compulsory superannuation system has certainly been to increase retirement security for older workers, although only a low proportion of workers over fifty-five have enough superannuation to fully

135. Superannuation was progressively expanded from the 1980s through the award system which imposed compulsory levies on employers. See *National Wage Case* (1986) 14 Indus R 187, 212 (Full Bench, Austl. Conciliation & Arbitration Comm'n).

136. *Superannuation Guarantee (Administration) Act 1992* (Cth).

137. See *id.* ss 6A-15; *Guide to Superannuation for Individuals*, AUSTL. TAXATION OFFICE, <<http://ato.gov.au/individuals/content.asp?doc=/content/00250233.htm>> (last modified Jan. 31, 2011).

138. See AUSTL. BUREAU OF STATISTICS, 4102.0, AUSTRALIAN SOCIAL TRENDS 2002, at 175-77 (2002) [hereinafter AUSTRALIAN SOCIAL TRENDS 2002], available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C0A01711EAD911BFCA256BCD007D7F10/\\$File/41020_2002.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C0A01711EAD911BFCA256BCD007D7F10/$File/41020_2002.pdf)>.

139. Diana Warren, *Australia's Retirement Income System: Historical Development and Effects of Recent Reforms* 10, 18-19 (Melbourne Inst. of Applied Econ. & Soc. Research Working Paper 23/08, 2008), available at <<http://www.melbourneinstitute.com/wp/wp2008n23.pdf>>.

140. Maggie Walter et al., *Keeping Australia's Workers in the Labour Force: A Policy Perspective*, 43 AUSTL. J. SOC. ISSUES 291 (2008).

fund their retirement.¹⁴¹ However it has significantly increased the accumulated wealth of older workers, though it has also increased wealth and income inequality. For most workers, superannuation accrues through cumulative investment earnings rather than by reference to average or final salary, and is then taken as a lump sum on retirement (rather than as a pension or annuity) which is then reinvested, with the interest earned being used for self-funded retirement.¹⁴² Paradoxically, the system may have contributed to greater anxiety and perceived insecurity, since both the level of payout on retirement and earnings afterwards are unpredictable and dependent on ever-fluctuating market earnings. There are also very significant gender differences. Because women workers tend to have interrupted careers and are concentrated in casual and part-time work, they have much lower accumulated superannuation than men.¹⁴³ This is likely to increase their vulnerability to exploitation and poor conditions resulting from exposure to precarious work.

Given the dependence of superannuation on financial and property market performance, the greatest direct impact of the global financial crisis on older workers in Australia has been the erosion of their superannuation and other savings for retirement. Average returns for superannuation funds fell by 8.1 percent in 2007-08 and 11.7 percent in 2008-09, while total fund assets declined 9.6 percent between 2007 and 2009.¹⁴⁴ This greatly shook worker confidence because it was the only serious decline since the superannuation scheme began. Similar to trends in the U.K. and the U.S., which will be described below, there are reports of Australian older workers deciding to continue working longer as a result of their eroded retirement savings. A telephone survey of older workers (aged fifty-five and over) indicated that over one-third (36.5 percent) had decided to

141. The average balance for workers aged fifty-five to fifty-nine is \$92,460, while for workers aged sixty to sixty-four, it is \$99,430. Women have only 46 percent of the average balance for male workers. ROSS CLARE, ASS'N OF SUPERANNUATION FUNDS OF AUSTRALIA. RESEARCH & RESOURCE CTR., RETIREMENT SAVINGS UPDATE 6 (2008), *available at* <http://www.superannuation.asn.au/ArticleDocuments/116/rc0802_retirement_savings.pdf.aspx>.

142. See AUSTRALIAN BUREAU OF STATISTICS, 6361.0, EMPLOYMENT ARRANGEMENTS, RETIREMENT AND SUPERANNUATION, AUSTRALIA: APRIL TO JULY 2007 (RE-ISSUE) 21-23 (June 2, 2009), *available at* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/1A653F883363040DCA2575C8001ECB4E/\\$File/63610_apr%20to%20jul%202007%20%28re-issue%29.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/1A653F883363040DCA2575C8001ECB4E/$File/63610_apr%20to%20jul%202007%20%28re-issue%29.pdf)>; AUSTRALIAN SOCIAL TRENDS 2002, *supra* note 138, at 175-79.

143. AUSTRALIAN HUMAN RIGHTS COMM'N, 2009 ACCUMULATING POVERTY? WOMEN'S EXPERIENCES OF INEQUALITY OVER THE LIFECYCLE: AN ISSUES PAPER EXAMINING THE GENDER GAP IN RETIREMENT SAVINGS (2009), *available at* <http://www.humanrights.gov.au/pdf/sex_discrim/accumulating_poverty.pdf>.

144. AUSTRALIAN PRUDENTIAL REGULATION AUTH., STATISTICS: ANNUAL SUPERANNUATION BULLETIN 39 tbl.11, 42 tbl.13 (rev'd Jan. 19, 2011), *available at* <<http://www.apra.gov.au/Statistics/upload/June-2009-revised-Annual-Superannuation-Bulletin.pdf>>.

postpone plans to retire, with significantly more women than men adopting this stance.¹⁴⁵ In the national labor force survey, there was a slight increase (1.3 percent) among those aged forty-five and over and working full-time who intended to continue working full-time between 2006-07 and 2008-09. This was accompanied by a similar-sized decline in the proportion of those who intended to switch from full-time to part-time work. There were also similar small increases in the “don’t know” categories.¹⁴⁶

G. Australia: Conclusions

Australia is often described (by Australians) as “the lucky country.” The phrase was coined in the 1960s by political scientist Donald Horne and meant ironically, to indicate that the country’s good fortune was due more to its exploitation of natural resources than to creativity and innovation.¹⁴⁷ The luck has continued in the economic crisis, although at least this time it has been abetted by regulation and planning.¹⁴⁸ For older workers, the effects of vulnerability in the labor market during the recession have been reduced by laws prohibiting compulsory retirement and, to a lesser extent, age discrimination. Perhaps more significant are the legal protections which promote general employment security (such as minimum wages and unfair dismissal laws) which are, moreover, now effectively enforced. These legal protections are supplemented by government policies introduced over the past twenty years which allow workers to plan their transition to retirement through part-time work. The risk of older workers having to endure exploitive working conditions late in their working lives has also been reduced by measures designed to secure decent living standards in retirement.

And yet these protections and policies have not been truly tested by the current global economic crisis. The mildness of the recession in Australia means that potential weaknesses have not been exposed. In particular, the reduction in centralized regulation in the labor law system,

145. Kate O’Loughlin et al., *Impact of the Global Financial Crisis on Employed Australian Baby Boomers: A National Survey*, 29 AUSTRALASIAN J. AGEING 89 (2010).

146. AUSTRALIAN BUREAU OF STATISTICS, 6238.0, RETIREMENT AND RETIREMENT INTENTIONS: JULY 2008 TO JUNE 2009, at 18 tbl.2 (Dec. 17, 2009), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/61A0264E827F59C4CA25768E002C8F72/\\$File/62380_jul%202008%20to%20jun%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/61A0264E827F59C4CA25768E002C8F72/$File/62380_jul%202008%20to%20jun%202009.pdf)>.

147. DONALD HORNE, THE LUCKY COUNTRY: AUSTRALIA IN THE SIXTIES 209 (1964): “Australia is a lucky country, run by second-rate people who share its luck. It lives on other peoples’ ideas . . . A nation more concerned with styles of life than achievement has managed to achieve what may be the most evenly prosperous society in the world.”

148. John Quiggin, *Australia and the Global Financial Crisis*, in GOODBYE TO ALL THAT? ON THE FAILURE OF NEO-LIBERALISM AND THE URGENCY OF CHANGE 99, 121 (Robert Manne & David McKnight eds., 2010).

associated with the decline in industry awards and their replacement by enterprise agreements, has reduced the scope for softening the impact of recession on the most disadvantaged groups of workers. In previous recessions it was possible for governments and arbitration tribunals to adopt coordinated wage and employment policies which sought to spread the costs of recovery to some extent. Instead, with a decentralized system, work and its benefits have become more unevenly distributed. As a result, if the recession had been worse in Australia, we would expect to see its effects as being more unequal and more intractable than in previous downturns.

Based on previous experience, if the recession had been deeper and longer, older workers would have been exposed to age-targeted retrenchments and declining re-employment prospects when competing with younger workers, resulting in lower employment participation.¹⁴⁹ Using the 1991 recession as a guide, older male workers especially would have faced underemployment, long-term unemployment and withdrawal from the labor force, the full effects of which might have taken five years or more to reverse.¹⁵⁰ Many of those older workers who remained in work would have faced eroding conditions in the part-time and casual jobs which they predominantly occupy. These effects would have been compounded by shrinking non-wage incomes as the value of investments evaporated and interest rates fell. Given the dependence of the superannuation scheme on the fortunes of the domestic financial sector, many older workers would have faced several more years of work beyond their preferred retirement age. Fortunately for them, older workers (by virtue of their accumulated skills, experience and wealth) have not been particularly affected. It is the older workless and underemployed for whom decent work remains out of reach particularly in straitened times.

149. SPOEHR ET AL., *supra* note 75, at 10.

150. AUSTRALIAN BUREAU OF STATISTICS, 4102.0, AUSTRALIAN SOCIAL TRENDS: MARCH 2010, at 14 (2010), available at <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AD88F98646E88BD7CA2576E70016C552/\\$File/41020_ASTMarch2010.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/AD88F98646E88BD7CA2576E70016C552/$File/41020_ASTMarch2010.pdf)>; Kennedy & Da Costa, *supra* note 66, at 40. Some analyses argue that low skill level was a more significant determinant of job displacement than age; however low skill level is positively correlated with age. See Jeff Borland & James Ted McDonald, *Displaced Workers in Australia 1984-1996: Macroeconomic Conditions and Structural Change* (Univ. of Melbourne Dep't of Econ. Research Paper No 824, 2001), available at <<http://www.economics.unimelb.edu.au/downloads/wpapers-00-01/824.pdf>>.

III. UNITED KINGDOM

The European Union (E.U.), of which the U.K. is a member, has been concerned for some time with increasing the employment rate of older workers. This rate varies enormously among the member states. The Lisbon Strategy¹⁵¹ called for an increase of the total employment rate within the E.U. to 67 percent by 2005 and 70 percent by 2010. This included increasing the employment rate of older workers to 50 percent by 2010.

Despite a re-launch in 2005, the Lisbon Strategy failed to achieve its objectives with respect to older workers. The overall employment rate for older workers aged fifty-five to sixty-four grew to an average of 46 percent.¹⁵² Only twelve member states had an older worker employment rate which met the target of 50 percent and nine member states were more than ten percentage points short. These were Malta, Hungary, Poland, Slovenia, Luxembourg, Italy, Belgium, France, and Slovakia. Malta, in 2008, had the lowest rate with just 30 percent of the age group in employment.¹⁵³

There is in the E.U. a steep fall in the employment rate after the age of fifty and the level of employment for those over sixty-five is very low. For the E.U. as a whole, approximately 85 percent of men and 70 percent of women are in employment at age fifty. By the age of sixty-nine for men and sixty-six for women, these figures fall to less than 10 percent.¹⁵⁴ This is partly, of course, a reflection of national policies and culture on retirement and social security systems. While the U.K., for example, is proposing to raise the state pension age to sixty-six years in the near future, the French government has faced opposition when it has proposed an increase in its pension age from sixty to sixty-two years.¹⁵⁵

151. This was a strategy devised by the Council of Ministers of the E.U. following a meeting in Lisbon in 2001, where a ten year plan was conceived to make the European Community much more competitive. This process was to include increasing labor force participation rates for women and older workers; it became known as the Lisbon Strategy. Further information can be found at *Lisbon Strategy for Growth and Jobs*, EUROPEAN COMM'N, <http://ec.europa.eu/archives/growthandjobs_2009/> (archived Apr. 6, 2010).

152. *Communication from the Commission: Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* COM(2010) 2020 (Mar. 3, 2010), [hereinafter *Europe 2020*], available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>>.

153. *Commission Report on the Social Situation in the European Union 2009* (Feb. 2010), available at <http://epp.eurostat.ec.europa.eu/cache/TTY_OFFPUB/KE-AG-10-001/EN/KE-AG-10-001-EN.PDF>.

154. *Commission Staff Working Document: Demography Report 2008: Meeting Social Needs in an Ageing Society*, SEC(2008) 2911 (Nov. 21, 2008), available at <<http://ec.europa.eu/social/BlobServlet?docId=709&langId=en>>.

155. See, e.g., *Mass Protests over French Pensions Reform*, THE PARLIAMENT.COM (June 25, 2010), <<http://www.theparliament.com/latest-news/article/newsarticle/mass-protests-over-french-pen>>.

In its policy document, *Europe 2020*,¹⁵⁶ the European Commission described some of Europe's structural weaknesses:

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 fast as it did before 2007 – by about two million every year compared to one year previously. The combination of a smaller working population and a higher share of retired people will place additional strains on our welfare systems.¹⁵⁷

Perhaps more realistically than the Lisbon targets, there is a new E.U. target which relates to the working population as a whole between twenty and sixty-four years. The target aims to increase the employment rate for this group to 75 percent by 2020 “through greater involvement of women, older workers and the better integration of migrant workers in the work force.”¹⁵⁸

Increasing the involvement of older workers in the work force, as mandated by the new target, requires an understanding of the strengths and weaknesses of the member states' systems of labor market regulation, pensions, and other forms of social protection, and how they operate in times of economic stress. This section on the U.K. adds to that knowledge base by reviewing statistics on British older workers during the global economic crisis. Although by some measures older workers appear to have suffered less than their younger counterparts, a trend toward older employees working in non-standard positions – employed on a part-time or temporary basis or self-employed – raises concerns that they are a vulnerable working population. Facilitating their vulnerability, and undermining older worker decent work, is the existence in the U.K. of lawful mandatory retirement and, for at least a subgroup of workers, insufficient pension income.

A. Older Worker Employment and Unemployment Rates

In Great Britain there are just under twenty million people aged fifty or over. Almost nine million of these are between fifty and the State Pension Age (SPA).¹⁵⁹ The proportion of older workers in work has been

sion-reforms/>.

156. *Europe 2020*, *supra* note 152.

157. *Id.* at 5.

158. *Id.* at 8.

159. The State Pension Age is currently sixty-five years old for men and sixty years for women. The ages are being equalized at sixty-five years over a period ending in 2020. The U.K. government has also announced a consultation on increasing the sixty-five year limit in the near future. See *When*

increasing for some years. In the second quarter of 1999, for example, some 66.5 percent of the population between the ages of fifty and SPA and some 7.9 percent of those at SPA or above were in employment; by the second quarter of 2010 these figures had increased to 70.9 percent and 12.3 percent.¹⁶⁰

In terms of employment rates, as in Australia and the U.S., the recession appears to have impacted most heavily on younger workers. The employment rate for older workers has declined less than any other age group. Indeed the rate of decline appears to increase the younger the age group. Thus for those between the ages of fifty and SPA, the employment rate has declined from 72 percent in 2008 to 70.9 percent in 2010, compared to that, say, of the eighteen to twenty-four age group which has seen a decline from an employment rate of 64.4 percent to 58.5 percent.¹⁶¹ The decline for all age groups is:

Table 5

Employment Rates by Age¹⁶²

Age group	Employment rate		
	2008	2010	decline
50-SPA	72.0	70.9	-1.1
35-49	88.7	86.0	-1.3
25-34	88.6	83.9	-2.7
18-24	64.4	58.5	-5.9
16-17	34.8	24.9	-9.9

This trend is emphasized when one considers the figures for those at or above SPA. During this same period the employment rate for this oldest age group has actually increased, from 11.6 percent to 12.3 percent. This

Should the State Pension Age Increase to 66? A Call for Evidence, U.K. DEP'T FOR WORK & PENSIONS, <<http://www.dwp.gov.uk/consultations/2010/spa-66-review.shtml>> (last viewed Mar. 10, 2011).

160. These statistics are taken from the web site of the Government statistics service. *Employment by Age & Sex – Statistical Bulletin Dataset*, U.K. OFFICE OF NAT'L STATISTICS, <http://www.statistics.gov.uk/statbase/product.asp?vlnk=8285> (last visited Mar. 10, 2011) (scroll to "Labour market status by age group" and click to download the .xls file) [hereinafter *Employment by Age & Sex Dataset*]; U.K. OFFICE FOR NAT'L STATISTICS, STATISTICAL BULLETIN: LABOUR MARKET STATISTICS JUNE 2010 (June 16, 2010), available at <<http://www.statistics.gov.uk/pdffdir/lmsuk0610.pdf>>.

161. See *Employment by Age and Sex Dataset*, supra note 160.

162. See *id.* (figures are taken from the February to April cells for each of these years).

increase is mostly the result of an increase in the proportion of female workers over SPA. The employment rate for men at or over SPA hardly changed during this period (10.7 percent to 10.6 percent), while for women the increase was from 12.2 percent to 13.3 percent. The same outcome also applied to the lower age group of fifty to SPA. The employment rate for men decreased (73.5 percent to 71.1 percent) while the employment rate for women in this age group increased from 69.9 percent to 70.7 percent.¹⁶³

Although this superficially shows that older workers, especially female ones, have been less affected by the recession, there may be some evidence to show that this is a result of the disadvantages already suffered by older workers in the U.K. As described in greater detail below, the existence of a mandatory retirement age may have the effect of turning the older workforce into a contingent reserve workforce whose flexibility is attractive to employers in recessionary times. This is further evidenced by the increasing proportion of older women working, as it is the female workforce that traditionally makes up much of the flexible workforce.¹⁶⁴

Labor force participation rates may be influenced by a discouragement effect and an added workers effect. The discouragement effect has been described as the “decision to refrain from job search as a result of poor chances in the labor market.”¹⁶⁵ The added worker effect comes about as a result of the loss of employment by one household member resulting in another household member seeking work.¹⁶⁶ It can only be surmised as to whether the increase in the proportion of older female workers is the result of an added workers effect. One might hypothesize that older workers who fail to obtain employment may become discouraged workers, although, unlike in the U.S., in the U.K. there is a lack of statistical evidence to this effect.

On the other hand, as in Australia and the U.S., there are statistics which show that long term unemployment is a reality for many older workers. The figures show that longer term unemployment rates have been increasing for all younger age groups, but the rate for those workers aged over fifty has remained consistently high and appears unaffected by any recession.

163. *See id.*

164. *See infra* notes 181-83 and accompanying text.

165. Maarten Van Hamm et al., *Local Underemployment and the Discouraged Worker Effect*, 38 URBAN STUD. 1733 (2001); *see also* Maria Brown & Michael Briguglio, *Discouragement Amongst Ageing Workers in Malta within an E.U. Context*, 4 SOCIETIES WITHOUT BORDERS 45-60 (2009).

166. *See generally* Frances McGinnity, *The Labour-Force Participation of the Wives of Unemployed Men: Comparing Britain and West Germany Using Longitudinal Data*, 18 EUR. SOC. REV. 473 (2002) (describing the phenomenon and suggesting a disincentive for the effect in Britain caused by the benefit system).

Table 6**Percentage of Unemployment that Lasts for over Twelve Months¹⁶⁷**

	18-24	25-49	50 and over
2008	19.6	28.1	37.9
2009	17.9	25.6	31.0
2010	25.8	33.6	37.5

Clearly the prognosis for unemployed older workers is worse than for other age groups. The fragile nature of older workers' employment is exemplified in the current recession by the increasing unemployment rate for those over the age of fifty. One analysis in 2009 reported:

Unemployment increasing at high percentage rate: 'There are now 367,000 older people aged 50+ out of work. While the actual numbers are low in comparison to other age groups, this is a rise of almost half (37.7 percent) over the last year. This is worrying, particularly given the pattern in previous recessions when this group was hit hard by job losses.'¹⁶⁸

The same analysis blamed ageist attitudes which remained a huge obstacle for older workers and found that "many people feel that the chance of finding new employment is limited because employers simply don't want to take on someone in their 50s."¹⁶⁹

B. Vulnerability and Precarious Working: Part-Time, Flexible Work, Casual Work, and Self-Employment

If older workers are to be classified as a vulnerable workforce, it is because they are, both in the U.K. and the E.U., increasingly likely with age to work in types of precarious employment.¹⁷⁰ The historic ability of

167. U.K. OFFICE FOR NATIONAL STATISTICS, STATISTICAL BULLETIN: LABOUR MARKET STATISTICS MAY 2010, at tbl.11(2) (May 12, 2010), available at <<http://www.statistics.gov.uk/pdffdir/lmsuk0510.pdf>>.

168. AGE CONCERN, THE IMPACT OF THE RECESSION ON OLDER WORKERS (2009), available at <http://taen.org.uk/uploads/resources/Impact_of_the_recession_on_older_workers_media_briefing1.pdf>.

169. *Id.*

170. See Michael Quinlan et al., *The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health: A Review of Recent Research*, 31 INT'L J. HEALTH SERVICES 335 (2001).

employers to enforce a legal mandatory retirement age has added to both the vulnerability of the older workforce and enabled employers to possibly treat them subsequently as a contingent workforce which can be exploited depending upon the economic situation. Precarious employment here is defined as being in part-time or flexible working, or casual work or self-employment, such work being more vulnerable to change in recessionary times.

Both older and younger workers may share the characteristic of not being “prime age” workers. Compared to such workers, older people are seen to have characteristics such as inflexibility and reliability that rely upon stereotypes of age. Consequently they may be regarded as a “buffer” group or as part of a labor market reserve.¹⁷¹ They are, like others who suffer from negative attitudes, likely to be among the first to be dismissed when there is a need to reduce the workforce size, and among the last to be hired during periods of growth.¹⁷²

Several characteristics are considered relevant to older worker vulnerability. First, the likelihood of being in full-time permanent employment decreases with age; older people are more likely to be self-employed or working part-time than younger age groups. Second, as noted above, once unemployed, workers over the age of fifty tend to remain unemployed for longer than other age groups. Third, older workers are more likely to be employed in precarious work as previously defined. And finally, older workers suffer from stereotyping and age discrimination; in the U.K. this has traditionally included a legal mandatory retirement age.¹⁷³

In general terms, from January-March 2008 to January-March 2010, the number of employees, in the U.K., in full-time work fell by 876,000, but the number of employees in part-time work increased by 214,000.¹⁷⁴ For the same period, the number of self-employed people working full time decreased by just 17,000, while those self-employed people working part-

171. Bernard Casey & Frank Laczko, *Early Retired or Long-term Unemployed? The Situation of Non-Working Men Aged 55-64 from 1979 to 1986*, 3 WORK, EMPLOYMENT & SOC'Y 509 (1988).

172. Terence Hogarth, et al, *The Equality Impacts of the Recession* 43-44 (Warwick Inst. for Employment Research for the Equality & Human Rights Comm'n Report No. 47 2009), available at <http://www.equalityhumanrights.com/uploaded_files/research/47_the_equality_impacts_of_the_current_recession.pdf>.

173. See Malcolm Sargeant, *The Default Retirement Age: Legitimate Aims, Disproportionate Means*, 39 INDUS. L.J. 244 (2010).

174. See U.K. OFFICE FOR NAT'L STATISTICS, STATISTICAL BULLETIN: LABOUR MARKET STATISTICS MAY 2010, at 2 (May 12, 2010) [hereinafter LMS MAY 2010], available at <<http://www.statistics.gov.uk/pdffdir/lmsuk0510.pdf>>; U.K. OFFICE FOR NAT'L STATISTICS, STATISTICAL BULLETIN: LABOUR MARKET STATISTICS MAY 2009, at 2 (May 12, 2009) [hereinafter LMS MAY 2009], available at <<http://www.statistics.gov.uk/pdffdir/lmsuk0509.pdf>>; U.K. OFFICE FOR NAT'L STATISTICS, STATISTICAL BULLETIN: LABOUR MARKET STATISTICS MAY 2008, at 2 (May 14, 2008) [hereinafter LMS MAY 2008], available at <<http://www.statistics.gov.uk/pdffdir/lmsuk0508.pdf>>.

time increased by 82,000.¹⁷⁵ Thus, the British economy saw some shift into part-time working, partly perhaps because of the lack of full-time jobs. The number of people, for example, who stated that they worked part-time because they could not get a full-time job increased from 9.5 percent of part-time workers in 2008 to 14.1 percent of part-time workers in 2010.¹⁷⁶ Similarly, during the same period, there was an increase in those working on temporary contracts, and a jump from a figure of 25 percent of temporary workers in 2008, who were working on this basis because they could not get a permanent job, to a figure of 34.2 percent in 2010.¹⁷⁷ Assuming part-time work is a constituent of precarious working, one can conclude that there has been a move into precarious work by U.K. workers generally as a result of the recession and the decline in full-time employment.

As for older workers and precarious work, research prior to the recession suggests that workers over SPA in the U.K. were twice as likely to be employed in companies with one to ten employees, and far less likely to be employed in organizations with over fifty staff. People aged sixty and over were particularly likely to be employed on a temporary basis and were more likely to work in small firms with fewer than fifty employees.¹⁷⁸ There is no reason to assume that the recession has reversed those findings. Moreover, the likelihood of working part-time increases with age, as can be seen in these figures from the European Foundation:¹⁷⁹

Table 7

Workers on Part-Time Employment Contracts in the E.U.

Age	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

175. See LMS MAY 2010, *supra* note 174, at tbl.3; LMS MAY 2009, *supra* note 174, at tbl.3; LMS MAY 2008, *supra* note 174, at tbl.3.

176. Compare LMS MAY 2008, *supra* note 174, at tbl.3 with LMS MAY 2010, *supra* note 174, at tbl.3.

177. Compare LMS MAY 2008, *supra* note 174, at tbl.3 with LMS MAY 2010, *supra* note 174, at tbl.3.

178. NATIONAL STATISTICS & DEP'T FOR WORK & PENSIONS, FOCUS ON OLDER PEOPLE 31 (A. Soule et al. eds., 2005) [hereinafter FOCUS ON OLDER PEOPLE], available at <http://www.statistics.gov.uk/downloads/theme_compendia/foop05/Olderpeople2005.pdf>.

179. EUR. FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, WORKING CONDITIONS OF AN AGEING WORKFORCE 20 tbl.2 (2008), available at <<http://www.eurofound.europa.eu/pubdocs/2008/17/en/2/EF0817EN.pdf>>.

Notably, the European Foundation reported that “part-time work appears to be an involuntary choice for a considerable proportion of young and adult workers, while it seems to be much more of a voluntary choice for both older and female workers.”¹⁸⁰ There appeared to be no gender differences among workers in the older age group in terms whether part-time work was viewed as voluntary or not. This is evidence that for at least some older workers in the E.U., part-time work is preferred to full-time work.

Within the U.K., in the age group sixteen to forty-nine years, the part-time employment rate for women averages about 43 percent and for men 9 percent. In contrast, the part-time work rate for women aged sixty to sixty-four is 70 percent and for men it is 23 percent. In short, as illustrated by Table 7, in the U.K. there is a direct relationship between working part-time and getting older.¹⁸¹

Table 8

Employment of Older Workers in Part-Time Work in the U.K. (Percent)

Age	Women	Men
50-54	42	6
55-59	51	12
60-64	70	23
65-69	85	64
70+	89	74
Total (50+)	52	16

Flexible work arrangements are also considered indicative of vulnerability since they are subject to change in recessionary times. According to an analysis by Smeaton and Vegeris, older women are more

180. *Id.* at 20.

181. Elizabeth Whiting, *The Labour Market Participation of Older People*, 113 *Lab. Market Trends* 285, 289 tbl.3 (2005). Wendy Loretto, Sarah Vickerstaff, Phil White ‘Older workers and options for flexible work’; Working Paper Series no 31 table 2.8 Equal Opportunities Commission (2005); note the Equal Opportunities Commission has been subsumed into the Equality And Human Rights Commission; available at http://www.bcmeurope.com/openspace/documents/4_14_5_EOC_older_workers.pdf.

likely than older men to be in flexible working arrangements.¹⁸² It is interesting also how the proportion of both men and women working in these arrangements decreases after the age of sixty; the exception being with regard to part-time working.

Table 9

Proportion of Employed Men and Women Using Flexible Work Arrangements 2000 and 2007¹⁸³

Men								
Age	Flexitime		Annualized hours		Any flexible arrangements		Part-time	
	2000	2007	2000	2007	2000	2007	2000	2007
45-49	9	11	4	4	18	18	4	5
50-54	9	10	4	5	18	19	6	6
55-59	8	10	4	4	17	19	9	11
60-64	6	8	2	3	14	16	15	20
Women								
Age	Flexitime		Annualized hours		Any flexible arrangements		Part-time	
	2000	2007	2000	2007	2000	2007	2000	2007
45-49	12	15	5	5	31	32	44	43
50-54	10	13	5	5	27	30	47	42
55-59	9	11	3	5	24	27	52	47
60-64	7	10	2	5	19	24	61	80

Older workers in the U.K. were also more likely to hold a temporary employment contract. Thus some 10 percent of working men over SPA were in temporary employment compared to an average of 4 percent for the age groups below them. Similarly about 9 percent of women over SPA held temporary contracts compared to 6 percent of women between the ages of twenty-five and forty-nine and 5 percent of those between fifty and SPA.¹⁸⁴

182. DEBORAH SMEATON & SANDRA VEGERIS, POL'Y STUDIES INST., EQUALITY & HUMAN RIGHTS COMM'N, RESEARCH REPORT NO. 22, OLDER PEOPLE INSIDE AND OUTSIDE THE LABOUR MARKET: A REVIEW 26-27 (2009).

183. *Id.* at 27 tbls.3.1, 3.2.

184. DEBORAH SMEATON & STEPHEN MCKAY, DEP'T FOR WORK & PENSIONS, RESEARCH REPORT NO. 182, WORKING AFTER STATE PENSION AGE: QUANTITATIVE ANALYSIS 29 tbl.3.2 (2003).

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 work and casual work.¹⁸⁵

Finally, as noted below in the U.S. section, during recessions, increases in self-employment may be evidence that workers have lost and been unable to replace their jobs.¹⁸⁶ In terms of age, self-employment is more common in the U.K. among older workers than among the younger age groups. One study showed that

19 per cent of people aged fifty and over were self-employed compared with 14 percent of people aged 25 to 49. Older men were more likely than older women to be self-employed: 26 per cent of men aged 50 and over compared with 11 per cent of women. Gender differences in self-employment become more marked after SPA – 46 per cent of men aged 65 and over were self-employed compared with 13 per cent of women aged 60–64 in 2004.¹⁸⁷

Across the E.U. there is a similar trend.¹⁸⁸

Table 10

Self-employed People as a Percentage of Total Employees in the E.U.

Age	% Self-Employed
15-24	6.6
25-34	13.6
35-44	16.3
45-54	17.5
55+	28.8
Total	16.4

In all age groups men are much more likely to work on a self-employed basis than women. For the over fifty-five-year-olds in the E.U., the figures were that 72.8 percent of the self-employed were men compared to 27.2 percent who were women.¹⁸⁹

185. *Id.* at 31 tbl.3.3.

186. *See infra* note 290 and accompanying text.

187. FOCUS ON OLDER PEOPLE, *supra* note 178, at 31.

188. EUR. FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, *supra* note 179, at 19 tbl.1.

189. *Id.*

C. Age Discrimination and Its Connection to Weakened Job Security

Age discrimination is unlawful in the U.K. unless it can be justified as being a proportionate means of achieving a legitimate aim.¹⁹⁰ As in the U.S., seemingly robust protection against age discrimination nonetheless contributes to older worker vulnerability, albeit through different means.¹⁹¹ More specifically, the employer's ability in the U.K. to compulsorily retire its employees renders many older workers members of a flexible and contingent workforce. Prior to 2006, compulsory retirement was effectuated, in most cases, by an express term in individual contracts of employment, which provided that employment would come to an end at a certain age, usually, but not always, sixty-five. The ability to include this term was re-enforced by legislation which took away an individual's right to complain about unfair dismissal at or after this retirement age.¹⁹²

In 2006, the government introduced a "default retirement age" (DRA) in conjunction with regulations designed to tackle age discrimination in employment.¹⁹³ The DRA gave employers the option of forcing employees to retire at, normally, age sixty-five without the employee being able to claim age discrimination or unfair dismissal,¹⁹⁴ so long as the procedure mandated in Schedule 6 of the age regulations is followed. This procedure allows the employee to ask to continue working beyond sixty-five years of age.¹⁹⁵ The employer, following a meeting with the employee, may agree or reject the request without giving reasons.¹⁹⁶ Importantly, the employer may also agree to continued working for a fixed period or on a different basis.¹⁹⁷ This prerogative creates the potential for an employer to use older workers in a contingent way, to suit the needs of the business.

A default retirement age was a strange concept to introduce at the same time as regulations implementing a European Directive aimed at tackling age discrimination,¹⁹⁸ and not surprisingly, the DRA was challenged in the courts. The European Court of Justice has decided several cases challenging whether a retirement age is compatible with the

190. The Employment Equality (Age) Regulations 2006 S.I. 2006/1031, art. 3. These regulations were subsumed into the Equality Act 2010, c. 15, effective October 2010.

191. *See infra* Part IV(D).

192. Employment Rights Act 1996, c. 18, § 109.

193. The Employment Equality (Age) Regulations 2006 S.I. 2006/1031. These Regulations have now been substantially incorporated into the Equality Act 2010, c. 15.

194. *See* MALCOLM SARGEANT, AGE DISCRIMINATION IN EMPLOYMENT 119-21, 174 (2007).

195. Employment Equality (Age) Regulations 2006, sch. 6.

196. *Id.*

197. *Id.*

198. Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303)16.

Framework Directive on Equal Treatment in Employment and Occupation.¹⁹⁹ In *Palacios de la Villa*,²⁰⁰ for example, the complainant claimed that he had been subject to age discrimination as a result of his dismissal at the age of sixty-five. The Court accepted that the aim of the measure which permitted the employer's action was legitimate – the aim being to check unemployment and promote employment generally – and the means were also judged to be appropriate and necessary.²⁰¹ Compulsory retirement could be a proportionate means of achieving the aim, particularly taking into account the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable.²⁰²

A second judgment concerning a mandatory retirement age was contained in the *Age Concern* case, a reference from the English High Court.²⁰³ In that case, the European Court of Justice was asked, *inter alia*, whether the scope of the Directive extended to rules which permitted employers to dismiss employees aged sixty-five or over by reason of retirement, and whether the national regulations concerning discrimination in employment and retirement were national provisions laying down retirement ages.²⁰⁴ In simple language, this claim questioned the U.K.'s introduction of the default retirement age of sixty-five years.

Age Concern, the aforementioned NGO, argued that Article 6(1) of the Framework Directive did not permit member states to introduce a general defense of justification for direct age discrimination, but allowed them to make specific provisions listing the grounds which could constitute a legitimate aim.²⁰⁵ In turn, the U.K. government argued that the provisions at issue did not fall within the scope of the Directive at all.²⁰⁶ The Court concluded that the Directive gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are objectively and reasonably justified by a legitimate aim, such as employment policy, or labor market or

199. *Id.*

200. Case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, 2007 E.C.R. I-8531.

201. *Id.* ¶ 64.

202. *Id.* ¶ 73.

203. Case C-388/07, *Inc. Trs. of the Nat'l Council on Ageing (Age Concern Eng.) v Sec'y of State for Bus., Enter. & Regulatory Reform*, 2009 E.C.R. I-1569.

204. *Id.*

205. *Id.* ¶ 36.

206. *Id.* ¶ 19.

vocational training objectives, and if the means of achieving that aim are appropriate and necessary.²⁰⁷

One of the reasons the recently defeated Labor government prevailed when the case returned to the English High Court²⁰⁸ was that it proposed a review of the DRA in 2011, a review subsequently brought forward to 2010. Britain's newly elected coalition government, however, has committed itself to phasing out the DRA at an early stage.²⁰⁹ This is now to take place from April 2011.²¹⁰ There will remain, nonetheless, the possibility for employers to retain an "employer justified retirement age" (EJRA), if the employer can show that it has a legitimate aim and the means for achieving that aim are proportionate.²¹¹ Although this is likely to provide only a limited opportunity for employers, it does seem as if it will be left to the courts to decide whether an EJRA is justified. Given the wide scope for justification contained in Article 6 of the Framework Directive, it cannot be assumed that the phasing out of the DRA will inevitably mean the end of mandatory retirement in the U.K.

D. Insufficient Retirement Security

One analysis of evidence concerning the default retirement age cited an Age Concern survey in 2010 of 976 adults aged 60 to 70 which found:

[O]f adults aged 65-70 who had retired, four per cent had been 'made to retire by their employer because of their age' in the previous year, and six per cent in the previous three years. A quarter of the age group 'know someone who has been forced to retire'; the employers of four in ten employees over 60 use forced retirement; 13 per cent of employees aged 60 to 64 definitely expect to be forced to retire.²¹²

The first Old Age Pensions Act in the U.K. was adopted over one hundred years ago.²¹³ It introduced a universal, albeit means tested, state

207. *Id.* ¶ 8.

208. *R (on the application of Age U.K.) v Sec'y of State for Bus., Innovation & Skills*, [2009] EWHC (Admin) 2336, [2010] ICR 260.

209. The Conservative Party and the Liberal Democrat Party entered into a coalition agreement in May 2010 which included this commitment. H.M. Gov't, *The Coalition: Our Programme for Government* 7-8, 26 (2010), available at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf>.

210. DEP'T FOR BUS. INNOVATION & SKILLS & DEP'T FOR WORK & PENSIONS, PHASING OUT THE RETIREMENT AGE: CONSULTATION DOCUMENT 5 (2010), available at <<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation.pdf>>.

211. *Id.* at 10, 31-32.

212. WENDY SYKES, ET AL., REVIEW OF THE DEFAULT RETIREMENT AGE: SUMMARY OF THE STAKEHOLDER EVIDENCE 31 (Dept. for Work and Pensions, Research Report 679, 2010); available at <http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep675.pdf>.

213. *The Old Age Pensions Act, 1908*, 8 Edw. 7, c. 40.

pension for those of seventy years of age and over. It was a landmark in welfare reform and was intended to alleviate the worst poverty suffered by the poorest people in the country. Yet after a century of pension provision and pension reform, the development of pensions, and of formalized pension ages have been described by some as aspects of a process of marginalizing and degrading older people in the twentieth century, as they were progressively excluded from paid work and the social status assumed to be associated with it.²¹⁴

In a sense, the development of the state pension system, and the creation of the state retirement age which accompanies it, creates a separate class of excluded persons, many of whom continue to live in relative or absolute poverty. This is because the U.K. pension system provides only a subsistence pension. The post-1945 old age pension arrangements were intended to allow people to retire on an income that only partially came from the state; there was an expectation that individual savings would be an important part of retirement income.²¹⁵ Indeed, the U.K. state subsistence pension is one of the lowest, as a proportion of earnings, of any E.U. member state.²¹⁶ This is very much a gender issue with only 30 percent of women who reach state pension age entitled to a full basic state pension, compared with 85 percent of men.²¹⁷ In addition, some 70 percent of the female pensioner population has no private pension at all.²¹⁸

Nearly two thirds of all those receiving state pensions are women.²¹⁹ The following sums up the situation of women with regard to pension provision in the U.K.:

[One] in five single women pensioners risk being in poverty in retirement . . . By 2020 it is estimated that there will be as many divorced women aged 65 to 75 as widows. Almost two thirds of divorced and separated older women have no private pension income at all . . . the number of women who are saving for retirement halves when they have a baby and the figure for men remains unchanged when they become new fathers.²²⁰

214. PAT THANE, *OLD AGE IN ENGLISH HISTORY 385-406* (2002).

215. SIR WILLIAM BEVERIDGE, *SOCIAL INSURANCE AND ALLIED SERVICES*, 1942 Cmd. 6404, available at <<http://www.fordham.edu/halsall/mod/1942beveridge.html>>.

216. See AON CONSULTING, *EUROPEAN BUSINESS LEADERS SURVEY 7* (2009), available at <http://www.aon.com/austria/products-and-services/human-capital-consulting/attachements/ebls_engl.pdf>.

217. PENSIONS COMM'N, *PENSIONS: CHALLENGES AND CHOICES: FIRST REPORT OF THE PENSIONS COMMISSION 268*, (2004), available at <<http://image.guardian.co.uk/sys-files/Money/documents/2005/05/17/fullreport.pdf>>

218. *Id.* at 62.

219. DEP'T FOR WORK & PENSIONS, *QUARTERLY STATISTICAL SUMMARY 1*, 17 (Nov. 11, 2009), available at <http://campaigns.dwp.gov.uk/asd/asd1/stats_summary/Stats_Summary_Nov2009.pdf>.

220. Equal Opportunities Commission, *Parliamentary Briefing, Pensions Bill 16th January 2007*,

Contributing to women's disadvantage is the traditional family caregiving role they play. Some 25 percent of all women age forty-five to sixty-four are care-givers and only 37 percent of women work full-time, compared to 60 percent of men, greatly impacting the ability of women to save for retirement.²²¹ The system has traditionally been based on the model of husband in paid work and wife in unpaid domestic work, a model which presently lacks correspondence to the lives of many women.²²² Linked to this is the abandonment of the principle of a non-contributory entitlement, or an entitlement not based upon the amount or regularity of contributions, and the reliance on a private pension system which is linked to earnings and periods of service.²²³ Although the Pensions Acts of 2007 and 2008 sought to improve the overall levels of income and have reduced, from 2010, the qualifying period to be eligible for a full state pension,²²⁴ there is still a legacy of large numbers of older people being reduced to poverty at retirement.

Given this weakness in the pension system, the financial imperative to continue working may be quite strong for some older workers. One international survey, which included the U.K., reported that 38 percent of respondents stated that "they will continue to work after retirement age for financial reasons; 31 percent [said] that they will work to stay involved and active, but not for financial reasons; [and] 32 percent [said] they will not seek employment after retiring."²²⁵ According to the survey, some 21 percent of private sector employees believed that "recent economic events mean they will have to work longer before they can afford to retire. A further 10 percent expect to retire when planned but will have to scale back

Commons 2nd Reading 4.

221. JAY GINN, *GENDER, PENSIONS AND THE LIFECOURSE: HOW PENSIONS NEED TO ADAPT TO CHANGING FAMILY FORMS* 3 (2003) ("The disproportionate share of poverty borne by today's older women reflects the model of gender relations prevailing during much of their earlier lives, one in which a gender division of labour confined most married women to raising a family and homemaking – the male breadwinner-housewife model"); see also, Debora Price & Jay Ginn, *Sharing the Crust? Gender, Partnership Status and Inequalities in Pension Accumulation*, in *GENDER AND AGEING: CHANGING ROLES AND RELATIONSHIPS* 127 (Sara Arber et al. eds., 2003).

222. See GINN, *supra* note 221, at 3; Price & Ginn, *supra* note 221.

223. The current situation of women with regard to pensions and how this may be changing is discussed further below.

224. Malcolm Sargeant, *Gender Equality and the Pensions Acts 2007-2008*, 38 *INDUS. L.J.* 143 (2009). The Pensions Act 2007 reduced the qualifying period from forty-four years for men and thirty-nine years for women to thirty years for both. Pensions Act, 2007, c. 22, § 1.

225. *Recession Dents a Third of Workers' Retirement Plans*, TOWER WATSON (Apr. 20, 2010), <<http://www.towerswatson.com/united-kingdom/press/1659>> (reporting on the results of the company's Global Workforce Study 2010).

on their spending.”²²⁶

E. U.K.: Conclusions

The statistics reveal that the oldest workers are more likely to be in a non-standard contractual relationship, by working on a part-time or temporary basis or being self-employed. This pattern is not unique to the U.K., but is part of a trend throughout the E.U., where higher levels of part-time working and self employment are recorded for older workers – some 22 percent of older workers work part-time, compared to an average of 16 percent for workers generally, and almost one quarter of older workers labor on a self-employed basis compared to an average of 15 percent for the general working population.²²⁷ These are some of the characteristics of a vulnerable work force, i.e. one that might be more subject to exploitation because it does not fulfill the criteria of being in a full-time, permanent contractual relationship. This is not to say that all older people are necessarily coerced into these working arrangements. One piece of qualitative research in the U.K. suggested that significant numbers of older people actually preferred casual or temporary work compared to permanent work.²²⁸ That research also revealed, however, that there was a desire among significant numbers of older people to remain in or enter employment.²²⁹

Discrimination in employment on the ground of chronological age is an issue when considering the vulnerability of older workers. There is much evidence that such discrimination exists. A U.K. government consultation, *Equality and Diversity: Age Matters*, provided some examples of age discrimination.²³⁰ These were persons being forced to retire after reaching a certain age; not being given a job they applied for because of their age; being told their age was a barrier to general advancement; assumptions being made about their abilities due to age; and being selected for redundancy (layoff) because of age.²³¹ In addition, the adoption of a default retirement age in 2006 seems to have contributed to a contingent older workforce which, perversely in difficult economic times,

226. *Id.*

227. EUROPEAN COMM'N, EMPLOYMENT IN EUROPE 18 (2007), available at <ec.europa.eu/social/BlobServlet?docId=3068&langId=en>.

228. DEBORAH SMEATON ET AL., EQUALITY & HUMAN RIGHTS COMM'N RESEARCH REPORT 43, OLDER WORKERS: EMPLOYMENT PREFERENCES, BARRIERS AND SOLUTIONS vii, 59-64, 87, 111, (2009).

229. *Id.* at vii, 58-60, 61, 64.

230. DEP'T OF TRADE & INDUS., EQUALITY AND DIVERSITY: AGE MATTERS 9 (2003), available at <<http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file24331.pdf>>.

231. *Id.*

has suffered much less proportionately in terms of employment and unemployment rates than other groups.

Regarding decent work, the U.K. falls short of at least two decent work objectives: social protection and fundamental rights at work, the latter referring to the obligation to eliminate age discrimination. Moreover, the troubling trend toward increasing part-time work and irregular employment arrangements casts a shadow on the extent to which the U.K. fulfills its obligation on employment promotion for older workers.

IV. UNITED STATES

The Great Recession²³² produced serious adverse effects for American workers of all ages. Unemployment, for example, rocketed from a November 2007 pre-recessionary rate of 4.7 percent to a high of 10.1 percent in October 2009.²³³ At present, eight months into 2010, the unemployment rate is 9.6 percent, about where it has anemically hovered for months.²³⁴ Some 14.9 million people are unemployed with 6.2 million of them categorized as long-term unemployed.²³⁵ By one estimate, close to one-third of the American labor force is currently looking for work or has experienced unemployment sometime during the crisis.²³⁶ That study also found that since the recession began, more than half of Americans “in the

232. Due to its severity, in terms of depth and duration, the most recent economic downturn is often referred to in the U.S. as the “Great Recession.” Michael Elsby et al., *The Labor Market in the Great Recession*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, Spring 2010, at 1, available at <http://muse.jhu.edu/journals/brookings_papers_on_economic_activity/toc/eca.2010.1.html> [hereinafter *The Labor Market in the Great Recession*]. The National Bureau of Economic Research designates December 2007 as the beginning of the current recession in the U.S. See Sharon Cohany, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Ranks of Discouraged Workers and Others Marginally Attached to the Labor Force Rise During Recession*, ISSUES IN LABOR STATISTICS, SUMMARY 09-04, Apr. 2009, at 1 n.2, available at <www.bls.gov/opub/ils/pdf/opbils74.pdf>.

233. See RICHARD W. JOHNSON ET AL., URBAN INSTITUTE PROGRAM ON RETIREMENT POLICY, UNEMPLOYMENT STATISTICS ON OLDER AMERICANS tbl.2 (Mar. 2011), available at <http://www.urban.org/UploadedPDF/411904_unemploymentstatistics.pdf>.

234. News Release USDL-11-0271, Bureau of Labor Statistics, U.S. Dep’t of Labor, The Employment Situation – August 2010, at 1 (Sept. 3, 2010), available at <http://www.bls.gov/news.release/archives/empsit_09032010.pdf>.

235. *Id.* at 1-2. The Bureau of Labor Statistics defines the “long-term unemployed” as “those jobless 27 weeks and over.” *Id.* at 2. In other words, the long-term unemployed are those who are jobless and actively looking for work for over six months.

236. PAUL TAYLOR ET AL., PEW RESEARCH CTR., A BALANCE SHEET AT 30 MONTHS: HOW THE GREAT RECESSION HAS CHANGED LIFE IN AMERICA 11 (2010) [hereinafter HOW THE GREAT RECESSION HAS CHANGED LIFE]. Notably, in assessing the differences in the impact of the recession in eighty-four countries during 2009, the ILO places the U.S. in its highest category with respect to job loss – countries sustaining a very strong increase in unemployment (more than three percentage points). See *Recovery and Growth*, *supra* note 1, at 12 tbl.1.1; see also News Release, OECD, Employment Outlook 2010 – How Does the United States Compare?, 1 available at <www.oecd.org/dataoecd/14/57/45603148.pdf> (last viewed Mar. 14, 2011) (“Unemployment has risen more sharply in the United States following the recent global financial crisis than in most other OECD countries.”).

labor force have suffered a spell of unemployment, a cut in pay, a reduction in hours or have become involuntary part-time workers.”²³⁷

By some measures U.S. older workers, like their Australian and British counterparts,²³⁸ are faring better than younger workers.²³⁹ A closer inspection, however, reveals that the financial crisis has magnified older workers’ existing vulnerabilities. As described below, older Americans’ occupational and economic security is undercut by four factors: 1) weak job security protections; 2) weakened protections against age discrimination in employment; 3) declining retirement security; and 4) an inadequate unemployment benefit system. Although these factors are independent of the recession in a causal sense, the financial crisis highlighted vulnerabilities which must be addressed by policymakers if the U.S. is to nurture a vibrant labor market for all workers and guarantee decent work for older Americans. Before taking up those topics, however, a review of older worker employment and unemployment statistics, along with additional indicators of labor market vulnerability, is in order. These data are relevant to assessments of U.S. efforts at employment promotion, the first decent work objective.

A. Older Worker Employment and Unemployment Rates

In keeping with the trend in many countries, the U.S. population is aging.²⁴⁰ In a country of about 310 million, the U.S. Census Bureau estimates that in 2010 there were just under ninety-nine million people

237. HOW THE GREAT RECESSION HAS CHANGED LIFE, *supra* note 236, at i. At the time of this writing, in the summer 2010, the National Bureau of Economic Research (NBER) had not yet declared the recession over. *Id.* at 5. The NBER, a non-profit economic research organization is considered “the quasi-official arbiter of the timing of expansions and recessions in the U.S. economy.” *Id.* at 5 n.4. Shortly before submission of the manuscript to the *Employee Rights and Employment Policy Journal*, in September 2010, the NBER determined that the U.S. recession ended in June 2009. See Larry Swisher, *NBER Declares U.S. Recession Lasted Record 18 Months, Ended in June 2009*, Daily Lab. Rep. (BNA), A-1 (Sept. 20, 2010).

238. See *supra* Parts II-III.

239. For example, the U.S. labor force presently contains more workers aged sixty-five and over than teenagers. See Michael McDonough & Andy Cinko, *Elderly Workers Overtake Teens in Job Search: Chart of the Day*, BLOOMBERG (Jul. 12, 2010, 6:00 PM CT), <http://www.bloomberg.com/news/2010-07-12/u-s-workers-over-65-overtake-teens-for-first-time-since-48-chart-of-day.html>. Thus, in the first half of 2010, the number of workers aged sixty-five years old and older, who were employed or actively looking for work, averaged 6.6 million while the number of sixteen- to nineteen-year-old workers in labor force averaged 5.9 million. *Id.* Indeed, there is competition for jobs between the groups in some industries, like food preparation and serving. *Id.*

240. See ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2009 4-5 (2010) [hereinafter A PROFILE OF OLDER AMERICANS], available at http://www.aoa.gov/AoAroot/Aging_Statistics/Profile/2009/docs/2009profile_508.pdf (“Since 1900, the percentage of Americans 65+ has tripled . . . , and the number has increased more than twelve times The older population will continue to grow significantly in the future.”).

aged fifty and over in the United States.²⁴¹ Not only is the population at-large aging, so is the U.S. labor force, a consequence of the aging of the baby boom generation.²⁴² This latter fact is relevant because, as explained below, workers vary by age in their likelihood to experience negative employment outcomes, such as unemployment.²⁴³ Indeed, throughout the recession, U.S. younger workers were more severely affected than were older workers, a fact apparent by looking at a number of measures. Yet carefully analyzing available statistics also reveals hidden vulnerabilities among older workers that should concern policymakers.

Turning first to employment rates, or employment-to-population ratios, age-based patterns detrimental to younger workers are clearly evident. Between December 2007 and May 2010, workers aged sixteen to twenty-four experienced a drop of 6.6 points in their employment rate.²⁴⁴ In comparison, the employment rate for prime age workers, those twenty-five to fifty-four, fell 4.5 points.²⁴⁵ In sharp contrast, while there was minor variation during the relevant time period in the employment-to-population ratios of workers fifty-five and over, these older workers ended in May 2010 with the same employment rate they had in December 2007.²⁴⁶

241. See U.S. Census Bureau, THE 2010 STATISTICAL ABSTRACT, at tbl.8 (Resident Population Projections by Sex and Age: 2010 to 2050), available at <<http://www.census.gov/prod/2009pubs/10statab/pop.pdf>>. In 2008, there were a little over ninety-four million individuals aged fifty and over in the country. See *id.* at tbl.9 (Resident Population by Race, Hispanic Origin, and Age: 2000 and 2008). Individuals aged sixty-five and over numbered 38.9 million in 2008. See A PROFILE OF OLDER AMERICANS, *supra* note 240, at 3.

242. *The Labor Market in the Great Recession*, *supra* note 232, at 9; see also Mitra Toossi, *Labor Force Projections to 2018: Older Workers Staying More Active*, MONTHLY LAB. REV., Nov. 2009, at 30, 30, available at <<http://www.bls.gov/opub/mlr/2009/11/art3full.pdf>> (“With the aging of the baby-boom generation, defined as persons born between 1946 and 1964, the older age cohorts are expected to make up a much larger share of the labor force.”).

243. *The Labor Market in the Great Recession*, *supra* note 232, at 9.

244. See AM. ASS’N OF RETIRED PERSONS PUB. POLICY INST., FACT SHEET 193, THE EMPLOYMENT SITUATION, MAY 2010: OLDER WORKER UNEMPLOYMENT AND DURATION OF UNEMPLOYMENT MOVE UPWARD 4 tbl.2 (2010) [hereinafter THE EMPLOYMENT SITUATION, MAY 2010], available at <<http://assets.aarp.org/rgcenter/ppi/econ-sec/fs193-employment.pdf>>.

245. *Id.*

246. *Id.*

Table 11**Employment Rates by Age²⁴⁷**

Period	16-24	25-54	55+
Dec. 2007	52.1	79.7	37.7
Dec. 2008	49.4	77.5	37.9
Dec. 2009	44.6	74.7	37.0
May 2010	45.5	75.2	37.7
Decline	-6.6	-4.5	0

This age-based pattern comports with a common phenomenon in recessions. More specifically, during recessions, demand for younger workers declines significantly.²⁴⁸ Labor economists attribute this to the lower skill and experience levels of this group.²⁴⁹ Moreover, as explained further below, pressures to delay retirement – including a significant drop in retirement security – kept many older employees in the workplace during the recession, drawing a paycheck.²⁵⁰ As with workers in the U.K., during the global financial crisis, the employment rate of older American workers tended not to suffer as much as that of other age groups. Thus, an initial assessment of the American system’s efforts at employment promotion for older workers appears favorable. At least with respect to this group, significant numbers of a potentially vulnerable population were able to remain employed during a severe and extended economic downturn.

Unemployment rates, calculated by determining that percentage of the labor force actively engaged in a search for work, superficially indicate older workers fared better during the recession. Older worker unemployment rates throughout the recession have been lower than those for young and prime age workers.²⁵¹ This is not surprising, as older workers are typically those with the most experience and often those who have found long-term jobs.²⁵² A review of average unemployment rates by age

247. *Id.*

248. See Steven F. Hipple, *The Labor Market in 2009: Recession Drags On*, MONTHLY LAB. REV., Mar. 2010, at 3, 4, available at <<http://www.bls.gov/opub/mlr/2010/03/art1full.pdf>>.

249. *Id.* at 4.

250. See ALICIA H. MUNNELL ET AL., CTR. FOR RETIREMENT RESEARCH AT BOSTON COLL., ISSUE BRIEF NO. 9-2, RECESIONS AND OLDER WORKERS 2 (2009), available at <http://crr.bc.edu/images/stories/Briefs/ib_9-2.pdf>.

251. See Heidi Shierholz, *Job Creation at a Glacial Pace*, ECONOMIC POLICY INST. (Jul. 2, 2010), <http://www.epi.org/publications/entry/job_creation_at_a_glacial_pace/> (“Older workers (age 55+) have seen the lowest unemployment rates throughout the downturn.”).

252. See DAVID ROSNICK, CTR. FOR ECON. & POLICY RESEARCH, ISSUE BRIEF, THE ADULT

from 1981 through 2010 found unemployment rates skewed heavily toward younger workers.²⁵³ During that period, those under twenty experienced an average unemployment rate of over 15 percent while those thirty-five and over had an average rate of unemployment of less than 5 percent.²⁵⁴

The overwhelming advantage older workers appear to possess, however, diminishes somewhat when one considers additional facts. First, older worker unemployment reached record levels in 2009.²⁵⁵ In raw numbers, in 2009, on average 1.5 million employees aged fifty-five to sixty-four were unemployed each month; the 2009 monthly figure for employees aged sixty-five and over was 421,000.²⁵⁶

Second, since the global financial 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.²⁵⁷ Between December 2007 and August 2010, the unemployment rate for older workers increased by about 128 percent.

RECESSION: AGE-ADJUSTED UNEMPLOYMENT AT POST-WAR HIGHS 2 (July 2010), *available at* <www.cepr.net/documents/publications/ur-2010-07.pdf>.

253. *Id.*

254. *Id.* An accurate comparison of the unemployment rates associated with the Great Recession and those of earlier recessions requires adjusting the figures for age to account for how much the labor force has aged over time. *Id.* On an age adjusted basis, the overall unemployment rates during the current recession are the highest and have lasted longest of any recession since the Great Depression. *Id.* at 1-3.

255. See RICHARD W. JOHNSON & CORINA MOMMAERTS, RETIREMENT POLICY PROGRAM, URBAN INST., HOW DID OLDER WORKERS FARE IN 2009?, RETIREMENT POLICY PROGRAM, URBAN INSTITUTE, at v (2010) [hereinafter HOW DID OLDER WORKERS FARE?], *available at* <http://www.urban.org/UploadedPDF/412039_older_workers.pdf> (“The 2009 unemployment rate was 7.2 percent for men age 55 to 64 and 6.7 percent for men age 65 and older. For women, the 2009 unemployment rate was 6.0 percent at age 55 to 64 and 6.1 percent at age 65 and older.”).

256. *Id.* at v. Actually, in August 2010, fourteen months after the official end of the recession in the U.S., the unemployment rate for workers aged fifty-five and over reached 7.3 percent, a new record. See AM. ASS’N OF RETIRED PERSONS PUB. POLICY INST., FACT SHEET 202, THE EMPLOYMENT SITUATION, AUGUST 2010: SHARP RISE IN UNEMPLOYMENT AMONG OLDER MEN 1, 2 fig.1 (2010) [hereinafter THE EMPLOYMENT SITUATION, AUGUST 2010], *available at* <<http://assets.aarp.org/rgcenter/ppi/econ-sec/fs202-economic.pdf>> In numerical terms, more than 2.2 million older workers were unemployed in August 2010. *Id.* at 1.

257. See THE EMPLOYMENT SITUATION, AUGUST 2010, *supra* note 256, at 3.

Table 12

Unemployment Rates by Age²⁵⁸

Period	16-24	25-54	55+
Dec. 2007	11.8	4.1	3.2
August 2010	18.1	8.5	7.3
% change	53.4%	107.3%	128.1%

Third, once unemployed, older American workers, like those in Australia and the U.K., tend to experience longer bouts of unemployment.²⁵⁹ A recent Bureau of Labor Statistics report examined the experience of long term joblessness for different age groups. That study determined younger workers have a lower probability of remaining unemployed for twenty-seven weeks or more as compared with their older counterparts.²⁶⁰ This pattern is evident throughout the recession and its aftermath. In February 2010, for example, the percent of workers aged sixteen to twenty-four unemployed twenty-seven weeks or over was 28.5 percent while for those fifty-five and older it was 49.1 percent.²⁶¹ In February 2010, the average duration of joblessness for workers sixteen to twenty-four years old was 23.3 weeks compared with 35.5 weeks for those fifty-five and above.²⁶² These statistics indicate significant weaknesses in the American system of employment promotion for a subgroup of older workers.

258. *Id.* December 2007 is the designated beginning of the Great Recession. See *supra* note 235.

259. THE EMPLOYMENT SITUATION, AUGUST 2010, *supra* note 256, at 2; see also Bureau of Labor Statistics, U.S. Dep't of Labor, *Record Unemployment among Older Workers Does Not Keep Them Out of the Job Market*, ISSUES IN LABOR STATISTICS, SUMMARY 10-04, Mar. 2010, at 1 [hereinafter *Record Unemployment among Older Workers*], available at <<http://www.bls.gov/opub/ils/pdf/opbils81.pdf>> (“... [O]lder persons who do become unemployed spend more time searching for work.”).

260. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Long-Term Unemployment Experience of the Jobless*, ISSUES IN LABOR STATISTICS, SUMMARY 10-05, Jun. 2010, at 2, available at <<http://www.bls.gov/opub/ils/pdf/opbils82.pdf>> (“Once unemployed, however, younger workers actually have a relatively low probability of remaining jobless for a half year or more.”).

261. See *Record Unemployment among Older Workers*, *supra* note 259, at 1.

262. *Id.*

Table 13
Percentage of Unemployment Lasting Twenty-Seven Weeks or More²⁶³

Period	16-24	25-54	55+
2007	11.9	19.9	27.7
2008	13.8	21.8	25.7
2009	23.3	33.4	39.4
2010	28.5	41.3	49.1

Age related-differences in unemployment duration, apparent not only in the U.S. but also in Australia and the U.K., are not well understood. It could be that older workers are less mobile than younger workers, may search for jobs less intensively, or may be more selective concerning available opportunities.²⁶⁴ Employers may hesitate to employ older workers, fearing their wages will be too high or out of concern that older workers lack relevant skills.²⁶⁵ Older workers may also be experiencing age discrimination in employment, a topic discussed below.²⁶⁶

Further complexity emerges from the unemployment statistics when one considers the gender, race, ethnicity, and educational level of older workers. Regarding gender, following the pattern for the entire labor force, older men experienced higher unemployment than older women.²⁶⁷ This gender-differentiated pattern, which was larger for younger groups, is attributable to the gender composition of the industries hit hardest by the recession, including construction and manufacturing.²⁶⁸

The recession also produced far greater unemployment for older workers who are racial or ethnic minorities, and those with limited education, though the differences are greater among men than women.²⁶⁹

263. *Id.*

264. See RICHARD W. JOHNSON, RETIREMENT POLICY PROGRAM, URBAN INST., RISING SENIOR UNEMPLOYMENT AND THE NEED TO WORK AT OLDER AGES 6 (2009), available at <http://www.urban.org/UploadedPDF/411964_senior_unemployment.pdf>.

265. *Id.*

266. See *infra* section IV(D).

267. See HOW DID OLDER WORKERS FARE?, *supra* note 255, at 4-5. In 2009, for example, the average monthly unemployment rate for men aged fifty-five to sixty-one was 7.3 percent; the corresponding rate for women in that age range was 4.5 percent. *Id.* at 4. Similarly, during the same year, the average monthly unemployment rate for men aged sixty-two to sixty-four was 6.6 percent; the rate for women in that age group was 5.9 percent. *Id.*

268. *Id.* at 7.

269. *Id.* at 9-11.

For example, in 2009, the average monthly unemployment rate for men aged fifty-five to sixty-four was 11.4 percent for Hispanics, 9.7 percent for African-Americans, and 6.3 percent for non-Hispanic whites.²⁷⁰ For women in the same age range, the unemployment rate was 8.7 percent for Hispanics, 7.1 percent for African-Americans, and 5.6 percent for non-Hispanic whites.²⁷¹

As for educational level, in 2009, the average monthly unemployment rate for men aged fifty-five to sixty-four who did not complete high school was 12.1 percent compared with 4.7 percent for those who were college graduates.²⁷² The 2009 rates for women were 9.9 percent for those who did not complete high school compared with 4.5 percent for those who were college graduates.²⁷³

In sum, a review of employment and unemployment statistics reveals many American older workers remained in the labor force during the global financial crisis. While older worker employment rates were not affected as much as those of younger workers, older worker unemployment increased dramatically. Additionally, among older workers, unemployment struck disproportionately, with disparities often tracking factors associated with vulnerability such as race,²⁷⁴ ethnicity,²⁷⁵ and education level.

B. Measures of Vulnerability: Part-Time Work, Multiple Jobs, Self-Employment, Atypical Work, and Discouraged Workers

Employment and unemployment rates only provide a partial picture of the state of the labor force and the economy at-large. In this subsection several other measures are considered as indicative of economic health or hardship. The first is the rate of those employed part-time for economic reasons, also known as underemployment.²⁷⁶ This measure captures those

270. *Id.* at 10.

271. *Id.*

272. *Id.*

273. *Id.*

274. For additional information on how African Americans forty-five years old and over were affected by the Great Recession see REBECCA PERRON, AM. ASS'N OF RETIRED PERSONS, AFRICAN AMERICAN EXPERIENCES IN THE ECONOMY: RECESSION EFFECTS MORE STRONGLY FELT (2010) [hereinafter AFRICAN AMERICAN EXPERIENCES IN THE ECONOMY], available at <<http://assets.aarp.org/rgcenter/econ/economyaa.pdf>>.

275. For additional information on the occupational challenges of older Hispanic workers see THE URBAN INST. & AM. ASS'N OF RETIRED PERSONS, 50+ HISPANIC WORKERS: A GROWING SEGMENT OF THE U.S. WORKFORCE (2009), available at <http://assets.aarp.org/rgcenter/econ/hispanic_workers_09.pdf>.

276. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Involuntary Part-Time Work on the Rise*, ISSUES IN LABOR STATISTICS, SUMMARY 08-08, Dec. 2008, at 1, available at <www.bls.gov/opub/ils/pdf/opbils71.pdf>.

workers who would prefer to work full-time yet are involuntarily working part-time due to slack economic conditions causing a cut in their hours or their inability to find full-time work.²⁷⁷ Such workers, especially if they are considered temporary employees or employees not provided with the benefits of full-time workers, are for the purpose of this article considered to be engaged in precarious work.²⁷⁸

Older workers considering phased retirement might willingly choose to work part-time.²⁷⁹ Yet a percentage of older workers are involuntary part-time workers, and that percentage has more than doubled since the recession began. In December 2007 only 2.4 percent of American workers aged fifty-five and over were involuntarily engaged in part-time work.²⁸⁰ In June 2010, 4.9 percent of workers aged fifty-five and up were involuntarily working part-time.²⁸¹ In raw numbers, this represents over 1.2 million older workers.²⁸²

A recent study bolsters concern about this population. Reviewing the employment status of workers aged fifty-five and over from 1987 through 2008, the study found that the percentage of older workers employed full-time/full year steadily increased through 2007.²⁸³ The trend reversed in 2008, with older workers still more likely to work but less likely to be working full-time/full year during that first year of the economic downturn.²⁸⁴ Thus, more older workers were remaining in the labor force "but increasingly in part-time rather than full-time jobs."²⁸⁵

277. *See id.*

278. *See* Frazer & Sargeant, *supra* note 76, at 3 (noting that "[p]art-time work may be relevant to the issue of precariousness as two-thirds of part-time workers are casuals.").

279. *See* THE EMPLOYMENT SITUATION, MAY 2010, *supra* note 244, at 4.

280. *Id.*

281. *See* KHARY J. COOK & PHYLLIS L. LOTT, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT & EARNINGS, July 2010, at 37 tbl. A-27 [hereinafter EMPLOYMENT & EARNINGS], available at <www.bls.gov/opub/ee/empearn201007.pdf>.

282. *Id.* In the U.S., the likelihood of involuntarily working part-time diminishes with age. *See id.*; *see also* Jenny Marljar, *Underemployed Report Spending 36 % Less than Employed*, GALLUP (Feb 23, 2010), <<http://www.gallup.com/poll/125960/underemployed-report-spending-less-employed.aspx>> (noting that workers eighteen to twenty-nine are almost twice as likely to be underemployed as older workers).

283. *See* Craig Copeland, Emp. Benefit Research Inst., *Employment Status of Workers Ages 55 and Older, 1987-2008*, EBRI NOTES, Mar. 2010, at 2, 2 available at <[ebri.org/pdf/notespdf/EBRI_Notes_03-Mar10.EmpStat.pdf](http://www.ebri.org/pdf/notespdf/EBRI_Notes_03-Mar10.EmpStat.pdf)>.

284. *Id.* The percentage of older workers employed full-time/full year increased steadily from 54.2 percent in 1993 to 66.0 percent in 2007 but declined in 2008 to 63.9 percent. *Id.* The percentage of older workers working part-time/full year remained constant in 2008 at 13-14 percent. *Id.* The percentage of older workers working only part-year (either full or part-time) increased in 2008 to 22.7 percent from 20.9 percent in 2007. *Id.*

285. *See* Press Release No. 869, Emp. Benefit Research Inst., *Older Workers Trending Toward More Part-Time Work* (Mar. 16, 2010), available at <<http://www.ebri.org/pdf/PR.869.Notes.Mar-10.EmpStat.Final.pdf>>.

Another indicator of economic health and hardship is the rate of those working who hold multiple jobs. Holding more than one job is an indication that a worker cannot find a job that pays sufficient wages or provides sufficient hours.²⁸⁶ This rate increased for some older workers between June 2009 and June 2010. In June 2009, 4.7 percent of workers aged fifty-five to sixty-four held multiple jobs.²⁸⁷ In June 2010, the rate had increased slightly to 4.9 percent.²⁸⁸ In raw numbers, in June 2010 over one million workers aged fifty-five to sixty-four held multiple jobs.²⁸⁹

During a recession, an increase in self-employment is sometimes seen as a measure of economic hardship, indicating that some number of workers have lost and been unable to replace their jobs.²⁹⁰ Self-employment, however, is difficult to measure because the Bureau of Labor Statistics only counts as self-employed those workers who are “unincorporated workers employed in their own business, profession, trade, or farm.”²⁹¹ Once an employee incorporates his or her business, he or she is counted as an employee of that business.²⁹² Nonetheless, since the start of the recession, there has been a slight increase in the number of workers aged fifty-five and up who are counted as self-employed. In December 2007, a little less than 2.6 million older workers, 10 percent of older non-agricultural workers, were counted as self-employed.²⁹³ In May 2010, close to 2.9 million older workers were counted as self-employed, 10.5 percent of non-agricultural workers aged fifty-five and over.²⁹⁴

In the U.S., there is a dearth of current data on contingent, flexible or alternative employment arrangements. Anecdotally, it appears the recession has significantly boosted the ranks of those working in jobs described as temporary or project based.²⁹⁵ Some of these workers are characterized as independent contractors; others may be employees of temporary agencies or seasonal workers hired directly by their employers. It is difficult to say whether a disproportionate number of older workers fall into these

286. See THE EMPLOYMENT SITUATION, MAY 2010, *supra* note 244, at 4-5.

287. See EMPLOYMENT & EARNINGS, *supra* note 281, at 49 tbl.A-39.

288. *Id.* Interestingly, the rate of multiple job holders aged sixty-five and over decreased between June 2009 and June 2010. The rate for June 2009 was 3.4 and for June 2010 was 2.8 percent. *Id.*

289. *Id.*

290. See THE EMPLOYMENT SITUATION, MAY 2010, *supra* note 244, at 4-5.

291. *Id.* at 5.

292. *Id.*

293. *Id.*

294. *Id.*

295. See Michael Luo, *Recession Adds to Appeal of Short-Term Jobs*, N.Y. TIMES, Apr. 19, 2010, at A14 available at: <http://www.nytimes.com/2010/04/20/business/economy/20contractor.html> (“What is known as “contingent work,” or “flexible” and “alternative” staffing arrangements, has proliferated, although exact figures are hard to come by because of difficulties in tracking such workers.”).

categories.²⁹⁶ A 2005 study, however, did find those classified as independent contractors more likely to be age thirty-five or over.²⁹⁷ In terms of numbers, a 2006 Government Accountability Office report, using a broad definition of contingency – workers who do not have standard full-time employment – estimated contingent workers, including independent contractors, constituted almost one-third of the 2005 workforce or 42.6 million people.²⁹⁸

Finally, regarding the discouragement effect mentioned in the Australia and U.K. sections,²⁹⁹ there has been a disturbing increase in the proportion of American discouraged workers who are older workers. These are individuals who are not in the labor force – they are not employed nor are they actively looking for work.³⁰⁰ However, they report that they want a job and that their reason for not looking is discouragement over their job prospects.³⁰¹ In June 2009, workers fifty-five and over comprised 15 percent of discouraged workers.³⁰² By June 2010, their representation among discouraged workers had increased to almost 24 percent.³⁰³

The figures reviewed above evidence a labor market greatly affected by the economic downturn and cast a troubling light on U.S. efforts at employment promotion. A recent study, however, provides even more cause for concern. That study indicates that the serious labor market effects witnessed since the recession began in December 2007 are out of

296. The last Bureau of Labor Statistics study of contingent and alternative employment arrangements was published in 2005, using data from February of that year. See News Release, USDL 05-1433, Bureau of Labor Statistics, U.S. Dep't of Labor, Contingent and Alternative Employment Arrangements, February 2005 (Jul. 27, 2005), available at <www.bls.gov/news.release/pdf/conemp.pdf>. Using a common definition of contingency – workers who do not expect their jobs to last – there were 5.7 million contingent workers, about 4.1 percent of total employment. *Id.* at 3, tbl.1. Fifty-five percent of these workers “would have preferred a permanent job.” *Id.* at 3. The study found contingent workers were twice as likely as their non-contingent counterparts to be young, defined as under the age of twenty-five. *Id.*

297. *Id.* at 4. In February 2005 there were 10.3 million independent contractors, 7.4 percent of total employment. *Id.* at 1.

298. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, U.S. SENATE: EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 10 (2006), available at <<http://www.gao.gov/new.items/d06656.pdf>>. A recent Bureau of Labor Statistics study of the temporary help services industry found that between 1990 and 2008, the number of workers employed in the temporary help services industry increased from 1.1 to 2.3 million people. See Tian Luo et al., *The Expanding Role of Temporary Help Services*, MONTHLY LAB. REV., Aug. 2010, at 3, 3, available at <<http://www.bls.gov/opub/mlr/2010/08/art1.full.pdf>>.

299. See *supra* Parts II-III.

300. See THE EMPLOYMENT SITUATION, MAY 2010, *supra* note 244, at 5.

301. *Id.*

302. See EMPLOYMENT & EARNINGS, *supra* note 281, at 48 tbl.A-38.

303. *Id.*

proportion to the economic distress experienced by corporations.³⁰⁴ Although real output dropped by 2.5 percent, corporate payrolls were slashed by 6 percent.³⁰⁵ Looking at the period between the fourth quarter of 2008 and the first quarter of 2010, the study found corporate profits increased by \$572 billion while wage payments declined by \$122 billion.³⁰⁶ In other words, many employers are using the recession as an opportunity for restructuring operations to maximize profits at the expense of workers.³⁰⁷

Discussions of the recession and its impact on American life frequently focus on the failure to regulate aspects of the American financial system or the overheated housing market. Less examined is another area short on regulation: the U.S. system of workplace law, which is predominantly market driven and insufficiently protective of employees' occupational and economic security, a topic relevant to evaluating the country's pursuit of employment promotion, an obligation it bears as an ILO member.³⁰⁸ That subject will be addressed below with a focus on older workers.³⁰⁹

C. Weak Job Security Protection

While 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,³¹⁰ the U.S. system of workplace law is far less

304. See Bob Herbert, *A Sin and a Shame*, N.Y. TIMES, Jul. 31, 2010, at A15 (quoting study author Professor Andrew Sum of Northeastern University's Center for Labor Market Studies).

305. See ANDREW SUM & JOSEPH MCLAUGHLIN, CTR. FOR LABOR MKT. STUDIES AT NORTHEASTERN UNIV., HOW THE U.S. 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 2 (2010), available at <http://www.clms.neu.edu/publication/documents/How_the_U.S._Economic_Output_Recession_of_20072009_Led_to_the_Great_Recession_in_Labor_Markets.pdf>.

306. *Id.* at 4.

307. See, e.g., Nelson D. Schwartz, *Industries Find Surging Profits in Deeper Cuts*, N.Y. TIMES, Jul. 25, 2010, at A1.

308. See Edwin R. Render, *How Would Today's Employees Fare in a Recession?*, 4 U. PA. J. LAB. & EMP. L. 37, 60-62 (2001) (positing in 2001 that constraints on employee dismissal are insufficiently protective of workers in the event of a recession).

309. See *id.* (noting that scant legal protections rendered older workers particularly vulnerable); see also Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511 (1997) (describing a trend in increasing rates of job displacement among older workers, and arguing that the Age Discrimination in Employment Act was not an effective limitation on opportunistic, downsizing of aging employees).

310. See generally Paul De Grauwe, *Flexibility Is Out: Now We See Rigidity's Virtues*, CTR. FOR EUR. POLICY STUDIES, CEPS COMMENTARY, Feb. 23, 2009, available at <<http://www.ceps.eu/ceps/download/1624>> (arguing that E.U. members' job security protections and a robust social safety net are advantages in countering the global financial crisis).

protective of job security than are the systems of most developed nations.³¹¹ Americans leave many facets of the employment relationship to the workings of the market.³¹² Although this factor no doubt affects workers regardless of age, older workers are increasingly at risk of job displacement³¹³ and especially vulnerable to long term unemployment.³¹⁴ When coupled with general declines in retirement security, a topic discussed below, weak job security protection, and the stress it occasions, may affect older workers differently, perhaps even more severely, than their younger colleagues.³¹⁵

The flexible system of labor market regulation in the U.S., as a legal matter, allows employers to treat non-unionized workers as expendable.³¹⁶ While employment discrimination is prohibited and some terms and conditions of employment are subject to statutory law, the vast majority of American workers – those without trade union representation, working in the private sector – are employed at will.³¹⁷ 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

311. The Organisation for Economic Cooperation and Development (OECD) ranks the U.S. last among developed countries in its rating of the strength of its members' protective workplace laws. *See How Do OECD Labour Markets Perform?*, *supra* note 20 (scroll to "employment protection," eighth on the page).

312. *See* ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES AND MATERIALS 100-01* (2007) [hereinafter *THE GLOBAL WORKPLACE*]; *see also* CHANTEL SHEAKS & MICHELLE WONG, *THE SLOAN CTR. ON AGING & WORK AT BOSTON COLL., GLOBAL POLICY BRIEF NO. 5, UNITED STATES PUBLIC POLICY 13* (2009) [hereinafter *UNITED STATES PUBLIC POLICY*], available at <http://www.bc.edu/content/dam/files/research_sites/agingandwork/pdf/publications/GPB05_UnitedStates.pdf> ("In the United States, many aspects of the employment relationship are unregulated, and, instead, left to the market.").

313. *See* ALICIA H. MUNNELL, ET AL., *CTR. FOR RETIREMENT RESEARCH AT BOSTON COLL., ISSUE BRIEF NO. 9-10, WHY ARE OLDER WORKERS AT GREATER RISK OF DISPLACEMENT?* (2009), available at <http://ctr.bc.edu/images/stories/Briefs/ib_9-10.pdf> (describing older workers' risk of job displacement as rising absolutely and relatively vis-à-vis prime age workers); Daniel Rodriguez & Madeline Zavodny, *Changes in the Age and Education Profile of Displaced Workers*, 56 *INDUS. & LAB. REL. REV.* 498 (2003) (concluding that older workers' relative risk of displacement has increased relative to younger workers).

314. *See supra* notes 259-62 and accompanying text.

315. *See e.g.* Ariel Kalil, et al., *Job Insecurity and Change Over Time in Health Among Older Men and Women*, 65B *J.S. GERONTOLOGY, SERIES B: PSYCHOL. SCI. & SOC. SCI.* 81-90 (2010) (finding the correlation between job insecurity and health different yet salient in both older men and women, and job insecurity "a potentially important threat to older adults' health and well-being"); *see also* KENNETH A. ROOT & ROSEMARIE J. PARK, *FORCED OUT: OLDER WORKERS CONFRONT JOB LOSS* (2009).

316. *See* William A. Douglas, *Labor Market Flexibility Versus Job Security – Why Versus?*, *NEW ECON. INFO. SERV., ORIGINAL INK*, Nov. 1, 2000, <http://www.newecon.org/LaborFlexibility_Douglas.html> (arguing that abolishing job security protections promotes not labor flexibility but labor expendability).

317. *See THE GLOBAL WORKPLACE*, *supra* note 312, at 99-100. The State of Montana is the only one of the fifty U.S. states to have legislatively modified the at-will doctrine. *MONT. CODE ANN.* §39-2-501 (2010).

discrimination or a very limited number of other proscriptions, is violated.³¹⁸ In many cases, advance notice is not required.³¹⁹ Nowhere in the U.S., even in cases of mass layoffs or plant closings, is severance pay statutorily required.³²⁰ Thus, it is easy and relatively inexpensive to dismiss most workers.

Before the global economic crisis, American workers' job security deficit was less tangibly evident.³²¹ In fact, empirical research done before the Great Recession indicates that despite the long-standing status of employment-at-will, American workers generally believed they had legal dismissal protections.³²² However, the surge in and prolonged nature of unemployment produced during the recession and its aftermath has proven revelatory.³²³ And the economic impact on older workers has been

318. THE GLOBAL WORKPLACE, *supra* note 312, at 102-03.

319. Except for a federal statute requiring sixty days' notice in advance of mass layoffs 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. The federal notice statute, the Worker Adjustment and Retraining Notification Act (WARN Act), only governs large employers – those employing 100 workers or more. See UNITED STATES PUBLIC POLICY, *supra* note 312, at 7; see also Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification Act (WARN) in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 64-70 (1993); Rachel S. Arnow-Richman, *Just Notice: Re-Reforming Employment At-Will for the Twenty-First Century*, 58 UCLA L. REV. 1 (2010) (arguing for a pay-or-play system whereby employers either provide notice before discharge or pay workers for the notice period).

320. See THE GLOBAL WORKPLACE, *supra* note 312, at 110.

321. There was, of course, prior to the recession a “widely documented trend toward short term employment, the rise of contingent labor, the rollback of employer sponsored health plans and benefits, a reversion to external labor market practices . . .” Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place*, 13 EMP. RTS. & EMP. POL'Y J. 143, 146, (2009) [hereinafter *Putting the Restatement in Its Place*]. Yet so long as unemployment, both long- and short-term, remained relatively low, the weakness of employees' legal protections remained to some extent theoretical. Many employers in the 1990s, for example, despite a lack of legal requirements, continued to offer “career-type jobs” with “prospects of continuity.” Sanford M. Jacoby, *Kenneth M. Piper Lecture: Melting Into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1220 (2000). Those who did lose a job soon found another “career-type” position. *Id.*

322. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002); Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997). Of course, economic hardship would be a legitimate reason for dismissal under a just cause regime. There is, however, evidence that many of the layoffs precipitated by the economic downturn were taken not due to economic hardship but in order to boost profit margins. See *supra* notes 304-07 and accompanying text; see also Jeffrey Pfeffer, *Lay Off the Layoffs: Our Overreliance on Downsizing is Killing Workers, the Economy – and Even the Bottom Line*, NEWSWEEK, Feb. 5, 2010, at 32, available at <<http://www.newsweek.com/2010/02/04/lay-off-the-layoffs.html>>. Unfortunately, American judges interpreting cause for discharge would be unlikely to allow human concerns to trump profit margins. See *Putting the Restatement in Its Place*, *supra* note 321, at 146 (noting that judicial innovation in support of job security is unlikely given normative “pressures to defer to businesses on their need to meet their bottom line.”); see also David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 561 (2010) (arguing for enactment of just cause protections that require employers contemplating large scale layoffs to demonstrate economic necessity).

323. U.S. workers' realization is reflected in recent surveys documenting increases in the

especially profound.³²⁴ Other than providing protection against age discrimination, however, American workplace law does little to ameliorate the increasing vulnerability of older workers. Yet, as discussed below, recent changes in doctrinal law have weakened protections against age bias, rendering it a less effective tool for blunting the harsh economic conditions older workers face.

D. Weakened Age Discrimination Protections

The Age Discrimination in Employment Act of 1967 (ADEA) protects persons forty years old and older from employment discrimination based on age.³²⁵ The ADEA's prohibitions apply to employers with twenty or more employees.³²⁶ Both employees and job applicants are protected by the statute.³²⁷ Unlike in the U.K., at the time of this writing, but in harmony with Australia, mandatory retirement is prohibited in most sectors in the U.S.³²⁸ In the U.S., one rarely finds workers who were lawfully forced to retire.³²⁹

Concern that older workers might be asked to waive their protections without sufficient information prompted the U.S. Congress to pass the Older Worker Benefit Protection Act of 1990 (OWBPA).³³⁰ The OWBPA establishes stringent requirements for the execution of enforceable waivers of ADEA claims.³³¹ Waivers, also known as releases, most commonly arise

proportion of Americans who feel their jobs are at risk and declines in the proportion of those professing a personal sense of job security. *See, e.g.,* Dennis Jacobe, *One in Five Americans Fear Job Loss in Next 12 Months*, GALLUP (Apr. 23, 2010), <<http://www.gallup.com/poll/127511/in-u.s.-fear-job-loss-double-pre-recession-level.aspx>>.

324. The recession has taken a particularly harsh economic toll on workers aged fifty to sixty-four, many of whom are still in the labor force but approaching retirement. Close to sixty percent of workers in this group report "they are in worse shape financially than they were before the recession." HOW THE GREAT RECESSION HAS CHANGED LIFE, *supra* note 236, at 42. Twenty-one percent "say they are in much worse shape." *Id.* Thus, one recent study concludes that the "age group that seems to have suffered the most" is comprised of workers aged fifty to sixty-four. *Id.*

325. 29 U.S.C. §§ 621-34 (2006).

326. *Id.* § 630(b).

327. *Age Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <<http://www.eeoc.gov/eeoc/publications/age.cfm>> (last viewed Mar. 14, 2011).

328. *See* Donald C. Dowling, *International HR Best Practice Tips: Toward a Functional Cross-Border Age-Discrimination Policy*, *Int'l HR J.*, Spring 2009, at 1.

329. There are exceptions to the mandatory retirement ban for certain high level executives and also those whose jobs involve safety, such as firefighters and police officers. *See* 29 U.S.C. § 630(j); *see also* MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 482 (7th ed. 2008) (describing exceptions for bona fide executives, and state and municipal law enforcement officers and firefighters).

330. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS*, *available at*: http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html > (last modified July 15, 2009).

331. The OWBPA enumerates seven factors that must be satisfied in order for age discrimination

in the context of layoffs or other terminations of employment.³³² Although no U.S. law mandates the provision of severance pay, when terminations occur, many U.S. employers attempt to stave off litigation by paying severance to workers in exchange for a release of all claims.³³³

Despite these seemingly robust safeguards, which initially indicate American defense of a fundamental right at work, there is reason for concern about older workers' legal protection from age bias. Recent U.S. Supreme Court decisions have weakened the ADEA's protections, making it more difficult to prove age discrimination than other forms of discrimination. Dianna Johnston, Assistant Legal Counsel at the U.S. Equal Employment Opportunity Commission (EEOC), recently expressed her agency's concern about the direction of doctrinal age bias law at a Public Briefing on Age Discrimination in Employment in the Context of the Economic Crisis, an event hosted by the U.S. Civil Rights Commission. Ms. Johnston noted that the Court "increasingly minimizes the significance of age discrimination," has weakened the ADEA, and has "complicated [the EEOC's] efforts to enforce it."³³⁴

Key decisions include *Gross v. FBL Financial Services, Inc.*,³³⁵ a disparate treatment suit in which the Court held that mixed motives claims – claims involving both permissible and discriminatory reasons – are not cognizable under the ADEA.³³⁶ Instead, the Court held that age discrimination plaintiffs must prove that age was a "but for" cause of the challenged employment decision.³³⁷ In other words, unlike plaintiffs suing for other types of discrimination, age bias plaintiffs asserting disparate treatment must demonstrate that age had a decisive impact on the employer's actions, even in cases where the employer admits that age

claim waivers to be considered knowing and voluntary, a prerequisite for enforceability. *Id.* (scroll to pt. IV.A, question 6, "What makes a waiver of age claims knowing and voluntary?"). These include requirements that the waiver be supported by valuable consideration, provide for at least twenty-one days for the worker to evaluate the offer, and advise the worker to consult with a lawyer. *Id.* Additional release of claims requirements exist under the OWBPA for group layoffs of older workers. *Id.* (scroll to pt. IV.B). In such cases, employers must provide sufficient information to older workers to enable them to determine "whether older employees were terminated while younger ones were retained." *Id.*

332. *Id.* (scroll down to pt. I-II).

333. *Id.*

334. Statement of Dianna B. Johnston, Assistant Legal Counsel, U.S. Equal Emp't Opportunity Comm'n, before the U.S. Comm'n on Civil Rights 2 (June 11, 2010) [hereinafter *Johnston Statement*] (on file with the author); see also Transcript of Age Discrimination in Employment in the Current Economic Crisis Briefing Before the U.S. Comm'n on Civil Rights 13 (June 11, 2010) (statement of Dianna Johnston, Assistant Legal Counsel, EEOC), available at <<http://www.usccr.gov/calendar/transcript/061110ccr1.pdf>>.

335. 129 S. Ct. 2343 (2009).

336. *Id.* at 2350.

337. *Id.* at 2351.

motivated its decision in part.³³⁸ As noted by Dianna Johnson, “The *Gross* decision was a startling departure from decades of settled precedent developed in federal district and intermediate appellate courts. It erected a new, higher (and potentially insurmountable) legal hurdle for victims of age-based employment decisions.”³³⁹

Congress is presently considering legislation that would overturn *Gross*. The Chair of the EEOC, Jacqueline Berrien, recently testified in favor of the proposed legislation, noting it would ensure age discrimination plaintiffs bringing disparate treatment claims are given the same “core protections” as plaintiffs bringing race, color, national origin, religion, and sex discrimination claims.³⁴⁰

Another disparate treatment case of concern for older workers is the Supreme Court’s decision *Kentucky Retirement Systems v. EEOC*.³⁴¹ At issue in that case was a state disability retirement plan that tied benefit eligibility and calculation to normal retirement age (age fifty-five).³⁴² Under the plan, the plaintiff, an employee who worked beyond normal retirement age and was disabled at sixty-one years old, received no credit for imputed service, defined as years left until fifty-five, and thus had lower benefit payments than would a similarly situated younger employee.³⁴³ Even though the state plan clearly relied on age, a prohibited factor, the Court ruled that the plan was not facially discriminatory because the employer was motivated by pension status, not age.³⁴⁴ To prove age discrimination, the plaintiff would need to show animus beyond the use of age as a factor in disability retirement benefit determination.³⁴⁵ This additional burden, which plaintiffs proving other forms of disparate treatment discrimination do not bear, may doom many ADEA claims because it is rare to find direct evidence of discriminatory animus.³⁴⁶

338. *Id.* at 2352.

339. *Johnston Statement*, *supra* note 334, at 5.

340. Statement of Jacqueline A. Berrien, Chair, U.S. Equal Emp’t Opportunity Comm’n, at Protecting Older Workers against Discrimination Act: Hearing on S. 1756 Before the S. Comm. on Health, Educ., Labor & Pensions, 111th Cong. (May 6, 2010) [hereinafter *Berrien Statement*], available at <http://www1.eeoc.gov/eeoc/events/berrien_protecting_older_workers.cfm?renderforprint=1>.

341. 554 U.S. 135 (2008).

342. *Id.* 139-40.

343. *See id.* at 40.

344. *Id.* at 143-48.

345. *Id.* at 150.

346. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”); *see also* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961-62 (1999) (describing the way in which equal employment opportunity compliance strategies mask discrimination and hinder detection of workplace bias).

A final Supreme Court decision involves ADEA disparate impact claims, which allow plaintiffs to challenge neutral employment practices that fall more harshly on older workers. While the Court in *Smith v. City of Jackson*³⁴⁷ approved the use of this theory, it adopted an employer defense – the reasonable factor other than age defense – that appears easier for employers to meet than the business necessity defense available in disparate impact claims brought on grounds apart from age.³⁴⁸ Proving one’s neutral policy or practice is reasonable will likely prove far easier than proving one’s neutral practice is necessary.³⁴⁹

These three decisions, which make it more complex and burdensome for age discrimination plaintiffs to bring suit in comparison to those suing for discrimination on other grounds, indicate that at least some Supreme Court justices view age discrimination as less salient a societal problem than other forms of bias.³⁵⁰ Yet there is every indication that stereotypes based on age are still prevalent.³⁵¹ Moreover, age discrimination charges filed with the EEOC have recently increased dramatically. For example, in fiscal year 2008, the number of age discrimination charges increased almost 30 percent over the prior year, representing over 25 percent of all charges received.³⁵² In fact, since 1998 age discrimination charges are up 61 percent.³⁵³ In raw numbers, in fiscal year 2009, the EEOC received 22,778 age discrimination charges.³⁵⁴

In short, flimsy job security and weakened age discrimination protections render many older workers vulnerable, even when they are classified as permanent, full-time employees. That vulnerability is exacerbated by declining retirement security, addressed next, a topic relevant to social protection, and more specifically to American efforts

347. 544 U.S. 228 (2005).

348. See Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49, 51 (2009) (“[T]he Court has indicated that RFOA will not be difficult to prove, and lower courts are so holding.”).

349. *Id.* at 74-77.

350. See *Johnston Statement*, *supra* note 334, at 5.

351. See Statement of Michael Campion, Professor of Mgmt., Purdue Univ. at the EEOC Meeting: Age Discrimination in the 21st Century – Barriers to the Employment of Older Workers (Jul. 15, 2009), available at <<http://www.eeoc.gov/eeoc/meetings/7-15-09/campion.cfm>> (discussing ageist stereotypes and how they affect older workers); see generally AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS (Todd D. Nelson ed., 2002).

352. See *Johnston Statement*, *supra* note 334, at 2.

353. *Id.* As noted by the EEOC’s Ms. Johnston, not all age discrimination victims file charges and many charges are not meritorious. *Id.* at 3. The EEOC uses a merit factor rate as a gauge for assessing charge worthiness; this rate includes “all charge resolutions in which the charging party received a benefit.” *Id.* Ms. Johnston noted that “[s]ince 2005, the merit factor rate for ADEA charges has averaged 19.2 percent.” *Id.*

354. *Id.*

aimed at income security for older workers.

E. Declining Retirement Security

American retirement security has been declining for many years. In great part, this is due to a shift in the character of pension coverage. While in the U.S., employers need not provide pensions, modernly many do. Over the last few decades, however, there has been a precipitous decline in employers offering defined benefit retirement plans, which provide a guaranteed lifetime benefit to retirees.³⁵⁵ Increasingly, those employers who provide retirement plans offer defined contribution plans, in which payments from employer contributions and/or employee deferred salary are placed into individual accounts, which are then invested, in many cases, in the stock market.³⁵⁶ Defined contribution plans allocate risk away from employers and onto employees.³⁵⁷

The shift itself has been monumental. In 1985, 80 percent of those working full-time for large and medium private enterprises participated in traditional, defined benefit plans, and 41 percent were participants in defined contribution plans.³⁵⁸ In March 2009, only 24 percent of those working full-time for private enterprises of all kinds were participants in defined benefit plans, while 51 percent of full-time workers participated in defined contribution retirement plans.³⁵⁹

Shifting risk and retirement savings responsibility onto employees has clearly affected older worker labor force participation in the long term, which, as noted above, has been increasing over the years.³⁶⁰ The recent financial crisis, however, also produced great losses in the retirement

355. See ALICIA H. MUNNELL & DAN MULDOON, CTR FOR RETIREMENT RESEARCH AT BOSTON COLL., ISSUE BRIEF NO. 8-16, ARE RETIREMENT SAVINGS TOO EXPOSED TO MARKET RISK? 2 (2008), available at <http://crr.bc.edu/images/stories/Briefs/ib_8-16.pdf>.

356. See STEVEN A. SASS ET AL., CTR. FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, ISSUE BRIEF NO. 10-3, WORKERS' RESPONSE TO THE MARKET CRASH: SAVE MORE, WORK MORE? 1 (2010)[hereinafter WORKERS' RESPONSE TO THE MARKET CRASH], available at <http://crr.bc.edu/images/stories/Briefs/ib_10-3.pdf>; Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331-33 (2007) [hereinafter *The Shift From Defined Benefit Plans*].

357. See *The Shift from Defined Benefit Plans*, *supra* note 356, at 333. Defined contribution plans also shift financial decision-making responsibility from sponsors of the plan to participants (employees), a task many participants are ill-equipped to manage. *Id.* at 334-35.

358. See Hilery Z. Simpson, *How Does Your 401(k) Match Up?*, U.S. BUREAU OF LABOR STATISTICS n.9 (May 26, 2010), <<http://www.bls.gov/opub/cwc/print/cm20100520ar01p1.htm>>.

359. *Id.*

360. See *Record Unemployment Among Older Workers*, *supra* note 259, at 1 (“[O]ne underlying reason behind the long-term rise in participation rates among the 55-years-and-older population is the move by employers to replace defined-benefit retirement plans with defined-contribution retirement plans, allowing employers to shift more responsibility for retirement income to the employee.”).

accounts of American workers, and those losses affect older worker retirement planning and well-being. Between September 2007 and May 2009 – recall the recession began in the U.S. in December 2007 – the value of American retirement accounts declined by 31 percent, losing \$2.7 trillion.³⁶¹

A recent survey of workers aged forty-five to fifty-nine, found notable declines in retirement wealth tied to the financial crisis and a significant increase in the age at which the respondents expected to retire.³⁶² Approximately 40 percent of the respondents reported they would retire later than they had planned to before the recession³⁶³ Similarly, a May 2010 survey conducted by the Pew Research Center found that 60 percent of workers aged fifty to sixty-one report the recession may delay their retirement.³⁶⁴ A little over one-third (35 percent) of the survey's worker respondents age sixty-two and older also reported delaying retirement due to the recession.³⁶⁵

Moreover, many employees who experienced financial distress during the recession prematurely withdrew funds from their retirement accounts, with financial penalties, in order to make house payments, and pay bills and the like. One study found nearly 20 percent of American workers aged forty-five and older tapped into these funds in 2009.³⁶⁶ The figure was 28 percent for Hispanics in that age group³⁶⁷ and 26 percent for African Americans age forty-five and up.³⁶⁸

Further exacerbating the impact of the recession on retirement savings was the decision of many employers to cease contributing to their employees' defined contribution plans. One analysis, which found that the majority of suspensions occurred between December 2008 and May 2009, concludes that enterprise liquidity concerns – the need for cash to ensure that current liabilities can be discharged – rather than profitability concerns drove many companies to suspend their contributions.³⁶⁹ That study posited

361. See Howard Iams et al., Fed. Interagency Forum on Aging Related Statistics, *Data Sources on the Impact of the 2008 Financial Crisis on the Economic Well-being of Older Americans*, AGING FORUM REPORT, Dec. 2009, at 1, available at <http://www.agingstats.gov/agingstatsdotnet/main_site/docs/DSOA_Aging_Brief.pdf>.

362. See WORKERS' RESPONSE TO THE MARKET CRASH, *supra* note 356, at 3.

363. *Id.*

364. See HOW THE GREAT RECESSION HAS CHANGED LIFE, *supra* note 236, at 69.

365. *Id.*

366. See REBECCA PERRON, Am. Ass'n of Retired Persons, RECESSION TAKES TOLL ON HISPANICS 45+: BOOMERS PARTICULARLY HARD HIT 6 (2010), available at <<http://assets.aarp.org/rgcenter/econ/hispeconomy.pdf>>.

367. *Id.*

368. See AFRICAN AMERICAN EXPERIENCES IN THE ECONOMY, *supra* note 274, at 5.

369. See ALICIA H. MUNNELL & LAURA QUINBY, CTR. FOR RETIREMENT RESEARCH AT BOSTON

that the ultimate impact of the suspensions, which affected at least 4.9 percent of defined contribution, or 401(k), plan participants,³⁷⁰ will depend on whether the cessation is made permanent or, instead, employer contributions are eventually restored.³⁷¹ If the former, fewer workers might participate in the plans and employees overall might be unable to amass sufficient income for retirement.³⁷² Either way, the employer actions are a potent reminder to employees that the financial risk associated with retirement savings falls on them and not their employers.³⁷³

Another factor relating to retirement security is the legislatively mandated, gradual rise in the age at which full old age benefits through the government's Social Security program are available to workers. Amendments to the program passed in 1983 ushered in an increase from sixty-five years of age, for those born in 1937 or earlier, to sixty-seven years of age for those born in 1960 or later.³⁷⁴ Those who retire sooner than their full retirement age see a sizable reduction in benefits. For example, a worker retiring at age sixty-two, the earliest one can retire and receive Social Security benefits, whose full retirement age is sixty-seven, will sustain a 30 percent reduction in benefits received.³⁷⁵

A final factor undercutting retirement security is a decline in the number of employers offering retirement medical insurance for their workers.³⁷⁶ The disappearance of such coverage and rising medical care costs leave retired workers vulnerable to economic disaster until they reach age sixty-five, the age when the government's Medicare older worker health insurance becomes available.³⁷⁷

COLLEGE, ISSUE BRIEF NO. 10-2, WHY DID SOME EMPLOYERS SUSPEND THEIR 401(K) MATCH? 3-4 (2010), available at <http://crr.bc.edu/images/stories/Briefs/IB_10-2.pdf>.

370. *Id.* at 3.

371. *Id.* at 5.

372. *Id.*

373. *Id.*

374. See U.S. SOC. SEC. ADMIN., RETIREMENT BENEFITS 6 (2011) (explaining that those born in 1942 or earlier are already eligible for full benefits and listing the full retirement ages and how they differ for people born from 1943 to 1960 and later), available at <<http://www.ssa.gov/pubs/10035.pdf>>.

375. See *Retirement Planner: Retirement Benefits by Year of Birth*, SOC. SEC. ONLINE, <<http://www.ssa.gov/retire2/agereduction.htm>> (last modified Feb. 9, 2011).

376. See PATRICK PURCELL, CONG. RESEARCH SERV., RL30629, OLDER WORKERS: EMPLOYMENT AND RETIREMENT TRENDS 5 (2009), available at <http://assets.opencrs.com/rpts/RL30629_20090916.pdf>.

377. See U.S. SOC. SEC. ADMIN., MEDICARE 4 (2011) (explaining that Medicare is available to those sixty-five and over and to those with disabilities, permanent kidney failure, or Lou Gehrig's disease), available at <<http://www.ssa.gov/pubs/10043.pdf>>.

F. A Note on the Safety Net

As noted above, while older workers are less likely than younger workers to experience unemployment, once unemployed, older workers are more likely to remain jobless than their younger counterparts.³⁷⁸ For example, in December 2009, 18 percent of unemployed workers aged twenty to twenty-four were unemployed for a year or more compared with more than 29 percent of those older than fifty-five.³⁷⁹

Unemployment benefits in the U.S., however, are only available for a maximum of ninety-nine weeks, and many of the long-term unemployed have exhausted their benefits.³⁸⁰ In June 2010, approximately 1.4 million Americans had been jobless for at least ninety-nine weeks.³⁸¹ The failure of the American safety net in the face of the current recession represents a significant deviation from the notion of decent work. The system in the U.S. insufficiently addresses the obligation of social protection.

G. U.S.: Conclusions

The data reveal that vulnerability has increased for older workers during the recession and its aftermath. While employment rates are stable, unemployment rates have hit historic highs, and older worker long-term unemployment is common and increasing. A trend toward a greater proportion of older workers working part-time has appeared, while the number of older workers involuntarily working part-time has doubled since December 2007. In the last year, the proportion of discouraged workers aged fifty-five and over has increased 62.5 percent. Troubling disparities among older workers based on race and ethnicity are apparent with respect to unemployment rates and retirement savings.

While statistics on casual, temporary, and atypical work are not available, there is every reason to believe such forms of employment have proliferated. Moreover, the American system of labor market regulation provides weak job security protection for all workers, even those with full-

378. See SCOTT S. GREENBERGER & DOUGLAS WALTON, PEW ECONOMIC POLICY GRP., *A YEAR OR MORE: THE HIGH COST OF LONG-TERM UNEMPLOYMENT 4* (2010) [hereinafter *A YEAR OR MORE*], available at <http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/PEW-Unemployment%20Final.pdf>; see also CHRISTINE RIORDAN, NAT'L EMP'T LAW PROJECT, *THE CRISIS OF LONG TERM UNEMPLOYMENT AND THE NEED FOR BOLD ACTION TO SUSTAIN THE UNEMPLOYED AND SUPPORT THE RECOVERY 6* (2010), available at <http://www.nelp.org/page/-/UI/2010/long_term.unemployment.fact.sheet.pdf?nocdn=1%20?nocdn=1>.

379. See *A YEAR OR MORE*, *supra* note 378, at 4.

380. See Michael Luo, *99 Weeks Later, Jobless Have Only Desperation*, N.Y. TIMES, Aug. 3, 2010, at A-1.

381. *Id.*

time, so-called permanent work. Age discrimination protections have been weakened, retirement security is declining, and the social safety net for the longest term unemployed is proving inadequate.

The U.S. falls short in pursuing for older workers three decent work objectives: employment promotion, social protection, and fundamental rights in the form of eliminating age discrimination.³⁸² Present conditions also support use in the U.S. of a more expansive definition of precarious employment than the definition used in Australia, the U.K., and many other countries. Directly responsive to the legal plight of American workers, Professor Katherine Stone includes within her definition of precarious employment not only workers in atypical employment relationships but also those steady, full-time employees who “lack a reasonable expectation of job security.”³⁸³ Such a definition is especially fitting for many American older workers, who in addition to dwindling job security and weakened age bias protection, cope with declining retirement security and an insufficient system of unemployment compensation.

V. CONCLUSIONS

In this article we have examined how older workers in three broadly similar countries have fared during the recession. The ILO’s concept of decent work has been used to draw the basis of comparison in terms of four dimensions: employment opportunities and participation; conditions of work, especially precarious work; labor regulation, especially regarding discrimination; and provision for income security both before and after retirement. It remains for us to draw comparisons of the state of decent work for older workers in the countries studied, and the lessons which our study has for the concept of decent work.

A. Similarities and Differences

The recession affected each country to a different extent. In terms of the impact on general employment, Australia is regarded as one of the least affected countries, the U.K. as having been moderately affected, and the U.S. as falling in the severely affected category.³⁸⁴ The response of national employers to the crisis varied significantly: in Australia, where memories

382. Consideration of the decent work agenda’s social dialogue obligation is beyond the scope of this article.

383. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 U.C.L.A. L. REV. 519, 542 (2001).

384. OECD, *EMPLOYMENT OUTLOOK 2010: MOVING BEYOND THE JOBS CRISIS* 32 tbl.1.2 (2010).

of skilled labor shortages were fresh, employers avoided labor shedding, while employers in the U.S. were “particularly aggressive about shedding labour in response to deteriorating business conditions.”³⁸⁵ Despite the differences in conditions in general labor markets, the effects of the recession on older workers in each country have been strikingly similar. In terms of employment participation, older workers have been among the least affected by the recession. Employment rates among older workers during the global recession have declined slightly in the U.K. (increasing for those past retirement age), remained steady in the U.S., and increased in Australia. The low impact on both employment and unemployment among older workers has been common among industrialized countries and represents a significant departure from the experience of earlier recessions.³⁸⁶ The exception here is the U.S., where older workers experienced accelerating rates of unemployment as the recession worsened. There is also evidence of a decline in hours worked, though again older workers have been affected less than younger groups.

The recession seems to have had a greater effect on the *quality* of work for older workers. For many, employment has become more fragile, inconstant, and insecure. In all three countries, older workers experience very high rates of long-term unemployment and high levels of underemployment. Older workers have been more able to stay in work than younger workers but, once unemployed, have found it much more difficult to find work, especially full-time work. It appears that the advantages of age (related to position and skills) are diminished or reversed as recession lengthens and intensifies.³⁸⁷ There are also significant gender differences, with women faring better than men in keeping or gaining jobs.

Furthermore, the recession has seen an increase in the proportion of older workers living on inadequate or precarious incomes through part-time and temporary contracts. In the U.K., a disproportionately large increase in part-time employment among the oldest workers may be associated with the recession, while the recession is likely to have affected the high percentage of older workers in seasonal and casual work. In the U.S., the recession has seen a near doubling in the proportion of older workers in involuntary part-time employment.

385. *Id.* at 32.

386. *Id.* at 21.

387. For example, in the U.S., of some 14.9 million unemployed in August 2010, greater than 2.2 million are aged fifty-five or over. Almost half of those older workers fall into the category of the long-term unemployed, those out of work and actively seeking employment for six months or longer. As reported in the *New York Times*, “[t]he unemployment rate in the group [fifty-five and over] – 7.3 percent – is at a record, more than double what it was at the beginning of the latest recession.” Motoko Rich, *For the Unemployed Over 50, Fears of Never Working Again*, N.Y. TIMES, Sept. 20, 2010, at A1.

Many of these effects have much to do with longer-term trends in employment among older workers, the trends being similar for all of the countries examined. People are staying in work longer, reversing the trend towards early retirement that was observable in the 1980s. This is part of a wider pattern among industrialized countries generally.³⁸⁸ In Australia, the U.K., and the U.S., the increase appears to be the combined result of falling age barriers (both legal and perceptual), increased opportunities for suitable work (especially part-time), and a greater need for older workers to support themselves and their dependents. Increased participation rates at older ages are a reflection of a change in engagement in the labor force, as older workers shift towards part-time work and self-employment.

In one sense, the increase in participation by older workers simply exposes them to the same kind of insecurities faced by younger age cohorts. As they shift toward part-time and other precarious work, the pattern of participation by older workers is becoming more like that of the youngest workers.³⁸⁹ Increasingly, older workers are in direct competition with younger workers for the very same jobs.³⁹⁰ In the past, many older workers, men especially, had been insulated from the insecurities of precarious work by both formal and informal job protections – by laws or collective agreements restricting dismissals and by institutional lay-off practices which prioritized length of service. However many of these protections have been dismantled in the name of deregulation and efficiency.

At the same time, older workers face additional vulnerabilities related to disability and discrimination. The evidence from all three countries shows very strongly that discrimination against older workers is endemic. This is reflected statistically in the high and increasing levels of discouraged older workers: those who have withdrawn from the labor force because of the unavailability of work due to perceived age bias. For the less skilled and members of racial or ethnic minorities, the vulnerabilities of age are compounded. And where levels of precariousness are high among older workers, the dislocation effects of recession are particularly strong as working choices are further reduced. As experience from previous recessions shows, the age-related effects intensify as the period of recession lengthens.

Stronger national differences emerge when we turn to labor regulation

388. *Id.*; see also OECD, *Statistical Annex, in EMPLOYMENT OUTLOOK 2010, supra* note 384, at 274-82 tbl.C, available at <<http://www.oecd.org/dataoecd/30/33/43272221.pdf>>.

389. See *supra* Part IV.B.

390. *Id.*

affecting older workers. All three countries have undergone significant dismantling of labor protections in the last two decades, although the process has been more recent and less intensive in Australia, and in both Australia and the U.K., the deregulatory process has to some extent been reversed by social democratic governments. Mandatory retirement has been illegal in both the U.S. and Australia for some time; although in the U.S., effective protection against age discrimination in employment has been diminished by court decisions which make it much more difficult to challenge discriminatory discharge based on age. Effective prohibition of involuntary retirement is now also timetabled for introduction in the U.K.

However such prohibitions, by themselves, do not greatly contribute to employment security for older workers. General labor standards, such as those restricting termination and layoff or requiring severance payments, are just as important in reducing or forestalling older worker vulnerability. Americans generally have been content to leave to the market most matters affecting terms and conditions of employment and dismissal. American employers are consequently free to manage without much legal constraint. Dismissal is relatively costless and, as detailed in Part IV, during the American Great Recession employers have acted opportunistically, shedding workers in great numbers at a time when corporate profits are robust. The American case is a cautionary tale about living by market principles. Market principles are a poor mechanism for pursuing decent work.

In the U.K., dismissal is restricted but during the current crisis, mandatory retirement has been legal. This, as noted in Part III, renders older workers vulnerable, creating a kind of contingent workforce that can be flexibly deployed (or not) depending on economic circumstances. While changes are imminent in the U.K., the phasing out of the default retirement age does not necessarily guarantee the end of mandatory retirement. Thus, we see in two of the three countries profiled, aspects of legal regulation have contributed to vulnerability.

The third, Australia, is attempting to take a different road. With the Fair Work Act 2009, Australia has recently taken steps to reintroduce a measure of effectively enforced minimum conditions for vulnerable workers and has also strengthened protections against discrimination. Will the Australian approach succeed? Even if Australian statistics appear robust, it will be awhile before we can attribute such results to government policies rather than serendipity or unforeseen consequences. Keeping decent work principles in mind, however, will help us evaluate results in the future.

Regarding social security, the differences between the three countries are manifold, each having adopted a combination of approaches to retirement incomes. There are also some strong similarities. All three countries have relatively high levels of private pension provision, with retirement incomes largely provided by private pensions and investments.³⁹¹ Because of this, older workers' exposure to financial loss in these countries has been particularly high: in 2008 losses in pension investment returns were 26 percent for Australia and the U.S., 17 percent for the U.K.³⁹² In these countries, investments for post-retirement remain exposed to further erosion through low earnings growth.

B. Decent Work Lessons

As developed by the ILO since 1999, and restated in 2008, the concept of decent work is founded on four pillars: fundamental principles and rights at work; employment and income opportunities; social protection and social security; and social dialogue and tripartism. The ILO has recently confirmed that these four objectives of the Decent Work Agenda are "inseparable, interrelated and mutually supportive."³⁹³ The development of the concept of decent work reflects the tendency of international labor law and the role of the ILO towards the expansion of international concern for the conditions of labor beyond minimal standards to embrace social justice and the improvement of wellbeing. Ever since the Declaration of Philadelphia in 1944, the ILO has recognized the need for working conditions to be underpinned by the protection of social security measures that provide basic levels of income and health.³⁹⁴ It is now recognized that the four objectives of decent work extend well beyond minimum standards to encompass dignity, security, and social justice.

391. OECD, PENSIONS AT A GLANCE 2009: RETIREMENT INCOME SYSTEMS IN OECD COUNTRIES 30 (2009) [hereinafter PENSIONS AT A GLANCE]. For figures on private pensions, see details for each country, *Country Highlights*, OECD, <http://www.oecd.org/document/49/0,3343,en_2649_34757_42992113_1_1_1_1,00.html#country_highlights> (last viewed Mar. 15, 2011). In the U.K., about 55 percent of post-retirement incomes are privately provided. For the U.S. and Australia, the figure is about 45 percent.

392. PENSIONS AT A GLANCE, *supra* note 391, at 33-34.

393. Int'l Labour Conference, Declaration on Social Justice for a Fair Globalization, ILO art. 1(B) (June 10, 2008) [hereinafter Declaration on Social Justice], available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_099766.pdf>; see also Resolutions adopted by the International Labour Conference at Its 99th Session (2010), *Conclusions Concerning the Recurrent Discussion on Employment*, ¶ 42 (June 16, 2010), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_143164.pdf>.

394. Emmanuel Reynaud, *Social Security for All: Global Trends and Challenges*, 27 COMP. LAB. L. & POL'Y J. 123, 140 (2006).

The concept of decent work and its pillars was elaborated by the 2008 Declaration on Social Justice for a Fair Globalization. For example, the promotion of employment involves developing the capacity of workers to be “productively occupied for their personal fulfillment and the common well-being.”³⁹⁵ Social protection involves extending social security to all, including a basic income and a living wage to all in need of protection. Increasing attention is being paid to the importance of taking a broad approach to social protection in the realization of decent work, one which addresses the risks of exclusion as well as the values of dignity, community (or solidarity), and equality.³⁹⁶ The promotion of social dialogue includes building consensus on strategic national objectives and their effective implementation,³⁹⁷ recognizing that formal law and policy is only effective when based in widespread social involvement and support. Fundamental rights at work have long been recognized as embracing the principles of non-discrimination and equal opportunity.³⁹⁸

This enhanced approach to decent work is particularly relevant for older workers. Such an approach allows for the needs of workers to be considered across the life course, so that life events like aging, disability, and dependency are provided for. The decent work agenda allows recognition of the needs of workers to develop their skills and realize their capabilities over their working lives. It also recognizes the importance of workers’ ability to plan their retirement in conditions of security: security against the fear of poverty in old age; and security of income when they are no longer able to supplement their income through work.³⁹⁹

This study of older workers highlights the inseparable nature of the four pillars of the decent work agenda. For example, the promotion of decent employment opportunities has little meaning if it is undermined by a lack of social protection for those who are not able to support themselves and their dependents through work. Effective standards for securing rights at work are essential underpinnings to ensure that workers are fully enabled to support themselves without being limited by artificial barriers such as discriminatory restrictions. Social protection after retirement, to the extent

395. Declaration on Social Justice, *supra* note 393, art 1(A)(i).

396. In 2001 the ILO concluded that social security activities should be anchored in the decent work concept. See Alain Supiot, *The Position of Social Security in the System of International Labor Standards*, 27 COMP. LAB. L. & POL’Y J. 113, 119 (2006). On the values of dignity, solidarity and equality, see Alain Supiot, *The Outlines of A Framework Agreement on the Extension of Social Protection*, 27 COMP. LAB. L. & POL’Y J. 273 (2006).

397. Declaration on Social Justice, *supra* note 393, art 1(A)(ii), (iii).

398. Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), ILO Constitution, Annex, art. II(a), May 10, 1944.

399. See *supra* notes 13-15 and accompanying text.

that it is increasingly dependent on worker contributions, can only be effective if it is supported by rights to full participation in work without discrimination, and by opportunities for a decent standard of living which will allow workers to accumulate savings for their own security. And, since the situations of older workers and retirees are diverse, extended forms of social dialogue are necessary to ensure that government policies are responsive and well-designed, so as to avoid unintended consequences arising from the interaction of separate policies or a failure to appreciate the needs of particular disadvantaged groups.

In all the countries examined, the demise of state-supported universal social protection has resulted in increased social insecurity, especially in times of economic instability. Following the financial crisis and recession, pressures to reduce or limit state-supported retirement security have been accompanied by setbacks to workers' private savings due to the enormous losses in financial markets. This insecurity is compounded by the spread of precarious work. As a consequence, older workers are less able to make up shortfalls in provision for retirement caused by unemployment and underemployment. They also face the likelihood of involuntary and unplanned early retirement as a result of job loss, since discrimination against older job applicants appears to be both subtle and systemic, and therefore beyond the reach of current anti-discrimination laws. An OECD report has noted that "[t]he financial and economic crisis highlights and exacerbates the issue of safety-net benefits in retirement for workers with low earnings and career gaps."⁴⁰⁰ In countries with high dependence on private provision of post-retirement income, such as the three under examination, these inequalities are wider and the consequences for low-income workers greater, particularly for older workers who are less able to make up any shortfall in accumulated wealth for retirement.

Finally, the focus on a particular group of workers, in this case older workers, highlights the value which the concept of decent work performs in recognizing and promoting the variety of their needs. Decent work, like the capability perspective on development, promotes enhancement of "the actual opportunities of living."⁴⁰¹ Older workers are a diverse group. One thing that they have in common is the approaching end of work. For them, decent work has to do not only with their current experience of work, but also with their ability to plan their withdrawal from the labor force and the provision of a secure and adequate standard of living in retirement. Only a multi-faceted concept like decent work is capable of recognizing the deep

400. PENSIONS AT A GLANCE, *supra* note 391, at 38.

401. AMARTYA SEN, THE IDEA OF JUSTICE 233 (2009).

social roots and the interdependence of measures needed to secure human dignity across the course of working lives. This is never clearer than when the certitudes of market capitalism have so manifestly failed.

