



Tulane Economics Working Paper Series

# Seniors for Hire? Age Discrimination, “Sex-Plus-Age” Discrimination, and the Effectiveness of Age Discrimination Laws

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Working Paper 1715  
August 2017

## **Abstract**

In this paper I discuss population aging, increased participation of seniors in the labor force in the United States (and reasons for this), and how these trends are making the struggles of older workers in the labor market increasingly policy relevant. I discuss evidence examining if age discrimination, especially age discrimination against older women (“sex-plus-age” discrimination), as a barrier for seniors as they try to increase their work lives through the common practice of “bridge” or “partial retirement” jobs. After discussing the evidence that measures age discrimination, I discuss economics and legal research that seeks to determine to what extent the federal Age Discrimination in Employment Act and state-level age discrimination laws prevent age and “sex-plus-age” discrimination. I conclude that while age discrimination laws seem to help mitigate some age discrimination faced by older men, older women face more age discrimination, and current age discrimination laws do a poor job of protecting older women, who are even more economically vulnerable.

Keywords: Age discrimination, older women, Age Discrimination in Employment Act, population aging, intersectionality

JEL codes: J71, J78, J14, K31, J16, J26

# **Seniors for Hire? Age Discrimination, “Sex-Plus-Age” Discrimination, and the Effectiveness of Age Discrimination Laws**

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June 21, 2017

## **Abstract**

In this paper I discuss population aging, increased participation of seniors in the labor force in the United States (and reasons for this), and how these trends are making the struggles of older workers in the labor market increasingly policy relevant. I discuss evidence examining if age discrimination, especially age discrimination against older women (“sex-plus-age” discrimination), as a barrier for seniors as they try to increase their work lives through the common practice of “bridge” or “partial retirement” jobs. After discussing the evidence that measures age discrimination, I discuss economics and legal research that seeks to determine to what extent the federal Age Discrimination in Employment Act and state-level age discrimination laws prevent age and “sex-plus-age” discrimination. I conclude that while age discrimination laws seem to help mitigate some age discrimination faced by older men, older women face more age discrimination, and current age discrimination laws do a poor job of protecting older women, who are even more economically vulnerable.

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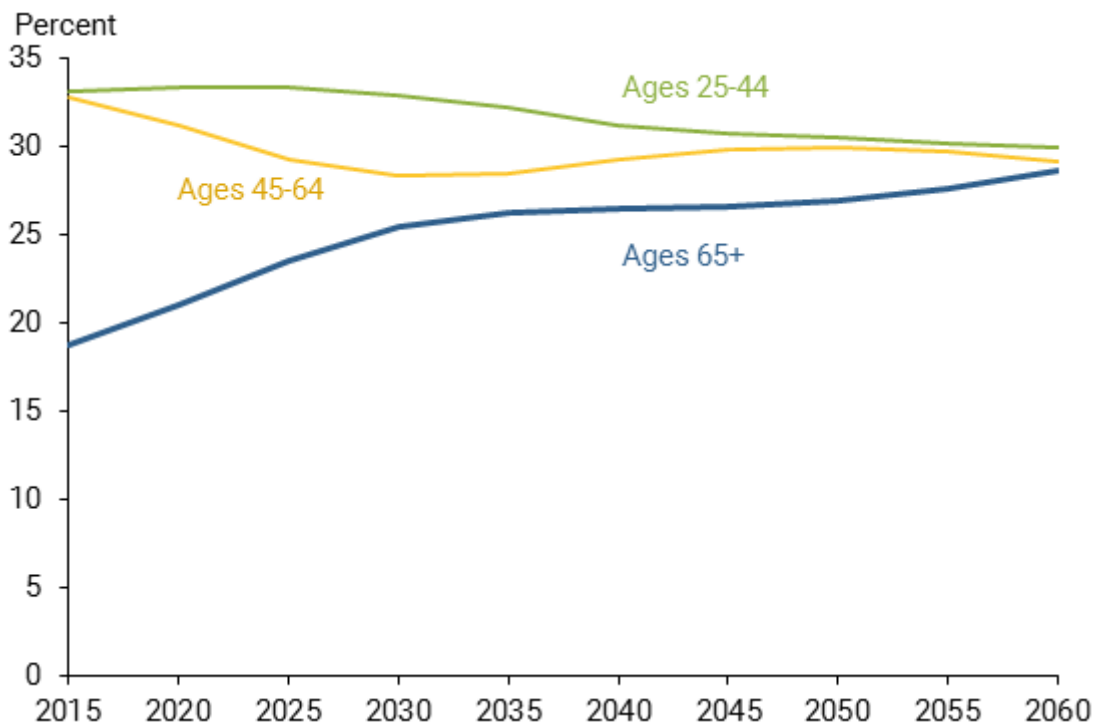
<sup>†</sup>6823 St. Charles Avenue, New Orleans, LA 70118, pbutton@tulane.edu. This research was prepared for the Equal Employment Opportunity Commission (EEOC)’s Public Meeting for the 50<sup>th</sup> Anniversary of the Age Discrimination in Employment Act (June 14, 2017). The findings and conclusions expressed here are solely mine and do not represent the views of EEOC or any other government agency. I thank Cathy Ventrell-Monsees, Raymond Peeler, and Emmarose Glaser for helpful comments.

## 1. Introduction and Background

### *An Aging Population*

The United States is experiencing a rapidly aging population. The share of the population of age 65 and older was 9.0% in 1960 (20.3% for age 45 to 64) and this increased to 13.0% (26.4%) in 2010 (Howden and Meyer, 2011). This trend will continue, as the share of seniors (here defined as age 65 and older) in the U.S. working-age population is projected to rise sharply—from about 19% currently to 29% in the year 2060—approaching equality with the shares of those aged 25–44 and 45–64 (Figure 1). This aging population makes issues such as the employment and financial well-being of seniors increasingly important.

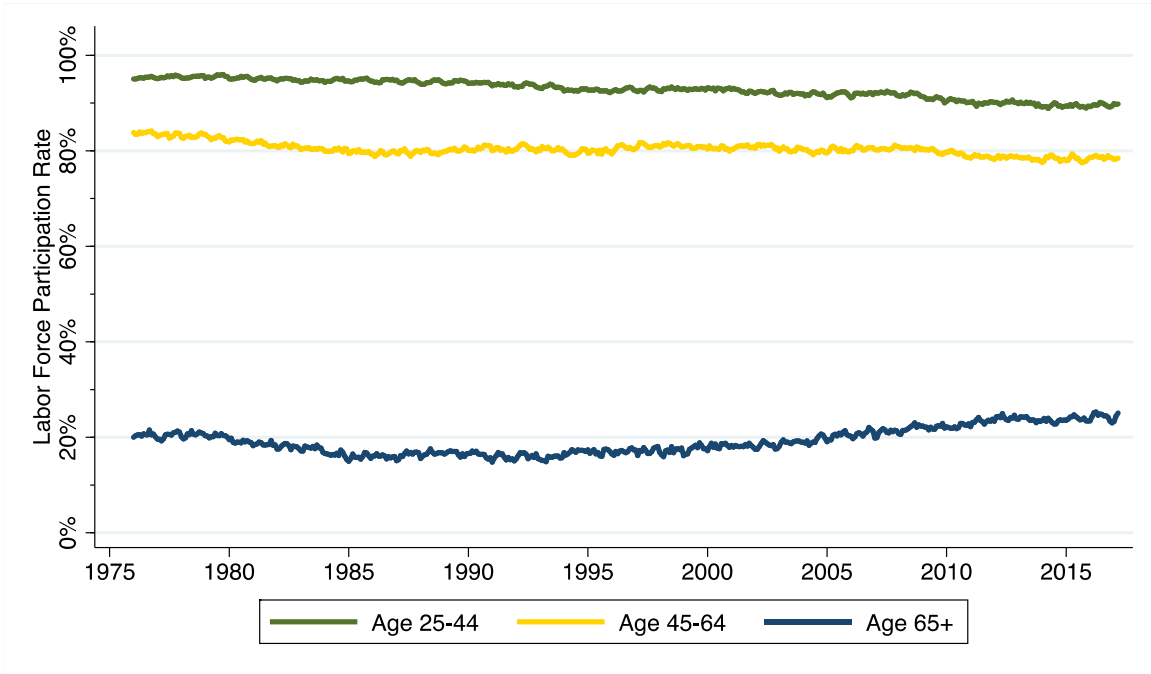
**Figure 1 - Projection of U.S. working-age population by age group**



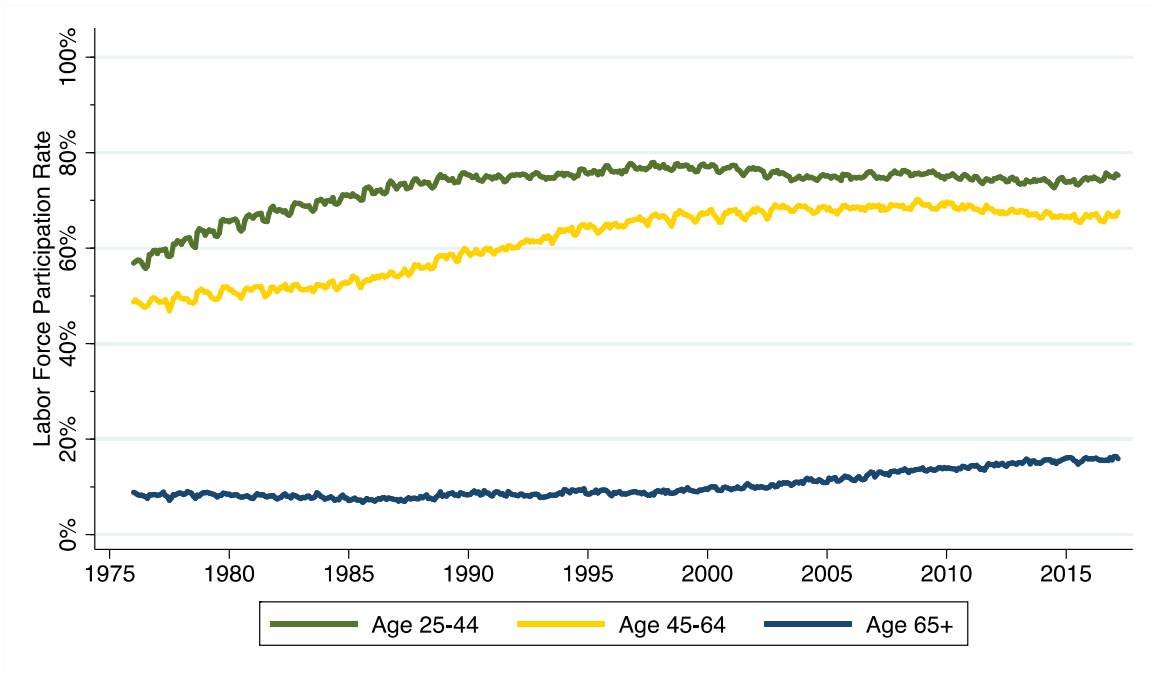
Source: Neumark, Burn, and Button (2017), with data from U.S. Census Bureau (2014).

**Figure 2 - Labor Force Participation Rates by Age Group and Sex**

**(a) Men**



**(b) Women**



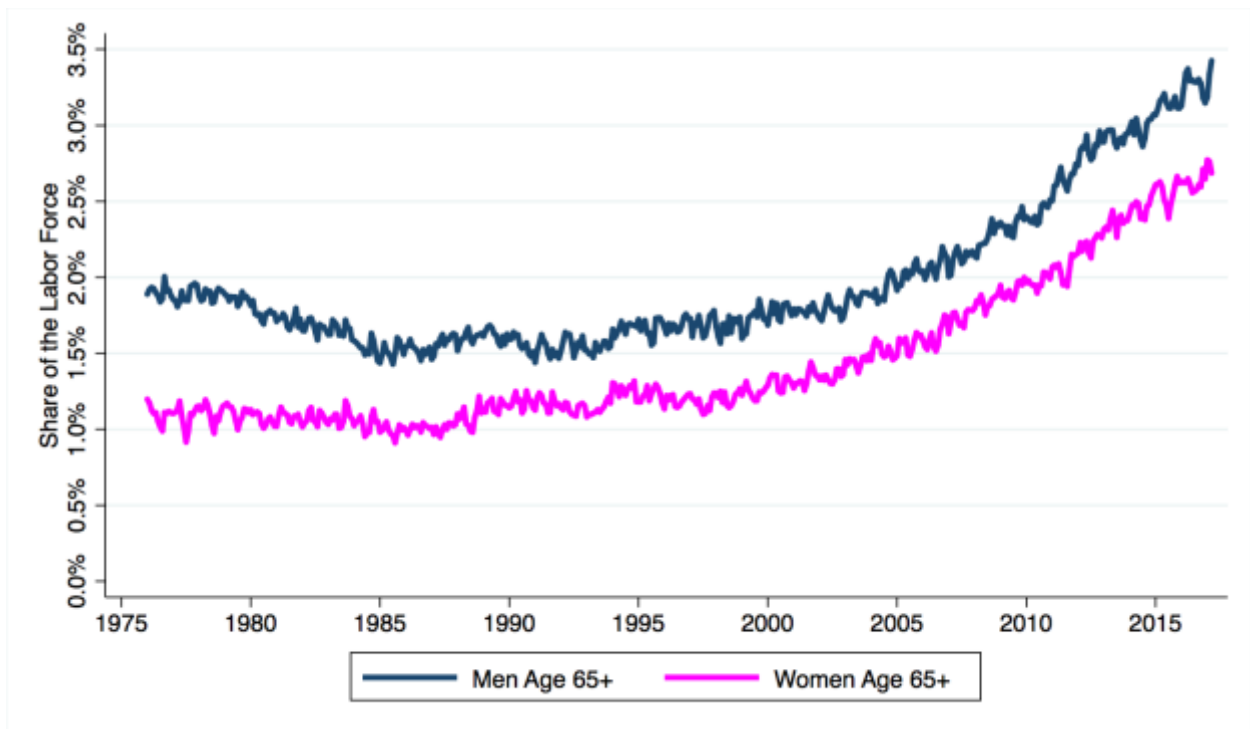
Source: Author's calculations using data from the Current Population Survey (monthly) from 1975 to March 2017, via IPUMS-CPS (Flood et al., 2015).

### Seniors Working Longer

In addition to there being more seniors due to the aging population, seniors are increasingly choosing to work into older ages. Figure 2 presents the labor force participation rate of men (panel (a)) and women (panel (b)) for the same three age groups. For men, those younger than 65 have experienced slightly decreasing participation since 1975. For men age 65 and older, participation has increased from 16.5% in March 1985 to 20.2% in March 2017. The changes are more drastic for older women. While the participation rate of women younger than 65 increased up until 1995 (age 25-44) or 2005 (age 45-64) it has since flat-lined. Meanwhile since about 2000 the participation rate for women aged 65 and older has been rapidly increasing, from 10.0% in March 2000 to 15.9% in March 2017.

In addition to there being more seniors due to the aging population, seniors are increasingly choosing to work into older ages. Figure 2 presents the labor force participation rate of senior women and men. For senior men participation has increased from 15.9% in 1985 to 24.3% in 2016, a 52.9% increase. But this increase was much larger, proportionately, for senior women, whose labor force participation rate more than doubled from 7.3% to 15.8% during this period.

**Figure 3 - Proportion of the Labor Force by Age Group and Sex**

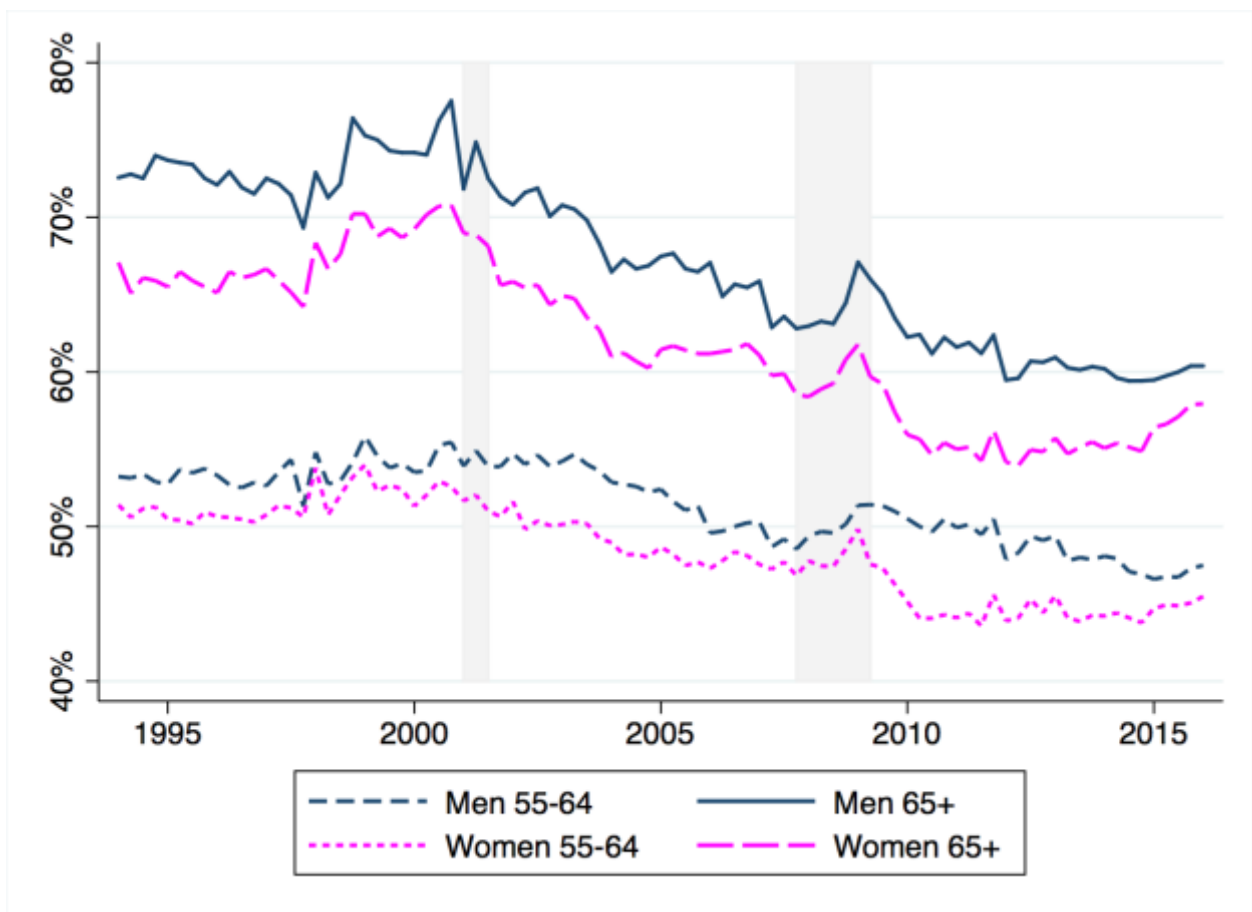


Source: Author’s calculations using data from the Current Population Survey (monthly) from 1975 to March 2017, via IPUMS-CPS (Flood et al., 2015).

*How are Seniors Working Longer?*

A common approach that seniors take to work longer is taking “bridge” jobs or “partial retirement” jobs (see, e.g., Johnson, Kawachi, and Lewis, 2009) that ease them into a complete retirement. “Unretirement” is also very common, where seniors leave retirement to take jobs before retiring again. Nearly 50% of retirees follow a non-traditional retirement path that involves transitioning to bridge jobs before retirement or involves “unretirement”. This behavior is usually anticipated and often isn’t due to some adverse economic event during retirement (Maestas, 2010). For these reasons, hiring in these “bridge” jobs remains important as seniors seek to work longer.

**Figure 4 – Hiring Rates by Age and Gender, Relative to Men Age 25-34**



Source: Author’s calculations using data from the National Quarterly Workforce Indicators (NQWI) from 1994Q1 to 2006Q1 (release R2017Q1). Each series is seasonally adjusted by the author using X-13ARIMA-SEATS before

being converted to relative rates. Shaded areas are recessions according to the NBER Business Cycle Dating Committee.

Figure 4 presents the hiring rate of men and women age 55-64 and age 65 and older, relative to the hiring rate of men age 25-34<sup>2</sup>. Both of the older age groups have a lower hiring rate than that of young men, reflecting that young men move jobs more often and face fewer frictions (e.g., age discrimination). Older women also, unsurprisingly, have lower hiring rates. However, it is notable that the hiring rates of those age 65 and older are higher than for those age 55 to 64, reflecting the importance of these “bridge” jobs. For both of the older age groups and for both genders, the hiring rate has been declining since about 2000, especially for seniors age 65 and older, perhaps reflecting increased difficulties faced by older workers in the labor market and the increased difficulties as seniors seek to extend their work lives<sup>3</sup>.

#### *Why are Seniors Working Longer?*

Seniors are working longer both due to “push” and “pull” factors. “Pull” include internal, personal reasons for why seniors prefer to work longer. With each generation being healthier and living longer, there is more capacity for seniors to work longer (Coile, Milligan, and Wise, 2017). Not all cognitive and physical skills decline near retirement age, leading productivity of many common “bridge” jobs (e.g., retail sales, administrative assistants, see Neumark, Burn, and Button, 2015) largely unaffected (Belbase, Sanzenbacher, and Gillis, 2015). Many seniors elect to work longer based on preferences, as this allows workers to maintain their sense of identity (Riach and Loretto, 2009) and is associated with improved physical and mental well-being (Calvo, 2006).

“Push” factors include the economic situation and government policies that push seniors into the labor force rather involuntarily. Even with seniors choosing voluntarily to work longer, they are increasingly pushed into the labor force because their financial situation demands it. This is because most seniors cannot fully rely on the combination of Social Security benefits (Retirement Benefits, Survivor Benefits, Supplemental Security Income), private pensions, and personal savings to get by during retirement. For this reason, poverty is highly concentrated among

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<sup>2</sup> The hiring rate is calculated from Quarterly Workforce Indicators (QWI) data as the number of hires divided by employment for that age group and gender. I calculate this as relative to the hiring rate for men age 25-34. A value of 50% means that this group has half the hiring rate of men age 25-34.

<sup>3</sup> As supporting evidence, Figure 6 shows that mean unemployment durations were also generally increasing for older workers after 2000.

seniors, especially senior women who are single, separated, divorced, or widowed (Sandall and Iams, 1997).

The primary income source for seniors is Social Security Retirement Benefits, but most don't receive many benefits relative to their previous earnings. As of 2007, the hypothetical "medium earner" retiring at 65 receives Social Security Retirement Benefits equal to about 41% of previous earnings (Munnell and Sass, 2007). This is less now, particularly since the full benefits retirement age is currently 66, and is approaching 67, and individuals are penalized for claiming benefits early. Other recent and future Social Security reforms will further reduce the ability of Social Security to provide an adequate standard of living for seniors. For example, both the gradual increase of the retirement age with full benefits from 65 to 67, along with changes to the Social Security earnings test (see e.g., Figinski and Neumark, 2016), have pushed seniors into the labor market through cuts to Social Security benefits (Neumark and Song, 2013).

Many seniors cannot rely on private sector employer-sponsored pensions, as less than half of the private sector work force age 25 to 64 have an employer-sponsored plan of any type (Munnell and Sass, 2007) and only 27.6% of those who stopped working to retire claimed a pension (Maestas, 2010). Since pension participation rises with earnings, the lack of coverage of private pensions hits lower income seniors even harder. Even for those with a pension, the typical pension does not provide much. The Federal Reserve's 2004 Survey of Consumer Finances shows that a typical individual approaching retirement had 401(k)/IRA balances of only \$60,000 (Munnell and Sundén, 2006; Munnell and Sass, 2007).

Personal savings are even less likely to help seniors make ends meet during retirement. A study of the U.S. National Income and Product Accounts (NIPA) personal saving rate found that almost all of the saving undertaken by the working-age population occurred in pension plans (Munnell, Golub-Sass, and Varani, 2005) and in many recent years the saving outside of pensions has actually been negative (Munnell and Sass, 2007).

Another "push" factor that primarily affects women is the death of a spouse. Because women tend to live longer than men, more than half (53.0%) of women aged 65 or older are separated, divorced, widowed, or never married/single<sup>4</sup>. These women cannot rely on supplementary income from a partner, who is or was often the primary earner. This is a major

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<sup>4</sup> Calculated by the author using 2015 data from the Current Population Survey, via IPUMS CPS (Flood et al., 2015).

factor for why poverty among seniors is particularly concentrated among senior women and leads to increased pressure to work (Sandall and Iams, 1997).

## **2. Is Age Discrimination a Barrier to Working Longer?**

Since much of the increased labor force participation of seniors comes from “bridge” or “partial retirement” jobs, increasing hiring is fundamental to increasing the employment and financial security of seniors. However, research demonstrates that age discrimination remains a large barrier for seniors seeking to get hired in these jobs.

### *Non-Experimental Evidence of Age Discrimination*

There is ample evidence of age discrimination in hiring. One prominent piece of evidence is longer unemployment durations for older workers compared to younger workers (see Neumark and Button, 2014), which partly reflects the increased difficulty that older workers face in the labor market. There is also industrial psychology research that notes that older workers face negative stereotypes such as disinterest in building their skills (e.g., Fritzsche and Marcus, 2013), a lack of ambition (e.g., Bowen and Staudinger, 2013), physical and cognitive health challenges (e.g., Ng and Feldman, 2012; Hummert et al., 1994), inflexible or abnormal personalities (e.g., Fritzsche and Marcus, 2013), and less experience with technology (e.g., AARP, 1999)<sup>5</sup>. Some studies also examine worker self-reports of discrimination, which are correlated with adverse labor market outcomes (Johnson and Neumark, 1997; Adams, 2002).

### *Experimental Evidence of Age Discrimination*

The most credible studies that quantify age discrimination in hiring are field experiments, more specifically, resume-correspondence studies (Fix and Struyk, 1993; Neumark, 2016). These studies create fictitious-but-realistic job applicants that are on-average equal except for age, which is signaled through school graduation year(s). This approach controls for all factors but age, which better isolates age discrimination. These fictitious job applicants then apply for real job openings, and hiring discrimination is measured by comparing interview request rates (“callbacks”).

While it would be ideal to track job offers, as that is an exact measure of hiring

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<sup>5</sup> There are also some positive stereotypes, such as older workers being more dependable (e.g., Chiu et al., 2001), kind (e.g., Fritzsche and Marcus, 2013), and of course, more experienced (Bal et al., 2013).

discrimination, this requires hiring actors and actresses. Not only is this costly but it opens up the study to “experimenter effects” (Heckman and Siegelman, 1993). While comparing interview request rates is only a proxy for hiring, most discrimination occurs at the interview offer stage (90%), according to studies of ethnic discrimination by the International Labor Organization (ILO), discussed in Riach and Rich (2002) (Neumark, Burn, and Button, 2015).

Previous resume-correspondence studies almost always point to substantial age discrimination in hiring (Bendick, Jackson, and Romero, 1997; Bendick, Brown, and Wall, 1999; Riach and Rich, 2006, 2010; Lahey, 2008b). However, a difficulty in this literature is making older job applicants on-average identical to the younger job applicants. Real older workers generally have much more experience, such that giving older workers the same experience as younger workers could lead to an upward-biased estimate of age discrimination.

#### *The Neumark, Burn, and Button (2015) Resume-Correspondence Study*

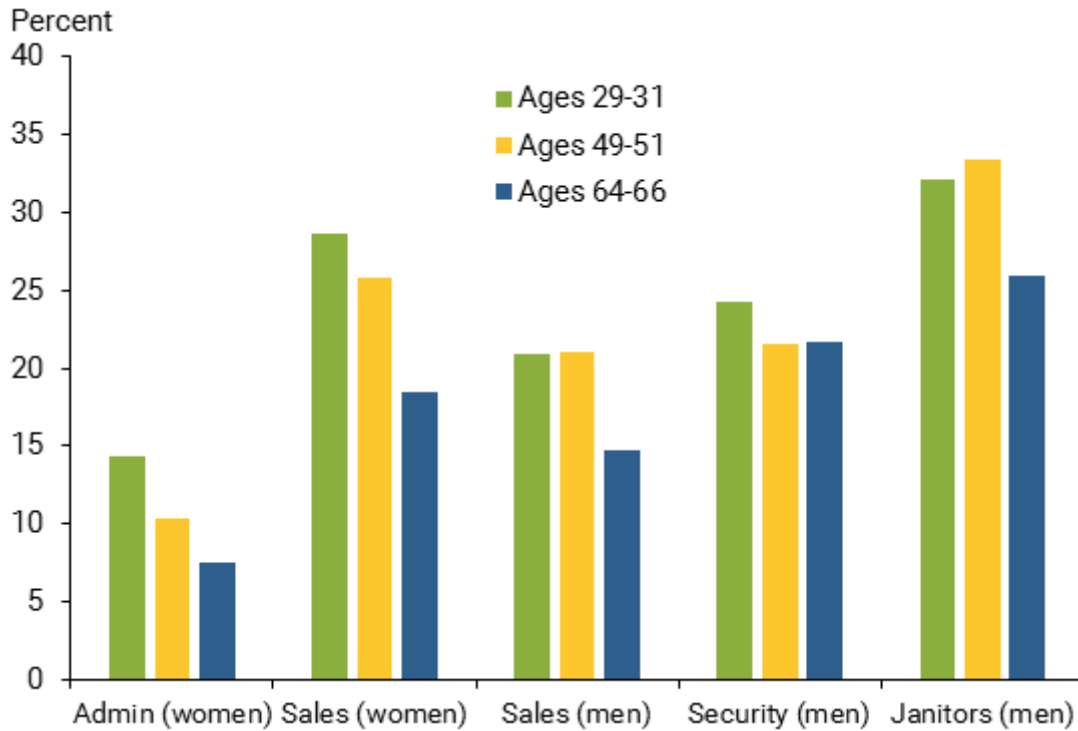
Partly to better confront this issue, and to provide more detailed and accurate evidence of age discrimination, my co-authors and I conducted the largest and most comprehensive resume correspondence study of age discrimination in hiring (Neumark, Burn, and Button, 2015). We created realistic but fictitious resumes for young (aged 29-31), middle-aged (aged 49-51), and senior (aged 64-66) job applicants. The 64-65 age group is new to the literature, and is motivated by the common occurrence of “bridge” jobs for this age group.

In this experiment, we sent over 40,000 applications (resumes) to over 13,000 job positions in 12 cities spread across 11 states, by far the largest resume-correspondence study of hiring discrimination to date. We sent applications for positions that seniors often take as “bridge” jobs, according to Current Population Survey data: administrative assistant and retail sales for women, and retail sales, security, and janitor for men. These positions are also common for younger workers. While our resumes were generally on-average identical to isolate the effect of age, we sent different types of senior resumes: some with the same experience on-average as the younger applicants, and many where the senior had a longer work experience commensurate with their age. As in other studies, we tracked callbacks – interview requests or other similar positive responses from employers – and compared the callback rates by age.

Figure 5 presents the main results from Neumark, Burn, and Button (2015). Across all occupations and genders, senior applicants (age 64-66) got fewer callbacks than younger

applicants. These differences are statistically significant in all cases, except for security jobs (men). The evidence is more mixed for middle aged applicants (age 49-51), as female middle-aged applicants have a statistically-significantly lower callback rate but there is no evidence of discrimination against middle aged men.

**Figure 5 - Comparisons of job applicant callback rates by age**



Source: Neumark, Burn, and Button (2017), using data from Neumark, Burn, and Button (2015).

Even in the cases where both senior women and men face age discrimination, the magnitude of the discrimination against senior women is much larger. For administrative assistant, the callback rate is nearly half for senior women (7.58%) compared to younger women (14.41%). For retail sales, senior women get callbacks 18.43% of the time while younger women get callbacks 28.68% of the time. These differences are less pronounced for older men. In retail sales, where we apply with both male and female applicants, the age penalty is larger for older women (35.7% fewer callbacks) than it is for older men (29.6%). Thus while we find age discrimination against older men, it is concentrated in those near traditional retirement ages and does not occur in every occupation. For older women, the discrimination is more severe and starts much earlier than it does for older men.

### **3. Can Stronger Age Discrimination Laws Help Reduce Age Discrimination?**

Age discrimination laws are the key approaches used to reduce age discrimination in employment. There is of course the federal *Age Discrimination in Employment Act* (ADEA), but there are also state laws in all states (plus DC) except Arkansas, Mississippi, and South Dakota. Some states even have features of their laws that make them broader or stronger than the federal law (Neumark, Song, and Button, 2017; Neumark and Song, 2013, discussed later), which provide additional protections against age discrimination.

#### *Evidence from Theory*

At first blush, one would expect that laws forbidding discrimination would reduce discrimination, and thus improve labor market outcomes for protected individuals. However, theory suggests that this may not necessarily be the case. Discrimination laws should reduce terminations, because terminating an employee, whether there is discriminatory intent or not, opens firms up to possible legal action. Because it is now harder to terminate older workers, it creates a disincentive to hire them, leading to decreased hiring (Bloch, 1994).

Of course, discrimination laws forbid discrimination in hiring, so they could still decrease hiring discrimination if employers follow this aspect of the law. Enforcement to curtail hiring discrimination is more difficult than other types of anti-discrimination enforcement, however, because it is harder to prove or identify a class of affected workers. For example, with most of the discrimination occurring at the interview offer phase (Riach and Rich, 2002), it is almost impossible to prove that age discrimination is the reason for a lack of interview. Economic damages are generally much smaller in hiring discrimination cases relative to terminations which leads to hiring cases being less attractive to plaintiffs and attorneys. This means that laws forbidding discrimination in hiring have little “bite”, which could mean that the negative hiring incentive dominates. But in net, it is difficult to know the effect of discrimination laws on hiring, and thus on employment.

#### *Evidence from the Empirical Literature*

Economists have long studied the effects of discrimination laws on the employment outcomes of protected workers. The most common approach that these studies employ is a

statistical analysis called a “difference-in-differences,” which tries to isolate the effect of the law on labor market outcomes. Most of these studies compare older workers before and after a change in discrimination law (e.g., introduction of the ADEA or changes in state laws) compared to the same before and after change for some unaffected control group, such as younger workers or older workers in states without legal changes, or both. Most studies of age discrimination laws have found positive effects of the laws, while some have found no effects or negative effects.

Most studies use the passage of state age discrimination laws before the passage of the ADEA to explore if the introduction of these laws affected employment for older workers. Neumark and Stock (1999) found that state-level age discrimination laws passed before the ADEA in addition to the passage of the ADEA in 1968 led to increased employment for protected older workers. Adams (2004) found a similar result using the state laws passed before the ADEA.

Other studies focus not just on the introduction of laws but rather how features of the laws differ. Lahey (2008a) finds that some features of age discrimination laws are associated with decreased hiring of older workers. Lahey (2008a) explores how the employment effects stemming from the introduction of the ADEA were mediated by existing state-level age discrimination laws. She argues that the ADEA was stronger in states with an existing law. She notes that the statute of limitations under the ADEA is 300 days if the state has a fair employment protection agency, whereas it is 180 days otherwise. She also argues that fair employment protection agencies in these states may be able to process claims more quickly than the EEOC. Lahey (2008a) finds that these increased legal protections lead to a decrease in employment, hiring, and an increase in retirement. However, Neumark (2009) disputes these results for several reasons, and argues rather that her results show that the introduction of the federal ADEA boosted employment of older workers in states without existing age discrimination laws.

Neumark and Song (2013) explore the effect of state age discrimination laws that had features that made them stronger or broader than the ADEA. They study older men “caught” by the increase in Social Security’s full retirement age, which meant that the men had to work longer before they could retire with full Social Security benefits. They compared “caught” older men to older men who were not caught, in states with and without these stronger law features. They defined states as having stronger laws if (1) the state law allows for compensatory or punitive

damages (“larger damages”) which provides for larger damages than the ADEA<sup>6</sup>, (2) the federal ADEA applies to employers with at least 20 employees, but some state laws apply to employers with fewer employees (“lower firm size”), and (3) if the state law has a longer statute of limitations than the ADEA<sup>7</sup>. They found that larger damages and the lower firm size both increased hiring of older workers, with the statute of limitations having little effect.

In a recent project, my co-authors and I use a unique approach to examine how these state law features (“larger damages” and “lower firm size”) affect hiring of older workers. In Neumark, Burn, Button, and Chehras (2017), we follow the resume-correspondence approach of Neumark, Burn, and Button (2015), creating on-average identical resumes for older (age 65) and younger (age 30) workers of both genders in retail sales. We then send these resumes (older men, older women, younger men, younger women) to job openings in all 50 states and compare callback rates between older and younger workers in states with stronger laws compared to in states with weaker laws. This approach provides direct evidence of discrimination in hiring and helps control for other factors, such as older and younger workers being different. We find some evidence that stronger age discrimination laws (“lower firm size”) reduce discrimination against older women, but the evidence is not very robust. Otherwise we find no effects of the laws, although our study may not capture other possible positive effects, such as increased labor market participation of older workers (more older workers seeking jobs).

### *Age Discrimination Laws and the Great Recession*

One consideration for discrimination laws is how they operate over the business cycle – that is – are they more or less effective during recessions compared to during economic expansions? This is a timely question, given the recent Great Recession from December 2007 to June 2009<sup>8</sup> which was devastating, especially for older workers, who faced decreased income

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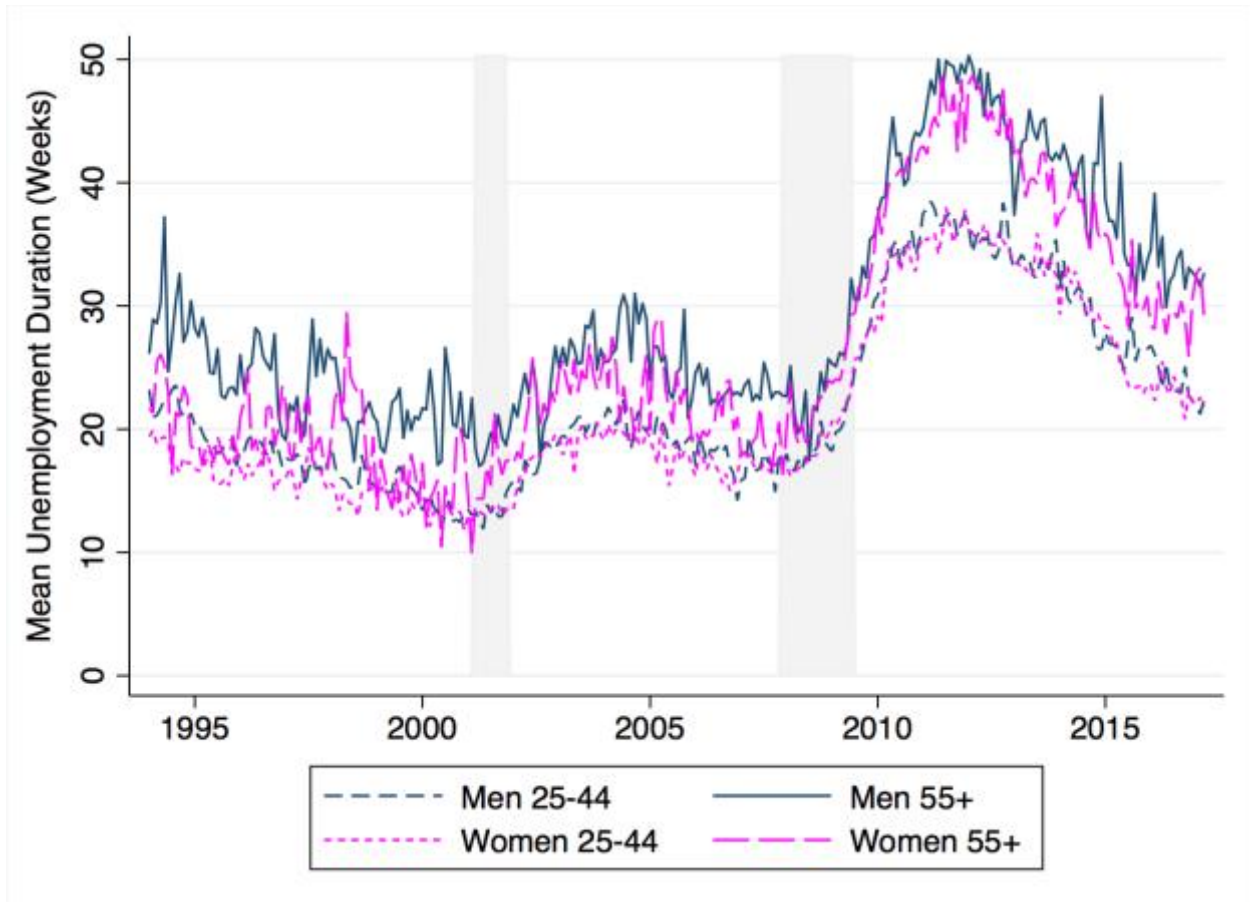
<sup>6</sup> To be more specific, compensatory and punitive damages are not allowed under the ADEA, but “liquidated damages” are which are available up to the amount of back pay for a willful violation of the ADEA. A violation is willful when an employer either knew it engaged in illegal conduct under the ADEA or the employer showed “reckless disregard” for whether it was prohibited. See [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/annualmeeting/004.authc heckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/004.authc heckdam.pdf) (accessed May 29, 2017). Neumark and Song (2013) define states as having larger damages than the ADEA if they allow compensatory or punitive damages, regardless of if they require proof of intent or willful violation.

<sup>7</sup> The filing period for the ADEA for states without a law is 180 days, but is 300 days for states with a state law and enforcement agency.

<sup>8</sup> These are the dates of the Great Recession as determined by the National Bureau of Economic Research (NBER) Business Cycle Dating Committee. See <http://www.nber.org/cycles.html> (accessed May 29, 2017).

(Davis and von Wachter, 2011), wealth, and significantly more job loss (Munnell and Rutledge, 2013), and thus increase Social Security benefit claiming (Rutledge and Coe, 2012; Rutledge, 2012; Munnell and Rutledge, 2013; Mueller, Rothstein, and von Wachter, 2016). There was

**Figure 6 – Effects of the Great Recession on Mean Unemployment Duration, in Weeks**



Source: Author’s calculations using data from the Current Population Survey (monthly) from 1994 to March 2017, via IPUMS-CPS (Flood et al., 2015). Each series is seasonally adjusted by the author using X-13ARIMA-SEATS. Shaded areas are recessions according to the NBER Business Cycle Dating Committee.

significant anecdotal evidence, especially in the media, of age discrimination both during the Great Recession and during the long recovery<sup>9</sup>, and ADEA claims filed with the EEOC increased significantly during this period, rising from about 16,000 in 2006 to about 23,000 per year in 2008 to 2012 (Neumark and Button, 2014).

<sup>9</sup> See, e.g., <http://www.pbs.org/newshour/bb/women-over-50-help-not-wanted/>, <http://www.npr.org/2017/03/24/521266749/too-much-experience-to-be-hired-some-older-americans-face-age-bias>, and <http://www.cbsnews.com/news/age-discrimination-is-alive-and-well/> (all accessed June 1, 2017).

This is mirrored in the dramatic increase in unemployment durations for older workers during and after the Great Recession. Figure 6 shows the mean unemployment duration (in weeks) since 1994 by age and gender. Older workers consistently have higher unemployment durations, which reflects both age discrimination but also the fact that older workers are pickier about jobs. The gap in average unemployment durations by age increased significantly after the Great Recession. The gap was the smallest in the year before the Great Recession (2007), about 6.2 weeks (1.4 weeks) longer for older men (older women) and peaked in 2012 at 11.7 weeks (10.7 weeks) longer<sup>10</sup>.

Motivated by the severity of the Great Recession, David Neumark and I explored if age discrimination laws helped protect older workers during this difficult time. In Neumark and Button (2014), we focused on whether state age discrimination laws that were stronger or broader than the federal ADEA helped older workers. We focused on “larger damages” and “lower firm size” as defined in Neumark and Song (2013). We found more mixed evidence suggesting that the effect of age discrimination laws may vary over the business cycle, with them possibly being more helpful in non-recessionary periods but of mixed and often negative impact during and after the recent Great Recession.

### *Intersectional “Sex-Plus-Age” Discrimination*

Given that age discrimination is stronger against women than men (Neumark, Burn, and Button, 2015), intersectional discrimination, that is discrimination at the intersection of age and gender, may be relevant. If age discrimination against older women is primarily intersectional, that is, they are not discriminated against for being just female, or just being old, but by being old *and* female, then the ADEA provides limited protection for this “sex-plus-age” discrimination (Day, 2014).

For older women to be protected from this intersectional discrimination, they must use both the ADEA and Title VII of *the Civil Rights Act*, recognizing older women as a subgroup of two protected classes. However, in practice, courts generally do not allow this (Crocette, 1998; Porter,

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<sup>10</sup> My calculations for this, using Current Population Survey data, are available upon request. Note that the effect of recessions on unemployment durations typically take a few years to materialize, hence the 2012 peak.

2003; Song, 2013; Day, 2014)<sup>11</sup>, although some have allowed it<sup>12</sup>. Meanwhile, intersectional claims that fall under the same statute (e.g., race-and-gender, both under Title VII) are generally accepted by courts (Day, 2014)<sup>13</sup>. This odd quirk seems to stem from the mere fact that the ADEA is a separate statute.

Moreover, sex-plus-age claims are more difficult to make after the *Gross v. FBL Financial Services, Inc.* Supreme Court decision. *Gross* made it such that the plaintiff must prove by preponderance of evidence, that age was the “but for” cause for the adverse employment action<sup>14</sup>. This made the “mixed-motive” framework<sup>15</sup> not allowed for the ADEA (Van Ostrand, 2010). This increased the burden on the plaintiff to make a prima facie case of discrimination, with some arguing that this radically weakened the ADEA (e.g., Lazarus, 2012). Day (2014) argues that the *Gross* decision will likely create a “chilling effect” as to the initiation of sex-plus-age claims, and older women would be dissuaded from bringing the claim under the ADEA because they can’t use the mixed-motives framework.

Given all this, an open question is to what extent age discrimination laws protect older women from discrimination. All the studies of age discrimination laws discussed above estimated the effect on men only, except Neumark and Button (2014) and Neumark, Burn, Button, and Chehras (2017) who analyzed men and women separately. Based on these two studies, there are mixed effects of the laws. Larger damages under state law are associated with shorter

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<sup>11</sup> Case law showing that this is not allowed includes *Thompson v. Mississippi State Personnel Board*, 674 F. Supp. 198 (N.D. Miss 1987), *Murdock v. B.F. Goodrich*, 1992 Ohio App. LEXIS 6611, and *Sherman v. American Cyanamid Company*, 1999 U.S. App. LEXIS 21086. See Song (2013) for a discussion of these cases. Ventrell-Monsees (2014) also lists *Johnson v. Napolitano*, 2013 WL 1285164 \*8 (S.D.N.Y., 2013) which cited “*Cartee v. Wilbur Smith Associates, Inc.*, No. 3:08-4132-JFAPJG, 2010 WL 1052082, at \*4 (D.S.C. Mar 22, 2010); [Block-Victor v. CITG Promotions, L.L.C.](#), 665 F. Supp. 2d 797, 808 (E.D. Mich. Oct 13, 2009); [Smith v. Board of County Com'rs of Johnson County, Kan.](#), 96 F. Supp. 2d 1177, 1187 (D. Kan.,2000) (collecting cases); [Luce v. Dalton](#), 166 F.R.D. 457, 461 (S.D. Cal. 1996); see also [Kelly v. Drexel University](#), 907 F. Supp. 864, 875 n. 8 (E.D. Pa. 1995).”

<sup>12</sup> Some courts have recognized intersectional discrimination, such as *Arnett v. Aspin*, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994), *Grozynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109 (2d Cir. 2010), *Barnett v. PA Consulting Group*, 715 F.3d 354 (D.C. Cir. 2013), *DeAngelo v. Dental EZ, Inc.*, 738 F. Supp. 2d 572-578-79 (E.D. Pa. 2010), *Good v. U.S. West Communications*, 1995 WL 67672 (D. Or. 1995), *Sogg v. American Airlines*, 603 N.Y.S.2d 21 (NY App. 1993), and *Foley v. Eckhart Richard-Allan Med. Inbus.*, 1995 U.S. Dist. LEXIS 20663 (C.D. Cal., Nov. 14, 1995), all discussed by Ventrell-Monsees (2014).

<sup>13</sup> For the first notable case (black women), see *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980). For Asian women, see *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994).

<sup>14</sup> “But for” the discrimination, the adverse employment action would not have happened. That is, discrimination must have been the determining reason for the adverse employment action, not just one reason among others. See <http://www.constangy.com/communications-247.html> (accessed June 5, 2017) for useful discussion.

<sup>15</sup> Under “mixed-motive” the jury is instructed to rule for the plaintiff if they determine that the protected class was a motivating factor, even if other (legal) factors were also present. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

unemployment durations for older workers during the Great Recession, but decreased hiring during and after (Neumark and Button, 2014). A lower firm-size minimum under state law is associated somewhat with lower employment of older women after the Great Recession (Neumark and Button, 2014) but increased hiring in our recent resume correspondence study (Neumark, Burn, Button, and Chehras, 2017).

Luckily, a study by Song (2013) fills this gap by estimating the effect of state age discrimination laws passed before the ADEA, and the passage of the ADEA, on employment outcomes for older women (similar to Adams [2004] and Neumark and Stock [1999]). She finds that while both state-level age discrimination laws and the ADEA helped older men, they either had a smaller positive effect for older women or no effect at all. This suggests that the ADEA and similar laws are less effective at protecting older women, likely because of the intersectionality issue.

#### **4. Conclusion**

The United States is experiencing an aging population that is increasingly trying to work longer into what would be normally considered typical retirement ages, leading to a more than a doubling of the proportion of the labor force that are seniors in the last 20 years (2.9% to 6.1%). Given that working longer is important to many seniors and is fundamental as they seek to support themselves financially, a key policy question is to what extent they face age discrimination, and if age discrimination laws help remedy this.

I summarized research that suggests that age discrimination is still common, even under the federal *Age Discrimination in Employment Act* and similar state laws. This age discrimination affects senior men (age 65+) but not middle-aged older men (around age 50). There is a huge gender component to age discrimination with older women experiencing age discrimination at younger ages (at least age 50) and much more age discrimination than older men (Neumark, Burn, and Button, 2015). Thus, “sex-plus-age” intersectional discrimination is a verified problem. Age discrimination was much higher during and after the Great Recession, as evidenced by increased EEOC claims, huge increases in unemployment durations for older workers, and a flurry of media discussions of age discrimination (Neumark and Button, 2014).

Research on the impacts of age discrimination laws on employment of older workers generally suggests that these laws are helpful (Neumark and Stock, 1999; Adams, 2004; Neumark

and Song, 2013), although they could be harmful (Lahey, 2008a) and are likely less effective during economic downturns such as the Great Recession (Neumark and Button, 2014). While the research generally finds positive effects of age discrimination laws, the research focuses on older men. The research focusing on older women demonstrates that older women are less protected by age discrimination and state and federal age discrimination laws do more to protect older men than older women (Song, 2013). This likely stems from “sex-plus-age” discrimination not being allowed under the ADEA and Title VII of the *Civil Rights Act* (Crocette, 1998; Porter, 2003; Song, 2013; Day, 2014). Given the aging population that increasingly wants to – and *needs* to – work, and is increasingly made up of older women, policies such as legal reform that confront “sex-plus-age” discrimination are needed.

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