

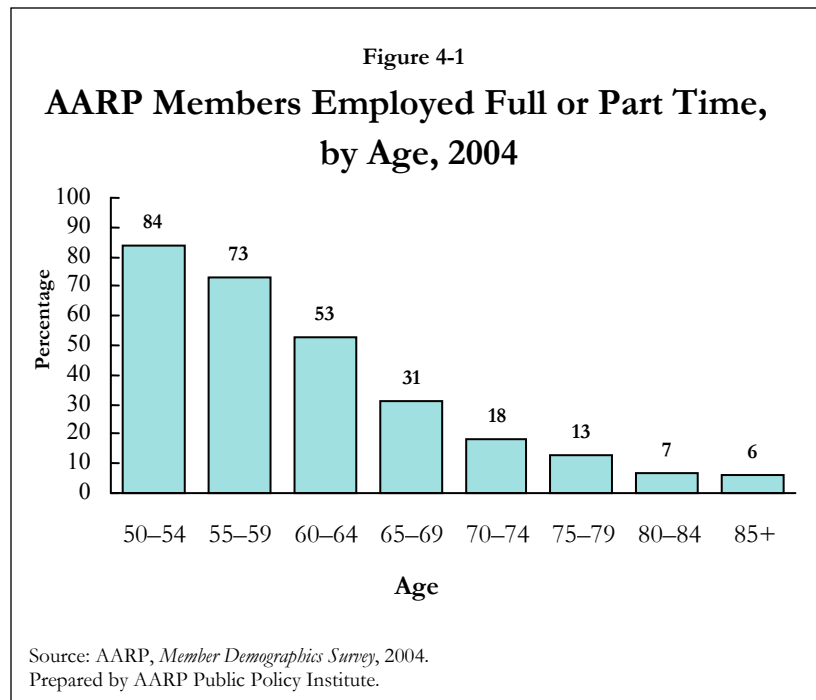
EMPLOYMENT • 4

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More than 37 million men and women age 50 and older are in the labor force, a number that will rise sharply as the workforce grows older and as employers face labor and skills shortages resulting from slowing labor-force growth. Retirement income uncertainty in the face of stock market declines over the past several years may be prompting some older workers to postpone retirement and some retirees to return to the labor force.

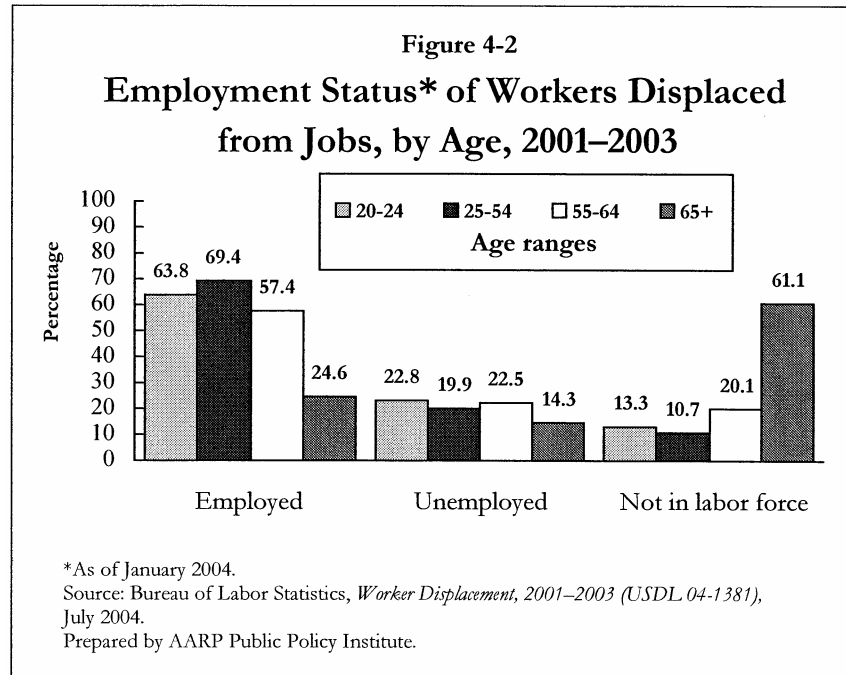
Of all AARP members 45 percent work full or part time. More than 80 percent of AARP's youngest members (ages 50 to 54) are employed. Although this figure drops steadily with age (Figure 4-1), rising proportions continue to work into their late 70s and even 80s.



For much of the 1990s and into 2000, a booming economy resulted in falling unemployment rates for all age groups. Job growth began to slow in mid-2000, and unemployment rates began to rise. The unemployment rate for people 55 and older averaged 4.0 percent in 2003, up from 3.8 percent in 2002.

The unemployment rate for older workers has typically been lower than the rate for younger workers, in part because older workers often stop looking for work when they lose their jobs. Of the nearly 1.7 million workers age 55 and older who were displaced from their jobs between 2001 and 2003, only

52 percent were reemployed by January 2004. Some unemployed workers become “discouraged workers,” who give up the job search when it appears futile. Older people are unemployed substantially longer than younger workers, and reemployment after job loss declines dramatically at older ages (Figure 4-2).



Despite rising unemployment rates and often bleak reemployment prospects following unemployment, employment among older workers is on the rise. The number of persons age 55 and over with jobs increased by nearly 3.5 million from 2000 to 2003, while the number of employed people under age 55 fell by nearly 1 million.

As part of developing a national employment policy, AARP is committed to expanding employment opportunities and promoting job security for workers of all ages and to removing all barriers to equal employment opportunity. These goals include increasing employment opportunities and providing access to jobs through training and other programs designed both to encourage older workers to remain in the labor force and to improve the job security of all working Americans. Given the link between employment and retirement income, the well-being of millions of future elderly people depends on their having well-paying jobs.

A variety of federal laws have been enacted to protect workers in the public and private sectors from employment discrimination. However, in the past several years federal courts have treated state workers as second-class citizens by barring them from suing their employers for monetary relief over violations of employment rights under a variety of federal statutes. Although such court decisions have been based on an asserted need to uphold long-

standing principles of federalism, they have disturbed sound legal rules in favor of novel doctrines that have restricted the ability of elected representatives to enact vital protections for older and disabled state workers, who have long faced discrimination on the job.

AARP PRINCIPLES

The following principles on employment guide AARP's efforts to develop employment policies that benefit older and younger workers:

- To work without discrimination is a fundamental right. All workers—regardless of age, gender, race, ethnicity, disability, sexual orientation or religious and national origin—deserve to be protected from arbitrary discrimination in hiring, terminations, compensation, access to training, promotion opportunities, and inclusion in mass layoffs and downsizings.
- Providing and expanding employment opportunities for all who are willing and able to work, minimizing underemployment, and promoting job security should be vital components of public policy. Such policy should enable people to maintain themselves and their families at a decent standard of living, enhance individual dignity, and help shore up economic activity throughout society.
- All workers, whether full time, part time, self-employed or contingent, should have access to employer and government benefit systems and programs that facilitate economic security.
- Vulnerable populations deserve special help in finding and keeping employment capable of sustaining a reasonable standard of living.

AGE DISCRIMINATION IN EMPLOYMENT

Introduction

To work without age discrimination is a fundamental right. However, despite the Age Discrimination in Employment Act of 1967 (ADEA), age-based employment discrimination remains prevalent. Age discrimination can be blatant or subtle and can include such practices as refusing to hire or promote older workers, encouraging their retirement, targeting them in reductions in force, curtailing their employee benefits, and limiting their training opportunities, job responsibilities and duties. Age discrimination is particularly severe for people who have lost jobs in declining industries, such as heavy manufacturing; for individuals in high technology and other fields where stereotypes about older workers are especially prevalent; and for displaced homemakers who have little or no work experience outside the home.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Strengthening the Age Discrimination in Employment Act

Congress enacted the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 to eliminate employment discrimination. Because of their similar purpose and almost identical language, these statutes have generally been applied in like fashion. Title VII, however, covers employers with 15 or more employees, while the ADEA applies to employers with 20 or more employees.

The Civil Rights Act of 1991 amended Title VII to overturn the adverse effect of several US Supreme Court decisions. By not similarly amending the ADEA, Congress created language differences between the two statutes that permit the continued application of those Supreme Court decisions to age discrimination cases, with detrimental consequences for age discrimination victims. Other Supreme Court decisions have further eroded the ADEA's protections, making it more difficult to prove unlawful discrimination and otherwise limiting the rights of plaintiffs to pursue discrimination claims.

Further, Title VII, but not the ADEA, permits victims to recover compensatory and punitive damages. Victims of age discrimination also should have such damages available, not only as a means of making victims whole but also to encourage representation of lower-income victims by private attorneys.

In *Kimel v Florida Board of Regents*, the US Supreme Court denied millions of state employees the protections of the ADEA by ruling that the Eleventh Amendment to the US Constitution shields states from ADEA suits by private individuals.

If enacted as introduced, the Civil Rights Act of 2005 would reverse or mitigate a number of these Supreme Court and lower court decisions.

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Strengthening the Age Discrimination in Employment Act

Congress should quickly pass legislation that restores the full force and effect of the Age Discrimination in Employment Act (ADEA) and other civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.

The protections afforded by the ADEA should be broadly interpreted and vigorously enforced. AARP is opposed to any administrative or executive action, legislation or judicial interpretation that would weaken ADEA protections.

Congress should expand the ADEA's jurisdiction to cover employers with 15 or more employees, as Title VII of the Civil Rights Act does, rather than retain the current threshold of 20 or more employees.

AARP supports legislation that would ensure that the rights of federal employees are enforced and their ADEA charges processed and pursued vigorously and equitably.

STATE & LOCAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Strengthening the Age Discrimination in Employment Act

State and local governments should enact, strengthen and enforce statutes prohibiting age discrimination in employment by both public and private employers. The rights and remedies provided in state and local laws and ordinances should, at a minimum, be modeled on those found in the federal Age Discrimination in Employment Act and other federal worker-protection laws. These laws should make clear that the right to work without age discrimination is on a par with other civil rights.

States should waive their sovereign immunity to age discrimination lawsuits by public employees, thereby ensuring that they are afforded the same protections as other workers.

States should enact or strengthen statutory provisions to prohibit wrongful discharge by any employer.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Age Discrimination in Employment Benefits

Passed in 1990 the Older Workers Benefit Protection Act (OWBPA) makes clear that employee benefits are among the “terms, conditions, compensation and privileges of employment” protected under the Age Discrimination in Employment Act (ADEA). The OWBPA also codifies long-standing regulations that embody the “equal benefit or equal cost” rule. This rule requires employers either to provide older workers and retirees with benefits equal to those of younger workers and retirees or to incur the same cost for providing a benefit regardless of the age of the beneficiary.

The OWBPA also establishes clear standards and information requirements for employers who want workers to waive and release their ADEA rights (see the section below, Waivers and Compulsory Arbitration).

Employers, employees and the courts need the Equal Employment Opportunity Commission (EEOC) to issue comprehensive regulations interpreting and implementing the OWBPA. To date, the EEOC has issued guidance with respect only to certain waiver provisions in Title II of the act.

In recent years a new risk to older workers’ benefits has emerged in the form of conversions of traditional pensions to cash balance plans. These plans describe their benefits in terms of “individual account balances” similar to 401(k) plans and thus appear like defined contribution plans to the worker. However, cash balance plans are defined benefit plans and must meet all defined benefit plan requirements. Although cash balance plans can be beneficial to workers, conversions from traditional defined benefit to cash balance plans can be harmful to older, longer-service workers. Traditional defined benefit plans are generally designed to provide the largest share of benefits in the later years of a participant’s career (see Chapter 3, Retirement Income: Private Pensions—Cash Balance Plans for a more complete discussion of cash balance plans).

Recent court decisions have cast doubt on the legality of cash balance plans; the Treasury Department has urged Congress to pass legislation establishing guidelines for the structure of such plans.

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Age Discrimination in Employment Benefits

AARP endorses the equal benefit or equal cost rule, which is the traditional, long-standing interpretation of Age Discrimination in Employment Act (ADEA) provisions regarding employee benefits for older workers.

The exceptions to the rule provided for in the ADEA must be narrowly construed in order to ensure that the rights of older workers and retirees to fair employment benefits are maximized.

Vigorous ADEA enforcement, which emphasizes strict compliance and an absolute prohibition against using benefit plans to accomplish illegal involuntary retirement, is critical to the law's fair application.

Employers' use of cash balance pension plans and conversions of traditional defined benefit pension plans to cash balance plans should be carefully designed to ensure that they do not discriminate on the basis of age.

The Equal Employment Opportunity Commission (EEOC) should immediately issue regulations under the Older Workers Benefit Protection Act that make clear the rights of older workers to fair and nondiscriminatory benefits under the ADEA. AARP also supports a broad interpretation of ADEA coverage and its prohibitions against discrimination in employee benefit plans.

AARP endorses the EEOC's position that with regard to employee benefit plans, the Americans with Disabilities Act applies not only to employers but also to certain insurance providers (such as those created for the sole purpose of providing insurance benefits for specific employers), and prohibits employers from reducing or denying benefits on the basis of disability.

STATE POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Age Discrimination in Employment Benefits

States should immediately comply with the employee benefits sections and mandatory retirement prohibitions in the Age Discrimination in Employment Act.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Retiree Health Coverage

Employer group health plans are the major source of health coverage for working adults and their families. Research has shown that the availability of health benefits is a key factor in retirement decisions, especially among those who are not yet age 65, the age when Medicare coverage typically becomes available. Because of the significant role that employer-sponsored health coverage plays in retirement, the decline in the number of employers offering retiree health benefits is a matter of serious concern.

Some retired workers may be eligible for health care coverage under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). However, the benefits promised by COBRA should not be confused with the retiree health benefits provided by an employer pursuant to a contract or other agreement to provide these benefits. COBRA benefits legally entitle a former employee or employee's dependent to continue in an employer's health plan for a period of time (established by law based on the type of termination); the benefits are entirely paid for by the former employee. Retiree health benefits, on the other hand, are a voluntary benefit offered by the employer to retirees. The employer may choose to underwrite all or part of the cost of these benefits, and the benefits may differ substantially from those offered to current employees.

The federal court decision in *Erie County Retiree Assoc. v County of Erie*, 220 F. 3d 193 (3d Cir. 2000) has highlighted many of the evolving legal and economic issues surrounding employer-provided retiree health benefits. The court held that the Age Discrimination in Employment Act (ADEA) prohibition against discrimination in benefits prohibits employers from implementing benefit plans that treat retirees differently based on their Medicare eligibility, e.g., an employer may not reduce or eliminate retiree health benefits at age 65. This decision has raised concerns among employers that their retiree health plans may violate the ADEA. In response to the decision, legislation was introduced in 2002 and 2003 that would allow employers that choose to offer retiree health benefits to discriminate against older retirees by eliminating such benefits at age 65.

Although AARP has successfully prevented passage of legislation amending the ADEA to permit employers to eliminate retirees' health benefits upon eligibility for Medicare, efforts to amend the law either through legislation or indirectly through the administrative process continue to threaten retirees' rights. The Equal Employment Opportunity Commission has voted to finalize a regulation that exempts this discriminatory practice from ADEA coverage. The opposition expressed by AARP and its members to this

regulation has, to date, prevented it from being published or otherwise taking effect.

(For additional discussions of retiree health coverage, see Chapter 2, Taxation: Other Revenue Options—Taxing Employer-Provided Benefits; Chapter 3, Retirement Income: Postretirement Health Benefits; and Chapter 6, Health Care: Health Care Coverage—Private Health Insurance—Retiree Health Coverage.)

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Retiree Health Coverage

AARP urges Congress and federal policymakers, including the Equal Employment Opportunity Commission, to protect the rights of older retirees to fair and equitable treatment in all benefits provided by employers, including retiree health benefits.

AARP supports measures to encourage the provision of employer-provided retiree health benefits.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Taxation of Damage Awards

The current tax treatment of damage awards reflects the cumulative (and, in some cases, unintended) effects of a number of recent laws and court decisions. Under current law, compensation for emotional distress related to a physical injury is tax free. However, the Small Business Job Protection Act of 1996 required people who suffered emotional distress through nonphysical injury—which includes acts such as discrimination, sexual harassment and retaliation—to pay taxes on amounts received for the mental anguish they suffered. Further, if successful plaintiffs receive back-pay or front-pay awards in a lump sum, they may be taxed at a higher “marginal” rate on those restored wages than if they had received this income as wages in increments over time. Finally, primarily as a function of the alternative minimum tax, many of those compensated for discrimination were required to pay taxes on the part of the award that went to their attorney, even though the attorney was also taxed on the fees received. Congress enacted legislation in 2004 eliminating the double taxation of legal fees and costs in civil rights, discrimination and false claims cases.

Taxation of Damage Awards

AARP supports the further enactment of laws to remedy the current inequitable tax treatment of damage awards, particularly the taxation of wages, emotional distress compensation, and damages received under the Age Discrimination in Employment Act and other civil rights laws.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Mandatory Retirement

The Age Discrimination in Employment Act (ADEA) generally prohibits employers from establishing maximum hiring or mandatory retirement ages for their workers. There are a number of exemptions to this prohibition: Air traffic controllers, airline pilots, federal police and firefighters are among those who can be forced out of their jobs solely on the basis of age. Despite arguments made by its supporters that mandatory retirement is needed to protect the public from older, unfit officers, in virtually every circumstance, public safety would be better served by testing the fitness of all public safety employees, regardless of age.

Unfortunately, Congress and some federal agencies expanded the exemptions to the ADEA in 1996. Congress passed legislation allowing state and local governments once again to set mandatory retirement ages as young as 55 and maximum hiring ages for public safety employees, such as police officers, firefighters and prison guards. This discriminatory legislation flies in the face of numerous and comprehensive scientific and medical studies, some commissioned by Congress. There is some evidence that Congress may be planning to reexamine this issue. The Senate held a hearing devoted to mandatory retirement requirements for federal law enforcement and public safety personnel at the close of the 108th Congress.

Research on airline pilots has also failed to document an increase in accident rates among older pilots. For example, a recent study by Johns Hopkins University researchers found little relationship between chronological age and safety performance in a ten-year study tracking more than 3,300 commuter aircraft pilots ages 45 to 54.

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Mandatory Retirement

AARP supports the elimination of mandatory retirement for all workers.

AARP urges Congress to repeal legislation permitting state and local governments to discriminate against their public safety employees by establishing arbitrary maximum hiring and mandatory retirement ages.

The Federal Aviation Administration should eliminate its age-60 rule and issue regulations for determining older pilots' competency and fitness on the basis of factors related to safety, as is done for younger pilots.

STATE & LOCAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Mandatory Retirement

AARP supports the elimination of mandatory retirement for all workers.

States and local governments should eliminate maximum hiring and mandatory retirement ages for their public safety employees.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Actions by the Equal Employment Opportunity Commission

The success or failure of the Age Discrimination in Employment Act (ADEA) largely depends on the actions of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with interpreting, implementing and enforcing federal employment discrimination law. Recently, the EEOC has taken many steps indicating a willingness to accommodate the concerns of employers at the expense of workers' rights. More than 60,000 AARP members have repeatedly contacted the EEOC to express their opposition to its efforts to issue a regulation that would exempt retiree health benefits from ADEA protections. The regulation would allow employers to discriminate against older retirees by denying them employer-provided health benefits that are offered to younger retirees (see also this chapter's section on Age Discrimination in Employment, Retiree Health Coverage).

The EEOC is also considering a regulation that would expand employers' use of mandatory binding arbitration in civil rights cases, thereby denying employees their right to sue under laws prohibiting employment discrimination.

The percentage of EEOC litigation resources devoted to age discrimination cases remains small, and few age cases are litigated. Of the 393 lawsuits in fiscal year 2003, only 21 (5.3 percent) were ADEA suits, compared with 29 of 364 EEOC cases (8 percent) for fiscal year 2002.

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Actions by the Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) must refocus its energies on addressing its primary obligation: to protect the rights of employees from discrimination by employers. When issuing regulations, establishing an enforcement strategy, and developing procedures for resolving charges, the EEOC must maximize older workers' protections under the Age Discrimination in Employment Act (ADEA).

Congress and the administration must recognize the importance of the EEOC in enforcing the ADEA and other civil rights laws and provide the EEOC with the tools—both financial and statutory—to accomplish this.

The EEOC must withdraw its regulation that would encourage employers to violate the ADEA by purporting to exempt their retiree health practices from the act's coverage. The commission must restore its proper guidance on retiree health benefits (prohibiting discrimination against older retirees).

The EEOC must vigorously exercise its authority to conduct "directed" investigations and should pay particular attention to circumstances in which there may have been systemic and class-wide discrimination. The EEOC should begin developing a larger number of broadly based, policy-oriented age discrimination cases.

With the loss of individual state-employee rights to sue for monetary relief, it is imperative that the EEOC vigorously enforce the prohibitions in the ADEA and other federal statutes against discrimination by state employers. Congress and the administration must provide the EEOC with the resources to do so.

The EEOC should develop and issue guidelines on what constitutes multiple discrimination and incorporate that guidance into its procedures for intake, tracking, investigation and resolution of charges. Whenever a complaint of

discrimination on any protected basis is filed, the EEOC should determine whether there also has been discrimination on other protected grounds.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Early Retirement Incentives

Voluntary early retirement incentives (ERIs) may be attractive to both employees and employers and, given the right program design, still can comply with the Age Discrimination in Employment Act (ADEA). However, ERIs may pressure some older workers to retire prematurely and may reinforce the stereotype that older workers are the most dispensable in the workforce. AARP is particularly concerned about exit incentive programs that deny valuable additional benefits to workers above a certain age, reduce the incentive benefits with increasing age, or reduce routine benefits of employment (e.g., vacation pay, parking spaces, etc.) for people who choose to continue working beyond “normal” retirement age. Educational institutions are the employers that most frequently have used such programs, which repeatedly have been found illegal. Such programs violate the ADEA and contravene national policy discouraging practices that limit older workers’ continuing labor-force participation.

When designing ERI benefits, it is important that they do not jeopardize the health of the overall pension plan, for either current or future retirees.

With limited exceptions for ERIs offered only to tenured faculty at institutions of higher education, all ERIs must further the “relevant purpose or purposes” of the ADEA if challenged as discriminatory—a standard set out under the Older Workers Benefit Protection Act. No early retirement incentive program may “permit or encourage involuntary retirement.”

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Early Retirement Incentives

AARP vigorously opposes any effort by employers seeking legislation permitting the use of “age-capped” benefit plans.

The Equal Employment Opportunity Commission, employers and advocates for older workers must carefully interpret and monitor the standards for early retirement incentive programs provided for in the Older Workers Benefit Protection Act to determine their effects on older workers and their rights.

AARP supports regulations that fully secure the rights of older workers to receive fair and nondiscriminatory benefits and to participate voluntarily in early retirement and exit incentive plans.

Employers who reduce their workforce are required to do so in ways that do not discriminate against older workers. Employers should be encouraged to use nondiscriminatory exit incentives for employees of all ages and develop nondiscriminatory, cost-saving options other than layoffs or terminations, such as flexible or part-time employment and job-sharing.

AGE DISCRIMINATION IN EMPLOYMENT

Background

Waivers and Compulsory Arbitration

Employers often require workers to sign a waiver of their rights and claims under the Age Discrimination in Employment Act (ADEA) and other labor laws as a condition of employment, when they are terminated, or when they accept early retirement or exit incentives. The Older Workers Benefit Protection Act (OWBPA) establishes stringent standards and information-provision requirements for employers seeking waivers and releases of ADEA rights. But despite the law's clear language on waivers, a number of concerns remain.

Mandatory binding arbitration provisions in employment contracts or applications threaten the protection Congress afforded older workers under the ADEA and other federal laws. They also undermine the enforcement system Congress put in place to eliminate employment discrimination. Pending legislation, the Civil Rights Act of 2005, if enacted as introduced, would clarify that mandatory binding arbitration may not be used by employers to deny workers their right to go to court under the civil rights laws prohibiting employment discrimination.

Although the Equal Employment Opportunity Commission has issued regulations interpreting OWBPA Title II, a number of important issues remain, such as the legality under OWBPA of compulsory arbitration agreements.

FEDERAL POLICY

AGE DISCRIMINATION IN EMPLOYMENT

Waivers and Compulsory Arbitration

The Equal Employment Opportunity Commission should quickly develop and promulgate regulations under Title I of the Older Workers Benefit

Protection Act to address important issues remaining under the law, such as what constitutes legal and illegal exit and early retirement incentive plans under the Age Discrimination in Employment Act (ADEA). The basis for all such regulations must be the intent of Congress to protect the rights of older workers under the ADEA. Any ambiguities in the statutory language must be resolved in favor of protecting older workers' rights.

AARP supports prohibiting the use of mandatory and binding arbitration of claims filed under federal fair employment laws, including the ADEA, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act, as introduced in the Civil Rights Act of 2005.

TITLE VII OF THE CIVIL RIGHTS ACT

Background

Title VII of the Civil Rights Act of 1964 is one of the major federal laws designed to eliminate employment discrimination. It prohibits employment discrimination based on race, gender, color, religion and national origin (for background and further policies on discrimination, see Chapter 13, Personal and Legal Rights: Civil Rights). Title VII is important to older workers because its interpretation influences the interpretation of the ADEA and because older workers are often subject to double or multiple discrimination based on gender, race or ethnicity, as well as age. In addition to facing inequities in hiring and promotion, older workers are often excluded from training, apprenticeship and internship programs that provide critical job skills and may be the key to entry into a profession. Upon retirement these workers suffer the consequences of low wages and occupational segregation—low Social Security benefits, small or no pensions, and limited personal savings.

In the wake of September 11, 2001, some groups have experienced profound discrimination and outright hostility based on their national origin, in workplaces as well as in the wider world. These displays evince the worst forms of bias, because they stem from individuals' appearance and apparent membership in groups identified with terrorism.

FEDERAL, STATE & LOCAL POLICY

TITLE VII OF THE CIVIL RIGHTS ACT

AARP supports laws that protect older workers from all forms of employment discrimination.

AARP supports policies and programs that seek to redress past and current discrimination through active measures that ensure equal opportunity in all areas of American life.

FEDERAL POLICY

TITLE VII OF THE CIVIL RIGHTS ACT

AARP supports broad interpretation and vigorous enforcement of Title VII of the Civil Rights Act of 1964.

AARP is opposed to any administrative or executive action, legislation or judicial interpretation that would weaken Title VII protections.

AARP supports restoring the full force and effect of Title VII of the Civil Rights Act of 1964, as introduced in the Civil Rights Act of 2005.

DISCRIMINATION AGAINST WORKERS WITH DISABILITIES

Background

The Americans with Disabilities Act (ADA) was enacted to provide a comprehensive national mandate for the elimination of discrimination against people with disabilities. The ADA's employment provisions are based on Title VII and Section 504 of the Rehabilitation Act, which prohibits disability-based discrimination by federal agencies and by states and other recipients of federal funds.

Workers age 50 and above include a disproportionate share of workers with "disabilities" protected by the ADA and Section 504—i.e., people who have an "impairment" causing a "substantial limitation" in one or more "major life activities," such as walking, seeing or communicating, but who are also fully qualified to perform gainful employment, though at times only with some "reasonable accommodation" on the job. Fifty percent of all workers with a condition impairing their ability to work are 45 and older. The aging of the American workforce is likely to increase the number of employees with disabilities.

Millions of older people are able to work, want to work and, in many cases, need to work, despite chronic health conditions and other disabilities. Yet people with disabilities who are ready, willing and able to work are routinely denied employment, promotions and other opportunities on the job and may be subject to harassment based on prejudicial stereotypes and misconceptions about their physical and mental abilities. Federal requirements under the ADA and Section 504 that job criteria accurately measure the abilities needed in a job are an important protection against discrimination based on disability. In addition, the ADA and Section 504, which also prohibit discrimination in employee benefits, including health insurance plans, have a profound effect on older workers and their benefits.

Like other federal employment discrimination laws, the ADA and Section 504 are intended to be interpreted broadly. However, many recent decisions by the US Supreme Court and other federal courts have deviated from this approach and have weakened both laws. Recent court decisions have interpreted quite narrowly what amounts to a substantial limitation in major life activities and thus have greatly reduced protections under the ADA and Section 504.

While the employment provisions of federal disability discrimination laws are important for all workers, they are particularly important for older workers who are at greater risk of developing the health conditions and impairments that too often prompt employment discrimination. (For more on services for and the rights of people with disabilities, see Chapter 3, Retirement Income: Disability Insurance, and Chapter 13, Personal and Legal Rights: Civil Rights—Protections for People with Disabilities.)

Finally, in 2001 the US Supreme Court held in *Board of Trustees v Garrett* that the Eleventh Amendment to the US Constitution also immunizes states from suits for money damages brought under the ADA by private individuals. As a result millions of qualified state employees with disabilities have lost their right to directly enforce the ADA against their state employer. Thus far, courts in many areas of the country have vindicated these rights in litigation under Section 504 of the Rehabilitation Act, which applies to many, but not all, state agencies. Most such efforts have succeeded. Until the Supreme Court upholds Section 504 as an antidote to the *Garrett* decision, however, this approach is uncertain.

FEDERAL & STATE POLICY

DISCRIMINATION AGAINST WORKERS WITH DISABILITIES

AARP supports federal and state laws that protect workers from employment discrimination based on disability. AARP also supports strengthening these protections.

AARP supports the broad interpretation and vigorous enforcement of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act.

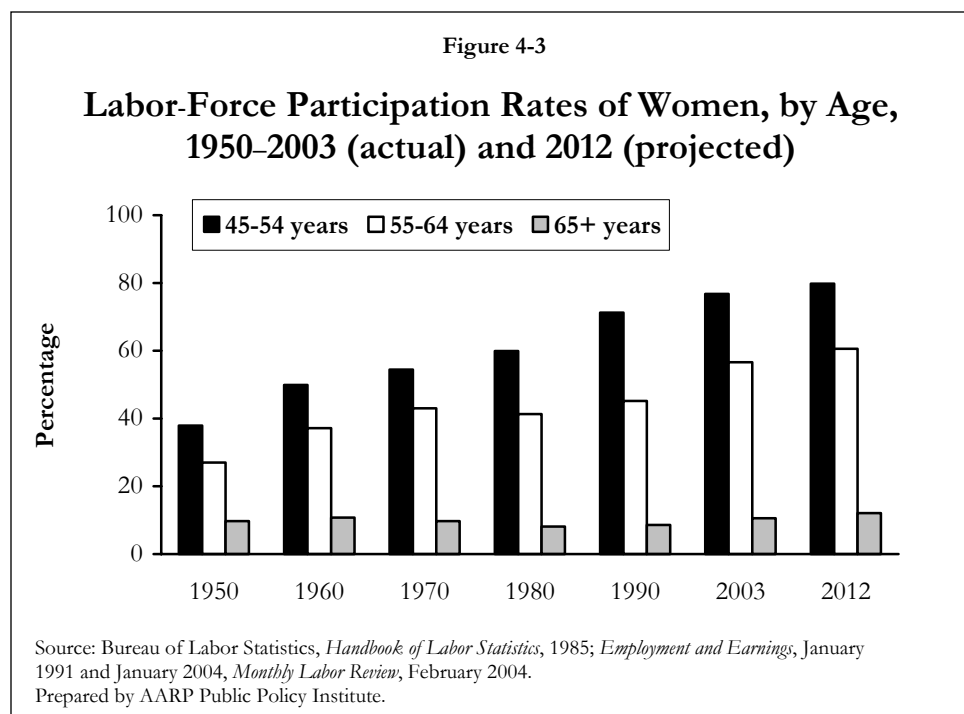
AARP is opposed to any administrative or executive action, legislation or judicial interpretation that would weaken ADA protections.

AARP supports careful monitoring to ensure ADA implementation and enforcement.

ECONOMIC EQUITY FOR WOMEN

Background

In the past five decades, the number of women in the workforce has more than tripled, and the rates of labor-force participation among midlife women, in particular, have risen dramatically (Figure 4-3). More than 40 percent of AARP's working members are women; the majority of these women work full time. Yet three-fourths of working women remain concentrated in low-paying occupations.



Working women of all ages encounter attitudes, business practices and laws that arbitrarily limit their employment opportunities and earning power and thus their ability to provide for their own financial security. Despite barriers that inhibit their equitable participation in the labor force, more than 70 percent of women age 50 to 59 are in the labor force. The 16.9 million working women age 50 and over account for almost 26 percent of female workers. The number of employed midlife and older women is increasing rapidly, and many are the sole or primary economic support for their family.

Responsibility for family care still usually falls to women, causing some women to work part time, with potentially adverse effects on employment status and retirement income and savings (see the section below, Family and Medical Leave). In fact, more than two-thirds of the part-time labor force is made up of women, who often work for low wages with no job security and

little or no access to employer-provided benefits. Fewer than one in five women working part time are covered by a health insurance plan at work, and only about one in three participate in a pension plan (see Chapter 3, Retirement Income).

It is not only women working part time whose earnings are low. As of 2003 women in full-time wage and salary jobs had a median weekly wage of \$552, which amounted to 79 percent of the \$695 earned by their male counterparts.

FEDERAL POLICY

ECONOMIC EQUITY FOR WOMEN

AARP supports efforts to eliminate all barriers to women's employment and to ensure equality in employment opportunities for women. These efforts include:

- improving compensation for jobs held predominantly by women, including efforts to eliminate wage disparities between men and women in similar jobs—Pay equity is key to enhancing women's wages and retirement income;
- increasing attention to the specific employment and training needs of midlife and older female workers, including displaced homemakers who have lost their primary source of financial support; and
- improving pension coverage in the occupations, industries and sectors in which women are most likely to work and strengthening the adequacy of pension benefits.

ECONOMIC SECURITY FOR WORKERS

Background

Employment of Low-Wage Workers

There is a sizable workforce that has not benefited from the general prosperity of the past decade: those in the low-wage sector for whom full-time, year-round work fails to provide sufficient income for a decent standard of living.

Low-wage workers have been losing out relative to higher-paid workers at a time when corporate executives receive ever more lavish compensation. As a rule the jobs held by these workers provide no health insurance or pension coverage, little if any paid time off, and virtually no job security. Often low-wage workers must work two full-time jobs to make ends meet.

In the wake of welfare reform, the “solution” to poverty has been enshrined in work, yet low-wage work of the kind available to most one-time welfare beneficiaries cannot keep economic hardship at bay. Supportive government policies continue to be needed. Some jurisdictions have passed living-wage ordinances intended to ensure that covered workers’ earnings are above the poverty level.

FEDERAL, STATE & LOCAL POLICY

ECONOMIC SECURITY FOR WORKERS

Employment of Low-Wage Workers

AARP supports policies to ensure that workers’ pay and other benefits are sufficient to cover essential living expenses.

Governments at all levels should explore ways to help low-wage and moderate-income families balance work and caregiving responsibilities, for example, by allowing unemployment insurance funds to be used for such purposes as making family leave possible for workers who cannot afford to take unpaid leave.

Employers should be encouraged to make career advancement possible for low-paid and part-time workers through training, apprenticeships, job-partnering, internships, and other means of making employment an antidote to poverty.

The living-wage concept should be widely enacted as a method of keeping workers’ pay commensurate with the cost of living in their areas.

ECONOMIC SECURITY FOR WORKERS

Background

Family and Medical Leave

The Family and Medical Leave Act (FMLA), enacted in 1993 with strong support from AARP, provides an extraordinarily useful benefit for working families. It allows individuals who work for employers with 50 or more employees to take up to 12 weeks of leave to care for a newborn or ill child, parent or spouse or to care for themselves in case of illness. There is no requirement for paid leave, but employers must continue their workers’ health insurance (on the same terms as during active employment) during the leave period.

The FMLA’s success has prompted policymakers to explore options for expanding and/or changing the law’s benefits structure. Some proposals

would expand the law to provide 24 hours of annual leave to attend to nonemergency family obligations (e.g., school meetings, older relatives' health needs and well-child examinations). Some would allow employees to take additional paid leave in exchange for overtime work; others would require that leave under the FMLA be paid. Research indicates that many caregivers to the elderly are neither immediate family members nor relatives. Given the aging of the population, the trend toward smaller and more diverse families, and the population's continued geographic mobility, a growing number of people may find themselves caring for—and receiving care from—extended family, neighbors and friends.

In 2003 the US Supreme Court ruled, in the case of *Nevada Department of Human Resources v Hibbs*, that states are not immune from individual lawsuits for money damages under the FMLA. AARP had urged the court to permit such suits in order to ensure state workers fair and equal access to necessary family and medical leave.

FEDERAL POLICY

ECONOMIC SECURITY FOR WORKERS

Family and Medical Leave

AARP supports efforts to improve the benefits provided under the Family and Medical Leave Act (FMLA) to working families, including by offering paid leave and extending the act's provisions to more employers and anyone engaged in the types of caregiving the FMLA covers, regardless of family relationship.

Changes to the FMLA must protect its current benefits and reflect the multiple family obligations of workers, especially women. Changes also must protect the rights workers enjoy under other fair employment laws, such as the Fair Labor Standards Act.

AARP supports the Healthy Families Act, which would require employers with 15 or more employees to provide their full-time employees with at least seven paid sick days a year to care for their own medical needs or the needs of their family.

ECONOMIC SECURITY FOR WORKERS

Background

Employee Health Benefits

Employers are the major source of health insurance for workers under age 65 and their dependents. For this group, continuous health insurance coverage is related to stable full-time employment.

However, fewer than three-fourths of working adults are covered by employer-sponsored health insurance. Workers employed in small businesses, the self-employed, part-time workers, and those with episodic work histories are least likely to have health coverage. Job changers and those who lose their jobs are also at risk of losing coverage, especially for preexisting conditions.

Many workers lack adequate health insurance if they retire early or become disabled. The same may be true for workers' spouses (for a discussion of retiree health benefits, see Chapter 3, Retirement Income: Postretirement Health Benefits and Chapter 6, Health Care: Health Care Coverage—Private Health Insurance—Retiree Health Coverage and Health Care: Health Care Coverage—The Uninsured and the Need for a Safety Net—The Uninsured).

Some of these workers may be eligible for health insurance under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). While COBRA is a valuable benefit, it should not be confused with retiree health benefits, and it is often too expensive for potential beneficiaries to purchase.

FEDERAL POLICY

ECONOMIC SECURITY FOR WORKERS

Employee Health Benefits

The Consolidated Omnibus Budget Reconciliation Act (COBRA) should be amended to ensure that retirees and people with disabilities and their spouses and dependents can continue coverage under their employer's health plan until they become Medicare-eligible, regardless of whether the employer otherwise provides retiree health benefits.

ECONOMIC SECURITY FOR WORKERS

Background

Benefits for Contingent and Part-Time Workers

A significant number of midlife and older workers are employed in the contingent workforce as part-time workers, temporaries, independent contractors, leased employees and on-call workers. Nearly one-third of AARP's employed members work part-time. Contingent work is the predominant form of employment for workers age 65 and older and a common type of work for people in midlife. Women and minorities are disproportionately represented in the contingent workforce.

Many midlife and older contingent workers have chosen this status, but significant numbers hold contingent jobs because they cannot find full-time permanent work. Some contingent workers are independent contractors who have been hired as self-employed workers so that the employer need not pay fringe benefits, contribute to Social Security, deduct taxes or grant paid time off.

Contingent workers typically receive lower pay and few or no benefits. They also have little job security, scarce potential for career growth, and few legal rights. Consequently, contingent workers generally have dimmer prospects for economic security in retirement. The availability of prorated fringe benefits would facilitate the ability of older workers to continue working and would especially help midlife and older women, who must frequently juggle work and family caregiving responsibilities.

FEDERAL & STATE POLICY

ECONOMIC SECURITY FOR WORKERS

Benefits for Contingent and Part-Time Workers

Congress and state legislatures should require employers that provide employee benefits to give those benefits—including prorated pensions, health insurance, sick leave and disability leave—to all employees regardless of their full- or part-time status.

The hiring of part-time and contingent workers should not be used as a means of avoiding the payment of fringe benefits.

AARP supports efforts to ensure that employees and independent contractors are properly classified and fairly compensated.

Workers' compensation and unemployment insurance rules and thresholds should cover contingent workers.

ECONOMIC SECURITY FOR WORKERS

Background

Alternative Work Arrangements

Alternative work options can help older workers remain employed while helping employers retain the skills and experience of a long-term staff. Flextime, part-time employment, flexplace and job-sharing are some options that especially appeal to older workers. Retiree reemployment programs can make the retirement transition easier for employees while helping employers meet business needs by tapping workers familiar with the organization. In addition, time off for education and training enables older workers to enhance and update their professional skills, thereby making their continued employment more rewarding. Such options can help meet the needs and interests of workers with family responsibilities, of older workers nearing retirement and hoping to reduce job responsibilities gradually, and of retirees interested in returning to work.

Phased or partial retirement programs that enable workers to reduce their work schedules over a period of time before full-time retirement may be one way to encourage workers to postpone retirement. Employers benefit from phased retirement programs that help retain long-term, skilled and experienced workers who can be hard to replace in a tight labor market. Easing into retirement by scaling back with the same employer offers workers advantages as well. Workers who wish to remain in the labor force but on reduced schedules could avoid the often discouraging search for new jobs that allow them to work fewer hours. The shock or stress of adjusting to abrupt, total and permanent labor-force withdrawal would be avoided; workers could test out retirement before plunging into it headlong. However, phased retirement programs may also affect benefit arrangements, particularly the eligibility for and accrual of health and pension benefits. Therefore, workers must be fully informed and must understand what the options entail. The Internal Revenue Service proposed regulations that would establish standards for a bona fide phased retirement program that fits into the structure of existing law. AARP will evaluate this and other proposals to ensure that they are based on sound retirement policy and protect those who opt for phased retirement.

AARP continues to be concerned about recurring work arrangement proposals that would erode workers' rights, such as those that would grant workers compensatory time off instead of overtime pay.

Alternative Work Arrangements

Public and private employers should be encouraged to provide more flexible work options, such as alternative work schedules, flextime, job-sharing, bridge jobs, phased retirement at prorated compensation, and retiree reemployment programs.

Flexible work options also should be used in lieu of layoffs whenever possible during economic downturns or temporary downsizings.

Barriers to the adoption and acceptance of phased retirement programs should be eliminated. Employers must fully inform workers about the potential impact of phased retirement on benefit arrangements. Phased retirement options must be voluntary for employees, must be designed to protect workers' benefits during phased retirement, and must not undermine the long-term retirement security of workers who choose such options.

AARP supports giving employers greater information and resources on phased or partial retirement programs. Public and private agencies should be encouraged to provide employers with information about such programs (incorporating but not limited to job-sharing, part-time work and progressive reduction of work hours), including successful program models and information on how to resolve legal issues and company policies that affect these programs.

Evolving legislative proposals must be monitored to ensure that workers' rights are protected.

ECONOMIC SECURITY FOR WORKERS

Background

Self-Employment

Self-employment continues to be an important alternative to wage and salary employment in the US. Self-employment opportunities make the economy more flexible, generate new products and services, and add to the nation's productive capacity. Self-employment also serves as a training ground for many of the nation's entrepreneurs and is an important first step in small-business formation and growth.

In 2001 there were 13.9 million self-employed individuals (incorporated and unincorporated) in the nonagricultural workforce—i.e., 10.3 percent of the

nation's labor force. Fifteen percent of all workers 50 and older were self-employed in 2001. Almost 40 percent of all self-employed individuals were age 50 and over.

The number of self-employed workers will likely increase as the population ages. Seventeen percent of baby boomers say they expect to go into business for themselves when they retire.

FEDERAL & STATE POLICY

ECONOMIC SECURITY FOR WORKERS

Self-Employment

AARP supports eliminating barriers to self-employment, such as the lack of access to capital, technical assistance and training.

The Small Business Administration and Departments of Labor and Commerce should coordinate programs designed to assist individuals in their efforts to become self-employed.

ECONOMIC SECURITY FOR WORKERS

Background

Federal-State Unemployment Insurance

The joint federal-state Unemployment Insurance (UI) system was created in 1935 as part of the Social Security Act to provide a safety net to workers who lose their job for reasons that are not their fault. Over the decades the system has become less effective in addressing the needs of the unemployed.

Although the rules vary from state to state, they typically exclude workers whose employers have contributed to the system on their behalf but who do not fit the traditional notion of a laid-off worker: part-time employees, recently hired low-wage workers, and people who are forced to leave their jobs for family reasons. These groups include many people recently hired from the welfare rolls. Further, most states impose a one-week waiting period and base eligibility on earnings over the 12-month period ending a few months before the date the job is lost. Today, fewer than 40 percent of the unemployed qualify for unemployment compensation, down from 50 percent in 1975 and even higher levels a half-century ago.

In addition, federal law allows states to reduce or even eliminate at least part of the state UI benefits for claimants receiving pension and/or Social Security payments. Thus, an unemployed person who is receiving a pension and/or Social Security may have his or her UI compensation reduced or

eliminated. Furthermore, federal law restricts UI recipients' ability to officially enroll in job training programs.

STATE POLICY

ECONOMIC SECURITY FOR WORKERS

Federal-State Unemployment Insurance

The unemployment insurance (UI) system should be brought up to date with changes in the American workforce. At a minimum it should not discriminate against people working part time or seeking part-time work. UI is particularly important during times of rising unemployment, and the compensation formula should be based on a worker's most recent earnings. In addition, waiting periods should be eliminated.

Older workers who have earned a pension and/or Social Security and UI coverage deserve to receive all their benefit payments while they search for new employment. Legislators should repeal those portions of federal and state UI laws that prevent this.

States should modify their UI compensation programs to provide more effective mechanisms for assisting the unemployed, including allowing UI recipients to be officially enrolled in job training programs while collecting benefits.

ECONOMIC SECURITY FOR WORKERS

Background

Workers' Compensation

Many states reduce or terminate workers' compensation benefits when recipients become eligible for retired-worker benefits under Social Security. Although older workers are less likely than younger workers to be injured on the job, the number of older workers affected by these offset or termination provisions is likely to increase as the workforce ages. In addition, many workers may reach retirement age having been unable to work for long periods due to occupational injury or illness, which would have an adverse impact on other retirement income.

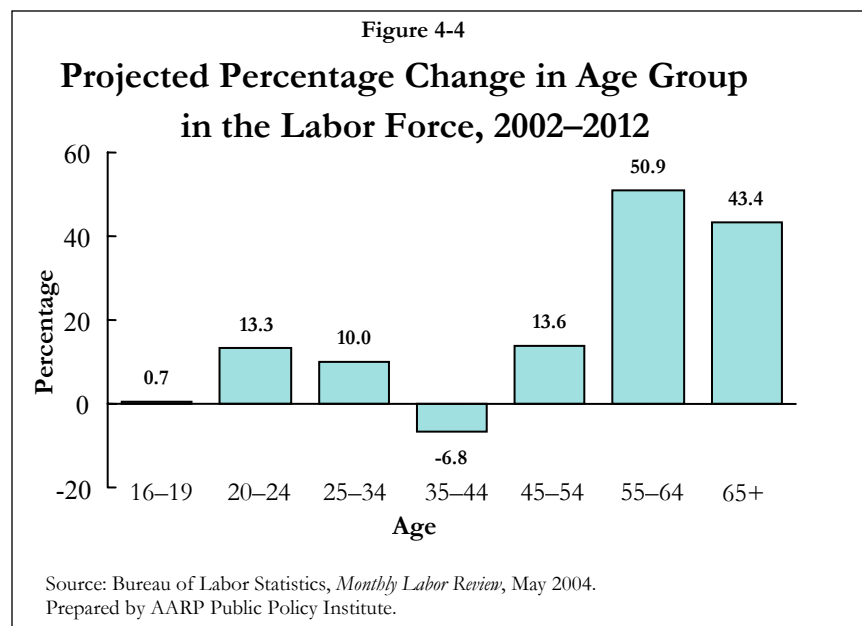
Workers' Compensation

Workers who suffer an occupational injury or illness should be eligible for unreduced workers' compensation regardless of age or eligibility for retired-worker benefits under Social Security. Legislatures should repeal those portions of state workers' compensation laws that prevent this.

TRAINING AND JOB PLACEMENT

Background

The US labor force is aging and becoming more racially and ethnically diverse. Historically, older workers and minorities have found themselves at a disadvantage when looking for work, seeking a promotion or participating in training programs. Widespread labor and skills shortages, coupled with a decline in the number of labor-force participants between the ages of 35 and 44 (Figure 4-4), may prompt employers to find innovative ways of encouraging older workers and minorities to continue working, for example, by offering training programs, flexible work schedules and job-sharing. Training programs, including programs that prepare workers for new occupations or careers, will be increasingly necessary to access and develop the employment potential of an aging workforce. The demand for training also may increase in the face of rising unemployment among older workers and minorities, who often encounter formidable employment barriers in their search for work.



In 1998 the Workforce Investment Act (WIA) was signed into law. The act consolidated federally funded employment and training programs, including the Job Training Partnership Act (JTPA), which was repealed effective July 1, 2000. WIA addresses the training needs of adults, youth and dislocated workers.

Important features of the law include:

- institutionalization and expansion of one-stop service delivery in career centers that provide core services such as job search and placement assistance, career counseling and labor-market information (One-stop career centers are intended to provide universal access to all Americans), and
- creation of customer choice in the selection of job-providers for adults. New individual training accounts (vouchers for training services) are designed to give adults seeking training more control over their own careers.

Unlike the JTPA, the Workforce Investment Act (WIA), which establishes separate funding streams for adults, dislocated workers and youth, does not require states to set aside funds to provide services specifically for older workers. According to a recent Government Accountability Office (GAO) report, most states no longer offer separate programs for older workers. GAO also found that only about 12 percent of nonworking people age 55 and older who wanted a job were enrolled in federally funded programs between July 2000 and June 2001. Most of them were participating in the Senior Community Service Employment Program, which is funded under Title V of the Older Americans Act. This program provides part-time public-service employment and job placement assistance for low-income people age 55 and older. Few older people receive skills training under WIA.

The training needs of vulnerable populations, such as current and former welfare recipients, require special attention. Successfully moving welfare beneficiaries into jobs with a living wage, security, benefits and promotion opportunities, or helping them start their own businesses, requires potentially new types of training and job preparation programs and initiatives.

FEDERAL & STATE POLICY

TRAINING AND JOB PLACEMENT

Workers of all ages with incomes below the poverty level should remain a priority in publicly funded job training programs. The federal government should encourage states to use public job training funds to serve the near-poor as well.

Publicly funded job training programs should be developed and coordinated to adequately serve older people, including displaced homemakers.

Publicly funded job training programs should provide essential support services (e.g., dependent care and transportation) so that displaced homemakers and older people can take advantage of training.

Training programs must be flexible enough to respond quickly to a changing economy; employers' changing skill demands; and the varying needs, abilities and desires of individual participants.

Midlife and older participants, particularly women, in publicly funded employment or training programs should receive encouragement and opportunities to move into nontraditional occupations.

Programs designed to assist dislocated workers should be made available to workers regardless of age and the reason for dislocation.

FEDERAL POLICY

TRAINING AND JOB PLACEMENT

AARP supports efforts to improve the marketable job skills of workers of all ages through such reforms as:

- ongoing evaluation by the Department of Labor of how older workers are faring in one-stop career centers and under the Workforce Investment Act (WIA);
- a job training system that is customer-driven and provides participants with marketable skills for jobs that promise good wages, benefits and advancement potential—AARP urges federal regulations for one-stop career centers that encourage states to implement performance standards, especially ones relating to underserved populations such as older workers;
- expanded employment and self-employment opportunities created through training and other employment programs and policies in both the public and private sectors;
- a renewed emphasis on training older workers for jobs, especially in expanding and high-technology occupations;
- services and funds for training older people proportional to their representation in the workforce—Efforts to achieve this goal should be especially intensive in publicly funded job training programs that have underserved older workers;
- equitable access to training programs regardless of age, gender, race, ethnicity, disability, sexual orientation or religious and national origin—This includes making training facilities and equipment accessible to people with disabilities;

- Department of Labor efforts to develop innovative programs for displaced homemakers and other underserved populations;
- approval of sufficient funds by Congress to implement fully the goals of federally authorized job training programs;
- a Senior Community Service Employment Program (SCSEP) that continues to be funded fully as a separate program—The basis for SCSEP funding (average cost per enrollee) should adjust automatically according to an indexing formula;
- incentives for employers to develop apprenticeship programs, expand the number of occupations for which apprenticeship programs are provided, and reach out to older people and encourage their recruitment into apprenticeship programs; and
- protection of job training participants against loss of public benefits while in training.

In addition, the reauthorized WIA should incorporate targeted training requirements to serve older workers and ensure that one-stop career centers have sufficient staff to assess older workers' needs and serve as resources to workers needing assistance with the centers' job-search technology (e.g., computers and databases).

STATE & LOCAL POLICY

TRAINING AND JOB PLACEMENT

One-stop career centers should be customer-focused and provide universal access to basic, high-quality, user-friendly services, including employment, training, career counseling and education services.

One-stop career centers should be required to have and meet performance standards that measure the attainment of the following goals: universal access, services targeted to underserved populations, customer satisfaction and choice, integration of services, and legislated services and performance outcomes.

State and local workforce development plans should incorporate performance benchmarks that address the needs and preferences of midlife and older workers, particularly those with special needs, such as people with disabilities, downsized workers and displaced homemakers, all of whom may be returning to the workforce after an absence.

States and localities should seek to ensure that their efforts to comply with federal welfare-to-work requirements do not jeopardize the jobs of current workers.

States and localities should involve older people in planning the use of job training funds, especially by including older people on state and local advisory and decisionmaking boards.