

THE AGING OF THE AMERICAN WORKFORCE

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INTRODUCTION

One of the great success stories of the past fifty years has been the institutionalization of retirement, the result of society's ability to support a growing nonworking population in dignity and reasonable comfort. A number of developments in the decades immediately following World War II made retirement financially feasible and attractive to the average American. These included Social Security's eventual coverage of almost the entire workforce; the introduction of automatic cost-of-living increases for Social Security benefits; the expansion of private pension coverage; the passage of Medicare legislation; and the lowering to sixty-two of the age of eligibility for Social Security retired worker benefits. The country was getting richer and choosing to use some of its increased wealth to purchase later-life leisure. Older workers jumped at the chance to retire and enjoy that leisure.

This is not to imply the absence of employment barriers confronting older workers. Age discrimination, mandatory retirement rules in many establishments, job dislocation, and skills obsolescence have long plagued the older worker. Nonetheless, the notion of what constituted acceptable activity in later life changed as retirement became respectable and workers began looking forward to it, often from relatively young ages. No longer were ill health, disability, or perhaps substantial wealth the only legitimate reasons for labor force withdrawal at older ages, although health problems have always forced some workers to retire earlier than they might have preferred. In her economic history of retirement, Dora Costa argues that retirement ceased to be a time of withdrawal and dependence on family for support and care; rather, it became one of discovery and personal fulfillment.¹ A vast leisure industry emerged to cater to increasingly affluent

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1. DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880-1990*, at 1 (1998).

retirees. Early retirement became and remains the norm; proposals to increase the age of eligibility for Social Security benefits are not popular with the public.²

In its recent assessment of aging and employment policies in the United States, the Organization for Economic Cooperation and Development warns of slowing economic growth, serious labor shortages, and increasing tax rates due to the rapid aging of the population.³ Although the United States is aging less rapidly than many other developed countries, the nation's older and retired population will increase demands on public pension, health, and welfare programs. The Social Security system, for example, is currently generating more revenues than it is paying in benefits. As the boomers retire, this favorable situation will change and the trust fund reserves will eventually have to be drawn down. According to the 2005 annual report of the Board of Trustees of the Social Security Administration, the combined Old-Age and Survivors Insurance and Disability Insurance reserves will be exhausted by about 2041, at which time, the system will be able to pay only about 74% of promised retirement benefits.⁴ The Medicare program faces insolvency even sooner. Fostering longer work lives, while seemingly flying in the face of prevailing patterns of behavior, could reduce the rate of growth in expenditures for these programs, contribute to economic growth, and (by giving workers longer to save and invest for retirement) help to promote workers' ultimate retirement security. Although not yet high on the policy agenda in the United States, older workers are likely to be the focus of considerably more attention on the part of lawmakers when Congress turns to specific proposals to reform Social Security.

This Article provides an overview of the weakening labor force attachment of older Americans in the decades after World War II, which was facilitated by the entrance of baby boomers and married women into the workforce; speculates on what the future holds and why more work later in life may characterize growing numbers of older workers; and discusses a

2. See SARA E. RIX, AARP PUB. POLICY INST., SOCIAL SECURITY REFORM: RETHINKING RETIREMENT-AGE POLICY—A LOOK AT RAISING SOCIAL SECURITY'S RETIREMENT AGE 6–8 (1999), available at http://assets.aarp.org/rgcenter/econ/ib40_age_policy.pdf.

3. ORG. FOR ECON. CO-OPERATION & DEV., AGEING AND EMPLOYMENT POLICIES: UNITED STATES 11 (2005).

4. See SOC. SEC. & MEDICARE BDS. OF TRS., STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2005 ANNUAL REPORTS 15 (2005), available at <http://www.ssa.gov/OACT/TRSUM/tr05summary.pdf>. The Congressional Budget Office projects an insolvency date of 2052, after which scheduled revenues will amount to 78 percent of scheduled outlays. CONG. BUDGET OFFICE, UPDATED LONG-TERM PROJECTIONS FOR SOCIAL SECURITY 1 (2005), <http://www.cbo.gov/ftpdocs/60xx/doc6064/03-03-LongTermProjections.pdf>.

number of issues—such as labor demand and the quality of work—that must be addressed to ensure a productive aging workforce. Although the population and workforce are aging, substantially higher participation rates on the part of older persons are not inevitable.

I. BACKGROUND

Few labor force developments of the twentieth century were as pronounced or significant as the decline in participation on the part of older men.⁵ Nearly two-thirds of men aged sixty-five and older were in the labor force in 1900,⁶ often remaining on the job until they died or were physically incapable of doing any work at all. With the shift from an agricultural to a manufacturing economy, older men's attachment to the labor force weakened as employers sought younger and stronger workers to employ in the factories. "The growth of the factory system unquestionably accelerated the process of retirement," notes historian David Hackett Fischer,⁷ a process that began well before World War II. By 1940, only 42% of men aged sixty-five and older were in the labor force.⁸ The war years brought a brief hiatus to this decline, which resumed and gathered speed once the war was over.

The proportion of men aged sixty-five and older who were working or looking for work plummeted from nearly 46% in 1950 to about 16% in 1985.⁹ Falling rates of participation were not limited to this age group. Over the same period, middle-aged (ages fifty-five to sixty-four in this Article) men were also showing less inclination or were provided fewer opportunities to work; their participation rate fell by nearly twenty percentage points—from 86.9% to 67.9%—between 1950 and 1985.¹⁰ (Labor force participation rates for middle-aged and older men and women since 1950 are presented in Table 1.)

5. The official definition of labor force participation includes persons who are employed or who are unemployed and looking for work. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BLS GLOSSARY (2005), <http://www.bls.gov/bls/glossary.htm>, for the full definitions of "labor force participation rate," "employed persons," and "unemployed persons."

6. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 132 (1975).

7. DAVID HACKETT FISCHER, GROWING OLD IN AMERICA 143 (1977).

8. U.S. CENSUS BUREAU, *supra* note 6, at 132.

9. These data, as well as much of the other statistical data in this Article, can be found at the searchable website of the Bureau of Labor Statistics. See Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, <http://data.bls.gov/PDQ/outside.jsp?survey=ln> (last visited Jan. 13, 2006).

10. *See id.*

Women—at least those who are middle-aged—have moved in a different direction. The participation rate for women aged sixty-five and over (the age that one is traditionally considered “old”) has fluctuated around a relatively low level over the past half century, while that for middle-aged women began to rise substantially after the war. In 1985, 42.0% of fifty-five- to sixty-four-year-old women were in the labor force, up from 27.0% in 1950.¹¹ Nonetheless, the increasing labor force attachment on the part of middle-aged women was not enough to offset the decline among men. As a result, from 1950 to 1985, the participation rates for the fifty-five and older population fell from 43.0% to 30.3%.¹²

Table 1 Labor Force Participation Rates, Selected Years, 1950–2004 (percent)¹³

Year	Ages 55–64		Ages 65+	
	Men	Women	Men	Women
1950	86.9	27.0	45.8	9.7
1955	87.9	32.5	39.6	10.6
1960	86.8	37.2	33.1	10.8
1965	84.6	41.1	27.9	10.0
1970	83.0	43.0	26.8	9.7
1975	75.6	40.9	21.6	8.2
1980	72.1	41.3	19.0	8.1
1985	67.9	42.0	15.8	7.3
1990	67.8	45.2	16.3	8.6
1991	67.0	45.2	15.7	8.5
1992	67.0	46.5	16.1	8.3
1993	66.5	47.2	15.6	8.1
1994	65.5	48.9	16.8	9.2
1995	66.0	49.2	16.8	8.8
1996	67.0	49.6	16.9	8.6
1997	67.6	50.9	17.1	8.6
1998	68.1	51.2	16.5	8.6
1999	67.9	51.5	16.9	8.9
2000	67.3	51.9	17.7	9.4
2001	68.3	53.2	17.7	9.6
2002	69.2	55.2	17.9	9.8
2003	68.7	56.6	18.6	10.6
2004	68.7	56.3	19.0	11.1

11. *See id.*

12. *See id.*

13. *See id.*

II. THE IMPACT OF THE BABY BOOMERS

At the same time that this was going on, the labor force experienced an eighteen-year shot in the arm as the baby boomers, born between 1946 and 1964, began entering the workforce. As they did so, labor force growth increased about 2.6% annually in the 1970s.¹⁴ The supply of labor at least temporarily assured, employers could afford to let their older workers go. Fixed retirement ages hastened the exodus of some older workers. Employers added special incentives to their pension plans to encourage older workers to retire; retiree health benefits spread. In addition, benefit calculations in some pension plans penalized (and still do penalize) continued employment beyond an often fairly young age.¹⁵ This happens when workers eligible for defined benefit pension payments postpone receipt of their benefits. Some find that the increase in the benefits realized as a result of delaying retirement is not enough to make up for the benefits foregone while continuing to work.¹⁶ In such cases, the sum of benefits paid over a lifetime of retirement is less than it would have been if retirement had occurred earlier. This is hardly an incentive to keep on working.

The same has been true for workers who postpone receipt of Social Security benefits after the age of eligibility for full benefits, typically referred to as the full or normal retirement age. Workers who do so are eligible for a delayed retirement credit (DRC) that, prior to the Social Security Amendments of 1983, amounted to 3% for each year that receipt of benefits has been put off.¹⁷ A full actuarial adjustment, however, is about 8% per year.¹⁸ The 1983 amendments to the Social Security Act introduced a gradual increase in the DRC (beginning in 1990) that, when it reaches 8% in 2008, will be more actuarially fair.¹⁹ Workers who postpone collecting their Social Security benefits will no longer be penalized with a loss in lifetime benefits by doing so, but until then, working longer does not fully pay off.

14. Howard N Fullerton, Jr., *The Workforce of Tomorrow*, in THRIVING ON AN AGING WORKFORCE: STRATEGIES FOR ORGANIZATIONAL AND SYSTEMIC CHANGE 14, 18 (Paulette T. Beatty & Roemer M.S. Visser eds., 2005).

15. See Laurence J. Kotlikoff & David A. Wise, *The Incentive Effects of Private Pension Plans*, in ISSUES IN PENSION ECONOMICS 283, 283 (Zvi Bodie et al. eds., 1987).

16. See, e.g., *id.* at 332.

17. Soc. Sec. Admin., Legislative History, <http://www.socialsecurity.gov/history/1983amend2.html> (last visited Jan. 13, 2006) (providing a detailed summary of the provisions of the 1983 Amendments).

18. Michael A. Anzick & David A. Weaver, *The Impact of Repealing the Retirement Earnings Test on Rates of Poverty*, SOC. SECURITY BULL., Dec. 2000, at 3, 4.

19. Social Security Amendments of 1983, Pub. L. No. 98-21, § 114, 97 Stat. 65, 79 (codified as amended at 42 U.S.C. § 402(w) (2000)). The DRC goes to workers who delay collecting Social Security beyond the normal retirement age up to age seventy. 42 U.S.C. § 402(w)(2)(a) (2000).

Employer concerns about the costs, technological competence, and productivity of older workers have also served as employment barriers for many who might have wanted to remain at work or return to the labor force.²⁰ All of these factors contributed to the early retirement boom of the post-war years.

Over time, as older workers exited the labor force at younger ages and, in particular, as boomers moved into it, the workforce got younger. Between 1950 and 1985, the proportion of labor force participants who were age fifty-five or older fell from about 17% to under 13%.²¹ The median age of the labor force fell from 40.5 years in 1962 to 34.6 years in 1980.²²

III. THE LABOR FORCE IS GROWING OLDER

Eventually, most of the boomers who were going to enter the labor force had done so. In addition, the rate of increase in women's labor force participation began to slow. And, significantly, around 1985 labor force participation rates for the fifty-five and older population leveled off and then began to rise. The labor force began to age.

Since the mid-1980s, labor force participation rates for the middle-aged and older populations have been moving upward. The rate for persons aged sixty-five and over rose from 10.8% to 14.4% from 1985 to 2004, while that for those aged fifty-five to sixty-four increased from 54.2% to 62.3%.²³

These figures for broad segments of the population obscure sizable differences by age group and sex. The participation rate for persons aged sixty-five to sixty-nine, for example, rose from 18.4% to 27.7%, or by just over 50%, between 1985 and 2004.²⁴ Women, particularly the middle-aged, have tended to show greater increases than men. The result has been a narrowing of the later-life male-female labor force participation gap. By 2004, the ratio of female to male labor force participation rates for those fifty-five and older was 70.6%, up from 27.6% in 1950 and 53.7% in 1985.²⁵

20. See AARP, AMERICAN BUSINESS AND OLDER EMPLOYEES: A SUMMARY OF FINDINGS 4-5 (2000), available at http://assets.aarp.org/rgcenter/econ/amer_bus_findings.pdf (reporting that employers view older workers as "resistant to learning and understanding new technologies").

21. See Bureau of Labor Statistics, *supra* note 9.

22. Howard N Fullerton, Jr. & Mitra Toossi, *Labor Force Projections to 2010: Steady Growth and Changing Composition*, MONTHLY LAB. REV., Nov. 2001, at 21, 36, available at <http://bls.gov/opub/mlr/2001/11art2full.pdf>.

23. See Bureau of Labor Statistics, *supra* note 9.

24. See *id.*

25. See *id.*

Although participation rates have been rising, it would be wrong to conclude that early retirement is a thing of the past. Most workers still opt to retire early, that is, before the age of eligibility for full Social Security benefits. Ever *earlier* retirement, however, seems to have come to an end, at least for the present. Reynolds, Ridley, and Van Horn of the John J. Heldrich Center for Workforce Development go so far as to contend that “[t]he traditional notion of retirement—where one stops working completely and enjoys leisure time with friends and family—is obsolete.”²⁶ Although it does seem as if baby boomers in particular are poised to redefine the retirement years by working longer (many of them after retiring from career jobs), most of them will undoubtedly still experience some, perhaps lengthy, period of total retirement from paid employment.

Why the declining labor force participation rate at upper ages began to change in the mid-1980s is not clear.²⁷ Most likely, a variety of factors came into play, affecting different workers in different ways. These include the 1967 Age Discrimination in Employment Act (ADEA) and its subsequent amendments,²⁸ the liberalization of the Social Security earnings test,²⁹ the eventual elimination of the earnings test for workers over the normal retirement age, and the growing labor force attachment of women, many of whom might be working longer to accrue pension and enhanced Social Security benefits. It is also possible that slowing labor force growth, as the baby bust generation (the cohort following the boomers) reached working age, played a role as well. Employers, particularly in industries typically reliant on an entry-level workforce, might have been experiencing labor shortages and turning to older workers as an alternative.³⁰

While women’s labor force participation rates may continue to rise somewhat, the extent of the increase remains to be seen. For one thing, women still assume more of the burden of informal caregiving. If women’s caregiving burdens increase as the population ages, their ability to remain

26. Scott Reynolds et al., *A Work-Filled Retirement: Workers’ Changing Views on Employment and Leisure*, WORKTRENDS, Aug. 2005, at 1 available at <http://www.heldrich.rutgers.edu/Resources/Publication/191/WT16.pdf>.

27. For an examination of male changes in behavior, see Richard Johnson, *The Puzzle of Later Male Retirement*, FED. RES. BANK KANSAS CITY ECON. REV., Third Quarter 2002, at 5, available at <http://www.kc.frb.org/Publicat/econrev/Pdf/3q02john.pdf>.

28. 29 U.S.C. §§ 621–634 (2000).

29. The earnings test reduces Social Security benefits for beneficiaries earning above a certain amount, which is adjusted annually. In 2005, beneficiaries below the normal retirement could earn up to \$12,000, above which \$1 in benefits would be withheld for every \$2 in earnings. The earnings limit and benefit reduction are different for the year in which a worker reaches the full retirement age. 42 U.S.C. § 403 (2000).

30. There was some evidence of this in the fast food industry in the 1980s. McDonald’s, for example, introduced its McMasters programs aimed at recruiting and training older workers.

in the labor force may be adversely affected. There is also the question of what women will do as more of them reach the traditional retirement age, having spent thirty-five or more years in the workforce. Perhaps retirement will begin to look more attractive to them—many of them have held full-time jobs in the paid workforce and in the home—especially if the retirement income they have earned during their long work lives enables them to maintain their preretirement standard of living. If so, participation rates could resume falling.

IV. WHAT THE FUTURE HOLDS

Labor force participation rates are nonetheless expected to continue rising. The Labor Department's Bureau of Labor Statistics (BLS) projects that approximately 41% of the fifty-five-plus population will be in the labor force in 2014,³¹ an increase of five percentage points over the rate for 2004.³² By 2014, more than one out of five persons in the workforce will be fifty-five or older, and the median age will be over a year higher than it is today.³³

There are several reasons to expect that older workers will increasingly postpone retirement and that more retirees will reenter the labor force, thus resulting in labor force participation rates above those projected by the Bureau of Labor Statistics:

Stagnating private pension coverage since the 1970s. Overall only about half of all private-sector workers are covered by pension plans through their current employers, and the Center for Retirement Research at Boston College finds little change in the number of covered workers over the past thirty years.³⁴ Unless they have income from other sources, such as savings and investments—and many can expect little from these—workers stand to experience a substantial decline in their standard of living if they are solely dependent on Social Security in old age.³⁵

The shift from defined benefit (DB) pension coverage to defined contribution (DC) coverage. Of workers whose employers do offer pension

31. Mitra Toosi, *Labor Force Projections to 2014: Retiring Boomers*, MONTHLY LAB. REV., Nov. 2005, at 25, 33 tbl.5, available at <http://www.bls.gov/opub/mlr/2005/11/art3full.pdf>.

32. See Bureau of Labor Statistics, *supra* note 9.

33. Toosi, *supra* note 31, at 25, 42.

34. ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH, HOW IMPORTANT ARE PRIVATE PENSIONS? 2 (2002), available at http://www.bc.edu/centers/crr/issues/ib_8.pdf.

35. Many older Americans are completely or largely dependent on Social Security for income. It is the only source of income for 20% of the sixty-five and older population and accounts for half or more of the income of 60% of this age group. SOC. SEC. ADMIN., PUBL'N NO. 13-11871, INCOME OF THE POPULATION 55 OR OLDER, 2002, at 105 tbl.6.A1 (2005), available at http://www.ssa.gov/policy/docs/statcomps/income_pop55/2002/incpop02.pdf.

coverage, a declining proportion has DB coverage; employers have moved instead to 401(k) and other DC plans. The Employee Benefit Research Institute reports that as of 2001, the Pension Benefit Guaranty Corporation insured just over 35,200 DB plans, down from a 1985 high of 114,400.³⁶ Also as of 2001, half of assets in qualified private pension plans were in DC plans, up from 29% in 1974.³⁷ DC plans such as 401(k)s provide workers with investment choices, which understandably appealed to workers during the 1990s when times were good as a result of the sustained stock market boom.

One outcome of the stock market bubble of the 1990s was an increase in retirement, according to Gustman and Steinmeier.³⁸ But a bursting bubble could have just the opposite effect, as 401(k)s place the burden of retirement-income support squarely on the shoulders of workers themselves. Given often inadequate savings and market uncertainties, some workers do appear to be reevaluating their retirement plans. Gustman and Steinmeier report that the recent stock market bust led many workers to conclude “that it would be prudent to continue the income from working until either the market recovers or they have had an opportunity to rebuild the nest egg to a level sufficient to ensure a comfortable retirement.”³⁹ Other research seems to confirm these observations.⁴⁰

The year 2000 was not good for market investors, workers with pension plans among them. A survey of fifty- to seventy-year-olds who reported market losses around that time found that about 20% of workers had pushed back the date of retirement.⁴¹ Munnell, Cahill, and Jivan estimate that workers with DC plans retire about one year later than those with DB plans.⁴²

36. DAVID RAJNES, EMPLOYEE BENEFIT RESEARCH INST., EBRI ISSUE BRIEF NO. 249, AN EVOLVING PENSION SYSTEM: TRENDS IN DEFINED BENEFIT AND DEFINED CONTRIBUTION PLANS 1 (2002), available at <http://www.ebri.org/pdf/briefspdf/0902ib.pdf>.

37. *Id.*

38. ALAN L. GUSTMAN & THOMAS L. STEINMEIER, NAT'L BUREAU OF ECON. RESEARCH, RETIREMENT AND THE STOCK MARKET BUBBLE 1-2 (2002), available at <http://www.nber.org/papers/w9404.pdf>. Gustman and Steinmeier report that retirement increased by more than 3 percentage points among workers in the Health and Retirement Study. *Id.* at 27-28.

39. *Id.* at 2.

40. See, e.g., S. KATHI BROWN, AARP, IMPACT OF STOCK MARKET DECLINE ON 50-70 YEAR OLD INVESTORS 2 (2002), available at http://assets.aarp.org/rgcenter/econ/market_decline.pdf; EMPLOYEE BENEFIT RESEARCH INST., THE 2003 RETIREMENT CONFIDENCE SURVEY SUMMARY OF FINDINGS 1 (2003), available at <http://www.ebri.org/pdf/surveys/rcs/2003/03rcssof.pdf>.

41. BROWN, *supra* note 40, at 2.

42. ALICIA H. MUNNELL ET AL., CTR. FOR RETIREMENT RESEARCH, HOW HAS THE SHIFT TO 401(K)S AFFECTED THE RETIREMENT AGE? 4 (2003), available at http://www.bc.edu/centers/crr/issues/ib_13.pdf.

Inadequate personal savings to supplement other sources of retirement income, particularly Social Security. Over one-third of workers report that they are currently putting nothing aside for retirement.⁴³ In an assessment of retirement preparedness, the Congressional Budget Office (CBO) concludes that only about half of boomers are on track to maintain their current living standards in retirement.⁴⁴ However, another CBO study suggests that much of the concern about savings in the United States could be alleviated if workers remained in the labor force until age seventy, when their Social Security benefits would be about double what they can expect at age sixty-two.⁴⁵ While workers do not have total control over how long they plan to keep working, because ill health, disability, caregiving responsibilities, or job displacement may propel them out of the workforce before they had planned, they have more say over their retirement age than they do over the vagaries of the market. A close reading of “Your Social Security Statement,” which the Social Security Administration annually mails to covered persons, would make clear the impact that delayed receipt of benefits has on monthly payments.

Concern on the part of those with savings that they might outlive their money, especially in light of rising life expectancy. Today’s average sixty-five-year-old can expect to live more than five years longer than could a sixty-five-year-old around the time that the Social Security system was established.⁴⁶ Life expectancy at upper ages is expected to continue increasing.⁴⁷

The increase in the age of eligibility for full Social Security benefits from sixty-five to sixty-seven. As a result of amendments to the Social Security Act in 1983, the full retirement age began increasing gradually for workers who turned sixty-two in 2000.⁴⁸ It will continue to rise until it reaches sixty-seven for persons born in 1960 or later. Workers will still be able to collect benefits as early as age sixty-two; however, the benefits will

43. Reynolds et al., *supra* note 26, at 3.

44. CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: THE RETIREMENT PROSPECTS OF THE BABY BOOMERS 2 (2004), available at <http://www.cbo.gov/ftpdocs/51xx/doc5195/03-18-BabyBoomers.pdf>.

45. CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: RETIREMENT AGE AND THE NEED FOR SAVING 3 (2004), available at <http://www.cbo.gov/ftpdocs/54xx/doc5419/05-12-RetireAge&Saving.pdf>.

46. Elizabeth Arias, *United States Life Tables, 2002*, NAT’L VITAL STAT. REP. (U.S. Dep’t of Health & Human Servs., Hyattsville, MD), Nov. 10, 2004, at 29 tbl.11, available at http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_06.pdf.

47. BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & DISABILITY INS. TRUST FUNDS, THE 2005 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 109-18, at 80 tbl.V.A3 (1st Sess. 2005).

48. See 42 U.S.C. § 416(l) (2000).

be substantially lower than when the full retirement age was sixty-five. Some experts doubt that this increase will have much of an impact on the actual retirement age,⁴⁹ but it is too soon to tell.

Eroding retiree health benefits. Although a long-term decline in retiree health coverage may be leveling off,⁵⁰ only 13% of private-sector employers offered health benefits to early retirees in 2002, a decline from 22% in 1997.⁵¹ Moreover, costs to workers for the coverage have been increasing, and restrictions have been placed on eligibility.⁵² Given the employer-based health system in the United States, workers who lack health-care coverage from another source may have little choice but to remain at work until age sixty-five if they are so able.

Rising educational levels. Better educated workers are more likely to be in the labor force than their less well-educated peers and to remain there later in life.⁵³ Although less well-educated workers may lack the resources to retire comfortably at younger ages, they are more likely than workers with more schooling to experience unemployment and work-limiting conditions such as ill health, or to find that demand for their skills has diminished. Educational attainment has also risen; among persons aged fifty-five and over, nearly 80% have four years of high school or more compared to only about 22% in 1960.⁵⁴ Nearly 90% of persons in their early- to mid-fifties are high school graduates or more.⁵⁵ All else being equal, the increase in years of formal schooling suggests continued increases in labor force participation at upper ages.

Improved health status at older ages. Ill health has long been a barrier to continued employment in old age, but declining disability rates at upper

49. See, e.g., GARY S. FIELDS & OLIVIA S. MITCHELL, NAT'L COMM'N FOR EMPLOYMENT POLICY, RESEARCH REPORT SERIES 83-09, RESTRUCTURING SOCIAL SECURITY: HOW WILL RETIREMENT AGES RESPOND? 17-18 (1983); Alan L. Gustman & Thomas L. Steinmeier, *The 1983 Social Security Reforms and Labor Supply Adjustments of Older Individuals in the Long Run*, 3 J. LAB. ECON. 237, 247 (1985).

50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-205, RETIREE HEALTH BENEFITS: OPTIONS FOR EMPLOYMENT-BASED PRESCRIPTION DRUG BENEFITS UNDER THE MEDICARE MODERNIZATION ACT 13 (2005), available at <http://www.gao.gov/highlights/d05205high.pdf>.

51. PAUL FRONSTIN, EMPLOYEE BENEFIT RESEARCH INST., EBRI ISSUE BRIEF NO. 279, THE IMPACT OF THE EROSION OF RETIREE HEALTH BENEFITS ON WORKERS AND RETIREES 1 (2005), available at <http://www.ebri.org/pdf/briefspdf/0305ib.pdf>.

52. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 50, at 23.

53. See STEVEN HAIDER & DAVID LOUGHRAN, RAND, WORKING PAPER SERIES 01-09, ELDERLY LABOR SUPPLY: WORK OR PLAY? 28 tbl.1 (2001), available at <http://www.rand.org/labor/DRU/DRU2582.pdf>.

54. See U.S. Census Bureau, U.S. Dep't of Commerce, Table A-1, Years of School Completed by People 25 Years and Over, by Age and Sex: Selected Years 1940 to 2004, at A-9 to -10, <http://www.census.gov/population/socdemo/education/tabA-1.pdf> (last visited Jan. 27, 2006).

55. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS NO. P20-550, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 3 tbl.A (2004).

ages⁵⁶ should increase the probability that workers will remain in the labor force.⁵⁷

Less physically demanding work. The proportion of workers in physically demanding jobs, defined as “requiring frequent lifting or carrying of objects weighing more than 25 pounds” fell from 20.3% in 1950 to 7.5% in 1996, according to the Urban Institute’s Eugene Steuerle.⁵⁸ The concomitant growth of the service sector is also assumed to offer suitable employment opportunities for large numbers of older workers.

Employer demand, especially in the face of anticipated labor and/or skills shortages. There can be little doubt that the supply of *potential* older workers is rising sharply. Population projections point to slower growth in the number of younger persons available to fill the shoes of boomers who will begin reaching the age of eligibility for early Social Security benefits in 2008.⁵⁹ If they retire in large numbers at this young age—as their parents did—employers might well experience severe labor and/or skills shortages. Should that happen, the demand for older workers will increase as well. It is this potential demand for labor and skills, more than any other, that stands to have the most substantial impact on older worker employment over the next two decades.

Worker demand. Workers themselves seem poised to remain longer in the workforce and may therefore prove more resistant to retirement incentives, more willing to fight targeted downsizing, and more likely to pressure employers to offer the types of employment opportunities they say they want, such as flexible work schedules and phased retirement. Recent public opinion polls find that upwards of 60% of workers expect to work at least part-time in retirement.⁶⁰ Among boomers, the figure is as high as 80%.⁶¹

56. Kenneth G. Manton & XiLiang Gu, *Changes in the Prevalence of Chronic Disability in the United States Black and Nonblack Population Above Age 65 from 1982 to 1999*, 98 PROC. NAT’L ACAD. SCI. U.S. 6354, 6354 (2001).

57. See, e.g., Haider & Loughran, *supra* note 53, at 11; CORI E. UCCELLO, AARP, FACTORS INFLUENCING RETIREMENT: THEIR IMPLICATIONS FOR RAISING RETIREMENT AGE 7 (1998), available at http://assets.aarp.org/rgcenter/econ/9810_retire.pdf.

58. Eugene Steuerle et al., *Can Americans Work Longer?*, STRAIGHT TALK ON SOC. SEC. & RET. POL’Y (Urban Inst., Wash., D.C.), Aug. 15, 1999, at 1, available at <http://www.urban.org/UploadedPDF/Straight5.pdf>.

59. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 14 tbl.12 (2006).

60. PAUL YAKOBOSKI & JENNIFER DICKEMPER, EMPLOYEE BENEFIT RESEARCH INST., EBRI ISSUE BRIEF No. 191, INCREASED SAVING BUT LITTLE PLANNING: RESULTS OF THE 1997 RETIREMENT CONFIDENCE SURVEY 4 (1997), available at <http://www.ebri.org/pdf/briefspdf/1197ib.pdf>; HUMPHREY TAYLOR, HARRIS INTERACTIVE, 3.7 MILLION PEOPLE OVER 55 NOT WORKING NOW ARE READY, WILLING AND ABLE TO WORK (1999), http://www.harrisinteractive.com/harris_poll/index.asp?PID=19; S. KATHI BROWN, AARP, STAYING AHEAD OF THE CURVE 2003: THE AARP WORKING IN RETIREMENT

Workers give a variety of reasons for why they expect to remain in the labor force, with nonfinancial reasons tending to take precedence. When pressed for the major reason, however, finances rise to the top; workers simply need the income or access to health care that employment provides. Money is also, not surprisingly, the primary reason working retirees give for remaining in the labor force.⁶²

With such high—and in recent years seemingly consistent—percentages saying they plan to work in retirement, the relatively low labor force participation rates for the older population might be expected to soar. Yet the extent to which expectations and desires will translate into action is by no means clear. The average expected age of retirement is on the rise, but workers still express interest in retiring, and often at a young age. More than one-third of boomers believe that they will not want to stop working; however, more than two-fifths cannot wait to retire.⁶³ In fact, the average age at which boomers would *like* to stop working for pay altogether is under sixty years.⁶⁴ In other words, the retirement in which boomers expect to be working would, ideally, be a fairly young retirement.

In 2005, Reynolds, Ridley, and Van Horn reported that over one-third of workers believe that they will never be financially able to retire from full-time work or will not be able to do so until after age sixty-five; more than 70% would ideally retire at age sixty or younger.⁶⁵ Workers are also apparently less confident about their ability to retire when they want to than they were five years ago.⁶⁶

V. EMPLOYMENT BARRIERS

Will 70 or 80, or even just 60, percent of workers remain in the workforce after the conventional retirement age? It is hard to envisage this happening if conventional retirement age is understood to be age sixty-five.

STUDY 5 (2003), available at http://assets.aarp.org/rgcenter/econ/multiwork_2003.pdf; Reynolds et al., *supra* note 26, at 1. *But see* CIVIC VENTURES, THE NEW FACE OF RETIREMENT: SURVEY RESULTS 9 (2002), available at http://www.civicventures.org/publications/surveys/new_face_of_retirement/2002_surveydata.pdf (reporting that 39% of nonretired persons aged fifty to seventy-five said that they planned to work for pay at another job after they retired).

61. AARP, BABY BOOMERS ENVISION RETIREMENT II: SURVEY OF BABY BOOMERS' EXPECTATIONS FOR RETIREMENT 24 (2004), available at http://assets.aarp.org/rgcenter/econ/boomers_envision.pdf.

62. BROWN, *supra* note 60, at 6.

63. AARP, *supra* note 61, at 27.

64. AARP, BABY BOOMERS ENVISION THEIR RETIREMENT: AN AARP SEGMENTATION ANALYSIS 82 (1998), available at http://assets.aarp.org/rgcenter/econ/boomer_seg.pdf.

65. *See* Reynolds et al., *supra* note 26, at 7. Unfortunately, this survey does not indicate when workers might like to retire from *all* work.

66. *Id.*

Only about 28% of persons aged sixty-five to sixty-nine are now in the labor force.⁶⁷ To be sure, as noted above, this reflects an increase of about 50% over the past two decades,⁶⁸ but a near tripling or even a doubling of the participation over the next decade (when the first several years of the boomer cohort will be in their mid- to upper-sixties) is highly unlikely. Today's workers may expect to work in retirement—and many of them will do so—but they also indicate that they plan to work considerably later in life than today's retirees actually worked. So, for example, only 37% of nonretirees in the 2004 Retirement Confidence Survey asserted that they planned to retire before age sixty-five; however, 61% of retirees had left the labor force by that age.⁶⁹

The CBO finds that many boomers are not waiting until sixty-five or even sixty-two to stop working.⁷⁰ As of 2004, four million boomers (the oldest of whom was only fifty-eight) had already left the labor force, most commonly because of a disability but others because they had retired. Moreover, many of the disabled were receiving benefits from Social Security Disability Insurance, a program with stringent eligibility criteria. Thus, these nonworkers would not appear to be malingerers who could work if they really wanted to. The CBO observes that if boomers “follow in the footsteps of workers now in their early 60s, perhaps one-third of the men and nearly half of the women will be out of the labor force before their 62nd birthday.”⁷¹

Not only may disability and other problems cause workers to leave the labor force prematurely, but retirement itself may look better the closer a worker gets to it. Although the vast majority of boomers still plan to work in retirement, the proportion not expecting to work at all has increased since the late 1990s.⁷²

Age continues to serve as an employment barrier for older workers, as evidenced by the duration of unemployment and wage losses experienced upon reemployment. The average duration of unemployment in 2004 was 25.8 weeks for jobseekers aged fifty-five and older, compared to 18.9

67. See Bureau of Labor Statistics, *supra* note 9.

68. See *id.*

69. See RUTH HELMAN & VARINY PALADINO, EMPLOYEE BENEFIT RESEARCH INST., EBRI ISSUE BRIEF NO. 268, WILL AMERICANS EVER BECOME SAVERS? THE 14TH RETIREMENT CONFIDENCE SURVEY, 2004, at 5 fig.3 (2004), available at <http://www.ebri.org/pdf/briefspdf/0404ib.pdf>.

70. CONG. BUDGET OFFICE, CONG. OF THE U.S., DISABILITY AND RETIREMENT: THE EARLY EXIT OF BABY BOOMERS FROM THE LABOR FORCE 1 (2004).

71. *Id.*

72. AARP, *supra* note 61, at 24.

weeks for younger jobseekers.⁷³ Upon reemployment older workers often experience lower wages with fewer benefits. In testimony before the Senate Finance Committee, economist Lori Kletzer mentioned earnings losses in excess of 30% for some older reemployed workers.⁷⁴ Couch has found that the average displaced worker aged fifty-one to sixty experienced an earnings loss of 39%, and the household with a displaced worker had 24% lower income.⁷⁵ The displaced are less likely to have health insurance on the new job.⁷⁶

Older workers can perhaps take some comfort in the fact that they are less likely than younger workers to lose their jobs.⁷⁷ Nonetheless, the Bureau of Labor Statistics reports that nearly 1.7 million workers aged fifty-five and older were displaced from their jobs between January 2001 and December 2003,⁷⁸ a greater number than had been displaced during the three-year period from January 1999 to December 2001, 1.2 million.⁷⁹ Job loss can have a devastating effect. If displaced, older workers are far less likely than their younger counterparts to find work. After displacement in the January 2001 to December 2003 period, for example, 69% of workers aged twenty-five to fifty-four and 57% of workers aged fifty-five to sixty-four had found work by January 2004, but only 25% of those sixty-five and older had done so.⁸⁰ Displaced workers aged fifty-five to sixty-four were nearly twice as likely to be out of the labor force as those twenty-five to fifty-four; those sixty-five and older were nearly three times as likely as those fifty-five to sixty-four to be neither working nor looking for work.⁸¹

Some of these varied outcomes obviously reflect varied opportunities—older workers, especially by age sixty-five, have greater access to alternative forms of income in the form of Social Security and pensions. But they may also reflect job-seeking discouragement, whereby workers

73. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 242 tbl.31 (2005).

74. *Measuring the Costs of Trade-Related Job Loss: Hearings Before the S. Comm. on Finance*, 107th Cong. 89 (2001) (statement of Lori G. Kletzer, Univ. of Cal. Santa Cruz & Inst. for Int'l Econ.).

75. See Kenneth A. Couch, *Late Life Job Displacement*, 38 GERONTOLOGIST 7, 13–14 (1998).

76. *Id.* at 15.

77. Henry S. Farber, *What Do We Know About Job Loss in the United States?: Evidence from the Displaced Workers Survey, 1984–2004*, ECON. PERSP., Second Quarter 2005, at 13, 15, available at http://www.chicagofed.org/publications/economicperspectives/ep_2qtr2005_part2_farber.pdf.

78. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKER DISPLACEMENT, 2001–03, at 12 tbl.8 (2004), available at http://www.bls.gov/news.release/archives/disp_07302004.pdf (economic news release number 04-1381).

79. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DATA TABLES BASED ON CENSUS 2000 POPULATION CONTROLS 9 tbl.8 (2004), available at <http://www.bls.gov/cps/disprv02.07302004.pdf>.

80. BUREAU OF LABOR STATISTICS, *supra* note 78, at 2.

81. *Id.* at 12 tbl.8.

give up the job search because they think age or lack of skills makes it difficult to find a job. As officially defined, only about 84,000 persons aged fifty-five or over were discouraged in 2004;⁸² however, the BLS has a particularly stringent definition of job-seeking discouragement.⁸³ Other research suggests that a far higher number of older workers might remain in or return to the workforce if they thought the odds of finding work were more favorable.⁸⁴

Age discrimination remains another employment barrier for older workers. Lahey highlights a downward trend by age in the probability that a job applicant will be called for an interview.⁸⁵ Other researchers find ample evidence of the persistence of age discrimination.⁸⁶ Nonetheless, reliable data on the frequency and nature of age discrimination are unavailable.

Workers themselves believe that age discrimination is common. Nearly two-thirds of older workers say they have experienced or witnessed age discrimination in the workplace, and they think that “workers begin to face age discrimination around age 49.”⁸⁷ Even though the percentage of workers reporting personally experiencing discrimination is relatively low—15% feel they have not gotten hired because of age, the highest percentage of any term of employment surveyed—the percentage has increased over time.⁸⁸ Workers who had recently looked for work were more likely to say they had experienced age discrimination, with 41% contending they had not been hired because of their age.⁸⁹

While demographers point to impending labor shortages, shortages are by no means assured. The Wharton School’s Peter Cappelli contends that

82. See U.S. BUREAU OF LABOR STATISTICS, *supra* note 73, at 246 tbl.35.

83. The Bureau of Labor Statistics defines discouraged workers as [p]ersons not in the labor force who want and are available for a job and who have looked for work sometime in the past 12 months (or since the end of their last job if they held one within the past 12 months), but who are not currently looking because they believe there are no jobs available or there are none for which they would qualify.

BUREAU OF LABOR STATISTICS, *supra* note 5.

84. See, e.g., LOUIS HARRIS & ASSOCS., STUDY NO. 884030, OLDER AMERICANS: READY AND ABLE TO WORK 16 tbl.1, 25 tbl.7C (1989).

85. Joanna N. Lahey, CTR. FOR RETIREMENT RESEARCH, DO OLDER WORKERS FACE DISCRIMINATION? 3 (2005), available at http://www.bc.edu/centers/crr/issues/ib_33.pdf.

86. See, e.g., Marc Bendick, Jr. et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10 J. AGING & SOC. POL’Y 5 (1999); Marc Bendick, Jr. et al., *Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices*, 8 J. AGING & SOC. POL’Y 25 (1996).

87. AARP, STAYING AHEAD OF THE CURVE: THE AARP WORK AND CAREER STUDY 66 (2002), available at http://assets.aarp.org/rgcenter/econ/d17772_multiwork.pdf. Workers in this survey were aged forty-five to seventy-four.

88. *Id.* at 69–70.

89. *Id.* at 71.

anticipated widespread labor shortages are “accepted as articles of faith” that do not necessarily hold up when examined carefully.⁹⁰ He maintains that the problems employers face have less to do with demographic changes than with retention. Furthermore, offshoring, outsourcing, automation, and other technological developments might mitigate some labor shortages and may help explain why many employers have not introduced any policies or programs to stem the tide of retirements.⁹¹ Labor shortages are occurring in some industries such as health care, and employers have consequently sought to attract older workers through workplace reconfiguring and alternative work schedules.⁹²

Even if the labor or skills shortages materialize, there arises a question of whether they will occur in occupations that are attractive to older workers. The Bureau of Labor Statistics projects that total employment will increase by nearly 19 million jobs between 2004 and 2014.⁹³ Registered nurses are expected to be one of the biggest job producers, with 703,000 jobs, but nursing is also an occupation with an early exit age.⁹⁴ Among the thirty occupations with the largest projected numerical growth (which are projected to account for almost half of the new jobs), one finds nursing aids, food preparation and food service workers, janitors and cleaners, home health aides, and maintenance workers,⁹⁵ whose jobs can be very demanding physically. Also to the point is what the big job producers pay, and eighteen of the thirty occupations with the largest projected job growth currently have annual earnings that are ranked low or very low.⁹⁶ It is not clear that workers of any age are going to be attracted to some of the occupations with the largest projected job growth, so competition for the more desirable jobs may be keen.

If labor and skills shortages do materialize, employers will respond with policies and programs to entice older workers to remain in or return to

90. Peter Cappelli, *Will There Really Be a Labor Shortage?*, 32 ORGANIZATIONAL DYNAMICS 221, 221 (2003).

91. See JESSICA COLLISON, SOC’Y FOR HUMAN RES. MGMT., OLDER WORKERS SURVEY 8–9 (2003) (reporting that 32% of survey respondents indicated that their organizations had not done anything to prepare for the “possibility of a shortage of workers due to the retiring baby boom generation”). Phased retirement, believed to be an option that would cause more workers to delay retirement, is another program that, at least with respect to formal programs, has not gained much currency. ROBERT HUTCHENS & KERRY L. PAPPS, PENSION RESEARCH COUNCIL, DEVELOPMENTS IN PHASED RETIREMENT 2 (2004), available at <http://rider.wharton.upenn.edu/~prc/PRC/WP/WP2004-14.pdf>.

92. AARP, STAYING AHEAD OF THE CURVE 2004: EMPLOYER BEST PRACTICES FOR MATURE WORKERS 15, 28–30 (2004), available at http://assets.aarp.org/rgcenter/econ/multiwork_2004.pdf.

93. Daniel E. Hecker, *Occupational Employment Projections to 2014*, MONTHLY LAB. REV., Nov. 2005, at 70, available at <http://www.bls.gov/opub/mlr/2005/11/art5full.pdf>.

94. *Id.* at 77 tbl.3.

95. *Id.*

96. *Id.*

the workforce. For example, public opinion polls and other surveys indicate that older workers would like to reduce their work hours as they age,⁹⁷ and labor force data confirm that part-time work does increase with age.⁹⁸ Many workers maintain that they would, in fact, work longer than planned if they were able to phase into retirement.⁹⁹ To date, however, formal phased retirement programs are rare outside of institutions of higher learning, and when phased retirement is available it is generally offered on an ad hoc basis¹⁰⁰ that enables employers to control who takes advantage of it. Still, one anticipates that phased retirement, along with other flexible work/retirement options such as retiree rehiring, will become more prevalent if workers are needed, and if the legal and structural impediments to some of them can be eliminated. The market will talk. It has not yet done so because employers, although for the most part cognizant of the aging workforce, have not yet needed to do much about it.

VI. RESPONDING TO AN AGING WORKFORCE

There are many advantages to a voluntary extension of working life, as workers themselves admit—staying mentally and physically active, continuing to be productive or useful, helping others, contributing to the greater good of society, being around others, learning to do new things, pursuing a dream, and by no means the least important, the money.¹⁰¹ Older men and women who postpone retirement continue to contribute to the nation's productive output. Further increases in Social Security's full retirement age could go a substantial way toward restoring the long-range solvency of the Social Security trust funds. Some economists argue that workers should retire later in light of the increasing life expectancy that has

97. See S. KATHI BROWN, AARP, ATTITUDES OF INDIVIDUALS 50 AND OLDER TOWARD PHASED RETIREMENT 3, 15 (2005), available at http://assets.aarp.org/rgcenter/post-import/phased_ret.pdf; Robert M. Hutchens, Employer Surveys, Employer Policies, and Future Demand for Older Workers 5 (March 23, 2001) (unpublished manuscript prepared for a roundtable sponsored by the Retirement Research Consortium), http://www.bc.edu/centers/crr/special_pubs/hutchens_id.pdf.

98. U.S. BUREAU OF LABOR STATISTICS, *supra* note 73, at 205 tbl.8.

99. BROWN, *supra* note 97, at 3; WATSON WYATT WORLDWIDE, PHASED RETIREMENT: ALIGNING EMPLOYER PROGRAMS WITH WORKER PREFERENCES 1 (2004); Joelle R. Weckerle & Kenneth S. Shultz, *Influences on the Bridge Employment Decision Among Older USA Workers*, 72 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 317, 322–25 (1999).

100. ROBERT HUTCHENS, THE CORNELL STUDY OF EMPLOYER PHASED RETIREMENT POLICIES: A REPORT ON KEY FINDINGS 8 (2003), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1000&context=lepubs>.

101. AARP, *supra* note 87, at 9; BROWN, *supra* note 60, at 6–7; METLIFE FOUND. & CIVIC VENTURES, NEW FACE OF WORK SURVEY 6–8 (2005), http://www.civicventures.org/publications/surveys/new_face_of_work/new_face_of_work.pdf.

lengthened the years workers spend in retirement.¹⁰² This argument holds that some of that increase should be “paid for” by working longer. Yet measures to increase further the age of eligibility for full Social Security benefits and to index the eligibility age to life expectancy are rarely proposed.

Older workers as such are not high on the policy agenda in the United States, and few U.S. lawmakers are actively promoting policies that would increase the labor force participation rate of older Americans. This is in stark contrast to Europe, where older workers have become a priority. For example, there is nothing comparable in the United States to the ambitious goals of the European Union (EU) that call for a five-year increase in the effective, or actual, age of retirement by 2010; an increase in the labor force participation rate of persons aged fifty-five to sixty-four from less than 40% in 2001 to 50% by 2010; and concrete action on the part of EU member states to reach those targets.¹⁰³

For U.S. policymakers, as for employers, a pressing need to raise the age at which people leave the workforce is not evident, unlike in Japan and much of Europe where populations are substantially older and, in the case of Western Europe, public pensions are far more generous. This is because insolvency of the U.S. public pension system, Social Security, is decades away; the country is more receptive to immigrant workers than many other aging nations; and the population is increasing and aging less. Japan and many European nations will see their populations shrink. Americans are also more likely to be in the labor force, in contrast to many European countries where almost no one remains at work after the age of sixty-five.¹⁰⁴ The labor force participation rate for the fifty-five to sixty-four age group in the United States is well above what Europe is aiming for by 2010.¹⁰⁵ Less generous pension benefits, more stringent criteria for disability benefits, less comprehensive unemployment insurance coverage, and low overall unemployment rates help keep the supply of and demand for older workers relatively high in the United States.

102. See, e.g., Eugene Steuerle, Urban Inst., Remarks for Tackling Social Security: Three Views (Mar. 22, 2005) (panel discussion cosponsored by AARP and the Society of Government Economists).

103. See SCADPlus: Increasing the Employment of Older Workers and Delaying the Exit from the Labour Market, <http://www.europa.eu.int/scadplus/leg/en/cha/c11309.htm> (last visited Jan. 27, 2006).

104. Of the fifteen preaccession countries, or those that had joined the European Union before May 2004, only Portugal has a higher labor force participation rate for its sixty-five and older population than the United States. SARA E. RIX, AARP, ISSUE BRIEF NO. 77, RETHINKING THE ROLE OF OLDER WORKERS: PROMOTING OLDER WORKER EMPLOYMENT IN EUROPE AND JAPAN 3 fig.3 (2005), available at http://assets.aarp.org/rgcenter/econ/ib77_workers.pdf.

105. See Bureau of Labor Statistics, *supra* note 9.

Nonetheless, although older worker employment in the United States is not the political issue that it is throughout Europe, to say nothing of Japan, a number of legislative changes over the past several decades have served to make it easier and more rewarding for older workers to remain in the labor force. These include the ADEA,¹⁰⁶ the Senior Citizens' Freedom to Work Act of 2000,¹⁰⁷ the increase in the age of eligibility for full Social Security benefits,¹⁰⁸ and the increase in the DRC.¹⁰⁹ Some businesses have also begun to target older workers for hiring and retention and have introduced exemplary practices to do that.¹¹⁰

As discussed previously, in the past several decades the U.S. government has taken steps to eliminate discrimination against older workers, thereby making it easier for people who want to remain at work to do so. The push for age discrimination legislation was perhaps motivated less by a belief that older workers represent a potential productive resource than by the conviction that discrimination against any worker is wrong and that protections afforded other minorities should be extended to the aged as well. Whatever the reason for the legislation, older workers in the United States are legally entitled to remain at work as long as they perform adequately and, of course, as long as there are jobs for them to do. The government would certainly like to see more older workers at work. But there remains the thorny issue of the desirability of the jobs—where they are, how many there are, and whether they are likely to appeal to older workers, especially those workers whose financial resources enable them to be selective about the type of work they will do.

Most of the legislative changes just highlighted make it easier or more attractive for older workers to remain in or perhaps return to the workforce, and as has been shown, some are doing that. But a substantially older workforce—or one where more older workers remain in the labor force involuntarily because they cannot afford to retire—raises a number of other questions that have not yet been adequately grappled with, even though analysts and others have been talking about the aging workforce for decades:¹¹¹

106. 29 U.S.C. §§ 621–634 (2000).

107. Senior Citizens' Freedom to Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198 (codified as amended at 42 U.S.C. §§ 402, 403 (2000)).

108. Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 65, 107–08 (codified as amended at 42 U.S.C. § 416(l) (2000)).

109. Social Security Amendments of 1983, Pub. L. No. 98-21, § 114, 97 Stat. 65, 79 (codified as amended at 42 U.S.C. § 402(w) (2000)).

110. See AARP, *supra* note 92, at 2.

111. See, e.g., HAROLD L. SHEPPARD & SARA E. RIX, *THE GRAYING OF WORKING AMERICA: THE COMING CRISIS IN WORKING AMERICA* (1977).

Are jobs really so much better today that substantially longer work lives are possible? The physical demands of work may be less than when men remained employed until very old age, but work intensification, the mental stress associated with many jobs, the need to run faster and faster just to stay in place, and the growing insecurity about job tenure may undermine some of the best efforts to prolong the working lives of both men and women. Furthermore, jobs can be physically demanding without requiring heavy lifting.

What about the “healthy worker” phenomenon? Workers with health problems and disabilities tend to leave the labor force at younger ages than do those without such problems. Will we be faced with a less healthy older workforce if, for whatever reasons, workers cannot retire as early as they have been retiring? If so, what are the consequences for employer health costs, or worker performance and productivity? Available research indicates that age is a poor predictor of work ability,¹¹² but might that change if large numbers of less healthy workers remain employed? Some have argued that even if older workers are just as productive as younger workers, their higher wages and benefits make them more expensive for the same degree of output. To level the playing field, this argument goes, the wages of older workers should be reduced,¹¹³ as they can be in Japan, which has substantially higher participation rates for older persons.¹¹⁴ Whether U.S. workers would find this acceptable, even if it were legal under the ADEA and even if it meant improved employment opportunities, is highly questionable.

Where are the jobs going to be, and who is going to want them? It is one thing for analysts and others with good educations and rewarding and stimulating jobs to tout the virtues of working longer. It may be quite another thing for the much larger proportion of workers who check and bag groceries, care for others' aged relatives in nursing homes or assisted care facilities, serve lattes, clean offices, drive buses, or otherwise do the things that keep our world in order. Will they really want to continue working once they actually reach the age of eligibility for Social Security or pension

112. See NAT'L RESEARCH COUNCIL & INST. OF MED. OF THE NAT'L ACADS., HEALTH AND SAFETY NEEDS OF OLDER WORKERS 95 (David H. Wegman & James P. McGee eds., 2004); Harvey L. Sterns & Michael A. McDaniel, *Job Performance and the Older Worker*, in OLDER WORKERS: HOW DO THEY MEASURE UP? 27, 29 (Sara E. Rix ed., 1994).

113. See, e.g., Marcus Rebick, *The Japanese Approach to Finding Jobs for Older People*, in AS THE WORKFORCE AGES 103, 115–16 (Olivia S. Mitchell ed., 1993); Ronald D. Lee, Univ. of Cal., Berkeley, *The Graying of the Planet: Implications of the Great Global Aging Ahead*, Fourth Henry Wendt Distinguished Lecture at the American Enterprise Institute (Sept. 28, 2005).

114. Rix, *supra* note 104, at 3.

benefits? Many of the jobs for which they will be qualified will not be conducive to prolonging working life voluntarily.

Do we really know what would, in fact, extend working life? As Greller and Stroh remind us, exiting the workforce (i.e., retirement) rather than remaining in it has been the focus of much of the analysis on older workers and an aging workforce.¹¹⁵ Far less is known about what encourages or forces people to delay retirement or about the interventions that might keep them working longer than is known about what gets them to retire. Workers say phased retirement would keep them in the workforce longer.¹¹⁶ But would it? Or would it make early retirement more attractive because workers could better afford to cut back their work hours at younger ages?

In one example of an effort to enable older workers to ease into retirement, German auto workers were given the option of working part-time for 5 years prior to retirement or full-time for 2.5 years; they all opted for full-time with the earlier retirement.¹¹⁷ This response highlights the risk that phased retirement could shorten working life rather than lengthen it, which is not the outcome that many proponents of phased retirement seek.

Phased retirement and other options that might encourage people to work longer raise the question of how employers can retain only the workers they want without violating the ADEA. This suggests the need for more effective screening and weeding out at younger ages and better training and retraining throughout the work life, so that workers who want to stay on have the skills that employers need. The legal impediments to some forms of continued employment must also be dealt with. Workers who might want or need to scale back their work hours with their current employer and receive pension benefits from that employer to make up for lost wages have been prevented from doing so by an Employee Retirement Income Security Act (ERISA) regulation that prohibits the in-service distribution of pension benefits to workers who have not reached the pension plan's normal retirement age.¹¹⁸

115. Martin M. Greller & Linda K. Stroh, *Extending Work Lives: Are Current Approaches Tools or Talismans?*, in RETIREMENT: REASONS, PROCESSES, AND RESULTS 115, 117 (Gary A. Adams & Terry A. Beehr eds., 2003).

116. BROWN, *supra* note 97, at 3; WATSON WYATT WORLDWIDE, *supra* note 99, at 1; Weckerle & Shultz, *supra* note 99, at 322-25.

117. Gerhard Naegele, *Gradual Retirement in Germany*, 10 J. AGING & SOC. POL'Y 83, 91-93 (1999).

118. The IRS has proposed regulations that would eliminate a number of barriers to phased retirement, but as of February 2006, they had not been finalized. Distributions from a Pension Plan Under a Phased Retirement Program, 69 Fed. Reg. 65108 (proposed Nov. 10, 2004) (to be codified at 26 C.F.R. pt. 1).

Will older workers have the skills needed to qualify for the more desirable jobs that may become available? Far more attention needs to be paid to older worker training and retraining. However, it is also incumbent upon both the public and private sectors to promote life-long learning to help ensure that tomorrow's older workers do not face employment barriers comparable to those of today. And some of the burden of skills updating must fall to workers themselves.

Finally, what about the social safety net? If it becomes more difficult (e.g., costly) for workers to retire early, or if the full retirement age is further increased or indexed to longevity, mechanisms must be in place to protect those who, due to ill health, disability, unemployment, lack of skills, or caregiving responsibilities, cannot work.

CONCLUSION

What is the appropriate role for government, business, and labor in answering some of these questions about coping with and adjusting to an aging workforce? The General Accounting Office (renamed the Government Accountability Office) in 2001 called on the Secretary of Labor to convene an interagency government task force that, with input from stakeholders such as businesses and unions, would develop legislative and regulatory proposals dealing with aging labor force issues.¹¹⁹ One was finally established by the Employment and Training Administration in November 2004 with the objectives of (1) “[i]dentifying and filling knowledge gaps that currently exist regarding older workers’ employment opportunities”; (2) “[s]trengthening the capacity of the workforce investment system to provide comprehensive, integrated employment and training services to older workers”; and (3) “[i]dentifying and addressing the barriers to employment faced by older workers in order to increase employment outcomes for this population.”¹²⁰ What recommendations this task force comes to remains to be seen; however, examples of effective collaboration among government, business, and labor can be found.

An excellent example of this tripartite cooperation is the Finnish National Program on Aging Workers (FINPAW).¹²¹ FINPAW was one of the

119. U.S. GEN. ACCOUNTING OFFICE, *OLDER WORKERS: DEMOGRAPHIC TRENDS POSE CHALLENGES FOR EMPLOYERS AND WORKERS* 34 (2001).

120. Emily Stover DeRocco, Assistant Sec’y, U.S. Dep’t of Labor, *A National Perspective on the Aging Workforce*, Remarks at the AARP Foundation Workforce Initiative Launch (February 25, 2005), http://www.doleta.gov/whatsnew/Derocco_speeches/2005-02-25-National.cfm.

121. See JUHA HIETANEN, EUR. FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, FINLAND ‘LEADS EU’ ON OLDER WORKERS POLICY (2002), *available at* <http://www.eiro.eurofound.eu.int/2002/04/feature/fi0204101f.html>; Rix, *supra* note 104, at 14–17.

more comprehensive and integrated older-worker programs in the world, designed and implemented to improve employment prospects for Finland's older workers. This five-year program initiated by the government sought to involve all stakeholders, including workers themselves, labor organizations, employers, managers and supervisors, employment office personnel, teaching staff, and staff of occupational health services and labor protection. Such a level of commitment is not yet evident in the United States, undoubtedly because the perceived need for it is not so obvious.

Despite the lack of a sense of urgency about the aging population in the United States, change is in the air. Seventy-six million baby boomers will obviously not all be in the labor force beyond normal retirement age—they are not all in it now. However, many millions of them will remain in the workforce until they get closer to retirement age than has been the case in recent years. And boomers, with their sense of entitlement, may expect—if they wish to remain at work in particular ways—that employers will accommodate them. Employers, for their part, might expect boomers to take advantage of the ADEA to an extent not done by their parents and grandparents. The recent Supreme Court ruling on disparate impact offers further protection to older workers.¹²² As a result of that ruling, employers may more carefully assess and consequently reconsider potential personnel decisions in light of their likely, rather than just intended, impact on older workers.

Projecting into the future is a hazardous undertaking. Many economists, labor analysts, and policymakers are certain that labor shortages will eventually force employers to treat older workers with the respect they deserve. Older worker advocates and many older workers themselves are just as certain that older workers will be the ones to decide when and how working life is prolonged. Both events are likely to happen, although an appropriate match between demand for and supply of older workers is by no means assured, and there will be bumps along the way to that older (than today's) labor force. It is good to keep in mind that the older population in the United States is a heterogeneous one and is becoming more diverse. Whatever story one chooses to tell about it is likely to be correct or true for a certain proportion of that population and wrong for perhaps just as many older persons. There is no "older worker" or "aging workforce" story in the United States—there are simply many stories. Nonetheless, one can take comfort in the fact that the economy adjusted to the entrance of boomers into the workforce, and it will likely adjust to their departure—

122. *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005).

2006]

THE AGING OF THE AMERICAN WORKFORCE

617

even, or especially, if departure occurs later than it occurred for many of today's retirees.