

**Testimony of Christine L. Owens, Executive Director
National Employment Law Project
Before the U.S. Senate Special Committee on Aging**

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The National Employment Law Project (NELP) is a 501(c)(3) non-profit organization that engages in research, education, litigation support and policy advocacy on issues affecting low wage and unemployed workers. In partnership with national, state and local organizational allies, NELP works to foster the creation of good jobs, remove unfair barriers to employment and maintain strong federal and state programs of unemployment insurance (UI) benefits that provide a lifeline of support for individuals who, through no fault of their own, lose their jobs.

On an ongoing basis, NELP also engages directly with unemployed workers to help them assess and address the problems they are facing in trying to find work in an economy that, though growing, is still not creating enough jobs to meet the employment demand. Through this work, we've had contact with workers from all parts of the country, and from all walks of life. Though there are commonalities that bind all of them, certain groups have been particularly hard-hit by the unemployment crisis.

One might expect that jobless workers with less education are suffering most, and many are. But one trend that surprises some is the fact that older workers, though less likely to become unemployed in the first instance, are overwhelmingly more likely to become long-term unemployed¹ if they do lose their jobs. A combination of economic factors, including the need to pay higher wages for more experienced members of the work force, and various iterations of age discrimination, are all at play in creating this reality. Therefore, we are very pleased that the Select Committee on Aging has chosen to hold this hearing and shine a light on the difficulties that some of the most seasoned members of our workforce are experiencing in our still-struggling economy.

As we address below, older workers are facing increased barriers to full participation in the workforce. Employers' refusals to consider unemployed workers for job openings, especially those with longer durations of unemployment, fall more harshly on older workers. Age discrimination-- some subtle, some not so subtle, some not even intentional, but no less insidious—limits employment and advancement opportunities. Congress has the ability to intervene and prevent and remedy much of this discrimination through passage of the Fair Employment Opportunity Act of 2011 and the Protecting Older Workers Against Discrimination Act, both of which I will discuss in my testimony. Moreover, because they are more likely to have been laid off from industries experiencing structural shifts, many older workers require assistance aligning

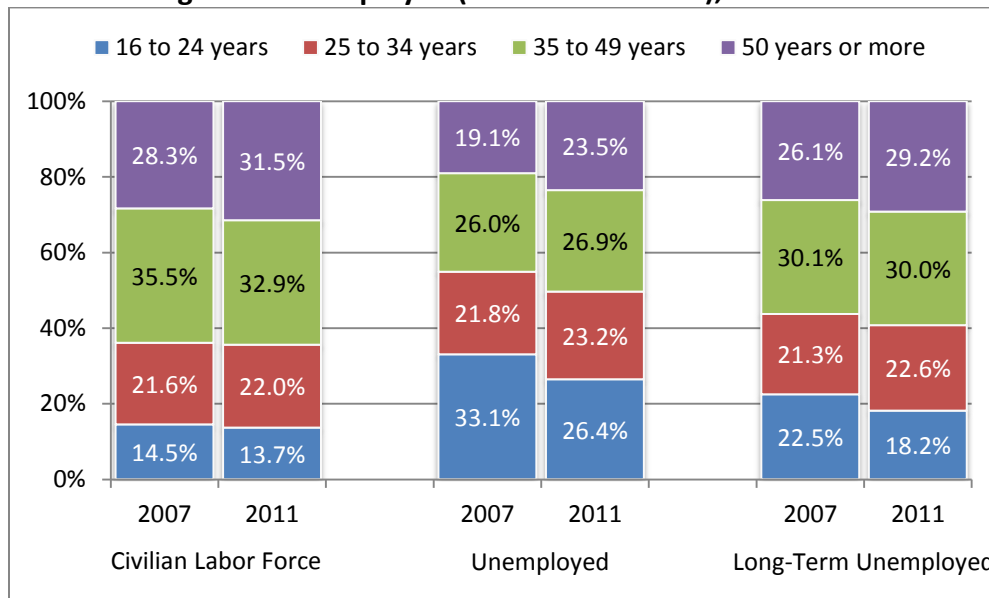
¹ Someone is "long-term unemployed" when they've been out of work for more than six months.

their skills with the needs of today’s job market. At a time when older workers are struggling to get back into the workforce and desperately need to do so to make up for retirement account losses they’ve suffered over the last four years, Congress must take their challenges seriously and work to eradicate the barriers they are facing to getting and keeping gainful employment and regaining economic security.

The Facts and Figures: Older Workers in the Labor Force, the Unemployed, and the Long-Term Unemployed

As described in a recent NELP analysis, workers age 50 and older made up a larger share of the labor force and the unemployed in 2011 than they did before the Recession began in late 2007 (see Figure 1 below).² More significantly, while older workers were underrepresented among the unemployed (23.5%) relative to their share of the labor force in 2011 (31.5%), they were *overrepresented* among the long-term unemployed (29.2%) relative to their share of the unemployed (23.5%). This continues a pattern from before the Great Recession. Furthermore, the share of long-term unemployed workers who were at least 50 years old *increased* from 26.1% in 2007 to 29.2% in 2011. In contrast, shares of long-term unemployed workers between the ages of 25 years and 34 years old and between 35 years and 49 years old stayed virtually the same in 2007 and 2011, while the share of long-term unemployed young workers (16-24 years old) declined.³

Figure 1: Age Distribution of the Civilian Labor Force, the Unemployed, and the Long-Term Unemployed (27 weeks or more), 2007 and 2011⁴



² Claire McKenna, “Economy In Focus: Long Road Ahead for Older Unemployed Worker,” March 9, 2012, <http://www.nelp.org/page/-/UI/2012/NELP.older.workers.3.9.2012.pdf?nocdn=1>.

³ The shares made up of younger workers increased by less (25- to 34-year-olds), stayed flat (35- to 49-year-olds), or decreased (16- to 24-year-olds).

⁴ Bureau of Labor Statistics, Current Population Survey. Data are not seasonally adjusted.

Unemployment and Long-Term Unemployment Among Older Workers

Although older workers had the lowest average monthly unemployment rate of any age group in 2011 (6.7%), it is more than double their rate in 2007 (3.1%) (Table 1). Furthermore, older workers experienced the greatest percentage increase in the size of their unemployed population. It more than doubled from 1.3 million in 2007 to 3.2 million in 2011. Although

Table 1: Unemployment and Long-Term Unemployment (27 weeks or more) by Age Group, 2007 and 2011 (Numbers in millions)

	2007		2011	
	Rate	Number	Rate	Number
Unemployment				
Total, 16+ years	4.6%	7.1	8.9%	13.7
16 to 24 years	10.5%	2.3	17.3%	3.6
25 to 34 years	4.7%	1.5	9.5%	3.2
35 to 49 years	3.4%	1.8	7.3%	3.7
50+ years	3.1%	1.3	6.7%	3.2
Long-term Unemployment ^A				
Total, 16+ years	17.6%	1.2	43.7%	6.0
16 to 24 years	11.9%	0.3	30.0%	1.1
25 to 34 years	17.1%	0.3	42.6%	1.4
35 to 49 years	20.3%	0.4	48.8%	1.8
50+ years	24.1%	0.3	54.3%	1.8

Source: Bureau of Labor Statistics, Current Population Survey. Data are not seasonally adjusted.

^AThe long-term unemployment "rate" refers to the long-term unemployed (27 weeks or more) relative to all unemployed.

younger groups of workers also experienced large increases in the number of unemployed over this period, proportionally the increases were not as great.

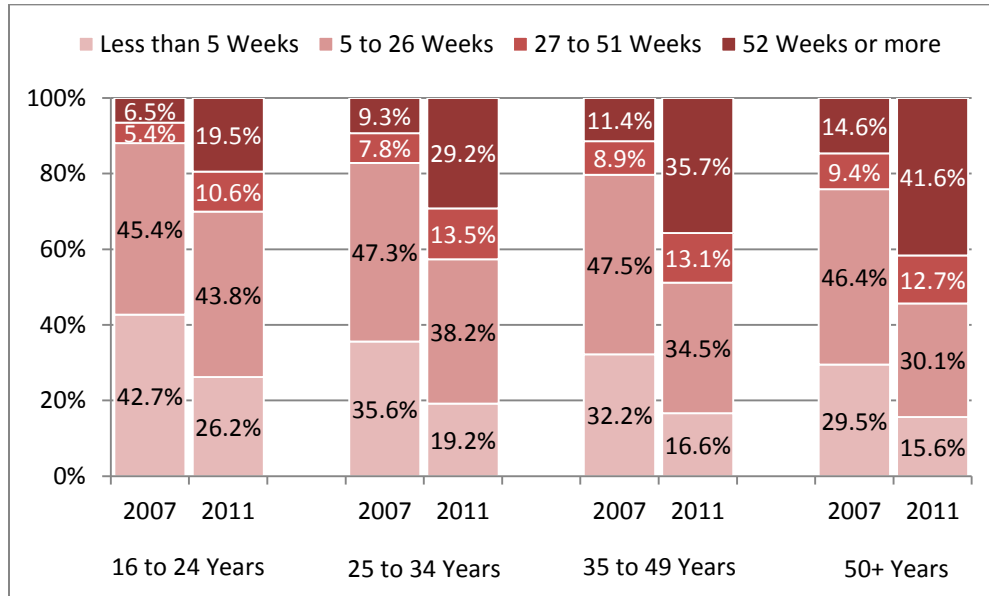
The second part of Table 1 shows the share and the number of unemployed in each age group who were long-term unemployed in 2007 and in 2011. In 2007, older unemployed workers were more likely than younger workers to become long-term unemployed—about one-quarter (24.1%) compared to about one-fifth (20.3%) of jobless 35- to 49-year-olds, and smaller shares of younger unemployed workers. During the recession and its aftermath, the number of long-term unemployed older workers more than quintupled, the greatest percentage increase out of all the age groups, from 0.3 million to 1.8 million. In 2011, more than *half* (54.3%) of older jobless workers were out of work for at least six months.

“Very Long-Term Unemployment” Among Older Workers

Figure 2 (below) shows the distribution of unemployment duration among the age groups in 2007 and in 2011. First, most of the long-term unemployed in 2011 were “very long-term unemployed,” or out of work for 52 weeks or more. Older unemployed workers were the *most* likely to be unemployed for one year or longer—about 4 in 10 (41.6%) jobless workers age 50 and older. Again, this continues a pattern from 2007.

Furthermore, during the recession and its aftermath, the share of workers experiencing unemployment lasting for one year or more increased most dramatically (by 27 percentage points) among older workers.

Figure 2: Distribution of the Duration of Unemployment by Age, 2007 and 2011⁵



An update of this analysis covering the first quarter of 2012 shows that even though older workers made up a significant share of employment gains over this period, they remain the most seriously impacted by prolonged joblessness.⁶ Workers ages 50 and older made up an even larger share of the long-term unemployed in the first quarter of this year (30.4%) than they did over 2011. Just over half (50.7%) remained long-term unemployed, and approximately four in ten jobless workers 50 and older, or 39.4 percent, had been out of work for at least one year, as opposed to smaller shares of younger groups of workers.

Implications of the Data

As the population ages, so does the labor force. Moreover, decreased values of retirement accounts, as well as changes to Social Security and employee benefit plans are causing many older working adults to delay retirement.⁷ However, the historical

⁵ Bureau of Labor Statistics, Current Population Survey. Data are not seasonally adjusted.

⁶ For more information about these updated figures, please contact Claire McKenna, Policy Analyst, at cmckenna@nelp.org.

⁷ Richard W. Johnson, "The Growing Importance of Older Workers," in *Public Policy & Aging Report*, Volume 21, Number 4, Fall 2011.

protection from lay-offs for older workers is diminishing.⁸ Older workers still have relatively low unemployment, but they saw the greatest percentage increase in the number of unemployed from 2007 to 2011

The prospects are dim for older workers who lose their jobs. They have the highest rates of long-term and very long-term unemployment of any age group. Older workers made up larger shares of the long-term unemployed in 2011 and in the first part of 2012, than they did before the recession; these shares are disproportionate relative to their shares of the unemployed over these periods.

Older unemployed workers are more likely to have been laid off from industries undergoing structural shifts that commenced years before the recession, such as manufacturing.⁹ This is one reason they fared worse in 2007 with respect to rates of long-term unemployment. As NELP's analysis shows, the recession and its aftermath aggravated their problems.

NELP's conclusions are consistent with research from the Urban Institute finding that although workers age 50 and older were less likely to lose their jobs over the recession, they had a harder time than their younger peers getting back to work. Controlling for select demographic and job characteristics, workers ages 50 to 61 were one-third less likely than workers ages 25 to 34 to find work within 12 months of job loss; workers over 61 were *half* as likely.¹⁰ In April, unemployed workers age 55 and older had an average duration of unemployment of about 60 weeks, or almost 14 months.¹¹

Prolonged periods of unemployment may have a severe impact on older workers' retirement prospects and later-life well-being generally. A national survey of workers who lost their jobs during the recession by the Heldrich Center for Workforce Development at Rutgers University found that a majority of respondents age 55 and older experienced a decline in savings while unemployed.¹² Because older workers are nearer to traditional retirement age, they have less time than younger workers to replace lost savings with new wages. There is the option of delaying retirement, but

⁸ Alicia H. Munnell, Dan Muldoon, and Steven A. Sass, "Recessions and Older Workers," Center for Retirement Research, Number 9-2, January, 2009.

⁹ Maria Heidkamp, Nicole Corre, and Carl E. Van Horn, "The "New Unemployables": Older Job Seekers Struggle to Find Work During the Great Recession," Sloan Center on Aging and Work, Issue Brief 25, November, 2010.

¹⁰ Richard W. Johnson and Janice S. Park, "Can Unemployed Older Workers Find Work?" Urban Institute, Older Americans' Economic Security, Number 25, January, 2011.

¹¹ National Employment Law Project, "Hiring Discrimination Against the Unemployed," Briefing Paper, July 12, 2011.

¹² Heldrich Center for Workforce Development, "Older Workers, the Great Recession, and the Impact of Long-term Unemployment," February 2011. The survey was conducted over 2009 and 2010. Respondents were a national random sample of 1,200 workers who lost their jobs between September, 2008 and August, 2009.

with such limited job prospects for older unemployed workers, forced early retirement seems a more likely possibility for many. In fact, two-thirds of older respondents had taken up Social Security or planned to do so as soon as they became eligible.¹³ Even if older workers find new work, research shows that they are more likely than younger workers to earn less than they did in their previous job, which also has an impact on their retirement plans and financial security.¹⁴

1. Congressional Interventions to HELP Older Workers in Today's Job Market Prohibit discrimination against the unemployed

As explained below in detail, there is a marked national problem of employers openly and/or willingly discriminating against the unemployed when making hiring decisions, often systematically excluding them from **any** consideration for hire. This is a shameful practice for many reasons, not the least of which is that it betrays an utter disregard for how many deeply qualified and skilled workers are currently unemployed, and the value they would bring to workplaces and the economy overall.

But of particular relevance today's hearing is the fact that any practice that excludes the unemployed from consideration for hire necessarily has a disparate impact on older workers because of their disproportionate representation within the ranks of the long-term unemployed. The courts and the Equal Employment Opportunity Commission (EEOC) have long held that seemingly neutral employment practices can run afoul of the Civil Rights Act's prohibitions against discrimination if they have a disparate impact on a protected class of workers, such as older workers.¹⁵

Stories suggesting systematic exclusion, often blatant, of unemployed workers from consideration for jobs began to emerge early in the summer of 2010. In May and June 2010, local media in Atlanta along with the *Huffington Post* and *CNNMoney.com* reported that Sony Ericsson, a global phone manufacturer that was expanding operations in Georgia, had posted a job announcement for a marketing position that explicitly said "No Unemployed Candidates Will Be Considered At All."¹⁶ Similar documented accounts of such exclusions reported around the same time included:

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Testimony of Christine L. Owens before the EEOC's hearing to Examine Treatment of Unemployed Job Seekers, February 16, 2011, <http://www.eeoc.gov/eeoc/meetings/2-16-11/owens.cfm>.

¹⁶ 11Alive.com, "Job Listing: Unemployed Need Not Apply," http://www.11alive.com/rss/rss_story.aspx?storyid=144719, May 31, 2010; Laura Bassett, "Disturbing Job Ads: 'The Unemployed Will Not Be Considered'," *The Huffington Post*, http://www.huffingtonpost.com/2010/06/04/disturbing-job-ads-the-un_n_600665.html, June 4, 2010, updated Aug. 8, 2010; Chris Isidore, "Looking for work? Unemployed need not apply," *CNNMoney.com*;

- An ad posted on **The People Place** (a job recruiting website) by an anonymous Angleton, Texas electronics firm seeking a “quality engineer;” the ad specified the company would “not consider/review anyone NOT currently employed regardless of the reason;”¹⁷
- A Craigslist posting advertised for assistant restaurant managers in Edgewater, N.J., flatly requiring that applicants “Must be currently employed;”¹⁸
- Numerous listings for grocery store managers throughout the Southeast posted in the spring by a South Carolina recruiting firm, Latro Consulting, included restrictions against considering unemployed applicants; the restrictions were removed after *CNN Money.com* inquired about the practice.¹⁹

Subsequent press reports confirmed the practice of ads excluding unemployed workers was continuing.²⁰ In July 2011, NELP published the results of an informal sampling it undertook over a four-week period in the spring on four job-listing websites: CareerBuilder.com, Indeed.com, Monster.com and Craigslist.com. In that survey, NELP identified roughly 150 job ads that included exclusionary language that implicitly or explicitly barred unemployed candidates, particularly the long-term unemployed, from applying for openings—simply because of their unemployment status and without regard to their qualifications for the position.²¹ Indeed.com has since announced that it will not include such restrictions in job postings on its website.

Still, NELP continues to find job ads that explicitly exclude unemployed applicants from being considered:

http://money.cnn.com/2010/06/16/news/economy/unemployed_need_not_apply/index.htm, June 16, 2010.

¹⁷ Bassett, “Disturbing Job Ads,” op. cit.

¹⁸ Ibid.

¹⁹ Isidore, op. cit.

²⁰ See, for example, “Outlook poor for long-term unemployed,” *The Atlanta Journal Constitution*, October 4, 2010 (<http://www.ajc.com/business/outlook-poor-for-long-657702.html>);

“Employers Continue to Discriminate Against Jobless, Think ‘The Best People Are Already Working’,” *Huffington Post*, October 8, 2010

(http://www.huffingtonpost.com/2010/10/08/employers-continue-to-dis_n_756136.html);

“Long-term unemployed face stigmas in job search,” *USA Today*, January 23, 2011

(http://www.usatoday.com/money/economy/employment/2011-01-23-longterm-unemployed_N.htm);

“How Employers Weed Out Unemployed Job Applicants, Others, Behind The Scenes,” *Huffington Post*, January 14, 2011

(http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html).

²¹ National Employment Law Project, “Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed From Job Opportunities, as Discriminatory Ads Persist,” July 12, 2011, p. 2 (url: <http://www.nelp.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf?nocdn=1>).

- An August 30, 2011 posting on CareerBuilder for a Medical Sales Rep in Wisconsin, required that candidates “must be currently employed” and admonished potential applicants that that “if you are not currently in medical sales and choose to apply you will not be given the opportunity of an interview and your resume will be deleted.” (<http://www.nelp.org/page/-/UI/2012/MEDICAL-PHARMA-SALES-REP-WI.pdf?nocdn=1>)
- A December 2011 CareerBuilder posting for Restaurant Managers in Mississippi required relatively modest relevant past experience (two years of salaried casual dining experience) but stated that candidates “must be currently employed.”(<http://www.nelp.org/page/-/UI/2012/RESTAURANT-MANAGERS-MS.pdf?nocdn=1>)
- And a job ad for an experienced travel agent in the Alamo-East Bay area in California, posted in in March on Craigslist, explicitly states “only those currently employed need apply.” (<http://www.nelp.org/page/-/UI/2012/CA-TravelAgent-CraigslistSF-03-2012.pdf?nocdn=1>)

While refusal to consider or hire applicants due to their unemployment status is sometimes overtly reflected in ads such as those described above, at NELP we also hear regularly from unemployed workers—mostly older workers—who despite years in the labor force and significant relevant experience are nevertheless told they will not be referred or considered for employment, once recruiters or potential employers learn they are not currently working.

That happened to 53-year-old Michelle Chesney-Offutt from Illinois, who earlier wrote NELP that after working successfully for 19 years as an IT help supervisor, she was laid off in 2008 due to the downturn. Many months into her job search, a headhunter contacted her, excited about her qualifications for a position he was retained to fill. The excitement faded, however, when he learned she had been unemployed for more than a year. As Ms. Chesney-Offutt put it, “When he realized this, he was very apologetic, but had to admit to me that he would not be able to present me for an interview due to the ‘over 6 month unemployed’ policy that his client adhered to.” The headhunter, she told NELP, explained to her that his client expressly prohibited him from referring workers who had been unemployed for six months or more. When we last spoke to Chesney-Offutt, she was still unemployed, had exhausted all unemployment benefits, was restructuring her mortgage, and had applied for SNAP (food stamps) and welfare—a first for her.

Similarly, 55-year-old Ginger Reynolds from California wrote to tell us about receiving a call from a recruiter for a six-month contract position as a software systems engineer. The recruiter thought Ms. Reynolds was a good fit for the job but upon learning of her

unemployment, told her she could not submit her resume because she had not worked in the past six months.

Ellen Pinney, a 56 year old New Jersey woman, was laid off from a management position she'd had for 17 years. Ms. Pinney has been actively seeking full-time work while caring for an elderly parent and taking a variety of what she calls "handywoman" jobs. With a college degree and 30 years employment history, she writes of her struggle to find work; how her savings have been depleted; and how she has rented out her home and moved in with her father. She reports that she made more as a teenager in 1971 than she did last year. And she says she was stunned when told recently by a representative of a professional staffing firm "the company she was representing WOULD NOT interview any professional NOT PRESENTLY working."

Selena Forte, 56, of Ohio, a commercially-licensed driver with 8 years of experience, wrote to us of being referred to a major delivery company for a position only to be told by the recruiter that they would not consider anyone who had not been employed in the last 6 months.

Theresa Mancusi, 55, from Maryland, lost her compliance administrator job when her employer lost a contract re-bid. She reports recently seeing a job posting for which was well qualified, but that it stated: "Qualified candidates will have previous experience working in an administrative capacity within the past 6 months." And when following up with a recruiter regarding open positions recently, she reports being told that their clients will ask to see resumes only of people currently working.

There is no official data on how frequently unemployed workers are denied consideration for jobs because of their employment status, but the openness of the exclusionary ads noted above and the experiences jobless workers shared with NELP suggest the practice may be fairly common. That suspicion is borne out by comments of human resource consultants and recruiters willing to go on record about the practice. Rich Thompson, vice president of learning and performance for Adecco Group North America, the world's largest staffing firm, told *CNNMoney.com* in June 2010 that companies' interest only in applicants who are currently working "is more prevalent than it used to be...I don't have hard numbers," he said, "but three out of the last four conversations I've had about openings, this requirement was brought up."²² Similarly, Lisa Chenofsky Singer, a New Jersey human resources consultant specializing in media and publishing jobs, commented that, "Most executive recruiters won't look at a candidate unless they have a job, even if they don't like to admit it." According to Ms. Singer, the first question she is generally asked when recommending a candidate is whether the candidate is currently working—and if the candidate is unemployed, the recruiter is not interested.²³

²² Isidore, op. cit.

²³ Ibid.

A January 2011 article posted on **The Ladders**, an online job search resource site, further corroborates the widespread exclusion of jobless workers from employment opportunities.²⁴ According to one quoted source, Matt Deutsch, communications coordinator at TopEchelon.com, the tendency to exclude the unemployed is “growing.” Deutsch said:

Not all companies are doing this, but it certainly has become an issue. What’s startling are the lengths to which companies and recruiters are going to communicate this, such as including the phrase “Unemployed candidates will not be considered” right in the job posting.²⁵

Deutsch speculates that some companies may rationalize the exclusion on the assumption that the best candidates are likely to be those who are currently working. But in an economy with such high unemployment, he notes, it is simply not “100 percent true” that being employed is a proxy for suitability for a position. More likely, Deutsch says firms are inundated with applications and screening out the unemployed is “a pretty simple metric that can easily reduce their workload...”²⁶

Other staffing firm industry specialists similarly confirm that the unemployed need not apply. Amherst Healthcare headhunter Isang Inokon told the *Huffington Post* that “he has trouble placing jobless pharmacists because the reality of today’s job market is that employers ‘want somebody who’s wanted’”—that is, already employed.²⁷ Another executive recruiter who has worked for major staffing firms for 20 years said, “There’s a lot of dirty stuff going on, a lot of hush-hush discrimination, I can assure you. As a recruiter,” he said, “you get an HR director on the phone, and they tell you point blank, ‘We want somebody ... [who] currently has a job. We don’t want to see a resume from anyone who’s not working.’ It happens all the time.”²⁸

An informal survey reported in October 2011 by SmartRecruiters, which markets free recruiting software, found that “82% of recruiters, hiring managers, and human resources professionals, report the existence of discrimination against the

²⁴ “Uninterested in the Unemployed,” (<https://recruit.theladders.com/recruiter-resource-center/uninterested-in-unemployed>)

²⁵ Sharon L. Florentine, “Uninterested in the Unemployed,” *The Ladders*, <https://recruit.theladders.com/recruiter-resource-center/uninterested-in-unemployed>, Jan. 2011.

²⁶ Ibid.

²⁷ Laura Bassett, “Employers Won’t Hire The Jobless Because of the ‘Desperate Vibe’,” *The Huffington Post*, http://www.huffingtonpost.com/2010/12/03/employers-wont-hire-the-u_n_791710.html, Dec. 3, 2010, updated Feb. 2, 2011.

²⁸ Laura Bassett, “How Employers Weed Out Unemployed Job Applicants, Others, Behind the Scenes,” *Huffington Post*, http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html, Jan. 14, 2011.

unemployed.” Among those surveyed by the company, “55% of recruiters and HR managers have ‘personally experienced resistance when presenting qualified yet unemployed candidates to clients/colleagues.’”²⁹

In sum, a review of job postings, press accounts (including interviews with recruiters and HR professionals), and the personal experiences related by jobless workers indicates that discriminatory exclusion of applicants for jobs simply because they are unemployed is a barrier to employment—and may be a significant one—for many older workers. This is why NELP supports the Fair Employment Opportunity Act of 2011 (FEOA),³⁰ pending in both houses of Congress and introduced in the Senate by Committee Member Senator Blumenthal, and similar legislative efforts throughout the United States. The FEOA would preclude employers and job recruiters from excluding the unemployed from job consideration simply because of their unemployment status

The ban on “unemployment discrimination” contemplated by the FEOA strikes an appropriate balance between the rights and interests of employers and employment agencies, on the one hand, and those of qualified unemployed job seekers. Nothing in the FEOA requires employers or recruiters to hire or refer unqualified job seekers simply because of their unemployment status, nor does the legislation require employers to favor qualified unemployed candidates over qualified candidates who are currently working. All the legislation does is preclude employers and employment agencies from using the mere fact of unemployment status as a basis for excluding a candidate from job consideration—and even there, an employer may insist on current employment status where current employment is a *bona fide* occupational qualification.

This common sense response to an unfair employment practice that has continued notwithstanding growing awareness will serve several important functions. First, the act of passing the legislation alone is powerful public education: By raising public and employer awareness of the unnecessary and unfair stigmatizing of the unemployed, it will induce more employers voluntarily to change their employment practices and give the unemployed a fair shot in the hiring practice. Second, it will give qualified unemployed workers a means of redress against unlawful conduct. While we do not believe litigation under this statute would be substantial – few unemployed workers have the resources to litigate, and most are busy spending their time looking for work – the availability of a remedy for affected workers will help encourage voluntary compliance with the law. Finally, by promoting greater voluntary compliance and conferring on unemployed workers a right to fair consideration for jobs and power to enforce that right, this legislation will promote greater hiring of the unemployed, helping to stem the decline and loss of human capital our nation is experiencing as millions continue to go without work, while reducing the ongoing toll that

²⁹ See <http://www.prleap.com/pr/182495/> <http://www.prleap.com/pr/182495/>

³⁰ The Fair Employment Opportunity Act of 2011 was introduced in the House of Representatives on July 12, 2011 (H.R. 2501) and in the Senate on August 2, 2011 (S. 1411).

unemployment, and particularly long-term unemployment, takes on these workers and their families and communities. We urge members of this Committee to co-sponsor this legislation and work with Senator Blumenthal towards its passage.

2. Restore long-established standards of proof in cases under the Age Discrimination in Employment Act

Before 2009, an older worker alleging discrimination in employment under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was required to prove that age was a “motivating factor” in a challenged employment decision. If the plaintiff met that burden through direct or circumstantial evidence of age bias, the employer could avoid liability for its unlawful consideration of age only if it proved—that is, met the burden of persuasion—that the action was motivated by other legitimate reasons: in other words, that the same action would have been taken even if age had not been considered. This “mixed motives” standard and allocation of proof burdens had been followed by lower courts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was upheld by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and was codified by Congressional amendments to Title VII in 1991. Lower courts typically applied this analysis to all cases involving claims of unlawful discrimination under federal employment discrimination statutes.³¹

The Supreme Court upended this long-standing and well established precedent in its 2009 decision in *Gross v. FBL Financial*, 129 S.Ct. 2343 (2009), where it ignored the issues that had actually been presented for review, and, in the words of dissenting Justice Stephens, engaged in “unnecessary lawmaking” to rewrite the standard and burden of proof in cases involving age discrimination. In *Gross*, a five-to-four majority of the Court held that plaintiffs in ADEA cases must prove not only that unlawful age considerations were a factor in an employer’s action, but that age discrimination was the **deciding** factor in the decision.

The higher standard imposed by *Gross* in age discrimination cases is not only unprecedented under the ADEA and inconsistent with the rules applied under Title VII, but it is also unreasonable, illogical and virtually impossible for plaintiffs to meet. In effect, it requires plaintiffs to show not only that age discrimination was at play in an employer’s decision, but also that no other factor could have caused the decision. It presumes that job applicants and current employees alleging age discrimination have access to information about decision-making that only employers possess. And it essentially gives employers a pass to discriminate, so long as another legitimate factor **could** account for the adverse decision. Adding insult to the injury the *Gross* decision has inflicted on victims of age discrimination, lower courts have now extended its

³¹ See Statement of Senator Harkin upon introduction of S. 2189, Protecting Older Workers Against Discrimination Act, I Congressional Record, 112th Congress, pp. S. 1615-S. 1617; <http://thomas.loc.gov/cgi-bin/query/F?r112:23:/temp/~r112d9JftB:e0:>

holding to cases under other employment discrimination statutes, including the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

The Court's decision in *Gross* has rightly met with bi-partisan disapproval. On March 13, 2012, Senators Harkin and Grassley, with Senator Leahy as a co-sponsor, introduced S.2189, the Protecting Older Workers Against Discrimination Act (POWADA).³² A common-sense correction to the Supreme Court's ruling, POWADA affirms that "mixed motive" standards and burdens of proof apply under the ADEA and other federal employment discrimination laws, and expressly repudiates the Supreme Court's contrary holding and analysis. The legislation clarifies that courts may not require workers to prove that age (or another protected characteristic) was the "but for" cause for their adverse treatment as *Gross* demanded,³³ or the *sole* cause of the adverse action, as some courts have since incorrectly ruled.³³

The POWADA legislation also takes pains to correct additional mischief created by the Court's decision in *Gross*. It answers the actual question presented in the case, i.e., whether proof of age discrimination must be direct, or may be circumstantial. Again following longstanding precedent, POWADA makes clear that *any* evidence that can reasonably convince a trier of fact that discrimination has occurred is acceptable to meet the plaintiff's burden of proof—direct evidence is not required. POWADA also expressly amends other employment discrimination statutes to which lower courts have extended the *Gross* holding.³⁴

The legislative fix POWADA provides is urgently needed. As noted, not only has *Gross* significantly narrowed the scope of protections intended to be afforded by the ADEA, it has also been extended to other laws. It places an impossible proof burden on plaintiffs who are seeking remedy for invidious discrimination. As Senator Harkin said in introducing POWADA, "only the employer is in a position to know his own mind and offer an explanation of why a decision that involves discrimination or retaliation was actually motivated by legitimate reasons."³⁵

Moreover, POWADA will help reduce the incidence of employment discrimination. In the words of Senator Harkin again, "[b]y putting the entire burden on the worker to demonstrate the absence or insignificance of other factors, the Court has freed employers to discriminate or retaliate."³⁶ POWADA rights that wrong. The decision has also created extraordinary anomalies in litigation involving claims of dual discrimination—e.g., an older woman denied a promotion must meet differing burdens in establishing the gender and age claims, generating confusion for judges and juries

³² <http://harkin.senate.gov/press/release.cfm?i=336287>.

³³ <http://thomas.loc.gov/cgi-bin/query/z?c112:S.2189:>.

³⁴ *Ibid.*

³⁵ <http://thomas.loc.gov/cgi-bin/query/F?r112:23:./temp/~r112d9JftB:e0:>.

³⁶ *Ibid.*

and creating the potential for skewed and irrational results. By making burdens and standards of proof under similar statutes uniform, POWADA will help streamline litigation, mitigate confusion, and reduce the likelihood of inconsistent and conflicting results.

Reversing the judicial activism of the Supreme Court and restoring the rules that prevailed—successfully—before 2009 should be an area of bi-partisan agreement. None of us believes that invidious discrimination based on age or disability status is any more acceptable than invidious discrimination based on gender, race or ethnicity. None of us feels that it's okay to discriminate "just a little bit"—even where that has an impact on employment decisions—so long as an employee can't prove that the discrimination was the final reason for the employer's action. All of us share a commitment to eliminating unlawful considerations of bias from employment decisions, and to allocating proof burdens in these cases in a manner that is fair, reasonable, and realistic, and that furthers the goal of reaching a just result.

These considerations are particularly important today, when older workers already face such barriers to gaining or regaining employment after losing their jobs. That challenge should not be further complicated by crabbed judicial interpretations of our nation's employment discrimination laws that impose second class status on workers simply because the discrimination they experience is based on age or disability status, and not on gender, race or ethnicity. As Senator Grassley said when POWADA was introduced, "The decision in the *Gross* case has had a major impact on employment discrimination litigation across the country. It's time we clarify the law to ensure that other people like Jack Gross aren't put in similar situations. Older Americans have immense value to our society and our economy and they deserve the protections Congress originally intended."³⁷

3. Address the special training needs of older unemployed workers.

Finally, policymakers should ensure that workforce development programs and services are accessible and tailored to the needs of groups that face special workforce challenges, including unemployed older workers. Many older unemployed workers simply need help navigating today's web-based job-search landscape. For other older workers displaced after many years with a single employer or within a single industry, the key to improving employment prospects may be as straightforward as a course in the latest version of Microsoft Office, or as intensive as getting credentialed in a new occupation.

The President's recent proposal for a new *Universal Displaced Worker Program* holds some promise for a more streamlined service delivery system that would offer high-quality job-search assistance, along with access to critical skills training for high-growth

³⁷ "Bipartisan Legislation Will Protect Older Workers From Discrimination," March 13, 2012, <http://harkin.senate.gov/press/release.cfm?i=336287>.

and in-demand industries. While the proposal needs refinement, it serves as a starting place for a productive discussion about the ways in which we can better serve those who are struggling to find work. Congress also needs to reauthorize the Workforce Investment Act and protect its funding from the current furor to cut costs at all costs, no matter how great the damage.

Another option is work-sharing, also known as short-time compensation. This program allows employers to avert layoffs by reducing employees' work hours and wages during periods of slack demand; prorated unemployment insurance benefits for those workers help offset wage loss. For older workers in industries with employment cycles vulnerable to shifting customer demand, a layoff aversion program like work-sharing can save jobs while reducing income loss and facilitating a much smoother transition to retirement. The Middle Class Tax Relief and Job Creation Act,³⁸ signed into law by President Obama in February, provides nearly \$500 million in incentive funding to states that adopt or expand work-sharing programs. NELP urges Members of this Committee and this Congress to work with their state Departments of Labor to implement work-sharing programs where they do not already exist.

Conclusion

The challenges that older unemployed workers are facing in this economy are significant. In a time when we are creating too few jobs for too many workers who desperately need them, older workers face a particularly high hurdle in their search for re-employment. Fortunately, there are some relatively simple levers that Congress can push which can immediately reduce unfair barriers to re-employment, keep workers on the job, and help retrain those who need new skills to compete. Each of these policies should enjoy wide bi-partisan support, and we hope that this Committee hearing is the beginning of exactly the type of cooperation that can really make a difference in the lives of older workers who are struggling with unemployment.

³⁸ Public Law 112-96, February 22, 2012, <http://thomas.loc.gov/cgi-bin/query/z?c112:S.2189>.