

Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed From Job Opportunities, as Discriminatory Ads Persist

As the Labor Department's recent employment report for June 2011 showed, America's workers face a seemingly relentless jobs crisis. Unemployment has risen over each of the last four months and now stands at 9.2 percent. More than 14 million Americans are counted as officially unemployed (a number that excludes those who have given up looking for work), and more than six million of those have been jobless for longer than six months. Equally discouraging, job creation has stagnated, with employers nationwide adding only a net of 43,000 new jobs over the last two months.

Making matters worse, U.S. employers of all sizes, staffing agencies and online job posting firms are using recruitment and hiring policies that expressly deny employment to the unemployed—simply because they are not currently working. In other words, at a time when the competition for jobs is extraordinarily intense—with more than nearly five unemployed jobseekers for each new job opening—some businesses and recruitment firms are telling would-be job seekers that they can't get a job unless they already have a job.

This perverse catch-22 is deepening our unemployment crisis by arbitrarily foreclosing job opportunities to many who are otherwise qualified for them. It dilutes the storehouse of talent in America, by casting aside an untold number of skilled and dedicated workers who have the misfortune of being unemployed in the worst downturn since the Great Depression. And it adds to the crisis that unemployed workers, their families and their communities face, as we try to crawl out of this deep recessionary hole.

The sections that follow provide a more detailed treatment of the issue of refusing to consider or hire individuals because they are unemployed. Included are the results of an informal survey of exclusionary job advertisements posted on some of the nation's most highly trafficked job posting sites. The paper also reports on recent public opinion research, which found strong public opposition to the exclusion of unemployed job seekers and public support for legislation banning this practice. The paper closes with a discussion of the Fair Employment Opportunity Act of 2011—recently introduced legislation that takes reasonable steps to effectively address the critical issue.

Excluding the Unemployed from Job Opportunities

News accounts suggesting the blanket exclusion of unemployed workers from job consideration first broke last summer, when local media in Atlanta reported that Sony Ericsson's newly relocated headquarters had posted a job announcement that explicitly stated, "No Unemployed Candidates Considered At All."¹ Despite considerable media coverage since the practice was first reported,² a recent informal sampling of online job postings conducted by the National Employment Law Project (NELP) documents that the practice of excluding unemployed job seekers persists.

NELP conducted its review over the four-week period that commenced on March 9, 2011 and ended on April 5, 2011. A NELP researcher reviewed job postings during that period that appeared on four of the nation's most prominent online job listing websites: CareerBuilder.com, Indeed.com, Monster.com, and Craigslist.com. The online research sought information on both employers and staffing firms that were specifically identified by name (often, job listings are posted anonymously), while also seeking a diverse sample from across the United States.

NELP's snapshot of jobs postings identified more than 150 ads that included exclusions based on current employment status, including 125 ads that identified specific companies by name. The overwhelming majority of the offending ads required that applicants "must be currently employed." CareerBuilder.com and Indeed.com accounted for more than 75 percent of the exclusionary ads NELP identified. Staffing firms were prominently represented among those companies identified with the practice of excluding unemployed job seekers, accounting for about half of all the postings.

Significantly, the fact that NELP's relatively limited research yielded such a broad cross-section of exclusionary ads—with postings for jobs throughout the United States, by small, medium and large employers, for white collar, blue collar, and service sector jobs, at virtually every skill level—suggests that the practice of excluding unemployed job seekers could be far more extensive than depicted in this limited sample.

Table 1 below provides a sampling of the job postings by prominent employers and staffing firms (Appendix A provides further examples).

¹ 11 Alive News, "Job Listing; Unemployed Need Not Apply" (May 31, 2010) (<http://www.11alive.com/news/local/story.aspx?storyid=144719&catid=3>)

² "Round-Up: Excluding the Unemployed is Unjust," *USA Today*, June 6, 2011; "Jobless Discrimination? When Firms Won't Even Consider Hiring Anyone Unemployed," *Time*, May 23, 2011; "Help wanted? For some companies, not if you're unemployed," *Orlando Sentinel*, May 27, 2011; "Tammerlin Drummond: Job discrimination against unemployed a new low," *Mercury News*, May 17, 2011; "Unemployed Need Not Apply: State Bans Want-Ad Ploy," *NPR*, April 3, 2011; "Jobless? More Employers Say You Need Not Apply," *ABC News*, March 4, 2011 (<http://abcnews.go.com/Business/february-unemployment-falls-long-term-jobless-struggle/story?id=13039978>); *"The Unemployed Need Not Apply," (Editorial), *New York Times*, February 19, 2011; "Businesses are refusing to hire the unemployed, commission told," *Los Angeles Times*, February 17, 2011; "Bias Against the Unemployed Is Subject of Probe," *Wall Street Journal*, February 17, 2011; "Are companies not hiring unemployed people?," *USA Today*, February 16, 2011.

Table 1: Selected Employer Job Postings

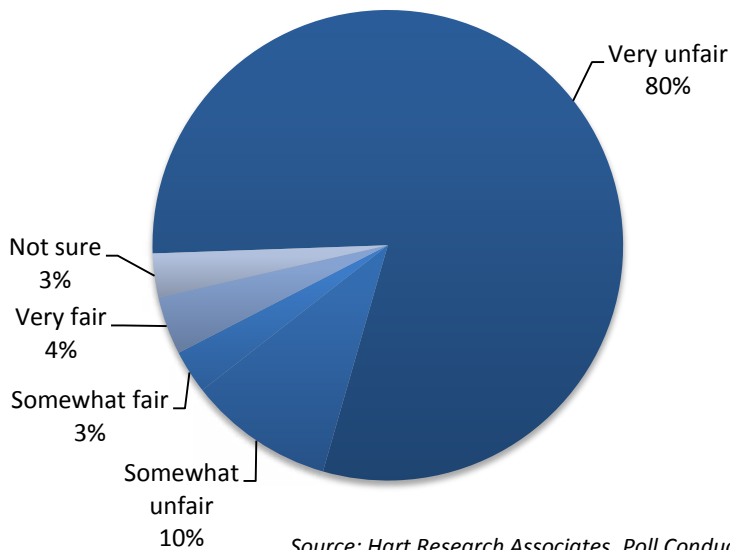
Company	Position/Job Type and Location	Discriminatory Language
Allstate Insurance	Position for Licensed P&C Team Member in Huntsville, Alabama	<i>"must be currently employed"</i>
Beacon Hill Staffing Group	Paralegal position, Atlanta, Georgia	<i>"must be currently employed"</i>
Cypress Hospitality Group	Kitchen Manager position, San Francisco, California	<i>"require current (or very recent) tenure"</i>
Kelly Services	IT Professional/Engineering, Maryland Heights, Missouri	<i>"currently employed"</i>
Martin and Associates	Restaurant/Food Service positions, Lubbock, Texas	<i>"must be currently employed"</i>
University of Phoenix	Professor position, Fresno, California	<i>"must be currently employed"</i>

Americans Strongly Oppose Excluding the Unemployed from Job Opportunities and Support Measures to Ban the Practice

Not surprisingly, denying employment opportunities to the unemployed—especially in the midst of a severe jobs crisis—hits a nerve with the American public. In a national survey Hart Research Associates conducted for NELP last month, 90 percent of respondents described the refusal to consider unemployed job applicants as “very unfair” (80 percent) or “somewhat unfair” (10 percent). (See Figure 1.) Nearly two-thirds (63 percent) said they favor a congressional proposal making “it illegal for companies to refuse to hire or consider a qualified job applicant solely because the person is currently unemployed.”

Figure 1: The Public Overwhelmingly Opposes Discrimination Against the Unemployed

Responses to the question: *Some companies may have a policy that they will not hire or consider someone for a job opening if that person is currently unemployed, regardless of their qualifications. Do you think this is a fair or unfair hiring policy?"*



Source: Hart Research Associates, Poll Conducted June 2011

Severe Jobs Shortage Compounds the Problem of Hiring Exclusions Aimed at the Unemployed

Precluding consideration of the unemployed in hiring is not only fundamentally unfair, it also reflects egregious insensitivity to today's severe jobs deficit.

By any measure, the nation is suffering from a severe unemployment crisis, cutting across nearly all sectors of the economy. High unemployment has persisted for three years, with the national unemployment rate hovering around 9 percent for more than two years and edging up to 9.2 percent in June 2011. Millions have been out of work for significantly longer than in any other recession on record: nearly 6.3 million unemployed workers have been out of work for six months or longer, and the average spell of unemployment has risen, reaching nearly 40 weeks, or more than nine months, as of June 2011.

Our ongoing unemployment crisis is not the result of unwillingness to work on the part of the unemployed, or a mismatch between available jobs and skills of job seekers. At the core of the crisis is the fact that there simply are not enough jobs. Our current jobs deficit exceeds 11 million jobs, taking into account the net number of jobs lost since December 2007 and the additional new jobs that were needed simply to keep up with population growth. As one small measure of the intense competition for jobs resulting from this deficit, the ratio of unemployed workers (that is, individuals who are without jobs and are actively looking for work) to the number of new job openings (net) is alarmingly high. The most recent figures available show that during the month of May 2011, there were more than nearly five unemployed workers for every one job opening—the exact ratio stood at 4.7-to-1³. May 2011 marked the 29th consecutive month during which there was only one opening for at least every four unemployed workers.

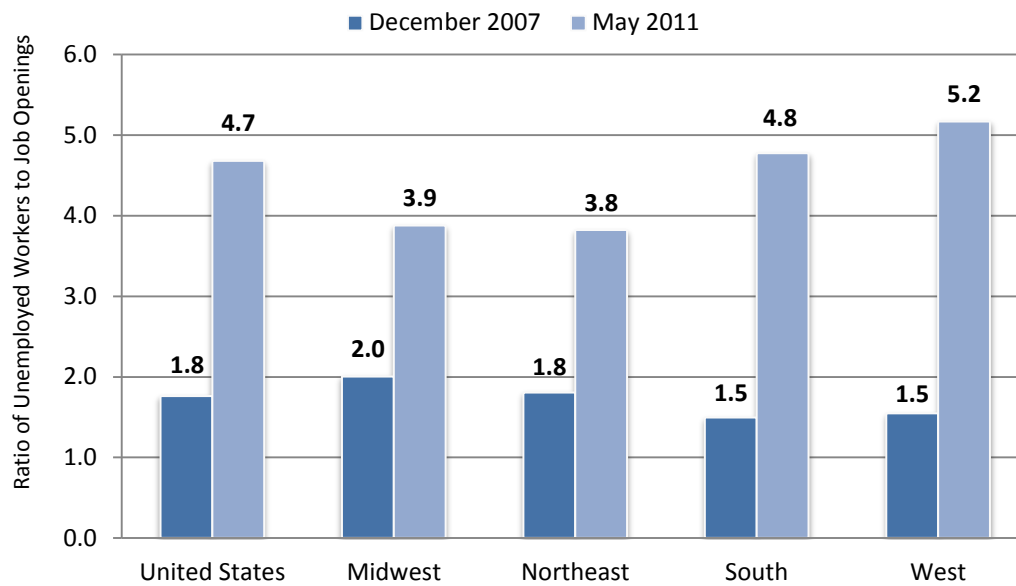
By comparison, at the start of the Great Recession in December 2007, there were less than two unemployed workers for every opening. Even during the prior 2001 recession and its aftermath, the ratio of unemployed to job openings peaked at 2.8-to-1—a level surpassed less than a year into the current downturn. (Appendix B provides more detail on this ratio over time.)

Competition for jobs is stiff in every part of the country, with unemployed workers outnumbering available job openings by nearly four-to-one or more in every region. (See Figure 2, below.) In the West, the demand for scarce jobs is even greater, with five or more unemployed workers for every opening as of May; the South is not far behind. The ratio of unemployed workers to job openings has roughly doubled in every region and at the national level since the start of the Great Recession, and in the South and West, it has roughly tripled.

Taken together, the lack of available job openings and the denial of employment opportunities that do exist create stark obstacles for more than 14 million unemployed who simply want to get back to work.

³ This ratio, though high, understates the severity of the jobs shortage, because it excludes many people who would like to work but are not actively looking, such as those who have been unemployed for a while and have become too discouraged to keep seeking work, or those who have chosen not to enter the labor market (e.g., recent college grads) even though they want to work because they believe their prospects of finding jobs are too bleak.

Figure 2: Ratio of Unemployed Workers to Job Openings, by Region, Comparing the Start of the Great Recession to the Present



Source: Bureau of Labor Statistics, Job Opening and Labor Turnover Survey and Current Population Survey. Accessed July 12, 2011

Why Are Employers Excluding the Unemployed from Job Opportunities?

The precise rationale for excluding the unemployed from consideration for job openings is unknown, but media reports suggest a couple of possibilities for this practice. One is that with so many applicants for every job opening, screening out the unemployed or the long-term unemployed is a convenient device for reducing the workload associated with the hiring process. In other words, eliminating unemployed candidates from consideration is expedient for the employer or staffing firm. But expediency is not a proxy for candidates' qualifications, and excluding the unemployed simply because they are not currently working not only unfairly forecloses job opportunities to many qualified applicants, it potentially undermines an employer's ability to recruit and retain the best candidates.

The second rationale for the exclusionary practice is more troubling: Employers presume that workers who are currently employed are more likely to be good performers and have a stronger work ethic than those who are unemployed. Of course, this reasoning completely ignores the realities of the current labor market, in which millions have become unemployed through no fault of their own, and unemployment spells are unusually long because of larger economic trends that have forced employers and entire industries to dramatically reduce their workforces. The unemployed workers barred from employment opportunities based on these biased assumptions have talents and experience and intense motivation to rejoin the workforce, to support their families and contribute to their communities. Erecting additional obstacles to their efforts to regain their economic footing on the basis of stereotyped assumptions is unfair and inconsistent with American values.

It is also contrary to the bottom line of the employer community and to the struggling economic recovery. Employers are losing out on qualified employees based on an arbitrary screen of workers

who happen to be unemployed at a given time, and the economy is denied the highest and best use of skilled and experienced workers. This approach toward hiring and internal personnel management potentially puts discriminating firms at a competitive disadvantage with other employers that forego exclusionary shortcuts and focus on recruiting and hiring the best talent and most productive workers possible, without regard to their current employment status.

Proposed Federal Legislation Outlaws Discrimination

On July 12th, Representatives Rosa DeLauro (D-CT) and Henry Johnson, Jr. (D-GA) introduced the Fair Employment Opportunity Act of 2011, which levels the playing field for unemployed jobseekers by prohibiting employers and employment agencies from refusing to consider job applicants solely because they are unemployed.

Prohibiting employers and employment agencies from refusing to consider job applicants solely because they are not working fills an important gap in the law. Many unemployed workers fall into categories subject to protection under federal and state anti-discrimination laws (e.g., older workers, people of color, disabled workers), and as such, may be eligible for remedies under those laws when a policy of excluding unemployed candidates has a disparate impact on members of one or more of these protected classes.⁴ In addition, one state—New Jersey—recently passed legislation that makes it illegal for employers and staffing firms to post such exclusionary ads, and similar legislation is pending in New York.⁵

These existing protections, while significant, do not address the full scope of the problem of exclusions based solely on unemployment status. By explicitly prohibiting employers and employment agencies from screening candidates out of consideration because of their unemployed status, the Fair Employment Opportunity Act directly fulfills the objective of ensuring that qualified unemployed job applicants have a fair opportunity for job consideration.

Significantly, the legislation does not make the unemployed a “protected class” under anti-discrimination laws. It is far more targeted, focusing solely on the process of recruiting and hiring, and applies only to decisions that are based on individuals’ employment status. Under the bill, it is unlawful for an employer to:

- (1) Refuse to consider for employment or refuse to offer employment to someone because the person is unemployed, or
- (2) Include in any job advertisement or posting a provision that unemployed persons will not be considered or hired, or

⁴ The legal and policy implications of these exclusionary practices were explored at a February 2011 forum sponsored by the Equal Employment Opportunity Commission. See, Media Advisory, “EEOC to Examine Treatment of Unemployed Job Seekers” (February 16, 2011) (testimony available online at <http://www.eeoc.gov/eeoc/meetings/2-16-11/index.cfm>).

⁵ New Jersey Statutes, Title 34, Chap. 8B, §§1-2-C.348B-1 to 34:8B-2 (A.3359/S.2388, approved March 29, 2011); New York Senate Bill 5151.

- (3) Direct or request that an employment agency take into account an individual's unemployed status in screening or referring applicants for employment.⁶

The legislation makes an exception to its prohibition where being employed in a similar or related job for a period of time reasonably proximate to the time of hiring is a *bona fide* occupational qualification for successful performance of the job. And the bill does nothing to impair an employer's right to select a candidate who has the most relevant and/or most recent appropriate work experience. It simply prohibits employers and employment agencies from screening workers out of the pool of candidates to be considered solely because they are unemployed.

The Fair Employment Opportunity Act strikes a reasoned balance in recognizing and protecting several important rights and interests: those of workers to pursue job opportunities for which they are qualified, without having to navigate a catch-22 that requires them to have a job in order to get a job; those of employers to impose limitations related to current employment status when doing so is genuinely necessary; and the national interest in reducing the ranks of the unemployed and ensuring that America's human capital is used to its fullest and best. As noted earlier, the public supports a measure such as this one by nearly two to one.⁷

Conclusion

These are hard times for many Americans, especially unemployed workers and their families who are struggling to cope with the worst economic downturn in 70 years. Denying employment opportunities to the unemployed is unfair, counterproductive, and inconsistent with our nation's values. The Fair Employment Opportunity Act of 2011 is an important step in addressing this problem and limiting this disturbing practice. But in the interest of ensuring fairness to unemployed job seekers, more fully utilizing the skills and talent that reside in the American workforce, and reducing the strain imposed on our economy by practices that exacerbate the unemployment crisis, it is time for employers, staffing firms and online posting sites to act immediately to end exclusionary recruitment and hiring practices—and give the unemployed an equal chance to find work in today's economy.

⁶ The bill imposes similar restrictions on employment agencies in the screening and referral processes that they engage in on behalf of client employers.

⁷ The nationally-representative poll asked the following question: "There is a proposal in Congress that would make it illegal for companies to refuse to hire or consider a qualified job applicant solely because the person is currently unemployed. Do you strongly favor, somewhat favor, somewhat oppose, or strongly oppose this proposal?" 50 percent of respondents indicated they "strongly" favor the proposal, 13 percent "somewhat" favored the proposal, 10 percent "somewhat" opposed the proposal, 22 percent "strongly" opposed the proposal, and 5 percent were "Not sure." Hart Research Associates, Poll (808 Adults) conducted June 16-19, 2011.

Appendix A:

Sampling of Discriminatory Job Postings

Company Name	Exclusionary Reference	Position/Job Type	Location
Advanced Autoworks	currently employed	Mechanic	San Francisco, CA
AIELLO Home Services	currently employed	Heating/Air Technician	Central Connecticut
Allstate Insurance	must be currently employed	Licensed P&C Team Member	Huntsville, AL
April Durel	must be currently employed	Financial Advisor	San Francisco, CA
Arbita Recruitment Marketing Technology	currently working	Financial Advisor	Tinley Park, IL
Assay Systems	currently employed	Scientist	Menlo Park, CA
Back Bay Sign	currently employed	Sign Installer	Medford, MD
BAC Middle East Executive Recruitment	currently employed	Sales Managers-Photocopiers	Overseas Locations
Beacon Hill Staffing Group	must be currently employed	Paralegal	Atlanta, GA
BMW of Bayside	currently employed	Pre-Owned Sales Manager	Queens, NY
Bond Street Group Recruitment	currently employed on a permanent basis	Executive Assistant	New York, NY
Bryant Bureau Medical Sales	currently employed	Orthopedic Devices Sales Associate	TX
Business Careers	currently employed	Air Freight Sales	Seattle, WA
Career1Source	currently employed	Employee Benefit Account Manager	Pasadena, CA
Central Transport	must be currently employed	Part-time Freight Handler	Kansas, MO
Concorde Career Colleges	actively employed	Director of Nursing	Portland, OR
CornerStone Staffing	currently employed	Outside Sales Acct. Manager	Dallas, TX
CRW Consultants	must be currently employed	Financial Advisor	Seattle, WA
Cube Management	must be currently employed	Specialty Pharmaceutical Sales	CO, OH

Cypress Hospitality Group	require current (or very recent) tenure	Kitchen Manager	San Francisco, CA
Daily Dispatch/City of Redondo Beach	currently employed	Emergency Services Dispatch	Redondo Beach, CA
Dare HR	currently employed	Fleet Manager	GA, IL, MD
Direct Sales Recruiting, LLC	currently employed	Medical Sales-Ophthalmology	Chevy Chase, MD
Execustaff	must be currently employed	Pharmaceutical Sales Representative	San Francisco, CA
Express Employment Professionals	currently employed	Receptionist	La Crosse, WI
Financial Technology Recruiting, Ltd.	must be in a project management role	Project Manager-Banking Hardware	Central Illinois
Francis Tuttle Technology Center	currently employed	Executive Chef of Culinary Operations	Oklahoma City, OK
Frankel Staffing	currently employed	Entry Level Paralegal	Raleigh, NC
Gecko Hospitality	must be currently employed	Assistant General Manager	Poughkeepsie, NY
Gibraltar Laboratories, Inc.	currently employed	Mid-Level Microbiologist	Fairfield, NJ
Greenstreet Real Estate Partners	is currently/recently employed	Senior Accountant	Miami, FL
Grobard & Associates, Inc.	must be currently employed	Territory Representative	New Orleans, LA
Health Care Recruiters	currently employed	Medical Sales Representative	NJ, IL
Hertner Block & Associates	must be currently employed	Attorney-Litigation	Jacksonville, FL
Hospitality Pro Search	currently employed	General Managers/Assistant	Ventura, CA
Janus Partners, LLC	currently employed	Residential Superintendent	New York, NY
Joan Iacona Consulting, Inc.	currently/recently employed	Sous Chef	Rochester, MN
Johns Hopkins University	must be currently employed	Research Program Supervisor	MD
Kelly Services	currently employed	IT Professional/Engineering	Maryland Heights, MO
Kids In Sports	currently or recently employed	Teachers/Coaches	Washington, DC
Lakeshore Technical College	must be currently employed	Teaching/Administration	Cleveland, WI

Lithia Chrysler	currently employed	Sales Representative	Renton, WA
Los Angeles Bar Career Center	currently employed	Litigation Associate	Los Angeles, CA
MARBL Consultants	employed or only recently unemployed	Senior Buyer	IL, NV
Martin & Associates	must be currently employed	Restaurant/Food Service	Lubbock, TX
Martin Recruiting Partners	currently employed	Restaurant Managers	Raleigh, NC
McGuire Woods, LLP	must be currently employed	Legal Secretary/Litigation	New York, NY
MedSearch	must be currently employed	Medical Sales Representative	Philadelphia, PA
Michael Lord & Company	currently employed	Corporate Associate	New York, NY
MRI Network	currently employed	Sales Account Manager	Orange County, CA
National Hospitality Associates, Inc.	must be currently or recently employed	General Manager	Washington, DC
NRI Legal Resources	currently employed	Legal Secretary	Washington, DC
NWA Safety Resources, Inc.	currently employed	Class A OTR Drivers	CO, TX, GA
Patrice & Associates	must be currently employed	Assistant General Manager	Annapolis, MD
Pollo Tropical	currently employed	General Managers	Kendall, FL
Quantum Star Ventures	currently employed	Sales	Dallas, TX
Rosebud Restaurants	currently employed or recently employed	Managers	Chicago, IL
Semper International	currently employed	Mail Services Manager	Boston, MA
Snappy/SolvIt, Inc.	currently employed	HVAC Service Technician	Atlanta, GA
S.R. Clarke, Inc.	candidate MUST be currently employed	Senior Electrical Engineer	Washington, DC
The Ross Carlisle Group, Inc.	must be currently employed	Vice President of Sales/Marketing	OH
Theranos	currently employed	Mechanical Engineer	CA
University of Arizona	must be currently employed	Police Lieutenant-Special Events	Tucson, AZ

University of Phoenix

must be currently
employed

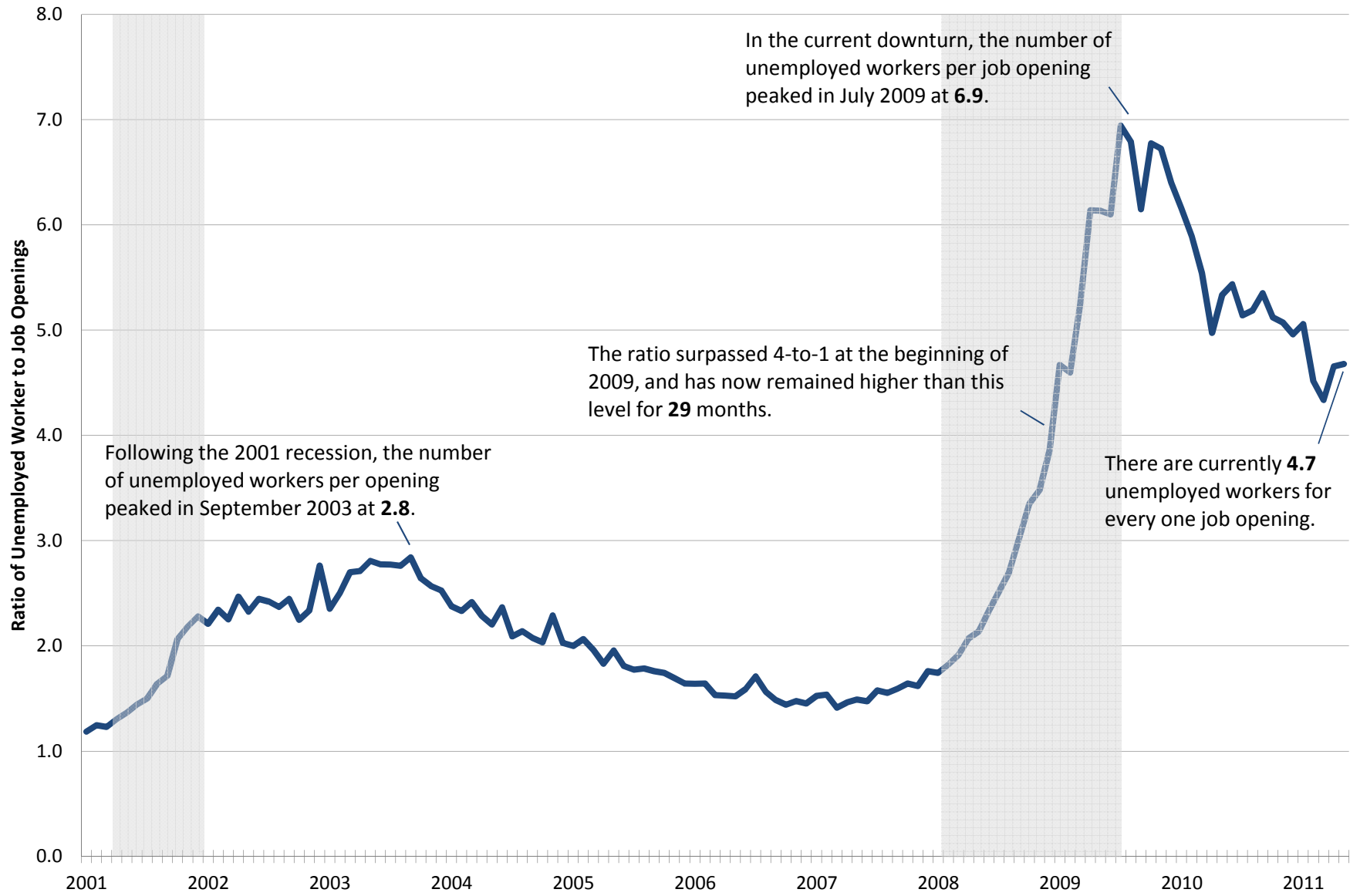
Professor

Fresno, CA

Appendix B: Competition for Available Jobs Remains High

Number of Unemployed Workers per Job Opening, 2001 - Present

Shaded areas represent months of a recession.



In the current downturn, the number of unemployed workers per job opening peaked in July 2009 at **6.9**.

The ratio surpassed 4-to-1 at the beginning of 2009, and has now remained higher than this level for **29** months.

Following the 2001 recession, the number of unemployed workers per opening peaked in September 2003 at **2.8**.

There are currently **4.7** unemployed workers for every one job opening.

Source: Bureau of Labor Statistics: Job Openings and Labor Turnover Survey and Current Population Survey, Accessed July 2011