March 21, 2012

The New Civil Rights: The “Currently Employed” Requirement, Disparate Impact, and New Legislation to Protect Unemployed Workers and Job-Seekers

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Abstract

The New Civil Rights: The “Currently Employed” Requirement, Disparate Impact, and New Legislation to Protect Unemployed Workers and Job-Seekers

By Jennifer Jolly-Ryan

Countless people struggle to find a job in a competitive job market, despite good qualifications. Although the news media reports that job numbers are improving, the problems of unemployment particularly loom for people of color, older workers, and people with disabilities. They are often unemployed longer than other workers and job-seekers and suffer the disparate impact of job ads that require “current employment” as a prerequisite to getting hired. The harsh reality is that the longer a job-seeker is unemployed, the closer a job-seeker becomes to being permanently unemployed. Job ads that require “current employment” as a litmus test to work exacerbate the problem.

Although traditional disparate impact analysis under the civil rights laws is useful to help some unemployed workers and job-seekers, there are huge gaps in the laws to help other unemployed workers and job-seekers who have lost jobs and have been unable to quickly recover them, through no fault of their own. Gap filling legislation, extending protection from discriminatory job ads and hiring practices to all unemployed workers, while at the same time allowing employers to reasonably consider the reasons for an applicants’ unemployment, would help level the playing field for all unemployed workers and job-seekers in a very difficult job market. Current civil rights provide the structure and balance needed to make the new legislation protecting all unemployed workers work and get unemployed workers back to work.
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(Word Count: 17,115)

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The New Civil Rights: The “Currently Employed” Requirement, Disparate Impact, and Legislation to Protect Unemployed Workers and Job-Seekers

By Jennifer Jolly Ryan

I. Introduction

Hiring practices and job ads that require unemployed workers and job-seekers to be “currently employed” leave unemployed Americans behind. They exclude workers and job-seekers from job opportunities in a very competitive job market. Job ads that require current employment cause a spiraling effect throughout the economy. The exclusion of unemployed workers and job-seekers from job opportunities prolongs the American unemployment crisis and limits the pool of talented and skilled job applicants looking for work. In the long run, that is bad for business and bad for the economy.

Moreover, hiring practices and job ads that require job-seekers to be currently employed discriminate against a large segment of unemployed Americans. The exclusion of unemployed job-seekers for job opportunities disparately impacts older job-seekers, job seekers of color, and job-seekers with disabilities, and likely violates many Americans’ basic civil rights.

Americans recently faced the longest and worst recession since the Great Depression. Many Americans lost jobs and remain unemployed, through no fault of their own. Many

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1 Professor of Legal Writing, Salmon P. Chase College of Law, Northern Kentucky University. Thank you to Jesse Bowman, Janice Ison, Amanda Perkins, and Carol Furnish.
2 Hearing before the EEOC on Out of Work, Out of Luck? Denying Employment Opportunities to Unemployed Job Seekers (February 16, 2010) (testimony of Christine Owens, Executive Director of the National Employment Law Project) available at http://www.eeoc.gov/eeoc/meetings/2-16-11/owens.cfm. (“For the millions of jobless Americans struggling to climb out of the deepest jobs hole in many decades, nothing can be more demoralizing than the double-whammy of losing a job and then learning they will not be considered for new positions because they are not currently working.”).
3 Id. (“As a business practice, [excluding unemployed workers from consideration] . . . makes no sense. It is debilitating to workers—particularly the long-term unemployed—and it hampers economic recovery.”).
4 Id.
Americans believe that excluding unemployed workers from employment opportunities in the aftermath of one of the worst and longest recessions in history is inherently unfair and bad for the economy. Americans view the denial of jobs to unemployed workers and job-seekers as detrimental to the nation’s future. They strongly support a ban on discriminatory practices against unemployed workers and job-seekers.5

This article describes America’s jobs and unemployment crisis. It predicts that although the unemployment rate has improved over recent months, the crisis will continue to grow larger, particularly for the long-term unemployed, as long as employers and employment agencies exclude unemployed workers and job-seekers from consideration for available jobs. It explains how traditional employment discrimination theories can be applied to address discrimination against unemployed workers and job-seekers, many who are protected under the civil rights laws.

In addition, this article discusses new state legislation and the proposed federal legislation, the Fair Employment Opportunities Act of 2011 and Americans Jobs Act, which will fill the gaps civil rights laws leave open, to protect a broader number of unemployed workers and job-seekers and help get them back to work. The new state and proposed federal legislation attempts to address discrimination against unemployed workers and job-seekers, regardless of their status under current civil rights laws.

5 Ninety percent of Americans responding to a recent survey conducted for National Employment Law Project (NELP) in June of 2011 described the refusal to consider the unemployed as “very unfair” (80 percent) or “somewhat unfair” (10 percent). Sixty three percent of respondents’ favored 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.” See Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed from Job Opportunities, as Discriminatory Ads Persists, BRIEFING PAPER (NELP, New York, N.Y.), July 12, 2011, at 3.
II. The American Unemployment and Jobs Crisis

America faces a jobs and unemployment crisis like never before. Although the unemployment rate has decreased some, since the Great Recession of 2007 through 2009, roughly 14 million Americans are still unemployed. For the past few years, the average unemployment rate has consistently hovered around nine or ten percent, only very recently dropping to under nine percent for the first time in three years. And the unemployment numbers are greatly understated.

For many American workers, unemployment has become a permanent or at least long-term status. The rise in long-term unemployment has been unprecedented since the recession began in December 2007 and officially ended in June 2009. The Bureau of Labor Statistics (BLS) defines long-term unemployment “as the number of persons unemployed for 27 weeks or longer.”

By the end of 2009, among the unemployed, 4 in 10 had been jobless for 27 weeks or more, “by far the highest proportion of long-term unemployed on record.” By April 2010, the

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9 Id. The Congressional Research Service (CRS) also published a report that breaks unemployment data down according to individuals looking for work for more than 26 weeks, more than 52 weeks, more than 78 weeks, and more than 99 weeks. Gerald Mayer, The Trend in Long-Term Unemployment and Characteristics of Workers Unemployed for More than 99 Weeks, Publication No. 705700, (CRS, Washington, D.C.), Dec. 20, 2010. The designation of “99 weeks” is also used “because in some states with high unemployment, unemployed workers may receive 26 weeks of regular Unemployment Compensation, 53 weeks of Emergency Unemployment Compensation, and 20 weeks of Extended Benefits, for a total of up to 99 weeks of unemployment compensation benefits. Id. Persons who have been unemployed for over 99 weeks are considered “very long-term unemployed” and are referred to as “ninety-niners.” Id. This designation will not be significant at the end of 2012. Sam Hananel, Deal on Payroll Tax Cut Also Reduces Maximum Jobless Pay to 73 Weeks, KY. ENQUIRER, Feb. 18, 2012, at A4. The legislation that extended the payroll tax cut also reduces the current maximum 99 weeks of unemployment benefits.
Bureau of Labor Statistics reported a 4.6 percent rate for workers unemployed for more than twenty six weeks; the highest long-term unemployment rate since 1948, when the Department of Labor’s, Bureau of Labor Statistics started collecting unemployment data.\(^{10}\) By December 2010, thirty percent of the 14 million jobless Americans were unemployed for a year or more. More than four million people remained jobless for longer than one year, “roughly equivalent to the total population of Kentucky” and the highest number “since World War II.”\(^{11}\) As of June 2011, the average “spell of unemployment” rose to more than nine months.\(^{12}\) Although the recession officially ended in 2009, by September 2011, the average length of unemployment rose to close to ten months, or 41.0 weeks.\(^{13}\)

Although the unemployment numbers are dire, the actual unemployment rate is much higher than what is actually reported. The unemployment rate does not account for the large number of discouraged workers who have given up the job search after months or even years of looking for work.\(^{14}\) Many of those workers are among the long term unemployed. To be classified as unemployed for more than six months, job-seekers must persevere in their job to 73 weeks by the end of September 2012. Id. Furthermore, “[f]or those in all but about a dozen states, benefits will be cut off after 63 weeks.” Id. In the future, there will be fewer people counted in the number eligible to collect unemployment benefits, although there are still so many unemployed for the long term. Politically, the deal is attractive to both Democrats and Republican who can boast that the former kept unemployment benefits alive, while the latter kept people off the public dole.

\(^{10}\) Id.


\(^{14}\) “Persons are classified as unemployed if they do not have a job, have actively looked for work in the past 4 weeks, and are currently available for work. See How the Government Measures Unemployment, supra note 6.
search. The statistics show that after a period of time, many job-seekers give up looking for a job and are no longer counted in the unemployment rate.\textsuperscript{15}

The unemployment rate also does not account for those Americans who choose to delay entry into the job market because of the bleak employment outlook. For instance, many recent college graduates and young workers choose to delay entering the labor market “because they believe their prospects of finding jobs are too bleak.”\textsuperscript{16} The off-shoring of white collar service jobs, the bursting information technology bubble, and the bursting financial services bubble in the early 2000s were greatly responsible for causing the number of unemployed college graduates to surpass that of high school drop outs for the first time. Cyclical in nature, many sectors employing recent college graduates have still not recovered in a prolonged, weakened economy. The cycle of unemployment for many workers, even for the well-educated, continues.\textsuperscript{17}

Many young adults are not covered in the unemployment rate because they have never joined the job market in the first place, to be counted in the unemployment rate. As one popular news source observed, although many unemployed young adults today may look like “[t]he slackers of the 1990s” who some remember “as listless MTV watchers and basement dwellers who opted out of America’s striving, mercenary ethos,”\textsuperscript{18} they are not the same. Although many young adults “don’t have jobs or spouses, and many still live at home with mom and dad, . . . that’s not by choice.”\textsuperscript{19} More than 5,557,000 young adults between the ages of 25 and 29 still

\begin{itemize}
\item \textsuperscript{15} Long-term Unemployment Experience of the Jobless, supra note 8.
\item \textsuperscript{16} Briefing Paper, NELP, supra note 5, at 4 note 3.
\item \textsuperscript{19} Id.
\end{itemize}
live with their parents and fewer young adults are choosing to marry. Because of the economy and the tight job market, many young adults’ lives, through no fault of their own, are stuck in neutral.

Even more Americans have decided to withdraw from the ranks of workers and job-seekers after spending most of their lives in the labor force. They are also not counted in the unemployment rate. For instance, many older workers who are unable to obtain employment after being laid off for a period are left little choice but to retire early or collect government benefits. They have been referred to as the “downwardly mobile.” For many older workers, Social Security benefits fill the void when unemployment benefits run out. In recent years, the number of Social Security retirement applications has far exceeded the numbers the Social Security Administration expected, despite the hit that older workers’ 401Ks have taken over the last decade. More Americans are taking Social Security at the age of 62 and a significant reduction in benefits than they could have at full retirement. These “downwardly mobile” older workers, with years of experience, job skills, and talent, are also excluded from the unemployment rate. So the actual unemployment rate is likely much greater than the statistics report.

The prospects for unemployed workers and job-seekers, and particularly the long-term unemployed, are not promising. Research shows that even though demand for workers increases

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21 Young adults have been referred to as “generation limbo” or “the lost Generation” and compared to American youth who grew up during World War I or Japanese youth who grew up during the Japan’s recession of the 1990. Adam Clarke Estes, More Signs That American Youth Are a Lost Generation, THE ATLANTIC WIRE, September 22, 2011, available at http://www.theatlanticwire.com/national/2011/09/american-youth-lost-generation/42814/.
24 Keith, supra note 22; See also Morley, supra note 23.
following a recession, the short term unemployed are hired before the long-term unemployed.

“Thus, the number of long-term unemployed could remain high for some time to come.”

Millions of willing workers are shut out of the labor market, simply because there are not enough jobs for them. While the ranks of the unemployed have grown, new job creation has stagnated. Employers added only 300,000 new jobs between November 2011 and December 2011. More than one million American jobs disappeared between 2001 and 2011. During that same ten year period, the number of persons in the civilian labor force increased by more than ten million. There is now only one job opportunity for nearly four Americans looking for


28 Figure derived from U.S. Census Bureau, U.S. Dep’t of Labor, Employment Status of the Civilian Non-Institutional Population, 1940 to Date, Current Population Survey: 2011, at Household Data and Annual Averages; and, Bureau of Labor Statistics, U.S. Dep’t of Labor, USDL 11-1441, The Employment Situation: September 2011, at 1 (Oct. 7, 2011). The total number of persons in the civilian labor force in 2001 was 143,734,000; in September 2011 the total number was 154,017,000 (an increase of 10,283,000).
work, during the worst downturn since the Great Depression.\textsuperscript{29} As a result, America is just beginning to recover from a jobs crisis of unprecedented proportions.\textsuperscript{30}

The real losers of America’s jobs crisis and the exclusion of unemployed job-seekers from the employment ranks is America itself. “Workers and their families lose wages, and the country loses the goods or services that could have been produced . . . [T]he purchasing power of those workers is lost.”\textsuperscript{31} Unemployment for one group of American workers leads to the ever ending spiral of unemployment for yet other workers.\textsuperscript{32} It leads to “increasing personal indebtedness, bankruptcies, and foreclosures; destroying credit; and diluting America’s storehouse of human capital.”\textsuperscript{33} Employers’ and recruiting or staffing agencies’ job ads and hiring practice that deny jobs to unemployed workers and job-seekers, regardless of their talents and qualifications, greatly exacerbate the problems.\textsuperscript{34} Employers’ and recruiting or staffing agencies’ outwardly discriminate against unemployed workers and job-seekers and have a devastating effect upon America’s economy and American’s psyche. They cast aside countless skilled and dedicated workers who are unemployed simply because of the poor economy.\textsuperscript{35} “A company’s choice to ignore unemployed applicants and recycle the current workforce ignores the

\textsuperscript{29} For example, in December 2011, there was 13.1 million unemployed, and according to the monthly Job Openings and Labor Turnover Survey, there was 3.4 million job openings. Dividing 13.1 by 3.4, the ratio of job seekers to job openings for this month is 3.8 to 1 (3.8 job applicants for every 1 job opening). Bureau of Labor Statistics, U.S. Dep’t of Labor, USDL 12-0012, Employment Situation: December 2011, at 1 (Jan. 6, 2012); and, News Release, Bureau of Labor Statistics, Job Openings and Labor Turnover: December 2011, (Feb. 7, 2012) available at http://www.bls.gov/news.release/pdf/jolts.pdf.
\textsuperscript{30} See Issues in Labor Statistics, supra note 8 at 3.
\textsuperscript{31} See id.
\textsuperscript{32} See id.
\textsuperscript{33} Owens, supra note 2.
\textsuperscript{34} Briefing Paper, NELP, supra note 5.
\textsuperscript{35} Id. (“[A]n untold number of skilled and dedicated workers who have the misfortune of being unemployed in the worst downturn since the Great Depression” are cast aside.).
effect of the recession on millions of highly-qualified workers and could prolong the unemployment crisis.”

III. Compounding the Jobs Crisis: The “Currently Employed” Requirement

The American jobs crisis and high unemployment rates, particularly for the long term unemployed, are unlikely to improve any time soon unless employers and recruiting or staffing agencies are willing to hire unemployed workers and job-seekers. As the likelihood of a successful job search declines, the probability of remaining unemployed sharply rises. Requiring one to have a job, to get a job creates a vicious cycle for unemployed workers and job-seekers. Recent hiring and screening practices by employers only compound the American jobs crisis. With more frequency, employers require job-seekers to be currently employed to be considered for available job openings. Requiring a job-seeker to be currently employed as a prerequisite for an available job discriminates against unemployed workers and job-seekers. It eliminates employment opportunities for many Americans, regardless of their talents, qualifications, or motivations to work.

News of the practice of excluding unemployed job-seekers as job candidates first broke in May of 2010 after Sony Ericsson posted a job announcement, through a recruiting firm, to fill 180 new jobs at its relocated headquarters near Atlanta Georgia. The job announcement stated, “No Unemployed Candidates Considered At All.” The media reported that many more

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potential employers refused to consider unemployed workers and job-seekers for jobs, regardless of the skills needed for the job. USA Today reported that “similar ads are cropping up in job postings for everything from restaurant managers to forklift operators to medical device salespersons.” Even an unemployed pet-sitter was reportedly black balled by potential employers, “as if no dog could be subjected to a sitter whose skills were not utterly up to date.”

A recent survey suggests that the exclusion of unemployed job applicants is wide spread. Over a four week period between March and April 2011, The National Employment Law Project (NELP) surveyed four of the top job search websites, Careerbuilder.com, Indeed.com, Monster.com, and Craigslist.com and discovered more than 150 job advertisements that required that applicants be currently employed. The survey revealed that job ads requiring “current employment” as a job qualification were placed by employers and employment agencies all across the United States, for “small and large employers, for white collar, blue-collar, and service jobs at virtually every skill level.”

There are reasons why potential employers view the exclusion of unemployed job-seekers from consideration for job opportunities as expedient. Employers rationalize blatant discrimination against the unemployment in two ways. The first rationalization is that screening out unemployed workers and job-seekers from the outset is cost effective and good business. The buyers’ market for job applicants has resulted in many more qualified job candidates from which an employer may choose to interview. Potential employers are often inundated with applications from qualified workers. There are so many job applicants that it is costly and very

40 Id.
41 Briefing Paper, NELP, supra note 5 at Appendix A (selected employer job postings include ads placed by Allstate Insurance, Beacon Hill Staffing Group, Cypress Hospitality Group. Kelly Services, Martin and Associates, and University of Phoenix requiring current employment as a condition to application).
42 Id. at 2.
difficult for businesses to sort out good workers from bad workers.⁴³ Therefore, current employment becomes a litmus test in the job market.

Second, employers rationalize that the best candidates for a job are likely to be those who are currently working. They presume that people who are already employed are “good performers and have a stronger work ethic than those who are unemployed.”⁴⁴ They therefore publicly advertise that only currently employed job candidates will be considered.⁴⁵ Employers and recruiting agencies see being employed as a “proxy for suitability of a position.”⁴⁶ However, the presumption that an employed worker is more qualified or suitable for a job than an unemployed worker ignores the realities of the current job market, where millions of Americans are unemployed regardless of their skills, talents, and efforts to find work.⁴⁷

[M]illions 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 stereotypical assumptions is unfair and inconsistent with American values.⁴⁸

⁴³ Hicks, Mike, Recession Took its Toll on Under-educated, THE INDIANAPOLIS BUSINESS JOURNAL, June 6, 2011; See also Meeting before the EEOC on Disparate Treatment in Hiring (June 22, 2011) (written testimony of Grace E. Speights, Partner, Morgan, Lewis & Bockius LLP.) available at http://www.eeoc.gov/eeoc/meetings/6-22-11/speights.cfm.
⁴⁴ Briefing Paper, NELP, supra note 5 at 5.
⁴⁶ Owens, supra note 2.
⁴⁷ Briefing Paper, NELP, supra note 5 at 5.
⁴⁸ Id.
Christine Owens, the executive director of the National Employment Law Project (NELP), surmises that employment, as a job requirement, creates a serious “catch-22” for job-seekers. A worker must “have a job in order to get a job and it means highly qualified, experienced workers who want and need work can’t get past the starting gate in the application process simply because they lost their jobs through no fault of their own.” She cautions that, “as a business practice, this makes no sense, and as a way to rebuild the economy, it only debilitates workers, particularly the long-term unemployed.”

Unfortunately, the persistent practice of excluding the long term unemployed from jobs may worsen the American jobs crisis even more. There is a real danger that job ads that exclude unemployed workers and job-seekers will relegate a growing segment of the population to the ranks of the long term unemployed. Long term unemployment may indeed erode “a worker’s skills and work discipline” over time and the conjectured horrors of taking a chance on the long-term unemployed may actually come to pass. A larger segment of the American population could indeed become unemployable.

IV. Disparate Treatment and Disparate Impact of the “Currently Employed” Requirement

Unless Americans are willing to accept that a larger and growing segment of the population are shut out of the work force, long term or perhaps permanently, a solution must be found to the long term unemployment of those Americans who are willing and able to work. Current civil rights laws could be used to eliminate hiring practices and job ads that exclude

49 “NELP is a national non-profit organization that engages in research, education, and advocacy on behalf of low wage and unemployed workers and individuals facing unfair and unlawful barriers to employment.” (testimony of Christine Owens, supra note 2).
50 Owens, supra note 2.
51 Id.
unemployed workers and job-seekers from being considered for employment and make the job
search fairer for unemployed Americans. The civil rights laws could be used to enlarge the job
applicant pool of qualified workers.

Although unemployed job-seekers and workers as a class are not protected under the civil
rights laws, many unemployed workers and job-seekers fall within classes of people who are
protected by the civil rights laws. For example, older workers, people of color, and people with
disabilities are protected under federal and state anti-discrimination laws. An employer may
violate the civil rights laws, including the Age Discrimination Employment Act (ADEA), Title
VII of the Civil Rights Act of 1964 (Title VII), or the Americans with Disabilities Act
(ADA), if a hiring practice or job ad disparately treats protected class members or has a
disparate impact upon protected class members.

A. Disparate Treatment

If an employer treats some job applicants who are protected under the civil rights laws
less favorably than others because of their protected status, a causal connection may be proven
under a disparate treatment theory. Proof of discriminatory intent is required in a disparate
treatment case. The employer’s motivation and intent can be proven through circumstantial

53 29 U.S.C. 621 et. seq.
54 42 U.S.C sec 2000 et seq. The civil rights laws also prohibit discrimination by employment agencies. See, e.g., 42 U.S.C. § 2000e-2(b) (2006) (“It shall be unlawful . . . for an employment agency . . . to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin”). Nor can an employer use an employment agency as a shield from liability for discriminatory hiring practices. See 29 C.F.R. § 1607.10 (2011).
56 See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Smith v. City of Jackson, 544 U.S. 228 (2005) (Employment of hiring practices that are facially neutral, violate the Title VII and the ADEA if they have a disparate impact upon members of a protected class.).
evidence, “showing that the complainant was treated worse than similarly situated persons in other protected classes.”

The burden of proof for Title VII in an employment case based upon disparate treatment theory employs *McDonnell Douglas* burden shifting. To prove a prima facie case in an employment discrimination case based on disparate treatment, a claimant must show that he is a member of a statutorily protected class who applied for and was qualified for a position and was rejected for the job. The essence of a disparate treatment claim is that the claimant was treated less favorably than another who is not protected under the civil rights laws. If the claimant is successful in proving a prima facie case of disparate treatment, the burden shifts to the employer “to articulate some legitimate nondiscriminatory reason for the employee’s rejection” of the job-seeker. If the employer is successful, the burden shifts back to the job-seeker to prove that the employer’s legitimate, nondiscriminatory reason for the decision is merely a pretext for discrimination.

Despite the civil rights laws, intentional discrimination and disparate treatment against protected class members, and particularly against people of color, is still present in hiring practices. A comprehensive study by the Urban Institute revealed that African Americans experience discrimination in a job search one out of five times. However, the difficulty in proving intentional discrimination necessary for a disparate treatment claim is that most employers today are quite savvy about it.

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60 *Id*.
61 *Id. at 802. See also Soules v. U.S. Dept. of Hous. & Urban Dev.,* 967 F.2d 817 (2d Cir. 1982) (applying the *McDonnell Douglas* burden shifting test in the context of a housing discrimination claim).
62 *McDonnell Douglas*, 411 U.S. at 802-03.
63 *Id*.
For example, rather than using blatant language directly showing a discriminatory intent, employers and employment agencies may use code words to exclude some job-seekers from consideration. Studies reveal that “Talk to Maria” means “I prefer Hispanics,” “See me” means “no people of color,” and “No I” means “no Blacks.” A job ad that requires a job applicant to have small hands may be code words to hire only attractive, small women which may discriminate against men or certain nationalities.

Other employers may not be conscious of what is unlawful in hiring practices. For example, some employers may not understand that anti-discrimination laws do not permit them to hire only people from their own countries and discriminate against members of other protected groups. A misunderstanding can be discriminatory intent, nonetheless. For example, requesting a birth certificate may be evidence of intentional discrimination and disparate treatment of people protected by the civil rights laws.

The question is whether a job ad that says that an applicant must be “currently employed” is a code for excluding protected class members, considering that an economy that creates high unemployment hits many people the civil rights protect the hardest. Certain words in job ads or hiring practices could be evidence of disparate treatment. For example, some words or hiring policies could show discriminatory intent against older workers. Employers want workers who

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65 Id. (citing Clyde W. Ford, WE CAN ALL GET ALONG: 50 STEPS YOU CAN TAKE TO HELP END RACISM, [Dell, 1994]).
67 See E.E.O.C. v. Scrub, Inc., CIV.A. 09 C 4228, 2010 WL 3172855 (N.D. Ill. Aug. 10, 2010). (alleged discrimination against African American applicants for janitor jobs at O’Hare Airport by hiring almost all Hispanic and Eastern European employees. Approximately 5,000 unsuccessful African-American applicants applied for the janitorial jobs at O’Hare Airport between October 2004 and December 2009. During the hiring process, an African American job applicant was told to get her birth certificate and show it to the employer. When she returned with her birth certificate, Scrubs, Inc. told her there were no more positions.).
68 In January 2012, the unemployment rate for African American’s was 13.6%. For those aged sixteen and over with disabilities, the unemployment rate was 12.9% (Bureau of Labor Statistics, U.S. Dep’t of Labor, USDL 12-0163, The Employment Situation Summary: January 2012, at Table A-2 and A-6).
are “on their way there, rather than workers who have already been there.” Hiring policies and recruitment materials that require a job candidate to be “promotable” may disparately treat older workers. “Many recruiters realize that such a policy constitutes age discrimination, so they don't articulate it directly. They may use subtle code words such as ‘fast track,’ ‘high potential’ or ‘rising star’ to describe the desired candidate. Or, they may say they are seeking candidates whose careers are ‘moving upward.’”

Hiring policies that set maximum experience limits also have great potential to exclude older workers who have been in the work force longer than younger workers. For example, a hiring policy that sets an experience limit from eight to 15 years excludes older workers, often by design. “Assuming they graduated from college at age 22, most over-age-40 job-seekers have at least 18 years of experience.” Other employers simply tell older workers that they are “overqualified,” knowing that older workers will be excluded from consideration. All of these tactics can be forms of disparate treatment of older workers.

It is difficult to prove that employers or employment agencies intentionally discriminate against unemployed workers or job-seekers by posting job ads that caution, only the “currently employed” need apply. Discriminatory intent or motive must be proven to win a disparate treatment claim, which is a high burden for any unemployed worker or job-seeker who has been excluded from consideration. However, if the length of time to find a new position increases with age, a policy or job ad that requires current employment more than likely excludes older

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70 Id.
71 Id.
72 Id.
73 See, e.g., McDonnell Douglas, 411 U.S. 792; Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); See Michael K. Grimaldi, Disparate Impact after Ricci and Lewis, 14 SCHOLAR 165, 173 (St. Mary's L. Rev. on Minority Issues) (Fall 2011) (noting that disparate impact theory has been used almost exclusively to challenge the employment tests of public employees and that “[d]isparate impact lawsuits are extremely difficult to win.”)
workers. Moreover, because higher unemployment among minority group members is also well-documented, a currently employed policy is likely to result in racial discrimination. Therefore, a disparate impact claim may be a more viable alternative for unemployed job-seekers. Disparate impact, as a theory to prove discrimination caused by job ads or hiring practices requiring current employment and exclude unemployed workers and job-seekers, is advantageous because the proof does not depend upon the employers’ intent or motivation.

B. Disparate Impact

Hiring policies and practices that create “built in headwinds” to the employment of protected groups are prohibited. This is so, even though the hiring policies and practices were not intended to discriminate and the employer did not intend to treat people protected by the civil rights laws differently than other job applicants. Disparate impact theory allows conduct which, although equally applied to all, has an adverse effect on protected class members as compared to majority class members. It also allows recovery when there is proof of a pattern or practice of discrimination. If the practice of screening out unemployed workers and job-seekers from job opportunities disparately impacts protected groups, it may violate the antidiscrimination laws.

Disparate impact analysis protects members of many groups who have suffered during times of high and prolonged unemployment, including certain people of color. The United States Supreme Court has extended disparate impact analysis outside of the scope of Title VII.

Disparate impact claims may also be brought under the Age Discrimination in Employment Act,

74 Id.
77 Id.
78 Id.
albeit with a narrower scope.\textsuperscript{79} Moreover, disparate-impact claims are cognizable under the Americans with Disabilities Act.\textsuperscript{80}

The United States Supreme Court in \textit{Griggs v. Duke Power Company} set forth the standard of proof in employment discrimination cases when hiring practices adversely affect job-seekers within a protected class.\textsuperscript{81} First, the job-seeker must present a prima facie case of disparate impact.\textsuperscript{82} To prove a prima facie case, the unemployed worker or job-seeker must identify a hiring practice that has caused a statistical under-representation of members of an otherwise protected class. Second, the job-seeker must show that the hiring practice “is not fairly linked to job performance and has caused the “exclusion of members because of their membership in a protected group.”\textsuperscript{83}

To prove a prima facie case that a hiring practice adversely affects protected class members as compared to majority class members, an unemployed worker or job-seeker can meet his or her burden through the use of statistics. Through statistical proof, the unemployed worker or job-seeker can meet the initial burden of proof and show that although “fair in form,” an employer’s hiring practices were discriminatory in operation.\textsuperscript{84}

\textsuperscript{79} See Smith v. Jackson, 544 U.S. 228 (2005). In Jackson, Police and public safety officers brought suit under ADEA, alleging that salary increases they received were less generous than increases received by younger officers. Although the salary increases were designed to retain qualified people; workers with less than five years of tenure received proportionally greater raises than those with seniority. The Court determined that the ADEA authorizes recovery in disparate-impact cases, however it is significantly narrower than Title VII because “§ 4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age.” This is significantly narrower than Title VII’s “business necessity” test. Under the standard articulated by the Court, the petitioner’s failed to set forth a valid claim and summary judgment for the city was affirmed. Id.

\textsuperscript{80} See Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003) (holding that both disparate treatment and disparate impact claims are available under the ADA).

\textsuperscript{81} Griggs, 401 U.S. at 432 (standardized tests and certain graduation requirements violated Title VII because they had a discriminatory impact).

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.
The burden shifts to the employer once the unemployed worker or job-seeker establishes a prima facie case. Disparate impact targets only those employment practices that have no “business necessity.” Once the burden shifts, the employer must demonstrate that its conduct was the result of a nondiscriminatory reason for the practice. If an employment practice excludes members of a protected class and is not related to job performance, the practice is prohibited. Even if the employer or employment agency proves that the challenged requirement is sufficiently related to job performance, a job-seeker may still prevail by showing that another practice with a less discriminatory impact would “serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’”

1. Examples of Disparate Impact of Job Requirements

Examples of mandatory job requirements that disparately impact Americans protected under the civil rights laws are plentiful. They include good credit, minimum height and weight requirements, passing pre-employment tests, and meeting educational requirements. Although in most cases employers advance a nondiscriminatory reason for imposing the requirements upon job applicants, the courts often find the connection between employers’ imposed requirements

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85 Griggs, 401 U.S. at 431. Subsequently, in Albermarle Paper Co. v. Moody, the Supreme Court held that the burden shifting test for disparate impact claims was similar to the test it announced in McDonnell Douglas Corp. v. Green. Many years later, the Supreme Court increased the burdens on a plaintiff pursuing a disparate impact claim. See Watson v. Fort Worth Bank & Trust and Wards Cove Packing Co. v. Antonio. In 1991, Congress amended Title VII and greatly restored disparate impact to its pre Watson and Wards Cove status.

86 Id.

87 See 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 29 C.F.R. § 1607.3(B) (“Where two or more selection procedures are available which serve the user’s legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.”); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

and actual job requirements too tenuous to rebut a job-seeker’s demonstrated prima facie disparate impact case.\footnote{Griggs, 401 U.S. at 433. See also \textit{EEOC v. Dial Corp.}, 469 F.3d 735 (8th Cir. 2006); \textit{Concepcion}, Jr., \textit{supra} note 88.} 

\textbf{a. Good Credit as a Job Requirement}

The weak economy has caused employers to use a discriminatory pre-employment screening device that, like the “currently employed” requirement, also causes a Catch-22 for some unemployed Americans protected by the civil rights laws. With increasing frequency, employers use credit checks “as a litmus test to weed out applicants” which results in a Catch-22 for racial minorities, and perhaps other groups which have traditionally experienced higher and longer unemployment. For example, racial minorities, as a class, have been shown, on average, to have lower credit scores.\footnote{Matt Fellows, \textit{Credit Score, Reports, and Getting Ahead in America}, THE BROOKINGS INSTITUTION, Survey Series (May 2006). See also \textit{Meeting before the EEOC on Employment Testing and Screening} (May 16, 2007) (testimony of Adam T. Klein, Partner, Outten & Golden LLP) available at http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html.} A recent Brookings Institution study found a disparity of consumer credit scores around the country and concluded that “[c]ounties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores.”\footnote{\textit{Id.} (“[A]pplicants need to secure employment to improve their credit, but employers reject them because they lack good credit.”).}

Unemployed workers and job-seekers with poor credit scores, like those weeded out by job ads that require current employment, face a harsh reality. Their Catch-22 is that they must be employed in the first place to improve their credit status, so racial minorities are hit hard by pre-employment credit checks.\footnote{\textit{Id.} (“[A]pplicants need to secure employment to improve their credit, but employers reject them because they lack good credit.”).} 

Employers’ use of pre-employment credit checks, though good credit history is seldom explicitly stated as a job requirement, is wide spread. Therefore, its impact is far-reaching. A 2009 survey conducted by the Society for Human Resource Management revealed that 47% of
all managers use pre-employment credit checks on selected job candidates and 13% use them on all job candidates.93

Because of the potential to adversely affect racial minorities and other groups protected by the civil rights laws, the looming question is whether credit checks are of business necessity. Human resource managers advance a number of reasons for using credit checks. Some jobs require great financial responsibility, handling of large sums of money, access to highly confidential information, or access to company or other people’s property. Others require security responsibilities or are safety sensitive positions.94 But the EEOC has made clear that absent a showing of job-relatedness and business necessity, an employer’s use of a job applicant’s credit history as a pre-employment screening device discriminates against racial minorities because it disproportionately impacts them.95

b. Height and Weight as a Job Requirement

Requiring job-seekers to meet height and weight requirements may adversely impact job-seekers who are protected under the civil rights laws. For example, women job-seekers or job-seekers from certain nationalities are often shorter and lighter than American men.96 Height and weight requirements must be job-related and consistent with business necessity to pass muster

94 Id. at 5.
95 See EEOC Decision No. 72-427, 1971 WL 3943 (August 31, 1971) (A bank’s failure to hire an African American as a computer operator, partially because of his marginally poor credit record, violated Title VII under a disparate impact theory in the absence of a showing that the credit check was a business necessity.). See also EEOC Decision No. 72-1176, 1972 WL 4005 (February 28, 1972) (Disparate impact of pre-employment credit check of Hispanic job applicants). See also United States v. Chicago, 549 F.2d 415 (7th Cir. 1977) (background checks, which include credit checks, for potential police officer patrolman disparately impacted minority applicants and was not job related).
under the civil rights laws. Physical strength tests may also violate Title VII of the Civil Rights Act if they disproportionately exclude protected groups from jobs and are not job-related. In determining whether minimum height and weight or strength tests violate the Civil rights laws, the courts assess the difficulty of the tests in relation to job requirements. In *EEOC v. Dial Corp.*, the employer was a company that produced canned meats. The court concluded that the company disproportionately rejected women for entry-level production jobs. The company’s pre-employment strength test had a significant adverse impact on women. Prior to the use of the strength test, 46% of all hires were women. However, after the company used the strength test as a screening mechanism for new hires, only 15% of hires were women. The job did require strength on the job. Workers were required to carry 35 pounds of sausage and lift the sausage between 30 and 60 inches above the floor. The company defended the claim, asserting that because of the bending and lifting tasks entailed in the job, the women job-seekers’ claims, the pre-employment strength test was related to job performance. It asserted that the test was administered solely for nondiscriminatory reasons; to reduce on the job injuries because of the lifting requirements of the job.

Although the court found that there were fewer on the job injuries, it concluded that the test was considerably more difficult than the job required. Moreover, the reduction in injuries occurred two years before the test was implemented, most likely as a result of improved training and better job rotation procedures. On appeal, the Eighth Circuit upheld the trial court’s finding that Dial’s use of the test violated Title VII under the disparate impact theory of discrimination. The court noted that “[s]tatistical disparities are significant if the difference between the

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97 *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006). The defendant, Dial, is an international company that produces canned meats and it is not the Dial that manufactures soap. The jury in the trial court also found that the defendant engaged in a practice of intentional discrimination against female job applicants.

expected number and the observed number is greater than two or three standard deviations. Here the disparity between hiring of men and women showed nearly ten standard deviations. 99 The end result is that the court will scrutinize the connection between actual job performance and requirements or qualifications that exclude job-seekers who the civil rights laws protect.

**c. Cognitive Test Score as a Job Requirement**

Requiring an unemployed worker or job-seeker to achieve a certain score on a cognitive test, as a precondition to employment, may disparately impact groups protected by the civil rights laws. Again, the inquiry is the relationship between what is actually required for job performance and what is tested. For example, in *EEOC v. Ford Motor Co.* and *United Automobile Workers of America*, 100 the United States District Court for the Southern District of Ohio approved a settlement agreement on behalf of African Americans who were rejected from Ford’s apprenticeship program. African American job candidates took a written cognitive test that measured verbal, numerical, and spatial reasoning. Ford asserted that the test was designed to evaluate job candidates’ mechanical aptitudes. Although Ford validated the cognitive test, the EEOC, on behalf of African American class members, asserted that it had a statistically significant disparate impact on African American job applicants because it excluded them from consideration. In addition to providing each settlement class member with a monetary award, Ford agreed to devise new hiring selection procedures and place 279 settlement class members, on the apprenticeship eligibility list. 101

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99 *Dial Corp.*, 469 F.3d at 741-42.
101 *Id.* at *2.
d. “Over Qualification” as a Disqualifier for a Job

Rejecting unemployed workers and job-seekers on the basis of over qualification can also be unlawful if the practice disparately impacts members of groups the civil rights laws protect. Older workers with years of experience and work history are particularly vulnerable to the “over qualification” hurdle to getting a job. Age discrimination may occur if a job ad or hiring practice screens out job applicants with extensive experience, even for nondiscriminatory reasons. An employer may believe that an experienced worker with a long work history will not be happy with the offered job or will demand more pay if he or she is overqualified for the position. However, the practice of disqualifying job-seekers because they are “over qualified” may be unlawful if it adversely impacts older workers. The key inquiry to a disparate impact analysis is how closely the mandatory job requirement is fairly related to job performance. “The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited.” When the job qualification is more limited than the qualifications or skills actually required for job performance, the relationship between qualifications and the job requirements is unconvincing. For example, the Second Circuit affirmed a jury verdict for the plaintiff, finding that the school board's policy of hiring only teachers with limited experience to save salary costs violated the ADEA under both disparate treatment and disparate impact theories. The court cited regulations prohibiting classification of older workers on the basis of their higher average cost. The court reasoned that the school district's policy operated to classify and exclude older workers

103 Griggs, 401 U.S. at 431.
104 Geller v. Markham, 635 F.2d 1027, 1034-1035(2d Cir. 1980).
105 Id. at 1033
because of their higher cost as a group.\textsuperscript{106} The court then found, based on the same reasoning, that the defendant's cost justification failed to defeat the plaintiff's disparate treatment claim.\textsuperscript{107}

e. “Under Qualification,” as a Disqualifier for a Job

On the opposite end of the spectrum, employers often reject job-seekers for jobs, saying that they are “under qualified” because they do not have the desired level of education. Requiring a job applicant to hold a high school diploma or college degree is unlawful if it disparately impacts members of protected groups with limited educational opportunities and is unrelated to job performance.\textsuperscript{108}

An example of a case addressing minimum educational requirements for employment is \textit{EEOC v. JAC}.\textsuperscript{109} In that case, the EEOC brought an action against an apprenticeship committee alleging disparate impact on behalf of African Americans and women because of unlawful educational and maximum age requirements. The committee administered a four year electrician apprentice training program. It required entry level applicants to the “apprentice training program to be between the ages of 19 and 22, and possess a high school education or GED.”\textsuperscript{110} The committee’s recruitment announcements cautioned that “[a]nyone who does not meet the age, educational or any other requirement outlined in the notice should not request an application.” The recruitment announcement further cautioned, in bold capital letters, “ALL APPLICANTS MUST MEET THE FOLLOWING MINIMUM QUALIFICATIONS IN ORDER TO QUALIFY.”\textsuperscript{111}

\textsuperscript{106} Id. at 1034  
\textsuperscript{107} Id.  
\textsuperscript{108} \textit{EEOC v. JAC}, 164 F.3d 89 (2d Cir. 1998).  
\textsuperscript{109} Id.  
\textsuperscript{110} Id. at 93.  
\textsuperscript{111} Id.
Age and education were the first two qualifications listed in JAC’s recruitment announcement. The EEOC challenged the education requirement with statistics, showing that "[f]or counties from which JAC received five or more applications, 89.2% of Whites and 68.3% of Blacks between the ages of 18 and 22 possessed a high school diploma or GED."\textsuperscript{112} The EEOC challenged the age requirement by showing that women comprised 28.8% of the potential applicant pool for the apprenticeship program, but made up 2.5% of the actual applicants to the program. Many of the women in the actual, small applicant pool were excluded because of their age.\textsuperscript{113} The district court found that the statistics were significant and concluded that “the educational requirement and the age requirement had a chilling effect on black and women applicants, which caused the . . . statistical disparities.”\textsuperscript{114} Because of the requirements stated in the recruitment announcement, African American and women job-seekers simply did not bother to apply for open positions. The Second Circuit Court of Appeals affirmed the trial court’s finding, concluding that the “general population and potential applicant pool studies reveal disparities so great that they could not have occurred by chance.”\textsuperscript{115}

The lesson learned from \textit{EEOC v. JAC} is that educational requirements that exceed what is necessary for job performance and disparately impact members of protected groups violate the civil rights laws. The Equal Employment Opportunities Commission, as announced in its guidelines, has long recognized that “[e]ducational requirements obviously may be important for certain jobs. For example, graduation from medical school is required to practice medicine.”\textsuperscript{116} However, it cautions that “employers often impose educational requirements out of their own

\textsuperscript{112} \textit{Id}. at 95.
\textsuperscript{113} \textit{Id}. at 95-96.
\textsuperscript{114} \textit{EEOC v. JAC}, 828 F.Supp. 264, 266 (S.D. N.Y. 1993) rev’d, 186 F.3d 89 (2d Cir. 1998).
\textsuperscript{115} \textit{EEOC v. JAC}, 164 F.3d 98, 102 (but reversing and remanding for consideration of whether JAC could show business justification for the age and education requirements pursuant to the standard announced in \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989)).
sense of desirable qualifications. Such requirements may run afoul of Title VII if they have a disparate impact and exceed what is needed to perform the job.”¹¹⁷

While also recognizing that educational requirements are important for certain jobs, the Supreme Court in Griggs also described the danger in blanket educational requirements as a consideration in hiring.¹¹⁸ The Court described the adverse impact educational requirements in hiring upon people who suffer historic discrimination.¹¹⁹ In interpreting Title VII and disparate impact theory, the Supreme Court stated: “History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.”¹²⁰

2. The “Currently Employed” Requirement’s Disparate Impact

Like many of the pre-employment requirements discussed above, an employer’s “currently employed” requirement, posted in a job ad or applied in a hiring process, could disparately impact people protected by the civil rights laws. To prove their prima facie case of disparate impact, unemployed workers and job-seekers who are older, people of color or people with disabilities could use statistics to show that members of groups civil rights laws protect are disparately impacted in great proportions. They could likely show that the connection between what is actually required in many jobs and the “current employment” requirement is nonexistent or at best, tenuous.

¹¹⁷ Id.
¹¹⁸ Griggs, 401 U.S. at 433.
¹¹⁹ Id.
¹²⁰ Id.
First, an excluded job-seeker could use labor-market (or “labor pool analysis”) to show a “currently employed” requirement adversely affects members of a protected group.\textsuperscript{121} For example, if a job ad or announcement requires applicants to be “currently employed” and dissuades unemployed workers and job-seekers from applying for a job because they know they cannot satisfy the job requirement, the applicant pool will likely be skewed in favor of groups that have not suffered the brunt of the unemployment crisis. Labor pool analysis could be used to show that the exclusion of protected groups from available job opportunities disparately impacted them.\textsuperscript{122}

Second, unemployed job-seekers could use applicant-flow analysis to show that a “currently employed” requirement, as a precondition to employment, disparately impacted them.\textsuperscript{123} Dean Helen Norton of the University Of Colorado School Of Law writes that applicant flow analysis is appropriate when the questionable employment practice is used to screen out unemployed workers or job-seekers later in the hiring process. For example, applicant flow analysis could be used to support a disparate impact claim “when an employer does not require current employment as a condition of application but instead screens applicants who are not currently employed later in the decision-making process.”\textsuperscript{124}

Based upon recent unemployment statistics, job ads or hiring practices that impose a “currently employed” requirement and exclude unemployed job-seekers have great potential to

\textsuperscript{121} Disparate impact will usually not be found unless the members of a group protected by the civil rights laws are selected at a rate that is less than 80 percent or four-fifths of the rate at which the group with the highest rate is selected. See EEOC’s Uniform Guidelines on Employee Selection Procedures, 41 CFR 60-3.4D (1987).

\textsuperscript{122} Helen Norton, Excluding Unemployed Workers from Job Opportunities: Why Disparate Impact Protections Still Matter, HASTINGS L.J. VOIR DIRE 1, 2 (2011).

\textsuperscript{123} E.E.O.C. v. H.S. Camp & Sons, Inc., 542 F. Supp. 411, 442-43 (M.D. Fla. 1982) (Applicant-flow analysis utilizes the actual applicants as the relevant labor pool rather than an estimate of those persons in the community who would be expected to apply. Applicant flow analysis is considered the most accurate statistical method of analyzing hiring practices.). See also Helen Norton, supra note 124, 2011 HASTINGS L.J. VOIR DIRE at 2 (“ Applicant-flow analysis compares the selection rate under that requirement for protected class members who apply for the position with that of the comparator group. Again, if the difference between the two percentages is statistically significant or satisfies the eighty-percent rule, the plaintiff has established the requisite adverse impact.”).

\textsuperscript{124} Supra note 122.
disparately impact groups protected by the civil rights laws. Based upon recent unemployment statistics, older workers, people of color, and people with disabilities particularly suffer the brunt of discriminatory job ads and hiring practices.

a. The “Currently Employed” Requirement’s Impact on Older Workers

Older workers are a growing category of the long term unemployed and the numbers will likely increase as long as “currently employed” remains a requirement for getting a job. Older workers who face prolonged layoffs and displacements are likely to face long-term or permanent unemployment. The NELP reported that older workers, even with years of relevant experience, are regularly told that “they will not be referred or considered for employment, once recruiters or potential employers learn they are not currently employed.” Older workers represent the largest group of the long term unemployed. On average, older workers’ “spell” of unemployment is 29.5 weeks, “the longest among the groups “of any unemployed workers. An older worker’s “spell” of unemployment may morph into permanent unemployment.

The news media has reported the plight of older unemployed Americans in a weak economy. For age-based reasons, employers may treat older job applicants different than younger workers. One older job-seeker described his plight as an unemployed older worker.

It’s nearly impossible to get a job unless you already have a job . . . Companies will view you, especially people over 50 like me, . . . as somebody that’s gonna require more money, that’s not gonna be productive, or that might have some personal problems, because if you were a good employee you would never have lost your job in the first place.

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125 Supra note 2.
126 Supra note 8. Older workers are more likely to remain unemployed, even though younger workers are overrepresented among the long-term jobless. For example, between 2007 and 2009, Younger workers represented 19.5% of all persons unemployed for 27 weeks or more compared with 13.9% of the labor force. However, between 2007 and 2009, the number of young unemployed workers actually declined. In comparison, during the same period, the share of long term unemployed made up of older workers rose. Id.
127 Supra note 68.
Even when older workers are fortunate enough to find work, they are not likely to obtain a similar position to the one they lost. Moreover, after years of work and wage increases, they are unlikely to regain their compensation level once they do find employment. Older workers also lose the wage premium for skills specific to their previous firm. If workers find new jobs in different industries, they lose the premium for that industry-level knowledge as well.

In a buyers’ market for qualified job candidates, potential employers view older, unemployed workers as a bad investment. They may take advantage of older workers’ desperation to find work or refuse to hire them at all. Potential employers may rationalize excluding older workers in three ways. The first rationalization is that older workers are often more expensive to employ than younger workers because of older workers’ higher health care costs. Second, employers may be reluctant to hire older workers, guessing that greying workers are not as technology savvy or as up to date with industry standards as younger workers. Moreover, employers may surmise that older workers are close to retirement age and not worth the investment to train or educate them.

As reasonable as these reasons for hiring older job-seekers may sound to some potential employers, the reasons are age based and violate the Age Discrimination and Employment Act. A perceived bad investment in hiring older workers is not a reasonable factor other than


130 See Whitaker, supra notes 128 and 129.

131 Id.

132 Id.

133 See Reggie Gay, So I’m Unemployed-Why Should that matter? 18 No. 10 S.C. Emp. L. Letter 3 (July 2010) (refusal to consider extensive experience because overqualified may be unlawful screening based on age). See also Hazen Paper Co. v. Biggins, 507 U.S. 604(1993). (“It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”)
Therefore, job ads and hiring practices that exclude workers if they are not currently employed may violate the Age Discrimination Act because of their disparate impact on older workers.  

b. The “Currently Employed” Requirement’s Impact on People of Color

People of color are also overrepresented in the scores of people still unemployed. For the period between October 2009 and September 2010, 19 percent of all unemployed workers were African American and 18.9 percent were Hispanic. Therefore, it is likely that job ads and hiring practices that require one to have a job to get a job disparately impacts many people of color. Nearly twice the number of African American and Hispanic workers is adversely impacted by hiring policies and job ads that exclude unemployed workers and job-seekers from consideration for available jobs.

Although Hispanics are overrepresented in the unemployment rates, they are often not unemployed as long as African American workers. For example in 2010, the average duration of unemployment for Hispanics was 30.5 weeks, and for African American workers was 36.6 weeks. In January 2012, the unemployment rate for African American workers was 14.2 percent, compared to 8 percent for white workers. Most significant, unemployed African American workers are unemployed much longer than unemployed white workers.

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Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950 (5th Cir. 1993). (disparate Treatment case where a jury found that the bank discharged 60-year-old trust department manager and replaced him with 37-year-old because of his age was supported by some evidence, even though performance evaluations reflected concern about how manager was reporting and managing trust accounts and that he might lack technical trust knowledge; manager's evidence emphasized that he was questioned about his age in interview and that supervisor stated that most "younger trust officers that I've seen, as well as most younger officers, have the ability to make entries in computers * * *The older ones have tended not to be as knowledgeable about computers.").

Supra note 2. (The National Employment Law Project concluded that “excluding the long-term unemployed from consideration for jobs will typically have an age-based disparate impact that can be justified only through an affirmative showing that a reasonable factor other than age justifies the practice.”).

Supra note 9 at 11-13.


2009 to September 2010, nearly 10 percent of African American unemployed workers were unemployed for more than 99 weeks, compared to 7.3 per cent of unemployed white workers.\textsuperscript{138} Because of the disproportionate number of long term unemployed people of color, job ads and hiring practices that require one to have a job to get a job likely disparately impacts them. The impact is especially felt by African Americans, who experience unusually high rates of unemployment and long term unemployment.\textsuperscript{139}

\textbf{c. The “Currently Employed” Requirement’s Impact on People with Disabilities}

As of November, 2011, the unemployment rate for people with disabilities was 13 percent as compared to 8 percent for people without disabilities.\textsuperscript{140} The unemployment rate for people with disabilities is also grossly understated. The numbers show that people with disabilities truly struggle to find jobs. For January 2011, the Bureau of Labor Statistics reported that nearly 80 percent of Americans with disabilities were not in the labor force at all.\textsuperscript{141} Of the remaining 20 percent of people with disabilities in the labor force, 13.6 percent of those individuals were not counted as employed.\textsuperscript{142}

Many people with disabilities lack current work experience, compounding their difficulties in the job market. In February, 2011, Joyce Bender, CEO of a consulting service

\textsuperscript{138} Supra note 9 at 11.
\textsuperscript{139} Supra note 2. \textit{See also} Wilkins v. Scrubs, Inc. 35 EDR 539 11/17/2010 (settlement of 3 million dollars). Scrubs, Inc. allegedly discriminated against African American applicants for janitor jobs at O’Hare Airport by hiring almost all Hispanic and Eastern European employees. Wilkins was told to get her birth certificate and when she came back with it, Scrubs, Inc. told her there were no more positions available at the company. \textit{E.E.O.C. v. Scrub, Inc.}, CIV.A. 09 C 4228, 2010 WL 3172855 (N.D. Ill. Aug. 10, 2010). Approximately 5,000 unsuccessful African-Americans applied for the jobs at Scrubs, Inc. between October 2004 through December 2009, and EEOC sought relief for about 550 of them.
\textsuperscript{140} U.S. Dep’t of Labor, Office of Disability Employment Policy, \textit{available at} http://www.dol.gov/odep/.
\textsuperscript{141} Hearings before the EEOC on “\textit{Out of Work, Out of Luck? Denying Employment Opportunities to Unemployed Job Seekers,}” (February 16, 2010) (written testimony of Joyce Bender, CEO, Bender Consulting Services).
\textsuperscript{142} \textit{Id.}
dedicated to the employment of Americans with disabilities, testified before the EEOC and described the plight of unemployed people with disabilities.\textsuperscript{143}

For many Americans with disabilities, the closing of the door to employment does not occur after the interview, it occurs before it when human resources “gate screeners” prevent the person from even getting an interview. The most common reason given is that the applicant with a disability doesn’t have current work experience, even if they are otherwise qualified. While there are forward-thinking employers who will include people with disabilities who are entry-level or currently unemployed, countless times I have heard the same excuse: “If only this person had current work experience, we would be happy to interview them.” Hiring managers call it seeking the “best qualified” talent for their company and no overt discriminatory comment is made, but I am concerned that for some of these employers discrimination is a factor. And even where it is not, the impact on workers with disabilities is the same; they are eliminated from the applicant pool.\textsuperscript{144}

The sheer numbers of people with disabilities who lack “current employment” place them in a growing disadvantage in the job search. Job ads and hiring practices that say only the “currently employed” need apply, likely have a significant disparate impact upon people with disabilities who are unemployed in greater proportions than many other people.

3. Is the “Currently Employed” Requirement a Business Necessity or Fairly Related to Job Performance?

The statistics support the conclusion that a “currently employed” requirement for getting a job disparately impacts groups protected by the civil rights laws. However, even if a current employment requirement in a job ad or hiring procedure disparately impacts protected groups, an employer will still have an opportunity to show business necessity or job relatedness for the requirement.\textsuperscript{145}

\begin{footnotes}
\item[143] See id.
\item[144] Id. See also Ashley Stein and Michael E. Waterstone, \textit{Disability, Disparate Impact, and Class Actions}, 56 Duke L. J. 861 (2006).
\item[145] Griggs, 401 U.S. at 431-32.
\end{footnotes}
Under Title VII, the employer can rebut the job-seeker’s prima facie disparate impact case by showing a business necessity for the current employment requirement. However, business necessity under Title VII is construed very narrowly. It applies only to “those limited instances where one must tolerate [discrimination] where it is a necessity, in fact, a prerequisite for the performance of a job.” The “business necessity” must relate to the “essence of the business.”

Under the ADEA, protecting older workers from discrimination, an employer can assert a facially broader defense to an age-based disparate impact claim; a reasonable factor other than age. In *Smith v. City of Jackson*, the Court held that an employment practice which disparately impacts older workers is not discriminatory if it can be justified by a “reasonable factor other than age.” However, the EEOC has recently proposed regulations that will potentially provide more guidance to employers and the courts. Under the EEOC regulations, the courts and employers would be guided by a list of factors to determine the “reasonableness of an employment practice. The factors include: whether the practice involved a common business practice, the extent to which the practice relates to the employer’s stated business goal, the extent to which the employer assessed the adverse impact of the practice on older workers, whether alternative options were available to the employer, the amount of discretion the employer gave to

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146 Id.
147 Id.
148 Johnson, 499 U.S. 187, 203 (1991). In *Johnson*, the exclusion of women from battery manufacturing process because of perceived health risks associated with lead exposure “to any fetus carried by a female employee” was not a sufficient BFOQ because a female’s “reproductive potential” was not a “business necessity” and did not relate to the “essence” of the employer’s business. Id. at 190, 206.
149 In *Smith v. Jackson*, 544 U.S. 228, 238-343 (2005), the Court held that an employment practice which disparately impacts older workers is not discriminatory if it can be justified by a “reasonable factor other than age.”
150 Id. at 228.
151 Id. at 243.
supervisors to assess employees subjectively, and the amount of training the employer provided to subordinates about how to avoid discrimination.\footnote{See Definition of “RFOA” under the ADEA, 75 Fed. Reg. 7212, 7218 (proposed Feb. 18, 2010) (to be codified at 29 C.F.R. § 1625.7).}

Many employers view weeding out unemployed workers and job-seekers as simply good business sense. However, in very few circumstances is the “weeding out” a business necessity, job related. Employers often perceive that the best candidates for a job are those who are currently working and employed workers are more qualified than unemployed workers. Understandably, employers want employees with fresh skills and the fear is that the longer a person is out of work, the rustier skills become. But how long must a worker be unemployed before he or she becomes virtually useless to a potential employer?

It is even more questionable why entry-level jobs require a job-seeker to be “currently employed,” since entry-level assumes that a new hire is coming in with limited skills and background for the job. The relationship between job performance and the requirement of current employment is even more attenuated where an employer provides on the job training, apprenticeship, or further education is provided by the employer. Moreover, although employers have an interest in hiring workers who are up to date with the latest technology and skills, job skills are not lost overnight. Indeed, many unemployed workers use their off time to enhance their skills.\footnote{Nancy Deville, Baby Boomers Hit the Books at Community Colleges, Herald Times Reporter, Feb. 8, 2012 http://www.htrnews.com/usatoday/article/38530209?odyssey=mod%7Cnewswell%7Ctext%7CFRONTPAGE%7Cs . See also Judy Keen, After Layoffs, Many Workers go Back to School, USA Today, April 8, 2009 http://www.usatoday.com/news/education/2009-04-07-bootstraps_N.htm. See also Kim Clark, Jobless Overwhelm Training Programs, U.S. News & World Report, Money (January 4, 2010), available at http://money.usnews.com/money/careers/articles/2010/01/04/jobless-overwhelm-retraining-programs. (So many unemployed workers are seeking retraining that they are overwhelming the community colleges.)}

When faced with a job applicant who has suffered a period of unemployment or a gap in his or her resume, the potential employer faces looming questions about whether and why the
applicant was let go from his or her previous job. For these reasons, many recruiters contact passive job-seekers who are already employed. Some recruiters contact currently employed workers before they even think of looking for another job and bypass the throngs of unemployed workers.  

But in a weak economy, there are many reasons why a worker might be unemployed that have nothing to do with job performance. Those reasons might include enrollment “in school or in a training program; having to leave a job because of spousal relocation; having lost a job because of a lack of seniority during employer downsizing; having lost a job because the employer eliminated an entire division or shut down altogether; and having left employment temporarily due to illness, injury, disability, pregnancy, or family caregiving responsibilities.”

A much better alternative to blanket exclusion of unemployed workers and job-seekers is for employers to ask job candidates why they are unemployed or lost their jobs.

Employers have alternatives to the blanket exclusion of unemployed workers. Dean Horton, writing about the disparate impact of the current employment requirement suggests posing problems or questions in interviews or tests that measure relevant contemporary knowledge, as well as asking questions that reveal recent experience or recent education and training. For example, the candidate may be currently unemployed because he or she has been in school, the candidate may have been employed until very recently, or the candidate may have used a period of unemployment to receive additional education or training.

VI. Federal and State Legislation: Filling a Gap

The civil rights laws do not address the problems of many unemployed Americans who are not protected under current civil rights law. Federal and state laws prohibiting employers and hiring agencies from refusing to consider job applicants on the basis of unemployment status

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154 Norton, supra note 124 at 5-6.
155 Id.
156 Id. at 6.
would fill a necessary gap in the law. Gap filling legislation would assure that unemployed workers and job-seekers have a fair opportunity for job consideration, regardless of their status under current civil rights laws.

A. Federal Legislation

In July, 2011 Representative Rosa DeLauro of Connecticut and Representative Hank Johnson of Georgia introduced The Fair Employment Opportunity Act of 2011 (FEOA) to ban discrimination on the basis of an individual’s employment status. In September of 2011, the bill was still pending before the Subcommittee on Health, Employment, Labor, and Pensions. A Senate companion bill was introduced in August 2011 by Sen. Richard Blumenthal, and is also still pending before the Committee on Health, Education, Labor, and Pensions.

The FEOA would permit unemployed workers who believe they have been discriminated against to sue prospective employers and employment agencies in state or federal court. The FEOA broadly defines employment status to include an individual’s present or past unemployment, regardless of how long the individual has been unemployed.

The proposed FEOA makes it an unlawful practice for an employer, recruiter, or employment agency to

1. Refuse to consider for employment or refuse to offer employment to an individual because of the individual’s status as unemployed;

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158 Id.
160 Id. The FEOA would also permit class actions on behalf of unemployed job-seekers against potential employers and permit the Department of Labor to investigate allegations of discrimination. The FEOA would allow unemployed job-seekers and the Department of Labor both recovery for money damages and changes in employment practices and policies. The Act also prohibits “retaliation” against employees for making claims under the FEOA.
161 Id.
2. Publish in print, on the Internet, or in any other medium, an advertisement or announcement for any job that includes—any provision stating or indicating that an person’s status as unemployed disqualifies the individual for a job; and

3. Direct or request that an employment agency take an individual’s status as unemployed into account in screening or referring applicants for employment.

Like current civil rights laws, the FEOA allows an employer, recruiter, or employment agency to defend nondiscriminatory reasons for excluding an unemployed worker or job-seeker. The FEOA allows employers, recruiters, and employment agencies to exclude an applicant “where an individual's employment in a similar or related job for a period of time reasonably proximate to the hiring of such individual is a bona fide occupational qualification reasonably necessary to successful performance of the job that is being filled.”\(^\text{162}\)

On September 2, 2011, President Obama introduced to the United States Congress the American Jobs Act of 2011 (the Jobs Act), which to a great extent, incorporates the FEOA. Although a bit narrower than the FEOA in its protections for unemployed workers and job-seekers, the Jobs Act incorporates much of the Fair Employment Opportunity Act of 2011.

Like the FEOA that preceded it, the Jobs Act would make it unlawful for employers and employment agencies to discriminate against unemployed workers and job-seekers by placing job announcements that require current employment as a precondition to consideration or by failing to consider or hire them on the basis of their unemployed status. However, unlike the FEOA, which expansively defines employment status no matter how long an individual has been unemployed or looking for work, the Jobs Act protects “individuals who do not have a job, are available for work and are searching for work when the action alleged to violate the Proposed Act occurred.”\(^\text{163}\)

\(^{162}\) Id. § 4, prohibited Acts (a) employers; “it shall be an unlawful practice for an employer to refuse to consider for employment or refuse to offer employment to an individual because of the individual’s status as unemployed.”

Like Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Employment Opportunity Commission (EEOC) would administer the law banning discrimination against unemployed workers and job-seekers. A structure for evaluating claims made under the Jobs Act is already in place, as Title VII procedures and remedies would also apply to the Jobs Act. Claimants could receive injunctive relief, back pay and attorneys’ fees. Employers and employment agencies would also be subject to a civil penalty of liquidated damages of up to $1000.00 for each day of the violation.

The proposed Jobs Act would permit employers to consider the reasons for a job applicant’s unemployed status if related to job performance in the new job, much like the disparate impact burden shifting analysis would allow under *Griggs*.

Like current disparate impact analysis, the Jobs Act would allow employers to assert the defense of business necessity. The Jobs Act would also permit potential employers to consider an individual’s

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164 *Id.* at sec. 5(B)(B) for such equitable relief as may be appropriate, including employment and compensatory and punitive damages.

165 *Id.* sec. 5 (A) (Enforcement)

1) LIABILITY FOR EMPLOYERS AND EMPLOYMENT AGENCIES - Any employer or employment agency that violates section 4(a) and (b) shall be liable to any affected individual (A) for actual damages equal to

(i) the amount of-

(I) any wages, salary, employment benefits, or other compensation denied or lost to such individual by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the individual, any actual monetary losses sustained by the individual as a direct result of the violation or a civil penalty of $1,000 per violation per day, whichever is greater; ii) the interest on the amount described in clause (i) calculated at the prevailing rate; (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer or employment agency that has violated section 4 proves to the satisfaction of the court that the act or omission that violated section 4 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 4, such court may, in its discretion, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

166 *Griggs*, 401 U.S. at 432.

167 *Id.* at 431.
unemployment “if preference for a candidate with recent employment in a similar or related job is consistent with the legitimate needs of the business.”\textsuperscript{168}

**B. State Legislation**

In addition to potential federal legislation, several states have also addressed discrimination against unemployed workers and job-seekers or are considering legislation banning discrimination against unemployed workers and job-seekers. As of January 2012, New Jersey is the only state that has enacted the anti-discrimination law protecting unemployed workers and job-seekers. In some significant ways, the New Jersey’s legislation appears to afford less protection than the FEOA, Jobs Act, or legislation pending in other states.

New Jersey’s enacted law contains a specific intent requirement. It penalizes employers who “knowingly and purposefully” discriminate against unemployed workers and job-seekers by excluding them from consideration in hiring.\textsuperscript{169} The specific intent requirement is similar to the intent requirement under disparate treatment theories. Under New Jersey’s law, employers are prohibited from “knowingly and purposefully” publishing, in print or on the internet, an advertisement for a job vacancy in the state that contains one or more of the following: a provision stating that the qualifications for a job include current employment; any provisions stating that an employer will not consider or review an application if the applicant is currently unemployed; any provision stating that only currently employed applicants will be considered or reviewed.\textsuperscript{170}

\textsuperscript{170} Id.
1. New Jersey

The New Jersey Act allows the New Jersey Department of Labor to impose civil penalties against employers who violate the statute. The possible penalties imposed are potentially much higher than the penalties in the proposed federal legislation. Punishment for violations of the New Jersey law includes civil penalties: $1,000 for the first violation; $5,000 for the second; and, $10,000 for each subsequent violation.\textsuperscript{171}

The original New Jersey assembly bill introduced, purported to afford unemployed workers much greater protections than the legislation that was finally adopted. The Act’s legislative history shows the business community’s concerns about legislation that makes unemployed workers and job-seekers a new protected class under the civil rights laws. The original assembly bill included much broader language which prohibited any provisions “suggesting” that current employment was required.\textsuperscript{172} However, the broader language was omitted from the final legislation because of concerns that the word “suggesting“ was too vague and would not provide employers and businesses with proper notice of their legal obligations.\textsuperscript{173}

The original New Jersey bill also did not include the specific intent requirement of “knowingly and purposefully.”\textsuperscript{174} The specific intent requirement was added because of New Jersey Governor Christies’ concerns that particularly in New Jersey’s already reputed business unfriendly environment, the severity of the penalties in the bill were “disproportionate to the offense prescribed in the legislation.”\textsuperscript{175}

\textsuperscript{171} Id.
\textsuperscript{172} H.D. 3359, 2010 Leg., 214 Sess. (N.J. 2010).
\textsuperscript{174} H.D. 2388, 2010 Leg., 214 Sess. (N.J. 2010).
\textsuperscript{175} See supra note 173.
The original assembly bill also included much larger civil penalties for employers’ violations of the statute; $5,000 for the first violation and $10,000 for each subsequent violation. However, in the final version of the bill, the penalties were reduced to $1,000 for the first violation and $5,000 for the second violation, out of concerns about the “significant financial penalties for New Jersey’s already over-regulated business community.”

Other states, including New York, Michigan, Illinois, and California are also considering legislation which prohibits discrimination against unemployed workers and job-seekers. At least in their early versions, they would afford more protection to unemployed workers and job-seekers than either the federal or New Jersey legislation.

2. New York

The proposed New York law prohibits an “employer or employer’s agent, representative, or designee” from discriminating “against an applicant on the basis of that applicant’s current employment status.” New York’s Act prohibits advertisements or jobs ads that state or suggest that current employment is a precondition to a job interview or review.

The New York law uses the word “suggesting” and that is significant. It would potentially afford more protection to unemployed workers and potentially make employers and employment agencies more cautious about all provisions and hiring procedures that suggest that unemployed workers and job-seekers need not apply. While the federal legislation prohibits job ads “stating or indicating” that a job-seeker’s “status as unemployed disqualifies” the job-seeker

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177 Id.
179 Id.
for a job, the New York law would prohibit “any provision stating or suggesting that the qualifications for a job include current employment.”  

As of January 2012, the proposed New York law, unlike New Jersey’s law, does not contain a specific intent requirement on the part of the employer or employment agencies. It omits the words “knowingly and purposefully.” It would also impose larger penalties than either the federal or New Jersey legislation; “five thousand dollars for the first violation and ten thousand dollars for each subsequent violation . . . .”

3. Michigan

In May of 2011, Representatives Ananich and Durhal introduced Michigan’s “Fair Consideration of the Unemployed Act.” The Michigan bill would also prohibit the discriminatory acts of more employers than the federal legislation. It narrows the definition of employer to “a person that engages the services of one or more individuals for compensation (much lower than the 15 employee requirement of the federal legislation.) It also uses the broader “suggesting” language, similar to New York’s legislation. The Michigan bill, like all of the adopted and pending legislation, enumerates what employers can do and consider as part of the hiring process. They can grant preference to current employees. They can require previous experience, relevant to employment. Michigan’s Fair Consideration of the Unemployed Act does not include a specific intent requirement and includes civil penalties of no more than $5,000 for the first violation and $10,000 for each subsequent violation.

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180 Id.
181 Id.
183 Id.
184 Id.
185 Id.
186 Id.
4. Illinois

Illinois’ proposed Employment Advertisement Fairness Act also uses the broader “suggesting” language, does not require a specific intent on the part of the employer, and imposes the larger civil penalties, not to exceed $5,000 for the first violation and $10,000 for each subsequent violation. The Illinois Employment Advertisement Fairness Act speaks loudly that discrimination against unemployed workers and job-seekers is a matter of civil rights. It would amend the state’s Human Rights Act to specifically make unemployed workers and job-seekers a protected class under the state’s civil rights laws. The Act would make “freedom from discrimination based upon unemployment status in employment or based on a gap in employment history in employment” a matter of state public policy.

The Illinois Employment Advertisement Fairness Act adds the category of “unemployment related practices” and enumerates the types of violations against the unemployed that will be considered civil rights violations. It provides that it is a violation of the civil rights laws, “[u]nless otherwise authorized by law, for any employer, employment agency, or labor organization to inquire into or to use a prospective employee’s unemployment status or gap in employment history as a basis to refuse to hire or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or terms, privileges, or condition of employment.

5. California

Proposed legislation in California, introduced on January 5, 2012, also would fine California employers and employment agencies that refuse to consider jobless applicants for job

\[188\] Id.
\[189\] 775 Ill. Comp. Stat. 5/1-102 (2010).
California Assembly Bill 1450 would make it unlawful, unless based on a bona fide occupational qualification for:

■ An employer to knowingly or intentionally refuse to consider for employment or refuse to offer employment to an individual because of the individual’s status as unemployed, publish an advertisement or announcement for any job that includes provisions pertaining to an individual’s status as unemployed, as specified, or direct or request that an employment agency take an individual’s status as unemployed into account in screening or referring applicants for employment.

■ An employment agency to knowingly or intentionally refuse to consider or refer an individual for employment because of the individual’s status as unemployed, limit, segregate, or classify individuals in any manner that may limit their access to information about jobs or referral for consideration of jobs because of their status as unemployed, or publish an advertisement or announcement, as described above with respect to employers. ¹⁹¹

California Assembly Bill 1450 contains a specific intent requirement, as it places the burden on the job-seeker to show that the prospective employer or employment agency acted “knowingly and intentionally.” It would impose upon employers civil penalties that increase with each violation. The Bill includes an escalating civil penalty of $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation. ¹⁹²

Whatever their reach, all of the new laws prohibiting employers from using current employment as a litmus test for getting a job protect a greater number of unemployed job-seekers. They would fill a gap between laws protecting a limited number of job-seekers under the civil rights laws and laws that do nothing to protect many other job-seekers.

¹⁹¹ Id. (quoting Legislative counsel’s digest).
¹⁹² Calif. AB No. 1450.
VII. Are Laws that Prohibit the “Currently Employed” Job Requirement a Paper Lion?

Some people argue that the new laws that prohibit employers from posting ads or using hiring practices that require applicants to have a job to get a job are merely paper lions. Some argue that extending legal protections to more workers and job-seekers would cause more harm than good. They assert that the new laws would do little to help unemployed workers get back to work. Moreover, some people fear that legislation designed to protect unemployed workers and make them a new protected class under civil rights laws would only invite frivolous lawsuits and hurt job creation.

Critics of both the state and federal legislation say that no matter how well intended, new legislation will make unemployed workers and job-seekers a new protected class under the civil rights laws. They argue that the new laws would have dire consequences on unemployed job-seekers and the economy. They argue that the new laws would make it even more difficult for unemployed workers and job-seekers to find work because employers and employment agencies would be encouraged to go “underground” with their discriminatory hiring practices. No doubt, potential employers are perceptive about finding gaps in resumes and work history. Even if employers do not put their discrimination against unemployed workers in writing, countless resumes and applications are thrown in the trash, once a potential employer detects that the applicant is unemployed.

Critics also say that the new laws prohibiting job ads that say a job-seeker must be “currently employed” would make it even more difficult for many unemployed workers and job-seekers to get jobs because they have no strong professional or personal networks. Many jobs are informally filled through family members, friends, and other personal contacts rather than
through job ads. The fear is that the FEOA, Jobs Act, or state laws would have a chilling effect on employers who would otherwise publically announce job openings. Critics of the new laws say that employers would be encouraged to rely even more heavily on informal channels for hiring workers. “Without a public job listing, unknown workers could not apply for an open position—or sue for not being hired. While this would reduce businesses’ liability risks, it would also make it much more difficult for unemployed workers without good professional or personal networks to find work.”¹⁹³

Critics also say that more hiring through informal channels is not only bad for workers; it is bad for the economy. If businesses are forced to rely on informal channels rather than job ads, the pool of candidates available for a position is narrower and likely less qualified. Employers’ businesses would suffer. “And if businesses suffer, the U.S. economy suffers.”¹⁹⁴

There is also the fear that legislation protecting unemployed workers from discrimination would make job creation even more stagnant. The fear is that allowing unemployed workers to bring law suits against potential employers would encourage frivolous law suits and pressure employers into settling. Critics of the new laws say that employers would face substantial legal liability and cost of hiring new workers would increase. As a result, job creation would stagnate as employers “decide that attempting to fill vacancies was not worth the risk of getting sued. The end result: fewer new jobs.”¹⁹⁵

But the true goal of the new laws is to simply level the uneven playing field for unemployed workers and job-seekers. It would afford them better economic opportunities in an extremely difficult job market. Legislation is needed in order to protect workers from arbitrary

¹⁹⁴ Id.
¹⁹⁵ Id.
employment decisions. While discrimination claims are notoriously difficult to prove, proponents of the legislation say that “employers would be on notice.” The legislation would help stop employers from using discriminatory language in their job ads and refusing to look at resumes from jobless applicants.

The goal is “to give the unemployed a fair shot at earning a job rather than blithely and pointlessly writing them off.” Lisa Chenofsky Singer, a human resources consultant specializing in media and publishing jobs says that the first question often asked by a recruiter is whether an applicant currently has a job. If the answer is “no,” the unemployed applicant is not interviewed and the resume or application is thrown in the trash. She reports that employers “think you must have been laid off for performance issues,” which “is a ‘myth’ in a time of high unemployment.” But there are many reasons for unemployment besides poor performance in a weak economy. It seems counterintuitive to best business practices to hire from a smaller pool of applicants when employers’ goal is to hire the best qualified for the position.

Moreover, critics’ claims of potentially frivolous law suits are largely unfounded. A 2005 Federal Judicial Center survey reported that most U.S. District Court judges say frivolous law suits of any kind are a very small problem in the federal court system. The Federal Judicial Center survey reports that only 1 percent of 278 United States District Court judges responded that frivolous law suits were a very large problem and only 2 percent said that they were a large

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197 Id. (quoting Hank Johnson, co-sponsor of HR 2501, who points out that the high burden of proof, similar to other civil rights cases, would deter frivolous claims. “The state of the law is pretty tough on claimants in Title VII cases to prevail, but nevertheless, we do have successful claimants, and this legislation will simply put employers on notice that it’s not in their best interest to run ads saying ‘no unemployed people need apply,’ or other things such as that would show that they are prejudiced against the unemployed.”)
198 Supra note 41.
200 Id.
201 Supra note 196.
problem. Only fifteen percent of the judges said that groundless law suits were a problem at all in the federal court system.\footnote{Nat’l Council on Disability, The Americans with Disabilities Policy Brief Series: Righting the ADA, No. 5, Negative Media Portrayals of the ADA, \textit{available at} http://www.ncd.gov/publications/2003/Feb202003.} The reality is that anyone can sue any other person for anything. Businesses can sue other businesses for claimed breaches of contracts. Workers and job-seekers protected by the civil rights laws can currently sue potential employers for claimed age, race, or disability discrimination. But the portrayal that civil rights laws promote frivolous law suits is a myth. The National Council on Disability recently rebutted similar arguments that the ADA would flood the courts with fringe lawsuits and hurt business with groundless disability discrimination law suits. The National Council on Disability’s rebuttal also emphasizes how arguments against affording greater legal protections often undercut what is at the core of our legal system:

Access to the courts is a fundamental American liberty; architectural barriers notwithstanding, everyone is supposed to have access to the courthouse doors. All that it takes to bring a court action against someone is the preparation of court papers and submission of a filing fee. You can sue your neighbors because you think their chimney is ugly or your uncle because you do not like his ties. This does not mean that such lawsuits will get anywhere . . . . The test of a law’s efficacy is not whether it can prevent people from suing, but whether it gives the courts adequate standards for distinguishing between cases that have some potential merit to them from cases that are brought on a frivolous basis without any legal substance to them. The courts routinely weed out lawsuits that lack legal validity.\footnote{Id.}

The efficacy of civil rights laws are repeatedly proven, as many discrimination claimants with failed law suits can attest. A large number of discrimination claims under current laws are dismissed at preliminary stages, so the civil rights laws “obviously provide adequate statutory criteria for excluding numerous conditions that the courts find do not meet the Act’s standards
for establishing a disability.\footnote{Id.} If legislation protecting all unemployed workers is adopted, it would pass the same efficacy test as current civil rights laws.

The new laws would be just as demanding as current civil rights laws on claimants. Under the proposed federal legislation and state legislation, the burden of proof would be on the unemployed worker or job-seeker to show that he or she was discriminated against because he or she is unemployed. Significantly, the proposed legislation protects employers’ rights to consider reasons for a job applicant’s unemployment and assess whether those reasons would negatively impact job performance. The Americans Jobs Act provides:

Nothing in this Act is intended to preclude an employer or employment agency from considering an individual's employment history, or from examining the reasons underlying an individual's status as unemployed, in assessing an individual's ability to perform a job or in otherwise making employment decisions about that individual. Such consideration or examination may include an assessment of whether an individual's employment in a similar or related job for a period of time reasonably proximate to the consideration of such individual for employment is job-related or consistent with business necessity.\footnote{American Jobs Act, S.1549, 112 Cong. (2011).}

The courts construing the new laws affording legal remedies to more workers and job-seekers will be guided by precedent defining “job-relatedness” and “business necessity” in civil rights cases. Situations where the job requirement of “current employment” is more than a meaningless requirement to screen out qualified applicants will be identified and the employer will have a defense. At the same time, the playing field for unemployed workers and job-seekers will become more level.
VIII. Conclusion

President Barack Obama has said that “Americans want jobs; not handouts.” But jobs ads and hiring practices that require one to have a job to get a job condemns a large number of unemployed workers and job-seekers to long term unemployment. It forces many hard working Americans to take handouts to survive. It robs many people of the American dream, all at the expense of government, businesses, and individuals. Requiring one to have a job to get a job in a very weak economy is fundamentally unfair and disparately impacts workers and job-seekers who are older, African American, or disabled, in particular. Gap filling legislation, extending protection from discriminatory job ads and hiring practices to all unemployed workers, while at the same time allowing employers to reasonably consider the reasons for an applicants’ unemployment, would help level the playing field for all unemployed workers and job-seekers in a very difficult job market. Current civil rights laws provide the structure and balance needed to make the new legislation protecting all unemployed workers work and get unemployed workers back to work.

Throwing a jobless worker’s application in the trash solely because of joblessness is counter to good business practices. The goal of employers is to hire the best and most qualified workers, which can best be accomplished by enlarging, rather than shrinking the applicant pool. A larger pool of qualified job applicants for employers to consider makes good business sense.

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