

From social policies to organizational practice: Do national policies translate into organizational policies to retain, retrain, or rehire older workers?

Tonette S. Rocco, David Stein, Sunny L. Munn, & Gina Ginn

Abstract: How a society might value and employ older workers is reflected in the social policies governing the rights, responsibilities, and obligations of employers and employees. This study examined three major workforce policies in the United States the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act to determine the underlying values expressed in these legislative acts. The analysis suggests that while organizations follow the practices much more attention to the values regarding the worth of older workers is still necessary.

The extent to which older workers elect to remain or return to the workplace is related to an understanding of how organizations manage social, economic, political, and technological trends regarding the employment and productivity of older workers in the workplace. Federal and organizational policy and the aging baby boomer population affect these trends. Withnall (2000) refers to this group of aging, educated and healthy workers, as the Third Age of Employment. The Third Age is associated with choice, personal fulfillment and liberation (Soulsby, 2000). During the Third Age, older workers are situated in a dynamic pattern of periods of active employment, disengagement from the workplace, and re-entry into the same or new career. The purpose of this paper is to examine the influence of society through legislation on the organization and the workspace asking: how does social policy affect the employment decisions of aging workers such as to remain, return, retire, or the organization's decisions to redesign, retrain, and recruit.

The workspace has been described as a field of interacting forces where Rocco, Stein and Lee (2003) postulated five potential work patterns: renewing the relationship, redesigning the workspace, retraining older workers for a new position, retaining older workers in current positions, and recruiting older workers to fill vacancies. These patterns might characterize the relationship between an employer and an older worker. The renewing pattern, allows older workers to capitalize on their expertise and renew their relationships with organizations as entrepreneurs or consultants. For example, an older worker leaves a workplace and returns as an independent agent selling services and expertise to the former employer. For the older worker, returning as a consultant or supplier provides flexibility, new skill development, and new challenges. In the redesign pattern, jobs are redesigned to accommodate flexible work schedules or a physical redesign of the work. For example, job redesign in health care includes using lifting equipment to reduce bending by older workers (Mullich, 2004). Retraining involves an organization's commitment to older workers seeking new positions within the same organization. It can also involve retraining to enhance technical skills. Today, organizations are realizing that losing older workers reduces productivity and organizational memory. Therefore, efforts are made to retain older workers.

Method

A policy review was conducted which illustrates reasons for the creation of the policy and its phases of implementation and societal receipt (Bardach, 2000). We examined the influence on organizational decisions about retaining, retraining, recruiting or retiring older workers and the counterpoint decisions of the individual. We selected national legislation such as the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act.

Insights from the Analysis

The national policies provide notice to organizations that older workers are a valued source of knowledge and experience. Age, family responsibilities or physical ability should not be more important to the employer than continued and sustained performance. Federal policies concerning older workers may encourage new employment patterns and encourage organizations to proactively seek strategies to make the workspace more accommodating toward older workers. They also have the potential to discourage such actions. These laws are intended to protect a growing percentage of the United States population from employment discrimination. However, with the implementation and enforcement of these policies, many still face employment discrimination. Providing incentives for companies and organizations to retain, retrain, or rehire this population of workers, can benefit society socially and economically.

The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA), was enacted as the first social policy prohibiting discrimination in employment against workers ages 40-65 and indicated a mandatory retirement age of 65. The ADEA was designed to protect older workers in the workforce, specifically their ability to retain and regain employment, as well as to receive retraining within current employment. In 1960, prior to the ADEA numerous states had already enacted laws protecting workers within certain age brackets (Stock & Beegle, 2004). The ADEA also outlawed the establishment of “arbitrary age limits” often set by employers to displace and disadvantage older workers when seeking or retaining employment. Because of such discrimination, older workers were more likely to suffer from unemployment than their younger counterparts: ADEA was a countermeasure to these inequities (P.L. 90-202, 1967).

The ADEA acts to prohibit age discrimination in numerous facets for multiple entities, including employers, employment agencies, and labor organizations. The ADEA was created to reduce the occurrences of employment discrimination due to an employee’s age (Johnson & Neumark, 1996). This legislation only applies to employers with twenty or more employees, but is inclusive of all employers including state and local governments (www.eeoc.gov/types/age.html). The ADEA protects employees and/or potential employees in apprenticeship programs, pre-employment inquiries, benefits, and job notices. Though the ADEA does not directly prohibit an employer from asking a job applicant’s age or date of birth, employers are in violation if they choose to terminate employment or refuse hiring of an individual, or attempt to remove company compensation or benefits due to an employee’s age.

Many employers denied benefits to older workers that were offered to younger workers because it often costs more to provide benefits for an older adult, hence the creation of the Older Workers Protection Act of 1990 (OWPA). Should the employer attempt to separate employees

based on age in a manner that inhibits one's ability to prosper within the organization or to reduce the wage of an employee based on age, the employer is in violation of ADEA and subject to charges of discrimination (P.L. 90-202, 1967). Additionally, the displacement of older, more expensive workers often saves organizations money because they can be replaced with younger, less expensive employees (Koeber & Wright, 2001). Similar consequences occur for employment agencies that "fail to refer" an individual for employment based on age (P.L. 90-202 § (4), 1967). There are exceptions to the ADEA, which allow employers to make decisions based on age when a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" can be demonstrated (P.L. 90-202, 1967, §623(F) (1)). Discrimination is also allowed if "good cause" is discovered for dismissal of an employee ((P.L. 90-202, 1967, §623(F)(1)), §623 (f)(3)). Although, mandatory retirement laws are outdated, some remain such as a mandatory age limit of firefighters and law enforcement officers.

The Age Discrimination in Employment Act of 1967 has undergone multiple amendments. For instance, the 1974 amendments to ADEA extended the original legislation to state employers instead of solely private employers. Via the Fair Labor Standards Amendments of 1974 (FLSA), the word "employer" was amended to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State" (FLSA, §630b). In 1974 it was also amended to protect workers ages 40 to 70 as opposed to only 65. However, the FLSA indicated a mandatory retirement age of 70. Mandatory retirement was finally abolished in 1986. Two studies, Neumark & Stock (1997) and Adams (2000) found that the ADEA has aided in the increase of employment opportunities available to workers 60 years and older. However, Adams (2000) also found that due to the ADEA, those 65 and older were less likely to be a new hire. This has attributed to decreased retirement rates since the implementation of the ADEA.

The Age Discrimination Act of 1975 extends coverage of the Age Discrimination in Employment Act by protecting all persons in the United States, "on the basis of age, [from] be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under, any program or activity receiving Federal financial assistance" (Age Discrimination Act, Section 6102). Under no circumstances should this act be construed in such a way that it violates the provisions of the Age Discrimination in Employment Act of 1967. The Commission on Civil Rights has an obligation to research and to provide the results and analysis of age discrimination where applicable to federal funds. Under the 1979 President's Reorganization plan, all issues related to age discrimination were transferred to the Equal Employment Opportunity Commission (EEOC). Established via Title VII of the Civil Rights Act of 1964, the EEOC is the federal agency, which is responsible for overseeing, coordinating and enforcing all Federal Equal Employment Opportunity (EEO) Laws. By examining these laws concerning hiring, retaining, and retraining workers in the next several decades, it is important to understand how companies can encourage or discourage employment of older workers.

The Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (FMLA) provides opportunities for both males and females to leave the workplace temporarily in order to care for a child or an ill parent (P. L. 103-3). Although, the FMLA tends to focus on balancing the duties of work and home in terms of birthing and raising children, this act does have implications for older workers. The FMLA allows individuals to take up to 12 weeks of unpaid leave from a job with the security that they will return to their same job or a similar job. Workers can take this time to 1) care for

an immediate family member such as child, spouse, or parent, 2) care for oneself, 3) care for a newborn baby, and 4) care for a recently adopted child. Workers are eligible to utilize the benefits of the FMLA if they have been employed for at least 12 months and worked a minimum of 1250 hours during that period, and their employer has more than fifty employees (FMLA, Section 101). Although, many employers with fewer than fifty employees abide by this legislation they are not required to because it is thought that the absence of one employee for 12 weeks could potentially damage their businesses.

The act also finds it unlawful for an employer to discriminate against an employee for the use of this benefit. For example, a worker may take time off work to care for an aging parent, or an older worker may take the time off work to care for him/herself. All protections under the ADEA and other anti-discrimination policies are applicable in this situation. Another example of how the FMLA applies to older workers occurs when an older worker survives a child and is needed at home to take care of grandchildren. Older workers may take over the position of parent once again. The same job or equivalent job must be available for the worker upon return. If an employee chooses to utilize the benefits of the FMLA, they do so unpaid by their employer. However, pertinent to the FMLA is the issue of informal care giving and its economic value. The consequences of informal long-term care giving for an older adult and/or disabled individual are minimally addressed in public policy. The FMLA only allows 12 weeks for an individual to care for such a person and without pay; therefore placing an incredible economic burden on the employee should they have to take the time away from work. Arno, Levine, and Memmott (1999) note that policy adjustments should be made to the FMLA to compensate for the economic costs of informal care. Such costs could be supplemented by the government or the employer. However, the employer may also incur additional costs as the absence of an employee may cause them to hire a contingent worker and/or pay other workers overtime.

Americans with Disabilities Act of 1990

The Rehabilitation Act of 1973 was implemented to eliminate discrimination within federal work environments due to disability. It requires nondiscrimination in federal employment, accessibility in federal buildings, affirmative action in employment by federal contractors and nondiscrimination by the recipients of any federal funds (Schaffner & Van Horn, 2003).

In 1990, the Americans with Disabilities Act (ADA) was passed to prohibit discrimination of individuals with disabilities and mandates reasonable accommodations. Disabilities can be both visible and invisible and can be mental, cognitive, or physical. Currently, the ADA provides for accommodations to be made for people with disabilities. The ADA states that if an individual can perform the essential function of the job, reasonable accommodations should be made for the person as long as it does not cause undue hardship to the employer (Americans with Disabilities Act: P.L. 336). The baby boomer generation is comprised of nearly 76 million aging adults (Appel, 2005). Advanced age brings about new disabilities that were not previously there. For instance, many may become disabled due to hearing loss, vision impairments or other aging conditions. Issues regarding an individual's age and accessibility can change the impact that the ADA has on the workplaces and the surrounding community (Appel, 2005). As a result, accessibility within the community and the workforce may be affected (Appel, 2005).

Since the enactment of the ADA, several Supreme Court cases have influenced the implementation of the ADA as it pertains to older workers. *Murphy vs. United Parcel Service*,

Inc. (1999) involved an employee hired by the United Parcel Service (UPS) as a commercial driver. The position required a Department of Transportation (DOT) health certification which documented “no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely” ([49 CFR § 391.41 (b)(6)] as in (Katsiyannis & Yell, 2002). Murphy was hired, and subsequently fired due to incorrect medical documentation. The 10th circuit court ruled that Murphy’s hypertension was not a disability because he could function normally in everyday activities, and therefore did not qualify under the ADA. The Supreme Court upheld this judgment by stating that Mr. Murphy’s condition only limited him from performing this particular job, thus having insufficient grounds for being protected under the ADA. Additionally, the Supreme Court stated that employees who can function normally when an impairment is treated do not qualify for protection under the ADA (Katsiyannis & Yell, 2002). A person must presently, not potentially or hypothetically, have a substantial limit in their ability to work. Therefore, a person may be considered too disabled to be hired or not disabled enough to challenge an employer’s judgment for hire, while reserving eligibility for those who “truly” qualify (Katsiyannis & Yell, 2002). Rulings such as these may have had an affect on the reduction in the number of people with disabilities in the labor force since the passage of the ADA (Houtenville & Daly, 2003). This case is pertinent to older workers because the Administration on Aging found that most older adults have at least one chronic condition such as hypertension and many have multiple conditions. In 2000-2001, hypertension (49.2%), arthritic symptoms (36.1%), all types of heart disease (31.1%), cancer (20.0%), sinusitis (15.1%), and diabetes (15.0%) were among the most frequent medical conditions effecting older adults (Administration of Aging, A Profile of Older Americans: 2004). Because these conditions can be treated with medication, as in the Murphy ruling, special accommodations in the workplace or in the hiring process are not required. This could have serious implications for older workers who wish to retain or re-enter the workforce.

The Murphy ruling causes reflection on the extent to which the ADA can have a positive effect on employment and accommodations for people with disabilities. Some argue that the Murphy ruling stripped the definition of a disability of its intended meaning. This judgment creates a need for the ADA to protect those truly in need of the protection. If a person is legitimately limited in his or her work ability for which medication is not an option, they qualify under the ADA (Katsiyannis & Yell, 2002).

Concluding thoughts

These laws are intended to protect a growing percentage of the United States population from employment discrimination. Without the enforcement of these policies, many older workers face unemployment. Providing incentives for companies and organizations to retain, retrain, or rehire this population of workers, can benefit society socially and economically. Since, increasing global competition causes increasing costs for employers and little incentive to keep aging employees. Older workers often have a need for retraining, increased health care and family care, causing employers to encourage retirement.

In response to organizational and social forces, employers make policy decisions to retain, recruit, and retrain older workers as a strategy to maintain an experienced workforce and possibly, alleviate shortages of skilled experienced workers. The decision to remain in the workplace is dependent upon the employer’s decision to provide training opportunities, modify the work environment to account for the physiological changes of age, assign tasks that build

upon the older worker's experience and expertise, and recognize the place of work in the life situation of the older worker.

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Tonette Rocco, Associate Professor, Florida International University roccot@fiu.edu; David Stein, Associate Professor, The Ohio State University stein.1@osu.edu; Sunny L. Munn, munn.12@osu.edu and Gina Ginn, ginn6042@aol.com doctoral students, The Ohio State University

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