

PROTECT OLDER JOB APPLICANTS ACT OF 2021

SEPTEMBER 23, 2021.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SCOTT of Virginia, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3992]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3992) to amend the Age Discrimination in Employment Act of 1967 to prohibit employers from limiting, segregating, or classifying applicants for employment, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The amendments are as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Protect Older Job Applicants Act of 2021” or “POJA Act of 2021”.

**SEC. 2. PROHIBITION AGAINST LIMITING, SEGREGATING, OR CLASSIFYING APPLICANTS FOR EMPLOYMENT.**

Section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(a)(2)) is amended—

- (1) by inserting “or applicants for employment” after “employees”, and
- (2) by inserting “or as an applicant for employment” after “employee”.

Amend the title so as to read: “A bill to amend the Age Discrimination in Employment Act of 1967 to prohibit employers from limiting, segregating, or classifying applicants for employment.”.

**PURPOSE AND SUMMARY**

Approximately 3.8 million Americans age 40-and-over are currently unemployed.<sup>1</sup> Ideally, the *Age Discrimination in Employment Act of 1967* (ADEA)<sup>2</sup> should protect these older workers from age discriminate hiring practices as they seek new employment. However, recent decisions in the Seventh and Eleventh Circuit Courts of Appeals have eroded one of the central tools older job applicants use to counteract age discrimination—the ADEA disparate impact provision. In these two jurisdictions, employers can now use facially neutral hiring practices that discriminate against older job applicants on the basis of their age without fear of legal repercussion under federal law.

H.R. 3992, the *Protect Older Job Applicants Act* (POJA), amends the ADEA to make clear that the disparate impact provision in the statute protects older “applicants for employment” and not just those already employed. By adding the term “applicants” to the ADEA, POJA cures the problem created by the two federal circuit court holdings, aligns the ADEA with the parallel statute under Title VII of the *Civil Rights Act of 1964* (Title VII),<sup>3</sup> and gives force to the Equal Employment Opportunity Commission’s (EEOC) long-held interpretation that the ADEA disparate impact provision protects job applicants. This legislation complements the amendments to the ADEA that were passed by the U.S. House of Representatives in the *Protecting Older Workers Against Discrimination Act of 2021* (H.R. 2062) on June 23, 2021, which clarifies that the mixed motive evidentiary standard applies to disparate treatment claims under the ADEA.

**COMMITTEE ACTION**

**116TH CONGRESS**

On September 9, 2020, Representative Sylvia Garcia (D–TX–29) introduced H.R. 8381, the *Protect Older Job Applicants Act*. The bill was referred to the Committee on Education and Labor (Committee). No further action was taken on the bill.

<sup>1</sup>Table A–13 *Employment status of the civilian noninstitutional population by age, sex, and race*, BUREAU OF LAB. STAT., <https://www.bls.gov/web/empsit/cpseea13.pdf> (last visited Aug. 18, 2021).

<sup>2</sup>Age Discrimination in Employment Act of 1967 § 4(a), 29 U.S.C. § 623(a).

<sup>3</sup>Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e–2.

## 117TH CONGRESS

On March 18, 2021, the Committee’s Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections held a joint hearing entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.*” During this hearing, Laurie McCann, Senior Attorney representing AARP Foundation, testified on the impact of age discrimination on the workforce and offered recommendations for improving legal protections under the ADEA for older workers. Additionally, Ms. McCann discussed the Seventh Circuit’s *Kleber v. CareFusion Corporation* decision,<sup>4</sup> which held older job applicants cannot sue under the ADEA, and the trend of judicial holdings reducing the ADEA’s legal protections for older job applicants under its disparate impact provision.<sup>5</sup>

On June 17, 2021, Representative Garcia (TX) introduced H.R. 3992, the *Protect Older Job Applicants Act*. H.R. 3992 was referred to the Committee.

On July 15, 2021, the Committee held a full committee markup of H.R. 3992. The Committee adopted an Amendment in the Nature of a Substitute (ANS) offered by Representative Susan Wild (D-PA-7).

The ANS incorporated the provisions of H.R. 3992, as introduced, with the following modification:

- Changed the title of the bill from “Protect Older Job Applicants Act” to “Protect Older Job Applicants Act of 2021.”

Four amendments to the ANS were offered:

- Representative Mariannette Miller-Meeke (R-IA-2) offered an amendment to prevent the bill from prohibiting or limiting an employer from recruiting or interviewing for employment students attending high schools, Job Corps centers, colleges, or universities, provided such recruiting or interviewing is not intended to discriminate because of age. The amendment failed by a vote of 20 Yeas and 26 Nays.
- Representative Rick Allen (R-GA-12) offered an amendment to prevent the bill from prohibiting or limiting an employer from operating an apprenticeship or internship program, provided such program is not intended to discriminate because of age. The amendment failed by a vote of 20 Yeas and 26 Nays.
- Representative Julia Letlow (R-LA-5) offered an amendment to prevent an employer from being prohibited or limited from posting job openings on job search websites and on online job boards, provided such posting is not intended to discriminate because of age. The amendment failed by a vote of 19 Yeas and 26 Nays.
- Representative Fred Keller (R-PA-12) offered an amendment requiring a Government Accountability Office (GAO) study to determine whether disallowing disparate impact discrimination claims by applicants for employment under the ADEA has a significant negative impact on such applicants.

<sup>4</sup>*Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019) (*en banc*) (adopting the interpretation of the Eleventh Circuit in *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016)).

<sup>5</sup>*Id.* at 484–88.

The Act would only go into effect if the GAO study found there is no significant negative impact from disallowing such claims. The amendment failed by a vote of 19 Yeas and 26 Nays.

H.R. 3992 was reported favorably, as amended, to the House of Representatives by a vote of 26 Yeas and 19 Nays.

## COMMITTEE VIEWS

### INTRODUCTION

In 1967, Congress passed the ADEA to prohibit age discrimination in employment. Because age discrimination harms both employed and job-seeking older workers, the ADEA prohibits all forms of age discrimination, including age discrimination in hiring, and protects “any individual” regardless of their employment status.<sup>6</sup> The ADEA provides two methods of seeking relief for an age discrimination claim. The first method is the disparate treatment provision under section 4(a)(1) prohibiting intentional age discrimination.<sup>7</sup> The second method is the disparate impact provision under section 4(a)(2) prohibiting practices that are facially neutral with regard to age but have the effect of harming older workers more than younger workers, unless the employer can show reasonable factors other than age caused the disparity.<sup>8</sup> Proof of intent to discriminate is not a requirement in a disparate impact claim.<sup>9</sup>

Job applicants who are denied a job because of their age have sought protection under either or both the disparate treatment and disparate impact provisions of the ADEA. However, a job applicant can only rely on the disparate impact provision when an employer uses a hiring practice that statistically harms older applicants but lacks any intent to do so. For example, an employer might cap the number of years of prior working experience an applicant is allowed to have to apply for a job. A hiring policy such as this disparately harms older workers based on their age even though the employer may not intend to discriminate against any individual applicant. These neutral seeming but harmful hiring practices can only be addressed with a disparate impact theory of age discrimination.<sup>10</sup>

In 2016, the Eleventh Circuit in *Villarreal v. R.J. Reynolds Tobacco Company* read the disparate impact provision of the ADEA more narrowly so as to not cover older job applicants.<sup>11</sup> Just three years later in 2019, the Seventh Circuit adopted the same interpretation in *Kleber v. CareFusion Corporation*.<sup>12</sup> These circuit decisions misinterpret the ADEA, overturn decades of EEOC guidance, and contradict the Supreme Court’s own interpretation of parallel

<sup>6</sup>Age Discrimination in Employment Act § 4(a).

<sup>7</sup>Age Discrimination in Employment Act § 4(a)(1), “It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”

<sup>8</sup>Age Discrimination in Employment Act § 4(a)(2), “It shall be unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age”; see also *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241 (2005) (holding ADEA § 623(a)(2) supports a disparate impact theory of suit).

<sup>9</sup>*Smith*, 544 U.S. at 234–35.

<sup>10</sup>*Kleber*, 914 F.3d at 507 (Hamilton, J. dissenting).

<sup>11</sup>*Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (*en banc*) (holding older job applicants may not sue for disparate impact age discrimination).

<sup>12</sup>*Kleber*, 914 F.3d at 480.

disparate impact language in Title VII; still, the Supreme Court denied *certiorari* to review either decision.<sup>13</sup> Therefore, it is incumbent upon Congress to act to fully restore this provision's protections.

POJA is supported by AARP and the National Council on Aging.

THE HISTORY, TEXT, AND AUTHORITATIVE INTERPRETATIONS OF THE  
ADEA CONFIRM OLDER JOB APPLICANTS ARE COVERED BY ITS DIS-  
PARATE IMPACT PROVISION

One of the central goals of the disparate impact provision of the ADEA is to prevent age discrimination in hiring.<sup>14</sup> This goal formed out of the long history of congressional action to prohibit age discrimination in employment. After amendments to the *Equal Employment Opportunity Act of 1962*<sup>15</sup> and Title VII to include age as a protected class failed, Congress directed then-Secretary of Labor Willard Wirtz to make a “full and complete study of the factors which may tend to result in discrimination in employment because of age.”<sup>16</sup> This resulted in the Department of Labor’s 1965 report, *The Older American Worker: Age Discrimination in Employment*, otherwise known as the Wirtz Report, regarded as the most influential source material used by Congress in crafting the ADEA.<sup>17</sup>

Hiring discrimination was a central issue discussed in the Wirtz Report, which found managers made “negative decisions regarding older applicants in advance of any review of individual qualifications by setting upper age limits as a matter of formal or informal hiring policy.”<sup>18</sup> The report also found these age discriminate hiring practices were widespread; approximately half of all private job openings were barred to individuals over age 55, and a quarter barred to those age 45 and over.<sup>19</sup> The Wirtz Report recommended: “To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite *unintentionally lead to age limits in hiring.*”<sup>20</sup>

Lawmakers in the 90th Congress incorporated the Wirtz Report’s call to action as they crafted the ADEA. The chief sponsor of the ADEA in the Senate, Sen. Ralph Yarborough (D–TX), advocated in specific terms the law would protect older job applicants. He stated: “It is time that we turn our attention to the older worker who is not ready for retirement—but who cannot find a job because of his age, despite the fact that he is able, capable, and efficient.”<sup>21</sup> Manager of the House bill, Rep. Carl Perkins (D–KY), added that in his “own district in Kentucky . . . thousands of former coal miners”

<sup>13</sup> See *Villarreal v. R.J. Reynolds Tobacco Co.*, 137 S. Ct. 2292 (2017) (denying petition for writ of *certiorari*); *Kleber v. CareFusion Corp.*, 140 S. Ct. 306 (2019) (denying petition for writ of *certiorari*).

<sup>14</sup> See *Kleber*, 914 F.3d at 507 (Hamilton, J., dissenting).

<sup>15</sup> H.R. 10144, 87th Cong. (1962).

<sup>16</sup> REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 1 (1965) [HEREINAFTER WIRTZ REPORT].

<sup>17</sup> See generally *id.*; see also *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587–91 (2004) (discussing the strong influence of the Wirtz Report on the ADEA’s text).

<sup>18</sup> REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT: RESEARCH MATERIALS 7 (1965).

<sup>19</sup> *Id.* at 6.

<sup>20</sup> WIRTZ REPORT, *supra* note 16, at 22 (emphasis added).

<sup>21</sup> *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the S. Subcomm. On Labor, Comm. On Labor and Public Welfare*, 90th Cong. 22 (1967).

learned “age is a great handicap in finding a job” but the proposed ADEA would redress “this longstanding misconception about the employability of older workers.”<sup>22</sup>

These conclusions are also cemented in the text of the ADEA, both in the congressional statement of findings and purpose and the disparate impact provision itself. The statement of findings and purpose specifically refers to unemployment and hiring: “older workers find themselves disadvantaged in their efforts to retain employment, and especially to *regain employment* when displaced from jobs” and “the incidence of unemployment, *especially long-term unemployment* . . . is, relative to the younger ages . . . great and growing; and their employment problems grave.”<sup>23</sup>

The text of the disparate impact provision also reflects a concern for protecting all workers, including applicants. Section 4(a)(2) broadly includes “any individual” from being deprived of “employment *opportunities* . . . because of such individual’s age.”<sup>24</sup> This language does not limit legal claims only to the employed, and it is illogical to suggest ‘any individual’ who seeks ‘employment opportunities’ does not include older job applicants. The simplest interpretation of this text is that the disparate impact provision “easily reaches employment practices that hurt older job applicants as well as current older employees.”<sup>25</sup>

In fact, the Supreme Court already agreed with this interpretation in the context of disparate impact claims under Title VII. Title VII is an authoritative source for interpreting the ADEA because, in the words of the Court, the ADEA was “‘derived *in haec verba* from Title VII.’”<sup>26</sup> As enacted in 1967, the ADEA’s disparate impact language was identical to the disparate impact language in section 703(a)(2) of Title VII.<sup>27</sup> Interpreting this shared language in their 1971 decision, *Griggs v. Duke Power*, the Supreme Court held job applicants can in fact sue for disparate impact discrimination on the basis of race.<sup>28</sup>

*Griggs* is the foundational case for interpreting disparate impact in civil rights cases and a “precedent of compelling importance.”<sup>29</sup> Therein, African American jobseekers and employees who were seeking promotions were harmed by long-standing practices that invidiously discriminated on the basis of race.<sup>30</sup> Writing for the majority, Chief Justice Burger identified job applicants as a class of workers capable of suing under the disparate impact language: “Congress has now required that the posture and condition of the *job-seeker* be taken into account.”<sup>31</sup> Justice Burger’s use of the

<sup>22</sup> 113 Cong. Rec. 34738, 34740 (1967).

<sup>23</sup> 29 U.S.C. § 621(a) (emphasis added).

<sup>24</sup> 29 U.S.C. § 623(a)(2) (emphasis added).

<sup>25</sup> *Kleber*, 914 F.3d at 491 (Hamilton, J. dissenting); see also *Villarreal*, 839 F.3d at 984 (Martin, J. dissenting) (“[N]o one disputes that ‘any individual’ in § 4(a)(1) refers to job applicants. And a word or phrase is presumed to bear the same meaning throughout the text.”); and see *Rabin*, 236 F.Supp.3d at 1128 (“The plain language of the statute supports the more inclusive interpretation.”).

<sup>26</sup> See *Smith*, 544 U.S. at 233–34 (citing *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

<sup>27</sup> Civil Rights Act of 1964, Pub. L. No. 88–352, § 703, 78 Stat. 241.

<sup>28</sup> *Griggs v. Duke Power*, 401 U.S. 424, 430–31 (1971) (holding employer was prohibited from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs). The Supreme Court’s “unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance” in interpreting the ADEA § 623(a)(2). See *Smith*, 544 U.S. at 234.

<sup>29</sup> *Smith*, 544 U.S. at 233–34.

<sup>30</sup> *Griggs*, 401 U.S. at 430–31.

<sup>31</sup> *Id.* at 431 (emphasis added).

term ‘job-seeker’ without specifying the particular protected class in *Griggs*, also underscores the shared purpose of the disparate impact language in these civil rights laws: discriminatory practices that disparately harm workers on the basis of race should be equally resisted on the basis of all protected categories like sex, religion, ability, and age.

Subsequent to the *Griggs* decision, Congress amended the Title VII disparate impact provision to adopt the common law interpretation of that statute, adding ‘applicants for employment’ in the *Equal Employment Opportunity Act of 1972*.<sup>32</sup> It should be noted, this amendment was not intended to distinguish Title VII from disparate impact provisions in other civil rights laws, rather, the Congressional Record states the amendment was “merely declaratory of present laws” and meant to “make it clear that discrimination against applicants for employment . . . is an unlawful employment practice.”<sup>33</sup>

Federal courts also did not read this amendment to Title VII as a substantive change. Instead of distinguishing Title VII from the ADEA, federal circuit courts continued to recognize that civil rights laws, and the ADEA in particular, protect job applicants from disparate impact discrimination. This is evident in federal circuit cases in the decades following *Griggs*, wherein no fewer than five federal circuit courts allowed disparate impact claims made by job applicants under the ADEA.<sup>34</sup> During this period, neither the courts nor employer-defendants questioned whether applicants had the ability to pursue a claim under the disparate impact provision of the ADEA. Although it was uncertain in these federal circuit decisions whether the ADEA authorized a disparate impact claim under the particular text of section 4(a)(1) or (2) (unclear until the Supreme Court’s 2005 decision in *Smith v. City of Jackson, Miss.*),<sup>35</sup> what is certain is that so long as a job applicant-plaintiff was a member of the 40-and-over protected class defined by section 12 of the ADEA, the applicant could file a suit relying on a disparate impact theory of the law.<sup>36</sup>

For example, in the Second Circuit Court’s 1980 decision *Geller v. Markham*, a teacher who applied for a school position, but was rejected in lieu of a younger applicant, successfully asserted a *prima facie* disparate impact claim by “showing that an employer’s facially neutral practice has a disparate impact upon members of plaintiff’s class, in this case teachers over 40 years of age.”<sup>37</sup> There was no dispute or question about whether the plaintiff-teacher

<sup>32</sup>Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 7, 86 Stat. 103.

<sup>33</sup>*Kleber*, 914 F.3d 501 (Hamilton, J. dissenting) (citing 118 CONG. REC. 7,169 (1972)). The Senate report reiterated the amendment would “merely be declaratory of present law.” *Id.*

<sup>34</sup>See *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1423–24 (10th Cir. 1993) (laid-off warehouse workers applying for jobs with new buyer of warehouse; summary judgment affirmed on separate issue); *Wooden v. Board of Educ. of Jefferson Cty.*, 931 F.2d 376, 377 (6th Cir. 1991) (applicant for full-time teaching position; summary judgment affirmed on separate issue); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1365–70 (2d Cir. 1989) (laid-off teachers later re-applied but were not hired; motion to dismiss affirmed on other grounds); *Geller v. Markham*, 635 F.2d 1027, 1030 (2d Cir. 1980) (upholding jury award for teacher applicant temporarily hired, then passed over in favor of younger applicant due to ‘cost-cutting policy’); and see *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 689–90 (8th Cir. 1983) (faculty member forced to re-apply for job and not hired).

<sup>35</sup>*Smith*, 544 U.S. at 540 (clarifying that 29 U.S.C. 623(a)(2) supports a disparate impact theory of a claim).

<sup>36</sup>See *Smith*, 544 U.S. at 228 (2005) (affirming ADEA disparate impact theory of a suit under § 623(a)(2)).

<sup>37</sup>*Geller*, 635 F.2d at 1032 (citing *Griggs*, 401 U.S. at 429–30).

could sue for disparate impact as an outside applicant. The Supreme Court in *Griggs* already answered that question, and the purpose of the law itself was obvious: the ADEA prohibits age discrimination by employers against any individual. As the Eighth Circuit noted just three years later in their 1983 *Leftwich* decision:

In enacting the ADEA, Congress was plainly concerned about unemployment among older workers and the difficulty they encounter in obtaining or retaining employment. The express purpose of the Act is ‘to promote employment of older persons based on their ability rather than age’ and ‘to prohibit arbitrary age discrimination in employment.’<sup>38</sup>

In addition to these federal circuit decisions, agency interpretations have always agreed that the ADEA disparate impact provision covers applicants. Originally, the Department of Labor (DOL) was tasked with administering the ADEA. In 1968, the DOL issued regulations for interpreting the Reasonable Factors Other than Age (RFOA) defense, which eventually became the affirmative RFOA defense to disparate impact claims as it is known today. The DOL explained therein that hiring policies are also subject to disparate impact coverage: “The clear purpose is to insure [sic] that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding *hiring*, dismissal, promotion or any other term, condition or privilege of employment of an individual.”<sup>39</sup>

The EEOC, tasked with enforcing the ADEA since 1978, has also “long interpreted the ADEA as permitting disparate impact claims by job-seekers.”<sup>40</sup> As the EEOC argued in a 1995 ADEA disparate impact case, “By its express terms, section 4(a)(2) is not limited to protecting incumbent employees . . . the employer may not engage in such conduct ‘in any way which would deprive or tend to deprive any individual of employment opportunities.’”<sup>41</sup> It is particularly confounding that the Seventh and Eleventh Circuit decisions barring ADEA disparate impact claims to applicants largely ignored these consistent agency interpretations of the statute, particularly given the Supreme Court has provided wide deference to the EEOC’s interpretations of section 4(a)(2) in the past.<sup>42</sup>

For forty-five consecutive years, the history, text, and authoritative interpretations of the ADEA disparate impact provision indicated that it protected older job applicants from age discriminate hiring practices.

#### THE SEVENTH AND ELEVENTH FEDERAL CIRCUIT COURT DECISIONS DISREGARD HISTORY AND ELIMINATE AN IMPORTANT LEGAL TOOL FOR OLDER JOB APPLICANTS

The factual records of the *Villarreal* and *Kleber* decisions reflect the sort of widespread, endemic hiring discrimination originally criticized by the Wirtz Report, and which still harms older workers

<sup>38</sup> See *Leftwich*, 702 F.2d at 691.

<sup>39</sup> 33 Fed. Reg. 9173 (1968).

<sup>40</sup> *Rabin*, 236 F.Supp.3d at 1132. See also *Villarreal*, 839 F.3d at 989 (Martin, J. dissenting).

<sup>41</sup> Brief for the Petitioner, Equal Emp. Opportunity Comm’n v. Francis W. Parker Sch., 1995 WL 17047545, 13 (1995) (No. 94–1558) (Appellate Petition, Motion and Filing), *cert. denied*, 515 U.S. 1142 (1995).

<sup>42</sup> See *Smith*, 544 U.S. at 239–40.



to this day. These cases underscore the need for Congress to clarify the disparate impact provision of the ADEA for older job applicants.

On November 8, 2007, 49-year-old Richard Villarreal applied for a manager position at R.J. Reynolds Tobacco Company (RJR).<sup>43</sup> RJR hiring guidelines described the target candidate as someone who was “2–3 years out of college” and to exclude applicants with “8–10 years” of experience in sales.<sup>44</sup> Villarreal had over 8 years of sales experience and graduated from college well over 3 years prior to applying for the job at RJR.<sup>45</sup> His application was rejected, presumptively for exceeding these experience requirements. Villarreal filed suit in federal court for age discrimination based on a hiring practice with an age discriminate disparate impact on older workers.<sup>46</sup>

Although Villarreal’s suit was dismissed by the district court, Villarreal won his appeal before a panel of the Eleventh Circuit Court of Appeals. The majority opinion deferred to the expertise of the EEOC, concluding that “the agency charged with enforcing the ADEA, has reasonably and consistently interpreted the statute to cover claims like Mr. Villarreal’s.”<sup>47</sup> After RJR appealed for a rehearing in front of the entire Eleventh Circuit sitting *en banc*, the panel decision was reversed, and the court held that 29 U.S.C. § 623(a)(2) does not allow job applicant disparate impact claims.<sup>48</sup>

The Seventh Circuit’s *Kleber* decision was similarly contentious. In 2014, 59-year-old Dale Kleber applied for a senior in-house counsel position with CareFusion Corporation.<sup>49</sup> Kleber had significant prior legal and corporate management experience as the CEO of a national dairy trade association, general counsel to a Fortune 500 corporation, and Chairman and interim CEO of a medical device manufacturer.<sup>50</sup> Although the open position was titled “Senior Counsel,” the job description also included that applicants should have “3 to 7 years (no more than 7 years) of relevant legal experience.”<sup>51</sup> CareFusion did not select Kleber for an interview and ultimately hired an applicant who was twenty-nine years old.<sup>52</sup>

As with *Villarreal*, Kleber originally prevailed before a panel of the Seventh Circuit Court of Appeals. In addition to deferring to the history and congressional intent behind the ADEA disparate impact provision, the court pointed out the “improbable view that the Act outlawed employment practices with disparate impact on older workers, but limited the protection to those already employed by the employer in question.”<sup>53</sup> In other words, it is illogical to suggest Kleber could not sue for age discrimination because he was an *outside* applicant, but a lawyer of the same age and having the

<sup>43</sup> *Villarreal*, 839 F.3d at 961.

<sup>44</sup> *Id.*

<sup>45</sup> *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12–CV–0138–RWS, 2013 WL 823055, at \*1 (N.D. Ga. Mar. 6, 2013).

<sup>46</sup> *Villarreal*, 839 F.3d at 961.

<sup>47</sup> *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1290 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15–10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016).

<sup>48</sup> *Villarreal*, 839 F.3d at 958.

<sup>49</sup> *Kleber v. CareFusion Corp.*, No. 15–CV–1994, 2015 WL 7423778, at \*1 (N.D. Ill. Nov. 23, 2015).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Kleber v. CareFusion Corp.*, 888 F.3d 868, 879 (7th Cir. 2018); *see also Kleber*, 914 F.3d at 505 (Hamilton, J. dissenting).

same qualifications as Kleber already employed by CareFusion would be able to sue for age discrimination as an *inside* applicant. Essentially, barring Kleber from making a disparate impact claim would mean “the ADEA prohibits hiring discrimination, but not for job applicants!”<sup>54</sup>

This irony was lost on a rehearing before the entire Seventh Circuit sitting *en banc*. The Seventh Circuit ignored the long history of giving the ADEA similar treatment to Title VII and the EEOC’s own legal interpretation supporting applicant disparate impact coverage.<sup>55</sup> Instead, the Seventh Circuit distinguished the ADEA from the declaratory amendment that added applicant language to Title VII in 1972, despite the evidence of the Congressional Record weighing against this interpretation.<sup>56</sup>

As a matter of practical application, *Villarreal* and *Kleber* create a problematic loophole in the ADEA, opening the door for employers to engage in invidious age discrimination in hiring. It is not enough to suggest older applicants are still protected under a disparate treatment claim (intentional discrimination); the most salient problem older workers face in hiring is not plainly visible, intentional age discrimination, but neutral practices which disparately harm older workers.<sup>57</sup> These practices, like the experience caps and college graduation year requirements exhibited in *Villarreal* and *Kleber*, can only be counteracted by relying on a disparate impact theory of a legal claim. By passing POJA, Congress can ensure future older individuals who are seeking new employment, harmed as Villarreal and Kleber were, are at least given an opportunity to file a federal claim in court and challenge these discriminatory practices.

The *Villarreal* and *Kleber* decisions also draw an arbitrary and problematic legal line for determining who is an outside or inside applicant and allowed to bring a disparate impact claim under the ADEA. For example, are employers allowed to use age or years-of-experience hiring requirements against furloughed employees who attempt to return to their former jobs?<sup>58</sup> This is now uncertain within the boundaries of the Seventh and Eleventh Circuits. Of course, this question should never be asked at all; age discrimination is wrong in any context.

Additionally, *Villarreal* and *Kleber* will create a federal circuit split in the ADEA if other federal circuits choose to adopt the more persuasive interpretation that older job applicants are covered by the disparate impact provision. Indeed, two district courts have al-

<sup>54</sup> *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Joint Subcomm’s on Civil Rights and Human Services and Workforce Protections of the H. Comm. on Educ. and Labor*, 117th Cong. (2021) (written statement of Laurie McCann, Senior Attorney, AARP Foundation).

<sup>55</sup> “The language of section 4(a)(2) of the ADEA, the *Griggs* Court’s interpretation of identical statutory language in Title VII as encompassing disparate impact claims by applicants, and the ADEA’s underlying purposes all support the conclusion that the ADEA authorizes disparate impact claims by applicants who are harmed by hiring criteria that are facially neutral but, in practice, deny employment opportunities to individuals on the basis of their age. Moreover, the longstanding agency interpretation of the ADEA recognizes that applicants may pursue ADEA disparate impact claims, making this ‘an absolutely classic case for deference to agency interpretation.’” Brief of the U.S. Equal Emp. Opportunity Comm’n as Amici Curiae Supporting Plaintiff-Appellant, *Villarreal v. R.J. Reynolds Co., et al.*, 806 F.3d 1288 (2015) (No. 15–10602), 2015 WL 1508771 (citing *Smith*, 544 U.S. at 243).

<sup>56</sup> *Kleber*, 914 F.3d at 485–86; see also CONG. REC. *supra* note 33.

<sup>57</sup> See Lindsey A. Viscomi, Note, “*Over-the-Hill*” Yet Still Fighting Uphill Battles to Find Jobs: *The Plight of Older Job Applicants Under the ADEA*, 52 CONN. L. REV. 505, 532 (2020).

<sup>58</sup> *Kleber*, 914 F.3d at 506.

ready chosen not to follow the *Villarreal* decision,<sup>59</sup> indicating that a circuit split is in fact likely to occur. Circuit splits are an undesirable outcome; they turn federal laws into a patchwork of different rules, leading to confusion and disparities in the treatment of workers between states. Congress has an obligation to ensure federal laws, including the ADEA, can be applied consistently on a nationwide basis whenever it is possible to do so.

Finally, there is growing criticism of *Villarreal* and *Kleber* in the wider legal community. Both the Northern District of California and the Southern District of Texas specifically declined to follow the *Villarreal* holding.<sup>60</sup> In the Northern District of California's 2018 *Rabin v. PricewaterhouseCoopers LLP* holding, United States District Judge Jon S. Tigar contemplated *Villarreal* at length, concluding: "The text of the statute therefore contradicts the *Villarreal* majority's conclusion that '4(a)(2) protects an individual only if he has a status as an employee.'" <sup>61</sup> In a recent law review article, former Deputy Secretary of Labor Seth D. Harris argues that *Villarreal* and *Kleber* "Exacerbate the result" of disparate impact claim failures in the courts for older workers and recommends that "Congress also should amend the ADEA to allow disparate impact claims by job applicants" to "ensure that seemingly age-neutral policies or practices adversely impacting older job applicants . . . may be challenged successfully in court."<sup>62</sup>

#### DISPARATE IMPACT AGE DISCRIMINATION AFFECTS MILLIONS OF OLDER WORKERS

Age discriminate practices are still widely embedded in employer hiring decision processes. In 2017, the Federal Reserve Bank of San Francisco conducted a study to assess age discrimination in hiring, sending similar resumes to over "13,000 positions in 12 cities across 11 states, totaling more than 40,000 applicants," to determine if employers were less likely to respond to the resumes of older applicants compared to the resumes of younger applicants.<sup>63</sup> The results showed that for all five job position types studied, "the callback rate was higher for younger applicants and lower for older applicants, consistent with age discrimination in hiring."<sup>64</sup> This study also indicates age discrimination intersects with other forms of hiring discrimination such as gender discrimination, as older women applicants "face worse age discrimination than men."<sup>65</sup>

Tolerating this sort of age discrimination imposes needless consequences for older Americans and ripples into a drag on the overall economy. As of July 2021, over 3.8 million workers age 40-and-over are unemployed.<sup>66</sup> When older workers lose their jobs, they are more likely to endure long-term unemployment (defined as 27

<sup>59</sup> See *Rabin v. PricewaterhouseCoopers LLP*, 236 F.Supp.3d 1126 (N.D. Cal. 2017); *Champlin v. Manpower Inc.*, No. 4:16-CV-00421, 2018 WL 572997 (S.D. Tex. Jan. 24, 2018).

<sup>60</sup> See *id.*

<sup>61</sup> *Rabin*, 236 F.Supp.3d at 1129.

<sup>62</sup> Seth D. Harris, *Increasing Employment for Older Workers with Effective Protections Against Employment Discrimination*, 30 CORNELL J.L. & PUB. POL'Y 199, 209, 224 (2020).

<sup>63</sup> David Neumark, et. al., *Age Discrimination and Hiring of Older Workers*, FED. RESERVE BANK OF SAN FRANCISCO (Feb. 27, 2017), <https://www.frbsf.org/economic-research/publications/economic-letter/2017/february/age-discrimination-and-hiring-older-workers/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> BUREAU OF LAB. STAT., *supra* note 1.

weeks or longer).<sup>67</sup> Among workers ages 40 to 65 who reported that they lost a job in 2020, 74 percent said they have been unemployed for more than six months.<sup>68</sup> Discouraged older workers who are forced into an early retirement must accept permanently lower Social Security benefits and possibly rely on insufficient retirement savings.<sup>69</sup>

These costs place enormous weight on the economy at large. A study by AARP Foundation and the Economist Intelligence Unit estimates that age discrimination costs the U.S. economy a potential \$850 billion in gross domestic product (GDP) each year.<sup>70</sup> In particular, this substantial cost arises from the lost earnings of workers 50 and over who are unable to remain in or re-enter the labor force, switch jobs, or be promoted within their existing company.<sup>71</sup>

#### CONCLUSION

Without the ADEA disparate impact provision, millions of older job-seeking workers are defenseless against covert and invidious age discriminate hiring practices identified by the Wirtz Report over a half-century ago and that persist today. Congress must pass POJA to restore full application of this vital legal tool and protect older workers applying for jobs.

#### SECTION-BY-SECTION ANALYSIS

##### *Sec. 1. Short title*

This section specifies that the title of the bill may be cited as the *Protect Older Job Applicants Act of 2021* or *POJA Act of 2021*.

##### *Sec. 2. Prohibition against limited, segregating, or classifying applicants for employment*

This section amends the *Age Discrimination in Employment Act of 1967* disparate impact provision, § 623(a)(2), by adding a reference to “applicants for employment” for the purpose of including older job applicants as a group of workers who can bring an ADEA disparate impact claim in court.

#### EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the descriptive portions of this report.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act of 1995*, Pub. L. No. 104–1, H.R. 3992, as amended, applies to terms and conditions of employment within the legislative branch because the law amended by H.R. 3992 (ADEA) is included within

<sup>67</sup> Jennifer Schramm, *Many Older Jobseekers are not Long-Term Unemployed*, AARP (Jan. 12, 2021), <https://blog.aarp.org/thinking-policy/many-jobseekers-long-term-unemployed>.

<sup>68</sup> *Id.*

<sup>69</sup> Christian Weller, *Working Longer Was A Retirement Plan Until It Wasn't*, FORBES (Aug. 4, 2020), <https://www.forbes.com/sites/christianweller/2020/08/04/working-longer-was-a-retirement-plan-until-it-wasnt/?sh=5736871e3e70>.

<sup>70</sup> AARP & THE ECONOMIST, *THE ECONOMIC IMPACT OF AGE DISCRIMINATION* 6 (2020), <https://www.aarp.org/content/dam/aarp/research/surveys—statistics/econ/2020/impact-of-age-discrimination.doi.10.26419-2Fint.00042.003.pdf>.

<sup>71</sup> *Id.*

the list of laws applicable to the legislative branch enumerated in section 102(a) of the *Congressional Accountability Act of 1995*.

#### UNFUNDED MANDATE STATEMENT

Pursuant to section 423 of the *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. No. 93-344 (as amended by section 101(a)(2) of the *Unfunded Mandates Reform Act*, Pub. L. 104-4), H.R. 3992, as amended, contains no intergovernmental or private-sector mandates as defined by the *Unfunded Mandates Reform Act*. Section 4 of the *Unfunded Mandates Reform Act* excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination “on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” CBO has determined that this legislation falls within that exclusion because it would extend protections against discrimination based on age in the workplace.

#### EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3992 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

#### ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee’s consideration of H.R. 3992:

Date: 7/15/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call:1

Bill: H.R. 3992

Amendment Number:2

Disposition: Defeated by a vote of 20-26

Sponsor/Amendment: Miller-Meeks/H3992ANS\_AM\_001.XML

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLON (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)	X		
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)	X		
Ms. LEGER FERNÁNDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)			X
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Ms. LETLOW (LA)	X		
Mr. POCAN (WI)			X	<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 20

Nos:26

Not Voting:6

Total: 53 / Quorum: / Report:

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 7/15/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call:2

Bill: H.R. 3992

Amendment Number:3

Disposition: Defeated by a vote of 20-26

Sponsor/Amendment: Allen/H3992ANS\_AM\_002.XML

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLON (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)	X		
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)	X		
Ms. LEGER FERNÁNDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)			X
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Ms. LETLOW (LA)	X		
Mr. POCAN (WI)			X	<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 20

Nos:26

Not Voting:6

Total: 53 / Quorum: / Report:

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 7/15/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call:3

Bill: H.R. 3992

Amendment Number:4

Disposition: Defeated by a vote of 19-26

Sponsor/Amendment: Letlow/H3992ANS\_AM\_003.XML

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLON (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)			X
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)	X		
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)	X		
Ms. LEGER FERNÁNDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)			X
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Ms. LETLOW (LA)	X		
Mr. POCAN (WI)			X	<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 19

Nos:26

Not Voting:7

Total: 53 / Quorum: / Report:

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.



Date: 7/15/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call:4

Bill: H.R. 3992

Amendment Number:5

Disposition: Defeated by a vote of 19-26

Sponsor/Amendment: Keller/H3992ANS\_AM\_004

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLON (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)			X
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)	X		
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)	X		
Ms. LEGER FERNANDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)			X
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Ms. LETLOW (LA)	X		
Mr. POCAN (WI)			X	<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 19

Nos:26

Not Voting: 7

Total: 53 / Quorum: / Report:

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 7/15/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 5

Bill: H.R. 3992

Amendment Number: Motion

Disposition: Adopted by a Full Committee vote of 26 ayes; 19 noes

Sponsor/Amendment: Bowman/to report to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended, do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mr. GRIJALVA (AZ)	X			Mr. WILSON (SC)		X	
Mr. COURTEY (CT)	X			Mr. THOMPSON (PA)			X
Mr. SABLON (MP)	X			Mr. WALBERG (MI)		X	
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)			X
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)		X	
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. BANKS (IN)		X	
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)		X	
Mr. NORCROSS (NJ)	X			Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)		X	
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)		X	
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)		X	
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)		X	
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)		X	
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)	X			Mrs. SPARTZ (IN)		X	
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)			X
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)		X	
Mr. BOWMAN (NY)	X			Ms. LETLOW (LA)		X	
Mr. POCAN (WI)			X	<i>Vacancy</i>			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)	X						
Mr. YARMUTH (KY)	X						
Mr. ESPAILLAT (NY)	X						
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 26

Nos: 19

Not Voting: 7

Total: 53 / Quorum: / Report:

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

## STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c)(4) of rule XIII of the Rules of the House of Representatives, the goal of H.R. 3992 is to improve the lives of American workers and job seekers by clarifying protections against age discrimination in hiring. The legislation achieves this by clarifying that the ADEA disparate impact provision includes job applicants.

## DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 3992 is known to be duplicative of another federal program, including any program that was included in a report to Congress pursuant to section 21 of Public Law 111–139 or the most recent Catalog of Federal Domestic Assistance.

## HEARINGS

On March 18, 2021, pursuant to clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the Committee’s Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections held a joint hearing entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*,” which was used to develop H.R. 3992. Relevant to H.R. 3992, the Committee heard testimony from Laurie McCann, Senior Attorney representing AARP Foundation, who testified about the impact of age discrimination on the workforce and offered recommendations for improving legal protections under the ADEA for older workers. Ms. McCann also discussed the Seventh Circuit’s *Kleber* decision and the trend of judicial holdings reducing the ADEA’s legal protections for older job applicants.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget and Impoundment Control Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget and Impoundment Control Act of 1974*, the Committee has received the following estimate for H.R. 3992 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 1, 2021.*

Hon. ROBERT C. “BOBBY” SCOTT,  
*Chairman, Committee on Education and Labor,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3992, the Protect Older Job Applicants Act of 2021.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Meredith Decker.

Sincerely,

PHILLIP L. SWAGEL,  
*Director.*

Enclosure.

<b>H.R. 3992, Protect Older Job Applicants Act of 2021</b>			
As ordered reported by the House Committee on Education and Labor on July 15, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	*	*	not estimated
Statutory pay-as-you-go procedures apply?	No	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	Excluded from UMRA
		Contains private-sector mandate?	Excluded from UMRA
* = between zero and \$500,000.			

H.R. 3992 would amend the Age Discrimination in Employment Act of 1967, which prohibits age-based discrimination in hiring, to specifically prohibit employers from limiting, segregating, or classifying job applicants on the basis of age. Clarifying the law to include job applicants could increase the number of age discrimination claims filed with the Equal Employment Opportunity Commission (EEOC). Based on current practice, CBO expects that enacting the bill would not significantly increase the number of claims filed with the EEOC or the agency’s workload and would thus not have any significant costs; any spending would be subject to the availability of appropriated funds.

CBO has not reviewed H.R. 3992 for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that this legislation falls within that exclusion because it would extend protections against discrimination in the workplace based on age.

The CBO staff contact for this estimate is Meredith Decker. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

#### COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3992. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 3992, as reported, are shown as follows:

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

### AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

\* \* \* \* \*

#### PROHIBITION OF AGE DISCRIMINATION

SEC. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee *or as an applicant for employment*, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual

of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive

plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a), because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act; or

(3) to discharge or otherwise discipline an individual for good cause.

(h)(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

- (A) interrelation of operations,
- (B) common management,
- (C) centralized control of labor relations, and
- (D) common ownership or financial control,

of the employer and the corporation.

(i)(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year

in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 and section 401(a)(14)(C) of the Internal Revenue Code of 1986, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 or section 411(a)(3)(B) of the Internal Revenue Code of 1986, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of the Internal Revenue Code of 1986) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m)..

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of the Internal Revenue Code of 1986 and subparagraphs (C) and (D) of section 411(b)(2) of such Code shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Employee Retirement Income Security Act of 1974 and section 411(a)(8)(B) of the Internal Revenue Code of 1986.

(9) For purposes of this subsection—

(A) The terms “employee pension benefit plan”, “defined benefit plan”, “defined contribution plan”, and “normal retirement age” have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term “compensation” has the meaning provided by section 414(s) of the Internal Revenue Code of 1986.



## (10) SPECIAL RULES RELATING TO AGE.—

## (A) COMPARISON TO SIMILARLY SITUATED YOUNGER INDIVIDUAL.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) SIMILARLY SITUATED.—For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) DISREGARD OF SUBSIDIZED EARLY RETIREMENT BENEFITS.—In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) ACCRUED BENEFIT.—For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

## (B) APPLICABLE DEFINED BENEFIT PLANS.—

## (i) INTEREST CREDITS.—

(I) IN GENERAL.—An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) PRESERVATION OF CAPITAL.—An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) MARKET RATE OF RETURN.—The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of the Internal Revenue Code of

1986), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this Act.

(ii) SPECIAL RULE FOR PLAN CONVERSIONS.—If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) RATE OF BENEFIT ACCRUAL.—Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) SPECIAL RULES FOR EARLY RETIREMENT SUBSIDIES.—For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) APPLICABLE PLAN AMENDMENT.—For purposes of this subparagraph—

(I) IN GENERAL.—The term “applicable plan amendment” means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) SPECIAL RULE FOR COORDINATED BENEFITS.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall

be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) MULTIPLE AMENDMENTS.—The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) APPLICABLE DEFINED BENEFIT PLAN.—For purposes of this subparagraph, the term “applicable defined benefit plan” has the meaning given such term by section 203(f)(3) of the Employee Retirement Income Security Act of 1974.

(vi) TERMINATION REQUIREMENTS.—An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) CERTAIN OFFSETS PERMITTED.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of the Internal Revenue Code of 1986.

(D) PERMITTED DISPARITIES IN PLAN CONTRIBUTIONS OR BENEFITS.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of the Internal Revenue Code of 1986 are met.

(E) INDEXING PERMITTED.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) PROTECTION AGAINST LOSS.—Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) INDEXING.—For purposes of this subparagraph, the term “indexing” means, in connection with an ac-

crued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) EARLY RETIREMENT BENEFIT OR RETIREMENT-TYPE SUBSIDY.—For purposes of this paragraph, the terms “early retirement benefit” and “retirement-type subsidy” have the meaning given such terms in section 203(g)(2)(A) of the Employee Retirement Income Security Act of 1974.

(G) BENEFIT ACCRUED TO DATE.—For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual’s age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or

(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

(k) A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

(l) Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(i) an employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2))) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 3(35) of such Act) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to re-

ceive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 8101 of the Elementary and Secondary Education Act of 1965), or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of such Code or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii), are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of the Internal Revenue Code of 1986) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term “retiree health benefits” means benefits provided pursuant to a group

health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of \$3,000 per year for benefit years before age 65, and \$750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of \$48,000 for individuals below age 65, and \$24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 101 of the Higher Education Act of 1965) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing

for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this Act;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

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## MINORITY VIEWS

### INTRODUCTION

Every job applicant should be protected from discrimination. It is already against the law, as it should be, to discriminate against job applicants. For 54 years, the *Age Discrimination in Employment Act of 1967* (ADEA) has prohibited employment discrimination against job applicants and employees because of age.<sup>1</sup> Older Americans are thriving in the workplace, and Committee Republicans are committed to ensuring a fair, productive, and competitive workforce.

Unfortunately, Committee Democrats are again rushing forward with ill-advised legislation that promotes their pro-trial lawyer agenda and harms job seekers. H.R. 3992, the *Protect Older Job Applicants Act*, is yet another example of a federal mandate that ignores the real-world job market and that will make it harder for Americans to find jobs.

Like other legislation in the 117th Congress, H.R. 3992 was rushed through this Committee without proper examination, discussion, or consideration. Careful Committee review and scrutiny of any legislation is necessary to determine whether a bill appropriately and effectively addresses an issue that warrants congressional action. The Committee majority's H.R. 3992 fails miserably to meet these standards. Despite the bill's sweeping consequences and expansive legal implications, Committee Democrats chose not to hold a hearing examining H.R. 3992, which was introduced just a month before the Committee markup. This lack of due diligence is irresponsible and not how the Committee should process expansive legislation affecting job seekers and employers.

Committee Democrats voted in lockstep to pass a bill without sufficient data, compelling evidence, thoughtful deliberation, or genuine consideration. Congress must ensure that nondiscrimination statutes will not harm job seekers, especially at a time when there are 8.4 million unemployed Americans.<sup>2</sup> H.R. 3992 does just the opposite, making it harder for job seekers to connect with employers. For these reasons, and as set forth below, the House should not consider or pass H.R. 3992.

### CONCERNS WITH H.R. 3992

#### *Age Discrimination Against Job Applicants is Already Illegal*

There is no dispute that ADEA Section 4(a)(1) prohibits disparate treatment discrimination against both job applicants and

<sup>1</sup> 29 U.S.C. § 623(a)(1) (unlawful for employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age").

<sup>2</sup> U.S. BUREAU OF LAB. STAT., EMPLOYMENT SITUATION SUMMARY (Sept. 3, 2021), <https://www.bls.gov/news.release/empsit.nr0.htm>.



employees because of age.<sup>3</sup> It is thus already illegal for an employer to discriminate against applicants for employment because of their age. Democrat assertions that two circuit court decisions have made it lawful to discriminate against job applicants because of age are false.

*Decades of ADEA Case Law Do Not Support a Need for H.R. 3992*

In 2005, the U.S. Supreme Court held in *Smith v. City of Jackson* that ADEA Section 4(a)(2) prohibits disparate impact discrimination against employees because of age.<sup>4</sup> However, in 2016, the U.S. Court of Appeals for the 11th Circuit ruled in *Villareal v. R.J. Reynolds Tobacco Company* that Section 4(a)(2) does not authorize job applicants to claim disparate impact discrimination because of age.<sup>5</sup> In 2019, the U.S. Court of Appeals for the 7th Circuit in *Kleber v. CareFusion Corporation* agreed with the 11th Circuit and held that ADEA disparate impact coverage does not extend to job applicants.<sup>6</sup> Both circuit court decisions noted that ADEA Section 4(a)(2), which authorizes disparate impact claims by employees because of age, does not include the language from ADEA Section 4(a)(1) applying coverage to job applicants.

Democrats assert that, from the time of the ADEA's enactment in 1967 until the 11th Circuit's 2016 decision in *Villareal*, disparate impact claims were universally available to job applicants. Therefore, they claim, the *Villareal* and *Kleber* decisions constitute a sea change that is contrary to prior settled law. This is false.

Prior to the Supreme Court's 2005 decision in *City of Jackson*, many circuits did not interpret the ADEA to include disparate impact coverage for employees, much less for job applicants. For example, in *City of Jackson*, the Supreme Court reversed a 2003 decision by the U.S. Court of Appeals for the 5th Circuit that disparate impact claims are not available for employees under the ADEA.<sup>7</sup> In 1996, the U.S. Court of Appeals for the 10th Circuit ruled, in a case involving job applicants, that the ADEA does not authorize disparate impact claims for any workers.<sup>8</sup> In 1995, the U.S. Court of Appeals for the 3rd Circuit wrote, "it is doubtful that traditional disparate impact theory is a viable theory under the ADEA."<sup>9</sup> In 1998, the U.S. District Court for the District of Puerto Rico, which is in the 1st Circuit, held that the ADEA does not authorize disparate impact claims.<sup>10</sup>

<sup>3</sup> 29 U.S.C. § 623(a)(1); see, e.g., *Kleber v. CareFusion Corp.*, 914 F.3d 480, 484 (7th Cir. 2019) ("All agree that § 4(a)(1), by its terms, covers both employees and applicants."). In the ADEA context, disparate treatment discrimination occurs where the employer intentionally treats a job applicant or employee less favorably than other job applicants or employees because of age. Proof of intent can sometimes be inferred from the mere fact of differences in treatment. See 1 BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW ch. 2.I (5th ed. 2012).

<sup>4</sup> 544 U.S. 228 (2005); 29 U.S.C. § 623(a)(2) (unlawful for employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."). Disparate impact discrimination claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *City of Jackson*, 544 U.S. at 239 (quotation marks omitted).

<sup>5</sup> 839 F.3d 958 (11th Cir. 2016).

<sup>6</sup> 914 F.3d 480 (7th Cir. 2019).

<sup>7</sup> See *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), affirmed on other grounds, 544 U.S. 228 (2005).

<sup>8</sup> *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996).

<sup>9</sup> *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3rd Cir. 1995).

<sup>10</sup> 10 Febres Morales v. Challenger Caribbean Corp., 8 F.Supp.2d 126 (D. Puerto Rico 1998).

Moreover, no federal circuit court of appeals has ever ruled that job applicants are authorized to bring disparate impact claims under the ADEA. The Democrats' contention that *Villareal* and *Kleber* reversed well-settled law and took away well-recognized rights from job applicants is a false description of decades of ADEA case law.

*Evidence and Data Are Sorely Lacking*

The Committee lacks evidence or data indicating this bill is necessary to ensure older job applicants are protected. The Democrat majority unfortunately proceeded directly to a Committee markup only one month after H.R. 3992 was introduced without examining the bill in a hearing. Before this bill is considered by the House, additional information is sorely needed so that Members can thoroughly understand the numerous implications of applying disparate impact theory to job applicants under the ADEA.

As noted previously, in the history of the ADEA since 1967, no circuit court has ever ruled that the statute extends disparate impact coverage to job applicants. It is not convincing to claim that the *Villareal* and *Kleber* decisions have harmed the nation's older job applicants when the disparate impact cause of action for job applicants has never been available in many of the nation's federal circuits and district courts.

More broadly, job trends for older workers are positive in recent decades, according to the Bureau of Labor Statistics:<sup>11</sup>

- "For workers age 65 and older, employment tripled from 1988 to 2018, while employment among younger workers grew by about a third."
- "Among people age 75 and older, the number of employed people nearly quadrupled, increasing from 461,000 in 1988 to 1.8 million in 2018."
- "The labor force participation rate for older workers has been rising steadily since the late 1990s. Participation rates for younger age groups either declined or flattened over this period."
- "Over the past 20 years, the number of older workers on full-time work schedules grew two and a half times faster than the number working part time."
- "Full-timers now account for a majority among older workers—61 percent in 2018, up from 46 percent in 1998."

*H.R. 3992 Harms Job Seekers While Benefitting Trial Lawyers*

By allowing job applicants to file age discrimination lawsuits against employers under a disparate impact theory, H.R. 3992 will needlessly interfere with employers' routine recruitment and hiring processes. The legislation applies to all job applicants who are at least 40 years old in all circumstances, not only the specific circumstances in the *Villareal* and *Kleber* cases. The bill could thus result in massive class action litigation using the disparate impact theory.

<sup>11</sup> 11 U.S. BUREAU OF LAB. STAT., HOW ARE OUR OLDER WORKERS DOING? (May 20, 2019), <https://blogs.bls.gov/blog/2019/05/20/how-are-our-older-workers-doing/>.

Under the bill, current, reasonable recruiting practices of employers that focus on new entrants to the workforce will become suspect. For example, students in high school, colleges, and universities are young on average. Job Corps center students are 16–24 years old.<sup>12</sup> If H.R. 3992 becomes law, when employers conduct recruiting activities at these institutions and interview potential hires drawn from these student populations, trial lawyers will be able to claim that these recruiting practices have a disparate impact on older potential job applicants. This is not mere speculation. Attorneys from the AARP Foundation have claimed in class action litigation that college recruiting violates the ADEA.<sup>13</sup>

Likewise, internship and apprenticeship programs tend to have younger participants. Implementing and operating such programs could be alleged to have a disparate impact on older workers who are not as likely to participate in these programs. Moreover, to the extent employers recruit and hire full-time employees from participants in internship and apprenticeship programs, such recruitment could also be alleged to have a disparate impact on older workers who are not as likely to participate in these programs.

In addition, posting job openings on common online job sites could be alleged to have a disparate impact on older applicants because the users of these websites tend to be younger on average.<sup>14</sup> Furthermore, job websites often include information that is correlated with age, such as when an individual attended college. H.R. 3992 will lead to costly and troubling litigation as trial lawyers will claim that an employer's use of such online job sites provided the employer with information on applicants' ages, resulting in a disparate impact on older applicants.<sup>15</sup>

H.R. 3992 may also impede the use of background checks or the ability of background checks to produce usable information. Background checks on job applicants routinely provide age or date of birth to the employer. Under the bill, a trial lawyer could claim the information provided in the background check influenced the employer's decision-making and had a disparate impact on older job applicants. Employers may be subject to needless and costly litigation even in jobs and industries where using background checks is well-advised.

#### *Age Discrimination is Different from Other Forms of Discrimination*

Democrats claim that H.R. 3992 will merely conform the ADEA with other federal nondiscrimination laws. However, Congress and the U.S. Supreme Court have long-recognized that age discrimination is different from other forms of discrimination, and the scope of the ADEA is not the same as Title VII of the *Civil Rights Act of 1964*. When debating the *Civil Rights Act of 1964*, the House and

<sup>12</sup> U.S. DEPT OF LAB., JOB CORPS, <https://www.dol.gov/general/topic/training/jobcorps>.

<sup>13</sup> See Erin Mulvaney, *PwC Deal Targets Recruiting That Can Weed Out Older Workers*, Daily Lab. report, Mar. 4, 2020.

<sup>14</sup> See, e.g., STATISTA, DISTRIBUTION OF LINKEDIN USERS WORLDWIDE AS OF APRIL 2021, BY AGE GROUP, <https://www.statista.com/statistics/273505/global-linkedin-age-group/>.

<sup>15</sup> See Mulvaney, *supra* note 13 (settlement included agreement by employer to stop asking job seekers when they graduated college).

Senate voted against amendments to add age to Title VII.<sup>16</sup> Moreover, in 1972, Congress amended Title VII to cover “applicants for employment” expressly in the provision prohibiting disparate impact discrimination but has never modified ADEA Section 4(a)(2) in this way.<sup>17</sup>

Both Title VII, which makes it unlawful to discriminate in employment because of race, color, religion, sex, or national origin, and the *Americans with Disabilities Act* (ADA) prohibit disparate treatment and disparate impact discrimination against employees and job applicants.<sup>18</sup> However, in disparate impact cases under Title VII and the ADA, the employer is not liable if it demonstrates the challenged employment policy or practice is job related and consistent with business necessity.<sup>19</sup> The ADEA does not include such a provision.

The ADEA states that it is lawful for an employer to take an otherwise prohibited action under the Act if “the differentiation is based on reasonable factors other than age” (RFOA).<sup>20</sup> Title VII and the ADA do not include a similar provision. In 2008, the U.S. Supreme Court noted, “Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, significantly narrowing its coverage.” Moreover, the Court wrote, “it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.”<sup>21</sup> The Court recognized that Congress did not intend the ADEA’s scope to be the same as Title VII because age discrimination has different features compared to discrimination because of race, color, religion, sex, or national origin.

#### REPUBLICAN AMENDMENTS

Committee Republicans offered several amendments during the Committee markup to highlight the fundamental policy flaws in H.R. 3992 and to advance important protections and practical solutions for all job applicants.

To protect job opportunities for students, Rep. Mariannette Miller-Meeks (R-IA) offered an amendment to ensure H.R. 3992 does not prohibit or limit employers from recruiting students attending high school, a Job Corps Center, college, or a university, provided such recruiting is not intended to discriminate because of age. If enacted, H.R. 3992 will discourage employers from sponsoring or participating in job fairs and from recruiting and interviewing stu-

<sup>16</sup>*Eliminating Barriers to Employment: Opening Doors to Opportunity: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. 128 (2019) (statement of Lawrence Z. Lorber, Couns., Seyfarth Shaw LLP).

<sup>17</sup>*See Kleber*, 914 F.3d at 487.

<sup>18</sup>*See* 42 U.S.C. § 2000e-2(a)(1), (2) (Title VII makes it unlawful to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities”); *id.* § 2000e-2(k) (burden of proof in Title VII disparate impact cases); *id.* § 12112(a), (b)(1) (ADA makes unlawful “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee”); *id.* § 12112(b)(6) (ADA makes unlawful “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability”).

<sup>19</sup>*See* 42 U.S.C. § 2000e-2(k)(1)(A)(i); *id.* § 12112(6).

<sup>20</sup>29 U.S.C. § 623(f)(1).

<sup>21</sup>*Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 102 (2008) (quotation marks omitted).

dents at high schools, Job Corps centers, colleges, and universities because of the high risk of facing disparate impact lawsuits. Under the bill, an employer's facially neutral practice, such as focusing recruiting efforts on a college, could be unlawful because these efforts could allegedly have a disparate negative impact on older workers since students at these institutions are younger in age on average. In fact, even without the changes proposed by H.R. 3992, trial lawyers are already targeting employers who recruit job applicants on college campuses. Rep. Miller-Meeks' practical amendment ensures the bill will not jeopardize common, yet vital, recruiting practices that help students find jobs and pursue careers. Committee Democrats nevertheless defeated her amendment on a party-line vote.

To preserve apprenticeship and internship programs, Rep. Rick Allen (R-GA) offered an amendment to ensure H.R. 3992 does not prohibit or limit employers from operating apprenticeship or internship programs, provided these programs are not intended to discriminate because of age. Under the sweeping scope of the bill, an employer's facially neutral practice, such as operating an apprenticeship or internship program, could be unlawful because the program would allegedly have a disparate negative impact on older workers. Participants in internship and apprenticeship programs tend to be younger, and employers often hire participants in these programs as full-time employees. Trial lawyers could claim under the bill that older workers are less likely to participate in internship and apprenticeship programs and are therefore further disadvantaged by employers tending to hire full-time employees from the pool of participants in these programs.

Under the threat of disparate impact lawsuits created by H.R. 3992, employers will be discouraged or impeded from setting up and operating apprenticeship and internship programs. This will be devastating for workers and will limit important opportunities for job seekers to reenter the labor market and for our economy to recover from the damage done during the pandemic. Apprenticeships provide valuable skills for workers and a pathway to career success. Employers around the country have been leading the way in creating new, innovative apprenticeship programs in nursing, advanced manufacturing, and other growing fields. The last thing Congress should do is pass a law that prevents employers from implementing these highly valued and successful programs. Even though Rep. Allen's amendment ensures employers can continue offering and expanding important and valued programs that help new entrants to the workforce acquire the skills and experience they need, Committee Democrats defeated his amendment on a party-line vote.

To safeguard job opportunities for workers, Rep. Julia Letlow (R-LA) offered an amendment to ensure H.R. 3992 does not prohibit or limit employers from posting job openings on job search websites and online job boards, provided such posting is not intended to discriminate because of age. The bill will unfortunately discourage employers from posting job openings on popular websites used by workers to find job opportunities such as LinkedIn or Indeed, harming millions of workers who seek and find employment on these online job search sites. According to the Bureau of Labor Statistics, there are currently 10.9 million job openings in the United

States, and there are 8.4 million unemployed Americans.<sup>22</sup> Especially in this time of economic recovery, Congress should protect every avenue available to connect job seekers with their preferred job. The last thing Congress should do is jeopardize job opportunities for millions of Americans by making it more difficult for employers to communicate job openings online.

Unfortunately, under H.R. 3992, an employer's facially neutral practice, such as posting a job opening on a job search website, could be unlawful because this posting would allegedly have a disparate negative impact on older workers. For example, approximately 80 percent of LinkedIn users are estimated to be between the ages of 18 and 34.<sup>23</sup> Under the bill, posting a job opening on LinkedIn could be unlawful because this would disadvantage older job seekers who are less likely to use this website, and therefore employers will have to think twice before posting job openings on these widely used platforms. This is exactly what Congress should not be doing. Job seekers should be able to find out about every potential job available during times of economic uncertainty. Rep. Letlow's amendment ensures all Americans will continue to have as many avenues as possible to find jobs, but Committee Democrats defeated her amendment on a party-line vote.

To determine whether H.R. 3992 is actually needed, Rep. Fred Keller (R-PA) offered an amendment to require the Government Accountability Office to conduct a study on whether not allowing job applicants to bring disparate impact claims under the ADEA has a significant negative impact on these applicants. If the study does not find a significant negative impact, the bill's amendments to the ADEA will not go into effect. Before considering any legislation, the Committee should make a determination about whether the proposal is in fact needed and whether it will positively address the issue. Unfortunately, Committee Democrats failed in this regard. The Committee never held a hearing on H.R. 3992. The bill has wide-ranging implications that need thorough examination. The Committee has no data on whether excluding job applicants from ADEA disparate impact coverage has a significant negative impact on older job applicants. Indeed, to date, there have been no circuit court decisions ruling the ADEA authorizes job applicants to sue under a disparate impact theory. Even though the Committee is flying blind and in considerable need of additional data, Committee Democrats defeated Rep. Keller's amendment on a party-line vote.

#### CONCLUSION

H.R. 3992 is a far-reaching bill that was not given a hearing or adequate consideration in Committee. Committee Democrats also failed to demonstrate that the legislation is needed to protect older job applicants. Instead, H.R. 3992 will likely result in a surge of class action litigation against employers. This tsunami of litigation will challenge reasonable recruitment and hiring practices, which will deter or eliminate effective and valued recruitment opportunities for job seekers at a time when 8.4 million Americans are look-

<sup>22</sup> U.S. Bureau of Lab. Stat., Job Openings and Labor Turnover Summary (Sept. 8, 2021), <https://www.bls.gov/news.release/jolts.nr0.htm>; U.S. BUREAU OF LAB. STAT., *supra* note 2.

<sup>23</sup> STATISTA, *supra* note 14.

ing for work. For these reasons, and the reasons described above, we oppose the enactment of H.R. 3992 as reported by the Committee on Education and Labor.

VIRGINIA FOXX,  
*Ranking Member.*  
JOE WILSON.  
GLENN "GT" THOMPSON.  
TIM WALBERG.  
ELISE M. STEFANIK.  
RICK W. ALLEN.  
JIM BANKS.  
JAMES COMER.  
FRED KELLER.  
MARIANNETTE MILLER MEEKS,  
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BURGESS OWENS.  
BOB GOOD.  
LISA C. McCLAIN.  
MARY E. MILLER.  
VICTORIA SPARTZ.  
SCOTT FITZGERALD.  
MADISON CAWTHORN.  
JULIA LETLOW.

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