

PROTECTING OLDER WORKERS AGAINST  
 DISCRIMINATION ACT

JANUARY 9, 2020.—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. 1230]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H. R. 1230) to amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal employment discrimination and retaliation claims, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Protecting Older Workers Against Discrimination Act”.

**SEC. 2. STANDARDS OF PROOF.**

(a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.—

(1) CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF AGE IN EMPLOYMENT PRACTICES.—Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by inserting after subsection (f) the following:

“(g)(1) Except as otherwise provided in this Act, an unlawful practice is established under this Act when the complaining party demonstrates that age or an activity protected by subsection (d) was a motivating factor for any practice, even though other factors also motivated the practice.

“(2) In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—

“(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act; and

“(B) shall not be required to demonstrate that age or an activity protected by subsection (d) was the sole cause of a practice.”

(2) REMEDIES.—Section 7 of such Act (29 U.S.C. 626) is amended—

(A) in subsection (b)—

(i) in the first sentence, by striking “The” and inserting “(1) The”;

(ii) in the third sentence, by striking “Amounts” and inserting the following:

“(2) Amounts”;

(iii) in the fifth sentence, by striking “Before” and inserting the following:

“(4) Before”; and

(iv) by inserting before paragraph (4), as designated by clause (iii) of this subparagraph, the following:

“(3) On a claim in which an individual demonstrates that age was a motivating factor for any employment practice, under section 4(g)(1), and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

“(A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 4(g)(1); and

“(B) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.”; and

(B) in subsection (c)(1), by striking “Any” and inserting “Subject to subsection (b)(3), any”.

(3) DEFINITIONS.—Section 11 of such Act (29 U.S.C. 630) is amended by adding at the end the following:

“(m) The term ‘demonstrates’ means meets the burdens of production and persuasion.”.

(4) FEDERAL EMPLOYEES.—Section 15 of such Act (29 U.S.C. 633a) is amended by adding at the end the following:

“(h) Sections 4(g) and 7(b)(3) shall apply to mixed motive claims (involving practices described in section 4(g)(1)) under this section.”.

(b) TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.—

(1) CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by striking subsection (m) and inserting the following:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin or an activity protected by section 704(a) was a motivating factor for any employment practice, even though other factors also motivated the practice.”.

(2) **FEDERAL EMPLOYEES.**—Section 717 of such Act (42 U.S.C. 2000e-16) is amended by adding at the end the following:  
“(g) Sections 703(m) and 706(g)(2)(B) shall apply to mixed motive cases (involving practices described in section 703(m)) under this section.”.

(c) **AMERICANS WITH DISABILITIES ACT OF 1990.**—

(1) **DEFINITIONS.**—Section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) is amended by adding at the end the following:

“(11) **DEMONSTRATES.**—The term ‘demonstrates’ means meets the burdens of production and persuasion.”.

(2) **CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF DISABILITY IN EMPLOYMENT PRACTICES.**—Section 102 of such Act (42 U.S.C. 12112) is amended by adding at the end the following:

“(e) **PROOF.**—

“(1) **ESTABLISHMENT.**—Except as otherwise provided in this Act, a discriminatory practice is established under this Act when the complaining party demonstrates that disability or an activity protected by subsection (a) or (b) of section 503 was a motivating factor for any employment practice, even though other factors also motivated the practice.

“(2) **DEMONSTRATION.**—In establishing a discriminatory practice under paragraph (1) or by any other method of proof, a complaining party—

“(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that a discriminatory practice occurred under this Act; and

“(B) shall not be required to demonstrate that disability or an activity protected by subsection (a) or (b) of section 503 was the sole cause of an employment practice.”.

(3) **CERTAIN ANTI-RETALIATION CLAIMS.**—Section 503(c) of such Act (42 U.S.C. 12203(c)) is amended—

(A) by striking “The remedies” and inserting the following:

“(1) **IN GENERAL.**—Except as provided in paragraph (2), the remedies”; and

(B) by adding at the end the following:

“(2) **CERTAIN ANTI-RETALIATION CLAIMS.**—Section 107(c) shall apply to claims under section 102(e)(1) with respect to title I.”.

(4) **REMEDIES.**—Section 107 of such Act (42 U.S.C. 12117) is amended by adding at the end the following:

“(c) **DISCRIMINATORY MOTIVATING FACTOR.**—On a claim in which an individual demonstrates that disability was a motivating factor for any employment practice, under section 102(e)(1), and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

“(1) may grant declaratory relief, injunctive relief (except as provided in paragraph (2)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 102(e)(1); and

“(2) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.”.

(d) **REHABILITATION ACT OF 1973.**—

(1) **IN GENERAL.**—Sections 501(f), 503(d), and 504(d) of the Rehabilitation Act of 1973 (29 U.S.C. 791(f), 793(d), and 794(d)), are each amended by adding after “title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.)” the following: “, including the standards of causation or methods of proof applied under section 102(e) of that Act (42 U.S.C. 12112(e)).”.

(2) **FEDERAL EMPLOYEES.**—The amendment made by paragraph (1) to section 501(f) shall be construed to apply to all employees covered by section 501.

### **SEC. 3. APPLICATION.**

This Act, and the amendments made by this Act, shall apply to all claims pending on or after the date of enactment of this Act.

### **SEC. 4. SEVERABILITY.**

If any provision or portion of a provision of this Act, an amendment or portion of an amendment made by this Act, or the application of any provision or portion thereof or amendment or portion thereof to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this Act, the amendments made by this Act, or the application of that provision or portion thereof or amendment or portion thereof to other persons or circumstances shall not be affected.

## PURPOSE AND SUMMARY

Congress enacted the *Age Discrimination in Employment Act* (ADEA) in 1967 to prohibit age discrimination in the workplace.<sup>1</sup> The ADEA was an integral part of civil rights legislation enacted during the 1960s to ensure equal opportunity in the workplace, along with the *Equal Pay Act of 1963*<sup>2</sup> and Title VII of the *Civil Rights Act of 1964* (Title VII).<sup>3</sup>

Protections for older workers were eroded by the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* (*Gross*) which imposed a higher burden of proof for age discrimination than previously required. This 5–4 decision overturned precedent by requiring individuals to prove that age discrimination was the decisive and determinative cause for the employer's adverse action rather than just a motivating factor in the employer's adverse action.<sup>4</sup>

The purpose of H.R. 1230, the *Protecting Older Workers Against Discrimination Act* (POWADA or the Act), is to rectify the harms caused by the *Gross* decision and restore the congressional intent underpinning the ADEA:<sup>5</sup> to eliminate age as a factor in employment decisions, to promote the employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment. By reinstating the mixed-motive evidentiary threshold applied to age discrimination claims prior to *Gross*, this legislation returns to decade old legal precedent in age discrimination cases—where the complaining party need only prove age was one of a number of factors behind the employment decision rather than age being the “but-for” or sole motivating cause of the employer's adverse action under the ADEA.<sup>6</sup> Further, this legislation clarifies that complaining parties may rely on any type of admissible evidence to establish their claims of an unlawful employment practice.

For older Americans, age discrimination is a significant barrier to job opportunities. When older workers lose their jobs, they are far more likely than other workers to join the ranks of the long-term unemployed. Therefore, this legislation is needed to re-establish vital protections for older workers.

## COMMITTEE ACTION

## 111TH CONGRESS

On October 6, 2009, Senator Tom Harkin (D–IA) introduced S. 1756, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions (Senate HELP Committee). On May 6, 2010, the Senate HELP Committee held a hearing entitled “*Ensuring Fairness for Older Workers*.” The Committee heard testimony to ex-

<sup>1</sup>Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018).

<sup>2</sup>Equal Pay Act of 1963, 29 U.S.C. § 206 (2018).

<sup>3</sup>Civil Rights Act of 1964, 2 U.S.C. § 1311 (2018).

<sup>4</sup>*Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

<sup>5</sup>Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623

<sup>6</sup>*The Protecting Older Workers Against Discrimination Act, Before the Subcomm. on Health, Education, Labor, and Pensions of the H. Comm. on Educ. and Labor*, 111th Cong. (2010) (written testimony of Prof. Michael Foreman, Director, Civil Rights Appellate Clinic, Pennsylvania State University Dickinson School of Law).

amine the employment discrimination against older workers, and the need to enact protective legislation in the wake of the decision in *Gross v. FBL Financial Services, Inc.*<sup>7</sup> Witnesses included Jacqueline Berrien, Chair of the Equal Employment Opportunity Commission; Jack Gross, plaintiff in *Gross v. FBL Financial Services, Inc.*; Helen Norton, Professor at the University of Colorado Law School; Gail Aldrich, Member of the AARP Board of Directors; and Eric Dreiband, Partner at Jones Day. No further action was taken.

Representative George Miller (D-CA-7) introduced a companion measure, H.R. 3721, on October 6, 2009. The bill was referred to the House Committee on Education and Labor, where it was further referred to the Subcommittee on Health, Education, Labor, and Pensions, which held a hearing on May 5, 2010, entitled “*H.R. 3721, The Protecting Older Workers Against Discrimination Act.*” The Committee heard testimony on the impact of the *Gross* decision on age discrimination claims and the practical application of H.R. 3721 as a potential remedy. Witnesses included Jack Gross, plaintiff in *Gross v. FBL Financial Services, Inc.*; Gail Aldrich, Member of the AARP Board of Directors; Eric Dreiband, Partner at Jones Day; and Professor Michael Foreman, Director of the Civil Rights Appellate Clinic at the Pennsylvania State University. No further action was taken.

The bill was also referred to House Committee on the Judiciary where it was subsequently referred to the Subcommittee on Constitution, Civil Rights, and Civil Liberties. On June 10, 2010, the Subcommittee held a hearing entitled “*Protecting Older Workers Against Discrimination Act.*” The Committee heard testimony to examine if H.R. 3721 appropriately course corrects *Gross*. Witnesses included Jocelyn Samuels, Senior Counsel at the U.S. Department of Justice Civil Rights Division; Jack Gross, plaintiff in *Gross v. FBL Financial Services, Inc.*; Eric Dreiband, Partner at Jones Day; and Helen Norton, Associate Professor at the University of Colorado Law School. No further action was taken.

#### 112TH CONGRESS

On March 13, 2012, Senator Harkin introduced S. 2189, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the Senate HELP Committee. No further action was taken.

#### 113TH CONGRESS

On July 30, 2013, Senator Harkin and Representative Miller introduced the *Protecting Older Workers Against Discrimination Act*, S. 1391 and H.R. 2853 respectively. S. 1391 was referred to the Senate HELP Committee. H.R. 2853 was referred to the House Committee on Education and the Workforce, where it was subsequently referred to the Subcommittee on Workforce Protections. No further action was taken on either bill.

#### 114TH CONGRESS

On October 8, 2015, Senator Mark Steven Kirk (R-IL) introduced S. 2180, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the Senate HELP Committee.

<sup>7</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

On June 24, 2016, Representative Robert C. “Bobby” Scott (D–VA–3) introduced an identical bill, H.R. 5574, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the House Committee on Education and the Workforce, where it was subsequently referred to the Subcommittee on Workforce Protections.

No further action was taken on either bill.

#### 115TH CONGRESS

On February 27, 2017, Senator Robert P. Casey, Jr. (D–PA) introduced S. 443, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the Senate HELP Committee.

On May 25, 2017, Representative Scott (VA) introduced an identical bill, H.R. 2650, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the House Committee on Education and the Workforce.

No further action was taken on either bill.

#### 116TH CONGRESS

On February 14, 2019, Senator Casey introduced S. 485, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the Senate HELP Committee.

On February 14, 2019, Representative Scott (VA), introduced an identical bill, H.R. 1230, the *Protecting Older Workers Against Discrimination Act*. The bill was referred to the House Committee on Education and Labor (the Committee).

On May 21, 2019, the Committee considered H.R. 1230 during a legislative hearing entitled “*Eliminating Barriers to Employment: Opening Doors to Opportunity*.” The Committee heard testimony from Laurie McCann, Senior Attorney at AARP, on employment discrimination on the basis of age; how the *Gross v. FBL Financial Services, Inc.*<sup>8</sup> decision made it more difficult to prove age discrimination under ADEA; and remedies that would provide more effective relief to victims of discrimination on the basis of age, including the provisions included in H.R. 1230.

On June 11, 2019, the Committee marked up H.R. 1230. The Committee adopted an Amendment in the Nature of a Substitute (ANS) offered by Chairman Scott and reported the bill favorably to the House of Representatives by a vote of 27 ayes to 18 nays.

The ANS incorporated the provisions of H.R. 1230, as introduced, with the following modifications:

- eliminated section 2 (Findings and Purpose);
- added a severability clause as a new section 4; and
- made minor technical and correcting changes.

Three amendments to the ANS were offered, which were considered *en bloc* and failed by a vote of 20 ayes to 25 nays.

- Representative Lloyd Smucker (R–PA–11) offered an amendment to add a finding stating that Congress finds that nearly all successful plaintiffs under the Act will not receive any damages, other payments, or reinstatement, but their attorneys will receive awards of fees and costs.
- Representative Rick Allen (R–GA–12) offered an amendment to require a Government Accountability Office (GAO)

<sup>8</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

study to determine whether: (1) the Court’s decisions in *Gross and University of Texas Southwest Medical Center v. Nassar*<sup>9</sup> have discouraged older workers from filing age discrimination and Title VII anti-retaliation charges with Equal Employment Opportunity Commission (EEOC); or (2) from filing age discrimination and Title VII cases; and (3) whether the success rates of age discrimination and Title VII cases have decreased since the *Gross* and *Nassar* decisions. The Act would only go into effect if the GAO study found these negative impacts resulting from the *Gross* and *Nassar* decisions.

- Representative Virginia Foxx (R–NC–5), the Ranking Minority Member of the Committee, offered an amendment to strike the provision of H.R. 1230 allowing mixed-motive claims in Title VII retaliation cases.

## COMMITTEE VIEWS

### INTRODUCTION

There are numerous economic challenges facing older individuals. According to the U.S. Bureau of Labor Statistics (BLS), approximately 40 percent of people age 55 and older were working or actively looking for work in 2014. The number of individuals actively looking for work is expected to increase fastest for the oldest segments of the population through 2024—most notably, people ages 65 and older.<sup>10</sup> More than half of older U.S. workers are pushed out of longtime jobs before they choose to retire, suffering financial damage that is often irreversible.<sup>11</sup> When older workers lose their jobs, they are far more likely than other workers to join the ranks of the long-term unemployed and discrimination appears to be a significant factor.

Significantly, approximately 61 percent of older workers have either seen or experienced age discrimination in the workplace.<sup>12</sup> In 2017, the EEOC received nearly 17,000 age discrimination complaints—accounting for over 20 percent of all discrimination charges filed,<sup>13</sup> and while most older workers say they have seen or experienced age discrimination, only 3 percent report having made a formal complaint.<sup>14</sup> Age discrimination continues to be a “. . . significant and costly problem to workers, their families, and the economy.”<sup>15</sup> These trends have a profound impact on the economic security of older workers and their families.

POWADA is supported by organizations that represent millions of workers nationwide including: AARP, American Association of

<sup>9</sup>*Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

<sup>10</sup>*Strong Labor Market is Not Bringing Unemployed Older Americans Back to Work*, The New School SCEPA (Nov. 2, 2018), <https://www.economicpolicyresearch.org/jobs-report/october-2018-unemployment-report-for-workers-over-55>.

<sup>11</sup>Peter Gosselin, *If You’re Over 50, Chances are the Decision to Leave a Job Won’t be Yours*, ProPublica (Dec. 28, 2018, 5:00 AM), <https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement>.

<sup>12</sup>Rebecca Perron, *The Value of Experience Study*, AARP (July 2018), <https://www.aarp.org/research/topics/economics/info-2018/multicultural-work-jobs?CMP=RDRCT-PRI-OTHER-WORKJOBS-052118.html>.

<sup>13</sup>Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Releases Fiscal Year 2017 Enforcement and Litigation Data (Jan. 25, 2018) (on file with author) available at <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm>.

<sup>14</sup>Victoria A. Lipnic, U.S. Equal Emp’t Opportunity Comm’n, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (2018), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm>.

<sup>15</sup>*Id.*

People with Disabilities, American Association of University Women, American Civil Liberties Union, American Federation of State, County, and Municipal Employees, Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, Easterseals, Equal Rights Advocates, Justice for Migrant Women, Justice in Aging, Leadership Conference on Civil and Human Rights, National Council on Aging, National Disability Institute, National Domestic Workers Alliance, National Education Association, National Employment Law Project, National Employment Lawyers Association, National Partnership for Women & Families, National Women’s Law Center, Lobby for Catholic Social Justice, Paralyzed Veterans of America, The Arc, The Gerontological Society of America, Women Employed, and Women’s Institute for a Secure Retirement.

HISTORY OF PROTECTIONS AGAINST AGE DISCRIMINATION IN THE  
UNITED STATES

Age discrimination is not new. Congress considered expressly prohibiting age discrimination in employment as part of the *Equal Employment Opportunity Act of 1962* and Title VII of the *Civil Rights Act of 1964*, but amendments to include age as a protected class failed. Instead, as part of Title VII, 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> That report became known as the “Wirtz Report.”<sup>17</sup>

The Wirtz Report examined age discrimination in the workplace during the 1960s. The report concluded that “employers believed age impacted job performance and ability,” and that employers routinely refused to hire workers in their 40’s, 50’s and 60’s “based upon false beliefs and unfounded assumptions,”<sup>18</sup> or the false pretense that higher age resulted in poorer job performance. The Wirtz Report distinguished age discrimination from discrimination based on “race, color, religion or national origin,”<sup>19</sup> finding that “discrimination based on age was different because it did not derive from historical origins or feelings of dislike or intolerance that originated from outside the workplace,”<sup>20</sup> and therefore recommended against adding age to Title VII of the *Civil Rights Act of 1964*.<sup>21</sup> Instead of amending Title VII, President Lyndon Johnson in 1967 urged Congress to take action to protect “[h]undreds of thousands not yet old, not yet voluntarily retired, who find themselves jobless because of arbitrary age discrimination.”<sup>22</sup> That year,

<sup>16</sup> U.S. Dept’t of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 (1965), [https://www.eeoc.gov/eeoc/history/adea50th/wirtz\\_report.cfm](https://www.eeoc.gov/eeoc/history/adea50th/wirtz_report.cfm) (“Wirtz Report”).

<sup>17</sup> Victoria A. Lipnic, U.S. Equal Emp’t Opportunity Comm’n, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (2018), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm>.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. Dept’t of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 (1965), [https://www.eeoc.gov/eeoc/history/adea50th/wirtz\\_report.cfm](https://www.eeoc.gov/eeoc/history/adea50th/wirtz_report.cfm) (“Wirtz Report”).

<sup>20</sup> Cathy Ventrell-Monsees, *It’s Unlawful Age Discrimination—Not the “Natural Order” of the Workplace!*, 40 *Berkeley J. Emp. & Lab. L.* 91, 96 (2010).

<sup>21</sup> Victoria A. Lipnic, U.S. Equal Emp’t Opportunity Comm’n, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (2018), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm>.

<sup>22</sup> President Lyndon B. Johnson, *Special Message to the Congress Proposing Programs for Older Americans*, *The American Presidency Project* (Jan. 23, 1967), <https://www.presidency.ucsb.edu/documents/special-message-to-the-congress-proposing-programs-for-older-americans>.

Congress enacted the ADEA,<sup>23</sup> which protects employees as well as job applicants over the age of 40 from age discrimination in hiring, while on the job, and in termination.<sup>24</sup> Among its core provisions, the ADEA states that 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 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; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.<sup>25</sup>

#### EROSION OF ANTIDISCRIMINATION PROTECTIONS FOR OLDER WORKERS

The ADEA prohibits adverse employment actions against employees “because of” an individual’s age. In interpreting the “because of” causation standard, between 1989 and 2009 the courts applied the *Price Waterhouse v. Hopkins*<sup>26</sup> Title VII mixed-motive framework to claims of age discrimination, and they explicitly rejected the “but-for” interpretation.<sup>27</sup> Under a mixed-motive analysis, the plaintiff is required to show that a protected characteristic was a motivating factor in the employer’s adverse action. The burden then shifts to the employer to prove that it would have taken the same action regardless of the protected characteristic. The “but-for” standard requires the plaintiff to show that the adverse action would not have occurred “but-for” the employee’s age.

In *Price Waterhouse*,<sup>28</sup> the Supreme Court noted that the phrase “because of” contained within the statutory language of the ADEA<sup>29</sup> was derived from Title VII,<sup>30</sup> and that “because of” under Title VII translates into a motivating factor of causation.<sup>31</sup> *Price Waterhouse* established that a plaintiff satisfies the burden of persuasion by demonstrating that the protected characteristic (age) “played a motivating part in an employment decision.”<sup>32</sup> Once the plaintiff makes this showing, the burden then shifts to the employer to prove that the plaintiff’s age was not the “but-for” cause of the adverse employment decision.<sup>33</sup> *Post Price Waterhouse*<sup>34</sup> ap-

[www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-programs-for-older-americans](http://www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-programs-for-older-americans) (proposing several legislative measures including the ADEA).

<sup>23</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018).

<sup>24</sup> “The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964.” *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357–58 (1995) (citations omitted).

<sup>25</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018).

<sup>26</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

<sup>27</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>28</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–241 (1989).

<sup>29</sup> 29 U.S.C. § 623(a)(1). (“[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of the individual’s age.”)

<sup>30</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 182–83 (Stevens, J., dissenting) (internal quotations omitted).

<sup>31</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989).

<sup>32</sup> *Id.* at 240.

<sup>33</sup> *Id.* at 244–45.

<sup>34</sup> *Id.* at 228.

pellate courts universally applied “motivating factor” causation to disparate impact claims under the ADEA.<sup>35</sup>

Twenty years after *Price Waterhouse*,<sup>36</sup> protections for older workers were eroded by the Supreme Court’s 2009 decision in *Gross*,<sup>37</sup> which threw out the mixed-motive framework for age discrimination cases that was established in *Price Waterhouse*<sup>38</sup> and all successive precedent. In the *Gross* case, Jack Gross, then 54, brought suit for age discrimination. After working for more than 30 years and steadily rising within the company, Jack’s employer reorganized and underwent a merger. As a result, many older workers were offered a buy-out, and those who did not take the buy-out were demoted and their prior duties and titles assigned to younger workers. Jack brought suit against his employer and was awarded \$46,945 in lost compensation.<sup>39</sup> However, on appeal, the employer prevailed by arguing that “mixed-motive” discrimination must be proven by direct evidence, not circumstantial evidence.<sup>40</sup> The Supreme Court agreed to hear the case on that evidentiary question. However, the Court issued its decision on a question that was never presented to the Court or briefed by the parties: it ruled that older workers may not bring “mixed-motive” claims under the ADEA. It was no longer legally sufficient to prove that age discrimination tainted the employer’s decision, but that older workers must prove that age discrimination was the decisive, determinative, “but-for” cause for the employer’s conduct.<sup>41</sup>

The *Gross* Court discarded decades of legal precedent that interpreted a parallel construction of the ADEA with Title VII. Instead, the Court held that Congress’ failure to amend any statute other than Title VII of the *Civil Rights Act of 1964*<sup>42</sup> (with respect to discrimination claims) as part of the *Civil Rights Act of 1991*<sup>43</sup> meant that Congress intended to disallow mixed-motive claims under other statutes. The Court concluded that Congress could have similarly and simultaneously amended the ADEA to include the mixed motive test, but it intentionally chose not to do so. Drawing a negative inference from Congress’ omission, the Court reasoned that if the ADEA was not amended to include motivating factor discrimination, then Congress must have intended to exclude motivating factor discrimination under the ADEA. This 5–4 decision diluted protections under the ADEA by requiring plaintiffs attempting to prove age discrimination to demonstrate that age was a decisive and determinative cause for the employer’s adverse action.

Congress enacted section 107 of the *Civil Rights Act of 1991* (adding section 703(m) to the *Civil Rights Act of 1964*)<sup>44</sup> to allow for an unlawful employment practice to be established when a protected characteristic was a motivating factor for an employment

<sup>35</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 182–83 (Stevens, J., dissenting); see also *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004); *Tratree v. BP N. Am. Pipelines, Inc.*, 277 Fed. App’x 390, 393–95 (5th Cir. 2008) (following *Rachid* in ADEA case, noting that the standards of proof for claims of discrimination under the ADEA and Title VII were treated identically in the Fifth Circuit).

<sup>36</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989).

<sup>37</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, (2009).

<sup>38</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249–253 (1989).

<sup>39</sup> *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 358 (8th Cir. 2008).

<sup>40</sup> *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 361 (8th Cir. 2008).

<sup>41</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>42</sup> Civil Rights Act of 1964, 2 U.S.C. § 1311 (2018).

<sup>43</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981 (2018).

<sup>44</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981 (2018).

practice, even though other factors also motivated the practice (also known as a “mixed-motive” claim).<sup>45</sup> This mixed motive framework made it easier for employees to prove discrimination and more difficult for employers to conceal discriminatory motives behind a facially neutral pretext. Prior to *Gross*, Title VII’s motivating factor standard had been applied to ADEA. As Justice Stevens noted in his dissent in *Gross*, “the relevant language in the two statutes is identical, and [the Court] has long recognized . . . Title VII’s language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.”<sup>46</sup> Justice Stevens further pointed out that, “ADEA standards are generally understood to conform to Title VII standards.”<sup>47</sup>

Experts, including Laurie McCann, a Senior Attorney with the AARP Foundation, have testified before the Committee expressing concerns about the lack of legal protections for older workers due to the Court’s failure to interpret the ADEA as a remedial civil rights statute, ultimately eroding the ADEA’s protections.<sup>48</sup> Specifically, Ms. McCann points to *GROSS* as an example of the Court misinterpreting ADEA and severing the ADEA from its ties to Title VII. In her written testimony to the Committee on May 21, 2019, Ms. McCann stated:

the ADEA’s language was borrowed directly from Title VII, prohibiting discrimination ‘because of’ age. Thus, for decades, the ADEA was interpreted in concert and consistently with Title VII. The tradition and precedent of parallel construction was so strong that, when the Supreme Court recognized a ‘mixed-motive’ framework for proving discrimination under Title VII in the *Price Waterhouse v. Hopkins* case in 1989, and after Congress codified that framework in the Civil Rights Act of 1991, courts ‘uniformly’ interpreted the ADEA to permit a mixed-motive cause of action.” . . . “In *Gross*, the Court ruled that older workers may not bring mixed-motive claims under the ADEA. The Court discarded decades of precedent embracing parallel construction of the ADEA with Title VII and flipped it on its head”<sup>49</sup>

In the 111th Congress, Jocelyn Samuels, Senior Counselor to the Assistant Attorney General for Civil Rights for the Department of Justice, testified before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties. In her June 10, 2010, testimony, Ms. Samuels stated:

the *Gross* decision reduces the protections available to age discrimination plaintiffs. They are now subject to a new burden that they had never had to bear under all of the precedent that pre-dated the *Gross* decision. Namely the obligation to prove that age is a “but for” cause of discrimination. That makes it

<sup>45</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981 (2018).

<sup>46</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 183 (Stevens, J., dissenting) (internal quotations omitted).

<sup>47</sup> *Id.* at 185 (Stevens, J., dissenting).

<sup>48</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity Before the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Laurie McCann, Senior Attorney, AARP).

<sup>49</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity Before the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Laurie McCann, Senior Attorney, AARP, at 4–5).

harder for plaintiffs to prevail in cases even in which employers admit that they have relied on age discrimination and reduces court's power to enjoin age discrimination in the future. That, of course, also reduces the deterrent effect of the law. In addition, the fact that other courts have extended *Gross* to laws like the Americans With Disabilities Act or the Jury Systems Improvement Act, suggests that under those laws, protections for plaintiffs that Congress intended to protect will be similarly reduced.<sup>50</sup>

Also in the 111th Congress, the Senate HELP Committee held a hearing on the *Protecting Older Workers Against Discrimination Act*. Jacqueline Berrien, the former Chair of the EEOC, testified on May 6, 2010, that—

nothing in the legislative history or the statutory language of the age-discrimination act suggests that this Congress intended to subject victims of age discrimination to a more stringent standard than victims of the types of discrimination prohibited by title VII. The case is causing concrete hardships for workers.<sup>51</sup>

Thus, while individuals with race or sex discrimination claims under Title VII can prove unlawful disparate treatment under a “motivating factor” standard, victims of age discrimination must prove a higher “but-for” standard.<sup>52</sup> In this way, older workers face a higher bar to prove discrimination than other protected classes.

Several courts have subsequently applied the *Gross* decision to other civil rights statutes. As Ms. McCann stated in her May 21, 2019, testimony, “the damage inflicted by *Gross* has not stopped with the ADEA. The Supreme Court and lower courts have extended the ‘negative inference’ reasoning of *Gross* to other civil rights laws.”<sup>53</sup> In *Nassar*,<sup>54</sup> the Supreme Court relied heavily on *Gross* to find that mixed-motive causation did not apply to claims of retaliation under Title VII. The majority ruled that, because the section of Title VII prohibiting retaliation did not contain language permitting mixed-motive causation, the statute had to be interpreted according to its plain language (requiring but-for causation). Circuit and district courts have reached similar conclusions in cases alleging violations of the *Americans with Disabilities Act* (ADA) and the *Family Medical Leave Act* (FMLA). One district court judge has even read *Gross* and *Nassar* to bar the allegation of multiple theories of discrimination in a complaint (alleging that the employer discriminated on the basis of both disability and

<sup>50</sup> Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, *Protecting Older Workers Against Discrimination Act*, YouTube (June 10, 2010), [https://www.youtube.com/watch?v=XTKzNyGJn\\_k](https://www.youtube.com/watch?v=XTKzNyGJn_k) (see video pin cite 14:58:00).

<sup>51</sup> *Ensuring Fairness for Older Workers Before the Senate Committee on Health, Education, Labor and Pensions*, 111th Cong. (2010) available at <https://www.govinfo.gov/content/pkg/CHRG-111shrg56416/html/CHRG-111shrg56416.htm> (citing transcript of oral testimony of Jacqueline Berrien, Chair, Equal Opportunity Employment Commission).

<sup>52</sup> Victoria A. Lipnic, U.S. Equal Emp't Opportunity Comm'n, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (2018), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm> (see Appendix A).

<sup>53</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity Before the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Laurie McCann, Senior Attorney, AARP, at 7).

<sup>54</sup> *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 352–354 (2013).

age—because only one allegation can serve as the “but-for” cause of the discrimination).<sup>55</sup>

While the Supreme Court has yet to rule on the availability of the mixed-motive framework under the ADA or the *Rehabilitation Act of 1973 (Rehabilitation Act)*, several lower courts have extended *Gross* and *Nassar* to these two statutes. In May 2019, the Second Circuit<sup>56</sup> joined the Fourth,<sup>57</sup> Sixth,<sup>58</sup> and Seventh Circuits,<sup>59</sup> in ruling that disability discrimination must be established under a “but-for” causation standard.<sup>60</sup> The Second Circuit held in a *Rehabilitation Act* case (which incorporates the ADA causation standard):

*Gross* and *Nassar* dictate our decision here. The ADA does not include a set of provisions like Title VII’s §2000e–2(m) (permitting a plaintiff to prove employment discrimination by showing that discrimination was a “motivating factor” in the adverse decision) and §2000e–5(g)(2)(B) (limiting the remedies available to plaintiffs who can show that discrimination was a “motivating factor” but not a but-for cause of the adverse decision). There is no express instruction from Congress in the ADA that the “motivating factor” test applies. Moreover, when Congress added §2000e–2(m) to Title VII, it “contemporaneously amended” the ADA but did not amend it to include a “motivating factor” test. We, therefore, join the conclusion reached by the Fourth, Sixth, and Seventh Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the but-for cause of any adverse employment action.<sup>61</sup>

As Ms. McCann testified:

POWADA is needed to fix the enormous problem created by the *Gross* decision and its progeny—an unreasonably high standard of proof that is stacked against workers and back-

<sup>55</sup>*Savage v. Secure First Credit Union*, 107 F. Supp. 3d 1212, 1215–1216 (N.D. Ala. 2015).

<sup>56</sup>*Natofsky v. City of N.Y.*, 921 F.3d 337, 24–25 (2d Cir. 2019) (holding because the ADA does not have a provision like Title VII’s §2000e–2(m) “motivating factor” standard, the ADA requires a plaintiff alleging a claim of employment discrimination to prove the discrimination was the but-for cause of any adverse employment action).

<sup>57</sup>*Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016) (Holding the Supreme Court’s analysis in *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343 (2009) dictates what constitutes or what serves to prove an ADA claim. The ADA’s text does not provide that a plaintiff may establish liability by showing that disability was a motivating factor in an adverse employment decision, and therefore Title VII’s motivating factor standard cannot be read into ADA).

<sup>58</sup>*Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (following *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), the ADEA and the ADA bar discrimination “because of” an employee’s age or disability, meaning they prohibit discrimination only when it is a “but-for” cause of the employer’s adverse decision).

<sup>59</sup>*Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–963 (7th Cir. 2010) (Holding that the ADA, like the ADEA, renders employers liable for employment decisions made “because of” a person’s disability, and *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343 (2009) construes “because of” to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII’s mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice).

<sup>60</sup>It’s important to note that the ADA expressly incorporates by reference Title VII’s enforcement provisions, including the provision containing the “same decision” defense. See 42 U.S.C. §12117(a).

<sup>61</sup>*Natofsky v. City of N.Y.*, 921 F.3d 337, 348 (2d Cir. 2019).

tracks on the promise of the ADA and other civil rights laws: equal opportunity in employment.<sup>62</sup>

Given the problems engendered by the extension of *Gross* to other civil rights statutes, POWADA would clarify congressional intent that no amount of unlawful discrimination in the workplace is acceptable.

#### CONGRESSIONAL ACTION IS NECESSARY TO PROTECT WORKERS

For older jobseekers and workers, age discrimination remains a barrier to both getting employed and staying employed. According to an AARP survey released in 2019 (AARP Survey), 3 in 5 older workers report they have seen or experienced age discrimination on the job.<sup>63</sup> A recent Associated Press-NORC Center for Public Affairs Research survey found that 91 percent of adults aged 45 and over thought that older workers sometimes or often face age discrimination in the workplace.<sup>64</sup> This discrimination can occur during several stages of employment.

- *Hiring*: Discrimination in hiring is quite common. However, due in part to the increased use of technology in the screening and hiring process, such discrimination is largely opaque and difficult to prove. Experimental studies have documented significant discrimination against older applicants in the hiring process, including a recent study that found employers were less likely to call back older applicants.<sup>65</sup> The AARP Survey found that three-fourths of workers age 45 and older blame age discrimination for their lack of confidence in finding a *new* job and 44 percent of older jobseekers who had recently applied for a job were asked for age-related information such as their date of birth or date of graduation.<sup>66</sup>

- *Terms and Conditions of Employment*: The second most frequent complaint to the EEOC by older workers involves the “terms and conditions” of employment,<sup>67</sup> such as being moved to a night shift or given an unfair performance evaluation. Nearly one-fourth of workers age 45 and older in the AARP Survey said they had experienced negative comments about their age from supervisors and coworkers.<sup>68</sup>

- *Termination*: A study by the Urban Institute/*ProPublica* found that 56 percent of all older workers age 50+ are “pushed out of longtime jobs before they choose to retire” and “only one in 10 of these workers ever again earns as much as they did

<sup>62</sup>H. Comm. on the Educ. and Labor, *Eliminating Barriers to Employment: Opening Doors to Opportunity*, YouTube (May 21, 2019), <https://www.youtube.com/watch?v=LORcesGHQEM&t=5433s> (see video pin cite 36:41:00) (oral testimony of Laurie McCann, Senior Attorney, AARP).

<sup>63</sup>Rebecca Perron, AARP, *The Value of Experience: Age Discrimination Against Older Workers Persists* 3 (2018), [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf) [hereinafter AARP survey].

<sup>64</sup>Andrew Soergel, *Older Americans More Likely to Cite Workplace Discrimination*, AP (May 23, 2019), <https://apnews.com/dc208bc4bbda4f7b9a13559df8b00e50>.

<sup>65</sup>David Neumark et al., Federal Reserve Bank of San Francisco, *Age Discrimination and Hiring of Older Workers*, 3,4 (2017), <https://www.frbsf.org/economic-research/files/el2017-06.pdf> [hereinafter Neumark Study].

<sup>66</sup>AARP Survey, *supra* note 63.

<sup>67</sup>AARP calculation based on EEOC, *Statutes by Issue (Charges filed with EEOC): FY 2010–FY 2018*, U.S. Equal Emp’t Opportunity Comm’n, [https://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm); *Age Discrimination in Employment Act (Charges filed with EEOC): FY 1997–FY 2018*, U.S. Equal Emp’t Opportunity Comm’n, <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm>.

<sup>68</sup>AARP Survey, *supra* note 63.

before” their involuntary separation.<sup>69</sup> Among the age discrimination charges filed with the EEOC, complaints about discriminatory discharge constitute, by far, the largest number of charges filed under the ADEA.<sup>70</sup>

Age discrimination appears to be even more prevalent for women and workers of color. In a 2017 experimental study using blind resumes, older women encountered more age discrimination in hiring than men.<sup>71</sup> According to the AARP Survey, nearly two-thirds of women and more than three-fourths of African American workers age 45 and older say they’ve seen or experienced age discrimination in the workplace.<sup>72</sup>

#### CONCLUSION

Court decisions have created a legal hurdle in the ADEA that makes it difficult for older workers to prevail in cases of age discrimination in employment. POWADA would return the legal standard to the pre-*Gross* evidentiary threshold applied in ADEA discrimination claims by replacing the “but-for” test the Court adopted in *Gross* with the mixed-motive test that courts applied prior to 2009. POWADA also amends three other laws—the anti-retaliation provisions in Title VII of the *Civil Rights Act of 1964*, the ADA, and the *Rehabilitation Act*. POWADA is necessary to ensure that older workers and disabled workers have the same protections against discrimination as other protected classes of workers. That is, they can establish an unlawful employment practice when a protected characteristic such as age or disability is proven to have been a motivating factor for an employer’s action, even though nondiscriminatory motives may have also been involved.

As Chairman Scott noted at the May 21, 2019, hearing on POWADA, “[s]ince the 1960s, Congress has recognized the Federal Government’s responsibility to ensure that older workers are not forced out of their jobs or denied work opportunities because of their age.”<sup>73</sup> It is time for Congress to pass legislation that restores the same protections to older workers that exist for other protected classes of individuals, so that, as President Johnson stated in his address to Congress, the many “who are able and willing to work” do not “suffer the bitter rebuff of arbitrary and unjust job discrimination.”<sup>74</sup>

<sup>69</sup>Peter Gosselin, *If You’re Over 50, Chances are the Decision to Leave a Job Won’t be Yours*, ProPublica (Dec. 28, 2018, 5:00 AM), <https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement>.

<sup>70</sup>AARP calculation based on EEOC, *Statutes by Issue (Charges filed with EEOC): FY 2010–FY 2018*, U.S. Equal Emp’t Opportunity Comm’n, [https://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm); *Age Discrimination in Employment Act (Charges filed with EEOC): FY 1997–FY 2018*, U.S. Equal Emp’t Opportunity Comm’n, <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm>.

<sup>71</sup>Neumark Study, *supra* note 65.

<sup>72</sup>AARP Survey, *supra* note 63.

<sup>73</sup>H. Comm. on the Educ. and Labor, *Markup on H.R. 1230—Protecting Older Workers Against Discrimination Act, H.R. 1309—Workplace violence Prevention for Health Care and Social Service Workers Act, H.R. 397—Rehabilitation for Multiemployer Pensions Act*, YouTube (June 11, 2019), <https://www.youtube.com/watch?v=8Y3gzTUIL7g> (see video pin cite 36:41:00) (opening statement of Chairman Robert C. “Bobby” Scott, Committee on Educ. and Labor).

<sup>74</sup>President Lyndon B. Johnson, *Special Message to the Congress Proposing Programs for Older Americans*, The American Presidency Project (Jan. 23, 1967), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-programs-for-older-americans>.

## SECTION-BY-SECTION ANALYSIS

*Sec. 1. Short title*

This section specifies that the title of the bill may be cited as the *Protecting Older Workers Against Discrimination Act*.

*Sec. 2. Standards of proof**In general*

H.R. 1230, as reported, amends the *Age Discrimination in Employment Act of 1967* (ADEA), section 703 of the *Civil Rights Act of 1964*, the *Americans With Disabilities Act of 1990* (ADA), and the *Rehabilitation Act of 1973* to clarify that a complaining party establishes an unlawful employment practice when the complaining party demonstrates that age or any of the other protected characteristics or protected activities were a motivating factor for any unlawful employment practice. The changes made by the bill apply to claims brought by employees in the private, public, and not-for-profit sectors in the same manner and to the same extent as they are covered under current law.

*Sec. 2(a). Age Discrimination in Employment Act of 1967*

This section amends the ADEA to reinstate the availability of the “mixed-motive” test that allows the complaining party to establish their claim by demonstrating that the party’s age or participation in investigations, proceedings, or litigation under the ADEA was a motivating factor for any alleged unlawful employment practice. It also clarifies that complainants are never required to prove that discrimination was the “sole cause” for their adverse treatment on the job, and that any type and form of evidence normally admissible in a court can be used to establish a claim. This section also clarifies that federal employees may also bring their claims using a mixed-motive framework.

Under the mixed-motive framework, once a complaining party establishes a prohibited motivation, the employer is permitted to prove it would have taken the same action in the absence of the impermissible factor.

If the employer proves that it would have taken the same action in the absence of the impermissible factor, remedies are limited to declaratory relief, injunctive relief, and attorney’s fees and costs directly related to pursuit of the mixed-motive claim. Damages and orders requiring admission, reinstatement, hiring, promotion, or payment are not available in this situation. If the employer is unable to prove that it would have taken the same action in absence of the impermissible factor, the employee is entitled to back pay, front pay or reinstatement, liquidated damages if the violation was willful, and injunctive relief.

*Sec. 2(b). Section 703 of the Civil Rights Act of 1964*

This section amends section 703 of the *Civil Rights Act of 1964* to add “an activity protected by 704(a)” to the list of unlawful employment practices that may be proven using a motivating factor framework, thereby reinstating the availability of the “mixed-motive” test for charges of retaliation under Title VII of the *Civil Rights Act of 1964*. Under section 704(a) it is unlawful for an em-

employer or job training program to discriminate against an individual for making charges, testifying, assisting, or participating in enforcement proceedings regarding an unlawful employment practice under Title VII of the *Civil Rights Act of 1964*. Additionally, H.R. 1230 amends section 717 of the *Civil Rights Act of 1964* by specifying that the “mixed-motive” framework also applies to unlawful employment cases involving federal employees.

*Sec. 2(c). Americans with Disabilities Act of 1990*

This section amends the ADA to codify the availability of the “mixed-motive” test that allows the complaining party to establish a claim by demonstrating that disability or participation in investigations, proceedings, or litigation under subsection (a) or (b) of section 503 of the ADA was a motivating factor for any alleged unlawful practice. It also clarifies that complainants are never required to prove that discrimination was the “sole cause” for their treatment on the job, and that any type and form of evidence normally admissible in a court can be used to establish a claim.

Under the mixed-motive framework, once a complaining party establishes a prohibited motivation, the employer is allowed an opportunity to mitigate damages by proving he would have taken the same action in the absence of the impermissible factor.

If the employer proves that it would have taken the same action in the absence of the impermissible factor, remedies are limited to declaratory relief, injunctive relief, and attorney’s fees and costs directly related to pursuit of the mixed-motive claim. Damages and orders requiring admission, reinstatement, hiring, promotion, or payment are not available in this situation.

If the employer is unable to prove that it would have taken the same action in absence of the impermissible factor, the employee is entitled to back pay, front pay or reinstatement, liquidated damages if the violation was willful, and injunctive relief.

*Sec. 2(d). Rehabilitation Act of 1973*

This section amends section 2(d) of the *Rehabilitation Act of 1973* to incorporate by reference the changes made to the ADA in section 2(c) of the bill.

*Sec. 3. Application*

This section states that the Act applies to all claims pending on or after the date of its enactment.

*Sec 4. Severability*

This section provides that if any provision, portion of a provision, amendment, or their application is held invalid or found to be unconstitutional, the remainder of this Act shall not be affected.

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*, Pub. L. No. 104–1, H.R. 1230, as amended, applies to terms

and conditions of employment within the legislative branch because the four laws amended by H.R. 1230 (ADA, ADEA, the *Rehabilitation Act*, and Title VII of the *Civil Rights Act of 1964*) are included within the list of laws applicable to the legislative branch enumerated in section 102(a) of the *Congressional Accountability Act*.

#### UNFUNDED MANDATE STATEMENT

Pursuant to section 423 of the *Congressional Budget and Impoundment Control Act* (as amended by section 101(a)(2) of the *Unfunded Mandates Reform Act*, Pub. L. 104–4), H.R. 1230, as amended, contains no intergovernmental or private-sector mandates as defined by the *Unfunded Mandates Reform Act* (UMRA). 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 and disability in the workplace.

#### EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1230 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. 1230:

Date: 6/11/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 1

Bill: H.R. 1230

Amendment Number: 2, 3, and 4 en bloc

Disposition: Defeated by a vote of 20-25

Sponsor/Amendment: Smucker (amend #2), Allen (amend #3), and Foxx (amend #4)/ amendments voted on en bloc

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)			X	Mr. ROE (TN)	X		
Mr. GRIJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)			X	Mr. GUTHRIE (KY)	X		
Mr. SABLAN (MP)			X	Mr. BYRNE (AL)	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. ROONEY (FL)			X
Mr. DESAULNIER (CA)		X		Mr. SMUCKER (PA)	X		
Mr. NORCROSS (NJ)		X		Mr. BANKS (IN)	X		
Ms. JAYAPAL (WA)		X		Mr. WALKER (NC)	X		
Mr. MORELLE (NY)		X		Mr. COMER (KY)	X		
Ms. WILD (PA)		X		Mr. CLINE (VA)	X		
Mr. HARDER (CA)		X		Mr. FULCHER (ID)	X		
Mrs. MCBATH (GA)		X		Mr. TAYLOR (TX)	X		
Ms. SCHRIER (WA)		X		Mr. WATKINS (KS)	X		
Ms. UNDERWOOD (IL)		X		Mr. WRIGHT (TX)			X
Mrs. HAYES (CT)		X		Mr. MEUSER (PA)	X		
Ms. SHALALA (FL)		X		Mr. TIMMONS (SC)	X		
Mr. LEVIN (MI)		X		Mr. JOHNSON (SD)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)		X					
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 20

Nos: 25

Not Voting: 5

Total: 50 / Quorum: / Report:

(28 D - 22 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: 6/11/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 2      Bill: H.R. 1230      Amendment Number: Motion

Disposition: Agreed to by a vote of 27-18

Sponsor/Amendment: Bonamici/to report to the House with 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	
Mrs. DAVIS (CA)			X	Mr. ROE (TN)		X	
Mr. GRUJALVA (AZ)	X			Mr. THOMPSON (PA)		X	
Mr. COURNTEY (CT)	X			Mr. WALBERG (MI)		X	
Ms. FUDGE (OH)			X	Mr. GUTHRIE (KY)		X	
Mr. SABLAN (MP)			X	Mr. BYRNE (AL)		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. ROONEY (FL)			X
Mr. DESAULNIER (CA)	X			Mr. SMUCKER (PA)		X	
Mr. NORCROSS (NJ)	X			Mr. BANKS (IN)		X	
Ms. JAYAPAL (WA)	X			Mr. WALKER (NC)		X	
Mr. MORELLE (NY)	X			Mr. COMER (KY)		X	
Ms. WILD (PA)	X			Mr. CLINE (VA)		X	
Mr. HARDER (CA)	X			Mr. FULCHER (ID)		X	
Mrs. MCBATH (GA)	X			Mr. TAYLOR (TX)		X	
Ms. SCHRIER (WA)	X			Mr. WATKINS (KS)		X	
Ms. UNDERWOOD (IL)	X			Mr. WRIGHT (TX)			X
Mrs. HAYES (CT)	X			Mr. MEUSER (PA)		X	
Ms. SHALALA (FL)	X			Mr. TIMMONS (SC)		X	
Mr. LEVIN (MI)	X			Mr. JOHNSON (SD)		X	
Ms. OMAR (MN)	X						
Mr. TRONE (MD)	X						
Ms. STEVENS (MI)	X						
Mrs. LEE (NV)	X						
Mrs. TRAHAN (MA)	X						
Mr. CASTRO (TX)	X						

TOTALS: Ayes: 27

Nos: 18

Not Voting: 5

Total: 50 / Quorum: / Report:

(28 D - 22 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) of rule XIII of the Rules of the House of Representatives, the goal of H.R. 1230 is to improve the lives of American workers and job seekers by restoring protections against age discrimination in the workplace. The legislation achieves this by reinstating the mixed-motive evidentiary threshold in age discrimination cases. The legislation also extends the mixed-motive evidentiary threshold to claims for disability discrimination under the ADA and the *Rehabilitation Act*, and anti-retaliation claims under Title VII of the *Civil Rights Act of 1964*.

## 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. 1230 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## HEARINGS

Pursuant to section 103(i) of H.Res. 6 for the 116th Congress, on May 21, 2019, the Committee held a legislative hearing entitled “*Eliminating Barriers to Employment: Opening Doors to Opportunity*,” which was used to consider H.R. 1230, among other bills. Relevant to H.R. 1230, the Committee heard testimony from Laurie McCann, Senior Attorney at AARP, Washington, DC. The Committee heard testimony about and discussed employment discrimination on the basis of age; how the *Gross v. FBL Financial Services, Inc.*<sup>75</sup> decision made it more difficult to prove age discrimination under ADEA; and remedies that would provide more effective relief to victims of discrimination on the basis of age, including the provisions included in H.R. 1230.

## 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 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 Act of 1974*, the Committee has received the following estimate for H.R. 1230 from the Director of the Congressional Budget Office:

<sup>75</sup>*Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, October 16, 2019.

Hon. 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. 1230, the Protecting Older Workers Against Discrimination Act.

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

Sincerely,

PHILLIP L. SWAGEL,  
Director.

Enclosure.

<b>H.R. 1230, Protecting Older Workers Against Discrimination Act</b>			
As ordered reported by the House Committee on Education and Labor on June 11, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2024	2020-2029
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
<b>Spending Subject to Appropriation (Outlays)</b>	<b>2</b>	<b>10</b>	not estimated
Statutory pay-as-you-go procedures apply?	Yes	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	Excluded from UMRA
		Contains private-sector mandate?	Excluded from UMRA
* = between -\$500,000 and \$500,000.			

H.R. 1230 would ease the standard of proof for age discrimination claims as well as for certain other employment discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. Using information from the Equal Employment Opportunity Commission (EEOC), CBO estimates that the bill would increase the caseload related to age discrimination by 5 percent to 10 percent, or roughly 1,300 additional claims per year and that the EEOC would need to hire about 20 new employees to handle the additional workload including training and outreach, at a cost of about \$2 million annually over the 2020–2024 period. Such spending would be subject to the availability of appropriated funds. For fiscal year 2019, the Congress appropriated about \$380 million for all of the EEOC's operations.

Enacting the bill could require federal agencies to respond to claims, thereby affecting direct spending because some agencies are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible

because most of them can adjust amounts collected to reflect changes in operating costs.

CBO has not reviewed H.R. 1230 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 based on age and disability in the workplace.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs) and Lilia Ledezma (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for 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. 1230. 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 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. 1230, 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 (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, 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 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; 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.

*(g)(1) Except as otherwise provided in this Act, an unlawful practice is established under this Act when the complaining party demonstrates that age or an activity protected by subsection (d) was a motivating factor for any practice, even though other factors also motivated the practice.*

*(2) In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—*

*(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act; and*

*(B) shall not be required to demonstrate that age or an activity protected by subsection (d) was the sole cause of a practice.*

(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 accrued 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 en-

actment 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 receive 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.

\* \* \* \* \*

#### RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers

and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) **[The]** (1) *The* provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). **[Amounts]**

(2) *Amounts* owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. **[Before]**

(3) *On a claim in which an individual demonstrates that age was a motivating factor for any employment practice, under section 4(g)(1), and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—*

(A) *may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 4(g)(1); and*

(B) *shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.*

(4) *Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.*

(c)(1) **[Any]** *Subject to subsection (b)(3), any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.*

(2) *In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.*

(d) *No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—*

(1) *within 180 days after the alleged unlawful practice occurred; or*

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(e) Section 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

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#### DEFINITIONS

SEC. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees

for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term “firefighter” means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term “law enforcement officer” means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, “detention” includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term “compensation, terms, conditions, or privileges of employment” encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

(m) *The term “demonstrates” means meets the burdens of production and persuasion.*

\* \* \* \* \*

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT  
EMPLOYMENT

SEC. 15. (a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Of-

office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to non-discrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure non-discrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of sections 7(d)(3) and 12(b) of this Act and the provisions of this section.

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

*(h) Sections 4(g) and 7(b)(3) shall apply to mixed motive claims (involving practices described in section 4(g)(1)) under this section.*

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**CIVIL RIGHTS ACT OF 1964**

\* \* \* \* \*

**TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY**

\* \* \* \* \*

**DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN**

**SEC. 703.** (a) It shall be an unlawful employment practice for an employer—

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

(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, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

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

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for 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 appli-

cant for employment, because of such individual's race, color religion, sex, or national origin; or

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

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by any employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or ad-

ministered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(1) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

[(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.]

*(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin or an activity protected by section 704(a) was a motivating factor for any employment practice, even though other factors also motivated the practice.*

(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

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#### NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall

be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit

until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties..

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.

(g) *Sections 703(m) and 706(g)(2)(B) shall apply to mixed motive cases (involving practices described in section 703(m)) under this section.*

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**AMERICANS WITH DISABILITIES ACT OF 1990**

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**TITLE I—EMPLOYMENT**

**SEC. 101. DEFINITIONS.**

As used in this title:

(1) **COMMISSION.**—The term “Commission” means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(2) **COVERED ENTITY.**—The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **DIRECT THREAT.**—The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **EMPLOYEE.**—The term “employee” means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) **EMPLOYER.**—

(A) **IN GENERAL.**—The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in

each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) EXCEPTIONS.—The term “employer” does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) ILLEGAL USE OF DRUGS.—

(A) IN GENERAL.—The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) DRUGS.—The term “drug” means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) PERSON, ETC.—The terms “person”, “labor organization”, “employment agency”, “commerce”, and “industry affecting commerce”, shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) QUALIFIED INDIVIDUAL.—The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) REASONABLE ACCOMMODATION.—The term “reasonable accommodation” may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) UNDUE HARDSHIP.—

(A) IN GENERAL.—The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) FACTORS TO BE CONSIDERED.—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(11) DEMONSTRATES.—The term “demonstrates” means meets the burdens of production and persuasion.

#### SEC. 102. DISCRIMINATION.

(a) GENERAL RULE.—No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.—As used in subsection (a), the term “discriminate against a qualified individual on the basis of disability” includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) COVERED ENTITIES IN FOREIGN COUNTRIES.—

(1) IN GENERAL.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) CONTROL OF CORPORATION.—

(A) PRESUMPTION.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) EXCEPTION.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) DETERMINATION.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

- (i) the interrelation of operations;
  - (ii) the common management;
  - (iii) the centralized control of labor relations; and
  - (iv) the common ownership or financial control,
- of the employer and the corporation.

(d) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) PREEMPLOYMENT.—

(A) PROHIBITED EXAMINATION OR INQUIRY.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION.—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) EXAMINATION AND INQUIRY.—

(A) PROHIBITED EXAMINATIONS AND INQUIRIES.—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) ACCEPTABLE EXAMINATIONS AND INQUIRIES.—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) REQUIREMENT.—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(e) *PROOF*.—

(1) *ESTABLISHMENT.*—Except as otherwise provided in this Act, a discriminatory practice is established under this Act when the complaining party demonstrates that disability or an activity protected by subsection (a) or (b) of section 503 was a motivating factor for any employment practice, even though other factors also motivated the practice.

(2) *DEMONSTRATION.*—In establishing a discriminatory practice under paragraph (1) or by any other method of proof, a complaining party—

(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that a discriminatory practice occurred under this Act; and

(B) shall not be required to demonstrate that disability or an activity protected by subsection (a) or (b) of section 503 was the sole cause of an employment practice.

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#### SEC. 107. ENFORCEMENT.

(a) *POWERS, REMEDIES, AND PROCEDURES.*—The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

(b) *COORDINATION.*—The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act.

(c) *DISCRIMINATORY MOTIVATING FACTOR.*—On a claim in which an individual demonstrates that disability was a motivating factor for any employment practice, under section 102(e)(1), and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(1) may grant declaratory relief, injunctive relief (except as provided in paragraph (2)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 102(e)(1); and

*(2) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.*

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**TITLE V—MISCELLANEOUS PROVISIONS**

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**SEC. 503. PROHIBITION AGAINST RETALIATION AND COERCION.**

(a) RETALIATION.—No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) INTERFERENCE, COERCION, OR INTIMIDATION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES.—**[The remedies]**

*(1) IN GENERAL.—Except as provided in paragraph (2), the remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.*

*(2) CERTAIN ANTI-RETALIATION CLAIMS.—Section 107(c) shall apply to claims under section 102(e)(1) with respect to title I.*

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**REHABILITATION ACT OF 1973**

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**TITLE V—RIGHTS AND ADVOCACY**

**EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES**

SEC. 501. (a) There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the “Committee”), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission, (hereafter in this section referred to as the “Commission”), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President’s Disability Employment Partner-

ship Board and the President's Committee for People with Intellectual Disabilities shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effective-

ness of the activities of the Commission under subsection (b) and (c) of this section.

(e) An individual who, as a part of an individualized plan for employment under a State plan approved under this Act, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leaves, unemployment compensation, and Federal employee benefits.

(f) The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.), *including the standards of causation or methods of proof applied under section 102(e) of that Act (42 U.S.C. 12112(e))*, and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

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#### EMPLOYMENT UNDER FEDERAL CONTRACTS

SEC. 503. (a) Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of \$10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

(b) If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c)(1) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.

(2)(A) The Secretary of Labor may waive the requirements of the affirmative action clause required by regulations promulgated under subsection (a) with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcon-

tractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this Act.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

(d) The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.), *including the standards of causation or methods of proof applied under section 102(e) of that Act (42 U.S.C. 12112(e))*, and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

(e) The Secretary shall develop procedures to ensure that administrative complaints filed under this section and under the Americans with Disabilities Act of 1990 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

#### NONDISCRIMINATION UNDER FEDERAL GRANTS AND PROGRAMS

SEC. 504. (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term “program or activity” means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

(d) The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.), *including the standards of causation or methods of proof applied under section 102(e) of that Act (42 U.S.C. 12112(e))*, and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

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## MINORITY VIEWS

### INTRODUCTION

Every worker should be protected from discrimination at his or her job. Because Congress enacted protections against workplace discrimination in the *Civil Rights Act of 1964* (CRA), the *Age Discrimination in Employment Act of 1967* (ADEA), the *Rehabilitation Act of 1973* (Rehab Act), and the *Americans with Disabilities Act of 1990* (ADA), among other nondiscrimination laws, it is already against the law, as it should be, to discriminate in the workplace because of an individual's age or disability or to retaliate against someone because of a prior complaint alleging discrimination. It is encouraging to see older Americans continue to make invaluable contributions in the workplace, and Committee Republicans are committed to eliminating illegal discrimination in the workplace to ensure a fair, productive, and competitive workforce.

Unfortunately, Committee Democrats have chosen to promote their pro-trial lawyer agenda by advancing legislation that masquerades as a protection for a specific group of workers. H.R. 1230, the *Protecting Older Workers Against Discrimination Act* (POWADA), is yet another example of a one-size-fits-all federal mandate that disregards real-world workplace experience and decades of Supreme Court precedent.

Careful examination and scrutiny of any legislation is necessary to determine whether it is needed and whether it appropriately and effectively addresses the relevant issues. Unfortunately, in developing H.R. 1230, the Committee majority has failed miserably in this regard. Committee Democrats chose not to hold a hearing solely dedicated to examining H.R. 1230. Only one majority witness testified on the bill at a wide-ranging hearing titled "Eliminating Barriers to Employment: Opening Doors to Opportunity," which covered multiple topics and several other pieces of legislation unrelated to H.R. 1230. Regrettably, Committee Republicans were only allowed to invite one witness for the entire hearing to cover the many topics and bills that were included on the agenda.

Like other legislation before it in the 116th Congress, H.R. 1230 has been rushed through this Committee without necessary examination, discussion, or consideration. H.R. 1230 begs for reliable data and evidence, thoughtful deliberation, and genuine consideration. To reduce and eliminate workplace discrimination, we must ensure nondiscrimination statutes allow workers to remedy unlawful discrimination effectively, and H.R. 1230 fails in this regard. The legislation does nothing to improve our nondiscrimination laws and will not help older workers. The bill's title and provisions are yet another case of false advertising and empty promises. For these reasons, and as set forth below, the House should not consider or pass H.R. 1230.

## CONCERNS WITH H.R. 1230

*Evidence and Data Are Lacking*

The Committee has little to no evidence or data indicating this bill is necessary to ensure workers are protected. In fact, the lone Democrat-invited witness who testified on H.R. 1230 at a Committee hearing covering many bills and topics admitted the impact of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 767 (2009), is unknown. Laurie McCann, Senior Attorney, AARP Foundation, testifying on behalf of AARP, said in her written testimony:

For several reasons, it is difficult to quantify the impact that the *Gross* decision has had on the number of older workers who bring cases, and the number of those who win them. First, it is difficult to separate out the impact of the *Gross* decision from larger economic forces. Around the same time of the *Gross* decision, when we might have expected a drop in charges due to *Gross*-inspired discouragement from employment attorneys, there was a sizeable jump in the number of ADEA charges filed with the EEOC, which coincided with massive, recession-spawned lay-offs that resulted in record unemployment levels among older workers.<sup>1</sup>

Indeed, age discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) as a percentage of all charges filed with the agency were approximately the same the nine years before *Gross* as the nine years after *Gross*.<sup>2</sup> This data does not indicate individuals have been discouraged from filing age discrimination charges following *Gross*. In addition, there has been a slight uptick in retaliation charges under CRA Title VII filed with EEOC as a percentage of all charges filed since the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013).<sup>3</sup> Again, this data does not indicate individuals have been discouraged from filing Title VII retaliation charges after *Nassar*.

More broadly, employment trends for older workers are positive in recent decades, according to the Bureau of Labor Statistics:<sup>4</sup>

- “In 1998, median weekly earnings of older full-time employees were 77 percent of the median for workers age 16 and up. In 2018, older workers earned 7 percent more than the median for all workers.”

<sup>1</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. (May 21, 2019) (written statement of Laurie McCann, Senior Attorney, AARP Foundation, at 6) [hereinafter McCann Statement]. Ms. McCann's written statement said that “civil rights groups, business groups,” and Senate staff co-wrote an “agreed-upon draft” of POWADA in 2010. *Id.* at 8. However, in a letter dated June 4, 2019, the U.S. Chamber of Commerce, HR Policy Association, and the Society for Human Resource Management wrote that “no agreement was reached” and “no draft was agreed upon” by “business groups.” *Id.* (letter from U.S. Chamber of Com. et al. to Chairman Bobby Scott, Comm. on Educ. & Labor, & Ranking Member Virginia Foxx (June 4, 2019)).

<sup>2</sup> EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2018, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>3</sup> *Id.*

<sup>4</sup> BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., HOW ARE OUR OLDER WORKERS DOING? (May 20, 2019), <https://blogs.bls.gov/blog/2019/05/20/how-are-our-older-workers-doing/>.

- “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.”

#### *Older Workers are Protected Under Current Law*

Contrary to the “findings” section in H.R. 1230, *Gross* has not narrowed the protections of the ADEA and Title VII. The Supreme Court made clear in *Gross* that its ruling did not increase the burden of persuasion on plaintiffs in ADEA cases: “There is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the ‘but-for’ cause of the employer’s adverse action, . . . and we imply none.”<sup>5</sup>

Indeed, with respect to litigation, evidence is lacking that individuals have been discouraged from filing age discrimination or retaliation lawsuits since the *Gross* and *Nassar* decisions, or that they are finding it harder to win these cases. Courts continue to rule in favor of employees in ADEA<sup>6</sup> and Title VII retaliation<sup>7</sup> cases following *Gross* and *Nassar*. In fact, courts have ruled for plaintiffs in cases that might have been mixed-motive cases in the absence of *Gross*, but the courts nonetheless ruled the plaintiffs’ claims were sufficient under *Gross*.<sup>8</sup>

#### *H.R. 1230 Harms Workers While Enriching Trial Lawyers*

Under *Gross* and *Nassar*, a plaintiff must prove age or a retaliatory motive was the “but-for,” or decisive, cause of the adverse em-

<sup>5</sup> 557 U.S. at 178 n.4.

<sup>6</sup> See, e.g., *Westmoreland v. TWC Admin. LLC*, 2019 WL 2195164 (4th Cir. May 22, 2019) (evidence was sufficient to support jury’s finding that employer’s proffered reason for firing employee was pretext for age discrimination); *Steele v. Mattis*, 899 F.3d 943 (D.C. Cir. 2018) (denying summary judgment where genuine issues of material fact existed regarding whether age was true reason for professor’s discharge); *H.R. 3721, The Protecting Older Workers Against Discrimination Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 111th Cong. 21–22 (2010) (statement of Eric S. Dreiband, Partner, Jones Day Law Firm) (collecting cases in which federal courts ruled in favor of plaintiffs in ADEA litigation after *Gross*); BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW Ch. 12.X.B.1 (5th ed. 2012) (collecting cases on the plaintiff’s prima facie case in age discrimination litigation).

<sup>7</sup> See, e.g., *Collymore v. City of New York*, 2019 WL 1568070 (2d Cir. Apr. 11, 2019) (employee sufficiently alleged causal connection between protected activity and retaliatory acts to state a claim for retaliation under Title VII); *Mys v. Mich. Dep’t of State Police*, 886 F.3d 591 (6th Cir. 2018) (record contains sufficient evidence of retaliation to support jury’s verdict); *Garayalde-Rijos v. Municipality of Carolina*, 747 F.3d 15 (1st Cir. 2014) (employee plausibly alleged Title VII retaliation claim against city); *Connelly v. Lane Constr. Corp.*, 809 F.3d 780 (3d Cir. 2016) (employee stated plausible Title VII retaliation claim).

<sup>8</sup> See, e.g., *Mora v. Jackson Memorial Found., Inc.*, 597 F.3d 1201, 1205 (11th Cir. 2010) (even after *Gross*, defendant not entitled to summary judgment where there is a disputed question of material fact); *Baker v. Silver Oak Senior Living Mgt. Co.*, 581 F.3d 684 (8th Cir. 2009) (under *Gross*, plaintiff presented dismissible case of age discrimination for jury trial).

ployment action in ADEA and Title VII retaliation cases, respectively. H.R. 1230 overturns these Supreme Court decisions by allowing a plaintiff to prove age or the retaliatory motive was merely a motivating factor of the adverse employment action. Thus, the bill allows “mixed-motive” claims in these cases, as well as in ADA and Rehab Act cases.

If a plaintiff proves a mixed-motive claim under H.R. 1230, then he or she may be entitled to monetary damages, reinstatement, hiring, promotion, other payments, and attorneys’ fees and costs. However, if the employer demonstrates it would have taken the same action in the absence of the impermissible motivating factor (such as age or a retaliatory motive), then the plaintiff may only receive declaratory relief, injunctive relief (not to include requiring an admission, reinstatement, hiring, or promotion), and attorneys’ fees and costs; and no monetary damages or other payments may be rewarded.

The only party who will be paid in nearly all mixed-motive cases is the plaintiff’s attorneys, because most employers will be able to demonstrate that they would have taken the same action in the absence of the impermissible motivating factor. This raises the question of whether the legislation will benefit workers—who will, in nearly all cases, not receive any monetary damages under H.R. 1230. Lawrence Z. Lorber, Senior Counsel, Seyfarth Shaw LLP, raised this concern in his statement for the hearing record:

Another significant concern about POWADA which should be addressed is that including a mixed-motive theory into the ADEA, and the other statutes at issue, will simply encourage needless litigation [in] which, by statute, the only successful participant will be the plaintiff’s attorney.<sup>9</sup>

James A. Paretti, Jr., of the Workforce Policy Institute also discussed in his statement for the hearing record how H.R. 1230 slants the law against workers:

[A]s a matter of substantive law, we are concerned that the bill as drafted would in too many instances result in an employee who has proven that he or she was the victim of age discrimination recovering nothing under federal law, and certainly less than they would under the current-law *Gross* standard. . . . To so limit the recovery of an individual who has proven that his or her employer factored age into its employment decision hardly seems to “protect” such workers. Indeed, the only party who “wins” under such a scenario is the plaintiffs’ bar.<sup>10</sup>

It is a legitimate question whether H.R. 1230 was written to ensure that the plaintiff’s attorneys are paid even if the impermissible factor was not the “but-for” cause of the adverse employment action. As G. Roger King, Senior Labor and Employment Counsel,

<sup>9</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. (May 21, 2019) (statement of Lawrence Z. Lorber, Senior Counsel, Seyfarth Shaw LLP, at 4 (June 4, 2019)) [hereinafter Lorber Statement].

<sup>10</sup> *Eliminating Barriers to Employment: Opening Doors to Opportunity: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. (May 21, 2019) (letter from James A. Paretti, Jr., Shareholder, Workforce Poly Inst., Littler Mendelson, P.C., to the Hon. Robert C. “Bobby” Scott, Chairman, Comm. on Educ. & Labor, at 2–3 (June 4, 2019)) [hereinafter Paretti Letter].

HR Policy Association, wrote in a memorandum to Republican Leader Virginia Foxx (R-NC): “The only beneficiaries from H.R. 1230 would appear to be plaintiff’s attorneys—certainly not a protected ‘class’ under any appropriate definition of the term.”<sup>11</sup> Moreover, adding insult to injury, the plaintiff will owe taxes on any attorneys’ fees awarded even though the plaintiff has not received any monetary award.<sup>12</sup>

Notably, *Gross* and *Nassar* eliminated the “same action” defense for employers in ADEA and Title VII retaliation cases, which benefitted plaintiffs, while H.R. 1230 restores this defense, which benefits defendants. Restoring the “same action” defense will likely render the mixed-motive standard irrelevant for employees, because nearly all employers will be able to demonstrate they would have taken the same employment action in the absence of the impermissible factor, a showing which therefore eliminates monetary damages for plaintiffs under the bill.

#### *H.R. 1230 Will Promote and Increase Frivolous Litigation*

Retaliation cases are particularly ill-suited to allow mixed-motive causation, which would increase frivolous litigation rather than benefitting workers. Retaliation is the most frequently claimed violation for those filing charges with EEOC.<sup>13</sup> Retaliation claims inherently involve “differing explanations” by the employee and employer.<sup>14</sup> In a retaliation claim, the employee will have already made a discrimination complaint or availed him or herself of Title VII processes, so it will be a mere formality for the employee to plead that a subsequent adverse employment action is retaliation. The business owner will be faced with a nearly impossible task of proving the employee’s discrimination complaint was not a motivating factor in taking the adverse employment action.

The Supreme Court observed in *Nassar* that in retaliation cases, “lessening the causation standard could . . . contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.”<sup>15</sup> Not only would more frivolous claims increase costs, but these resources would not be available to prevent harassment and other forms of discrimination, defeating the purpose of H.R. 1230 claimed by its advocates to reduce workplace discrimination.

The Court was also concerned that permitting mixed-motive claims in retaliation cases would encourage plaintiffs to game the system by filing anticipatory discrimination claims:

Consider . . . an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or

<sup>11</sup>Memorandum from G. Roger King, Senior Labor & Emp’t Counsel, HR Pol’y Ass’n, to the Hon. Virginia Foxx, Ranking Member, U.S. House of Rep. Comm. on Educ. & Labor, at 1 (June 10, 2019) (on file) [hereinafter King Memo].

<sup>12</sup>See Lorber Statement, *supra* note 9, at 4.

<sup>13</sup>EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2018, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>14</sup>Lorber Statement, *supra* note 9, at 6.

<sup>15</sup>70 U.S. at 358.

religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation . . . . [T]hat claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage . . . . It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.<sup>16</sup>

The Court noted the significance of the “lessened causation standard” making it “far more difficult to dismiss dubious claims at the summary judgment stage.” Mixed-motive claims are a fallback position for plaintiffs to survive a summary judgment motion by the employer. If summary judgment is not granted to the employer, most employers will settle the case because they will be faced with the risk and expense of a trial. Mr. King explained this dynamic:

The critical tactical point in many of these cases is for a plaintiff’s attorney to get past an employer’s motion for summary judgment. If a plaintiff’s attorney can succeed in defeating an employer’s summary judgment motion, in virtually every case, the next step is for the plaintiff’s attorney to attempt to extract a large settlement payment from the employer. Employers often are inclined to make such payments to avoid large expenses from protracted litigation. Often a large portion of any such settlement goes to the plaintiff’s lawyer, with employees and individuals receiving small payments, if any.<sup>17</sup>

While plaintiffs will receive no monetary damages in most mixed-motive court judgments, most settlements in these cases will not provide much in the way of payments for plaintiffs either.

*The Mixed-Motive Standard in H.R. 1230 Contradicts the ADEA*

Adding the mixed-motive standard of proof to the ADEA is contrary to the statutory scheme. Many employment actions have effects that correlate with age, which the ADEA itself acknowledges. Allowing mixed-motive claims in these situations would make defending these cases extraordinarily difficult for employers.

The ADEA states that it is lawful for an employer to take an employment action otherwise prohibited by the statute if the differential treatment is “based on reasonable factors other than age.”<sup>18</sup> The Supreme Court in 2008 noted the uniqueness of ADEA claims in *Meacham v. Knolls Atomic Power Laboratory*:

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

<sup>16</sup> *Id.* at 358–59.

<sup>17</sup> King Memo, *supra* note 11, at 2.

<sup>18</sup> 29 U.S.C. § 623(f)(1).

with age, when it put the RFOA [reasonable factor other than age] clause into the ADEA, “significantly narrow[ing] its coverage.”<sup>19</sup>

Allowing mixed-motive claims in age discrimination cases will eliminate the flexibility Congress intended when it adopted the ADEA. Commenting on the RFOA provision in the ADEA, Mr. Lorber wrote:

[The ADEA] recognizes, as it should, that in dealing with the complexities of discrimination, not every form of discrimination is the same nor does it require that every form of discrimination be defined precisely the same, or that procedures and remedies designed to address the discrimination be the same . . . .<sup>20</sup>

Because the ADEA contemplates there can be reasonable factors other than age involved in an employment decision, Mr. Lorber also doubted that adding mixed-motive claims to the ADEA is workable:

[I]n reviewing the RFOA affirmative defense, it is difficult to square that defense with the mixed-motive theory holding that liability can be found when there are two factors deemed to be motivating . . . . Indeed, it is difficult to discern how the mixed-motive theory can co-exist with the RFOA defense.<sup>21</sup>

Adding mixed-motive claims to the ADEA is ill-advised and in conflict with Congress’s intent in enacting the statute separately, with different substantive provisions from Title VII.

*H.R. 1230 Will Impede Reasonable Accommodations under the ADA*

The ADA operates under a completely separate statutory scheme than Title VII or the ADEA. Under the ADA, employers must provide a reasonable accommodation to an individual with a disability unless this would impose an undue burden on the employer.<sup>22</sup> Accommodations are often reached through an interactive process between the employer and employee. Under H.R. 1230, allowing mixed-motive claims interferes with the interactive process in the ADA and makes it more difficult to find reasonable accommodations for individuals with disabilities. Mr. Lorber explained this outcome:

In the interactive process, the parties must engage in discussion of all factors considered for reasonable accommodation. There may be instances where the employer does not accept the proffered accommodation and instances where the employee or applicant does not accept the proffered accommodation. Under a mixed motive theory, the interactive process could by itself be an example of a mixed-motive and lead to a finding of employer liability. Concern about expensive and needless litigation addressing a mixed-motive would hinder the achievement of the key purpose of the ADA and *Rehabilitation Act*, reasonable

<sup>19</sup> 554 U.S. 84, 102 (2008) (citation omitted).

<sup>20</sup> Lorber Statement, *supra* note 9, at 4.

<sup>21</sup> *Id.*

<sup>22</sup> 42 U.S.C. § 12112(b)(5)(A).

accommodation. There is no evidence that the ADA needs the mixed motive analysis in order to be an effective statute.<sup>23</sup>

Mr. Paretti elaborated on this point, observing that H.R. 1230 may result in judgments against employers who have not discriminated on the basis of disability:

As amended by H.R. 1230, the ADA could presumably result in liability for an employer who fails to engage in the interactive process, even where it may be evidently obvious that no reasonable accommodation would allow the employee to perform the essential functions of his or her position. Is the employer's failure to engage in such a process a "motivating factor" under POWADA? Assuming arguendo that it may be, an employer under POWADA may be able to establish a "same action" defense as outlined above—proving that its failure to engage would not have changed the ultimate result—but that employer, otherwise acting lawfully under the ADA, would conceivably face liability for injunctive relief, and as a dollars-and-cents manner, attorneys' fees.<sup>24</sup>

H.R. 1230 disrupts the carefully crafted statutory framework of the ADA, increasing employer liability with no discernible benefit for employees.

*Evidentiary Language in H.R. 1230 is Vague, Overly Broad, and Creates Legal Loopholes*

H.R. 1230 says a plaintiff "may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred." Further, the bill's findings and purposes state that a plaintiff under H.R. 1230 "may demonstrate an unlawful employment practice through any available method of proof or analytical framework." This is exceedingly broad language that could allow a plaintiff to evade traditional civil litigation requirements. Mr. Paretti discussed concerns regarding the evidentiary language in H.R. 1230:

[C]ertain provisions of H.R. 1230 are unclear in their scope and purpose, and appear to be novel additions to the existing scheme of federal law protecting the civil rights of employees . . . . Foremost, we note that this language is almost limitlessly broad, and that the inclusion of it as a "purpose" of POWADA does nothing to clarify the application of the proposed statutory language, instead leading only to confusion as to the law's true intent and impact.<sup>25</sup>

Such unclear and overly broad language in H.R. 1230 regarding evidentiary standards is unnecessary and will result in confusion and unnecessary subsequent litigation.

<sup>23</sup> Lorber Statement, *supra* note 9, at 5–6.

<sup>24</sup> Paretti Letter, *supra* note 10, at 3.

<sup>25</sup> *Id.* at 3–4.

## REPUBLICAN AMENDMENTS

Committee Republicans offered several amendments during the Committee markup to highlight the fundamental policy flaws in H.R. 1230 and to advance important priorities and practical solutions for all workers, including older workers.

To add some much-needed truth in advertising to the bill, Representative Lloyd Smucker (R-PA) offered an amendment to add a finding pointing out that under H.R. 1230, nearly all successful plaintiffs will not be entitled to monetary damages, other payments, or reinstatement. As discussed previously, the Supreme Court in *Gross* eliminated the defense that allows the employer to demonstrate it would have taken the same employment action in the absence of the impermissible factor, such as age, while H.R. 1230 restores this defense. Nearly all employers will be able to make this demonstration, and plaintiffs in these cases will not be entitled to any monetary damages, other payments, or reinstatement. Only the trial lawyers in these cases will be paid. Committee Democrats nonetheless unanimously rejected this amendment that would have informed workers they are very unlikely to be awarded any damages, other payments, or reinstatement under H.R. 1230.

A second amendment was offered by Representative Rick Allen (R-GA) to ensure the Committee receives needed data and evidence, which the majority failed to provide, as it considers H.R. 1230. The amendment required that the Government Accountability Office do a much-needed study on whether the Supreme Court decisions in *Gross* and *Nassar* have discouraged individuals from seeking or achieving legal relief before the legislation goes into effect. The amendment is needed because the Committee failed to hold a hearing dedicated to examining the legislation, and it only heard testimony from one witness invited by the Democrats at a wide-ranging hearing on a number of disparate workforce topics. Remarkably, the one Democrat-invited witness who testified at the hearing about the bill acknowledged “it is difficult to quantify the impact that the *Gross* decision has had on the number of older workers who bring cases, and the number of those who win,” and “when we might have expected a drop in charges due to *Gross*-inspired discouragement from employment attorneys, there was a sizeable jump in the number of ADEA charges filed with EEOC.”<sup>26</sup> In fact, age discrimination and retaliation charges as a percentage of all charges filed with EEOC have not declined since *Gross* and *Nassar* were handed down,<sup>27</sup> and plaintiffs continue to win age discrimination and retaliation cases in the courts. Committee Democrats unanimously rejected this amendment to gather much-needed data before making changes to the nation’s civil rights laws and proceeded to adopt H.R. 1230 despite a lack of evidence indicating a need for the bill.

Republican Leader Virginia Foxx (R-NC) offered an amendment to strike the unworkable and ill-advised provisions in H.R. 1230 allowing mixed-motive claims in Title VII retaliation cases. Allowing mixed-motive claims in retaliation cases is contrary to the text,

<sup>26</sup> McCann Statement, *supra* note 1, at 6.

<sup>27</sup> See EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2018, *supra* note 2.

structure, and history of Title VII, as the Supreme Court held in *Nassar*. All retaliation claims are inherently about differing explanations. The Supreme Court pointed out in *Nassar* that in a retaliation claim, the plaintiff has already made a discrimination complaint or can make an anticipatory discrimination complaint, and, under the mixed-motive standard, it will be a mere formality to plead the subsequent employment action in question was retaliatory.<sup>28</sup> As noted previously, the Supreme Court in *Nassar* wrote that in retaliation cases, “lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment.”<sup>29</sup> The Supreme Court also noted the concern about diverting resources was especially relevant because retaliation charges filed at EEOC had nearly doubled in the past 15 years and had become the second-most frequently filed category of charge in 2013. This concern is even more relevant today, because retaliation is now the most frequently filed EEOC charge.<sup>30</sup> Despite these serious concerns with adding mixed-motive claims to retaliation cases, Democrats unanimously rejected this prudent amendment.

#### CONCLUSION

H.R. 1230 is an unnecessary and misleading bill that does not “protect older workers.” Committee Democrats failed to allow a proper examination of H.R. 1230, depriving Members of the opportunity to review the legislation appropriately before it was considered by the Committee. Supporters of the bill also failed to demonstrate that the legislation is needed, or that it will actually help workers. H.R. 1230 was instead written for the benefit of trial lawyers, ensuring they will be paid, while most workers will not receive any monetary damages, other payments, or reinstatement. For these reasons, and the reasons described above, we oppose the enactment of H.R. 1230 as reported by the Committee on Education and Labor.

VIRGINIA FOXX,  
*Ranking Member.*  
 DAVID P. ROE.  
 GLENN “GT” THOMPSON.  
 TIM WALBERG.  
 BRETT GUTHRIE.  
 BRADLEY BYRNE.  
 RICK W. ALLEN.  
 LLOYD SMUCKER.  
 MARK WALKER.  
 JIM BANKS.  
 JAMES COMER.  
 RUSS FULCHER.

<sup>28</sup> 570 U.S. at 358.

<sup>29</sup> *Id.*

<sup>30</sup> See EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2018, *supra* note 2.

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STEVE WATKINS.  
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FRED KELLER.  
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