NIH Public Access
Author Manuscript
Res Aging. Author manuscript; available in PMC 2014 September 04.

Published in final edited form as:
Res Aging. 2010 November ; 32(6): 679–697. doi:10.1177/0164027510379348.

International Comparison of Age Discrimination Laws

Joanna N. Lahey[1]
Texas A&M University and NBER

Abstract

European age discrimination legislation is discussed in the context of the US Age Discrimination in Employment Act (ADEA) and related state laws. US law was originally introduced to protect productive older workers from age stereotypes, but more recently preventing age discrimination has become important as a means of keeping costs down on entitlement programs as the population ages. Changes in enforcement, penalties, exemptions, length of time to file, and burden of proof have changed the effects of the laws over time. The ADEA has had both positive effects on currently employed older workers and negative effects on the hiring of older workers. Enforcement and publicity are offered as possible explanations for the strength of these positive and negative effects. Age discrimination legislation in Europe, indicated in the Framework Directive 2000/78, is driven by economic and political considerations. European legislation calls for less enforcement and more exemptions than the corresponding US cases which could lead to smaller effects on employment. However, pensions, disability, unemployment, and social security potentially have a stronger effect on social norms for retirement age than does anti-discrimination legislation.

Although the United States has had federal legislation outlawing employment discrimination based on age since the 1960s, many European countries have recently had their first experiences with age discrimination laws with the advent of the Framework Directive 2000/78/EC. This directive, put in place in 2000, required member countries to design their own anti-discrimination laws by 2003, with an extension to 2006 allowed for age discrimination laws. As the baby boomer population ages, retired workers put stresses on national pension systems across the world. Given reductions in morbidity and mortality, a possible way to mitigate these stresses would be to raise the pension ages for public pensions, in effect decreasing the benefits from annuities, and encouraging workers to increase the length of their working lives. However, in order to make these changes without decreasing the quality of life of these cohorts, employers must be willing to employ older workers.

One method to combat age discrimination in employment is to prohibit it through regulation. Although the goal of these age discrimination laws is to increase the employment of older workers, theoretically the effects of these laws are not as clear. When a worker becomes more difficult to remove, firms are less likely to take a chance on hiring that worker. Empirical work from the United States has already shown that protection laws can have

[1]Contact author at jlahey@nber.org.

NIH-PA Author Manuscript
NIH-PA Author Manuscript
NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

unintended effects (e.g. Acemoglu and Angrist 2001, Deliere 2000, Lahey 2008). Viewing the new European laws within a framework developed for analyzing US data can help guide EU policymakers and researchers as they attempt to grapple with ways to increase employment among these groups.

Each country in the European Union was able to create its own age discrimination law guided by the principles put forth in the Framework Directive. Although similar in many ways, a diverse set of these laws exists across the EU. The different aspects of these laws may result in different effects. Differences in enforcement, penalties, exemptions, time to file, and burden of proof influence the scope and strength of these laws, as they have influenced the effects of age discrimination laws in the United States. Additionally, some aspects of these laws, such as the effect of prohibiting age-based employment advertisements or discouraging the use of birth dates on resumes, could have a large impact but have not been formally studied.

This paper introduces these new European Union laws and provides a framework for thinking about how these laws affect employment outcomes for older workers based on research that has been done in the US on the Age Discrimination in Employment Act (ADEA).

US DISCRIMINATION LAW

History

In 1965, the US Department of Labor drafted a report on age discrimination in the economy that would become the basis for the 1967 federal Age Discrimination in Employment Act (ADEA). This report focused on how negative and incorrect stereotypes hurt older workers and hurt the economy by keeping productive older workers from contributing. More recently, the issue of age discrimination has become of interest in most developed countries as the retirement of the baby boom generation stresses public pension programs, a problem that could be ameliorated with little loss of quality of life if older people remained in the labor force.

The ADEA protects workers and potential workers from age-based discrimination in terms of hiring, firing, and other conditions of employment. In addition to the federal ADEA, individual states have their own legislation protecting workers from discrimination based on age, beginning with Colorado's statute in 1903. Figure 1 shows the introductory dates for state legislation. Although many states essentially copied the federal law, some have had more restrictive laws. Additionally, an idiosyncrasy in the federal law provides potential plaintiffs in states with state laws additional time to bring a lawsuit compared to those in states without their own laws.

Anatomy of a Law

The original 1967 federal law protected workers age 40 to age 65 and allowed for mandatory retirement and other discriminatory behavior after age 65. In 1978, the law expanded to cover those age 40 to 70 and in 1986 removed the upper age limit entirely. In 1978, the law also allowed the right to a jury trial and in 1979 the Department of Labor moved

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

enforcement to the Equal Employment Opportunity Commission (EEOC), both of which strengthened the enforcement of the ADEA (Hersch and Viscusi 2004, Neumark 2001). The law included some exceptions, allowing mandatory retirement to be phased out by 1993 for workers in jobs with tenure, such as university professors. The ADEA covers workers in firms of 20 workers or more, in contrast to the more restrictive Civil Rights Act (1964) that protects those in firms of 15 or more workers from discrimination based on race, gender, national origin, or religion.

Employers are allowed to use age as a qualification in employment decisions if there is a "Bona Fide Occupational Qualification" or BFOQ that is directly related to age. A common example given is that of an acting position. In practice, the courts have also allowed age to be considered a BFOQ in cases where public safety may be affected, including occupations such as pilots, air traffic controllers, or bus drivers. The federal law also exempts high-salaried policy-making positions (such as CEO) from age discrimination law.

Unlike the US Civil Rights act, which allows damages for emotional suffering and punitive damages, the ADEA limits awards to plaintiffs to "make whole" status, that is, returning plaintiffs to the point where they would have been had they not been discriminated against. These awards can include hiring, reinstating, promoting, back pay, restoring benefits and paying lawyer fees. Lawyer fees often make up the majority of the award to ADEA recipients. Additional damages are only awarded in rare cases in which the defendant has willfully violated the law and these damages are limited to twice the amount of actual damages (O'Meara 1989, Lindemann and Kadue 2003). Because of these limits to damages, the majority of plaintiffs under the ADEA have been white male middle managers in their 50s who have lost sizeable salaries and benefits (Schuster and Miller 1984, O'Meara 1989). From the firm's perspective, if the penalties are not steep enough, it may be a profitable business decision to ignore the law and pay penalties as they occur. However, consumer backlash from publicized discrimination cases may make this type of law violation less palatable to firms.

Interpretation

The interpretation of the law in court is subject to whether or not disparate impact cases are allowed in addition to disparate treatment cases. While disparate treatment cases require intentional discrimination, in disparate impact cases a policy can indirectly impact a protected group differently than the unprotected group. A common example of a disparate impact policy would be a minimum height requirement that has a disparate impact on women, who are shorter than men on average. For age, disparate impact often involves decisions based on seniority or wages such as the decision to fire those who have the highest salaries or who have been with the firm the longest. Recently, in Smith v. City of Jackson, 544 U.S. 228 (2005), the United States Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination. The Court also held that the "reasonable factors other than age" ("RFOA") test, rather than a "business-necessity" test, is the appropriate standard for determining the legality practices that disproportionately affect older individuals. This ruling differed from the EEOC's earlier position that an employment

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

practice that had a disparate impact on individuals within the protected age group could not be a reasonable factor other than age unless it was justified as a business necessity.[2]

A second legal interpretation question is that of who bears the burden of proof in disparate impact cases. Generally, this question is equivalent to whether the plaintiff must prove that a policy is intentionally discriminatory, or whether the defendant must prove that the policy had a bona fide business rationale. This burden of proof has shifted from defendant to plaintiff and back in age cases since the 1970s. Currently the 2005 *Smith v. City of Jackson* ruling is that "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (quoting Wards Cove, 490 U.S. at 656).

Procedure

If a state has its own age discrimination statutes, the ADEA requires the claimant to file with the state Fair Employment Practices (FEP) office within 300 days of the occurrence of the incident. In the few states that do not have statutes, the claimant must file with the EEOC within 180 days. The EEOC can then dismiss the claim, at which point the claimant may pursue a civil action in court, or the EEOC can seek to settle or mediate. If the settlement or mediation is unsuccessful, the EEOC can then sue, or if it chooses not to sue, the claimant may sue (Neumark 2001). Over 95% of employment discrimination cases are brought by private attorneys, not the EEOC, and of the cases filed in federal court for employment discrimination, 92% are never brought to trial (Gregory 2001).

If the case goes to trial, the plaintiff first shows evidence of disparate treatment, that is, that there was a motive to discriminate based on age, if there is any evidence. The most common type of evidence for direct discrimination is a verbal statement of age bias as company policy. If there is no direct evidence of discrimination, then the plaintiff shows that he or she is in the protected age range, suffered an adverse reaction, was successfully performing to the employer's expectations of the work, and was replaced. Next the defendant presents one of the exceptions or defenses to the ADEA. Finally, the plaintiff attempts to establish that this defense is untrue.

Effects of the law

Laws protecting people from age discrimination potentially have both positive and negative effects. Any law that manipulates free market decisions could have negative impacts on individual firm productivity, in this case preventing employers from making efficient hiring and firing decisions. However, if the law is fixing market failures, such as those caused by incorrect stereotypes, lack of information, or tastes for discrimination, it can improve firm productivity. Overall productivity in the economy may be increased if the law allows older potential workers who would have been unproductive in the absence of the law to become

[2]The recent 2009 *Ricci v. DeStefano* decision may have made it more difficult for plaintiffs to win disparate impact cases.

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

productive members of society, although resources used to follow and enforce the law may be a drain on society.

On the individual level, because it is much easier to detect discrimination once a worker has been employed, the law will have the effect of protecting those with jobs from termination and other negative actions. However, short of overt discriminatory language, it is almost impossible to detect discrimination on the hiring margin. Therefore, the law may have the effect of preventing those who might have been hired in the absence of the law from being hired; because of the law, firms may not wish to take a chance with a worker who will be difficult to fire.

Empirically, we can test which of these two competing effects, decreases in hiring or decreases in firing, dominate over time and for different groups in the labor force. Early on, the law may have even had positive effects on the hiring margin because of its effects on social norms regarding aging. The ADEA has virtually eliminated age-based language in advertising, and in the United States, it is no longer the norm to put birth-date or familial status information on a resume or cover letter and work histories are generally limited to the previous 10 years. Using a differences-in-differences strategy that assumes that states with their own laws are untreated by the federal ADEA, Adams (2004) determines that the introduction of the law in 1967 caused a small positive effect on overall employment for older workers, a finding consistent with Lahey (2008b). Neumark and Stock (1999) and Jolls (1996) suggest that the ADEA may also improve efficiency during this time period in companies with long-term Lazear-type contracts because the ADEA provides a commitment device for these contracts in the absence of perfect employee monitoring; the ADEA improves employee willingness to be compensated at lower wages when first entering a firm on the promise of higher wages later.

However, the effects of the ADEA may not be fixed over time. The law was strengthened by expansions and increases in enforcement in 1978 and 1979. Lahey (2008b) exploits a difference in the legal environment that makes it easier for those in states with their own age discrimination laws to sue than those in states without their own discrimination laws. This study finds unintended negative consequences of the law on employment for older men. Men work 1.5 fewer weeks per year in states where it is easier to sue after the 1978 enforcement of the law than do men in states where it is not as easy to sue. Men are both less likely to be hired and less likely to be fired in these states, suggesting that firms take the probability of a lawsuit from older applicants into account when making hiring and firing decisions. There is no negative impact on women of the same age groups.

Other work examines the effect of changes on mandatory retirement directly. Mitchell and Luzadis (1988) find that prior to age discrimination laws in 1960, pension plans rewarded delayed retirement, but by the 1980s union plans actively encouraged early retirement while non-union plans encouraged delayed retirement. Von Wachter (2002) examines the shift of mandatory retirement to age 70 in 1978 and its end in 1986 using imputed probability of being covered by mandated retirement, and finds that the labor force participation of workers age 65 and older increases by 10 to 20 percent in 1986 in specific industries.

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

Ashenfelter and Card (2002) show that the abolition of retirement for college professors in 1994 reduced retirement for those age 70 and 71.

Even with stronger incarnations of the Age Discrimination in Employment Act in place, age discrimination has not been eliminated from the US labor force. From 1992 to 2008, on average 15.79% of ADEA cases, for a total of 44,624 cases, were described as "merit resolutions," or successful claims, by the EEOC (author's calculations).[3] These numbers give only a lower bound because many instances of age discrimination are never litigated, and cases of hiring discrimination often go undetected. In 2002–2003, Lahey (2008a) performed an audit study, or correspondence review, experiment in Boston, MA and St. Petersburg, FL, sending out thousands of resumes and measuring the response rate based on date of high school graduation. Because of the need to make treatment and control groups similar except for age, the study was limited to entry-level women with work histories of ten years or less. Among this group, younger applicants (those whose date of high school graduation indicated that they were less than 50 years old) were 40% more likely to be called back for an interview than were older applicants (Lahey 2008a).

Importance of Enforcement and Publicity

On one hand, a law has no teeth without the threat of enforcement. On the other hand, employers may be more willing to take a chance on hiring older workers if they are not concerned about the ability to remove those workers later on. Between 1967 and 1978, the ADEA was publicized but there was no formal enforcement mechanism at the federal level for violations of the law. In theory, firms were not truly constrained by the law, and therefore may not have taken it into account when making hiring decisions. The positive effect on employment found by Adams (2004) could have been caused by a decrease in age-related advertisements or a change in social norms influenced by the law. However, there may have also been a decrease in firing caused by the threat of individual lawsuits; these may not have been widespread enough for firms to take them into account during the hiring decision, but could still have increased employment overall. During the later period when there was much stronger enforcement, Lahey 2008b shows a strong relationship between the groups most likely to sue for age discrimination and the propensity for employers not to hire those workers. The hiring of women and minorities does not seem to be affected by the ADEA, and those groups are extremely unlikely to bring lawsuits during the 1978–1991 time period studied. Only white men over 50, the group that brought the majority of age discrimination lawsuits (Schuster and Miller 1984, O'Meara 1989), seem to have been affected by the law; they were less likely to be hired and less likely to be fired.

Publicity, the extent to which employers and potential employees know about the laws, may also affect whether reduced firing or reduced hiring dominates overall employment of older workers. To this author's knowledge, no one has studied the trends in prevalence of advertisements that use age cut-offs or discriminatory language; however, prior to the original ADEA they were wide-spread and today they are much more limited. It is quite possible that removal of these age limits has increased hiring of older workers without any

[3] http://www.eeoc.gov/stats/adea-a.html

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

negative consequences, to the extent that employers are able to get more information to correct inaccurate negative stereotypes and are better able to hire older job seekers who do not fit the average profile of an older worker. Additionally, this removal could change social norms, increasing the age at which society believes that people should stop looking for work. Knowledge of age discrimination laws may also protect currently employed workers from discrimination and dismissal. However, publicity of these laws could also have negative consequences if firms react (or over-react) by increasing discrimination on the hiring margin for fear of being stuck with a worker who will be difficult to remove later.

Although the ADEA has not eliminated age discrimination from the labor market, and may actually cause some discrimination in hiring among middle-aged males, it is difficult to believe that eliminating the ADEA would result in better employment outcomes for older people, particularly if age-based advertising returns.

EUROPEAN CASE

Directive 2000/78/EC Framework Directive

European age discrimination law is guided by the European Union's Framework directive 2000/78. Article 13 of the 1998 EC Treaty allowed for future employment protection legislation by permitting "appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (1998 ECR I-621, 651, Riesenhuber 2009). The Directive 2000/78 was agreed upon in 2000 and was to be put into national law by member states by December 2003, allowing member countries to request an additional three years to formulate age and disability legislation (Adnett and Hardy 2007, Bell 2002, Riesenhuber 2009). The Directive only covers employment discrimination and specifically excludes state social security and social protection programs.

The European Commission's stated reasons for examining the issues of age discrimination were heavily influenced by economic reasons. The population of older people has been increasing in relation to those "working age." This increase is pressuring pension systems and other public finance systems. Additional financing pressures for healthcare and old-age care will be caused by those too frail to work. The European Commission also recognized that there is a large amount of diversity among older workers—some will pressure governmental systems, but some can be tapped to contribute to these systems. The Commission thus hoped to increase the employment rate of able-bodied workers over the age of 50 in European countries through eliminating age discrimination (Sargeant 2006).

Most member countries did not have age discrimination legislation of their own prior to the inclusive legislation. Those that did generally amended or strengthened their legislation to bring it in line with the Framework Directive. Italy introduced general protection laws in 1970, but greatly strengthened them in 2003 (Radoccia 2009, Toffoletto e Soci 2009). Finland amended its penal code in 1995 to make age discrimination illegal in Penal Code Chapter 47, s 3 and passed a new Non-Discrimination Act in 2004 (Koto and Viljakainen 2009, Finnish Penal Code 2003). Poland and Romania originally implemented age discrimination laws in 1996 and 1991 respectively, however these laws did not have "properly structured sanctions" and were updated to be in line with the European Directive

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

in 2004 and 2000 respectively (Bazilescu 2009, Raczkowski 2009). Ireland instituted an Employment Equality act in 1998 and amended it in 2004 (Adnett and Hardy 2007, Langford and Casey 2009). Similarly Belgium prohibited age discrimination in recruitment and selection in a 1998 law and instituted the Anti-Discrimination Act in 2007 (Adnett and Hardy 2007, Stox 2009). Spain outlawed age discrimination with the Workers Statute in 1980, but has been one of the worst discriminators (Drury 1993); it again updated its laws in 2005 (Sagardoy 2009).[4]

Belgium, Bulgaria, Denmark, Hungary, the Netherlands,[5] Portugal, and Romania are among the states that instituted new legislation on or before the original deadline of December 2003 (Almeida 2009, Bazilescu 2009, Karacholova and Yaneva 2009, Krisch and Kürti 2009). Austria, Cyprus, Denmark, France, Germany,[6] Greece, Luxembourg, Malta, Slovakia, Sweden, and the United Kingdom are among those member states that used extension time to formulate and implement the age discrimination provisions of the Framework Directive (Banatvala and Flanagan 2009, Brincat 2009, Castegnaro and Claverie 2009, Čermák and Sturdíková 2009, Emilianides 2009, Iliadou 2009, Kliemt and Vollstadt 2009, Madsen 2009, Mertinz 2009, O'Cinneide 2005, Sands, Tour, and Truchot 2009, Stalhåmmar 2009, von Steinau-Steinrück and Vernuft 2009). In all, at least 25 countries in Europe have or will introduce legislation prohibiting age discrimination. Figure 2 groups countries by their date of original law passage.

Modern laws prohibit explicit age limits in advertising for most occupations. Prior to the Framework Directive, some countries already prohibited age-based advertisements or had social norms that did not include them. For example, France prohibited them, and West Germany and Italy had low use in 1993. However, Spain, Greece, and the UK reported 40% of job advertisements having upper age limits (Drury 1993, Sands et al. 2009). Examining Craigslist ads, Greece and Spain still have customer service advertisements with age limits, but most of the other countries in the EU with Craigslist pages do not (author's calculations). However, in place of explicit age qualifications, advertisements in many countries did request pictures with job applications, even for occupations in which appearance should not be the predominant qualification. The request of photos with the resume is very uncommon in the United States outside of occupations for which appearance is a BFOQ, such as acting or modeling, possibly because companies do not want to open themselves up to claims of discrimination. Given that research shows that employers discriminate based on attractiveness (Rooth 2009), the request of a photograph could implicitly substitute for age bars on the hiring margin. Additionally, most applicants still include date of birth in the standard c.v.

Unlike most age discrimination legislation in the United States, Directive 2000/78 does not target discrimination against older workers alone. Instead, it disallows any discrimination

[4]Articles with information by country on age discrimination laws can be found from www.agediscrimination.info and in ten Bokum et al (2009). Further information on these laws can be found in European Commission (2006) and information for Bulgaria is from Guentcheva (2006).

[5]The Netherlands legislation came into effect in May 2004 (ten Bokum and Hoekerd 2009).

[6]Note that Germany had legislation passed in 2001, the German Works Constitution Act, that regulated works councils, mandating that they "ensure that older employees are not discriminated against" (Adnat and Hardy 2007). Germany's law complied with the EU directive in 2006.

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

based on age alone, including that against younger workers. Additionally, like the early versions of the ADEA, but unlike the modern ADEA, Directive 2000/78 allows member states to specify mandatory retirement ages (Adnett and Hardy 2007, O'Cinneide 2005, Riesenhuber 2009). Because a firm would be allowed to forcibly retire an older worker at mandatory retirement age, it is plausible (though has not been thoroughly tested) that none of the other age protections would apply after the mandatory retirement age. The mandatory retirement age for many member countries is 65, although exceptions exist. For example, Ireland removed its age limit in 2004 (previously the limit was 65) and Cyprus allows a retirement age limit of 63 (formerly age 60) for civil servants (Emilianides 2009, Langford and Casey 2009, O'Cinneide 2005).

Exemptions

In addition to the potential exemptions for people over mandatory retirement age, Directive 2000/78 allows countries to make exceptions for certain industries, such as the military, judiciary, and government. It also allows exceptions for "occupational requirement," a term similar to the BFOQ in US law, and for "legitimate aims." The list of potential "occupational requirements" is similar to that of the US, primarily focusing on acting and occupations in which safety could be compromised by conditions correlated with aging. However, the list of "legitimate aims" provided in Article 6.1 to allow for direct age discrimination is much broader than the exceptions allowed in the United States, and includes items such as experience and seniority, time before retirement, and the promotion of vocational integration (Adnett and Hardy 2007, O'Cinneide 2005, Riesenhuber 2009). The UK has an even broader list of "legitimate aims" that address company planning and training goals. The Dutch Supreme Court has agreed with allowing compulsory retirement ages to ensure worker turnover and encourage younger recruits (Banatvala and Flanagan 2009, O'Cinneide 2005, ten Bokum and Hoekerd 2009).

O'Cinneide (2005) distinguishes among three different ways that member states provide guidance for exemptions. The most specific of these he terms "closed systems." These list specific circumstances for exemptions. For example, in addition to prohibitions and allowances for juveniles, Ireland specifically allows a maximum recruitment age in cases in which the job requires training or an "effective" period before retirement age. It also allows "genuine and determining occupational requirements" and exemptions for public transportation licenses. (Langford and Casey 2009, O'Cinneide 2005). These exemptions are similar to case law in the United States, except for the "effective" period before retirement age. At the other end of the specificity spectrum, "open systems" provide a more vague general guideline for how to decide cases. For example, Belgium allows for differential treatment that is "objectively and reasonably justified" and Finland allows distinctions for "a justified purpose" (Koto and Viljakainen 2009, Stox 2009). Some countries such as Cyprus and Poland transplant the Directive 2000/78 language directly (O'Cinneide 2005). Interpretation of these exemptions will be based on future case law. Finally, "half-open systems" provide both a specific list and a general test. For example, the Netherlands both gives general "objectively justified" test, and specifically allows for a retirement age of 65 (O'Cinneide 2005, Holtmaat 2007, ten Bokum and Hoekerd 2009).

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

Procedure and Punishments

The Directive ensures that those who believe they have been discriminated against can bring their complaints through their national court system. Time limits for bringing a claim are set by the country and vary considerably (Adnett and Hardy 2007, Riesenhuber 2009). Austria allows up to a year for complaints depending on the type of complaint, whereas in Germany, the plaintiff must bring the case within two months (Mertinz 2009, von Steinau-Steinrück and Vernuft 2009). Article 17 of the directive allows member states to decide their own sanctions, so long as they are, "effective, proportionate, and dissuasive." In practice, these penalties vary widely. For example, Austria limits administrative compensation to 360 Euros, failure to hire at 500 Euros, failure to promote at the difference in salary for 3 months and hardship compensation at 720 Euros (Kunz Shima Wallentin 2009, Mertinz 2009). However, France limits to 45,000 Euro compensation and also allows for criminal charges of up to three years imprisonment (Sands et al 2009). Several countries have compensation similar to the "make whole" legislation in the United States. Depending on the strength of the punishment, companies may make a business decision to discriminate and to pay the penalty if the expected value cost of being caught is less than that of not discriminating. However, the possibility of consumer backlash, as is argued to be the case for the Netherlands where companies are not bound by the decisions of the Committee for Equal Treatment, may make this option less attractive (ten Bokum and Hoekerd 2009).

The Burden of Proof rests with the complainant, although the European Court of Justice (ECJ) ruled in a 1989 sex discrimination case, *Danfoss*, that the worker only needs to show a suspicion of unequal treatment, if a practice is not transparent, to shift the burden of proof to the defendant. In practice, in cases of indirect discrimination, it is generally necessary to show that the complainant is both a different age than the comparator and better qualified. Other factors that may shift the burden of proof to the defendant include statistical differences in success rates between age groups, discriminatory comments or language, lack of transparency, a mismatch between formal selection criteria and actual selection criteria, and discriminatory questions during an interview stage (O'Cinneide 2005). In cases of direct discrimination, Directive 2000/78 includes something called a "comparator." Article 2.1.2(a) states, "direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been, or would be treated in a comparable situation." In practice, this requirement is difficult to implement because it is not always easy to find a direct comparator, real or hypothetical (O'Cinneide 2005).

Once the burden of proof is shifted to the defendant, the defendant must show that "there has been no breach of the principle of equal treatment" or that the use of age was "appropriate and necessary" (O'Cinneide 2005, Sargeant 2006). Age discrimination is permitted if individual assessment is impractical (O'Cinneide 2005). It is also permitted if there is an occupational requirement or there are "legitimate aims" to the discrimination. Disparate impact cases are allowed by the Directive (Sargeant 2006).

Case law and practice will determine the extent to which these new laws against age discrimination are enforced and publicized. Laws that are enforced and publicized should have greater effects, both intentional and unintentional, than those that are not. A study on

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

Spain for www.agediscrimination.info (and confirmed in Cortadi and Aragón 2009) notes that although Spain's law is relatively strong and does not cap damages, discrimination of all kinds is still common in Spain and the courts have been reluctant to find against defendants (Cortadi and Aragón 2009, Sagardoy 2009). The study also notes that there has not been much publicity about age discrimination law.

CONCLUSION

In the United States, legislation prohibiting age discrimination has been in existence for decades, but its effects are still not completely understood. Prohibiting age discrimination in the United States has positive effects for those workers already employed, but has negative effects on those seeking work. The effects of age discrimination law in Europe are only now beginning to be realized. Depending on the different characteristics of these laws, they may have little effect or they may change how older people are perceived and treated by employers – for better or for worse. However strong the effects of these laws, it must be emphasized that these age discrimination laws do not work in a vacuum. There are potentially much stronger effects on the social norms surrounding older employment from eligibility for pension, disability, and social security. Mandatory retirement ages also still exist in many European countries, after which point age discrimination laws are generally not in effect.

Works Cited

Acemoglu, Daron; Angrist, Joshua. Consequence of employment protection? The case of the Americans with Disabilities Act. Journal of Political Economy. 2001; 19:915–950.

Age Discrimination in Employment Act of 1967. Pub. L. No. 90–202, 81 Stat. 602.

Adams, Scott J. Age Discrimination Legislation and the Employment of Older Workers. Labour Economics. 2004; 11(2):219–41.

Almeida, Joana. Portugal. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 271-283.

Ashenfelter, Orley; Card, David. Did the Elimination of Mandatory Retirement Affect Faculty Retirement. American Economic Review. 2002; 92(4):957–80.

Adnett, Nick; Hardy, Stephen. The Peculiar Case of Age Discrimination: Americanising the European Social Model? European Journal of Law and Economics. 2007; 23:29–41.

Banatvala, Sarah; Flanagan, Tom. United Kingdom. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 375-390.

Bazilescu, Cristina. Romania. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 285-295.

Bell, Mark. Anti-Discrimination Law and the European Union. New York: Oxford University Press; 2002.

Brincat, Matthew. Malta. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 233-242.

Castagnaro, Guy; Claverie, Ariane. Luxembourg. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 217-232.

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

Čermák, Tomáš.; Sturdíková, Karin. Slovakia. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 309-326.

Civil Rights Act of 1964. Pub. L. No. 88–352, 78 Stat. 241.

Cortadi, Eva Sainz; Aragon, Jesus Domingo. Spain. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 339-346.

DeLeire, Thomas. The Wage and Employment Effects of the Americans with Disabilities Act. Journal of Human Resources. 2000; 35(4):693–715.

Directive 2000/78/EC: Employment Framework Directive.

Drury, Elizabeth. Age Discrimination against Older Workers in the European Community. Vol. 651. London, UK: Eurolink Age; 1993. E.C.R. I-6211998

Emilianides, Achilles C. Cyprus. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 55-63.

European Commission. Equality and Non-Discrimination: Annual Report 2006. Luxembourg: European Communities; 2006.

European Court Reports. 1998; I-621:651.

Gregory, Raymond F. Old at a Young Age. New Brunswick, NJ: Rutgers University Press; 2001.

Guentcheva, Rossitza. ASO Project Report. 2006. Overview of the Status of Anti-Discrimination Legislation in Bulgaria.

Hersch, Joni; Kip Viscusi, W. Punitive Damages: How Judges and Juries Perform. Journal of Legal Studies. 2004; 33:1–36.

Holtmaat, Rikki. Country Report: The Netherlands. 2007. Retrieved March 1, 2010 (http://www.migpolgroup.com/public/docs/125.Netherlands_DiscriminationCountryReport_EN_01.07.pdf)

Iliadou, Tati. Greece. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 141-156.

Jolls, Christine. Hands-Tying and the Age Discrimination in Employment Act. Texas Law Review. 1996; 74:1813–46.

Karacholova, Maria; Yaneva, Tanya. Bulgaria. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 39-54.

Kliemt; Vollstadt. Germany. 2009. Retrieved March 1, 2010 (http://www.agediscrimination.info/international/Pages/Germany.aspx)

Koto, Lassi; Viljakainen, Petteri. Finland. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 103-114.

Krisch, Imre; Kürti, Nora. Hungary. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 157-170.

Wallentin, Kunz Shima. Austria. 2009. Retrieved March 1, 2010 (http://www.agediscrimination.info/international/Pages/Austria.aspx)

Lahey, Joanna. Age, Women, and Hiring: An Experimental Study. Journal of Human Resources. 2008a; 43(1):30–56.

Lahey. State Age Discrimination Laws and the Age Discrimination in Employment Act. Journal of Law and Economics. 2008b; 51(3):433–60.

Langford, Kevin; Casey, Sinead. Ireland. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 171-181.

Lindemann, Barbara T.; Kadue, David D. Age Discrimination in Employment Law. Portland, OR: BNA Books; 2003.

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

Madsen, Sofie Høeg. Denmark. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 77-86.

Mertinz, Anna. Austria. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 1-18.

Mitchell, Olivia S.; Luzadis, R Annamarie. Changes in Pension Incentives through Time. Industrial and Labor Relations Review. 1988; 42(1):100–08.

Neumark, David. Age Discrimination in the U.S.: Assessment of the Evidence. In: Hornstein, Z., editor. Outlawing Age Discrimination. Bristol, UK: Joseph Rowntree Foundation; 2001. p. 43-62.

Neumark, David; Stock, Wendy A. Age Discrimination Laws and Labor Market Efficiency. Journal of Political Economy. 1999; 107(5):1081–125.

O'Cinneide, Colm. European Commission. Luxembourg: Office for Official Publications of the European Communities; 2005. Age Discrimination and European Law.

O'Meara, Daniel P. Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act. Philadelphia, PA: University of Pennsylvania; 1989.

Penal Code of Finland. 2003. Chapter 47, Section 3.

Raczkowski. Poland. 2009. Retrieved March 1, 2010 (http://www.agediscrimination.info/international/Pages/Poland.aspx)

Radoccia, Stefania. Italy. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 183-198.

Riesenhuber, Karl. The EC Anti-Discrimination Framework Directive 2000/78. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. xxvii-xlvi.

Rooth, Dan. Obesity, Attractiveness, and Differential Treatment in Hiring: A Field Experiment. Journal of Human Resources. 2009; 44(3):710–735.

Sagardoy. Spain. 2009. Retrieved March 1, 2010 (http://www.agediscrimination.info/international/Pages/Spain.aspx)

Sands, Roselyn; Tour, Laurent-Paul; Truchot, Mathilde. France. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 115-124.

Sargeant, Malcolm. Age Discrimination in Employment. Aldershot, UK and Burlington, VT: Gower Publishing Limited and Ashgate Publishing Company; 2006.

Schuster, Michael; Miller, Christopher S.; Christopher, S. An Empirical Assessment of the Age Discrimination in Employment Act. Industrial and Labor Relations Review. 1984; 38(1):64–74.

Smith v. City of Jackson, 544 U.S. 228, 241 (2005).

Stalhåmmar, Jessica. Sweden. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 347-352.

Steinau-Steinrück, Robert von; Vernuft, Cord. Germany. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 125-140.

Stox, Yves. Belgium. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 19-38.

Ten Bokum, Nicky; Hoekerd, Ilya. The Netherlands. In: ten Bokum, N.; Flanagan, T.; Sands, R.; von Steinau-Steinruck, R., editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Buisness; 2009. p. 243-256.

Ten Bokum, Nicky; Flanagan, Tom; Sands, Roselyn; von Steinau-Steinruck, Robert, editors. Age Discrimination Law in Europe. The Netherlands: Wolters Kluwer: Law and Business; 2009.

Soci, Toffoletto E. Italy. 2009. Retrieved March 1, 2010 (http://www.agediscrimination.info/international/Pages/Italy.aspx)

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

U.S. Department of Labor. The Older American Worker: Age Discrimination in Employment. Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964. Washington, DC: Government Printing Office; 1965.

Wachter, Til von. The Center for Labor Economics Working Paper. Berkeley, CA: University of California; 2002. The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts.

Wards Cove Packing Co. v. Atonio, 490 U.S. 656 (1989).

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

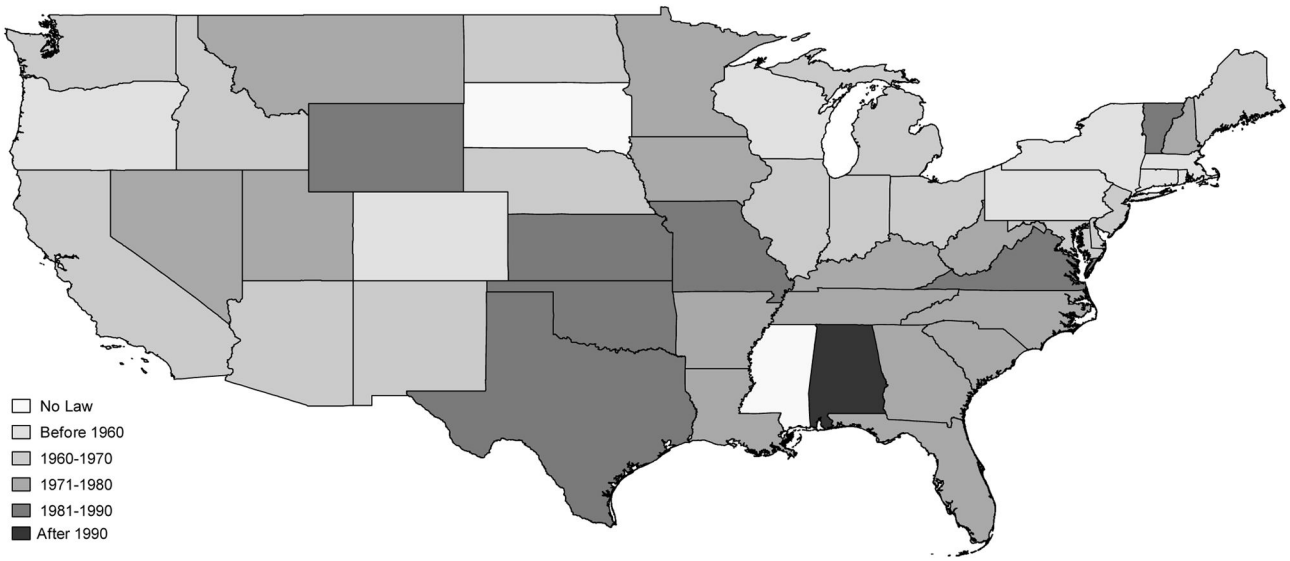

Figure 1.
Note: Information on years from Lahey 2008(b).

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

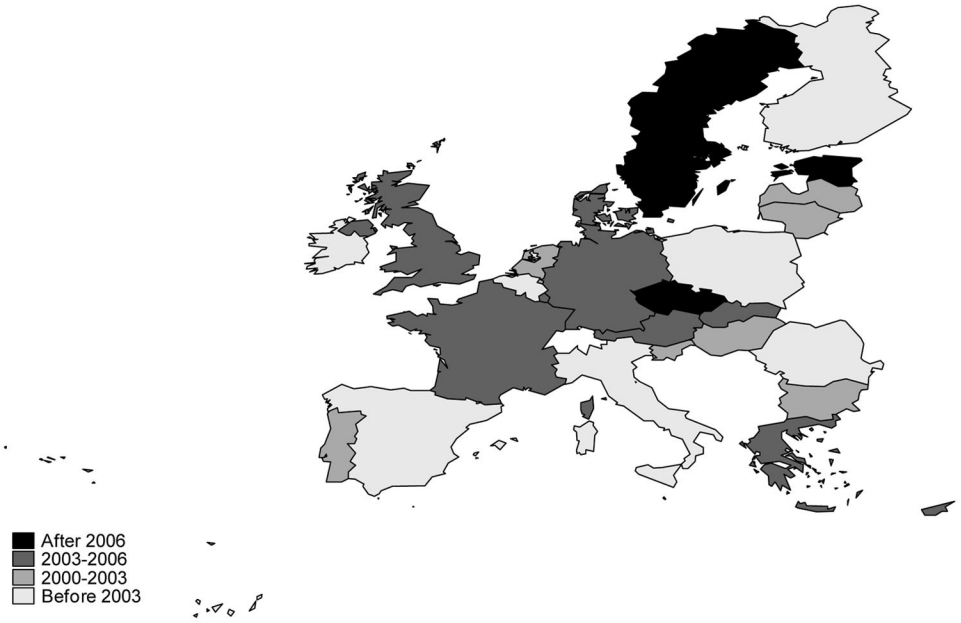

Figure 2.
Timing of Passage of First Age Discrimination Law