Neither Panacea, Placebo, Nor Poison: Examining the Rise of Anti-Unemployment Discrimination Laws

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I. Introduction

Since 2009, the unemployment rate in the United States has remained above eight percent, which means that more than twelve million individuals have been looking for work at any given time. With so many affected individuals, unemployment has become an issue of public concern, particularly as stories describing employers refusing to consider currently unemployed candidates for job opportunities have proliferated. In response to these trends, about twenty states and the federal government have passed, or are considering, legislation designed to prohibit employers from discriminating against individuals based on their employment status.

Although several bills already have been enacted to date, nearly all of the articles on this subject have been authored by members of various law firms’ employment practices.¹ These articles primarily focus on the legislative activity, discussing what employers need to know to anticipate and avoid liability. The one scholarly article that deals with this issue takes the mirror-image approach in that it primarily echoes the policy positions of employee-rights advocates and does not examine

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the specifics of any of the proposed or enacted bills.2

The goal of this Article is to survey the legislative activity, identify the factors driving it, and analyze its potential ramifications. I contend that it is unreasonable to project that this legislation will significantly reduce unemployment because there is only anecdotal data regarding the prevalence of discrimination against unemployed candidates in hiring and, regardless of the frequency of such a practice, none of the proposed or enacted legislation directly promotes job creation. However, I argue that the anti-unemployment discrimination legislation is a positive example of interest convergence in that it benefits the economy by reducing arbitrary discrimination in hiring and long-term unemployment. Furthermore, such legislation expresses a set of positive societal values and protects members of constitutionally-protected groups who are likely disproportionately impacted by current-employment requirements. I then discuss why the concerns advanced by the business community are overstated given the generally limited scope of the legislation, the lack of a private right of action, and the legally-approved uses of employment status as a proxy for characteristics about which a business might reasonably care. In sum, when taking an objective look, the anti-unemployment discrimination legislation is neither panacea, placebo, nor poison.

II. Background

A. Unemployment in the U.S.

In January 2013, the U.S. Bureau of Labor Statistics estimated that more than twelve million Americans, or about eight percent of the civilian labor force, were unemployed.3 Approximately five million of these individuals had been out of


work for more than twenty-seven weeks.\textsuperscript{4}

In terms of distribution, the unemployment rate for whites was 7 percent, while the rates for blacks and Hispanics were 13.8 and 9.7 percent, respectively.\textsuperscript{5} The unemployment rates for adult men and for adult women were both 7.3 percent.\textsuperscript{6} The unemployment rate for the disabled was 13.7 percent against 8.3 percent for individuals without any disabilities.\textsuperscript{7} On the whole, unemployment rates for older individuals was slightly lower than the rates for their younger cohorts but a much larger percentage of older unemployed individuals are long-term unemployed.\textsuperscript{8}

Political polls reflect these numbers with unemployment dominating as an area of concern. In September 2012, seventy-two percent of respondents in a national Gallup poll stated that economic problems are the most important problem facing the country today.\textsuperscript{9} Thirty-two percent of the total respondents specifically identified “unemployment/jobs.”\textsuperscript{10} In a related Gallup poll, more than three-quarters of respondents said that it is a bad time to find a quality job.\textsuperscript{11} Black, Hispanic, senior, and low-income respondents were particularly concerned about unemployment.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{4} Id.
\item \textsuperscript{5} Id.
\item \textsuperscript{6} Id.
\item \textsuperscript{7} Id. at Table A-6.
\item \textsuperscript{9} See \textit{Most Important Problem}, \textit{GALLUP}, http://www.gallup.com/poll/1675/Most-Important-Problem.aspx (last visited Apr. 16, 2013).
\item \textsuperscript{10} See Id.
\item \textsuperscript{12} See Lydia Saad, \textit{In U.S., Jobs a More Glaring Issue for Some Groups Than Others}, \textit{GALLUP} (June 27, 2012),
\end{itemize}
B. Rising Perception that Prospective Employers Discriminate Against Unemployed Candidates

In late May 2010, a staffing agency advertised a position with Sony Ericsson in Atlanta that stated, “Candidates MUST be currently working for an original consumer electronics manufacturer in marketing. NO EXCEPTIONS.” Shortly thereafter, the advertisement came to the attention of the Orlando Sentinel, which ran an article questioning the employer’s practice of excluding candidates based on their employment status. A spokesperson for Sony Ericsson quickly explained that there had been a miscommunication with the recruiter and that the language in the advertisement was a mistake.

A handful of articles discussing this practice quickly followed, although actual data remained anecdotal. For example, a New York Post columnist detailed the story of Andrea Altieri, an individual with years of work experience and a master’s degree, who was shocked to encounter a job posting in her area that required proof of “current W-2 income.” The piece further observed that a search through a job-listing aggregator website showed that a number of job advertisements in the New York City area required applicants to be currently working for positions, such as sales.


14. Id.
15. Id.
representative and bank office manager.\textsuperscript{18} Several job recruiters commented on the prevalence of this practice and bias.\textsuperscript{19}

Despite the instances of discrimination against the unemployed being only anecdotal, the reaction to the news has been strong. For example, an article on the topic published on the Huffington Post received over 3,000 comments.\textsuperscript{20} Furthermore, an October 2010 article in the Atlanta Journal-Constitution focused on people’s sense of outrage at the practice.\textsuperscript{21} A common refrain was that it should be illegal.\textsuperscript{22}

In June 2011, in a national survey conducted by Hart Research Associates, eighty percent of respondents described the refusal to consider unemployed job applicants as “very unfair.”\textsuperscript{23} Almost two-thirds of respondents said they favored a congressional proposal to make “it illegal for companies to refuse to hire or consider a qualified job applicant solely because the person is currently unemployed.”\textsuperscript{24}

With this backdrop, and as a presidential election approached,\textsuperscript{25} federal, state, and city officials have proposed
bills to address the perceived problem.\footnote{26}

C. The Legislative Responses

1. State and Local Responses

State and local legislators have been quick to propose legislation to address the perceived problem of employers discriminating against unemployed candidates in hiring. New Jersey and Oregon passed bills that regulate job advertisements. The District of Columbia passed a broader bill that also prohibits employers from using employment status as a basis for hiring decisions. More than a dozen other states have considered or are considering legislation. The trend appears to show that expansive bills face a more difficult path than narrower ones.

a. New Jersey

On March 29, 2010, New Jersey passed a statute aimed at stopping employers from discriminating against the unemployed, enacting the legislation within six months of the bill’s introduction in the state assembly.\footnote{27} The legislative process illustrates some of the competing considerations at play, including Governor Chris Christie voicing concerns about excess regulation and the legislature seeking to protect the unemployed. On October 7, 2010, Democrat Assemblyman Peter Barnes proposed a bill that would prohibit an employer or its agent from publishing job vacancies that prohibit or suggest that unemployed individuals should not apply for the advertised positions.\footnote{28} Eleven days later, the state assembly passed the proposed bill by a 58-to-18 margin with two abstentions.\footnote{29} On

\footnote{26. See Parker & Saperstein, supra note 1.}
\footnote{28. Id.}
\footnote{29. Id.}
November 8, 2010, the state senate received the proposed bill, which was in less than two weeks later by a vote of 29-to-6.\(^\text{30}\)

The original proposal stated:

1. No employer or employer’s agent, representative, or designee shall publish, in print or on the Internet, an advertisement for any job vacancy that contains one or more of the following:

   a. Any provision stating or suggesting that the qualifications for a job include current employment;

   b. Any provision stating or suggesting that the employer or employer’s agent, representative, or designee will not consider or review an application for employment submitted by any job applicant currently unemployed; or

   c. Any provision stating or suggesting that the employer or employer’s agent, representative, or designee will only consider or review applications for employment submitted by job applicants who are currently employed.

2. Any employer who violates this act shall be subject to a civil penalty in an amount not to exceed $5,000 for the first violation and $10,000 for each subsequent violation, collectible by the Commissioner of Labor and Workforce Development in a summary proceeding pursuant to the “Penalty Enforcement Law of 1999,” P.L.1999, c.274 (C.2A:58-10 et seq.).

\(^{30}\text{Id.}\)
3. This act shall take effect immediately.  

On January 6, 2011, Governor Christie returned the bill with several recommendations. Specifically, Christie voiced his concerns that the bill would harm the state’s business community by subjecting it to “significant fines, penalties and unwarranted litigation without requiring a finding of knowing and purposeful conduct on the part of the employer.” He further asserted that the term “suggesting” was too vague to provide employers with proper notice. Christie also argued that the penalties were too strong and that the bill was unclear as to whether a private civil cause of action had been created. Finally, Christie noted that the “bill’s provisions likely conflict with existing civil service laws, rules and regulations and may subject appointing authorities to the penalties set forth in the legislation.”

In less than two months, the New Jersey state legislature addressed Christie’s concerns and passed the final bill, which provides:

Unless otherwise permitted by the provisions of Title 11A of the New Jersey Statutes or any other law, rule or regulation, no employer or employer’s agent, representative, or designee shall knowingly or purposefully publish, in print or on the Internet, an advertisement for any job vacancy in this State that contains one or more of the following:

  a. Any provision stating that the
qualifications for a job include current employment;

b. Any provision stating that the employer or employer’s agent, representative, or designee will not consider or review an application for employment submitted by any job applicant currently unemployed; or

c. Any provision stating that the employer or employer’s agent, representative, or designee will only consider or review applications for employment submitted by job applicants who are currently employed.

Nothing set forth in this section shall be construed as prohibiting an employer or employer’s agent, representative, or designee from publishing, in print or on the Internet, an advertisement for any job vacancy in this State that contains any provision setting forth any other qualifications for a job, as permitted by law, including, but not limited to, the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training or professional, occupational or field experience.

In addition, nothing set forth in this section shall be construed as prohibiting an employer or employer’s agent, representative, or designee from publishing, in print or on the Internet, an advertisement for any job vacancy that contains any provision stating that only applicants who
are currently employed by such employer will be considered.\textsuperscript{37}

The legislation included maximum civil penalties of $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation.\textsuperscript{38} The legislation explicitly disclaims that it creates a private right of action.\textsuperscript{39}

Ultimately, the final version of the legislation appears to have followed a middle path. The law prohibits employers from posting job advertisements that exclude currently unemployed candidates.\textsuperscript{40} However, it does not ban consideration of either past or present employment statuses in hiring decisions.\textsuperscript{41} Also, it subjects violators to civil fines.\textsuperscript{42} These fines are graduated penalties, with the severity rising with recidivism.\textsuperscript{43} Finally, the passed legislation does not create a private right of action, leaving it to the state to enforce the provisions.\textsuperscript{44}

b. Washington, District of Columbia

On March 19, 2012, the Mayor of the District of Columbia signed a proposed law making it unlawful for an employer to refuse to hire or consider for hire a candidate based on his or her employment status.\textsuperscript{45} This legislation also specifically prohibits employers from publishing an advertisement for a job opening that disqualifies candidates who are not presently

\begin{footnotesize}
\begin{enumerate}
\item Id. § 34:8B-2.
\item Id.
\item Id. § 34:8B-1.
\item Id.
\item Id. § 34:8B-2.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
employed. The law further protects whistleblowers, prohibiting employers from restraining current employees' exercise of rights conferred by the act or from retaliating against employees who take action under the act. Despite implementing broad protections for the unemployed, the law permits employers to (1) post job advertisements that require occupational or professional licenses or other similar qualifications, (2) consider the reasons underlying a candidate's unemployment, and (3) publish job advertisements that state only the employer's current employees will be considered. No private right of action is created. Instead, aggrieved individuals must file claims with the District of Columbia's Office of Human Rights, which must investigate all claims and assess civil penalties against employers determined to have violated the act. The civil fines are as follows: $1,000 per claimant for an initial violation, $5,000 per claimant for a second violation, and $10,000 per claimant for each subsequent violation, not to exceed a total of $20,000 per violation.

Currently, the District of Columbia stands alone in prohibiting employers from considering a candidate's employment status in the ultimate hiring decision. However, as noted below, the federal proposals are very similar.

c. Oregon

On March 27, 2012, Oregon Governor John Kitzhaber signed into law an act that prohibits discrimination against the unemployed in job listings. The Oregon law was passed within two months of its introduction in the state senate. The Oregon statute is similar to that of New Jersey's in virtually all

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47. Id. § 32-1363.
48. Id. § 32-1364.
49. Id. § 32-1366(b).
50. Id. § 32-1365.
51. Id. § 32-1366(a).
53. See Or. S. 1548.
material respects, except that the Oregon statute caps the penalties at $1,000. This means that the Oregon statute only prohibits employers from the following: publishing job advertisements that indicate that currently unemployed candidates should not apply for the job, or stating that such individuals will not be considered for the position. However, the law does not bar the consideration of employment status in the ultimate hiring decision. Additionally, there is no private right of action.

d. California

The California legislature passed Assembly Bill 1450 on August 30, 2012, enrolling the bill for Governor Jerry Brown’s approval on September 11, 2012. The version of the bill that passed both the state assembly and senate hews closely to the model of New Jersey and Oregon. The California legislation, however, has a few unique aspects to it. First, in addition to applying to employers and employment agencies, it also prohibits operators of internet web sites from publishing advertisements that exclude currently unemployed candidates, unless such advertisement is based on a bona fide occupational qualification or are restricted to current employees of the employer. Second, state contractors who violate the statute may have their contracts cancelled and may be barred from seeking other state contracts for up to three years.

The most interesting thing about the California legislation is that its scope was much broader when it was originally introduced in January 2012. First, it defined “status as

54. § 85.2(4); OR. REV. STAT. ANN. § 659A.855(1) (West 2011).
55. § 85.2(1).
56. § 85.2.
57. § 85.2(3).
59. Id.
60. Id.
61. Id.
unemployed” as including an individual’s past unemployment. Second, in addition to the publication provisions that ultimately passed, the proposed legislation would have prohibited employers from refusing to consider candidates based on their status as unemployed and it would have made it unlawful for employment agencies to refuse to refer somebody on the same basis. Third, the proposed legislation included whistleblower protections. The California Senate cut these provisions through its amendments. The bill was then passed after its third reading. However, on September 30, 2012, Governor Brown returned the bill without his signature, stating without explanation that the changes could lead to unnecessary confusion.

e. Pending State Legislation

In Arizona, House Bill 2660 was introduced on January 25, 2012 but it has been held in committees since then. The proposed bill would treat long-term unemployment status (defined as twenty-seven or more continuous weeks of unemployment) like race, color, religion, sex, age, national origin, or disability, prohibiting employers and employment agencies from using long-term unemployment status as a basis for hiring and other employment decisions. Similar bills in Illinois and Maryland are pending in committees, while an
analogous proposal failed in the Wisconsin Senate.\textsuperscript{72}

In Connecticut, the general assembly introduced Bill No. 5199, which would prohibit employers both from posting job advertisements that excluded unemployed candidates and from refusing to hire an individual based on their current and recent employment status, unless it was a bona fide occupational qualification.\textsuperscript{73} The bill appears to have failed.\textsuperscript{74} Similar proposals in New York and Pennsylvania are still pending while proposed bills in Florida, Indiana, Iowa, Minnesota, South Dakota, and Tennessee have been stalled or killed in committees.\textsuperscript{75}

In New Hampshire, House Bill 350 was introduced on January 3, 2013 and is now in committee.\textsuperscript{76} This proposed bill


would prohibit employers and employment agencies from discriminating against unemployed individuals in hiring decisions and advertisements. Violations would result in a fine of no more than $5,000 for the first violation and $10,000 for subsequent violations. However, unlike Connecticut’s proposed bill described in the paragraph above, New Hampshire’s proposed bill does not include an explicit exception for bona fide occupational qualifications.

In Colorado, House Bill 12-1134 was introduced on January 20, 2012. In substance, it is very similar to the legislation passed by New Jersey, calling for the same penalties, substantive scope, and absence of a private right of action. On February 21, 2012, the Colorado House Committee on Economic and Business Development recommended that the bill be postponed indefinitely. Similar legislation proposed in Michigan and Ohio is still pending.

f. Local Responses

Even municipal legislators have dabbled in legislation designed to prevent employers from discriminating against unemployed candidates. Notably, as of May 1, 2012, a Chicago
city ordinance prohibits employers from publishing job advertisements that discriminate against the currently unemployed.\footnote{Ch. Ill., Municipal Code § 2-160-055 (2012).} Also, on January 23, 2013, the City Council of New York City passed a bill that would make it unlawful for employers to base employment decisions on a candidate’s recent or current unemployment and to publish job advertisements that discriminate against the unemployed.\footnote{NYC Council Passes Bill Protecting Unemployed, The Leader, Jan. 24, 2013, at 3A, available at 2013 WLNR 1859522.}\footnote{Id.} Mayor Bloomberg of New York has stated that he will veto the bill but the city council likely has enough votes to override the veto.\footnote{Id.}

2. Federal Response

   \textit{a. Initial Response from Congress and EEOC}

   In response to the early news stories of employers discriminating against unemployed candidates, in November 2010, more than fifty members of Congress wrote to the chairperson of the U.S. Equal Employment Opportunity Commission (EEOC), voicing their outrage and calling on the agency to investigate how the practice of excluding unemployed individuals from consideration for job opportunities might have an adverse impact on minority groups.\footnote{Letter from Representative Hank Johnson, et al., to Jacqueline Berrien, Chair, U.S. Equal Employment Opportunity Commission (Nov. 17, 2010), available at http://nelp.3cdn.net/d46e3430d5e9cd7003_2tm6vw2oy.pdf.}\footnote{Id.} The members of Congress further asserted that if employers discriminated against the unemployed, it would prolong the unemployment crisis.\footnote{Id.}

   On February 16, 2011, the EEOC met to examine the treatment of unemployed job seekers.\footnote{Meeting of Feb. 16, 2011— EEOC to Examine Treatment of Unemployed Job Seekers, EEOC, http://www.eeoc.gov/eeoc/meetings/2-16-11/index.cfm (last visited Apr. 16, 2013).} The EEOC heard from eight panelists who came from the U.S. Department of Labor,
non-profit organizations, and private firms.\textsuperscript{90} The panelists discussed whether employers actually discriminated against the unemployed, the effect any such discrimination might have on different populations, and the issues associated with bringing Title VII disparate impact claims based on the practice.\textsuperscript{91}

\textbf{b. Congressional Legislative Proposals}

While the EEOC has not yet formally acted on its hearing, members of Congress have introduced several bills that would prohibit unemployment discrimination.

On March 26, 2011, Representative Hank Johnson from Georgia introduced H.R. 1113, the Fair Employment Act of 2011.\textsuperscript{92} This bill would amend Title VII of the Civil Rights Act (42 U.S.C. 2000e-1, \textit{et seq.}) by adding “unemployment status” to the list of covered characteristics.\textsuperscript{93} The bill remains in committee.\textsuperscript{94}

On September 21, 2011, Representative John Larson from Connecticut introduced the American Jobs Act of 2011.\textsuperscript{95} This bill included a section that would prohibit discrimination in employment on the basis of an individual’s employment status and is very similar to the legislation passed in the District of Columbia.\textsuperscript{96} The federal bill would prohibit employers from publishing job advertisements that excluded candidates who were currently unemployed and from refusing to hire or consider hiring an individual based on his or her current employment status.\textsuperscript{97} The bill also contained a whistleblower provision that would prevent employers from restraining

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\textsuperscript{90} Transcript of U.S. Equal Employment Opportunity Commission Meeting, \textit{available at} \url{http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm} [hereinafter Transcript of EEOC Meeting].

\textsuperscript{91} Id.


\textsuperscript{93} Id.

\textsuperscript{94} Id.


\textsuperscript{96} Id.

\textsuperscript{97} Id. \S 374(a)-(b).
\end{flushleft}
individuals from exercising their rights under the act or from retaliating against individuals for exercising those rights. The proposed bill would not have precluded an employer or employment agency from considering an individual's employment history. The bill provided for a private right of action. Remedies included injunctive relief, reimbursement of costs, liquidated damages of no more than $1,000 for each day of the violation, attorneys' fees, and compensatory damages not to exceed $5,000. The bill failed in the Senate. Two other bills – S. 1549 and H.R. 3638 – set forth similar proposals. These bills remain in committee.

Additionally, on July 12, 2012, Representative Rosa DeLauro from Connecticut introduced H.R. 2501. Further, on August 2, 2011, Senator Richard Blumenthal of Connecticut introduced S. 1471. These proposals are very similar to the American Jobs Act provisions described above. The key difference is that H.R. 2501 and S. 1471 prohibit employers from discriminating against candidates based on the candidate’s history of unemployment as well as the candidate’s current employment status. The bills remain in committee.

98. Id. § 374(c).
99. Id. § 374(d).
100. Id. § 375(a)(6).
101. Id. § 375(c).
104. H.R. 3638; S.1549.
107. See H.R. 2501; S. 1471.
108. H.R. 2501; S. 1471.
III. Discussion

A. Solutions in Search of a Problem?

One of the most curious aspects of the flurry of legislative activity detailed above is that it appears to be based on very little evidence that discrimination against the unemployed is actually a widespread practice. A dozen or so articles detailed a handful of cases and included reports of recruiters acknowledging the existence of the practice even when not explicitly stated. And, as seen in the legislative records, these stories generally have formed the basis for the proposed legislation.

But only one survey has been conducted and publicized. In 2011, the National Employment Law Project (NELP) found more than 150 job postings on employment web sites such as Indeed.com, CareerBuilder.com, and Monster.com requiring that applicants “must be currently employed” or using other exclusionary language based on current employment status.

Michael Saltsman, a research fellow at the Employment Policies Institute, took issue with the NELP report. Saltsman observed that one of the websites examined by NELP estimated that there were three million job posts available online when NELP searched its site. This means that the incidence rate of job postings that discriminated against the


111. Sam Hananel, Jobless Seek Protection Against Bias, CHI. SUN-TIMES, Oct. 10, 2011, at 37.


113. Id.
unemployed was less than 0.005% of one month’s job postings. Saltsman further contended that the NELP report took words out of context, citing an example in which the phrase “currently employed” appeared but did not indicate that the unemployed were unwelcome to apply. Saltsman concluded that, given the lack of hard data as to whether employers are discriminating against the unemployed, the legislative activity is misguided, as it would create a new liability for employers while doing little to lower the unemployment rate.

It is also possible that employers are reducing their use of employment status in hiring given the public’s response to the practice. For example, as noted above, Sony Erickson—whose 2010 advertisement kicked off the public debate—quickly disclaimed any responsibility for the inclusion of the current-employment requirement in the posting. Additionally, in September 2011, the job listing website Indeed.com said that it would stop posting advertisements that exclude applications from unemployed candidates. Accordingly, there are several data points that suggest employers might be moving away from excluding unemployed candidates even absent legislation.

As exemplified by the testimony of the various panelists at the EEOC hearing to examine the practice of excluding currently unemployed people from an applicant pool, there are other general trends and perspectives that might color whether one believes that unemployment discrimination is widespread. At the EEOC hearing, William E. Spriggs, Assistant Secretary for Policy, U.S. Department of Labor, was the first to testify. He noted that there were approximately nine unemployed job seekers for every two available positions and that, given the surplus in labor supply, “employers, of course, are going to very

114. Id.
115. Id.
116. Id.
117. Stratton, supra note 13, at B1.
118. Job Website Will Refuse Ads that Reject Unemployed, TAMPA BAY TIMES, Sept. 9, 2010, at 4B.
119. Transcript of EEOC Meeting, supra note 90.
likely up the ante on job applicants.” He specifically referenced the possibility that employers might require applicants to be currently employed or only very recently unemployed and observed that it is hard to quantify the prevalence of the practice because it might not be done openly. Christine Owens, Executive Director of the National Employment Law Project (NELP), echoed these views, describing anecdotal reports of the discriminatory practices and the disparate impact it has had on older workers, women, and minorities. On the other hand, Fernan R. Cepero, Vice President for Human Resources of The YMCA of Greater Rochester, representing the Society for Human Resource Management, discussed the costs involved in hiring, explaining that the key issue for employers is getting the right employee as opposed to privileging an artificial marker such as current employment status. He further stated that his organization is unaware of any trend in excluding the unemployed from consideration for jobs. James S. Urban, a partner at Jones Day, seconded Cepero’s remarks and described looking through “help wanted” sections of major newspapers and not turning up any advertisements that excluded the unemployed.

Although there is a paucity of data supporting the notion that discrimination against the unemployed is a widespread practice, as discussed further below, the legislative activity might have some beneficial economic effects and expresses social values. The legislative activity will likely aid members of constitutionally-protected classes who are unemployed and disproportionately impacted by the practice, and will not result in the parade of horribles described by employer-friendly industry groups.

120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
B. *Anti-Unemployment Discrimination Legislation as a Means of Reducing Unemployment or Otherwise Improving the Economy*

The public rhetoric in support of the anti-unemployment discrimination legislation often includes strong words about how discrimination against the unemployed prolongs joblessness and hurts the economy. For example, at a press conference promoting the proposed Fair Employment Opportunity Act in September 2011, Senator Sherrod Brown said: “The best way to get our economy back on track is also the best way to reduce our deficit: putting people back to work. There are millions of Americans who would rather be paying taxes than collecting unemployment insurance.”\(^\text{126}\) In an article attacking opponents of New Jersey’s anti-unemployment discrimination legislation, a New Jersey assemblyman stated: “It is also now apparent that when our state’s Republican leaders talk about creating jobs for New Jersey residents, those jobs aren’t necessarily for the jobless.”\(^\text{127}\) A state senator, supporting the passage of the Oregon bill, asserted: “It’s crazy to say that you have to have work, to look for work. If you had work, you wouldn’t need work, so you wouldn’t have to look for work. We’re just trying to make it clear that people who don’t have work can look for work.”\(^\text{128}\)

While this rhetoric speaks to a sense of injustice and lack of fairness, it does not actually explain the mechanics of how the bills might reduce unemployment. Illustrating this gap, the California Assembly’s Committee on Judiciary issued a report in which it asked whether employers’ policies discriminating

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127. Moriarty, supra note 110.

against the unemployed exacerbate the unemployment crisis. The supporters of the bill argued that such policies “reflect insensitivity to today’s severe job deficit” and that “the lack of available job openings and the denial of employment opportunities that do exist create stark obstacles for more than 14 million unemployed who simply want to get back to work.”

The problem with this statement is that addressing putative barriers for unemployed candidates does not clearly mitigate the issue of overwhelming job scarcity, which presumably drives the high unemployment rates and the negative economic effects of high unemployment.

To this point, writing in opposition to California’s anti-unemployment discrimination bill, a coalition of employer groups lead by the California Chamber of Commerce explained, “Finally, this bill will not affect the unemployment rate. If there is an available position, the employer will ultimately hire someone.” Additionally, as an Oregon representative observed, “There’s nothing I can perceive in this piece of legislation that would create one more job in the private sector.”

As the opponents of the anti-unemployment discrimination bills argue, the salutary effect of the bills probably will not be a reduction in aggregate unemployment. Even if we assume that most employers have a preference for hiring currently employed individuals, in the aggregate, employer-demand for a new full-time employee presumably ultimately results in the hiring of a currently unemployed individual. When an employer excludes the currently unemployed from its applicant pool, it does so in the belief that it can entice a currently employed individual to leave his or her job for the new position. If this belief is correct, the new hire’s old position presumably

130. Id. at 5.
131. Id. at 9.
is now open and must be filled. Eventually, some employer will have to either opt to let its position remain vacant and suffer the associated economic costs or hire a currently unemployed individual. In other words, it is job creation that reduces unemployment and the anti-unemployment discrimination bills do not obviously encourage job creation.\textsuperscript{133} To the contrary, it is possible that some employers might actually forgo seeking to fill positions based on liability concerns related to the anti-unemployment discrimination legislation.\textsuperscript{134}

On the other hand, the anti-unemployment discrimination legislation probably has economic benefits other than reducing unemployment in the aggregate. First, it is widely acknowledged that arbitrary discrimination negatively impacts the economy. As a senator stated when discussing Title VII, “There is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy.”\textsuperscript{135} Amongst other harms, discriminatory exclusions in hiring can alienate clients and artificially limit applicant pools.\textsuperscript{136}

Second, although the anti-unemployment discrimination legislation is unlikely to reduce the aggregate amount of unemployment, it might lead to an economically healthier distribution and pattern of unemployment. By reducing barriers for unemployed candidates, the anti-unemployment

\textsuperscript{133} See generally Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, The Supreme Court 1975 Term, 90 HARV. L. REV. 1, 37 (1976) (arguing that there is a cost to innocent individuals in the employment context that results from remedying racial discrimination because even the usual specific remedy—an order requiring the employer to accord an identifiable individual priority for the next vacancy—adversely affects another applicant for the vacancy who would otherwise have gotten the job).

\textsuperscript{134} See, e.g., Paul Oyer & Scott Schaefer, Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It’s Hard To Fire?, 45 J.L. & ECON. 41, 43 (2002) (noting that higher expected costs of litigation by protected workers might work to reduce the number of protected workers employed).

\textsuperscript{135} 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey).

discrimination legislation might encourage greater job movement amongst currently employed individuals, encouraging those who are dissatisfied with their jobs to quit because they will be more optimistic about finding another position.137 And, with more positions in play and no exclusions for unemployed candidates, there might be less stasis amongst the long-term unemployed. The economy would likely benefit from this lessened degree of stasis, because long-term unemployment carries unique problems that are more severe than those associated with brief periods of unemployment. For example, after a long time out of the workforce, workers’ skills might decay.138 This is particularly true for positions in which there are rapid changes in technology.139 Additionally, long-term unemployment can damage a family’s finances as savings are depleted.140 This, in turn, might place a greater burden on government programs such as Medicaid.141 It also might hurt the economy as a whole because the decline in consumer spending might impede growth.142 Workers’ morale might


140. Id.

141. Id.; see also In the Bleak Midwinter, supra note 138.

suffer too, leading to fewer motivated job seekers and a rise in health and emotional problems.\textsuperscript{143}

Although long-term unemployment is not singled out as the target of the legislation, these sentiments have been captured in the legislative records of several proposed anti-unemployment discrimination bills.\textsuperscript{144} For example, the most recently introduced federal bill states that discrimination against the unemployed burdens commerce by:

\begin{itemize}
\item[](1) reducing personal consumption and undermining economic stability and growth;
\item[](2) squandering human capital essential to the Nation’s economic vibrancy and growth;
\item[](3) increasing demands for Federal and State unemployment insurance benefits, reducing trust fund assets, and leading to higher payroll taxes for employers, cuts in benefits for jobless workers, or both;
\item[](4) imposing additional burdens on publicly funded health and welfare programs; and
\item[](5) depressing income, property, and other tax revenues that the Federal Government, States, and localities rely on to support operations and institutions essential to commerce.\textsuperscript{145}
\end{itemize}

Despite the general thrust of public rhetoric in support of the anti-unemployment discrimination bill, they are unlikely to reduce unemployment in the aggregate but they might change the demographics of the unemployed in a manner that benefits the economy.

C. Anti-Unemployment Discrimination Bills as an Expression of Social Values

\begin{flushleft}
\textsuperscript{143} Id.; Tara Siegel Bernard, When 'for Richer, for Poorer’ is Put to the Test, N.Y. TIMES, Mar. 31, 2012 at B1; Yung, supra note 139, at A1.
\textsuperscript{145} S. 1471.
\end{flushleft}
Laws communicate a society’s values. People may support a law because they “believe that [the law] is intrinsically valuable for the relevant ‘statement’ to be made” and not because of the law’s ability to control behavior.”

Given the unclear economic benefit of anti-unemployment discrimination bills, it is easiest to characterize them as expressions of social values.

First, the bills express society’s understanding of fairness. As noted above, in June 2011, in a national survey conducted by Hart Research Associates, eighty percent of respondents described employers’ refusal to consider unemployed job applicants as “very unfair.” Indeed, the public rhetoric surrounding the bills mirrors this. For example, Senator Brown promoted the proposed Fair Employment Opportunity Act of 2012 by stating, “Americans who work hard and play by the rules—but lose a job through no fault of their own—deserve a fair chance at the next one.” And, as Helen Norton, a professor at the University of Colorado Law School, testified before the EEOC, current employment is likely a weak proxy for former professional success or relevant experience.

Second, the bills express a sense of care for the sensibilities of the unemployed. For example, following the initial passage of the New Jersey bill in the state assembly, Democrat Assemblyman Paul Moriarty wrote a piece that unfavorably compared Assemblyman Jay Webber, one of New Jersey’s highest-ranking Republicans, unfavorably to “heartless elitists” after Webber voted against the bill. Moriarty explained that employers who run job advertisements that exclude unemployed candidates “make unemployed people feel like...
lepers, outcasts and losers.””152 and communicated that, “You’re
damaged goods, you don’t merit consideration, jobs are not for
the jobless, just for those already employed!””153 He argued that
preventing this message was more important than protecting
businesses from additional regulation.

D. Anti-Unemployment Discrimination Bills as Protection for
Members of Constitutionally-Protected Classes

Employment status, in and of itself, is not immutable and,
therefore, does not fit comfortably within the set of existing
constitutionally-protected classes.154 This might explain why
the legislative attempts to turn employment status into a
protected class have been less successful than enacting
narrower anti-unemployment discrimination bills.155 But the
concern that discrimination against unemployed candidates
might disproportionately impact minorities, seniors, women,
and the disabled appears to have driven the initial federal
activity. For example, the November 2010 letter from more
than fifty member of Congress to the chairperson of the EEOC
explicitly identified the worry that excluding unemployed
individuals from consideration for job opportunities might have
an adverse impact on minority groups.156 As such, the
panelists’ discussions at the February 2011 EEOC meeting

152. Id.
153. Id.
154. See Wendy K. Mariner, The Affordable Care Act and Health
Promotion: The Role of Insurance in Defining Responsibility for Health Risks
and Costs, 50 Duq. L. Rev. 271, 320 (2010) (“A key difference between anti-
discrimination laws and common law doctrine is that the former creates
protected classes defined primarily (although not exclusively—religion is an
exception) on immutable traits of the employee, like race, age, and genetics,
while common law doctrine focuses on the employer’s reasons or the
employee’s actions, without regard to such inherent traits.”).
statute regarding restrictions upon the use of employment status as a
156. See Letter from Representative Hank Johnson, et al., to Jacqueline
Berrien, supra note 87, at 1.
focused on this issue.\textsuperscript{157}

At the EEOC hearing, Assistant Secretary Spriggs observed that African Americans, Latinos, and workers with disabilities were overrepresented in the unemployment pool.\textsuperscript{158} He further explained that older workers make up a disproportionate share of the long-term unemployed.\textsuperscript{159} He concluded “there is the strong indication that there’s the potential for disparate impacts among racial minorities, among workers with disabilities, and among older workers.”\textsuperscript{160} Christine Owens, Executive Director of NELP, also described anecdotal reports of the discriminatory practices and the disparate impact they likely have had on older workers, women, and minorities.\textsuperscript{161} Fatima Goss Graves, Vice President for Education and Employment at the National Women’s Law Center, testified that the practice would likely have a disparate impact on women, noting that women have lost ground to men in employment rates during the recession and that women are more likely to be long-term unemployed.\textsuperscript{162} Algernon Austin, Director of the Race, Ethnicity, and the Economy Program at the Economic Policy Institute, asserted that the practice would have a disparate impact on racial minorities, focusing on their current and historical high rates of unemployment, when compared to whites.\textsuperscript{163} Joyce Bender, CEO of Bender Consulting Services, likewise discussed why the practice would have a disparate impact on the disabled, explaining that many individuals become disabled after an accident that leaves them without a current job.\textsuperscript{164} The testimony of Assistant Secretary Spriggs, and the rest of the speakers, is consistent with the data from the U.S. Bureau of Labor Statistics, which is described above.

On the other hand, Mr. Urban, a partner at Jones Day,

\begin{flushleft}
\footnotesize
157. See Transcript of EEOC Meeting, supra note 90.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
\end{flushleft}
argued that the numbers from the U.S. Bureau of Labor Statistic did not meet the EEOC’s threshold for showing a disparate impact on African-American and Hispanic job seekers. But Professor Norton countered that the demographic data offered by the other witnesses suggested that a current-employment requirement had the potential to impose an adverse impact in a number of contexts. She noted that the particular market and job would play a role in determining whether the allegedly discriminatory policy had a disparate impact. Also, Mr. Urban’s comments only go to whether a complainant would be able to allege a prima facie Title VII disparate impact claim; not whether members of constitutionally-protected classes are, as a matter of fact, disproportionately vulnerable to current-employment hiring policies.

Regardless as to whether Mr. Urban or Professor Norton is right about whether a member of a racial minority group could demonstrate that a particular practice has a legally cognizable disparate impact, the anti-unemployment discrimination bills have value precisely because a Title VII challenge to a current-employment requirement would be difficult. More generally, the anti-unemployment discrimination bills arguably are necessary preventative measures to cover gaps or weak spots in existing anti-discrimination statutes.

The prophylactic value of the bills is even more pronounced when considering the effect of a current-employment requirement on older individuals. Actions, otherwise prohibited by the Age Discrimination in Employment Act (“ADEA”), are not unlawful if the differentiation made by the employer “is based on reasonable factors other than age.” This is a defense unique to the ADEA, making liability under an ADEA adverse impact theory narrower than under Title VII, and mixed-motives are permissible in the ADEA context.

165. Id.
166. Id.
167. Id.
169. Id. § 623 (f)(1).
170. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177-78 (2009);
effect, the broader anti-unemployment discrimination bills (such as that passed by the District of Columbia) remove employment status from the set of reasonable factors that would otherwise permit an employer to differentiate between younger and older candidates. (Whether employment status ever is a bona fide qualification or a proxy for legitimate qualifications is discussed further in the next section.)

E. Business Community’s Concerns About Legislation Are Likely Overstated

In opposition to the anti-unemployment discrimination bills, the business community has marshaled several arguments, which focus on the potential harms. In particular, pro-employer commentators have questioned whether the bills will (1) open the floodgate of potentially frivolous litigation and (2) reduce employers’ ability to properly vet applicants. These concerns appear overstated given the generally limited scope of the legislation, the lack of a private right of action, and legally approved uses of employment status and history.

1. Concern that Legislation Will Open Floodgate of Litigation

The pro-employer faction, typified by the large law firms that do labor law defense work, has suggested whether the anti-unemployment discrimination bills will lead to a significant increase in litigation. For example, an associate at Proskauer Rose contends that the definition of unemployment status in some proposals is so broad that it could apply to just about any query regarding the candidate’s work history. He also notes that some of the proposals allow for a private right of action with regard to the restrictions on including exclusionary


172. See Saperstein, supra note 102.
language in job advertisements.\textsuperscript{173} He argues that, under these proposals, it is possible for any currently unemployed individual to identify a non-complying job posting, inquire about the position, and, if refused employment, file a lawsuit.\textsuperscript{174} He further asserts that such proposals unduly encourage litigation.\textsuperscript{175} He also raises the specter of negligent-hiring claims, reasoning that, for fear of liability and costs, human resources personnel might not as vigorously question a candidate’s past work experience or follow-up on the contents of a resume’s work history and this might lead to employers hiring poor applicants.\textsuperscript{176}

The floodgate concern appears overstated. First, the District of Columbia appears to be the exception that proves the rule in terms of the scope of the anti-unemployment discrimination legislation. Besides the District of Columbia, the states that have enacted anti-unemployment discrimination legislation have all restricted the statutes to regulating job advertisements.\textsuperscript{177} And, as is illustrated by the discussion of California’s legislative history in particular and the current status of the pending bills in general, it is unlikely that the broader bills will pass.\textsuperscript{178}

Second, the passed statutes prohibit a practice that could serve as a predicate for a Title VII disparate impact claim.\textsuperscript{179} The easy-to-follow bright line rule might actually reduce litigation given that an employer that uses candidates’ employment status in hiring decisions might violate existing federal law if it has the effect of discriminating against a constitutionally-protected class under a disparate impact theory. With that said, even if an employer complies with the job advertisement restrictions of the New Jersey and Oregon

\begin{itemize}
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
\item \textsuperscript{178} See supra notes 56-94 and accompanying text.
\end{itemize}
statutes, they might still be liable under Title VII.180 But, to
the extent that a viable disparate impact claim was present,
the new laws do not change that.

Third, state legislatures and agencies have examined the
problem and their findings generally do not suggest that the
anti-unemployment discrimination legislation would lead to a
significant increase in litigation. For example, the California
Assembly Committee on Appropriations estimated that there
might be several thousand cases a year but, for fiscal purposes,
the California Senate Appropriations Committee suggested
that only about 250 cases would be filed for investigation and
determination by the administrative agency tasked with
handling employment discrimination claims.181 The District of
Columbia estimated that there would be about 150 new cases a
year.182

Fourth, the majority of bills—and all three of the enacted
statutes—do not permit a private right of action.183 Thus,
focusing on the potential for spurious suits by individuals is an
attack against a straw man.

Fifth, as discussed below, employers may still take into
account employment status where it is appropriate or
necessary as a bona fide qualification.184 Companies, therefore,
should not be constrained from making diligent inquiries into
their candidates’ histories. And this implies that there should
be little additional negligent-hiring liability exposure.

180. New State Law Further Regulates Hiring, FISHER & PHILIPS LLP
181. See REPORT OF THE CAL. ASSEMB. COMM. ON APPROPRIATIONS
(Apr. 25, 2012); CAL. SENATE APPROPRIATIONS COMM. FISCAL
SUMMARY (Aug. 16, 2012).
182. Letter from Natwar M. Gandhi, Chief Fin. Officer, Washington,
D.C., to the Hon. Kwame R. Brown, Chairman, Council of D.C. (Jan. 25,
2012).
183. See supra notes 25-94 and accompanying text.
184. D.C. CODE § 32-1362; OR. LAWS ch. 85, § 2; N.J. STAT. ANN. § 34:8B-
1; OR. REV. STAT. § 659A.855.
2. Concern that Legislation Will Prevent Proper Vetting of Candidates

The pro-employer faction also has argued that the anti-unemployment discrimination laws will alter how employers approach the hiring process, limiting what employers will ask about candidates’ work histories. For example, in its opposition to the California bill, the California Chamber of Commerce explained that the bill would place employers in the impossible situation of either: (1) investigating an applicant’s most recent employment, including the reasons for the separation of his/her employment with the employer and potentially face an administrative claim or litigation for the alleged violation of AB 1450 if the applicant is ultimately not hired; or (2) forego any investigation into the most recent employment of the applicant to prevent a claim that he/she was discriminated against on the basis of the applicant’s “unemployed status,” and risk a potential negligent hiring claim on the backend for hiring an at-risk employee that the employer knew or should have known was a potential danger.

Likewise, Proskauer Rose has asserted that employers might raise suspicions by concentrating on gaps in a candidate’s work history and, therefore, “commonplace interview or application questions concerning unaccounted-for time on a resume may become scarce.”

186. SENATE FLOOR ANALYSES, supra note 185.
187. Parker & Saperstein, supra note 185.
These arguments do not apply to the New Jersey and Oregon legislation because these statutes do not prohibit an employer from using employment history as part of the hiring criteria. But even as to the District of Columbia anti-unemployment discrimination law, the strength of these arguments is questionable because it explicitly permits an employer to examine the reasons underlying an individual's status as unemployed in assessing an individual's ability to perform a job or in otherwise making employment decisions about that individual. The bona fide occupational qualification exception is well established, as it also appears in the Title VII and ADEA statutes.

Furthermore, it is not obvious that there is a strong link between an individual's employment status and his or her abilities. At the EEOC hearing, Professor Norton explained that current employment status probably is a poor proxy for quality job performance given that one might be unemployed for reasons unrelated to one's skills. Specifically, Professor Norton notes that one might have been in school or a training program, had to leave a job because of spousal relocation, lost a job because of lack of seniority during employer downsizing or because the employer eliminated an entire division or shut down altogether, or left employment temporarily due to illness, injury, disability, pregnancy, or family care-giving responsibilities. Professor Norton also stated that current employment is a poor proxy for relevant experience because the candidate might have been unemployed because he or she has been in school receiving training.

Putting aside the efficacy issues of using employment status in hiring decisions, courts do have some experience grappling with the use of unemployment status as a proxy for characteristics that are not constitutionally-protected in the

191. See Transcript of EEOC Meeting, supra note 90.
192. Id.
193. Id.
context of Batson challenges. Some courts have focused on the link between unemployment status and susceptibility to other forms of discrimination. But other courts have approached the use of an individual’s lack of current employment as being a legitimate proxy for analytic ability, responsibility, and having ties to the community. Accordingly, to the extent that a candidate’s employment history raised questions about these factors, it is likely that a potential employer would be able to ask about the candidate’s employment history without fear of liability under the anti-unemployment discrimination statutes.

F. The Rise of Anti-Unemployment Discrimination Legislation and Interest Convergence

The anti-unemployment discrimination bills appear to be part of a trend of legislation and regulation that prohibits employers from using criteria that disproportionately impact vulnerable individuals without being clearly tied to legitimate qualifications. For example, the EEOC has issued guidance that sets forth its view that the use of criminal history in hiring decisions might have a disparate impact on candidates who are members of racial minority groups, particularly black and

194. See, e.g., Montgomery v. Mississippi, 811 So. 2d 471, 476-77 (Miss. Ct. App. 2002) (Irving, J., concurring) (“Clearly denying unemployed persons a right to serve on the jury in Mississippi operates to the peculiar disadvantage of African Americans since, as already observed, more African Americans, percentage wise, are unemployed than European Americans.”); Bowie v. Mississippi, 816 So. 2d 425, 430 (Miss. Ct. App. 2002) (Irving, J., concurring) (“I continue to believe that excluding a juror from jury service because he is unemployed is discrimination based on economic status.”); Ford Motor Credit Co. v. Superior Court, 57 Cal. Rptr. 2d 682 (Cal. Ct. App. 1996) (quoting Brown v. Superior Court, 691 P.2d 272 (Cal. 1984) (“Victims of employment discrimination are frequently unemployed—many times as the result of the alleged discrimination.”).

Latino men. In the same vein, New York prohibits employers from discriminating against candidates with criminal convictions unless there is a direct relationship between the previous offense and the position or if hiring the applicant would create an unreasonable risk to property or to the safety of the general public. Additionally, the use of credit checks in employment decisions has received increased scrutiny. Again, the EEOC has questioned whether the use of credit checks might have an adverse impact on female and minority candidates. And the federal government and several states have limited how employers may use credit checks in hiring.

To the extent that the primary effect of the anti-unemployment discrimination legislation might be to protect vulnerable members of constitutionally protected groups from discrimination, the theory of interest convergence might explain its rise. In general, with regard to employment discrimination, the interest convergence theory suggests that states protect minorities only when doing so also promotes the interests of the majority. Recall that thirty-two percent of the...
IV. Conclusion

Unemployment is a significant issue in contemporary America. But the rise of anti-unemployment discrimination legislation does not appear to address the scarcity of jobs and, thus, is unlikely to reduce unemployment in the aggregate. However, the legislation might have an overall positive effect by reducing arbitrary discrimination in hiring and long-term unemployment, which have negative impacts on the economy. Additionally, the legislation expresses a set of social values about fairness and hard work. And the legislation protects members of constitutionally-protected groups who likely are disproportionately impacted by current-employment requirements. In sum, an objective look at anti-unemployment discrimination reveals that it is a positive example of interest convergence that might not have all the benefits that its proponents claim but is not just a placebo and also has very little—if any—downside.