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

Seth Katsuya Endo*

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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1. See, e.g., Katharine H. Parker & Daniel L. Saperstein, *Emerging Issues in Hiring—Employer Screening Processes*, 18 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE 5, art. 2, (Sept./Oct. 2012).

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

2. See Jennifer Jolly-Ryan, *Have a Job to Get a Job: Disparate Treatment and Disparate Impact of the "Currently Employed" Requirement*, 18 MICH. J. RACE & L. 189 (2012).

3. News Release, U.S. Bureau of Labor Statistics, *The Employment Situation - January 2013*, 2013, http://www.bls.gov/news.release/archives/empsit_02012013.pdf.

work for more than twenty-seven weeks.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.⁵ The unemployment rates for adult men and for adult women were both 7.3 percent.⁶ The unemployment rate for the disabled was 13.7 percent against 8.3 percent for individuals without any disabilities.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.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.⁹ Thirty-two percent of the total respondents specifically identified “unemployment/jobs.”¹⁰ In a related Gallup poll, more than three-quarters of respondents said that it is a bad time to find a quality job.¹¹ Black, Hispanic, senior, and low-income respondents were particularly concerned about unemployment.¹²

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at Table A-6.

8. U.S. Bureau of Labor Statistics, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Feb. 5, 2013), <http://www.bls.gov/cps/cpsaat03.htm>; see also Sylvia Allegretto & Devon Lynch, *Unemployment and Long-Term Unemployment: The Composition of the Unemployed and Long-Term Unemployed In Tough Labor Markets*, 133 MONTHLY LAB. REV. 3 (Oct. 2010), <http://www.bls.gov/opub/mlr/2010/10/art1full.pdf>.

9. See *Most Important Problem*, GALLUP, <http://www.gallup.com/poll/1675/Most-Important-Problem.aspx> (last visited Apr. 16, 2013).

10. See *Id.*

11. See Lydia Saad, *U.S. Perceptions of Job Market Remain Weak but Improved*, GALLUP (June 13, 2012), <http://www.gallup.com/poll/155171/Perceptions-Job-Market-Remain-Weak-Improved.aspx>.

12. See Lydia Saad, *In U.S., Jobs a More Glaring Issue for Some Groups Than Others*, GALLUP (June 27, 2012),

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.”¹³ 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.¹⁴ 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.¹⁵

A handful of articles discussing this practice quickly followed, although actual data remained anecdotal.¹⁶ 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.”¹⁷ 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

<http://www.gallup.com/poll/155375/Jobs-Glaring-Issue-Groups-Others.aspx>.

13. Jim Stratton, *You’re Out of Work? Don’t Apply for This Job*, ORLANDO SENTINEL, June 3, 2010, at B1, available at 2010 WLNR 11354998.

14. *Id.*

15. *Id.*

16. See, e.g., Liz Wolgemuth, *How to Get a Job After a Year (or More) Out of Work*, U.S. NEWS & WORLD REP., June 10, 2010, <http://money.usnews.com/money/careers/articles/2010/06/10/how-to-get-a-job-after-a-year-or-more-out-of-work>; Barbara Shelly, *Unemployed Need Support from Congress*, KAN. CITY STAR, July 12, 2010, <http://www.statesman.com/news/news/opinion/shelly-unemployed-need-support-from-congress/nRwGZ/>.

17. See Chris Erikson, *The Scarlet U – Why Employers Favor Candidates with Jobs Over the Unemployed; A Stacked Deck*, N.Y. POST, July 26, 2010, at 35, available at 2010 WLNR 14857453.

representative and bank office manager.¹⁸ Several job recruiters commented on the prevalence of this practice and bias.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.²⁰ Furthermore, an October 2010 article in the Atlanta Journal-Constitution focused on people's sense of outrage at the practice.²¹ A common refrain was that it should be illegal.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."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."²⁴

With this backdrop, and as a presidential election approached,²⁵ federal, state, and city officials have proposed

18. *Id.*

19. *Id.*

20. *Id.*

21. See Dan Chapman, *Long-Term Jobless Told Not to Apply*, ATLANTA J.—CONST., Oct. 4, 2010, at A1, available at 2010 WLNR 19654528.

22. *Id.*

23. National Employment Law Project, *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed From Job Opportunities, as Discriminatory Ads Persist* (July 12, 2011), available at http://nelp.3cdn.net/b4ade339e970088d72_alm6blqx8.pdf.

24. *Id.*

25. See Chuck Leddy, *A Nonpartisan Primer on Jobs and Politics*, BOS. GLOBE, March 21, 2012, at G4, available at 2012 WLNR 5966618 ("In this election year, polls have consistently shown that one thing is clear in the minds of Americans: The most important issues are the economy and unemployment."); Ewen MacAskill, *Obama Turns Up Heat on Romney Over Corporate Past*, GUARDIAN, July 13, 2012, at 26, available at 2012 WLNR 14576455 ("The issue is significant because the Obama campaign claims that after 1999, Bain Capital, an investment vehicle, was involved in layoffs, bankruptcies and the outsourcing of American jobs to China, Mexico and elsewhere. The remarks are a potent charge in a tight election—Obama and Romney are neck-and-neck in the polls—in which unemployment is the main issue.").

bills to address the perceived problem.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.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.²⁸ Eleven days later, the state assembly passed the proposed bill by a 58-to-18 margin with two abstentions.²⁹ On

26. See Parker & Saperstein, *supra* note 1.

27. Assemb. B. 3359, 214th Leg., 1st Sess. (N.J. 2010), available at http://www.njleg.state.nj.us/2010/Bills/A3500/3359_I1.PDF.

28. *Id.*

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-6.³⁰

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. *Id.*

3. This act shall take effect immediately.³¹

On January 6, 2011, Governor Christie returned the bill with several recommendations.³² 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."³³ He further asserted that the term "suggesting" was too vague to provide employers with proper notice.³⁴ 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.³⁵ 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."³⁶

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

31. *Id.*

32. Veto Message from Chris Christie, Governor of N.J., to The Members of the N.J. General Assembly, at 1, *available at* http://www.njleg.state.nj.us/2010/Bills/A3500/3359_V1.PDF (last visited Apr. 15, 2013).

33. *Id.*

34. *Id.*

35. *Id.* at 2.

36. *Id.*

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.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.³⁸ The legislation explicitly disclaims that it creates a private right of action.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.⁴⁰ However, it does not ban consideration of either past or present employment statuses in hiring decisions.⁴¹ Also, it subjects violators to civil fines.⁴² These fines are graduated penalties, with the severity rising with recidivism.⁴³ Finally, the passed legislation does not create a private right of action, leaving it to the state to enforce the provisions.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.⁴⁵ This legislation also specifically prohibits employers from publishing an advertisement for a job opening that disqualifies candidates who are not presently

37. N. J. STAT. ANN. § 34:8B-1 (West 2011).

38. *Id.* § 34:8B-2.

39. *Id.*

40. *Id.* § 34:8B-1.

41. *Id.*

42. *Id.* § 34:8B-2.

43. *Id.*

44. *Id.*

45. D.C. CODE § 32-1361 (2012); *see also* Katharine H. Parker & Daniel L. Saperstein, Client Alert, *Law Prohibiting Discrimination Based on Unemployment Status Signed by DC Mayor: Employers Beware – Similar Laws Likely to Follow*, PROSKAUER (Mar. 28, 2012), <http://www.proskauer.com/publications/client-alert/law-prohibiting-discrimination-based-on-unemployment-status/>.

employed.⁴⁶ 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.⁴⁷ 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.⁴⁸ No private right of action is created.⁴⁹ 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.⁵⁰ 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.⁵¹

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.⁵² The Oregon law was passed within two months of its introduction in the state senate.⁵³ The Oregon statute is similar to that of New Jersey's in virtually all

46. D.C. CODE § 32-1362(2).

47. *Id.* § 32-1363.

48. *Id.* § 32-1364.

49. *Id.* § 32-1366(b).

50. *Id.* § 32-1365.

51. *Id.* § 32-1366(a).

52. OR. REV. STAT. ANN. § 85.2 (West 2012); S. 1548, 76th Leg. Assemb., Reg. Sess. (Or. 2012).

53. *See* Or. S. 1548.

material respects, except that the Oregon statute caps the penalties at \$1,000.⁵⁴ 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.⁵⁵ However, the law does not bar the consideration of employment status in the ultimate hiring decision.⁵⁶ Additionally, there is no private right of action.⁵⁷

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, 2012.⁵⁸ The version of the bill that passed both the state assembly and senate hews closely to the model of New Jersey and Oregon.⁵⁹ 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.⁶⁰ 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.⁶¹

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).

58. *Assembly Bill No. 1450*, Version: 9/11/12 – Enrolled, CAL. LEGISLATIVE INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1450 (last visited April 1, 2013).

59. *Id.*

60. *Id.*

61. *Id.*

unemployed” as including an individual’s past unemployment.⁶² 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.⁶³ Third, the proposed legislation included whistleblower protections.⁶⁴ The California Senate cut these provisions through its amendments.⁶⁵ The bill was then passed after its third reading.⁶⁶ However, on September 30, 2012, Governor Brown returned the bill without his signature, stating without explanation that the changes could lead to unnecessary confusion.⁶⁷

e. Pending State Legislation

In Arizona, House Bill 2660 was introduced on January 25, 2012 but it has been held in committees since then.⁶⁸ 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.⁶⁹ Similar bills in Illinois⁷⁰ and Maryland⁷¹ are pending in committees, while an

62. *See id.* at Version: 01/05/12 - Introduced.

63. *Id.*

64. *Id.*

65. *See id.* at Version: 8/22/12 – Amended Senate Introduced.

66. *See id.* at Version: 9/11/12 – Enrolled..

67. Veto Message from Edmund G. Brown Jr., Governor of Cal., to The Members of the California State Assembly (Sept. 30, 2012), *available at* http://gov.ca.gov/docs/AB_1450_Veto_Message.pdf (last visited Apr. 1, 2013).

68. *See* H.R. 2660, 50th Leg., 2d Reg. Sess. (Ariz. 2012); *see also Bill Overview Status:HB2660*, ARIZ. STATE LEGISLATURE, http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/2r/bills/hb2660o.asp&Session_ID=107 (last visited Apr. 13, 2013).

69. Ariz. H.R. 2660.

70. *See* S. 2153, 97th Gen. Assemb., 1st Reg. Sess. (Ill. 2011).

71. *See* S. 966, 430th Gen. Assemb., (Md. 2012).

analogous proposal failed in the Wisconsin Senate.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.⁷³ The bill appears to have failed.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.⁷⁵

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

72. See generally *Senate Bill 249*, WIS. LEGISLATIVE DOCUMENTS, <http://docs.legis.wisconsin.gov/2011/proposals/reg/sen/bill/sb249> (last visited Apr. 13, 2013).

73. H.R. 5199, Gen. Assemb., Feb. Sess. (Conn. 2012), <http://www.cga.ct.gov/2012/TOB/h/pdf/2012HB-05199-R00-HB.pdf>.

74. See *Discrimination Against the Unemployed*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2012), <http://www.ncsl.org/issues-research/labor/discrimination-against-the-unemployed.aspx>.

75. See H.R. 815, 114th Leg., Reg. Sess. (Fla. 2012), <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=48051&> (died in Bus. & Affairs Subcomm., Mar. 9, 2012); S. 205, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012), <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2012&session=1&request=getBill&docno=205> (in Comm., Jan. 4, 2012); S. 2028, Gen. Assemb. (Iowa 2012), <http://coolice.legis.iowa.gov/CoolICE/default.asp?Category=BillInfo&Service=DspHistory&var=SF&key=0617B&GA=84> (Subcomm. reassignment, Feb. 15, 2012); S. 1919, 87th Leg. (Minn. 2012), https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1919&ssn=0&y=2012 (referring bill to Judiciary & Public Safety, Feb. 16, 2012); S. 00677, 236th Leg., Reg. Sess. (N.Y. 2013), <http://assembly.state.ny.us/leg/?term=2013&bn=S00677> (reintroducing bill, Jan. 9, 2013); H.R. 180, Gen. Assemb., 2013 Reg. Sess. (Pa. 2013), <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2013&sind=0&body=H&type=B&bn=0180> (reintroducing prior H.R. 2157 of 2011/2012, Jan. 22, 2013); S. 184, Leg. Assemb., 87th Sess. (S.D. 2012), <http://legis.state.sd.us/sessions/2012/QuickFind.aspx> (deferring bill, Feb. 10, 2012); S. 3130, Gen. Assemb. (Tenn. 2012), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB3757&ga=107> (deferring bill, Mar. 14, 2012).

76. See H.R. 350, 163rd Gen. Ct. (N.H. 2013), http://www.gencourt.state.nh.us/bill_status/Bill_docket.aspx?lsr=466&sy=201

would prohibit employers and employment agencies from discriminating against unemployed individuals in hiring decisions and advertisements.⁷⁷ Violations would result in a fine of no more than \$5,000 for the first violation and \$10,000 for subsequent violations.⁷⁸ 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.⁷⁹

In Colorado, House Bill 12-1134 was introduced on January 20, 2012.⁸⁰ 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.⁸¹ On February 21, 2012, the Colorado House Committee on Economic and Business Development recommended that the bill be postponed indefinitely.⁸² Similar legislation proposed in Michigan and Ohio is still pending.⁸³

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

3&sortoption=billnumber&txtsessionyear=2013&txtbillnumber=hb350
(introducing bill, Jan. 3, 2013).

77. *Id.*

78. *Id.*

79. *Id.*

80. *See* H.R. 12-1134, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012), http://www.statebillinfo.com/bills/bills/12/1134_01.pdf (introducing bill, Jan. 20, 2012).

81. *Id.*

82. *Reference Report*, COLO. COMM. ON EDUC., HOUSE COMM. OF REFERENCE REP., Feb. 27, 2012, *available at* http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/5F41EDDF5039315E87257981007E0034?Open&file=HB1135_C_001.pdf (last visited Sept. 30, 2012).

83. *See* H.R. 4675, 96th Leg., Reg. Sess. (Mich. 2011), [http://www.legislature.mi.gov/\(S\(sqjzm5uu34nscm45y2roco55\)\)/mileg.aspx?page=GetObject&objectName=2011-HB-4675](http://www.legislature.mi.gov/(S(sqjzm5uu34nscm45y2roco55))/mileg.aspx?page=GetObject&objectName=2011-HB-4675) (introducing bill, May 24, 2011); H.R. 424, 129th Gen. Assemb. (Ohio 2012), http://www.legislature.state.oh.us/BillText129/129_HB_424_I_Y.pdf (introducing bill, Jan. 24, 2012).

city ordinance prohibits employers from publishing job advertisements that discriminate against the currently unemployed.⁸⁴ 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.⁸⁵ 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.⁸⁶

2. Federal Response

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.⁸⁷ The members of Congress further asserted that if employers discriminated against the unemployed, it would prolong the unemployment crisis.⁸⁸

On February 16, 2011, the EEOC met to examine the treatment of unemployed job seekers.⁸⁹ The EEOC heard from eight panelists who came from the U.S. Department of Labor,

84. CHI., ILL., MUNICIPAL CODE § 2-160-055 (2012).

85. *NYC Council Passes Bill Protecting Unemployed*, THE LEADER, Jan. 24, 2013, at 3A, available at 2013 WLNR 1859522.

86. *Id.*

87. 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.

88. *Id.*

89. 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).

non-profit organizations, and private firms.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.⁹¹

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 2011.⁹² This bill would amend Title VII of the Civil Rights Act (42 U.S.C. 2000e-1, *et seq.*) by adding “unemployment status” to the list of covered characteristics.⁹³ The bill remains in committee.⁹⁴

On September 21, 2011, Representative John Larson from Connecticut introduced the American Jobs Act of 2011.⁹⁵ 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.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.⁹⁷ The bill also contained a whistleblower provision that would prevent employers from restraining

90. Transcript of U.S. Equal Employment Opportunity Commission Meeting, *available at* <http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm> [hereinafter *Transcript of EEOC Meeting*].

91. *Id.*

92. Fair Employment Act of 2011, H.R. 1113, 112th Cong. (2011).

93. *Id.*

94. *Id.*

95. American Jobs Act of 2011, H.R. 12, 112th Cong. (2011).

96. *Id.*

97. *Id.* § 374(a)-(b).

individuals from exercising their rights under the act or from retaliating against individuals for exercising those rights.⁹⁸ The proposed bill would not have precluded an employer or employment agency from considering an individual's employment history.⁹⁹ The bill provided for a private right of action.¹⁰⁰ 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 \$5,000.¹⁰¹ The bill failed in the Senate.¹⁰² Two other bills – S. 1549 and H.R. 3638 – set forth similar proposals.¹⁰³ These bills remain in committee.¹⁰⁴

Additionally, on July 12, 2012, Representative Rosa DeLauro from Connecticut introduced H.R. 2501.¹⁰⁵ Further, on August 2, 2011, Senator Richard Blumenthal of Connecticut introduced S. 1471.¹⁰⁶ 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.¹⁰⁷ The bills remain in committee.¹⁰⁸

98. *Id.* § 374(c).

99. *Id.* § 374(d).

100. *Id.* § 375(a)(6).

101. *Id.* § 375(c).

102. See Alan Silverleib, *Obama Vows to Break Jobs Plan Into Separate Bills After Senate Setback*, CNN (Oct. 12, 2011, 12:09 PM), http://articles.cnn.com/2011-10-11/politics/politics_jobs-bill_1_jobs-plan-gop-leaders-senate-democrats?_s=PM:POLITICS; Daniel L. Saperstein, *The Hiring Process Redefined: How Employers Should Prepare for the Prospect of "Unemployment Discrimination" Laws*, 18 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE 1, art. 3 (2012).

103. Act for the 99%, H.R. 3638, 112th Cong. (2011); American Jobs Act of 2011, S. 1549, 112th Cong. (2011).

104. H.R. 3638; S.1549.

105. Fair Employment Opportunity Act of 2011, H.R. 2501, 112th Cong. (2011).

106. Fair Employment Opportunity Act of 2011, S. 1471, 112th Cong. (2011).

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.¹⁰⁹ And, as seen in the legislative records, these stories generally have formed the basis for the proposed legislation.¹¹⁰

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.¹¹¹

Michael Saltsman, a research fellow at the Employment Policies Institute, took issue with the NELP report.¹¹² 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.¹¹³ This means that the incidence rate of job postings that discriminated against the

109. See *Jobs Hiring Bias Hurts Seekers' Chances Those Who are Unemployed for Lengthy Time See Discrimination*, HOUS. CHRON., Mar. 26, 2012, at B6; *The Long-Jobless See Hiring Bias*, L.A. TIMES, Mar. 24, 2012, at 4; Stephen Singer, *No Jobs? That May Keep You from Getting One*, ST. PAUL PIONEER PRESS, Mar. 24, 2012, at A13, available at 2012 WLNR 6459742; Mary Helen Miller, *Help Wanted. But Only if You Have a Job*, CHRISTIAN SCI. MONITOR, Sept. 8, 2011, available at 2011 WLNR 17839308.

110. See, e.g., Letter from Representative Hank Johnson, et al., to Jacqueline Berrien, *supra* note 87; Paul Moriarty, *The Unemployed: 'Elitist' Republican Stands in the Way*, DAILY REC., Nov. 7, 2010, available at 2010 WLNR 22252689.

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

112. See Michael Saltsman, *Are the Unemployed Victims of Discrimination?*, WALL ST. J., Nov. 25, 2011, at A15.

113. *Id.*

unemployed was less than 0.005% of one month's job postings.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ Additionally, in September 2011, the job listing website Indeed.com said that it would stop posting advertisements that exclude applications from unemployed candidates.¹¹⁸ 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.¹¹⁹ 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.”¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³ He further stated that his organization is unaware of any trend in excluding the unemployed from consideration for jobs.¹²⁴ 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.¹²⁵

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 horrors 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."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."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."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

126. Press Release, Sherrod Brown, Senator for Ohio, Unemployed Ohioans Need Not Apply: Brown Calls for Swift Passage of Bill Outlawing Discrimination Against Jobless Americans (Sept. 16, 2011), *available at* <http://www.brown.senate.gov/newsroom/press/release/brown-joins-unemployed-worker-in-columbus-to-call-for-swift-passage-of-bill-outlawing-discrimination-against-the-unemployed>.

127. Moriarty, *supra* note 110.

128. Janie Har, *Employers Could Not Discriminate Against the Unemployed Under Bill: 2012 Oregon Legislature*, PORTLAND OREGONIAN, Feb. 22, 2012, *available at* 2012 WLNR 3875033.

against the unemployed exacerbate the unemployment crisis.¹²⁹ 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.”¹³⁰ 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 led 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.”¹³¹ 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.”¹³²

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

129. See *Bill Analysis: Discrimination on the Basis of Unemployment*, CAL. ASSEMB. COMM. ON JUDICIARY, COMM., Apr. 17, 2012, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1401-1450/ab_1450_cfa_20120416_105620_asm_comm.html.

130. *Id.* at 5.

131. *Id.* at 9.

132. Editorial, *Employment Discrimination Always Wrong*, WALLA WALLA UNION-BULL., Feb. 29, 2012, available at 2012 WLNR 4410359.

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.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.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.”¹³⁵ Amongst other harms, discriminatory exclusions in hiring can alienate clients and artificially limit applicant pools.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

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).

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).

135. 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey).

136. See Vivek Wadhwa, *The True Cost of Discrimination*, BLOOMBERG BUSINESSWEEK (June 5, 2006), <http://www.businessweek.com/stories/2006-06-05/the-true-cost-of-discrimination>; see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 351-52 (1981).

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

137. Robert E. Hall, *Turnover in the Labor Force*, 3 BROOKINGS PAPERS ON ECON. ACTIVITY 709, 712 (1972), available at http://www.brookings.edu/~media/Projects/BPEA/1972%203/1972c_bpea_hall_gordon_holt.PDF (“[Workers’] decisions to quit will depend on the amount of the loss involved and the cost of finding new work. Everything else held constant, slack markets should discourage quits.”); Paula G. Ardelean et al., *The Development of Employment Rights and Responsibilities from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 449, 457 (2010) (“As fewer positions are available, employers become less willing to take chances in hiring, and employees become less willing to risk losing a secure position.”).

138. *In the Bleak Midwinter: Poverty Looms for the Long-Term Unemployed*, ECONOMIST (Dec. 16, 2010), available at http://www.economist.com/node/17733387?subjectid=348876&story_id=17733387 [hereinafter *In the Bleak Midwinter*]; Megan Felter, *Short-Time Compensation: Is Germany's Success with Kurzarbeit an Answer to U.S. Unemployment?*, 35 B.C. INT'L & COMP. L. REV. 481, 493-94 (2012) (detailing benefits of avoiding long-term unemployment for employers, employees, and government).

139. Katherine Yung, *Long-Term Unemployed Face Spiral Downward*, DETROIT FREE PRESS, Sept. 4, 2011, at A1, available at 2011 WLNR 17502459.

140. *Id.*

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

142. Patrik Jonsson, *Why Have Millions of Americans Given Up Looking for Work?*, CHRISTIAN SCI. MONITOR, Sept. 8, 2012, available at 2012 WLNR 19157620.

suffer too, leading to fewer motivated job seekers and a rise in health and emotional problems.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.¹⁴⁴ For example, the most recently introduced federal bill states that discrimination against the unemployed burdens commerce by:

- (1) reducing personal consumption and undermining economic stability and growth;
- (2) squandering human capital essential to the Nation's economic vibrancy and growth;
- (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;
- (4) imposing additional burdens on publicly funded health and welfare programs; and
- (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.¹⁴⁵

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*

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.

144. *See* S. 1471, 112th Cong. (2011); S. 2028, 84th Gen. Assemb. Sess. (Iowa 2012); S. 3130, 117th Gen. Assemb., Reg. Sess. (Tenn. 2012).

145. S. 1471.

Laws communicate a society's values.¹⁴⁶ 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."¹⁴⁷ 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."¹⁴⁸ 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."¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ Moriarty explained that employers who run job advertisements that exclude unemployed candidates "make unemployed people feel like

146. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

147. *Id.* at 2026.

148. Briefing Paper, *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed from Job Opportunities, as Discriminatory Ads Persist*, NAT'L EMPLOYMENT LAW PROJECT 3 (July 12, 2011), available at http://nelp.3cdn.net/b4ade339e970088d72_alm6blqx8.pdf.

149. CONG. DOCS. (Sept. 21, 2011), available at 2011 WLNR 18890284.

150. *Transcript of EEOC Meeting*, *supra* note 90.

151. *See* Moriarty, *supra* note 110.

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.”).

155. Compare N. J. STAT. ANN. § 34:8B-1 (West 2011) (New Jersey statute regarding restrictions upon the use of employment status as a qualification for job vacancies), with H.R. 2660, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (Arizona employment discrimination bill).

156. See Letter from Representative Hank Johnson, et al., to Jacqueline Berrien, *supra* note 87, at 1.

focused on this issue.¹⁵⁷

At the EEOC hearing, Assistant Secretary Spriggs observed that African Americans, Latinos, and workers with disabilities were overrepresented in the unemployment pool.¹⁵⁸ He further explained that older workers make up a disproportionate share of the long-term unemployed.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.”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.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.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.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.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,

157. *See Transcript of EEOC Meeting, supra* note 90.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

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.¹⁶⁵ 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.¹⁶⁶ She noted that the particular market and job would play a role in determining whether the allegedly discriminatory policy had a disparate impact.¹⁶⁷ 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 Act¹⁶⁸ ("ADEA"), are not unlawful if the differentiation made by the employer "is based on reasonable factors other than age."¹⁶⁹ 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.¹⁷⁰ In

165. *Id.*

166. *Id.*

167. *Id.*

168. 29 U.S.C. § 623 (2012).

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.¹⁷¹ 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.¹⁷² He also notes that some of the proposals allow for a private right of action with regard to the restrictions on including exclusionary

Smith v. City of Jackson, Inc., 544 U.S. 228, 233 (2005).

171. See Saperstein, *supra* note 102; Cal. Senate Rules Committee, Office of Senate Floor Analyses, Aug. 22, 2012; Lawrence R. Sandak & Daniel L. Saperstein, *Is N.J. Going Too Far to Protect Jobless?*, STAR-LEDGER, Apr. 30, 2012, at 5, available at 2012 WLNR 9079300.

172. See Saperstein, *supra* note 102.

language in job advertisements.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.¹⁷⁴ He further asserts that such proposals unduly encourage litigation.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.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.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.¹⁷⁸

Second, the passed statutes prohibit a practice that could serve as a predicate for a Title VII disparate impact claim.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

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Compare D.C. CODE § 32-1362, with OR. LAWS ch. 85, § 2 (West 2012); N.J. STAT. ANN. § 34:8B-1 (West 2011); OR. REV. STAT. § 659A.855 (West 2011).

178. See *supra* notes 56-94 and accompanying text.

179. D.C. CODE § 32-1362; OR. LAWS ch. 85, § 2; N.J. STAT. ANN. § 34:8B-1; OR. REV. STAT. § 659A.855.

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 (Mar. 29, 2012), <http://www.laborlawyers.com/15041>.

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.¹⁸⁵ 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.¹⁸⁶

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."¹⁸⁷

185. See Katharine H. Parker & Daniel L. Saperstein, *The Tide Turns Against Background Checks: How Employers Should Approach the Screening of Applicants and Employees*, 18 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE 4 (2010); CAL. SENATE RULES COMMITTEE, OFFICE OF SENATE FLOOR ANALYSES (Aug. 22, 2012) [hereinafter SENATE FLOOR ANALYSES].

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.¹⁸⁸ 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.¹⁸⁹ The bona fide occupational qualification exception is well established, as it also appears in the Title VII and ADEA statutes.¹⁹⁰

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.¹⁹¹ 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.¹⁹² 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.¹⁹³

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

188. OR. LAWS ch. 85, § 2; N.J. STAT. ANN. § 34:8B-1; OR. REV. STAT. § 659A.855.

189. D.C. CODE § 32-1364(b).

190. 42 U.S.C. § 2000e-2(f); 29 U.S.C. § 623(f)(1) (West 2008).

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.¹⁹⁴ 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.¹⁹⁵ 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.")).

195. See *United States v. Carr*, 67 F.3d 171 (8th Cir. 1995) (affirming dismissal of African American juror based on unemployment status because it evinced a lack of stake in the community); *United States v. Brown*, No. 8:03CR289, 2009 WL 962246, at *3 (D. Neb. Apr. 7, 2009) (affirming dismissal of juror based on unemployment status); *People v. Hecker*, 942 N.E.2d 248 (N.Y. 2010) (noting approval of dismissal of juror for lack of employment history because it demonstrated a lack of "decision-making responsibilities").

Latino men.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ And the federal government and several states have limited how employers may use credit checks in hiring.¹⁹⁹

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.²⁰⁰ Recall that thirty-two percent of the

196. *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDE (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

197. N.Y. CORRECT. LAW § 752 (McKinney 2007).

198. See *Pre-Employment Inquiries and Credit Rating or Economic Status*, EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/practices/inquiries_credit.cfm (last visited Apr. 23, 2013).

199. See 15 U.S.C. § 1681b(b) (West 2006); CAL. CIV. CODE § 1785.20.5 (West 2012); CAL. LAB. CODE § 1024.5 (West 2012); MD. CODE ANN., LAB. & Empl. § 3-711 (West 2012); OR. REV. STAT. § 659A.320 (West 2012); CONN. GEN. STAT. ANN. § 31-51tt (West 2011); 820 ILL. COMP. STAT. 70/15 (West 2011); HAW. REV. STAT. § 378-2.7 (West 2009); WASH. REV. CODE ANN. § 19.182.020 (West 2007).

200. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 940 (2005); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757, 1764 (2003); Joseph C. Feldman, Note, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569, 600 (1999) ("For many whites, before they endorse policies that benefit nonwhites and make the possibility of Title VII suits a real deterrent to employers who would discriminate, they must

total respondents in a national Gallup poll identified “unemployment/jobs” as the most important problem facing the country today.²⁰¹ And, while black, Hispanic, senior, and low-income respondents are particularly concerned about unemployment, it is an issue that cuts across all segments.²⁰²

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.

believe that their own self-interests are furthered.”); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980) (arguing that the “interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites”).

201. See *Most Important Problem*, *supra* note 9.

202. Saad, *supra* note 12.