

JOBLESS IN AMERICA: DISCRIMINATION AGAINST THE UNEMPLOYED AND THE EFFICACY OF STATE AND FEDERAL PROTECTED CLASS LEGISLATION

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[R]ecession is when your neighbor loses his job . . . [D]epression is when you lose yours.¹

- Ronald Reagan

I. INTRODUCTION

In May 2010, a news source ran a story exposing Sony Ericsson, a popular cellular phone manufacturer, for advertising a job opening in Buford, Georgia, which warned applicants—in bold typeface and all caps—that “[n]o unemployed candidates [would be] considered at all.”² The story quickly incited subsequent investigation into a possible trend of discrimination against the unemployed by employer rights groups, the Equal Employment Opportunity Commission (“EEOC”), and employer advocates alike, and spurred a nationwide discussion among legislators, the public, and even behavioral psychologists.³ In response to the public outcry, legislators from eighteen states and New York City have considered legislation to protect the unemployed during the hiring process. Proposed and enacted legislation includes measures ranging from banning discriminatory job advertisements to granting the unemployed protected class status.⁴

During the 2011 congressional session, the United States Congress considered legislation entitled the “Fair Employment Opportunity Act of 2011”⁵ (“FEOA”), a component of President Barack Obama’s proposed “American Jobs Act of 2011,”⁶ which would prohibit an employer of fifteen or more employees from refusing to consider an applicant for employment or refusing to hire an applicant because of her unemployment status.⁷ If this legislation were adopted, the FEOA would effectively add the “unemployed” as a

1. Ronald Reagan, Presidential Campaign Speech at Liberty State Park (Sept. 1, 1980) (transcript available at <http://www.reagan.utexas.edu/archives/reference/9.1.80.html>).

2. *Job Listing: Unemployed Need Not Apply*, 11 ALIVE NEWS (May 31, 2010, 10:35 PM), <http://www.11alive.com/news/local/story.aspx?storyid=144719&catid=3>.

3. See *infra* Part III and accompanying notes.

4. See *infra* Part IV.A and accompanying notes.

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

6. American Jobs Act of 2011, H.R. 12, 112th Cong. §§ 371-79 (2011).

7. Michael J. McNamara, *Occupying the Boardroom: Increasing Government Regulation and Growing Public Anger*, in EMPLOYMENT LAW 2012: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR 23 (Thomson Reuters rev. ed. 2012). In addition to prohibiting discrimination against the unemployed, Title III of the American Jobs Act, “Assistance for the Unemployed and Pathways Back to Work,” outlines a number of programs to aid the unemployed, including, but not limited to: extending the emergency unemployed compensation program, encouraging the States to enact short-term compensation programs, and providing long-term unemployed individuals with tax credits. See generally American Jobs Act of 2011, §§ 301-379.

protected class, as it would provide a victim of unemployment discrimination with the same remedies as those available to individuals in the protected classes under Title VII of the Civil Rights Act of 1964 and other statutorily protected groups. Thus, if the Act is passed, the “unemployed” will join the ranks of race, color, religion, national origin, age, and disability as a group federally protected against discrimination in hiring and employment practices.⁸

Part II of this Note discusses the gravity of the unemployment situation in the United States. Specifically, Part II addresses the extent to which long-term unemployment has come to characterize today’s economy and the most recent recession. Part III explores the practice of employers discriminating against the unemployed in hiring—a practice that was the impetus for legislation springing up around the country to protect the jobless. Next, Part IV outlines the various state and federal legislative responses to unemployment discrimination. Part V analyzes the merits of granting the unemployed protected class status and considers whether protected class legislation will ultimately prove effective in combating discriminatory hiring practices. This Note concludes in Part VI with the argument that although protective legislation will likely prove unenforceable and unworkable, state and federal legislation may be a helpful tool to raise awareness about the problem and to encourage employers to reconsider their approach to unemployed applicants.

II. BACKGROUND: AN ECONOMIC CRISIS

While an analysis of the reasons underlying the current state of economic affairs in the United States is well beyond the scope of this Note, it is important to understand the gravity of the economic situation in the United States today.⁹ Economists have coined the period of economic instability beginning in 2007 the “Great Recession,” so as to liken its severity to that of the Great Depression.¹⁰ Among other consequences of the 2007 recession, gross

8. *Equal Employment Opportunity (EEO) Terminology*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/eo/terminology.html#p> (last visited Jan. 25, 2014).

9. For a comprehensive empirical analysis of the events underlying the 2007-09 recession, see James H. Stock & Mark W. Watson, *Disentangling the Channels of the 2007-09 Recession*, 44 BROOKINGS PAPERS ON ECON. ACTIVITY 81 (2012); see also Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 686-701 (2000) (identifying and discussing three competing assumptions underlying job loss in the United States).

10. See, e.g., *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/cms/index.cfm?fa=view&id=3252> (last updated Jan. 17, 2014); Chris Isidore, *Recession Officially Ended in June 2009*, CNN MONEY (Sept. 20, 2010, 4:00 PM), <http://money.cnn.com/2010/09/20/economy.recession/index.html>.

domestic product ("GDP") decreased by 5.1%, and was not stabilized until the third quarter of the 2011 fiscal year.¹¹ Millions of families were forced to abandon homes that were foreclosed on, partially as a result of widespread job loss.¹² Although the recession officially ended in June 2009,¹³ high unemployment rates have seen little relief.¹⁴

A. Unemployment During and After the "Great Recession"

Among the many ills that inevitably accompany a downtrodden economy, the country saw a loss of 8.8 million jobs during the course of the 2007 recession.¹⁵ This means that almost one in every six workers experienced job loss.¹⁶ In fact, the 2007 recession represents "the deepest labor market downturn in the postwar era."¹⁷ As compared to the past two most recent recessions of March to November of 2001 and July 1990 to March 1991, unemployment rose much higher and at an accelerated rate.¹⁸

Most alarming, however, is the fact that the percentage of Americans out of work continued to rise even after the official end of the recession, with unemployment rates peaking in 2009, as 10% of

http://money.cnn.com/2010/09/20/news/economy/recession_over/index.htm ("[T]he 18-month recession that started in December 2007 [represented] the longest and deepest downturn for the U.S. economy since the Great Depression.").

11. Stock & Watson, *supra* note 9, at 81.

12. GARY PAINTER, WHAT HAPPENS TO HOUSEHOLD FORMATION IN A RECESSION? 8 (Research Inst. for Hous. Am. 2010), *available at* http://www.housingamerica.org/RIHA/RIHA/Publications/72429_9821_Research_RIHA_Household_Report.pdf.

13. Michael W.L. Elsby et al., *The Labor Market in the Great Recession: An Update* 2 (Fed. Reserve Bank of S.F., Working Paper No. 2011-29, 2011), *available at* <http://www.frbsf.org/publications/economics/papers/2011/wp11-29bk.pdf>.

14. *See Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/LNS14000000> (last updated Sept. 13, 2013) [hereinafter *Labor Force Statistics*] (noting a 7.2% unemployment rate for the month of August 2013); *see also* Paul Wiseman, *Long Road for Job Market After Recession Losses*, ASSOCIATED PRESS (Sept. 7, 2012), <http://www.businessweek.com/ap/2012-09-07/long-road-for-job-market-after-recession-losses> ("Including the 96,000 jobs added in August, the United States has regained fewer than 4.1 million jobs, or 46 percent, of those lost jobs."); *see also* Elyce Rotella, *Labor Policy and the Great Recession: An Economist's Perspective*, 87 IND. L.J. 63, 66 (2012) ("[E]ven though the economy has now been heading up for sixteen months, unemployment has fallen very little.").

15. Wiseman, *supra* note 14.

16. HENRY S. FARBER, JOB LOSS IN THE GREAT RECESSION: HISTORICAL PERSPECTIVE FROM THE DISPLACED WORKERS SURVEY, 1984-2010 (Inst. for the Study of Labor 2011), *available at* <http://ftp.iza.org/dp5696.pdf>.

17. Elsby et al., *supra* note 13, at 2.

18. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 10. For a complete list of economic recessions in United States history, *see US Business Cycle Expansions and Contractions*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/cycles.html> (last visited Jan. 25, 2014). For a graphic depiction comparing rates of job loss from 1984 through 2010, *see* Farber, *supra* note 16, at 5.

the population over sixteen years of age were without a job.¹⁹ As of the most recent Department of Labor data, in December of 2013, 6.7% of the United States work force remained unemployed.²⁰

While unemployment rates across the board are at an unacceptable low, these rates do vary significantly between states.²¹ November 2013 statistics showed ranges from 2.6% out of work in North Dakota to 9% of Nevada and Rhode Island residents facing unemployment.²² Among the states with the highest unemployment rates are Michigan (8.8%), Rhode Island (9%), and Illinois (8.7%).²³ New Jersey follows closely behind at 7.8% unemployment.²⁴

B. Long-Term Unemployment

The Great Recession “has been characterized by historically high levels of long-term unemployment.”²⁵ A person is classified as “long term unemployed” if she remains out of work for twenty-seven weeks or longer, so long as she has been actively pursuing employment.²⁶ For many jobless Americans, twenty-seven weeks of unemployment

19. *Labor Force Statistics*, *supra* note 14. *But see* Jim Powell, *Why Long-Term Unemployment Has Doubled Under President Obama*, FORBES (July 10, 2012, 4:22 PM), <http://www.forbes.com/sites/jimpowell/2012/07/10/why-long-term-unemployment-has-doubled-under-president-obama/> (arguing that the Bureau of Labor Statistics’ data “under-states the severity of our current crisis” because individuals receiving disability benefits are not taken into account). *See generally* BUREAU OF LABOR STATISTICS, HOW THE GOVERNMENT MEASURES UNEMPLOYMENT (2009), *available at* http://www.bls.gov/cps/cps_htgm.pdf (explaining that unemployment rates are calculated and published each month by the Bureau of Labor Statistics). These numbers are based on the Current Population Survey (CPS), a monthly survey distributed to 60,000 U.S. households. *Id.* The Bureau of Labor Statistics counts persons as unemployed if “they do not have a job, have actively looked for work in the prior 4 weeks, and are currently available for work.” *Id.*

20. *Labor Force Statistics*, *supra* note 14.

21. *See Local Area Unemployment Statistics*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/web/laus/laumstrk.htm> (last updated Dec. 10, 2013).

22. *Id.*

23. *Id.*

24. *Id.*

25. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-724T, UNEMPLOYED OLDER WORKERS: MANY FACE LONG-TERM JOBLESSNESS AND REDUCED RETIREMENT SECURITY (2012), *available at* <http://www.gao.gov/assets/600/590882.pdf>; *see also* FARBER, *supra* note 16, at 2 (comparing the mean length of unemployment during the past three recessions with the Great Recession, and finding the mean length of unemployment during this recession to be fifteen weeks longer than that of the previous three recessions).

26. Randy Ilg, *Long-Term Unemployment Experience of the Jobless*, ISSUES IN LABOR STATISTICS, June 2010, at 1, *available at* <http://www.bls.gov/opub/ils/pdf/opbils82.pdf>; *see also* FARBER, *supra* note 16, at 2 (“The mean unemployment rate reached about 20 weeks in the three earlier recessions show [sic] but rose to 35 weeks in the Great Recession. The median showed a similar pattern, reaching about 10 weeks in earlier recession but increasing to 35 weeks in the most recent recession.”).

represents only the beginning of a long and stressful journey on the unpredictable road that is the job market; as of December 2013, the typical jobless American spent an average of 37.1 weeks out of work.²⁷

In 2010, the Bureau of Labor Statistics (“BLS” or “Bureau”), an agency of the Department of Labor, recognized that the length of time Americans are now spending looking for work is unprecedented.²⁸ In order to allow for better measurement of the “severity of the nation’s prolonged economic downturn,” the Bureau changed its Population Consensus form to allow job-searchers to indicate that they have been out of work for five years or more, whereas for the past thirty-three years, the form has allowed for a response of up to two years or more.²⁹

Some economists fear that the actual number of unemployed Americans is in fact much higher than the monthly BLS estimates.³⁰ Several factors account for this alleged discrepancy. First, the BLS estimates fail to account for Americans who are unemployed and would like to work, but have stopped pursuing employment and effectively taken themselves out of the “unemployed” category.³¹ One reason given for the transition of individuals from “unemployed” status to “not in the labor force” status is that some may be so discouraged from a lack of employment prospects that they stop

27. *Table A-12: Unemployed Persons by Duration of Unemployment*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/empsit.t12.htm> (last updated Jan. 10, 2014); see also *Long-Term Unemployment: A National Crisis for Older Workers*, HUFFINGTON POST (Sept. 5, 2012, 11:14 AM), http://www.huffingtonpost.com/2012/09/05/long-term-unemployment-a-_n_1857516.html (noting that this number is significantly higher for the unemployed over the age of fifty-five who are looking for work).

28. See Rick Hampson, *U.S. Changes How it Measures Long-Term Unemployment*, USA TODAY (Dec. 28, 2010, 3:05 PM), http://usatoday30.usatoday.com/news/nation/2010-12-28-1Ajobless28_ST_N.htm.

29. *Id.*

30. See Annalyn Kurtz, *Forget Discouraged, 3 Million Workers Hopelessly Unemployed*, CNN MONEY (Jan. 4, 2013, 9:43 AM), <http://money.cnn.com/2013/01/04/news/economy/hopelessly-unemployed-workers/index.html> (quoting Stephen Bronars, a senior economist for Welch Consulting, who said that “[t]he way we’re measuring the long-term unemployed has a lot of holes in it.”). But see Alfred Tella, *Is There Actual Bias in the BLS’s Unemployment Reports?*, REAL CLEAR MARKETS (Oct. 8, 2012), http://www.realclearmarkets.com/articles/2012/10/08/is_there_actual_bias_in_the_blss_unemployment_reports_99920.html (arguing that it is not the data, but rather the presentation of the BLS’s monthly press releases that is questionable).

31. See Randy Ilg, *Analyzing CPS Data Using Gross Flows*, MONTHLY LABOR REVIEW, Sept. 2005, at 18 n.8, available at <http://www.bls.gov/opub/mlr/2005/09/art2full.pdf> (describing how discouraged workers stop looking for jobs because they believe there are no employment options available); see also Elsbey et al., *supra* note 13, at 1 (“[C]ontinued labor market weakness has led to . . . a blurring of the distinction between unemployment and nonparticipation.”).

searching for work altogether.³² To account for this contingency, economists at the BLS have created an “alternative measure of labor underutilization” that accounts for those who are “marginally attached to the labor force.”³³ The BLS defines “marginally attached” workers as “individuals [who] were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months.”³⁴ They were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey.³⁵ The findings of this alternative method of calculation are telling; in December of 2013, “2.4 million persons were marginally attached to the labor force,” with 917,000 of those persons listing “discouragement” as a reason for opting out of the job hunt.³⁶

Even still, this alternate measurement understates the severity of the unemployment situation as it fails to account for individuals who have settled for part-time employment because they were unable to secure a full-time position.³⁷ Instead, “all persons who did any

32. See Ilg, *supra* note 31, at 16; see also KAISER FAMILY FOUNDATION/NPR, LONG-TERM UNEMPLOYED SURVEY 1 (2011), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8261-f.pdf> [hereinafter KFF STUDY] (reporting that less than 40% of unemployed and under-employed workers who were surveyed between October 17 and November 16, 2011 “are very or somewhat confident” that they will be able to secure a job that will provide essential pay and benefits). The researchers define under-employed as “those 18-64 year-olds who are working part-time but would prefer to be working full-time, and who have been without full-time work (either unemployed or working part-time only) for a year or more.” *Id.* Note that this survey included responses from unemployed and under-employed individuals, regardless of how recently they have looked for work. *Id.* However, an August 2011 report prepared by the United States Congressional Joint Economic Committee noted that the probability of an unemployed individual dropping out of the labor force after being unemployed for a year is at a historic low. BOB CASEY, U.S. CONGRESS JOINT ECONOMIC COMMITTEE, ADDRESSING LONG-TERM UNEMPLOYMENT AFTER THE GREAT RECESSION: THE CRUCIAL ROLE OF WORKFORCE TRAINING 9 (2011), available at http://www.jec.senate.gov/public/?a=Files.Serve&File_id=97c2e98e-a791-47fc-a324-6b407948e083. The Committee attributed this statistic to “the extension of unemployment insurance benefits, reductions in household wealth associated with declining home values and equity markets, and a reluctance to accept a lower-paying job, especially among the highly-skilled.” *Id.* at 8. Even so, the labor force has seen a drop of 1.9% participation. *Id.* at 10.

33. News Release, Bureau of Labor Statistics, Employment Situation Summary: The Employment Situation—December 2013, at 2 (Jan. 10, 2014), available at <http://www.bls.gov/news.release/pdf/empstat.pdf>.

34. *Id.*

35. *Id.*

36. See *id.* Other reasons provided for not looking for work ranged from school and family responsibilities to health and transportation problems. *Id.* Women, at a greater rate than men, are more likely to drop out of the labor force. See FARBER, *supra* note 16, at 10.

37. Frank Bass, *Unemployment Rate: Part-Timers Are Hidden from Data*, HUFFINGTON POST (June 4, 2009, 4:06 PM),

work for pay or profit during the survey reference week,” either because they could not find a full-time position³⁸ or for any other reasons, are classified as “employed” for the purposes of the official unemployment rate.³⁹ As of December 2013, 7,650 non-agricultural workers were employed part-time on account of “economic reasons.”⁴⁰

C. *The Problems with Long-Term Unemployment*

Long-term unemployment is an extremely fragile issue that must be dealt with seriously, because its effects on the country’s overall economic health, on the jobless themselves, and on their families may be devastating.

President Obama’s American Jobs Act of 2011 enumerates the following economic consequences of long-term unemployment:

(1) reducing personal consumption and undermining economic stability; (2) squandering essential human capital; (3) increasing demands for unemployment insurance, reducing trust fund assets, and raising payroll taxes for employers and/or cutting benefits for jobless workers; (4) imposing additional burdens on publicly funded health and welfare programs; and (5) depressing income and other tax revenues that governments rely on to support operations and institutions essential to commerce.⁴¹

A recent survey of the under-employed and unemployed reports similarly debilitating financial consequences.⁴² Of those surveyed, 59% reported having to take money out of personal savings or retirement plans to pay bills, 53% had been contacted by a collection agency, and 51% had reported selling personal belongings or borrowing money from relatives or friends to survive.⁴³ Smaller but still significant percentages also reported trouble affording food and housing costs.⁴⁴

The financial consequences of job loss may linger even *after* an unemployed individual has become re-employed. Those who have lost

http://www.huffingtonpost.com/2009/06/04/unemployment-rate-parttim_n_211548.html.

38. In 2010, about 20% of full-time job losers who had reentered the labor market took a part-time position. FARBER, *supra* note 16, at 18.

39. *Labor Force Statistics from the Current Population Survey: Frequently Asked Questions*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/faq.htm#Ques4> (last updated Apr. 18, 2011).

40. News Release, Bureau of Labor Statistics, The Employment Situation—December 2013, at 22 (Jan. 10, 2014), *available at* <http://www.bls.gov/news.release/pdf/empstat.pdf>.

41. THE “AMERICAN JOBS ACT OF 2011” LEGISLATIVE PROPOSAL, H.R. DOC. NO. 112-53, at 37 (2011).

42. See KFF STUDY, *supra* note 32.

43. *See id.* at 1.

44. *Id.*

full-time jobs and settle on part-time employment⁴⁵ are typically greeted back into the labor force with hourly wages, as opposed to a yearly salary, and “less access to fringe benefits like health insurance and pensions.”⁴⁶ Additionally, a worker usually earns less in a post-displacement job than the job from which the worker was displaced.⁴⁷ This earnings cut tends to be more severe for employees who had been with their previous employer for a significant period of time.⁴⁸

In addition to the financial stresses accompanying unemployment, job loss too often results in severe emotional consequences on the individual. One psychologist has explained:

Personal identity and professional identity are intertwined to the extent that the person has defined themselves by what they do For these people, the impact of unemployment extends well beyond the financial impact. In addition to losing their job, there may be the overwhelming sense that they have lost themselves. Many experience profound self-doubt accompanied by feelings of sadness, anger, anxiety, and hopelessness.⁴⁹

In fact, 10% of the under-employed and unemployed in the above-mentioned survey reported beginning medication for mental health concerns after becoming unemployed.⁵⁰ Perhaps the most jarring evidence of the emotional impact of job loss on Americans comes from studies showing a positive correlation between a depressed economy and suicidal thoughts and actions.⁵¹

Similarly, long-term unemployment has been shown to have negative consequences on an individual’s physical well-being.⁵² One

45. See *supra* note 32 and accompanying text.

46. See FARBER, *supra* note 16, at 17.

47. *Id.* at 21 (noting an average earning decrease of 17.5%—the sharpest decrease since 1984).

48. *Id.* at 23.

49. Wyatt Myers, *The Effects of Long-Term Unemployment*, EVERYDAY HEALTH, <http://www.everydayhealth.com/emotional-health/effects-of-long-term-unemployment.aspx> (last updated Feb. 16, 2011).

50. See KFF SURVEY, *supra* note 32, at 10.

51. Benedict Carey, *Study Ties Suicide Rate in Work Force to Economy*, N.Y. TIMES, Apr. 14, 2011, at A17. Researchers at the Federal Centers for Disease Control and Prevention found a “correlation between suicide rates” of “young and middle-age[d] adults” and the business cycle, but no such correlation between a depressed economy and suicide rates of children and the elderly. *Id.* Researchers examined suicide rates during a number of recessions and found that rates saw their highest increase of 23% during the first years of the Great Depression. *Id.*; see also Alix Spiegel, *Economic Crisis, Unemployment Take Emotional Toll*, NPR (Feb. 13, 2009, 1:00 AM), <http://www.npr.org/templates/story/story.php?storyId=100600029> (discussing suicide hotline reports of a 35% increase in the number of calls received in 2009).

52. Laura Bassett, *Study: Longterm Unemployment Has Disastrous Effects on Health and Longevity*, HUFFINGTON POST (Nov. 5, 2010, 6:23 PM), <http://www.huffingtonpost.com/2010/11/05/study-longterm->

of the most plausible explanations for the physical consequences of unemployment is the stress that follows job loss.⁵³ A study conducted by the Harvard School of Public Health found that while 6% of those who remained employed during the period studied “developed a new health condition,” 10% of those who lost their job during that time developed a health condition.⁵⁴ These conditions included, but were not limited to, diabetes, heart disease and high blood pressure.⁵⁵ Lastly, researchers have found a positive correlation between unemployment and reckless behavior.⁵⁶ Specifically, unemployment leads to a greater likelihood of excessive alcohol consumption and drunk driving.⁵⁷

III. DISCRIMINATION AGAINST THE UNEMPLOYED

Outrage spread across the country in May of 2010, when a local news report exposed Sony Ericsson for a job posting that warned potential applicants in highlighted capital letters that: “No unemployed candidates considered at all.”⁵⁸ When reporters

unemployme_n_779743.html (citing a study showing a positive correlation between job loss and heart attacks and stroke). Moreover, these health problems may be exacerbated by the loss of health insurance that often accompanies unemployment. *Id.* (quoting Dr. Elise Gould, the director of health policy research at the Economic Policy Institute).

53. See Roni Caryn Rabin, *Unemployment May Be Hazardous to Your Health*, N.Y. TIMES, May 8, 2009, at A11, available at <http://www.nytimes.com/2009/05/09/health/09sick.html> (quoting Dr. David Williams, a professor of the Harvard School of Public Health and the director of the Robert Wood Johnson Foundation Commission to Build a Healthier America: “We know that stress affects health It causes changes in physiological function in multiple ways, and it can lead to alterations in health behavior.”)

54. *Id.* By including in their study only participants who had lost their job to no fault of their own, researchers sought to resolve whether the correlation between poor health and unemployment represents a causal element. *Id.*

55. *Id.*

56. See Remy Melina, *Recession Fuels Risky Drinking for Both Jobless and Employed*, LIVESCIENCE (Oct. 21, 2011, 10:39 AM), <http://www.livescience.com/16656-alcohol-economy-relationship.html>.

57. *Id.* These findings came as a surprise to researchers because earlier studies showed a decrease in alcohol consumption accompanying an increase in job loss, presumably because of a decrease in discretionary income to purchase alcohol. *Id.* Surprisingly, researchers found that an increase in alcohol consumption affects the employed as well as the unemployed. *Id.* One researcher explained this phenomenon as “even though employed individuals have a job, they could be affected psychologically (e.g., fear of losing their job) from an economic downturn, leading them to have more drinking days and driving under the influence episodes as the state-level unemployment rate increases.” *Id.*; see also KFF SURVEY, *supra* note 32, at 2 (finding that 9% of the unemployed and under-employed surveyed reported an increase in alcohol or drug use).

58. *Job Listing*, *supra* note 2; see generally NAT’L EMP’T LAW PROJECT, HIRING DISCRIMINATION AGAINST THE UNEMPLOYED: FEDERAL BILL OUTLAWS EXCLUDING THE UNEMPLOYED FROM JOB OPPORTUNITIES, AS DISCRIMINATORY ADS PERSIST (2011),

contacted Sony Ericsson about the posting, it was immediately removed and a company spokesperson noted that “this was a mistake.”⁵⁹ However, the president and owner of the online recruiting website that listed the Sony posting acknowledged that there exists a “growing trend” of employers scouting applicants who are currently employed.⁶⁰

In July of 2011, fueled by outrage over the Sony posting, the National Employment Law Project (“NELP”) launched its own investigation into whether, in fact, employers are discriminating against unemployed job seekers.⁶¹ Over a four-week period in the spring of 2011, one NELP researcher surveyed the websites of four of the major job posting sites in the country and discovered 150 discriminatory advertisements.⁶² Johns Hopkins University and Allstate Insurance were only some of the major employers using discriminatory advertisements, and positions ranged from financial advisors to administrative directors, scientists, kitchen managers, and coaches.⁶³ Based on these findings, NELP concluded that:

[T]he fact that NELP’s relatively limited research yielded such a broad cross-section of exclusionary ads—with postings for jobs throughout the United States, by small, medium and large employers, for white collar, blue collar, and service sector jobs, at virtually every skill level—suggests that the practice of excluding unemployed job seekers could be far more extensive than depicted in this limited sample.⁶⁴

Other reports have drawn similar conclusions. A *New York Times* article, for example, opens with images of discriminatory advertisements, and notes that:

A recent review of job vacancy postings on popular sites like Monster.com, CareerBuilder and Craigslist revealed hundreds that said employers would consider (or at least “strongly prefer”) only people currently employed or just recently laid off.⁶⁵

Similarly, a review of job advertisements conducted by the staff members of the office of a New York City councilman discovered dozens of discriminatory postings in New York City alone.⁶⁶

available at <http://www.nelp.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf?nocdn=1> (exploring the blanket exclusion of the unemployed from job opportunities).

59. *Job Listing*, *supra* note 2.

60. *Id.*

61. NAT’L EMP’T LAW PROJECT, *supra* note 58, at 1.

62. *Id.* at 2.

63. *Id.* at 8-9.

64. *Id.* at 2.

65. Catherine Rampell, *The Help-Wanted Sign Comes with a Frustrating Asterisk*, N.Y. TIMES, July 26, 2011, at B1.

66. See Press Release, The New York City Council, Speaker Quinn, Manhattan

Employer advocates, however, maintain that exclusionary advertisements are not nearly as prevalent as the NELP and other independent studies conclude.⁶⁷ One critic writes:

The stories of legions of job ads warning that the “unemployed need not apply” are unfounded. When these reports first appeared, the online job-search engine Monster.com reviewed the ads posted on its site. The company found that less than one one-hundredth of 1 percent—1 in 10,000—of its job ads excluded the unemployed.⁶⁸

These representatives also argue that because categorically excluding a large group of applicants would eliminate potentially powerful candidates, employers have no incentive to discriminate against the unemployed.⁶⁹

Notwithstanding arguments that discriminatory job listings are not nearly as prevalent as the NELP survey suggests, exclusionary job listings are by no means the only form of discrimination faced by job seekers. Even an applicant who progresses to the interview stage may be dismissed for employment gaps in her resume that have been occupied by her job search. Consider, for example, a segment broadcasted in February 2012 on “60 Minutes,” where the show’s host opened the floor to a handful of individuals who were struggling with long-term unemployment to share their experiences in the world of unemployment.⁷⁰ Two participants explained how interviewers questioned or dismissed their ability to work solely because they had been unemployed for over a year.⁷¹ The show’s producer characterized the phenomenon facing his participants as “you need a job to get a job,” and noted that “the longer you’re out of work, the

Borough President Scott Stringer and Council Members Hail Groundbreaking Legislation to Protect Unemployed From Job Discrimination (Jan. 22, 2013), *available at* <http://www.council.nyc.gov/html/pr/012213jobs.shtml> [hereinafter Speaker Quinn Press Release].

67. See, e.g., JAMES SHERK & ANDREW GROSSMAN, HERITAGE FOUND., UNINTENDED CONSEQUENCES: ALLOWING THE UNEMPLOYED TO SUE WOULD DESTROY JOBS, (2011), *available at* <http://www.heritage.org/research/reports/2011/11/unintended-consequences-allowing-the-unemployed-to-sue-would-destroy-jobs>.

68. *Id.*

69. Written Testimony of Fernan R. Cepero, Vice President for Human Resources, The YMCA of Greater Rochester, at the Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), *available at* <http://www.eeoc.gov/eeoc/meetings/2-16-11/cepero.cfm> [hereinafter Cepero Testimony] (“[E]xclusionary policies are poor business practices because they prevent organizations from accessing some of the best available knowledge, skills and abilities in a given labor force.”).

70. *60 Minutes: Discrimination Against the Unemployed* (CBS television broadcast Feb. 19, 2012), *available at* <http://www.cbsnews.com/video/watch/?id=7399344n>. The show’s producers did not set out to find jobless individuals who were discriminated against, and were surprised to find that such events were occurring.

71. *Id.*

harder it is to find work.”⁷² Moreover, the segment’s host analogized postings that prohibit unemployed candidates from applying to signs of the twentieth century that discriminated against Irish and African American job seekers.⁷³

In response to the NELP study and other recent developments suggesting a hiring bias against the unemployed, the EEOC held a hearing on February 16, 2011 to discuss the issue.⁷⁴ Speakers addressed the impact of discriminatory practices on the unemployed population, and argued specifically that such practices hurt the country’s minority populations the most.⁷⁵ Among the panelists were several employer representatives who maintained that employers are not, in fact, discriminating against unemployed applicants.⁷⁶ The EEOC has yet to issue guidance on dealing with unemployed applicants. Yet, many fear that unemployment discrimination is becoming even more prevalent “as jobs are in short supply and employers can have their pick of applicants.”⁷⁷

IV. LEGISLATIVE ATTEMPTS TO PREVENT DISCRIMINATION AGAINST THE UNEMPLOYED

To date, at least sixteen states and the District of Columbia have

72. *Id.*

73. *Id.*

74. Press Release, U.S. Equal Emp’t Opportunity Comm’n, Out of Work? Out of Luck: EEOC Examines Employers’ Treatment of Unemployed Job Applicants at Hearing (Feb. 16, 2011), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>.

75. *See* Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/meetings/2-16-11/index.cfm> (last visited Jan. 26, 2014); Written Testimony of Algernon Austin Ph.D., Director of the Program on Race, Ethnicity, and the Economy, Economic Policy Institute, at the Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), *available at* <http://www.eeoc.gov/eeoc/meetings/2-16-11/austin.cfm>; *see also* discussion *infra* Part V.C.

76. Written Testimony of James S. Urban, Partner, Jones Day, at the Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), *available at* <http://www.eeoc.gov/eeoc/meetings/2-16-11/urban.cfm> [hereinafter Urban Testimony] (“[W]hile I am aware of and have reviewed recent assorted media reports regarding employers who reportedly have excluded applicants from hiring because they were unemployed, I personally have never experienced an employer with such a policy or practice. . . . In sum, it is my experience and belief that there is not a widespread practice among employers to disqualify applicants on the basis of unemployment. I submit to you that the anecdotal examples contained in a [sic] media reports over the past year or so regarding such circumstances are, when viewed in the broad scope, isolated incidents.”); Cepero Testimony, *supra* note 69 (“[Society for Human Resource Management] is unaware of a widespread practice or trend to exclude unemployed individuals from consideration for available jobs.”).

77. Winnie Hu, *When Being Jobless Is a Barrier to Finding a Job*, N.Y. TIMES, Feb. 18, 2013, at A13.

enacted or are considering enacting legislation to protect the unemployed against discrimination in hiring.⁷⁸ The proposed federal legislation, the FEOA, has its genesis in New Jersey legislation, which was the first of its kind targeting discrimination against the unemployed.⁷⁹

A. State and Local Legislation

In 2011, New Jersey became the first state to pass legislation protecting its jobless residents.⁸⁰ Although revolutionary, the New Jersey legislation is limited in its prohibition against discrimination in that it seeks only to regulate online and print employment advertisements rather than discrimination generally.⁸¹ Specifically, the Act prohibits employers⁸² from advertising job openings that contain a provision stating that the qualifications for the job include current employment, the employer will not consider for hire someone who is currently unemployed, or the employer will only consider for hire someone who is currently employed.⁸³ One of the bill's primary sponsors has stated that "[y]ou can't control people's behaviors . . . but as a state, we can say that we find this practice unacceptable—

78. See Joanne Deschenaux, *States Considering Bills Barring Bias Against Unemployed Applicants*, WEKNOWNEXT (Apr. 17, 2012), <http://www.weknownext.com/public-policy/states-considering-bills-barring-bias-against-unemployed-applicants>.

79. See N.J. STAT. ANN. § 34:8B-1 (West 2011); Simona Farrise, *Congress Considers Banning Discrimination Against the Unemployed*, JDSUPRA (Dec. 24, 2013), <http://www.jdsupra.com/legalnews/congress-considers-banning-discrimination-73548/>.

80. § 34:8B-1; Lawrence R. Sandak & Daniel L. Saperstein, *N.J. Law Could Limit Employers' Use of Job Applicants Work History in Hiring*, NJ.COM (Apr. 30, 2012, 8:17 AM), http://blog.nj.com/njv_guest_blog/2012/04/nj_law_puts_could_limit_employ.html. Governor Christie vetoed the initial legislation, reasoning that its language was too vague and failed to provide a knowledge requirement, its fines were too harsh, and it failed to provide exceptions where following through with the law may violate state legislation already in place. See GOVERNOR CHRIS CHRISTIE, GOVERNOR'S VETO MESSAGE ON A3359, at 1-3 (Jan. 6, 2011) [hereinafter GOVERNOR'S VETO MESSAGE], available at http://www.njleg.state.nj.us/2010/Bills/A3500/3359_V1.pdf. The current legislation incorporates the Governor's requested revisions. See § 34:8B-1. Significantly, New Jersey consistently ranks as one of the states with the highest unemployment rates. *Unemployment Rate, State by State*, CNNMONEY, <http://www.money.cnn.com/interactive/economy/state-unemployment-rates/> (last visited Jan. 18, 2014). Partially as a result of high unemployment, the State has been struggling to keep its residents from fleeing to other states. Jenna Goudreau, *The States People Are Fleeing in 2013*, FORBES (Feb. 8, 2013, 2:40 PM), <http://www.forbes.com/sites/jennagoudreau/2013/02/07/the-states-people-are-fleeing-in-2013/>.

81. See GOVERNOR'S VETO MESSAGE, *supra* note 80, at 1.

82. As used in this Note, the term "employers" includes any representatives of employers or employment agencies.

83. See GOVERNOR'S VETO MESSAGE, *supra* note 80, at 1 (explaining the law prevents "stat[ing] or suggest[ing] that an unemployed person will not be considered for the position").

especially in these hard economic times.”⁸⁴ While the efficacy of such a limited ban is unclear,⁸⁵ Representative Celeste Riley told one source that the hope is that the legislation will “at least send [employers] a message.”⁸⁶

During the 2012 legislative session, seventeen states, the District of Columbia, and New York City considered protective legislation for their jobless citizens.⁸⁷ Already, nine states have introduced anti-unemployment discrimination during the 2013 legislative session.⁸⁸ While most proposals mirror New Jersey’s ban on advertisements, several states proposed legislation that would prohibit all discrimination against unemployed applicants.⁸⁹ Ultimately, out of all the proposed state legislation on this issue, only Oregon,⁹⁰ the District of Columbia, and New York City have adopted legislation.⁹¹

On March 19, 2012, the District of Columbia enacted “The

84. Laura Bassett, *New Jersey Bans Job Ads that Discriminate Against Unemployed*, HUFFINGTON POST (Apr. 25, 2011, 6:19 PM), http://www.huffingtonpost.com/2011/04/25/new-jersey-bans-unemployed-job-discrimination_n_853513.html (quoting New Jersey State Representative Celeste Riley).

85. It may even be the case that a ban against discriminatory advertisements, as compared with a full-out prohibition against discrimination generally, may merely lead to market inefficiencies and result in even greater harm to the job search for unemployed applicants. Employers with every intention of weeding out those who are not currently employed will nevertheless be forced to accept the resumes of jobless applicants, and, for the sake of propriety and avoiding lawsuits, may even go so far as to bring these applicants in for an interview. In the meantime, the prospective employee has expended a great amount of time, energy, and money preparing for an interview that is all for naught. The costs of postage to mail applications, dry cleaning bills, and transportation, in addition to the opportunity costs of spending time applying for a position for which she may actually have a chance of getting, are often great. See Catherine Rampell, *With Positions to Fill, Employers Wait for Perfection*, N.Y. TIMES, Mar. 6, 2013, at A1. Similarly, an employer would waste personnel time and resources in calling an applicant in who he does not intend to hire. See *id.*

86. Bassett, *supra* note 84.

87. *Discrimination Against the Unemployed*, NAT’L CONF. OF ST. LEGISLATURES (July 24, 2013), <http://www.ncsl.org/issues-research/labor/discrimination-against-the-unemployed.aspx> (summarizing each state’s proposed legislation during the 2011, 2012, and 2013 legislative sessions).

88. *Id.*

89. See *id.*

90. Like the New Jersey law, the Oregon bill prohibits discriminatory advertisements. *Id.* In March of 2012, when the legislation passed, 8.6% of Oregonians were unemployed. News Release, David Cooke, Economist, Emp’t Dept. News and Info., Oregon Statewide Unemployment Rate—March 2012 (Apr. 17, 2012), available at http://www.oregon.gov/EMPLOY/COMM/Pages/news/march_2012_unemployment.aspx. Oregon declared a state of emergency so as to allow the bill to become effective immediately upon its passage. *Id.*

91. *Discrimination Against the Unemployed*, *supra* note 87.

Unemployed Anti-Discrimination Act of 2012” (“D.C. Act”), which took the New Jersey legislation one giant step further by prohibiting *all* discrimination against the unemployed in the hiring process—not only discriminatory advertisements.⁹² An employer in the District of Columbia may not “fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee because of the individual’s status as unemployed,” and may not discriminate in online or print advertisements.⁹³ The D.C. Act “does not preclude an employer or employment agency from examining 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.”⁹⁴

Modeled after New Jersey’s law, the D.C. Act adopts New Jersey’s enforcement regime in that it provides for civil penalties against a violating employer, but does not create a private right of action.⁹⁵ Instead, the D.C. and New Jersey legislatures chose to impose fines against violators that increase upon each subsequent violation.⁹⁶ The Office of Human Rights (“OHR”) is charged with investigating complaints alleging a violation of the D.C. Act and imposing appropriate fines.⁹⁷ In both jurisdictions, a first-time violator faces a fine of up to \$1,000.⁹⁸ Two-time offenders may face a \$5,000 fine and \$10,000 fines for all subsequent violations.⁹⁹ The OHR will appropriate these fines to the aggrieved applicant or employee.¹⁰⁰

Most recently, in March of 2013, council members in New York City—which for the past several months has been flirting with 9% unemployment¹⁰¹—approved a bill that would place a blanket ban on

92. D.C. CODE § 32-1362 (2012). At the time of the D.C. Act’s drafting, the District saw an unemployment rate of 10%. COUNCIL OF THE DIST. OF COLUMBIA COMM. ON AGING AND COMMUNITY AFFAIRS, REPORT ON B19-0486 “UNEMPLOYED ANTI-DISCRIMINATION ACT OF 2012” (2012), *available at* <http://dcclims1.dccouncil.us/images/00001/20120206130956.pdf> [hereinafter D.C. COMMITTEE REPORT].

93. D.C. CODE § 32-1362.

94. D.C. COMMITTEE REPORT, *supra* note 92, at 4.

95. *Id.* at 3.

96. *Id.*

97. *Id.*

98. D.C. CODE § 32-1362; N.J. STAT. ANN. § 34:8B-1.

99. D.C. CODE § 32-1362; N.J. STAT. ANN. § 34:8B-1.

100. D.C. CODE § 32-1362; N.J. STAT. ANN. § 34:8B-1.

101. Patrick McGeehan, *Jobless Rate in New York City Rose Slightly in June*, N.Y. TIMES (July 19, 2013), <http://www.nytimes.com/2013/07/19/nyregion/jobless-rate-in-new-york-city-rose-slightly-in-june.html> (noting that the “City’s unemployment rate edged up to 8.4% in June even though employers had been steadily adding jobs all year”).

discrimination against unemployed applicants.¹⁰² Although Mayor Bloomberg vowed publicly to veto the bill, council members overruled the Mayor's veto with a forty-three to four vote.¹⁰³ The bill's primary sponsor and former mayoral candidate, Christine Quinn, had previously boasted that, if passed, "New York City will be the only place in the country that will allow its residents to plead their case at the Human Rights Commission or in court."¹⁰⁴

B. Proposed Federal Legislation: The American Jobs Act

On September 8, 2011, President Barack Obama urged Congress to accept his exhaustive plan to get more Americans back into the work force.¹⁰⁵ The President promised that passage of the American Jobs Act would "create more jobs for construction workers, more jobs for teachers, more jobs for veterans, and more jobs for *long-term unemployed*."¹⁰⁶ Specifically, subtitle D of the Act, which incorporates the FEOA, would prohibit discrimination against the unemployed in hiring practices.¹⁰⁷ The federal prohibition applies as against employers with fifteen or more employees.¹⁰⁸ The FEOA incorporates the New Jersey ban on discriminatory advertisements and outlaws any consideration of an applicant's employment status, using the language later adopted in the D.C. Act discussed above.¹⁰⁹

The FEOA attempts to provide employers with guidance as to what questions or inquiries they may direct toward jobless applicants, stating:

Nothing in this Act is intended to preclude an employer or employment agency from considering an individual's employment

102. Hu, *supra* note 77.

103. Mitchell Hirsch, *New York City Council Passes Landmark Bill Protecting Unemployed Job-Seekers from Discrimination*, UNEMPLOYEDWORKERS.ORG (Mar. 13, 2013), http://unemployedworkers.org/sites/unemployedworkers/index.php/site/blog_entry/new_york_city_council_passes_landmark_bill_protecting_unemployed_job-seeker.

104. Speaker Quinn Press Release, *supra* note 66.

105. See President Barack Obama, Address by the President to a Joint Session of Congress (Sept. 8, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/08/address-president-joint-session-congress>).

106. *Id.* (emphasis added).

107. See American Jobs Act of 2011, H.R. 12, 112th Cong. §§ 371-79 (2011).

108. *Id.* § 373(4)(A).

109. *Id.* § 374(a). The proposed legislation differs significantly from New Jersey and D.C. legislation by way of enforcement. Unlike the New Jersey and D.C. laws, the FEOA creates a private right of action for an aggrieved applicant or employee. *Id.* § 375(c)(1). Thus, in addition to imposing penalties on an offending employer, the aggrieved employee has a host of cumulative remedies available to him. Possible remedies include monetary damages, attorney fees, an injunction against the employer, and liquidated damages. *Id.* In order to bring a claim, a defunct potential or current employee must follow the procedures applicable to Title VII plaintiffs. *Id.* § 375(b)(1).

history, or from examining 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. Such consideration or examination may include an assessment of whether an individual's employment in a similar or related job for a period of time reasonably proximate to the consideration of such individual for employment is job-related or consistent with business necessity.¹¹⁰

By banning discrimination against the unemployed and by providing for a private right of action consistent with Title VII claims, the American Jobs Act carves out a new category of persons granted protected class status: the unemployed.¹¹¹

V. ANALYSIS: SHOULD THE "UNEMPLOYED" BE A PROTECTED CLASS?

Title VII of the Civil Rights Act was the first legislation to identify specific character traits as worthy of protection in the hiring and employment context. Specifically, Title VII identified "race, color, religion, sex, [and] national origin" as untouchable topics in the employment relationship.¹¹² Since Title VII, Congress has added age,¹¹³ disability,¹¹⁴ and genetic makeup as classes protected by federal antidiscrimination legislation.¹¹⁵

In granting these classes federal protection, Congress has considered the need to bar "arbitrary" hiring practices that have little to do with an employee's job potential,¹¹⁶ to eliminate "unfounded

110. *Id.* § 374(d).

111. Professor Michelle A. Travis identifies "non-group-conscious regulation of particular employment practices . . . [and] attempts to expand the list of legally protected social identity groups," and argues that the former is a more viable option for combating discrimination in the workforce. Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 564 (2012). While this argument carries great merit and support, this author views the pending federal legislation as in fact creating another protected class, as there is not a meaningful distinction in practice between banning discrimination against "the unemployed" and regulating employer hiring practices. *Id.*

112. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

113. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006).

114. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2006). Title I and Title V of the Americans with Disabilities Act of 1990 apply against employers in the private sector and state and local governments. *Id.* Section 504 of the Rehabilitation Act of 1973 bars discrimination against qualified individuals with disabilities by employers who receive federal funding. Rehabilitation Act of 1973, 29 U.S.C. § 791 (2006); see also U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE FOR CIVIL RIGHTS, YOUR RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT (2006), available at <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf>.

115. Genetic Information Non-Discrimination Act of 2008, 42 U.S.C. § 2000ff(1)(a)-(b).

116. See, e.g., Statement of Congressional Purpose, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006) (noting the common practice of

stigmatization” against certain groups,¹¹⁷ and to prevent practices that disproportionately impact minority groups.¹¹⁸ The discussion that follows analyzes each of these justifications for protected class membership in the context of the unemployed, and discusses whether such arguments militate toward a need for protected class membership.

A. The Relationship Between Unemployment Status and Job Performance

The most powerful justification for protected class legislation is that one’s race, sex, religion, national origin, age, disability, and genetic makeup are criteria completely irrelevant to employment decisions, and therefore it is irrational to use such characteristics as a basis for decision making.¹¹⁹ Opponents of protection for the unemployed argue that employment history, unlike race, is not innate and is relevant to an employer’s hiring decision.

For example, employers often expect applicants to be familiar with the most current technology and practices in their particular field.¹²⁰ To that end, employers may associate prolonged periods of unemployment with a greater likelihood of decreased skill.¹²¹ In fact, the FEOA itself acknowledges that unemployment status may be relevant to an employer’s hiring decision, and permits an employer to consider why the applicant is unemployed and to determine “whether an individual’s employment in a similar or related job for a period of time reasonably proximate to the consideration of such individual for employment is job-related or consistent with business necessity.”¹²² Thus, a computer engineering firm in a constantly evolving market

employers setting “arbitrary age limits regardless of potential for job performance”).

117. Statement of Congressional Purpose, Genetic Information Non-Discrimination Act of 2008, 42 U.S.C. § 2000ff(1)(a)-(b).

118. *Id.*

119. Jennifer Peltz, *Bloomberg Vetoes NYC Jobless Discrimination Bill; City Council Vows to Override*, HUFFINGTON POST (Feb. 22, 2013, 2:17 PM), http://www.huffingtonpost.com/2013/02/22/bloomberg-vetoes-jobless-discrimination-bill_n_2741983.html (“And unlike other characteristics that employers are generally banned from considering, such as an applicant’s race, religion or gender, ‘the circumstances surrounding a person’s unemployment status may, in certain situations, be relevant to employers when selecting qualified employees[]’” (quoting New York City’s Mayor Bloomberg)).

120. See *Discriminating Against Unemployed Workers*, 18 N.Y. EMP. L. LETTER (Bond, Schoeneck & King, PLLC, Syracuse, N.Y.), no. 9, Sept. 2011, at 4.

121. GEOFFREY C. HO ET AL., THE STIGMA OF UNEMPLOYMENT: WHEN JOBLESSNESS LEADS TO BEING JOBLESS 3 (Inst. for Research on Labor and Emp’t ed., 2011); see also Rampell, *supra* note 65 (“Idle workers’ skills may atrophy, particularly in dynamic industries like technology. They may lose touch with their network of contacts, which is important for people in sales. Beaten down by months of rejection and idleness, they may not interview well or easily return to a 9-to-5 schedule.”).

122. American Jobs Act of 2011, H.R. 12, 112th Cong. § 374(d) (2011).

will not be penalized for disqualifying an applicant who has spent the past few years in the fashion industry. Similarly, the same firm would be justified in refusing to hire the applicant who was fired for stealing from her employer.

The proposed legislation, then, purports to prevent only unwarranted and irrational bias against the unemployed.¹²³ Thus, the legislation operates under the assumption that employers are in fact discriminating against unemployed applicants and are unjustified in doing so. A recent study on employer bias, discussed below, lends credence to this underlying assumption.¹²⁴

B. The Role of Stigmatization in Considering Jobless Applicants

Many employers maintain certain preconceptions about unemployed applicants. First, employers generally believe that unemployed individuals are likely to be less productive than their still-employed counterparts, reasoning that the least productive workers are first to go when a company downsizes.¹²⁵ Consequently, a trend has developed whereby employers are hiring recruiting agencies to search for “actively passive” job seekers—those who are employed and not actively seeking a new position, but are nonetheless keeping an eye out for potential openings of interest.¹²⁶ Second, some human resource personnel have expressed a fear that applicants who have been jobless for a long time are likely to settle on a job and continue looking for something better.¹²⁷

Additionally, a firm may make assumptions about unobservable

123. See *id.*

124. See *infra* note 138 and accompanying text.

125. National Review, *THE WEEK*, Oct. 31, 2011, at 10 (“[T]here is a logical connection between one’s employment status and one’s desirability as an employee: Less productive workers are more likely to be unemployed. That is the nature of the labor market.”); see also Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 *LEWIS & CLARK L. REV.* 463, 473 (2012) (“Employers maintain that . . . current employment status is at least one indicator of an employee’s quality . . .”).

126. See Deborah S. Hildebrand, *Active v. Passive Job Seekers*, SUITE 101, <http://suite101.com/article/active-vs-passive-job-seekers-a30882> (last updated Mar. 25, 2013) (discussing the advantages and disadvantages of recruiting active over passive job seekers, and identifying a new category of job seekers—the “actively passive”); Arthur Delaney, *Stigma of Long-Term Unemployment Boosts Jobless Rate: CBO*, HUFFINGTON POST (Feb. 17, 2012, 10:28 AM), http://www.huffingtonpost.com/2012/02/17/unemployment-long-term-unemployment-cbo_n_1284202.html (“When my clients hire me, they want people who are motivated to go to work for the right reasons And if someone is currently employed in a good position, then their motivation to move to a different company would be that the company offers better benefits or offers more growth for advancement, or whatever. They’re not people who have to have a job, they’re people who want to move for the right reasons.” (quoting George Seed, an executive at a Georgia recruiting firm)).

127. Hu, *supra* note 77.

characteristics of the applicant based upon the length of the applicant's unemployment spell.¹²⁸ For example, a hiring partner may "think[] that unemployment duration provides a signal about . . . the worker's productivity (e.g., high ability workers may have shorter spells)."¹²⁹ To that end, a hiring agent may engage in a heuristic analysis, perceiving extended bouts of unemployment as indicative of an applicant's undesirable character traits.¹³⁰ In other words, an employer might reason that if no one else was willing to hire the applicant, then something about her must be unappealing.¹³¹ These logical leaps become even more debilitating the longer a job seeker remains out of work.¹³²

Professor Robert Shimer, a labor economist at the University of Chicago, has suggested that employers may be practicing "statistical discrimination" against the unemployed.¹³³ The theory of statistical discrimination is premised on the idea that, absent discriminatory animus, a rational employer may use an observable characteristic of an applicant as a proxy for unobservable traits, such as worker productivity, that would be costly and time consuming to otherwise discover.¹³⁴ Professor Shimer summarizes: "On average, [unemployed applicants] might be less attractive, and employers don't bother to look more closely to pick out the good ones."¹³⁵ Rather than taking the time to interview each prospective employee, employers use unemployment status as a marker for legitimate employment qualifications.¹³⁶

A recent study from the University of California, Los Angeles

128. See Tara Vishwanath, *Job Search, Stigma Effect, and Escape Rate from Unemployment*, 7 J. LAB. ECON. 487, 488-89 (1989).

129. *Id.* at 488; see also Delaney, *supra* note 126 (giving mathematical significance to the effect of the stigma of unemployment on one's likelihood of being hired).

130. Vishwanath, *supra* note 128, at 488; see also Shelly Banjo, *Measures Aim to End Bias Against Long-Term Jobless*, WALL ST. J., Feb. 24, 2012, available at <http://online.wsj.com/article/SB10001424052970204778604577241693309654990.html> ("Employers often worry that job skills erode the longer people go without working and may pass over unemployed workers because they assume other managers didn't hire them for good reason, said Gary Burtless, a senior fellow at the Brookings Institution and former U.S. Department of Labor economist.").

131. See Banjo, *supra* note 130.

132. See *id.*

133. Rampell, *supra* note 65.

134. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622 (1991). The theory of statistical discrimination was first espoused in the early 1970s by K.J. Arrow and Edmond S. Phelps. See Kenneth J. Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 3-5 (Orley Ashenfelter & Albert Rees eds., 1973); see also Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

135. Rampell, *supra* note 65.

136. See Strauss, *supra* note 134, at 1621.

supports Professor Shimer's idea of "statistical discrimination" and suggests that discrimination against unemployed applicants may have less to do with an employer's fear of deteriorating skill level and qualifications and more to do with a general bias against the unemployed.¹³⁷

Study participants were presented with resumes of currently employed and unemployed applicants and asked to rank each applicant for competency and warmth.¹³⁸ Participants consistently ranked the employed applicants above the unemployed applicants on both factors.¹³⁹ Moreover, researchers found that participants perceived unemployed applicants less favorably *regardless of the duration* of the applicant's bout of unemployment or the applicant's skill.¹⁴⁰ Thus, like a new car whose value depreciates the moment it is driven off the lot, an applicant becomes less attractive the moment he becomes unemployed. The same effect occurred when participants watched a video interview of the applicants: the bias against unemployed interviewees was not eliminated when participants were able to put a face to the resume and observe the applicants in a social interaction.¹⁴¹ Finally, the stigma existed regardless of whether the applicant was unemployed because he was laid off or made a conscious decision to leave the prior job.¹⁴² Researchers summed up their findings:

[T]he unemployed may have a legitimate concern about bias against them because unemployment stigma *exists*, occurs *instantaneously* (i.e., the moment an individual is unemployed), is *unjustifiable* (i.e., without regard to qualifications), *difficult to alleviate* (i.e., causal controllability of unemployment-onset did not affect stigma), and has *negative consequences* (i.e., leads to hiring biases against the unemployed).¹⁴³

Thus, this study significantly undermines the economic theories, explained above, that assume employers are necessarily "rational actor[s]" whose dismissal of unemployed candidates is a deliberate and rational decision relating to the applicant's skills and

137. Rampell, *supra* note 65; *see also* Traci Pederson, *Unemployment Stigma Hinders Job Seekers*, PSYCH CENTRAL (Apr. 4, 2011), <http://psychcentral.com/news/2011/04/04/unemployment-stigma-hinders-job-seekers/24962.html>. This study was the first to examine whether a stigma against the unemployed actually existed. Because this is the only study concerning a stigma against unemployed individuals, it is unclear whether such a stigma has always existed, or whether it is unique to the current economic client.

138. HO ET AL., *supra* note 121, at 6.

139. *Id.* at 6-8.

140. *Id.*

141. *Id.* at 9-10.

142. *Id.*

143. *Id.* at 11.

competence.¹⁴⁴

Since the UCLA study focused on the stigmatizing effect of unemployment, other scholars have taken an interest in this new area of employment discrimination.¹⁴⁵ Recently, two professors of managerial psychology at the University of Massachusetts sought to “discuss and seek a better understanding of the stigmatization of unemployed workers who have been laid off.”¹⁴⁶ In their conceptual paper published in the *Journal of Managerial Psychology*, the professors illuminated the ways in which discrimination against the unemployed can prove a great hindrance in the battle for employment.¹⁴⁷

Not only are assumptions made about jobless applicants often unsubstantiated, but such assumptions may backfire against individual employers, market productivity in general, and society as a whole.

The practice of categorically barring an entire group of applicants from consideration is widely considered an ineffective means of hiring the best candidate.¹⁴⁸ Because of the time and costs an employer expends in finding and training a new employee, it is in the employer’s best interest to identify the optimal candidate.¹⁴⁹ In an economy where many employers are forced to lay off employees for “recession-driven downsizing rather than because of performance issues,”¹⁵⁰ excluding the entire universe of unemployed applicants is a particularly ill-advised practice.

Moreover, the practice of denying jobless applicants consideration may result in an overall less productive workforce of dissatisfied and detached employees. Dissatisfied employees,

144. *Id.*; Pederson, *supra* note 137 (“In fact, economists have found that the longer individuals stay unemployed, the worse their chances of finding a job. Until now, however, this has been attributed to real concerns over his or her skills set or a lack of diligence in seeking a job.”).

145. See Ronald Karren & Kim Sherman, *Layoffs and Unemployment Discrimination: A New Stigma*, 27 J. MANAGERIAL PSYCHOL. 848 (2012).

146. *Id.* at 848.

147. See *id.*

148. See, e.g., Judy Greenwald, *New Type of Hiring Discrimination in Works*, 45 BUS. INS., Feb. 28, 2011, at 1 (“[Discriminatory policies] make little business sense because they eliminate potentially attractive candidates.”).

149. Urban Testimony, *supra* note 76, at 1 (“The reason that employers want to capture all qualified candidates—which is the common hiring practice of which I am aware—is simple: Employers invest a lot of time and money when they hire employees, and it is in their best interest to identify and hire the best candidate.”); Cepero Testimony, *supra* note 69 (“In SHRM’s experience, screening out the unemployed is not an effective practice. Given the high cost of hiring new employees, HR is always focused on keeping turn-over low and retaining those employees in whom you’ve invested.”).

150. Hu, *supra* note 77.

recognizing the stigma against unemployed applicants, may delay leaving their current position until they have secured another job.¹⁵¹ Thus, a network of unhappy—and, arguably less productive—workers would be sitting idly in positions that they do not want to be in, and all the while may be focusing their energies on finding a new position.¹⁵²

Finally, as a society, we should ask ourselves whether we should accept discrimination against a large sector of our population in exchange for information that may be relevant to employment credentials. Here, criminal status in the hiring process serves as a useful and surprisingly on-point analogy to unemployment status. Like the unemployed, individuals with criminal histories have a very difficult time finding a job.¹⁵³ Individuals with criminal records are undoubtedly stigmatized by employers and the public alike, and many employers fear that applicants with a criminal history are a liability.¹⁵⁴ To date, eleven states have enacted legislation limiting an employer's ability to discriminate against applicants based on their arrest or conviction records.¹⁵⁵ These states have performed the balance of employer's rights against the interest of society in hiring applicants with a criminal past.¹⁵⁶ States that have enacted this legislation have found that measures aimed to integrate an ex-convict into society after incarceration benefit society in general as they decrease the likelihood that the individual will reoffend, and therefore save taxpayers the cost of paying to keep repeat offenders behind bars.¹⁵⁷

In many ways, the plight of the unemployed applicant in today's economy is not unlike the plight of one with a criminal record. Notably, unemployed individuals are not only stigmatized by

151. See *supra* notes 126-27 and accompanying text.

152. See *supra* notes 126-27 and accompanying text.

153. Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 284 (2006) ("A recent survey of employers in four major metropolitan areas reveals that employers are highly averse to hiring ex-offenders; only 12.5% of employers said that they would definitely accept an application from an individual with a criminal record, and 25.9% said that they probably would." (citing Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 210 (Mary Pattillo, David F. Weiman, & Bruce Western, eds., 2004))).

154. *Id.*

155. *Id.* These statutes vary significantly with regards to the full scope of protection extended to applicants with criminal histories. See *id.* at 298-308.

156. See Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 24 CONN. L. REV. 1281, 1287 (2004).

157. See *id.* at 1281; see also Simonson, *supra* note 153, at 284.

employers, but also by society in general.¹⁵⁸ One scholar has noted that “[t]o be unemployed conveys a wholly negative identity.”¹⁵⁹ On account of this marginalization of the unemployed, like those with criminal records, the unemployed have difficulty getting back into the job market once hit with the unemployment bug.¹⁶⁰ One information technology operations analyst who has been out of work for six months expressed her frustration: “I feel like I am being shunned by our entire society.”¹⁶¹ Moreover, just as society pays the costs of reentry into the prison system, taxpayers continue to fund unemployment benefits for those who remain out of work the longest. In fact, if passed, the American Jobs Act would provide for the extension of unemployment benefits.¹⁶²

Because the bias against the unemployed that is not already accounted for in the exception of the FEOA may be completely irrelevant to an applicant’s capabilities, and because discrimination against the unemployed creates market inefficiencies and imposes greater costs on society, the need to combat stigmatization against this group appears great.

C. *Disparate Impact Analysis*

Proponents of protecting the unemployed argue that the legislation is necessary because discrimination against jobless applicants has a disparate impact on members of certain protected classes who are already overrepresented in the unemployment pool.¹⁶³

A protected class plaintiff has two routes to satisfy a discrimination claim: he may show either that the employer discriminated against him individually, or that the employer’s

158. See generally Note, *Finding a Place for the Jobless in Discrimination Theory*, 110 HARV. L. REV. 1609 (1997) (discussing the stigmatization faced by Americans without work, and placing the justification for that stigmatization in the American preoccupation with “productivity” and the notion that “[t]o be jobless is to be a disappointment”).

159. *Id.* at 1609 (quoting SUE GLYPTIS, LEISURE AND UNEMPLOYMENT xi (1989)).

160. See Leavitt, *supra* note 156, at 1289-97.

161. Rampell, *supra* note 65, at 1 (quoting Kelly Wiedemer).

162. American Jobs Act, H.R. 12, 112th Cong. § 301 (2011).

163. See Written Testimony of Helen Norton, Associate Professor, University of Colorado School of Law, at the Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), available at <http://www.eeoc.gov/eeoc/meetings/2-16-11/norton.cfm>; see also Written Testimony of Christine L. Owens, Executive Director, National Employment Law Project, at the Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), available at <http://www.eeoc.gov/eeoc/meetings/2-16-11/owens.cfm> [hereinafter Owens Testimony]. For a complete discussion of the potential disparate impact of discriminatory practices against unemployed job seekers, 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).

practice or policy disproportionately impacts members of his protected class.¹⁶⁴ Specifically, an employer may not “limit, segregate, or classify” individuals in a way that will disfavor members of a certain race, gender, color, religion, ethnicity or age.¹⁶⁵ Statistics strongly suggest that unilaterally dismissing unemployed applicants may prove to be a greater barrier to reentry for minorities and workers over forty.¹⁶⁶

To illustrate, a significantly greater number of African Americans and Latinos are unemployed than Caucasians.¹⁶⁷ In December 2013, 5.6% of white men over the age of twenty were unemployed.¹⁶⁸ For Black or African American men over age twenty, that rate more than doubled at 11.5%.¹⁶⁹ Similarly, while 5.3% of white women over twenty were unemployed during this period, 10.4% of Black or African American women were jobless.¹⁷⁰

Unemployment rates of Hispanic and Latino men and women ranged from two to three percentage points higher than white men and women.¹⁷¹ In fact, a sponsor of the New York City bill recognized that:

[The unemployed] must at least have a fair shot, if qualified, of being able to put forth their case for a job. Otherwise, we will have a permanently unemployed class in New York City - a class made up predominantly of people of color, as African-Americans, Latinos,

164. 42 U.S.C., § 2000e-2(a) (2006).

165. *Id.* §2000e-2(a)(2); see also Owens Testimony, *supra* note 163; Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (recognizing disparate impact in facially neutral employment practice); Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (holding “that the ADEA does authorize recovery in ‘disparate-impact’ cases comparable to Griggs”).

166. Owens Testimony, *supra* note 163.

167. Table A-2: *Employment Status of the Civilian Population By Race, Sex, and Age*, BUREAU OF LABOR STATISTICS, www.bls.gov/news.release/empst.t02.htm (last updated Jan. 10, 2014) [hereinafter Table A-2] (showing a disparity between the percentage of whites, African Americans, and Asians unemployed in August 2012, July 2013, and August 2013); Algernon Austin, *No Relief in 2012 from High Unemployment for African Americans and Latinos*, ECON. POLICY INST. (Feb. 16, 2012), <http://www.epi.org/publication/ib322-african-american-latino-unemployment/> (discussing how the African American and Latino unemployment rates are significantly higher than white unemployment rates, breaking the statistics down by state, and arguing that Congress should pass the American Jobs Act to counter projections showing that the unemployment rates by race will remain largely unchanged throughout 2012); see also Elsby et al., *supra* note 13, at 2 (finding that “men in general as well as younger, less educated workers, and individuals from ethnic minorities” experience steeper rises in joblessness during all recessions, including the most recent one).

168. Table A-2, *supra* note 167; see also Austin, *supra* note 167.

169. Table A-2, *supra* note 167.

170. *Id.*

171. See Austin, *supra* note 167.

and Native Americans have higher rates of unemployment.¹⁷²

Additionally, America's older workers may be disproportionately impacted by unemployment bias.¹⁷³ Although workers ages fifty-five and older face lower unemployment rates than younger workers,¹⁷⁴ they suffer from particularly long bouts of long-term unemployment.¹⁷⁵ Thus, businesses that consider the length of time a prospective employee has been unemployed are likely to disregard candidates ages forty and over, who are protected by the ADA, in greater proportion to younger applicants.¹⁷⁶ This effect on older workers is particularly troubling because it is the older workers who are more likely to surrender to repeat rejection and drop out of the labor force entirely.¹⁷⁷

D. Effectiveness of Legislation Protecting the Jobless

The proposed FEOA, the D.C. Act, and the New York City legislation (collectively, "protected class legislation"), which grant or would grant the unemployed protected class status, will likely prove ineffective as a means of recompensing jobless applicants who have been discriminated against.¹⁷⁸

Unlike current protected class legislation, which bars discrimination at every stage of the employment process—in hiring, firing, pay and promotion¹⁷⁹—this legislation is only relevant to discrimination at the hiring stage.¹⁸⁰ Thus, an individual claiming a

172. Speaker Quinn Press Release, *supra* note 66 (quoting Civil Rights Committee Chair Debi Rose).

173. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 25, at 8 (discussing the high unemployment rates of older workers).

174. Farber, *supra* note 16, at 7, 13 ("Job loss rates are highest for the youngest workers There has been some convergence over time in rates of job loss by age, with the rates for older workers increasing relative to those for younger workers.").

175. *Id.*; see also Owens Testimony, *supra* note 163 ("[T]he persons most likely to be [most] affected by discrimination against the unemployed are those who have been unemployed longest; and long-term unemployment is far more likely among older unemployed workers than among their younger counterparts."); JO ANNE SCHNEIDER, WHO ARE THE LONG TERM UNEMPLOYED IN THIS RECESSION AND WHAT CAN BE DONE TO HELP THEM? 5 (2011), available at <http://www.thecyberhood.net/documents/papers/unemployment.pdf>.

176. See Owens Testimony, *supra* note 163.

177. See Rampell, *supra* note 65. ("I worry that unemployment may eventually come down, not because older workers who have been unemployed for a year or two find jobs,' Professor [and labor economist at the University of Chicago Robert] Shimer said, 'but because older workers finally give up and drop out of the labor force.'").

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

179. See, e.g., *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1198 (5th Cir. 1984) (discussing a situation where the plaintiff can sue for discriminatory actions concerning "hiring, pay, promotion[s] . . . and terminations" under the Civil Rights Act).

180. See *supra* Part IV.

violation would have to assert that an employer failed to hire him because of his status as unemployed. This proof requirement is problematic for several reasons.

First, very few discrimination claims are brought at the hiring stage.¹⁸¹ One reason for this unsurprising statistic is that there is no requirement that employers convey to rejected applicants the reason they were passed over.¹⁸² Thus, an applicant may never suspect that she was passed over because she was currently unemployed, and that the recruiter was violating state or federal law.¹⁸³ Additionally, applicants, as opposed to employees bringing failure to pay or promote claims, are relatively un-invested in the company and thus unlikely to inquire into the reasons for rejection.¹⁸⁴ Particularly where individuals have been on the job hunt for an extended period of time and experience routine rejection, it seems unlikely that they would give pause to the reasons why they were not hired. As one unemployed New Yorker explained, “[Employers] reply back, ‘We find your résumé interesting, but we’ve decided to pick someone else.’”¹⁸⁵

Second, an important mechanism worked into the current protected class legislative regime that ensures its effectiveness is intentionally absent from the proposed federal legislation. Specifically, Title VII and the protected class statutes limit the information available to employers related to an applicant’s protected characteristics, and do so by barring the employer from inquiring into one’s protected class status.¹⁸⁶ Without knowledge of an applicant’s protected trait, an employer cannot discriminate—even

181. LAURA BETH NIELSEN ET AL., AM. BAR FOUND., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003*, at 6 fig.2.5 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf (reporting that less than 10% of employment discrimination claims brought between 1987 and 2003 were brought at the hiring stage).

182. See Naomi Schoenbaum, *It’s Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 HARV. J.L. & GENDER 99, 99-100 (2007).

183. See *id.*

184. See *id.*

185. Hu, *supra* note 77.

186. See, e.g., Schoenbaum, *supra* note 182, at 100 (“In recognizing that knowledge provides the power to discriminate, employment law regulates what information is available to employers during the hiring process.”); *Prohibited Employment Policies/Practices*, U.S. EQUAL OPPORTUNITY EMP’T COMM’N, <http://www.eeoc.gov/laws/practices/index.cfm> (last visited Jan. 31, 2014) (“As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations. Employers are explicitly prohibited from making pre-employment inquiries about disability.”).

subconsciously—on the basis of that trait.¹⁸⁷

The FEOA, on the other hand, expressly *permits* an employer to “consider[] an individual’s employment history, or examin[e] the reasons underlying an individual’s status as unemployed . . .”¹⁸⁸ Even absent this provision, short of doctoring her resume, an applicant would have no way to prevent an employer from knowing her employment status. Thus, unlike other protected class plaintiffs who could point to a hirer’s inquiry into a protected trait as a *per se* violation of anti-discrimination laws,¹⁸⁹ the unemployed plaintiff would have to show that the employer unlawfully relied on the applicant’s status as unemployed and that gaps in her employment were not relevant to the hiring decision. As a former New York City office manager who has been looking for employment for well over a year, stated: “It’s going to be the same thing . . . You can come up with 101 reasons not to hire someone. They’re never going to say it’s because you’ve been out of work for so long.”¹⁹⁰

Finally, the FEOA, without the aid of state legislation protecting the unemployed, is limited in its reach. Because congressional authority to regulate discrimination falls under its power to regulate interstate commerce,¹⁹¹ legislation must be tailored to that end. Thus, unlike the D.C. Act that prohibits discrimination by all employers, the FEOA only prohibits discrimination by employers of fifteen or more employees.¹⁹² This limitation is problematic because it is well understood that “small businesses are the engine of job growth in our economy.”¹⁹³ In fact, an April 2012 news article recognized that “small businesses are creating jobs faster than big businesses and faster than they did in the last economic recovery.”¹⁹⁴ Thus, the inability of the proposed legislation to reach small business

187. See Schoenbaum, *supra* note 182, at 100.

188. American Jobs Act, H.R. 12, 112th Cong. § 374(d) (2011).

189. *Mele v. United States Dep’t of Justice*, 395 F. Supp. 592, 596 (D.N.J. 1975) (stating that the Supreme Court established a rule that holds employers *per se* liable for racial discrimination).

190. Hu, *supra* note 77.

191. See § 373(4)(A) (defining “employer” as “a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”) (emphasis added).

192. *Id.*

193. Office of Mgmt. & Budget, *Supporting Small Businesses and Creating Jobs*, WHITE HOUSE, <http://www.whitehouse.gov/omb/factsheet/supporting-small-businesses-and-creating-jobs> (last visited Jan. 31, 2014); see also Scott Shane, *Small Business Job Creation Is Stronger than We Think*, BLOOMBERG BUSINESSWEEK (Apr. 26, 2012), <http://www.businessweek.com/articles/2012-04-26/small-business-job-creation-is-stronger-than-we-think> (“Since the recovery began, small and midsize companies have been producing more jobs than their larger counterparts and creating them at a faster pace than during the recovery from the 2001 recession.”).

194. Shane, *supra* note 193.

owners, who represent the lifeblood of job creation in the United States, severely restricts the FEOA's protective reach.

To summarize, legislation aimed at banning discrimination against the unemployed at the hiring stage will likely be highly ineffective as a means of compensating victims of discrimination. Because of the infrequency with which claims are brought at the hiring stage, the absence of any mechanism shielding the hiring party from information relating to one's employment status, and the infinite number of reasons that an interviewer can cite to for rejecting an applicant, it is unlikely that the unemployed could be compensated for being discriminated against. Moreover, without supportive state legislation capable of regulating the hiring practices of small businesses, the FEOA would be entirely inapplicable against the employers who are most responsible for job creation.

E. Potential Adverse Consequences of Legislation on Employers and Hiring Practices

Not only is the protected class legislation problematic from an enforcement and remedy standpoint, it fails to provide adequate guidance to employers on how to handle unemployed applicants. This is particularly true with regards to the FEOA. On the one hand, the FEOA would prohibit an employer from "fail[ing] or refus[ing] to consider for employment, or fail[ing] or refus[ing] to hire, an individual as an employee because of the individual's status as unemployed."¹⁹⁵ At the same time, as discussed above, the FEOA expressly allows an employer to question an applicant about her unemployment status, and to consider what relevance, if any, the responses to those questions have on her ability to work for the employer.¹⁹⁶ The difficulty a hiring agent may have in dealing with the FEOA is most clearly illustrated by a situation in which the agent is considering two equally qualified candidates, one of whom is unemployed. Even if the employer flips a coin to decide between the two, he may be subjecting himself to potential liability. Similarly, the legislation fails to address whether an employer may consider how the applicant has spent his time while out of work.¹⁹⁷ Thus, critics argue that the proposed legislation's ambiguity would impose unpredictable legal costs on employers trying to avoid a lawsuit.¹⁹⁸

For these reasons, the enforcement regime of the D.C. Act, which

195. § 374(a)(2).

196. *See id.* § 374(d).

197. Sherk & Grossman, *supra* note 67 (identifying a number of scenarios that are not resolved by the FEOA and could potentially expose employers to unknown liability).

198. *Id.*

does not provide for a private right of action upon violation,¹⁹⁹ may be a more preferable method than the proposed FEOA and New York City legislation, which give applicants a private right of action.²⁰⁰ In the District of Columbia, the appropriate agency will investigate any complaints filed, and upon finding a violation, will impose civil penalties on the employer.²⁰¹ First time violators will be charged \$1,000, and heavier standard fines will be issued for subsequent charges.²⁰² If the federal legislation adopted the same enforcement mechanism, an employer, rather than being sued for an unknown amount of damages for a violation that the employer may not even realize she is committing, will face a penalty and receive the message that the particular method used by that employer is unlawful.²⁰³

Some employer advocates claim that an additional repercussion of increased regulation over their hiring practices will be a chilling effect on overall hiring.²⁰⁴ One critic argues: “As a result [of the FEOA], many businesses that could hire would decide that attempting to fill vacancies was not worth the risk of getting sued. The end result: fewer new jobs.”²⁰⁵

However, employers could simply avoid potential lawsuits and a hiring freeze by changing their approach to hiring. For example, rather than posting job ads or hiring a recruiting agency, firms may decide to rely on word-of-mouth hiring from their current employees.²⁰⁶ In fact, many businesses are trending toward this employment model, finding it to be a good way to ensure that new hires will fit into the firm’s culture.²⁰⁷ From the perspective of those looking for jobs, trying to get their foot in the door through friends and acquaintances might be a positive approach.

V. CONCLUSION

Although the most recent recession technically ended in 2009, the long-term unemployment rate in this country has remained at an unacceptable high by our own standards.²⁰⁸ State and federal legislative efforts to combat discrimination against unemployed individuals should be lauded. As discussed above, an analysis of the usual justifications for granting a group protected class status militate towards the need for state and federal protection for the

199. *See supra* notes 92-97 and accompanying text.

200. *See Hirsch, supra* note 103.

201. D.C. CODE § 32-1365(a) (2012).

202. *Id.* § 32-1366(a).

203. *See id.*

204. *See Sherk & Grossman, supra* note 67.

205. *Id.*

206. *See id.*

207. *See id.*

208. *See supra* Part II.A.

unemployed.

Even if more protective legislation is enacted, the secrecy of the hiring process and the number of factors that may be considered in an employer's hiring decision significantly decrease the likelihood of an aggrieved applicant bringing a successful claim against an employer is slim to none. On the other hand, ambiguities in the D.C. Act and proposed federal legislation leave employers in the seemingly impossible position of satisfying a statute that lacks cohesion.

This is not to say that laws seeking to protect the jobless are entirely devoid of value. On the contrary, the strength of legislation extending employment protection to the unemployed may not be in its being properly effectuated, but rather in its ability to start a national conversation about an issue impacting our friends, families and economy.

In response to legislative action, employment lawyers throughout the country have issued guidance to their clients, urging them to consider all candidates, regardless of their employment status.²⁰⁹ For example, after the passage of the D.C. Act, one law firm that advises management personnel on employment matters warned that: "In no event should a DC employer use an applicant's unemployment as a screen in vetting potential employees."²¹⁰ A *New York Employment Law Letter* advised clients to "make clear to staffing and employment agencies that qualified unemployed workers are welcome to apply."²¹¹ Perhaps being "welcome" is the small but important step needed to help our unemployed friends and neighbors get back to work.

209. *Discriminating Against Unemployed Workers*, *supra* note 120 ("[E]mployers that want to ensure compliance with applicable laws and avoid disparate impact claims should review their current hiring policies and practices to confirm that qualified job candidates aren't being eliminated solely on the basis of their unemployment status. Your review should include job advertisements - particularly if ads are being placed by an employment agency. You should also make clear to staffing and employment agencies that qualified unemployed workers are welcome to apply. As always, hiring decisions should be based on legitimate nondiscriminatory reasons grounded in how well an applicant's experience and skills correspond to a job's requirements. That's still the most effective way to find the best person for the job.").

210. Bryan M. O'Keefe, *D.C. Bans Employers from Considering "Unemployed Status" in Hiring Decisions*, SHAW ROSENTHALL LLP (June 30, 2012), http://www.shawe.com/site/files/june_2012.pdf.

211. *Discriminating Against Unemployed Workers*, *supra* note 120.