

## How Estimates Can Miss The Mark On Age Discrimination

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Stephen G. Bronars      Nathan D. Woods

We have recently seen an increase in allegations of age discrimination and hiring in media coverage of labor and employment issues and in our own consulting practice. Perhaps with origins in the Great Recession, or more generally due to the increasing share of age 40-plus employees in the workforce, the plaintiffs' bar and U.S. Equal Employment Opportunity Commission appear to be more focused on age and hiring claims than was previously the case.[1]

A proper analysis of hiring discrimination claims typically presents certain challenges given the extent of information available (or not) at the different stages of the hiring process, including the qualifications of applicants. Unique to age in hiring cases, however, the analysis is complicated further by two critical issues.

First, it is our experience that age information is rarely requested on employment applications.[2] Without this direct age measure for an individual applicant, analysts resort to aggregate external data sources to estimate "benchmarks" for the share of workers who are age 40-plus in a relevant labor market. The second, and related problem, is that estimated benchmarks generally do not account for the propensity to be looking for a job, which can differ widely between workers age 40-plus and workers under age 40.

### Background to the Problem

Common sense and available empirical evidence both suggest that older workers are generally less likely to be looking for work and willing to change jobs relative to younger workers. For example, in 2014, the Bureau of Labor Statistics reported that a worker's median tenure with his current employer is strongly related to age. Median job tenure is three years for workers age 25 to 34 and 7.9 and 10.4 years

for workers age 45 to 54 and 55 to 64, respectively.[3] Older workers simply don't change jobs as often as younger workers do. As a practical matter, this means external benchmarks that don't account for the possible age difference among workers looking for work and willing to change jobs will overestimate the share of available age 40-plus workers in the labor market, perhaps to a wide degree.

In an analysis of this kind a comparison is made between the protected group's share of those hired and that group's share of a similarly situated set of applicants. Preferably the available information for individual applicants would enable the analyst to identify which applicants are both minimally qualified to perform the job and have also affirmatively expressed interest in a particular job opening.[4] While we can easily tell the *actual* age profile among those hired from human resource records, this information, in isolation, is not useful for determining whether age-protected workers are hired in proportion to the share of qualified and interested age 40-plus workers in the applicant pool. Without accurate information about the age profile among the actual applicant pool, it is challenging to prepare plausible estimates of the *expected* rate of hire for age 40-plus workers.

There is no perfect solution to this problem, but the typical approach we see falls well short of an adequate estimate of the age distribution of a qualified and interested applicant pool. In the ensuing section, we discuss the usual approach to estimating external benchmarks and illustrate the possibly profound consequences for drawing mistaken conclusions concerning age-related disparate impact. We also discuss a possible strategy for testing the sensitivity of external labor market measures and adjusting them to more plausibly reflect the realities of availability in a local labor market.

### **A Typical Approach to Estimating Protected Group Benchmarks for Hiring ... and Improvements**

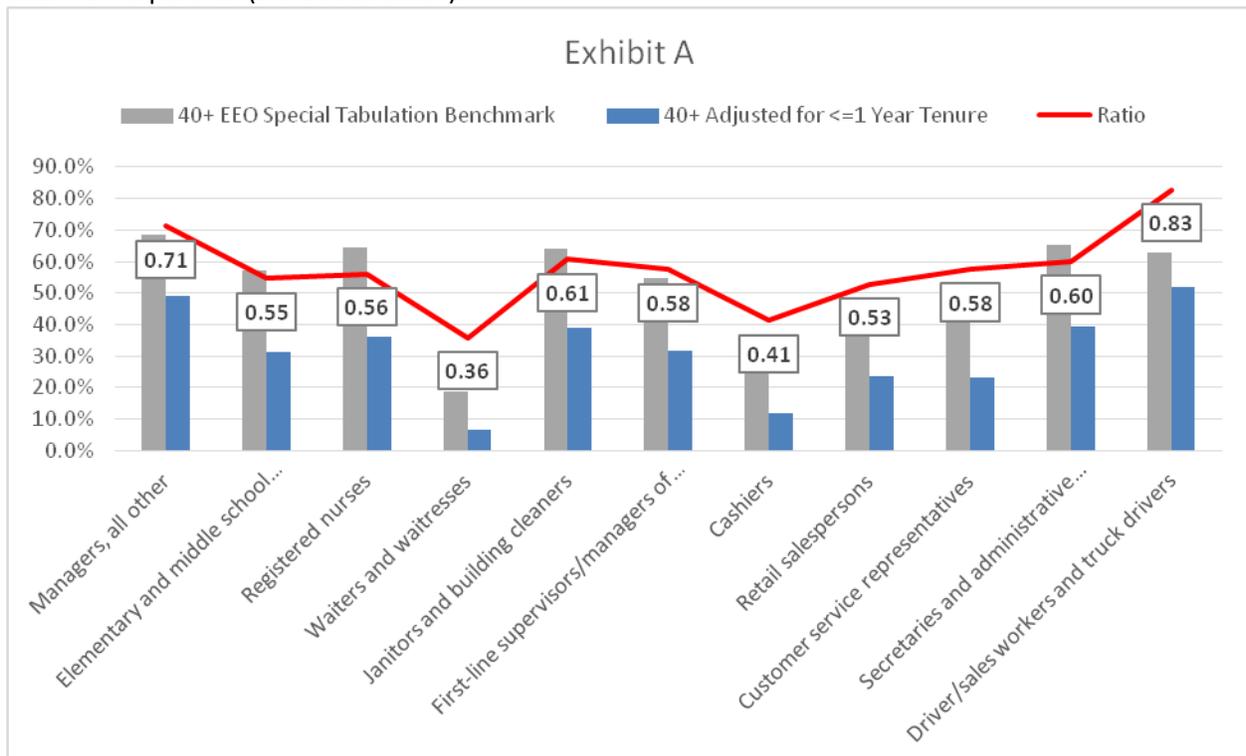
There are a number of ways to create benchmark measures, but in almost all cases the benchmark relies on external (to the company) data on already employed workers. This data is used to identify a labor market which, once defined, allows the analyst to estimate the share of the market accounted for by different protected groups. A labor market may be defined using more broadly or narrowly construed geographies, industries, occupations and income levels, depending on the nature of the position at issue and relevant characteristics of the company and its employees. Different data sources offer different tradeoffs between the possible factors that may be considered in applying these restrictions and constructing these labor market measures.

Regardless of the different formulations, a common limiting feature is that *by assessing currently employed persons these benchmarks do not account for which employees are actually looking for work and available to be hired*. In other words, the general approach assumes everyone in a defined applicant pool is equally interested and available to take a new job. This is unlikely to be true for benchmarks for any protected group, but for age 40-plus workers we think it is even less likely to be the case.

Take, as an example, the nationwide information available for *waiters and waitresses* in the 2006-2010 American Communities Survey EEO Special Tabulations.[5] According to this external labor market data, 18.6 percent of employed waiters and waitresses are age 40 and above.[6] Using this information, an investigating agency or plaintiff might allege that a restaurant is discriminating against age 40-plus applicants if the actual hiring of age 40-plus workers falls short of this benchmark. Using this logic, a restaurant hiring 100 waiters and waitresses would therefore expect about 18 or 19 to be age 40-plus. If just eight of those 100 hires were age 40-plus, a shortfall in hiring of more than 10 persons would be estimated and that shortfall would be considered statistically significant.[7]

Now consider approaching the same study for the same occupation but only after adjusting for whether respondents had been in their job for less than a year. This information *is not* included in the EEO Special Tabulations file but it *is* available, along with occupation and other information, in the January supplement to the Current Population Surveys.[8] At 19 percent, the unadjusted age 40-plus share of incumbent waiters and waitresses we see in the most recent January 2014 data is very similar to the ACS number in the 2006-2010 combined EEO file. However, if we restrict the data to employees in this occupation who are on the job for one year or less the percentage drops by nearly two-thirds to 6.7 percent. This pattern demonstrates the age profile of waiters and waitresses actually hired in the last year is vastly different from the age profile of all incumbents. The available labor market for waiters and waitresses is actually much younger than the benchmarks based on all incumbents would suggest. Returning to the example restaurant’s 100 hires, the eight actual age 40-plus hires now represent an excess relative to the 6.7 expected selections after adjusting the benchmark for those actively looking for work.

In Exhibit A we report the differences in estimated benchmarks for several different occupations. The gray bar represents the benchmark measure drawn from the EEO Special Tabulations file, without adjustment, and the blue bar represents the adjusted number based on the CPS January Supplement. The red lines and values report the ratio of the CPS measure to the EEO measure. Each of the selected occupations shows a similar pattern whereby the unadjusted benchmark based on all incumbents gives a higher share of age 40-plus workers than the figures once we adjust for the age composition of employees who looked for (and found) work in the past year. For some occupations the contrast is quite stark. For cashiers, for example, the share of age 40-plus workers who looked for work in the last year is about 12 percent compared to the age 40-plus share of all incumbents at about 29 percent (for a ratio of about .41). Other occupations are less disparate, but show a similar pattern. For example, driver/sales workers and truck drivers show an adjusted mark of about 52 percent compared to an unadjusted mark of about 63 percent (for a ratio of .83).



This data illustrates clearly that estimating external benchmark measures without accounting for possible age differences in the group of workers who are available and looking for work may be misleading. Depending on the geographic level of focus, and the need for further refinements by industry or income bands, the CPS data may stand on its own, or the ratio may be used to adjust measures drawn from the EEO Special file, or other available data sources.

## Conclusion

This discussion has focused on age-related studies of hiring motivated by litigation. It is worth pointing out two additional items. First, possible differences between an overall incumbent population of employees and the population actually looking for work may extend to other protected groups, including gender and racial or ethnic groups, depending on geography, industry and occupation. Note that while we find the share of age 40-plus workers in the recent job search population is nearly always smaller than for incumbent employees, this may not be the case for other protected groups. Second, statistical assessments associated with internal monitoring and diversity initiatives, outside of litigation, should incorporate this adjustment as well. If a company's diversity goals are based on unadjusted measures drawn from all incumbent employees in an external labor market they may miss the mark.

—By Stephen G. Bronars and Nathan D. Woods, Edgeworth Economics LLC

*Stephen Bronars and Nathan Woods are partners in Edgeworth Economics' Washington, D.C., office.*

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[1] The first national priority on the EEOC's Strategic Enforcement Plan for fiscal years 2013-2016 is "Eliminating Barriers in Recruitment and Hiring" for protected groups, including older workers.

[2] This is unlike race, ethnicity and gender, which often are requested for monitoring and compliance-related reasons. In some cases another proxy for age might be available, such as degree date and level of degree information, but more typically this information is not tracked and no age-related information is included in application materials.

[3] The BLS also reports that in 2014 adults age 45 and above comprised only 29.8 percent jobless workers looking for work compared to 43.6 percent of employed workers.

[4] Additional individual level characteristics beyond those considered as minimally qualifying could be used as explanatory factors in a model of hiring selections, in addition to protected group status.

[5] This is the most recently updated source of this particular data source, which is commonly used for purposes of estimating external benchmarks. See <http://www.census.gov/people/eetabulation/> for more information.

[6] For purposes of illustration we use nationwide figures and do not account for possible sources of variation by geography or other factors.

[7] Differences of two standard deviations or more are generally considered “statistically significant” and not the result of chance.

[8] This information is currently available in even numbered years from 1984 through 2014. See <http://www.census.gov/cps/about/supplemental.html> for more details.

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