Employing Older Workers

The Baby Boomer generation is likely an important source of labor for employers. In his article “Aiming at the Wrong Target: What’s Holding Employers Back When It Comes to Older Workers?” on page 3, author Jack M. Towarnicky, CEBS, writes that employers should consider adopting flexible employment strategies if they want to gain a competitive advantage by tapping the talents of older workers. Following is a look at employment and retirement trends and preferences among older workers.

Projected Growth in Labor Force Participation by Age Group

Percent change in civilian labor force by age, 2000-10, 2010-20, and projected 2020-30


Worker Reasons for Working in Retirement

Top Financial Reasons

52% Want income
33% Concerned about Social Security benefits
31% Can’t afford to retire
27% Need health benefits

Top Healthy Aging Reasons

50% To be active
42% Keep brain alert
39% Enjoy what I do

17% Concerned that employer retirement benefits will be less than expected
16% Anxious about investment/financial market volatility
36% Have a sense of purpose
25% Maintain social connections

Worker Plans for Retirement Transition

Respondents describe how they plan to retire/how they retired.

Gradual transition or reduction of hours leading to a full-time stop
17% 44%  (vs. 51% in 2021)

Full-time stop
43% 73%

Other
Workers, n=914
Retirees, n=1,047

Source: Employee Benefit Research Institute, 2022 Retirement Confidence Survey.
Employers should target flexible employment and not phased retirement.¹

Labor force participation among adults in their prime working years (ages 25-54) is 83.5%, having consistently increased since 1948.² Participation among those ages 55 and older was once two-thirds of that prime age participation but has declined to less than half—38.3%.³ In six years, all 70 million Baby Boomers (born between 1946 and 1964) will be over age 65 and Medicare-eligible.⁴

In part because of those labor force participation rates, coupled with today’s unemployment rates—the lowest since the 1960s—few employers can afford to limit recruiting by excluding talented, skilled, experienced older workers.⁵

More than 20 years ago, Wharton professor Peter Cappelli challenged the then trendy belief that looming Baby Boomer retirements would trigger a shortage of labor.⁶ Instead, he noted that the labor force might grow faster if older workers work longer, and he encouraged employers to “focus on developing competencies in recruiting and selection, performance management, retention policies, and other practices that support the ability to find and keep good workers.” For the past 20 years or so, employers have had an opportunity to attract age 55-plus Baby Boomers by crafting age-neutral, cost-effective, flexible employment human resources (HR) policies, programs and rewards.

Flexible employment is consistent with the evolving, collaborative economy—sometimes referred to as the shareconomy—where freelancers who deliver continuous temporary employment are increasingly evolving into microentrepreneurs. The shareconomy allows workers—young and old—to pursue fulfillment and their next career through passion projects, side hustles or different, perhaps remote, employment. Project management has become a core competency as the focus on indefinite employment

**AT A GLANCE**

- When it comes to older workers, many employers focus solely on cost, not cost/benefit—encouraging separation to minimize deferred/delayed retirement.
- Cost-effective, age-neutral, flexible employment strategies could enable employers to achieve a competitive advantage by securing willing, capable, motivated, skilled, experienced, productive workers of every age.
- The best solution for increasing employment among older workers may be to remove certain statutory, regulatory and subregulatory barriers that employers and workers encounter.
gives way to prompt fulfillment of tasks and assignments.

Americans’ perceptions of relative periods of work and leisure have changed dramatically with the introduction of technology and the increase in life expectancy. For decades, policy wonks have argued that working longer benefits society, employers and the workers. For example, working longer reduces the cost of Social Security, increases the pool of experienced labor and generally improves individuals’ financial security.7

Older workers are ready: “Many individuals are trying to decide if they will reboot, rewire or retire as they leave longer term, traditional, career employment.”8 After the COVID dislocation, workforce participation of those age 65 and over has again started to increase.9

Past surveys confirmed retiree interest in work, and that remains true post-pandemic, though with less intensity and activity than in the past.10 While the Baby Boom generation is willing to work, many employers continue to avoid adopting and embracing innovative flexible employment strategies11 where they require hiring, retention and benefit changes.

It Is Time for a Change

Many employers continue to be wary of older workers due to a more than 50-year focus on combating age discrimination in the United States. Regulatory and subregulatory guidance as well as considerable litigation have led to layers and combinations of compliance requirements that discourage adoption of formal, age-neutral HR policies among private sector employers.12

Many would leave the status quo in place—comprised of encouraging employers to hire more older workers while amending existing statutes to prompt greater litigation by expanding the definition of age discrimination.13 Will more litigation be successful? As Henry Ford said, “If you always do what you have always done, you will always get what you have always got.”

Instead of more jawboning of employers or additional legislation, litigation and regulation, perhaps the best opportunity to increase both flexible employment and phased retirement is to pursue changes that would remove barriers and clarify rules—actions that have succeeded in prompting change. Before the Pension Protection Act of 2006 (PPA 2006), few employers deployed automatic features in 401(k) plans. Plan sponsors had many excuses: no rule clarity, increased legal exposure, autofeatures were paternalistic, many can’t afford to save, etc. However, once PPA 2006 clarified the requirements, employers responded. For the last ten years, more than half of surveyed plans have voluntarily deployed one or more automatic features.14

A similar outcome is possible for flexible employment—specifically, for how clarifying rules and removing barriers might increase employment of older workers who want to work.

Baby Boomer Retirement Preparation

Employment and retirement preparation by the oldest Baby Boomers was disrupted by the Great Recession, while the youngest suffered through both the Great Recession and the COVID-19 pandemic. Many Baby Boomers are not financially prepared for retirement, partly because the median tenure of U.S. workers has been five or fewer years for the past seven decades, including a new trend of increased turnover among older, full-time workers.15

Pandemic-related relief and employment activity likely combined to further reduce incentives and opportunities for continued employment.16

Employers are alarmed at the lack of retirement preparation resulting from a combination of modest savings and ever-increasing life expectancy.17 Because employers expect that many who are financially fragile will attempt to delay retirement, they are increasingly focused on the perceived, higher benefit expenses for older, longer service workers.18 That is, many employers are myopically focused on cost, not cost/benefit.

Private Sector Phased Retirement—Typically an Informal “One-Off”

In the private sector, formal HR policies on phased retirement continue to be scarce. Despite expressed desires of older workers, few firms have adopted formal HR policies that foster transition from full-time employment in a career role, over a period of months or years, to cessation of all employment, followed by full-time leisure. Where it exists, phased retirement is typically an individual one-off solution, often limited to management or executives19 and often focused on facilitating knowledge transfers to avoid losses of human, social, cultural and structural knowledge.
A variety of barriers preclude adoption of formal phased retirement HR policies, rewards and benefit plan designs. In turn, the lack of formal flexible employment policies and benefit provisions impedes retirement planning among workers—regardless of age.20

**Removing Barriers and Reducing Risk to Employers and Workers . . . Today**

Rather than continuing to focus on worker priorities or escalating efforts to eliminate age discrimination in recruitment and hiring,21 employers should consider focusing on adopting formal HR policies and amending benefit plans to remove bias “triggers” (e.g., age-based features). Other suggestions include the following.

- First, drop the term (and the focus on) phased retirement.
- Second, increase recruitment efforts—Don’t limit the focus to return or reentry programs.
- Third, deploy HR policies and benefits that include cost-effective, age-neutral provisions favored by older workers who are not financially prepared for retirement or who are interested in tax-preferred solutions that would minimize tax burdens.

Following are a few examples of age-neutral benefit changes—ones that could be part of a flexible employment HR policy. They offer specific value to workers of any age who are responsible for their own retirement preparation. Most of these changes do not add to expense, and some lower expense.

- Increase worker control over the allocation of cafeteria plan benefit credits (without leakage to cash).
- Add lifestyle spending accounts (provide benefit credits in lieu of paid time off) to offer participants a choice of benefits that are not tax-preferred.
- Add health savings account (HSA)-capable coverage with automatic enrollment/escalation, employer seed contributions and employer matching contributions to enable tax-favored accumulations for postemployment medical and long-term care (LTC) premiums and out-of-pocket costs.
- Incorporate savvy features in the 401(k) plan (Roth, after-tax 401(a), in-plan Roth conversions, directed brokerage, catch-up contributions, true-up employer match and a “still working” exception to required minimum distributions (RMDs)).
- Add a one-time, prehire savings election per Treasury Regulations §§ 1.401(k)-1(a)(v), 1.402(a)-1(d)—as an opportunity to maximize retirement savings.
- Recognize industry/occupation service with other employers for 401(k) eligibility and vesting purposes.
- Permit indefinite Roth 401(k) asset retention (starting in 2024).
- Provide liquidity without leakage along the way to and throughout retirement by adding 21st-century plan loan processing (electronic banking, a line-of-credit structure, behavioral economics concepts, tools, processes) and facilitate the rollover of outstanding loans from predecessor and successor 401(k) plans.
- Morph the 401(k) into a lifetime financial instrument, allowing for aggregation/consolidation of retirement savings, at hire, while employed and postseparation; concurrently encouraging asset retention; and eliminating/discouraging/curtailing in-service (hardship) and postseparation, preretirement leakage.
- Consider a retroactive amendment for non-highly compensated employees so participants can obtain any employer matching contributions missed during the past five years.
- For part-time new hires working less than 30 hours per week:
  - Offer access to worker-pay-all coverage using age-based rates, including HSA-capable health coverage, life insurance and long-term disability insurance
  - Add and provide access to nonqualified deferred compensation (NQDC) plans to “income average” or increase savings
  - Offer postemployment, employer-sponsored, retiree-pay-all, fully insured, Medicare Supplement or Medicare Advantage coverage (where retiree-paid premiums are HSA-eligible expenses)
  - Add second-career, job-related educational assistance with phased implementation, and waive collection at separation from those who meet the definition of retiree
benefits quarterly  fourth quarter 2023

— Add qualified retirement planning services per IRC §132(m)
— In lieu of paid time off (e.g., holidays, sick, vacation), allow for supervisor discretion in granting unpaid time off and flexible scheduling.

Removing Barriers and Reducing Risk to Employers and Workers . . . Tomorrow

Modest changes in certain statutory and regulatory provisions could incentivize nondiscriminatory, flexible employment of talented, skilled, experienced, older workers.

These changes could ensure that workers (and their supervisors and employers) have enough discretion and protection so that age-neutral, flexible employment strategies can become part of recruiting and retention as well as preretirement planning. Some examples designed to remove barriers to flexible employment follow. These changes are voluntary. Most would lower employment costs or would be cost-free. Implementing these changes should increase employment among older Americans, and any increase in tax expenditures would likely be more than offset by reduced federal/state entitlement spending. The “Suggested Statutory and Regulatory Changes” sidebar at the end offers suggested changes in the following areas.

- Employment practices (Focus Area 1)
- Cafeteria plans/HSAs (Focus Area 2)
- Retiree medical coverage (Focus Area 3)
- Retirement plans (Focus Area 4)

These changes remove risk and cost barriers—real or imagined—so that the value-add from skilled, experienced, older workers becomes more obvious. Over time, results may include the following:

- An increase in the number of formal HR flexible employment policies
- Retirement planning that incorporates a period of flexible employment
- Higher value rewards via customizations that reduce cost and increase worker control over allocations
- Greater mobility among older workers during and after their prime working years
- Reduced cost from better retirement preparation with greater focus on cost-benefit and less focus on cost management to avoid deferred or delayed retirements
- An improvement in retiree-to-worker ratios, reducing the need to raise Social Security, Medicare and general revenue (Medicaid) taxes.

Without change, an ever-increasing percentage of able-bodied, talented, older, experienced workers may not have an opportunity to effectively prepare for the transition to retirement. Potential economic impacts include a decline in productivity and profits while entitlement spending increases as workers exit the labor force while still highly productive and desirous of employment.

The opinions identified here are solely my own. They do not represent the views or opinions of employers or trade associations I am associated with—past, present or future. These materials and any accompanying remarks are provided for informational purposes only. Nothing contained in either should be taken as a legal or tax opinion or advice.

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Endnotes

1. The author is unaware of any official definitions for the terms flexible employment and phased retirement. This article defines phased retirement as a change in employment status with the current employer by a worker who is age 55-plus, including a change from career, full-time employment to transition, perhaps over a period of months or years, until separation and cessation of all work for wages. The article defines flexible employment as anything other than full-time employment in a career role for the same or a different employer, regardless of the age of the worker. It can include the following roles: part-time, contracted, temporary, gig, bridge, nontraditional, etc. For older workers, phased retirement is just one form of flexible employment.


13. For example, see: S.1030—Protecting Older Workers Against Discrimination Act—Legislation would expand and encourage litigation in “mixed motive” situations.


# Suggested Statutory and Regulatory Changes to Eliminate Barriers for Older Workers

## Focus Area 1

### Changes to Employment Practices

**Issue:** Lack of safe harbor

**Opportunity:** Legislation modeled after early retirement window precedents

**Actions needed:**
- Add an age discrimination safe harbor—comparable early retirement window* to allow a limited work schedule or a limited period of service (up to three years) at hire or to transition from full-time, career employment. Contracts could be extended by mutual agreement.
- Codify/expand “same actor” discrimination defense (beyond time of hire/specifc hiring manager).†

**Issue:** Lack of guidance on equal cost, equal benefit rule

**Opportunity:** Agency update

**Actions needed:**
- Equal Employment Opportunity Commission (EEOC) should clarify equal cost, equal benefit rules.‡
- Confirm/publicize that equal cost includes employer contributions of the same dollar amount without regard to age, Medicare eligibility, etc., where costs increase with age (e.g., apply the same rules to health coverage that already apply to life and disability).§
- Confirm that a safe harbor applies where premiums are actuarially determined and/or experience-based, allowing employee but not employer contributions to vary with age.

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†Same actor defense—an inference or a presumption of nondiscrimination where the hiring manager terminates the worker within a relatively short time span.

‡An equal dollar amount of company contributions toward the cost of medical coverage, regardless of age, is certainly equal cost/equal benefit (at least from the employer’s perspective) but may not meet current requirements under 29 CFR §1625.10(d)(4)(ii).


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## Focus Area 2

### Cafeteria Plan/HSA Changes

**Issue:** Cafeteria opt-out incentives

**Opportunity:** Agency guidance

**Actions needed:**
- Centers for Medicare and Medicaid Services (CMS) should confirm that IRC §125 cafeteria plan opt-out incentives and spousal surcharges do not violate Medicare Secondary Payer (MSP) rules if applied without regard to worker/spouse age* or where workers control allocations across cafeteria plan options (without leakage to cash).

**Issue:** Health savings account (HSA) eligibility

**Opportunity:** Legislation to increase access/utilization of HSAs

**Actions needed:**
- Amend IRC §223(b)(7) so that workers age 65-plus who commenced Social Security benefits can waive Medicare Part A coverage on the same basis permitted for beneficiaries who must pay Part A premiums.
- Amend IRC §223(c)(2) definition of high-deductible health plan to include any coverage that meets “bronze” level actuarial value.
- Replace Medicare medical savings accounts (MSAs) with HSA-capable Medicare Advantage options (Note: The sum of Medicare Part A and Part B deductibles already exceeds the HSA-capable minimum deductible).

**Issue:** Automatic features

**Opportunity:** Regulatory guidance

**Actions needed:**
- Enable trustee adoption of qualified default investment alternative (QDIA) and deploy automatic features to HSA cafeteria plan contributions and deemed IRA deferrals.

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*42 CFR §411.103—Prohibition against financial and other incentives. See also: EEOC Compliance Manual. See also: U.S. Supreme

(continued)
Suggested Statutory and Regulatory Changes to Eliminate Barriers for Older Workers (continued)


Focus Area 3

Retiree Medical Coverage Changes

Issue: Liability, funding, health savings account (HSA) eligibility

Opportunity: Agency guidance

Actions needed:

• Treasury/IRS should issue guidance to the Financial Accounting Standards Board (FASB 106, 158) to confirm that employer-sponsored, fully insured, retiree-pay-all Medicare Supplement and/or Medicare Advantage coverage creates no liability for financial statement purposes.

• Consistent with Internal Revenue Code §401(a)(13), Treasury/IRS should issue guidance allowing voluntary, revocable assignment “back” to a retirement plan (with no distribution, equivalent to waiving benefits or assigning benefits) of up to 10% of the amount in payout status (annuity or installment), in exchange for an equivalent dollar amount of employer contributions toward the cost of employer-sponsored retiree medical coverage.

• Amend IRC §223(b)(3) to update and index HSA catch-up contributions for inflation and to change eligibility to age 50.

• Treasury/IRS guidance (legislation as needed) should clarify HSA eligibility provisions applicable to:
  — Tax-free reimbursement of IRC §7702(B) long-term care (LTC) premiums and out-of-pocket expenses
  — Expansion of HSA-eligible expenses to include/confirm:
    » Medicare Part A, B and D as well as income-related monthly adjustment amount (IRMAA) premiums for the HSA account owner as well as the spouse and any other tax dependents, regardless of the HSA account owner’s age
    » Cafeteria Plan IRC §125 employee contributions and tax-favored employer contributions per IRC §§ 105, 106 used to fund a spouse’s HSA account, regular or catch-up, where covered under (1) the employer’s HSA-capable health coverage, (2) a spouse’s employer-employee’s HSA-capable health coverage or (3) marketplace/exchange HSA-capable health coverage.

Focus Area 4

Retirement and Other Changes

Issue: Separation from service, nondiscrimination

Opportunity: Agency guidance

Actions needed:

• Confirm that a plan sponsor may condition offering retiree medical coverage and/or defined benefit pension plan early retirement incentives to only those workers who have a complete separation from service.

• Permit exclusion or disaggregate part-time employees (working less than 30 hours) from all retirement plan nondiscrimination testing and eligibility requirements.

• Confirm that 30-hour-per-week requirement for the (Affordable Care Act) employer mandate means regularly scheduled to work less than 30 hours a week, tested on a calendar year basis (less than 1,560 hours/year).

Issue: Inadequate preparation for retiree medical costs

Opportunity: Update existing statute

Actions needed:

• Pass legislation to amend IRC §401(h) to include 401(k) and 403(b) plans, allowing for a “stretch match” structure where 25% of employer contributions can be allocated toward retiree medical coverage.

• Update deemed IRA guidance to apply the same fiduciary requirements as applied to other IRAs, to allow for self-correction, and to remove potential for disqualification of the underlying tax-qualified plan.*

Issue: Penalty tax on phased distribution payouts

Opportunity: Lifetime income payout guidance

(continued)
Suggested Statutory and Regulatory Changes to Eliminate Barriers for Older Workers (continued)

**Actions needed:**
Statutory change plus Treasury/IRS guidance/safe harbor for adding a lifetime income payout provision per IRC §72(t)(2)(A)(iv) designed to avoid the 10% early withdrawal penalty tax—permitting actively employed workers to commence payout before separation and age 59 ½, where distributable savings plan assets include after-tax 401(a) contributions, IRA rollovers, employer 401(a) contributions and earnings thereon (but not 401(k) assets).

**Issue:** Postseparation commencement of retirement benefits

**Opportunity:** Revenue ruling guidance

**Actions needed:**
- Treasury/IRS provide guidance for a level-income option design as an income bridge.
- For individual account and defined benefit pension plans, provide guidance for a level-income bridge to Social Security full retirement age or to age 70 that would also dovetail with commencement of required minimum distributions to facilitate a worker’s decision to defer commencement of Social Security, with participant control to commence or accelerate payout should circumstances change.²


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