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Fair Employment Practices Legislation

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FAIR EMPLOYMENT PRACTICES LEGISLATION

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PART 1. THE FIFTEEN STATE STATUTES

THERE are, at the present time, fifteen states which have Fair Employment Practice Laws.[1] It shall be the purpose of this paper to inquire into these laws: to see wherein they are similar and dissimilar; what they seek to accomplish, how they attempt to do so; and how effective they are in this attempt. Special attention shall be given to the problem of discrimination because of age. In a separate section, the federal attempt at fair employment practices will be discussed.

1. What Is Prohibited?

Although referred to in different terms, most calling them "unlawful" or "unfair employment practices" and others referring to them as "unlawful discriminatory practices", these laws, in general, forbid certain practices embracing the whole field of employer-employee relations from hiring to firing.

a. To whom do they apply?

Besides listing unlawful practices which can be committed by employers, they also enumerate certain practices of labor organizations, notably, denying membership to members of minority groups, expelling them from membership, and treating them differently than other members are treated.

Employment agencies are generally prohibited from refusing to list or refusing to refer members of minority groups. Most of the laws also contain

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[1] Colorado, COLO. REV. STATS. c. 81-19-2 to -7 (Supp. 1953).
Connecticut, CONN. GNRL. STATS. c. 371, §§ 7400 to 7408 (Revision 1949).
Indiana, BURNS IND. STATS., §§ 40-2301 to 40-2307 (1952).
Kansas, KAN. GNRL. STATS. c. 44, Art. 10, §§ 44-1001 to 44-1009 (1955).
Massachusetts, MASS. LAWS ANN. c. 151B §§ 1-11 (1950).
Michigan, MICH. STATS. ANN. c. 154, §§ 17.458(1) to (12) (Supp. 1956).
Minesota, MINN. STATS. ANN. § 363 (Supp. 1956).
New Jersey, N. J. STATS. ANN. c. 25, § 18.25 (Supp. 1956).
New Mexico, N. MEX. STATS. ANN. § 59-4-1 to59-4-15 (1954).
New York, N. Y. EXECUTIVE LAW, Art. 15, §§ 290 to 301 (1951).
Oregon, ORE. REV. STATS. c. 659.010 to 659.116 (1955).
Pennsylvania, PA. STATS. ANN. tit 43, §§ 951 to 964 (Supp. 1956).
Rhode Island, Chapt. 2181, Laws of 1949.
Washington, WASH. REV. CODE c. 49.60 (1952).
Wisconsin, WISC. STATS. §§ 111.31 to 111.37 (1955).

While Iowa has passed a resolution setting forth a state policy against discrimination, it cannot be called an "FEP" statute. IOWA CODE ANNOTATED LEGISLATIVE SERVICE, SENATE CONCURRENT RESOLUTION 15, April 25, 1955.

provisions proscribing certain practices by "persons." This gives flexibility to the statute and broadens its coverage. As we will see, there are various exemptions and qualifications in the acts.

Not all of the acts, however, list prohibited activities. A few of the acts without enforcement provisions merely make statements that it is against the public policy of the state to discriminate on certain grounds. It is submitted that it would be better if these states did list in detail the various practices by employers, labor organizations, and employment agencies. In this way they would know exactly what the state policy was, rather than just rely on generalities. As will be shown later, statutes without enforcement provisions are, on the whole, in effective.

b. Exemptions.

Most of the acts contain exemptions and most of the exemptions apply solely to employers. These exemptions can be grouped into three categories: the "type of employer" exemption, the "number" exemption, and the "bona fide occupational qualification."

The first category exempts certain employers because they are social clubs or fraternal organizations, etc., which are not run for profit.

The second category exempts employers who do not employ at least a certain number of employees. These minimum numbers vary from four in two of the states, to twelve in Pennsylvania. (In one state the minimum is five, in six others it is six, and in four states it is eight.) The number of persons required to be employed before one is an "employer" within the definition of the act, is more important than might be thought. For example, Pennsylvania's requirement ". . . excludes a sizeable percentage of employers from the provisions of the law," and if it were raised to twenty-five, as a proposed amendment would have done, almost fifty percent of the employers within the state would be exempt.[2]

It is submitted that if such requirements are to be justified at all, it would only be on grounds of administration, for if it is wrong for an employer with thirteen employees to discriminate, it is equally wrong for the employer with twelve or six or one. Possibly the legislatures anticipated a flood of litigation as soon as their laws became enacted and for this reason sought to eliminate many of the smaller firms so that the agency charged with enforcing the law could concentrate effectively on the major offenders without becoming bogged down in a sea of complaints.

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[2] Note, *Pennsylvania Fair Employment Practice Act*, 17 U. PITT. L. REV. 438, 448 (1956).

The opposite has been true. New York was especially surprised when the expected flood of complaints failed to materialize.[3] In that state, which has a very large minority element, especially Jews, Negroes, and Puerto Ricans, they had less than three thousand complaints filed in the first nine years of operation. In 1954 a total of only three hundred and seventeen complaints were filed.[4] Thus, it would seem that even administratively the burden would not be too great and therefore such provisions should be eliminated.

The manner in which the "bona fide occupational qualification" is used varies. In most of the statutes having such an exemption, it applies to employers. In many, it applies to employment agencies, while in some it applies also to labor organizations. The enforcing agencies generally decide on a case to case basis what is and what is not within such an exemption, rather than lay down broad general principles.

An example of a "bona fide occupational qualification" would be a case in which the New York Commission allowed the public schools to require that foreign language teachers be born and raised in the country whose language they teach.[5]

It would seem that such an exemption serves a useful purpose. There are, undoubtedly, jobs in which a person's background, religion, etc., would enter into the job specification for reasons other than prejudice. When this is so, the purpose of the statute is not being circumvented by allowing an exception. By proceeding on a case by case basis, the commission should be able to insure against abuse of this exemption.

2. *When Enacted*

FEP laws are relatively modern. The oldest is New York's, which dates back to 1945. The federal attempt at FEP dates back to 1941. The newest additions to the group are Michigan, Minnesota and Pennsylvania. These states enacted laws in 1955. Rhode Island, whose FEP law dates back to 1949, passed a separate law dealing with discrimination because of age in 1956.

3. *Standards*

The states are in almost complete agreement on the standards upon which the act should rest. In all of them, the various enumerated acts of employers, employment agencies, and labor organizations cannot be based on race, creed,

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[3] GRAVES, FAIR EMPLOYMENT PRACTICE LEGISLATION IN THE UNITED STATES 32 (1951).

[4] NEW YORK STATE COMMISSION AGAINST DISCRIMINATION, REPORT OF PROGRESS, Table 1 (1954).

[5] Reported in Mittenthal, *The Michigan Fair Employment Practices Act.* 35 MICH. STATE BAR. J. 41 (May 1956).

color, national origin or ancestry. Some of the states include "ancestry" within their definition of "national origin". In three states, age is also a standard: Massachusetts, Pennsylvania, and by special statute, Rhode Island. New Jersey is unique in including "liability for military service" as one of its standards.

There is complete agreement among writers on this subject that the heaviest incidence of discrimination is found to fall upon Negroes.[6] Using New York as an example, during its first nine years the complaints received by the commission in seventy-two percent of the cases charged discrimination based on color. This seventy-two percent was composed almost entirely of Negroes.[7] During the year 1955, the complaints received by the Rhode Island Commission in ninety percent of the cases charged discrimination because of color.[8]

While employers are charged with the most violations of FEP laws,[9] labor organizations are also offenders.[10] A recent survey reveals that of thirty-four large unions, only half regularly practiced full equality.[11] Another survey indicates that of the various grounds for exclusion from unions such as race, religion, sex, etc., race was one of the most frequent.[12]

It was found that many employment agencies were discriminating against Negroes not because of any prejudice on the part of the proprietor of the agency, but because of fear of adverse reaction by the employer to whom they were referred; by the same token, discrimination by employers was based, in many cases, not on employer prejudice, but on fear of adverse employee or customer reaction.[13] To put one of these fears to the test, a study was made to determine how, if at all, customer prejudice affected shopping habits. The results indicated no correlation between prejudice and buying habit.[14]

4. Administration

In almost all cases, an administrative agency or commission administers the act. Most of the acts set up a special commission. These commissions

[6] Leland, *We Believe in Employment on Merit, But . . .*, 37 MINN. L. REV. 246 (1953). Note, 56 YALE L. J. 837, 842 (1947). Carter, *Practical Consideration of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination*, 40 CORNELL L. Q. 40 (1950). Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L. Q. 747 (1950).

[7] REPORT OF PROGRESS, *supra* note 4.

[8] ANNUAL REPORT OF THE RHODE ISLAND COMMISSION AGAINST DISCRIMINATION 12 (1955).

[9] In New York they account for 80% of the complaints filed. Table 3, *supra* note 4.

[10] Carter, *supra* note 6.

[11] Sixteen were AFL, thirteen CIO and 5 independent. Craft unions were found to be responsible for most discrimination, industrial unions, the least. AMERICAN JEWISH CONGRESS, CIVIL RIGHTS 56 (1953).

[12] Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947).

[13] Leland, *supra* note 6.

[14] Marrow, *Prejudice and Scientific Method in Labor Relations*, 5 IND. & LAB. REL. REV. 593 (1952).

are usually within the state's Department of Labor. The New Jersey Commission is unique in that it is within the Department of Education.

5. *Commencing an Action*

It is to be expected that the person who was aggrieved by the alleged discriminatory practice could file a complaint with the commission, and such is the case in all states. In most of the states an employer whose employees are refusing to comply with the act can also appeal to the commission for its help. In some of the states some public official such as the attorney general can file a complaint, based on information gained through sources of his own. In some states the commission can, on its own initiative, file a complaint. Rhode Island is the only state which expressly allows organizations whose main function is combatting discrimination to file a charge, based on their own sources of information. New York, however, accomplishes the same thing by broadly construing "aggrieved person" to include such organizations.[15]

The victims of discrimination are often reluctant to file charges themselves, either because of a fear of becoming involved in legal porceedings, or fear of reprisal, or ignorance of their rights.[16] For this reason, it is submitted that organizations such as the NAACP or the National Jewish Congress should be allowed to file charges. While there are some minority group members who are militant about their civil rights, there are undoubtedly others who are so used to being discriminated against that they just shrug it off and make the best of a bad situation. But just because they do not complain, is there any less injury? If one of us has had his rights impinged, do not all of us lose something thereby? Also, as will be brought out more fully later, the economic cost to our nation caused by discrimination is huge. Discrimination is something which affects us all.

6. *Enforcement*

In this respect the state FEP laws vary. In three states nothing can be done if the offender remains recalcitrant. In Indiana the declaration that discrimination is against public policy is tempered by the statement that removal of it should be on a voluntary basis. In Kansas once the commission finds discrimination in employment it can only seek to eliminate it by conference and conciliation, while in Wisconsin it can give publicity to its findings. Presumably this is to "shame" the guilty party into complying. While Colorado's

[15] Note, 68 HARV. L. REV. 685, 689 (1954).

[16] Note, 32 ORE. L. REV. 177 (1953).

statute does have enforcement provisions, they apply only to "public employers" such as the state and contractors working for it.

In all the other FEP states, if the offending practice is not eliminated by the informal methods discussed in the next section, and an administrative hearing is ordered, a cease and desist order can result. The party against whom it is issued can appeal the order to a court, and the commission can go into court for an order, usually in the form of an injunction, to give meaning to its cease and desist order. In some states the commission, in addition to issuing its cease and desist order, can direct that affirmative action be taken such as hiring, upgrading, etc., the relative merits of which will be discussed at greater length in a later section.

Some of the states such as Massachusetts have provisions whereby willfully impeding or interfering with the commission is punishable as a misdemeanor with fine and/or imprisonment.

7. *Conference, Conciliation, and Persuasion*

After the complaint has been filed, the usual practice is to have the commission investigate it. If the commission finds "just cause" to exist for the complaint, in all states having enforcement powers the statue requires the commission to attempt to settle the matter by informal methods of conference, conciliation, and persuasion. The commission gets together informally with the offending party and explains the FEP statute, the policy behind it, and what is required under it. Here the commission can also make use of its educational machinery and attempt to show why discrimination is wrong. It is only when all this fails that the commission can order an administrative hearing (which can result in the cease and desist order).

The fact is, however, that formal hearings are the exception rather than the rule. Almost all the cases have been settled satisfactorily by the conference method.[17] New York, for example, has had four hearings in ten years.[18]

Does this mean that we can rely exclusively on these informal methods? It would seem that we cannot. The offender knows, when the commission informally meets with him, that they are trying to accomplish in a peaceful way what they could do by litigation.

> ". . . If therefore he appears quite willing to be 'persuaded' it is because he knows that he can be forced to do what he might not be persuaded to do." [19]

[17] A study of approximately six thousand cases, handled by ten different commissions, reveals that only seven culminated in hearings and of these only two were appealed. Leland, *supra* note 6. In Oregon from 1949 to 1952 there was only one hearing. Note 32 ORE. L. REV. 177 (1953). Note, 68 HARV. L. REV. 685, 694 (1954).

[18] Commented on in Mittenthal, *supra* note 5, also in Carter, *supra* note 6. For a discussion of the burden of proof, see note, *An American Legal Dilemma, Proof of Discrimination*, 17 U. CHI. L. REV. 107 (1949).

[19] Berger, *supra* note 6 at 752.

It is significant that four states that began with laws designed to secure voluntary compliance have shifted over to laws with enforcement provisions.[20] It is interesting to contrast the results achieved under the New York law, which can be enforced, and the federal FEPC which could not. Under the latter certain railroad unions not only refused to alter their policies of Negro exclusion, but also refused even to attend the hearings to which the commission called them. In New York they have eliminated the discrimination and admit members without regard to color.[21]

While voluntary compliance is to be desired and encouraged, it would seem from the above that at the present time, at least, it is not the answer to the problem. Laws with enforcement provisions, intelligently applied by the commissions, seem to work best.

8. *Miscellany*

Several other features of state FEP laws deserve mention. As has been alluded to above, most commissions engage in educational programs to help reduce discrimination. It is submitted that most racial prejudice and discrimination is based upon ignorance.[22] Therefore, an educational program aimed at dispelling this ignorance should be given all possible encouragement.[23]

Some of the states require employers, labor organizations, and employment agencies subject to the act to post notices in conspicuous places on their premises, containing summaries of the act and informing people where to file complaints. This would seem to be a wise provision. The employer who might be prone to discriminate against an ignorant member of a minority group might think twice before doing so with a copy of the act staring both of them in the face.

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[20] Connecticut Massachusetts, New Jersey and Oregon. GRAVES, *op. cit. supra* note 3, at 24. In Cleveland, Ohio, as a voluntary effort, the city FEP ordinance met with failure. When it was changed into one with enforcement provisions, a great change in the attitude of employers was noticed. BERGER, RACIAL EQUALITY AND THE LAW 58 (1954).

[21] S. REP. NO. 1539, 81st Cong., 2d Sess. 12 (1950). GRAVES, *op. cit. supra* note 3, at 58. Speaking of the federal commission which had no enforcement power it has been aptly said that it ". . . taught the political lesson that . . . equal employment opportunities cannot be secured by dialectic and a straw wand". Note, 56 YALE L. J. 837, 844 (1947).

[22] MYRDAL, AN AMERICAN DILEMMA 1142 (1944). Dr. Myrdal states that this is especially so of the "typical northerner".

[23] The success which New York achieved in a three year period in disseminating information to the public via the medium of films can be seen by the following figures.

	1946	1949
Number of films	0	10
Number of showings	0	3,087
Estimated audience	0	512,960

Graves, op. cit. *supra* note 3 at 48.

However, it has also been pointed out that an educational program alone, in a law without enforcement provisions, is ineffectual. S. REP. NO. 2080, 82d Cong. 2d Sess. 8 (1952).

Another meritorious provision appearing in many of the acts is one forbidding retaliation against a person who has filed a complaint or testified before the commission.

9. *Constitutionality*

While the United States Supreme Court has never ruled on the constitutionality of a state FEP law, the writers are in almost complete agreement that such laws are constitutional.[24] The language most often cited for this proposition is that of Mr. Justice Frankfurter in his concurring opinion in *Railway Mail Assn. v. Corsi*,[25] in which a New York Civil Rights Law was upheld.

> ". . . It is urged that the Due Process Clause of the Fourteenth Amendment precludes . . . New York from prohibiting racial and religious discrimination against those seeking employment . . . A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt."

PART II. PRE-EMPLOYMENT INQUIRIES

Before an employer could discriminate against a prospective employee, he would have to know that the person is in fact a member of a particular minority group. In the case of racial discrimination, this can almost always be ascertained by observation except in those cases in which an application may be mailed to the employer. However, it would seem to be the practice among employers to require some sort of personal interview before hiring, so ascertaining ones race is usually an easy matter. This is not the case, however, for religion, ancestry, etc. In these cases pre-employment inquiries can range from the direct question, "What is your religion?," to the more subtle, "What holidays do you observe?" The number of variations on this are endless.

Realizing the danger of such questions, almost all of the commissions are prepared to cope with them. In most cases the legislatures have refrained from promulgating a series of good and bad questions and have given the job to the commissions. Most commissions have promulgated a series of questions which they deem good and bad.

Since ideas as to what questions may be designed to solicit information which is irrelevant to employment on the basis of ability can vary from person

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[24] Note 17 PITT. L. REV. 438, 442 (1956). Judge Waite, after reviewing numerous cases, agrees; Waite, *Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349 (1947). That a federal FEP statute would be constitutional is stated in S. REP. No. 2080, 82d Cong., 2nd Sess. 9 (1952).

[25] 326 U. S. 88, 98 (1944).

to person and region to region, we will examine the policies of seven different states to see their similarities and differences. These states give a cross section view of the country, including the East (Massachusetts, New York, Rhode Island and Pennsylvania), the Midwest (Michigan), the Southwest (New Mexico), and the Far West (Oregon).[26]

They all have similar standards in their FEP laws, i. e., race, color, creed or religion, national origin and ancestry. In addition, Massachusetts and Pennsylvania add "age."

Beginning with the most obvious, all allow questions as to the applicant's name. There is also unanimity in refusal to allow inquiries into ones original name when it has been changed by a court. It would appear that this is rightfully excluded, since whether or not one has changed his name would seem to bear no relation to his ability to perform a job.

It should be noted that a "bona fide occupational qualification" can make an otherwise objectionable inquiry permissible.

There would appear to be nothing improper with asking for ones address, and all the seven states allow it. On the other hand, "place of birth" would disclose national origin, and all, therefore, do not allow it. By the same token, asking whether or not one is a citizen is permissible, but not whether it is by reason of birth or naturalization.

On the matter of "age," since only two states list it as one of their standards, it would seem probable that only they would limit any inquiry about it. Since, however, this could be a circuitous way of ascertaining national origin, all forbid requiring an applicant to produce a birth certificate. Massachusetts forbids questions as to age. Pennsylvania, however, does not. This presents the anomalous situation wherein the employer is forbidden to discriminate because of age, yet is allowed to inquire into it. The reason given for this is that while a question as to religion or race or one of the other standards,

> ". . . might tend to decrease a person's chances of employment . . . 'date of birth' would be more in the nature of a statistical question." [27]

Since Pennsylvania allows exemptions when based upon a "bona fide occupational qualification," it is submitted that it would be better to allow questions into age only when age is such a qualification. In all other cases it should be forbidden.

[26] CCH LABOR LAW REPORTS, vol. 4 Mass. ¶47,550; Mich. ¶47,525; N. Mex. ¶47,504; Vol. 4a N. Y. ¶47,507; Ore. ¶47,550; Pa. ¶47,660, R. I. ¶47,550.

[27] Letter from Elliot M. Shirk, Director, Pa. FEPC, March 25, 1957.

In the seven states under consideration you cannot directly ask about religion, but there is a difference of opinion on indirect queries. For example, asking whether or not one regularly attends a house of worship is expressly allowed in all states except Michigan and Pennsylvania. While religion plays no part in most job requirements, the fact that one regularly attends the church of his choice would, it is submitted, tend to show that he is of good character and such a question should be allowed. Telling an applicant, "We work a six day week, Monday through Saturday" is allowed in Massachusetts and Oregon, while going more direct and telling him, "We work on Rosh Hashana and Yom Kippur," is not. It would seem that the latter is merely a less subtle way of informing a Jew that perhaps he would be happier elsewhere. The former question surely tells him that he is required to work on his Sabbath even though the word "Saturday" is used. The drawing of such a distinction appears to be tenuous at best.

Naturally, all forbid questions concerning race, color, or complexion. While it would seem to bear no relationship to ability, nevertheless the southwest, midwest and three of the eastern states expressly allow questions as to the color of ones hair and eyes. Would this have any effect on the Negro who applies by mail? Apparently it would not since although more Negroes have brown eyes and black hair than white persons, this is not a universal rule.[28]

The tendency of some persons to do indirectly that which they could not do directly leads us to the question of the photograph. All of the commissions have anticipated the problem and refuse to allow requests for photographs. Five of them go even further and expressly forbid requesting an applicant at his option to submit a photograph. This would appear to be wise. If beauty is to be a requirement, there is always the "bona fide occupational qualification." If it is not, then such a request can only be a disguised desire that the applicant prove that he is not a Negro.

In no state can you ask what ones national origin is, but in four of them you can ask what languages the applicant reads, writes, and speaks fluently. Yet these very same states draw the line at asking how one acquired this knowledge, or what language he "commonly uses."

What of the Puerto Rican in New York, newly arrived from his native island? The chances are that he could truthfully answer that he is only fluent in Spanish, not English. Of course, it could be argued that this fact would be readily apparent in an interview anyway, so why not allow it? However,

[28] MYRDAL *op. cit. supra* note 22, at 139.

what of the positions, if any, which are filled from mailed applications? A person applying by mail would be protected if he did not have to answer such a question. Since a line is in fact drawn at inquiring into the source of ones knowledge of a foreign language, the well-educated applicant who grew up in New York and speaks perfect English, but was born in Puerto Rico, is protected. By the same token, should not his less fortunate countryman be protected? There is always the "bona fide occupational qualification" to aid the employer whose employees must, as a matter of job qualification, speak English.

In conclusion, all allow inquiries into education and experience. This is to be expected since it bears directly on ability.

Thus, the similarities and dissimilarities of the questions illustrate how reasonable men can differ on deciding what will elicit unlawful information and what will not. The field of pre-employment inquiries is one fraught with the possibility of discrimination. The more clever and subtile the questioner, the more vigilant and resourceful must be the commission.

PART III. OTHER STATE STATUTES

1. States Not Having FEP, But Having Public Works Clauses

While not having FEP laws, there are some states [29] which have a requirement that in all public works contracts the contractor must agree not to discriminate against either present employees, or job applicants, or both. This type clause was a part of the first federal FEPC and in a slightly different form is still a requirement in government contracts.

These clauses are by no means limited to states which do not have FEP laws. Indeed, many of our FEP states also have such requirements as separate parts of their code of laws—unconnected with the fair employment commission. Although there are some similarities, there is a wide range of difference, especially in the manner in which they are enforced.

Arizona [30] forbids discriminating because of race, religion, color, ancestry, and national origin in its public works contracts. A violation is a misdemeanor and is punishable by a fine of up to five hundred dollars.

California's [31] provision against discrimination because of race, color or religion does not state any specific penalty for violation.

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[29] Arizona, California, Illinois, Nebraska, Ohio.
[30] ARIZ. REV. STATS. §§ 23-371 to 375 (1955).
[31] CAL. LABOR CODE OF 1937, § 1735.

The Illinois'[32] provision calls for enforcement of its prohibition against discrimination because of race or color in a public works contract, by deducting five dollars per day per person discriminated against from the amount due the contractor. In a large job involving many workers and lasting for a long time, such a provision should be effective. The contractor on a small job, however, might well be willing to pay the relatively small sum of five dollars a day for the privilege of refusing to hire a Negro. It is submitted that such a provision would be ineffective in such a case.

Nebraska,[33] on the other hand, imposes the most severe penalty. For refusing to employ because of race, color, creed, religion, or national origin, one can be found guilty of a misdemeanor, fined from five hundred to one thousand dollars and/or imprisoned for between thirty and ninety days. The statute is also unique in that its provision covers not only those engaged in production, manufacture, or distribution for the state, but also for the federal goverment within the state.

It is submitted that a provision for jail sentences for discrimination is not the answer to the problem. Even Malcolm Ross, the wartime chief of the federal FEPC and an outspoken advocate of such laws, would advise against this. He favors cease and desist orders with court enforcement, after conference, conciliation, and persuasion have failed.[34] Enlightened self interest and human greed, being what they are, the businessman faced with a substantial pecuniary loss for engaging in discrimination may well pause before acting. A jail sentence might just make an embittered martyr out of him.

Ohio's[35] enforcement provision is similar to that of Illinois in that a sum of money is deducted from the amount due under the contract. For discriminating because of race, creed, or color, an Ohio contractor can be penalized by having twenty-five dollars for each person discriminated against deducted from the contract. While anyone can make a mistake once, it is only a fool who makes the same mistake twice. This is doubly true in Ohio because for a second offense of this nature, the entire contract is cancelled and any money due the contractor is forfeited to the state. This unique provision points out in no uncertain terms that the State of Ohio means what it says. While the penalty is severe, the offender has already been placed on notice by his first offense that conduct of this sort will not be tolerated.

While these states are making progress in the direction of non-discrimination in employment, it must also be noted that there is another side to the

[32] ILL. REV. STATS., STATE BAR ASSN. Edition 1951, c. 29 §§ 17, 19, 20.
[33] NEB. REV. STATS., of 1943, §§ 48-215, 216.
[34] Quoted in HUSZAR, EQUALITY IN AMERICA 188 (1949).
[35] OHIO REV. CODE § 153.59.

problem. There are states which have statutes calling for discrimination. Most of these appear in the South. A South Carolina statute [36] will serve as an example. Employers in the textile industry can be fined and/or imprisoned for allowing workers of different races to work in the same room or use the same doors or windows at the same time.

The South is not the only region that can be singled out for such conduct. The resentment in the western part of our country against persons of Oriental extraction, dating especially from the late eighteen hundreds, led to discriminatory laws. Nevada, for example, has a statute which is still in effect and provides that, "No Chinese or Mongolian shall be employed on any public works." [37]

Such statutes remind us of how much work remains to be done.

PART IV. SOME DECISIONS

It has already been pointed out that the great success of conference, conciliation, and persuasion in settling discrimination cases has meant a dearth of reported hearings. Of the few hearings, only a small number are appealed to the courts. An examination of what few cases there are does, however, reveal some interesting results.

1. New York

A New York court added to the existing standards in a novel way. The FEP statute forbids discrimination on the basis of race, creed, color, or national origin.

In the case of *Wilson v. Hacker,*[38] certain unions consisting of hotel and restaurant workers, waitresses, cafeteria and dairy lunch workers, and bartenders were picketing plaintiff's restaurant and tavern in an attempt to organize it and induce plaintiff to enter a union shop contract. Plaintiff employed three female barmaids who performed the functions of bartenders. Plaintiff was willing to enter a union shop contract and his employees were willing to become union members. But one of the picketing unions, the Bartenders League of America, did not accept female members. Thus, on the horns of a dilemma, plaintiff petitioned the court to enjoin the picketing. The court said,

> ". . . It is true that the statute prohibiting discrimination by labor unions . . . does not enumerate sex as one of the forbidden grounds of discrimina-

[36] Laws of S. C. § 40-452. The United States belatedly amended its 1902 act forbidding employment of Mongolian labor on irrigation projects. 43 U.S.C.A. § 419 (1956).

[37] NEVADA STATS. § 6177.

[38] 200 Misc. 124, 101 N.Y.S. 461 (1950).

tion, and it is likewise true that the other statutes in this State, aimed at the elimination of discrimination do not in terms forbid discrimination on the ground of sex . . . However, the *principle* against discrimination is not limited to the instances covered by the particular statutory provisions. Those statutes merely provide special penalties or special procedures against discrimination. Under the present New York statutes the special penalties or procedures cannot be invoked against discrimination on the ground of sex, but *it does not follow that a court may not condemn such discrimination as a violation of fundamental principles* and judge the legitimacy of union activities in the light of such principle." (Emphasis added)

2. *California*

In California, a state having no FEP law, a union which refused to admit Negroes on an equal status with whites was enjoined from demanding the discharge of a non-member Negro, under a closed shop contract, in the case of *James v. Marinship Co.*[39]

3. *Wisconsin*

Wisconsin's law only allows the administrative agency to investigate complaints and give publicity to its findings. Willie Blue, a Negro, was a member of a union in Gary, Indiana, and wanted to transfer to a sister union in Milwaukee. The union refused to admit him. He filed a grievance with the commission. The commission found that the local union had refused to accept Blue because he was a Negro. Accordingly, the commission published its findings and recommended that the union comply with them.

The union then agreed to "accept" Blue as a member but with the proviso that for a six month period his union book would be good only for the person who was presently employing him. The six month period was classified as one of "investigation." Although the commission gave tacit approval to these delaying tactics the court [40] struck it down and enjoined the union from limiting Blue's employment.

Thus a court issued an injunction to restrain racial discrimination by a union even though the statute is completely silent on enforcement procedure.

4. *Connecticut*

In an interesting Connecticut case [41] a Negro applied for membership as an apprentice in a union and was put off by the business agent. He filed a

[39] 25 Cal. 2d 721, 155 P. 2d 329 (1944). See also Williams v. Intn'l Brotherhood of Boilermakers, 27 Cal. 2d 586,165 P. 2d 903 (1946).

[40] Blue v. Schaefer, 25 CCH LAB. CAS. ¶68,378 (1954). The court was the Circuit Court, Milwaukee County.

[41] Int'l Brotherhood of Electrical Workers Local 35 v. Commission on Civil Rights of the State of Connecticut, 18 Conn. Supp. 427 (1954).

charge of discrimination with the commission and in due course the commission issued an order directing the union to cease and desist from excluding the Negro from membership because of his race. This order was in turn appealed to the state superior and supreme courts, the union losing in both.[42]

The union membership then met and voted against admitting him, giving as a reason that he did not meet the union's requirement of sponsorship and employment by a union contractor before admission to the union. For this action, the state supreme court adjudged the union to be in contempt of court and fined it one thousand dollars with an additional fine of two hundred fifty dollars per week beginning thirty days hence, for every week that it continued to discriminate against him.

This court really gave meaning to a commission ruling. Had it merely ordered a token fine as a slap on the union's wrist it would in effect have been condoning the union's action. Instead it hit the union where it hurts the most, in its treasury. By doing this it put all unions, and all those who would have occasion to be concerned with the FEP statute, on notice that it meant business. Who knows how many jobs are opened up to members of minority groups when an opinion such as this becomes known? [43]

Another Connecticut case illustrates the problem of whether or not a commission should be able to order that affirmative action be taken. Connecticut's FEP law provides for a cease and desist order by the commission, which can be enforced by court order. Many other states have a provision whereby, in addition to a cease and desist order, the commission may order such affirmative action as in its opinion best carries out the purpose of the statute.

In *Draper v. Clark Dairy*,[44] the plaintiff, a Negro, answered defendant's newspaper advertisement and was told that the job was already taken. The commission found, however, that several white applicants who later answered the advertisement secured jobs, one doing so two and one half hours after Draper's interview. Accordingly the commission found that the employer had refused employment to an applicant because of his race, in violation of the statute, and issued a cease and desist order. The order was worded as follows, ". . . you are hereby ordered to cease and desist forthwith *from refusing to employ* . . . Draper." (Emphasis added). As the court on

[42] 18 Conn. Supp. 125 (1953), 140 Conn. 537, 102 A. 2d 366 (1953).

[43] 31 L.R.R.M. 140 (1952) quotes from the report of the Humphrey Subcommittee of the Senate Labor Committee in which the point is made that it is very difficult to give any precise measurement of effects of FEP laws since the significance of a single case may extend to thousands of employees.

[44] 71 Conn. Supp. 93 (1950).

appeal pointed out, although in the form of a cease and desist order, it literally requires the employer to take affirmative action and employ him. While upholding the commission's finding of discrimination, the court modified the order to the effect that if Draper presented himself again for employment, the dairy must cease and desist from refusing to employ him because of his race.

It is submitted that the court's decision is the wiser of the two. Not only was the commission writing something into the act which the legislature had not seen fit to include, but it is open to question whether or not forcing affirmative action is wise.

A member of New York's commission has pointed out that,

> "The question of whether the investigating commissioner, on a finding of probable cause, should require the immediate employment of a complainant even if it compels the dismissal of the person who was hired to fill the vacancy or insist on the creation of a new job that he might fill has been the subject of considerable discussion in all the states having anti-discrimination laws." [45]

He points out that some urge that such affirmative action is merely restoring a civil right to someone who has been deprived of it. He states that his commission has not adopted this view for the reason that it believes that it can do more good in the long run by avoiding the bitterness that such action would engender.

It is submitted that this is the wisest course to follow. Where a commission has the power to order affirmative action, the chances are great that it can do a great deal of harm. Where it encounters an employer who is either a belligerent bigot or afraid that hiring a member of a minority group will cause dissention among his employees or loss of customer good will, ordering him to hire the person would solve nothing. If the employer is already prejudiced, it would merely further embitter him against the minority group. It may also create a tense atmosphere in which it would be unpleasant for all the employees.

In the case of employee resentment, the commission could invoke its educational powers and show films which explain not only the FEP law but the policy underlying it and why discrimination should have no place in a democracy.

By following this more moderate course, it is submitted that the commission could in many cases gain not just a mere token, grumbling compliance,

[45] Quoted in Carter, *supra* note 6.

but wholehearted cooperation so that in the long run many more jobs would be voluntarily opened up to members of minority groups. As the New York Commission has said,

> ". . . It would be of little avail if compulsory action on the basis of individual complaints resulted in temporary compliance which could only be maintained by a policing operation that in the end would assume formidable proportions." [46]

Secondly, what of the individual who was the subject of the discrimination? Assuming that the discrimination was a refusal to hire, would that person really want to work in the establishment if the only way he can get the job is to force the employer to hire him? The answer may be, "Of course, he filed the complaint, didn't he?" But, in Minnesota it was discovered that eighty percent of the cases involved refusals to hire. Yet in fifty-two percent of these, the complainant did not want the job after discovering the discriminatory practice. Instead he merely wanted the practice corrected so that those members of minority groups who did wish to work there would be afforded that opportunity in the future.[47]

This feeling may be shared by a large number of persons filing complaints. Except for a few crusading individuals who are very militant about civil rights, most people would probably prefer to work in a congenial atmosphere where their presence was not resented. Should not the commission with the power to order affirmative action take this into consideration?

On the one hand, it could be argued that the purpose of the statute is to deal with the problem of discrimination in general and not concern itself with individuals. Yet, the statutes do deal with individuals. They list practices of individuals which are forbidden. They allow individuals to file complaints with the commission. They direct the commission to meet with the offender on an individual basis and attempt to settle the matter peacefully. Why not, then, consider individuals? Furthermore, the person who filed the complaint, although not a party to the action between the commission and offending party and not bound by the order of the commission, may feel a moral obligation to the commission for acting on his behalf, and if the commission orders an employer to hire him, he may feel obligated to take the position even though he really does not want it now.

On the whole, it would seem that on a problem as fraught with high emotion as that of racial and religious prejudice and discrimination, a policy

[46] Subcommittee on Labor-Management Relations, *State and Municipal Fair Employment Legislation*. 82d Cong. 2d Sess. 12, (1952).

[47] Leland, *supra* note 6.

of avoiding, as much as possible, the use of force would bring about the best results.

Indeed, forcing an employer to hire someone gives ammunition to those who cry out that FEP laws seek to ram minority groups down the throats of employers.

Somewhere between the extremes of force and passivity lies a middle ground which commissions like New York's appear to be seeking. It would seem to be the wisest course to follow.

5. *Rhode Island*

While not a court decision, the following is submitted as a bad example of over-zealous commission action. In a recent report[48] the commission described a case in which an employment agency ran a help wanted advertisement. In response thereto, a Negro applied to the agency. A reason not printed in the advertisement was given him for his not being referred for the job. He filed a complaint and the same reason was given to the investigator. The commission proudly reported that it then told the employment agency to refer the Negro, and if he was rejected by the company, then they would immediately investigate the company. Thus, whether the job had already been filled or not, whether he was the best applicant for the job or not, whether he really met all the specifications or not, the company would be acting at its peril in refusing to employ the Negro.

Admittedly it is quite possible that the company had given a discriminatory job order to the agency. But it is also possible that the agency was refusing to refer the Negro because of its own policy of discrimination. Since Rhode Island is a state in which the commission may act on its own initiative, without a complaint being filed, the commission could have waited quietly to see what would happen. Its statement in advance could only serve to put the company under duress.

PART V. WARNINGS

1. *"You can't legislate morality," "Prohibition did not work," and other arguments*

Most of the vociferous opposition that is heard whenever the subject of FEP legislation is broached centers around one of two themes. One argument is that dire consequences will result from such an attempt. The other

[48] RHODE ISLAND COMMISSION AGAINST DISCRIMINATION, ANNUAL REPORT (1955).

is that this is a matter of social justice or of invoking the golden rule and is not amenable to legislation. The argument usually concludes with the statement, "Prohibition didn't work, did it?"

By no means are such arguments restricted to southern racists. Our own supreme court in the landmark case of *Plessy v. Ferguson,*[49] in which a Louisiana segregation statute was upheld and the famous "separate but equal" doctrine first enunciated, had this to say,

> ". . . The argument [of plaintiff, a Negro] assumes that social prejudices may be overcome by legislation. . . . We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . *Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.*" (Emphasis added.)

This type of reasoning is defective in two respects. First, two concepts are being confused, prejudice and discrimination. Secondly, there is a great difference between compelling social acceptance and forbidding discrimination.[50]

The difference between prejudice and discrimination is that the former is a mental attitude while the latter is an overt act. Discrimination is usually but not always derived from prejudice.[51]

Since discrimination is an overt act, why should it not be subject to the legal sanctions which we put on many acts? What of the statutes that combat discrimination in commerce, transportation, trade and labor relations? The prejudice may still exist but the discrimination has been stopped.[52] It is submitted that once we stop the overt act of discrimination, we have taken a step toward eliminating its underlying cause, prejudice. If we do not see daily examples of discriminatory acts we will not be constantly reminded of the prejudices behind them. We will be able to have more of an open mind toward a minority group if we are not constantly reminded that there are some who consider this group to be objectionable. As our government said in its brief in the case of *Henderson v. United States,*[53] although law cannot

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[49] 163 U. S. 537,551 (1895).

[50] MCWILLIAMS, RACE DISCRIMINATION AND THE LAW 12, 16 (1945).

[51] BERGER, *op. cit. supra* note 20 at 12. "Discrimination is generally considered to be the objective aspect of prejudice . . ." MYRDAL, *op. cit. supra* note 22 at 1141. In HUSZAR, ANATOMY OF RACIAL INTOLERANCE 126 (1946), prejudice is described as being an attitude in a closed mind, while discrimination is said to be an overt act of exclusion, prompted by prejudice.

[52] MCWILLIAMS, *op cit. supra* note 50 at 16.

[53] Brief of U.S. in the case *Henderson v. U. S.* 339 U.S. 816 (1950) reprinted in MURRAY, STATES LAWS ON RACE AND COLOR 685 (1950). In this brief they also criticize the reasoning of the *Plessy* case quoted on page 28.

change the way people think, it can create conditions favorable to the gradual disappearance of prejudice.

The point is well made, that,

> "If law cannot reach private tastes and inclinations, that is no longer proof that law cannot reduce employment discrimination, for under present conditions employment is not a matter of private taste. As an economic, relatively impersonal relationship it is a fit subject for legal control . . ." [54]

In answer to those who, like the *Plessy* case, say that you cannot legislate social equality, it is submitted that FEP laws have no such purpose. They act merely to remove economic barriers erected against minority groups. A study conducted by the New York State School, of Industrial and Labor Relations, Cornell University, had this to say,

> ". . . While all delicate problems of social adjustment are not automatically resolved by enacting a statute, nevertheless an anti-discrimination law appears to be an influential force for advancing the economic lot for those denied job opportunities for reasons other than training and ability." [55]

Analogous to the "social equality" argument is the one about it being impossible to make people act "morally" by passing laws. A writer in this field, debunks this argument by pointing out that such laws have no such purpose.[56] He gives the following example. Assume that there is a law requiring an employer to maintain safeguards against injury to his employees and also to help compensate them for injuries. Does this statute make the employer act "morally?" The answer that he gives to this question is yes, if by "morally" we mean conduct conforming to some humanitarian ideal; but the answer is no, if by "morally" we mean not only conforming to the law but believing in the principle behind it. He concludes by pointing out that obedience to a law and belief in its purpose are two different things. Such a law may effectively require employers to contribute to their employees' physical safety without changing the employer's attitude toward them.

So it can be in the field of discriminations. While it is to be hoped that an FEP law will aid in changing mental attitudes, it can stop the act of discrimination regardless of these attitudes.

It is interesting to note what two state commissions have said about this problem. On the basis of nine years' experience with their law, the New York Commission said that it,

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[54] Berger, *supra* note 6.
[55] SEIDENBERG, NEGROES IN THE WORK GROUP 45 (1950).
[56] Berger, *supra* note 20 at 66.

". . . has demonstrated once and for all that legislation in this field can and does work." [57]

on the basis of six years' experience, Rhode Island had this to say,

". . . it has been shown conclusively that discrimination can be appreciably reduced with a statute. . . ." [58]

2. *Dire Warnings of Calamity*

Turning to the second argument, everything from economic upheavals to race riots are predicted by some, when the FEP topic comes up for discussion. In New York, for example, the fear was expressed that such a law would "unsettle tranquility of business," or "promote harassing and black-mailing suits," or "divide employees into racial groups." [59]

The Chamber of Commerce also opposed the law on the grounds that it would make the state less desirable for employers and workers, and might attract unwelcome persons from other states and cause riots and pogroms.[60]

Has this happened in New York? On the contrary,

"Nothing now remains of the arguments so fervidly advanced against the passage of the anti-discrimination law. None of the awesome prophecies of its opponents have been fulfilled. There has been no exodus of business, no acceleration of racial and religious antipathies, no usurpation of the prerogative of hiring and firing." [61]

The Executive Committee of the Massachusetts Bar Association opposed the state FEP bill as being "unwise" because, inter alia, some people have strong prejudices and these would be accentuated if they were forced to employ others against their wishes.[62] This argument is not new, but its fallacy rests on a false premise. FEP laws do not force employers to hire anyone

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[57] N. Y. STATE COMMISSION AGAINST DISCRIMINATION, REPORT OF PROGRESS 5 (1954).

[58] R. I. COMMISSION AGAINST DISCRIMINATION, ANNUAL REPORT 4 (1955). They also say, what has been pointed out before, "Discrimination—the overt act—can be controlled. Prejudice—the attitude—is more difficult to eradicate".

[59] Tuttle, *The New York Law Against Discrimination,* 17 N. Y. STATE BAR ASSN. BULLETIN 76, 82 (1945).

[60] Berger, *supra* note 6 at 765. He also makes the point that, "The early fears of opponents of the law have not been realized: industries have not been driven from the state by the law; there have been only a few cases in which individual workers refused to work alongside members of minority groups employed as a result of the law; there has been no unfavorable response from department store customers since the employment of Negro salesgirls.

[61] Carter, *supra* note 6. Mr. Carter is one of New York's commissioners. The first two chairmen of New York's Commission in a joint statement said, ". . . the bogies and phantoms urged in opposition to the passage of the law have vanished in the light of experience." Berger, *supra* note 6 at 766. In debating the pros and cons of Michigan's bill in 1954, it was also pointed out that all the dire consequences which were predicted in other states have failed to materialize. Baker, *House Bill 285, Yes or No?* 33 MICH. STATE BAR J. 18 (May 1954). Accord, Note 56 YALE L. J. 837 (1947).

[62] 30 MASS. LAW QTRLY. 10 (1945).

against their will. They merely require employers to hire the most qualified person for the job, without considering his color, religion, etc. FEP laws do not even require an employer to hire a certain quota of minority group members. On the contrary, most commissions say that quota systems are abhorrent to the very purpose of such laws.

In one case a commissioner pointed out to a store owner, who was hesitant about discharging an unsatisfactory Negro for fear of a charge of discrimination, that the commission is equally interested in protecting respondents against unwarranted charges. That particular commission estimated that they did so in at least forty percent of their cases.[63] In short, FEP laws are not the monsters which their opponents claim.

3. Cost of Discrimination

If the chambers of commerce, bar associations, and employers who oppose FEP legislation could be made to see what discrimination is costing us, it might change their viewpoint. Some striking conclusions were made as a result of a research program which took ten years to complete and covered the entire nation.[64] Costs were divided into two categories, psychological and economic. Under the heading "psychological costs" it was noted that discrimination exacts a heavy toll in plant morale. Plant morale in turn effects productivity.

As for "economic costs," the study concluded that if the following factors are taken into account: the amount of purchasing power denied to minority groups by low wages; the possible contribution to society by minority group members who could move into high paying vocations where manpower shortages exist; the cost of crime traceable to discrimination and segregation costs resulting from discrimination—if all these are considered, then it is estimated that the cost comes to thirty billion dollars per year.

Mrs. Hobby, former Secretary of Health, Education and Welfare, was a bit more conservative in her estimate of the cost of discrimination. She estimated it as being between fifteen and thirty million dollars per year.[65]

Another study, while not attempting to assign a dollar value to discrimination, points out the vicious circle which it takes. It depresses earnings of a

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[63] Leland, *supra* note 6 at 256.

[64] Roper, *Discrimination in Industry: Extravagant Injustice*, 5 IND. & LAB. REL. REV. 584 (1952).

[65] AMERICAN JEWISH CONGRESS, CIVIL RIGHTS 48 (1953). See also, GUEST, DISCRIMINATION IS BAD FOR BUSINESS (1954) wherein the statement is made that labor unions are some of the most flagrant offenders.

large segment of our population. This in turn lowers the overall national buying power. The result is that industry has lower sales and fewer jobs and thus there is decreased purchasing power for all.[66]

This is where the educational programs of the commissions can do yeoman service. Perhaps when the high cost of discrimination becomes known, the enlightened self interest of employers will convince them to eliminate this costly practice.

PART VI. THE FEDERAL EXPERIMENT

1. Background—Was Roosevelt Forced?

The first Fair Employment Practices Commission was a federal commission. It came four years before New York pioneered the way for the states. It was, however, not created by statute, but by executive order.

The background to this first FEP executive order (8802)[67] is both interesting and controversial. The time was June, 1941. America was gearing its economic might for war production and needed all the workers it could get. Yet, the bars of racial intolerance were up in many industries. Although one writer on the subject[68] suggests that it was just good logic for the President to announce a national policy against discrimination, as an answer to Nazi racism, most observers are of the opinion that there was more to it than that. It appears that a group of Negroes, led by A. Phillip Randolph, head of the Brotherhood of Sleeping Car Porters, were planning an organized march upon Washington[69] for June 1, 1941.[70] As one report has it,[71] President Roosevelt appointed Fiorello H. LaGuardia to confer with the leaders of this movement and after a draft of the proposed executive order was submitted to them, the march was called off. It is a matter of conjecture whether or not the order would have been promulgated without this proposed movement. In any event, the order was issued on June 25, 1941, and the march in fact never occurred.

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[66] S. REP. No. 1267, 83d Cong. 2d Sess. 4 (1954).

[67] Exec. Order No. 8802, 6 FED. REG. 3109 (1941).

[68] Malcolm Ross, wartime chairman of the FEPC, quoted in HUSZAR, *op. cit. supra* note 34 at 178.

[69] Maslow, *FEPC—A Case History in Parliamentary Maneuver,* 13 U. CHI. L. REV. 407 (1946).

[70] BERGER, RACIAL EQUALITY AND THE LAW (1954).

[71] Maslow, *supra* note 69.

Undoubtedly this proposed march played some part, at least, in the issuing of the first government decree, but whether or not it was in fact "Negro pressure" [72] or the

> ". . . threat of a march of blacks on Washington [that] finally wrung the executive order from the reluctant hands of the President," [73]

all "skillfully staged" [74] by Randolph, is problematical. Perhaps the best analysis of the whole situation is that the executive order was issued with the immediate purpose in mind of staving off the march, and while,

> ". . . this was literally true . . . the fact standing alone appears in too sharp a light." [75]

2. *Executive Order 8802 and its Limitations*

Executive Order 8802 stated that it was the policy of the United States to encourage full participation in national defense regardless of race, creed, color, or national origin. Furthermore, it stated that it was the policy of the United States that there should be no discrimination in defense industries or in the government itself because of race, creed, color, or national origin. It declared that it was the duty of both employers and labor organizations to provide for employment without discrimination.

In addition to these policy declarations, it made three orders: all government agencies concerned with training programs were ordered to take special measures to avoid discrimination; all defense contracts were henceforth required to contain an anti-discrimination clause; a Fair Employment Practices Commission was set up.

But the commission from the outset had no power to enforce its decisions. It was limited to receiving complaints, investigating them, and making recommendations. It could, however, as a last desperate effort cite recalcitrants who refused to remove discriminatory practices to the President, who technically had power to cancel a war plant contract. Such a cancellation would, of course, slow down the flow of arms and ammunition. There were no cancellations.[76]

3. *Death of the FEPC*

In the end the foes of the FEPC killed it in the only way possible for them, by using Congress' power over the Commission's purse strings. They

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[72] Note, 56 YALE L. J. 837, 842 (1947).
[73] Carter, *Policies and Practices of Discrimination Commissions,* 304 ANNALS 62 (1956).
[74] MYRDAL, AN AMERICAN DILEMMA 1005 (1944).
[75] ROSS, ALL MANNER OF MEN 19 (1948).
[76] HUSZAR, *op. cit. supra* note 34.

simply starved it to death by refusing to appropriate any money for its continuance. When the FEPC chips were down the Southern bloc in Congress closed ranks and successfully led the fight to kill it. This was by no means a new attempt on their part. It was only after six weeks of wrangling (which held up seven hundred and fifty million dollars worth of funds urgently needed by war agencies) that the Commission was given an appropriation in 1945.[77] The filibuster of 1946 consumed eighteen meetings of the Senate.[78] This is an indication of the determined opposition of the South to any form of federal regulation in the field of employment equality.

4. Truman's Attempt

Executive Order 9980[79] became effective on July 28, 1948. Although it did not attempt to create another FEPC, it did establish a Fair Employment Board within the Civil Service Commission. In addition, it directed that all personnel actions taken by federal appointment be based solely on merit. It called for "appropriate steps" to insure that there would be no discrimination in government service because of race, creed, color, or national origin. The head of each department within the executive branch was charged with seeing that fair employment practices were carried out in his department. Department heads were also directed to appoint a "fair employment officer" to directly carry this plan out.

The importance of this order can be seen by the fact that the federal government is the largest single employer in the United States, with over two million people on its payroll, and that after this order was issued one-third of the agencies in the government, for the first time in their history, hired Negroes as supervisors of mixed Negro and white groups.[80]

It should be noted that although the wartime FEPC was gone, the requirement that non-discrimination clauses be put in government contracts was still operative. In this connection, President Truman issued another executive order[81] in 1951, establishing the "Committee on Government Contract Compliance" to improve means of obtaining compliance with that requirement.

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[77] Wilson, *The Proposed Legislative Death Knell of Private Discriminatory Employment Practices*, 31 VA. L. REV. 798 (1945).

[78] Maslow, *supra* note 69.

[79] Exec. Order No. 9980, 13 FED. REG. 4311 (1948).

[80] BERGER, RACIAL EQUALITY AND THE LAW (1954).

[81] Exec. Order No. 10308, 16 FED. REG. 12303 (1951).

5. *Eisenhower's Attempts*

President Eisenhower replaced his predecessor's "Fair Employment Board" with the "President's Committee on Government Employment Policy." [82] This committee is much like the one which it replaces.

The "Committee on Government Contract Compliance" was replaced by a "Government Contract Committee." [83] Like the old FEPC, it has power to receive complaints but no power to enforce any decision. It refers the complaint to the contracting agency involved and this agency in turn must make a report back to the committee informing them as to what action it took. Vice President Nixon, who is chairman of the committee, was reported to have remarked in 1955 that compliance had been so good that it had not been necessary for the government to cancel a single contract because of failure to adhere to the anti-discrimination clause.[84] This, however, is in conflict with criticism directed against the committee in 1954 to the effect that it had not accomplished very much.[85]

6. *Present Status of Government Contract Clause*

The latest version of this requirement [86] is that contractors will not discriminate against employees or applicants for employment because of race, color, religion, or national origin, and that they must post notices to this effect.

7. *Presently Proposed Federal Legislation*

Of ten bills dealing with equality in employment presently before Congress, none would re-establish the FEPC. These bills fall into three basic groups. One is like the FEPC in that there would be no enforcement powers, while the other two go further and provide for enforcement machinery.

The first type consists of a single bill, introduced in the House.[87] It is entitled the "Minorities Employment Act," and is the weakest of the three. It merely declares that it is the policy of the government to eliminate discrimination because of race, religion, national origin, or ancestry and empowers the Secretary of Labor to investigate complaints of discrimination. If discrimination is found, the Secretary then is to try to eliminate it by mediation and conciliation. There is no provision for enforcement and therein lies the danger of such a statute. Its passage might mean that we would think that something

[82] Exec. Order No. 10590, 20 FED. REG. 409 (1955).
[83] Exec. Order No. 10479, 18 FED. REG. 4899 (1953).
[84] Carter, *supra* note 73.
[85] BERGER, RACIAL EQUALITY AND THE LAW (1954).
[86] Exec. Order No. 10557, 19 FED. REG. 5655 (1954).
[87] H. R. 3047, 85th Cong. 1st Sess. (1957).

was being done about the problem, while in fact little would be accomplished. The same arguments that were made about state laws without enforcement provisions are applicable here. It is possible that this emasculated version of a fair employment law was intended to be a Southern attempt at a compromise, since it was introduced by a Congressman from Arkansas.

The second type consists of three bills, all entitled "National Act Against Discrimination in Employment." [88] They also make a policy declaration based on the same four standards as are set forth above. A National Commission Against Discrimination would be set up to administer the act. Like the state laws, it lists discriminatory practices for employers and labor organizations but makes no mention of employment agencies. Also like the state laws, the procedure followed in eliminating these enumerated practices is first to attempt informal compliance, then order the hearing, which can result in a cease and desist order enforceable by court decree. Notices are required to be posted, and if they are not, it being a willful violation, a fine of up to five hundred dollars can be imposed.

The third type has been introduced in both houses.[89] It is the "Federal Equality of Opportunity Act." It follows the same general pattern as type two above with a notable exception. It includes employment agencies within its coverage; thus it is broader in scope. The committee is called the Equality of Opportunity in Employment Committee, but has the same duties as outlined above. Court enforcement of the cease and desist order is possible. It also requires the posting of notices.

This type apparently is the most popular. Not only was it introduced by five different bills in the House, but the Senate version was introduced by a noted liberal, Senator Hubert Humphrey, and contains the names, as co-sponsors, of many highly respected senators of both parties.

8. A Proposed Taft-Hartley Amendment

During hearings in 1954 on a bill much like that described in type three above, a witness testified that regardless of whether the bill was passed or not,

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[88] H. R. 140 (Title III), 85th Cong. 1st Sess. (1957).
H. R. 145, 85th Cong. 1st Sess. (1957).
H. R. 2375 (Title III), 85th Cong. 1st Sess. (1957).

[89] S. 506, 85th Cong. 1st Sess. (1957).
H. R. 453, 85th Cong. 1st Sess. (1957).
H. R. 554, 85th Cong. 1st Sess. (1957).
H. R. 709, 85th Cong. 1st Sess. (1957).
H. R. 1098, 85th Cong. 1st Sess. (1957).
H. R. 3615, 85th Cong. 1st Sess. (1957).

the Taft-Hartley Act should be amended to make discrimination in employment an unfair labor practice. The witness was Walter White of the NAACP.[90]

The late Mr. White has not been the only person advocating such an amendment. At least one labor law professor would do the same.[91] He points out the anomaly of the government's acting on the one hand to prevent discrimination in public contracts, while at the same time offering its services to employers who may be actively discriminating on racial or religious grounds against employees and applicants for employment. Thus, he says, the employer who could not do business with the government can invoke the aid of the National Labor Relations Board.

What are the alternatives? One would be to do as the late Mr. White suggested and amend the act to make discrimination an unfair labor practice. The other course of action would be the law professor's amendment which would deny access to the NLRB by either a union or employer who practiced discrimination. It is submitted that amending the act in this manner, or by making discrimination an unfair labor practice, is not the answer.

By making discrimination an unfair labor practice, there would be the possible advantage of fitting it into the framework of an existing agency and thus avoid the time and expense involved.

However, there are many disadvantages. It is questionable whether or not the NLRB is the proper agency to administer such a statute. Also, the policy underlying the Taft-Hartley Act is not the same as that underlying an FEP statute.

The NLRB has no authority to attempt to settle disputes by the informal methods which have proven so successful in state statutes.

While enacting FEP statutes has not led to the flood of litigation expected in the states, there have, naturally, been complaints filed. So it would be under the federal act. It is open to question whether or not the board's workload is such that it could take on this additional burden.

Amending the act to deny access to the board merely acts negatively. It does not empower the board to take any affirmative action. All the success achieved by the state agencies in their informal methods of conference and conciliation (with an enforceable statute in the background) would seem to indicate that they should be encouraged rather than discarded.

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[90] *Hearings Before the Subcommittee on Civil Rights of the Senate Committee on Labor and Public Welfare*, 83rd Cong., 2nd Sess. at 180 (1954).

[91] O'Shaughnessy, *An Amendment to Taft Hartley: A Rejection of Racial Discrimination*, 5 LAB. L. J. 330 (1954).

9. *Critics of Federal FEP*

While all of the arguments that were discussed under state law have been raised in one form or other in opposition to a federal statute—with the same answers being applicable, a few of the more vociferous are presented as illustrative of the hue and cry peculiar to a federal enactment.

Georgia's junior senator has said that a federal FEP act,

> ". . . would mean the creation of a super state with a life and death hold on individuals and private business. It would deprive business, large and small of fundamental rights which have made this nation great. It would place an employer at the mercy of a super federal bureau with the power to fine or imprison the employer." [92]

A southern insurance executive has commented that such federal legislation is intended to,

> ". . . satisfy an un-American minority supported by carpetbag foreign crackpots and theorists." [93]

Not wanting to be outdone, Senator Hill of Alabama raises the legal argument that such legislation violates the first, fifth, sixth, ninth and thirteenth amendments.[94]

10. *Some Words of Praise*

One writer has said that considering the federal commission's limitations, its wartime success was "impressive if not spectacular;" [95] that it proved that a small amount of governmental authority can go a long way in securing voluntary compliance, was added by another.[96] It was also said that the "success" of the federal commission should dispell any doubts as to the effectiveness of such a law as a means to the desired end of "true economic progress." [97]

The fact that even without enforcement power, the commission did successfully close almost five thousand cases during its five years of life, is certainly evidence that it did meet with some success.[98] However, it must be

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[92] TALMADGE, YOU AND SEGREGATION 19 (1955). He also is of the opinion that such legislation is of Communistic origin and that, "The judgment of Government gestapo agents would be substituted for the judgment of the nation's businessmen as to the fitness of an applicant for a position".

[93] HANCOCK, UNFOLDING THAT FAIR EMPLOYMENT PLOT 4 (1945). However, in order to place such a critic in his proper light, it should be noted that Mr. Hancock also quotes with apparent approval an article saying that, ". . . the Ku Klux Klan was the sole guardian of civilization in the South from 1867 to 1870 and its members were the salt of the earth".

[94] S. REP. NO. 1539, part 2, 81st Cong., 2d Sess. 2 (1951).

[95] Carter, *supra* note 73 at 63.

[96] BERGER, RACIAL EQUALITY AND THE LAW (1954).

[97] LANE, THE PURPOSIVE PROJECTION OF FAIR EMPLOYMENT PRACTICES LEGISLATION: ACROSS THE BARRICADES OF CUSTOM 20 (unpublished thesis in Harvard Law School Library 1950).

[98] Note, 56 YALE L. J. 837, 842 (1947).

remembered that this was during wartime when our country was calling upon all citizens to do their share in the war effort. An employer with racial or religious prejudice, but also with a boy on the firing line, might well be persuaded to put his prejudice aside. But query whether or not he would voluntarily do so in peacetime.

PART VII. THE PROBLEM OF OLDER WORKERS

1. The States—the beginning of a trend?

One of the most recent states to join the FEP group was Pennsylvania in 1955. It included "age" among its standards. At the time of Pennsylvania's action, only Massachusetts had such a provision in its FEP statute. "Age" was added by amendment in Massachusetts in 1950. In 1956, Rhode Island passed a separate FEP law dealing exclusively with discrimination because of age.[99] Why this sudden attention to older workers? Are their problems any different from those of other groups who suffer from discrimination?

Only recently has light been focused on this problem. What it has revealed has caused many people in government, business and organized labor, to become concerned.

2. Why is there suddenly a problem?

The problem has not been "suddenly" thrust upon us. It has been with us for a long time but has been growing in its proportions. Boiled down to its bare essentials, it is this: people are living longer, so what are we going to do about it? What are we going to do with them?

Secretary of Health, Education and Welfare, Folsom, has pointed out some startling facts about the change that has occurred in man's life span. In ancient Greece during the Bronze Age, the average life span was a mere eighteen years; today it is around seventy. More significantly, in the past fifty-five years of our history, man has increased his life span nearly as much as in the previous nineteen hundred years.[100]

There are various estimates, computed from different sources, as to the exact percentages in which our population has reflected this trend toward greater longevity. They all agree on certain basic conclusions, namely: that

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[99] Rhode Island Laws of 1956, c. 3795.

[100] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, FEDERAL AND STATE ACTIVITIES 107 (1956). Secretary Folsom was speaking before the Federal-State Conference on Aging.

our population has expanded tremendously; that the biggest gains are in the middle and older age brackets; and that they are expected to continue.

Some figures released recently by the Bureau of the Census, break the problem down into three categories: total population; forty-five-to-sixty-four age bracket; sixty-five-and-over. These figures illustrate the gains made in the past fifty-five years and are presented below in the table of Population Growth. They agree with another study, to the effect that,

> ". . . the 65-and-over group is seen to rise most sharply and the 45 to 64 group next fastest. As a matter of fact, the total population of the United States little more than doubled between 1900 and 1955 while the 65-and-over group *almost quintupled* and the 45-to-64 group *more than trebled.*" (Emphasis added.)[101]

The reasons for this great increase are mainly attributable to the tremendous discoveries made by medical science in its battle against disease. Not only are the infant mortality rates much lower now than they were fifty years ago, but the degenerative diseases of old age are also being conquered. This is shown by the fact that in 1900 the average male at age forty could expect to live to be sixty-eight. By 1950 this picture had changed so that the average male aged forty could reasonably expect to live to the age of seventy-one. Looking into the future, it is thought that by 1975 he can expect to reach seventy-four.[102]

PROJECTED POPULATION TREND[103]
(in millions)

Age	*1960*	*1965*	*1975*
Total	177.8	190.3	221.5
Under 14	51.5	53.1	62.7
14 to 45	74.0	80.7	95.0
45 and over	52.3	56.5	63.8
45 to 54	20.9	22.1	23.3
55 to 64	15.6	17.0	20.7
65 and over	15.8	17.4	20.7

[101] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, POPULATION: CURRENT DATA AND TRENDS (1956).

[102] U.S. BUREAU OF EMPLOYMENT SECURITY, DEPT. OF LABOR, OLDER WORKER ADJUSTMENT TO LABOR MARKET PRACTICES 5 (1956).

[103] Table I, commitee data *supra* note 101, in part, at 88.

POPULATION GROWTH [104]

YEAR	TOTAL POPULATION		45 TO 64 AGE GROUP		65 AND OVER AGE GROUP	
	Number in thousands	*Percent Increase since 1900*	*Number in thousands*	*Percent Increase since 1900*	*Number in thousands*	*Percent Increase since 1900*
1900 ...	75,995	..	10,400	..	3,080	..
1910 ...	91,972	21	13,424	29	3,950	28
1920 ...	105,711	39	17,030	64	4,933	60
1930 ...	122,775	62	21,415	106	6,634	115
1940 ...	131,669	73	26,084	151	9,019	193
1950 ...	151,132	99	30,720	195	12,195	296
1954 ...	162,414	114	32,877	216	13,715	345

If the projected population trend, as shown in the Table of Projected Population Trend, *supra,* continues as predicted, it will mean that in 1975, the almost sixty-four million people in the forty-five-and-over group will constitute nearly half of all persons over the age of twenty; while the almost twenty-one million persons over sixty-five will represent a forty-six percent increase over the 1955 figure.[105]

Before focusing our attention on the data concerning the labor force trend as compared with the total population trend which we have been examining, a word must be said about one important application of this trend.

3. The Pinch on Younger Workers

An analysis of the projection to 1975 shows us that while it is estimated that the forty-five-and-over group will increase, (from 1950 to 1975) forty-nine percent; the twenty-one-to-forty-four group (the most employable age group) will only increase twenty-eight percent.[106]

Of course we will be able to count on technological improvements to increase productivity per worker, but how much is not known. This pinch, while expected to be most acute on the young-to-middle-age group, is by no

[104] Part of Table I, *Selected Statistics on Aging,* compiled by the Committee on Aging, U.S. Dept. of Health, Education and Welfare 88 (1956).

[105] From Table 3 committee data *supra* note 101, at 90.

[106] U.S. DEPT. OF LABOR, FACTS ABOUT OLDER WORKERS 1 and chart 3.

means restricted to them. It has been estimated that if we consider the "working age group" to be between the ages of eighteen and sixty-four, the following increase in productivity will be required. In 1950 each one hundred persons in the working age group provided goods and services for sixty-four others. By 1975 they will have to be providing goods for eighty-five others.[107]

4. *Makeup of the Labor Force*

In 1900, of a total labor force of twenty-seven and one-half million, those forty-five and over accounted for slightly over six and one-half million, or roughly twenty-five percent. In 1955, the labor force totaled almost sixty-nine million. Of these, almost twenty-five million were in the forty-five-and-over group, giving them a thirty-six percent representation. Thus, in a little over a half century, this age group of the labor force has grown from a fourth to over a third.[108]

What is the industrial distribution of these workers? In 1954, in the forty-five-and-over group, over eighty-seven percent were in non-agricultural industries and over seventy-three percent were wage and salary workers rather than self-employed.[109] Thus, most of them are in jobs controlled by someone else, and are vulnerable to discrimination.

Projecting this out to 1965, we see that skilled craftsmen and semi-skilled operatives will increase by approximately one-quarter, while clerical and sales people will increase by more than a quarter and service workers will increase by ten to fifteen percent.[110]

Looking forward to 1975, based on what are referred to as "conservative labor force figures" we see that there are expected to be approximately ten million additional workers forty-five and older in the labor force.[111] It is thought that this will be accomplished by an increase of four hundred thousand workers forty-five and over per year up to the year 1975.

This presents a problem. With the present general tendency toward discriminating against older workers, how will these ten million fit into the industrial economy? Where will the jobs come from? The answer seems to be that we will have to stop this practice of discriminating against older workers.

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[107] U.S. News and World Report, Feb. 1, 1957, P. 31.

[108] From Tables 4 and 5, committee data *supra* note 101 at 92 and 93.

[109] From Table 19, *Statistics on Aging, supra* note 104.

[110] U.S. DEPT. OF LABOR, OUR MANPOWER FUTURE, Table XIV.

[111] From Table 4, FACTS ABOUT OLDER WORKERS, *supra* note 106.

5. When Does Discrimination Begin?

A study conducted recently by the United States Department of Labor, discloses that "significant difficulty" in finding a job begins in the semi-skilled occupations after forty-five and in the skilled occupations, slightly later.[112] Of course, the practices vary greatly from one industry to another and from one region to another, so that one must speak in generalities. It can be said, that in general, age becomes a barrier to employment much earlier than sixty-five and on the average, arises as a barrier ten years earlier for women than for men.[113]

6. What forms does it take?

It has been said that there are three types of job barriers against older workers.[114] These are described as: cultural barriers; barriers erected by the worker himself; and industry-erected barriers. The latter are the most serious. The first (cultural barriers) arise from our natural tendency to generalize and assume that all older persons are to some extent infirm either physically or mentally. It is pointed out that ours is a nation which tends to glorify the virtues of youth and minimize the values of age. While growing old is no crime, there is a tendency to look upon old age as a mark of degradation.

The second barrier is described as being self-imposed. It is not hard to see how a person seeking a job and finding all doors closed to him, could retreat into his own shell and become apathetic. After encountering one refusal after another, the worker may begin to believe that there really is something wrong with him and that he does not stand a chance of finding employment. This is a challenge for career guidance and state counseling services.

The third type is the most serious obstacle and is the industry-erected age barrier. It is an all-too-common practice to set one rigid age limit for a job and then refuse to consider all who are above it, regardless of their individual ability. It is an almost everyday occurrence to open a newspaper or magazine and see a news item like the following.

> "Salesman shortage will force U.S. industry to add 400,000 new salesmen in next six months if they can be found, reports National Sales Executives Inc. after nationwide manpower survey. *But premium is on youth and 72% of job opportunities will be closed to experienced men over 45.*" (Emphasis added.)[115]

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[112] BUREAU OF EMPLOYMENT SECURITY, U. S. DEPT. OF LABOR, COUNSELING AND PLACEMENT SERVICES FOR OLDER WORKERS 4 (1956).

[113] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, FEDERAL AND STATE ACTIVITIES (1956). However, as in all generalities, there are exceptions. For example, age bars appear earlier for men than for women in clerical and sales positions. COUNSELING, *supra* note 112 at 32.

[114] U.S. DEPT. OF LABOR, THE U.S. DEPT. OF LABOR TODAY 36 (1956).

[115] Time 96, March 18, 1957.

Is it any wonder that self-imposed barriers arise, when experienced salesmen whose only fault is having counted forty-five birthdays, read such stories?

7. *When is a worker "old"?*

Regardless of the industrial barriers which tend to be felt at forty-five, when in fact is a person "old"? Although there are two facets of age, mental and physical, we tend to lump them together.

> "Age itself is relative. In 1900 when the median age of our population was just under 23 years, the person of 45 was in the older age group. Today, however, the median age is just over 30, and in 1975 it is expected to be 34. By 1980, it is estimated that there will be 43 million persons between 45 and 64 years of age, and over 22 million persons past 65. *As the age make-up of our population changes, so must our concept of the older person.*" [116] (Emphasis added.)

There is a considerable body of evidence to the effect that many of those in even the oldest category of the labor force, the sixty-five-and-over group, continue to be capable workers and that they would prefer to continue working.[117] Yet, they are denied this opportunity because of our conceptual pattern of delimiting them as being too old to work.

8. *Objections to Hiring Older Workers—Validity*

What are the main objections voiced by management to hiring older workers and how valid are they? A recent United States Department of Labor survey was conducted to explore this aspect of the problem. The following are the results of that study; reasons listed by employers, in descending order of importance were: [118]

1. Inability to maintain production standards.
2. Inability to meet physical requirements.
3. They are inflexible.
4. They cause higher pension costs.
5. They are above or too close to company retirement age.
6. Preference for younger workers.
7. They are more difficult to train.
8. Higher absenteeism.
9. They do not fit in with company policy of promotion from within.

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[116] HEALTH RESOURCES ADVISORY COMMITTEE, OFFICE OF DEFENSE MOBILIZATION, PRODUCTION AT ANY AGE 1. Accord, FACTS ABOUT OLDER WORKERS, *supra* note 106 where it is said, "Most of us think of older workers as men and women who have reached some arbitrary chronological age such as 65 or 70 or 75. In reality there is no fixed age at which a worker becomes too old to work".

[117] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, PUBLIC AND PRIVATE SERVICES FOR OLDER PEOPLE 142 (1956).

[118] COUNSELING, *supra* note 112. Also, "higher injury rates" was given, in another study. U.S. DEPT. OF LABOR, *supra* note 114 at 37.

Most of these that are susceptible of being proved false, have been. In a survey conducted by the University of Illinois, of over three thousand older workers in various industries, supervisors were asked to rate them. The results provide some startling figures. Eighty percent listed overall production of older workers as ranging from good to excellent. The quality of their work was adjudged to be either the same as or better than that of younger employees by ninety-three percent. The volume of their work was rated at being the same or higher than younger workers by eighty percent while their absentee record was the same as or better than the others in ninety-one percent of the cases. As for dependability, judgment and ability to get along with others, they rated ninety-four percent, ninety-three percent and ninety-one percent, respectively, as being equal to or better than their juniors.[119]

The problem of higher pension costs is one that is heard frequently. At first blush, it would appear to have some validity. Why would it not cost more in pension fund contributions to hire a man fifty-five than one twenty-five?

This is answered by Arthur Larsen, Under Secretary of Labor.[120] He points out that the fallacy of the argument is that almost all pension plans in effect today do not call for a flat sum upon retirement, but a variable amount, based on the number of years of service and amount of earnings. This merely means that the older worker gets less when he retires, not that it costs the employer more.

Other studies prove that the older, more mature workers are much more stable than their juniors and engage in far less flitting from job to job.[121] A study of almost eighteen thousand workers in a variety of manufacturing industries revealed that older workers had two and one-half percent fewer disabling injuries and twenty-five percent fewer nondisabling injuries than younger workers and that in one hundred and nine plants employing over sixteen thousand men, the older workers had a twenty percent better attendance record.[122]

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[119] FACTS, *supra* note 106 at 3.

[120] FEDERAL AND STATE ACTIVITIES, *supra* note 113 at 64. Giving further support to the thought that this may be just a make-weight argument, is the statement by Mr. Edwin C. McDonald, Vice President of Metropolitan Life Insurance Co., who says that the reluctance of employers to hire older workers has nothing to do with pension plans; they were reluctant to hire them even before pension plans became as popular as they are today. U. S. News and World Report, April 1, 1955 .

[121] From Table 3, *supra* note 103 at 19.

[122] U.S. DEPT. OF LABOR, MR. EMPLOYER: WHY NOT USE THIS GROWING SOURCE OF MANPOWER? Also reported was a poll conducted by the N.A.M., of three thousand employers having two and one-half million employees. Seventy percent said that older workers were equal in work performance to younger workers, twenty-three percent expressed the opinion that they were superior and only seven percent said that they were inferior.

Statistically, it would seem that almost all of the reasons employers give, have been shown to be either greatly exaggerated or false. Especially unfortunate is the vicious circle in which the unemployed older worker finds himself. With age barriers all around him, it takes him longer to find a new job than it does his younger counterpart. Yet, it has been shown that in general, the longer a person remains unemployed, the harder it is for him to find work.[123] Viewing this against studies showing that, for example in one month, older workers made up twenty-nine percent of the total unemployed, but got only eighteen percent of the jobs that opened up, there is indeed cause for alarm.[124]

9. *Part Time Employment for the Retired*

> "According to the latest Bureau of the Census annual survey of incomes, about two-thirds of all persons aged 65 and over . . . received no cash income or less than $1,000 during 1954 . . ." [125]

What is the situation of the Social Security pensioner? He can get up to $162.80 per month from the government, a twelve hundred dollar personal exemption on his income tax, a company pension if he is eligible for it, and the right to earn an additional twelve hundred dollars per year without losing any of his Social Security payments.[126]

While this appears to be adequate for the needs of many, it obviously will not take care of the needs of all. There will be those who will want to work for the therapeutic effect and those who will be forced to work in order to make ends meet. The anomaly is, that while the government allows him to work part time at least and earn twelve hundred dollars, his chances of finding a job will probably range from slight to nonexistent.

10. *Federal Legislation, Present and Proposed*

(a) Present[127]

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[123] COUNSELING, *supra* note 112 at 74. Illustrative of the relationship between duration of unemployment and success in finding a new job, are results from the following study.

Duration of Unemployment	*Percent of Applicants Finding Employment*
1 month	56
2 months	54
3 months	48
4 to 5 months	41
6 and more	27

[124] *After 45 It's Hard to Get a Job,* U.S. News and World Report 88, April 1, 1955. During the month chosen for observation, 2.8 million were unemployed. Of these 2 million were 45 and under, 800,000 were 46 and older. A total of 426,400 jobs were found but of these only 76,800 were found by those 45 and over.

[125] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, INCOME AND INCOME MAINTENANCE 13 (1956).

[126] *The Future for Youth and Older People,* U.S. News and World Report 33, Feb. 1, 1957.

[127] LEGISLATIVE REFERENCE SERVICE, SUMMARY OF FEDERAL LEGISLATION RELATING TO OLDER PERSONS (1956).

Existing federal statutes affecting older workers fall, roughly within four categories: income, health, employment and housing. Most of the federal legislation dealing with employment has to do with the government as an employer. As regards hiring, the present age bar to a civil service position is seventy. Although it is an inflexible, arbitrary standard, it is at least more lenient than many of the rigid age bars set in private industry. On the matter of retirement, the government's mandatory retirement age varies. The lowest age is sixty, the highest is seventy, and on some jobs there are no fixed ages at all. This is a good example of the lack of logic in a fixed, arbitrary system. It is submitted that there is no logic to saying that a foreign service officer must retire at sixty, an employee of the T.V.A. at seventy, but a member of the judiciary need never retire. As in all arbitrary systems, individual capabilities are ignored. Would the world have been better off had President Eisenhower, Winston Churchill, Connie Mack or Arturo Toscanini been forced to retire at sixty, or sixty-five merely because they had celebrated too many birthdays?

(b) Proposed

Of the proposals presently before Congress, dealing with older persons, only one is primarily concerned with employment.[128] It merely authorizes an investigation into discrimination based on age (forty to sixty-five).

11. Age Discrimination—An FEP Misfit?

That is what some writers would have us believe.[129] They do not believe that an FEP law should include age as a standard. They speak of "forcing" older workers on employers, thereby committing the same mistake as all who use that argument. They do not realize that FEP laws do not say that you must hire someone, but rather, that you must not discriminate "against" certain persons. If the employer were to ask how many of a certain group, be they Negroes, Jews or older persons he should hire under a new FEP law, the answer should be that he should hire all those who were best qualified for the jobs that open up.[130] If none of them are the best qualified for his particular need, then he should not hire any. Let ability be the test, not racial or religious designations, nor age brackets.

While they probably mean well, it is submitted that the practice of the unions in the building construction industry is not the proper answer to the

[128] H. R. RES. 80, 85th Cong. 1st Sess. (1957). H. R.s 44, 3408 and 3415 deal with housing, health and other matters.

[129] Note, *Age Discrimination in Employment: An FEPC Misfit*, 61 YALE L. J. 574 (1952).

[130] Note, 24 N. Y. U. L. REV. 398 (1949).

problem. They are currently following the practice of negotiating collective bargaining agreements with "ratio clauses" which provide that a pertain ratio of the work force must be made up of men past middle age.[131] This form of compulsion, ignores individual capabilities as much as the practice of setting arbitrary age limits on jobs and refusing to consider all applicants who exceed them.

While under such a ratio clause, the contractor may be able to fill his employee needs with workers who are best qualified for each particular job and by a happy circumstance the requisite number happen to be past middle age; he may, on the other hand, be forced to hire older workers who are not the best qualified for the job, just so that he can meet the required ratio.

12. Conclusion

As the Council of State Governments has recommended,[132] states should enact laws banning discrimination because of age, just as they have for race, religion, color, ancestry and national origin.

The point is well taken that,

> "No matter how much we would like to make youth eternal, we cannot. Inevitably, if we are fortunate, old age arrives. This problem confronts all of us. The only solution is to hire the older worker and profit from his production." [133]

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[131] U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. NO. 1199-1, OLDER WORKERS UNDER COLLECTIVE BARGAINING 6 (1956).

[132] FEDERAL AND STATE ACTIVITIES, *supra* note 113 at 248.

[133] U.S. DEPT. OF LABOR TODAY, *supra* note 114 at 42.