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Cognitive Decline and the Workplace

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COGNITIVE DECLINE AND THE WORKPLACE

Sharona Hoffman[†]

Cognitive decline will increasingly become a workplace concern because of three intersecting trends. First, the American population is aging. In 2019, 16.5 percent of the population, or fifty-four million people, were age 65 and over, and the number is expected to increase to seventy-eight million by 2025. Dementia is not uncommon among older adults, and by the age of eighty-five, between twenty-five and fifty percent of individuals suffer from this condition. Second, individuals are postponing retirement and prolonging their working lives. For example, about a quarter of physicians are over sixty-five, as are fifteen percent of attorneys. The average age of federal judges is sixty-nine. Third, a variety of technologies, such as PET scans, spinal taps, genetic tests, and even blood tests now enable physicians to detect potential signs of dementia long before symptoms emerge. Employers may well be tempted to pursue these diagnostic tools because cognitive decline can cause a multitude of complex challenges in the workplace, threatening productivity, workplace morale, and public safety.

The question of how to handle cognitive decline in the workforce has received very limited attention in the legal literature. This Article strives to treat the subject in a balanced way, considering the interests and difficulties faced by all stakeholders: employers, workers, and the public. It examines a variety of strategies that employers could implement, including mandatory retirement ages, mandatory cognitive testing for older employees or all employees, testing for dementia biomarkers, or an approach of individualized assessment. It assesses these approaches in light of the relevant federal laws that prohibit age, disability, and disparate impact discrimination and suggests necessary statutory revisions. The Article concludes with detailed recommendations to help employers, employees, and professional associations appropriately manage this very sensitive matter.

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INTRODUCTION

Dr. Michael Stern, a sixty-nine years old chief psychologist at a hospital, showed startling signs of job performance difficulties.¹ Coworkers reported that he had severe memory problems and forgot appointments, meetings, and treatment pre-approval procedures.² He also exhibited impulsive behavior, failed to record necessary information in patient charts, and had other performance deficiencies.³ After extensive cognitive testing, Dr. Stern was found to be unfit for duty and was ultimately fired from his job.⁴

Dr. Stern is not alone. When Yale New Haven Hospital tested its physicians who were seventy and older, it found that almost thirteen percent displayed significant cognitive deficits.⁵ The problem is not limited to the medical field. University professors may become incompetent teachers and yet remain on faculties.⁶ Concerns about diminishing mental capacities have been raised with respect to judges⁷ lawyers,⁸ and federal officials,⁹ and, in truth, they are relevant to all professions.

This Article addresses the accelerating problem of cognitive decline among employees. This phenomenon can impact not only workplace productivity and morale, but also public safety. It requires careful attention from workplace experts and legal scholars. The Article strives to treat the subject in a balanced way, considering the interests and challenges faced by all stakeholders: employers, workers, professional associations, and the public.

¹ Stern v. St. Anthony's Health Center, 788 F.3d 276, 279 (7th Cir. 2015); Complaint at 2, Stern v. Saint Anthony's Health Center, No. 12-cv-785-SCW, 2013 WL 5967745 (S.D. Ill. Nov. 8, 2013) (No. 3:12cv00785).

² Stern, 788 F.3d at 280.

³ *Id.*

⁴ *Id.* at 283-84.

⁵ Leo Cooney & Thomas Balcezak, *Cognitive Testing of Older Clinicians Prior to Recredentialing*, 323 JAMA 179, 180 (2020); Tia Powell, *OK, Boomer, MD: The Rights of Aging Physicians and the Health of Our Communities*, 50 HASTINGS CENTER REPORT 3, 3 (2020).

⁶ Beverley Earle & Marianne DelPo Kulow, *The "Deeply Toxic" Damage Caused by the Abolition of Mandatory Retirement and Its Collision with Tenure in Higher Education: A Proposal for Statutory Repair*, 24 S. CAL. INTERDISCIPLINARY L. J. 369, 372 (2015) (discussing "the difficulty of removing a tenured professor for poor performance"); David M. Rabban, *The Regrettable Underenforcement of Incompetence as Cause to Dismiss Tenured Faculty*, 91 IND. L. J. 39, 39 (2015) ("Universities are extremely reluctant to dismiss tenured professors for incompetence").

⁷ Frances X. Shen, *Aging Judges*, 81 OHIO ST. L. J. 235, 257-59 (2020) (discussing concerns about the cognitive abilities of judges).

⁸ David L. Hudson, *Lawyers and Cognitive Decline: Diminished Capacity May Bring Ethics Problems for Sufferers*, ABA J. (Sept. 1, 2018), https://www.abajournal.com/magazine/article/lawyers_and_cognitive_decline_diminished_capacity_may_bring_ethics_problems.

⁹ Jalayne J. Arias et al., *Legal and Policy Challenges to Addressing Cognitive Impairment in Federal Officials*, 76 JAMA NEUROLOGY 392, 392-93 (2019).

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Older workers generally bring a wealth of experience and highly refined skills to their jobs.¹⁰ They can therefore add great strength to the workforce, mentoring, advising, leading by example, and inspiring others to emulate them.¹¹

Yet, cognitive decline will increasingly become a concern in workplaces of all types and sizes because of three intersecting trends. First, the American population is aging.¹² In 2019, 16.5 percent of the population, or fifty-four million people, were age sixty-five and over.¹³ “Baby boomers,” defined as those born between 1946 and 1964, began turning sixty-five in 2011.¹⁴ The sixty-five and older population is projected to expand to seventy-seven million by 2035 and to then constitute twenty-one percent of total U.S. residents.¹⁵ Thus, more of America’s workers will be older than in prior generations. As people age, they are more likely to develop dementia.¹⁶ By the age of eighty-five, thirty-two percent of people have Alzheimer’s dementia.¹⁷

The COVID-19 pandemic might make matters worse. Researchers have found that many survivors have long-term cognitive problems.¹⁸ They worry that such patients are at increased risk of developing Alzheimer’s disease in the future.¹⁹

¹⁰ Anothai Soonsawat et al., *Cognitively Impaired Physicians: How Do We Detect Them? How Do We Assist Them?*, 26 AM. J. GERIATRIC PSYCHIATRY 631, 632 (2018).

¹¹ Grant Freeland, *Older Workers Deserve Your Company’s Love Too*, FORBES (Feb. 10, 2020), <https://www.forbes.com/sites/grantfreeland/2020/02/10/older-workers-deserve-your-companys-love-too/?sh=744f6d3c3b2a>.

¹² Erin Duff, *Share of Old Age Population (65 years and older) in the Total U.S. Population from 1950 to 2050*, STATISTA (Sept. 28, 2020), <https://www.statista.com/statistics/457822/share-of-old-age-population-in-the-total-us-population/>; United States Census Bureau, *Older Population and Aging*, <https://www.census.gov/topics/population/older-aging.html#:~:text=According%20to%20the%20U.S.%20Census,million%20on%20July%201%2C%202019> (last visited May 10, 2021).

¹³ *Id.*

¹⁴ Jeff Hoyt, *The Baby Boomer Generation*, SENIORLIVING.ORG (Mar. 4, 2021), <https://www.seniorliving.org/life/baby-boomers/>.

¹⁵ United States Census Bureau, *The U.S. Joins Other Countries with Large Aging Populations*, <https://www.census.gov/library/stories/2018/03/graying-america.html> (updated Oct. 8, 2019).

¹⁶ See *infra*, notes 44-45 and accompanying text.

¹⁷ Alzheimer’s Association, *2020 Alzheimer’s Disease Facts and Figures*, 16 ALZHEIMER’S DEMENTIA 391, 398 (2020), <https://alz-journals.onlinelibrary.wiley.com/doi/epdf/10.1002/alz.12068>.

¹⁸ Jon Hamilton, *Doctors Worry That Memory Problems After COVID-19 May Set The Stage For Alzheimer’s*, NPR, July 26, 2021, <https://www.npr.org/sections/health-shots/2021/07/26/1019875347/doctors-worry-that-memory-problems-after-covid-19-may-set-stage-for-alzheimers?origin=NOTIFY>.

¹⁹ *Id.*

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Second, individuals are postponing retirement and prolonging their working lives.²⁰ For example, about a quarter of physicians are over sixty-five,²¹ as are fifteen percent of attorneys.²² The average age of federal judges is sixty-nine.²³

Third, emerging technologies enable clinicians to detect potential signs of dementia even before symptoms emerge.²⁴ These include positron emission tomography (PET) scans, spinal taps, blood tests, and genetic tests.²⁵ Employers may well be tempted to utilize these tools for purposes of making employment decisions.

Cognitive decline can cause a multitude of complex challenges in the workplace.²⁶ These raise a host of questions. How can employers detect deficits before the worker at issue causes any harm? How can employers determine if employees with cognitive decline can continue performing their job duties and which accommodations might help them do so? How should employers approach sensitive conversations with employees about cognitive decline? At what point should employees who are aware that they are experiencing cognitive deficits discuss their circumstances with their employers? How might such employees protect themselves from unlawful discrimination? Are there any practices and policies that employers should implement in order to detect and address cognitive decline in the workforce?

Cognitive decline is different from most other disabilities. Employees themselves may not recognize that they have developed cognitive deficits or seek confirmation from a physician.²⁷ Cognitive impairments are often slow to progress, making it challenging for workers to discern when they affect their job performance

²⁰ Harriet Edleson, *More Americans Working Past 65*, AARP (Apr. 22, 2019), <https://www.aarp.org/work/employers/info-2019/americans-working-past-65.html>; Richard McGahey, *America Needs An Older Workers' Bureau*, FORBES (Jun. 11, 2021), <https://www.forbes.com/sites/richardmgahey/2021/06/11/america-needs-an-older-workers-bureau/?sh=48a5c41e1179> (“Workers over 65 have the highest projected labor force growth rate of any age group”); Stephen Miller, *COVID-19 Upends Retirement Expectations Across Generations*, SHRM (June 4, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/coronavirus-upends-retirement-expectations-generations.aspx> (“Many were planning to work longer than previous generations, even before the pandemic”); Andrew Van Dam, *A Record Number of Folks Age 85 and Older Are Working. Here's What They're Doing*, WASH. POST (Jul. 5, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/07/05/a-record-number-of-folks-age-85-and-older-are-working-heres-what-theyre-doing/>.

²¹ Powell, *supra* note 5, at 3.

²² AMERICAN BAR ASSOCIATION, *ABA PROFILE OF THE LEGAL PROFESSION 2020* 35 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

²³ Shen, *supra* note 7, at 237.

²⁴ *See infra* Part I.C.

²⁵ *Id.*

²⁶ Carole Fleck, *Coping with Cognitive Declines at Work*, SHRM (Sept. 3, 2015), <https://www.shrm.org/hr-today/news/hr-magazine/pages/coping-with-cognitive-declines-at-work.aspx>.

²⁷ *See infra* notes 51-53 and accompanying text.

and for employers to determine when intervention is appropriate.²⁸ Conversations about potential cognitive decline can also be far more sensitive and uncomfortable than conversations about obvious physical disabilities, and they can be especially difficult with veteran employees who have performed well for many years.

Little data exist as to how employers are actually addressing cognitive decline in the workplace.²⁹ It is unclear if employers are appropriately accommodating employees with cognitive decline, are discharging them under pretexts such as budgetary constraints, or are retaining them to the possible detriment of patients, clients, or customers.³⁰

The Article proceeds as follows. Part I discusses cognitive decline, traditional cognitive testing, and the emerging technologies that enable clinicians to detect or predict potential cognitive decline. Part II assesses the concerns that cognitive decline raises in the workplace, focusing on attorneys, judges, and physicians by way of illustration. Part III explains relevant provisions of the federal anti-discrimination statutes: The Age Discrimination in Employment Act, the Americans with Disabilities Act (ADA), and the disparate impact theory under Title VII of the Civil Rights Act of 1964.³¹

Part IV analyzes these laws to determine what guidance they provide regarding employers' treatment of workers with cognitive decline. It considers a variety of policies that employers might implement. Part IV argues that employers cannot establish mandatory retirement ages absent legislation that permits doing so in particular job categories and are prohibited from requiring cognitive testing beginning at specific ages. The Article further argues against requiring all employees to undergo periodic cognitive testing. This Part also posits that conducting testing such as PET scans or blood tests before any performance problems are evident would be legally and ethically impermissible.

Part IV next turns to the interventions that employers should implement. Performance problems stemming from cognitive decline should be treated like job concerns arising from other causes and should be assessed on a case-by-case basis. If workers exhibit actual job performance difficulties that suggest cognitive deficits, employers can require them to consult health care providers about testing. Workers with cognitive disabilities are entitled to reasonable accommodations, and employers must engage with employees to identify appropriate solutions. At the

²⁸ See *infra* notes 55-59 and accompanying text.

²⁹ Fabiola Silvaggi et al., *Keeping People with Dementia or Mild Cognitive Impairment in Employment: A Literature Review on Its Determinants*, 17 INT. J. ENVIRON. RES. PUBLIC HEALTH 842, 849 (2020) (“This review points out, as a first result, the paucity of literature addressing the work ability and factors associated with job loss in people with EOD [early onset dementias], along with the absence of studies addressing the same issues in people with MCI [mild cognitive impairment].”).

³⁰ *Id.*

³¹ 29 U.S.C. §§ 621-634 (2018); 42 U.S.C. §§ 12101-12117 (2018); 42 U.S.C. § 2000e-2(k) (2018).

same time, employers have a right and often a responsibility to terminate employees who cannot perform their jobs effectively and safely even with accommodation.

Part V argues for two modifications to the ADA that are necessitated by new cognitive testing technologies. First, the statute should be revised to prohibit discrimination based on predictions of future illness. Second, it should prohibit employers from conducting preemployment testing that is not job-related.

Part VI develops recommendations for employers, employees, and professional associations. It is vital for all sectors to confront the possibility of cognitive decline and to take appropriate action. Identifying cognitive decline and responding appropriately to it can protect workers, employers, and the people they serve. Communicating openly and crafting reasonable accommodations may well enable individuals to work longer and shield employers and employees from liability associated with job performance deficiencies. Among the suggestions that this Part offers are training for managers and supervisors about dementia, inclusion of optional cognitive testing and dementia education in workplace wellness programs, and involvement of professional associations in developing guidance and support mechanisms. Part VII concludes.

I. COGNITIVE DECLINE

Cognitive decline is a complex condition that is often difficult to detect. This Part provides background information about normal aging, cognitive deterioration, and dementia. It also discusses various ways to test for cognitive decline.

A. Cognitive Decline Facts and Figures

Human brains change as they age.³² They generally shrink in volume and lose white matter integrity.³³ These alterations can impair abilities such as quantitative reasoning, speed of perception, learning, multi-tasking, planning, and decision-making.³⁴ By contrast, vocabulary and language skills normally do not weaken with age.³⁵

³² Huan Liu et al., *Aging of Cerebral White Matter*, 34 AGEING RES. REV. 64, 64 (2017); Ruth Peters, *Ageing and the Brain*, 82 POSTGRADUATE MED. J. 84, 84 (2006).

³³ Liu et al., *supra* note 32, at 66; Peters, *supra* note 32 at 84 (“the volume of the brain and/or its weight declines with age at a rate of around 5% per decade after age 40 with the actual rate of decline possibly increasing with age particularly over age 70”); Shen, *supra* note 7, at 253-54 (explaining that reduction in white matter integrity means “[d]isruptions in brain network connectivity”).

³⁴ American Psychological Association, *Memory and Aging*, <https://www.apa.org/pi/aging/memory-and-aging.pdf> (last visited May 4, 2021); Liu et al., *supra* note 32, at 66; Shen, *supra* note 7, at 253-54.

³⁵ National Institute on Aging, *How the Aging Brain Affects Thinking*, <https://www.nia.nih.gov/health/how-aging-brain-affects-thinking> (last reviewed Oct. 19, 2020).

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Aging is typically associated with memory lapses, but not all types of memory deteriorate as people get older.³⁶ Semantic memory “refers to general knowledge about the world, including concepts, facts, and beliefs,” and it does not ordinarily diminish.³⁷ By contrast, episodic memory, which refers to the ability to store information “with ‘mental tags’ about where, when and how the information was picked up,” does commonly decline.³⁸

Different people age differently.³⁹ In general, aging trajectories fall into four categories.⁴⁰ When cognitive ability is compared to functioning at the age of thirty-five, older individuals may demonstrate:

- *Super aging*, in which there is little to no cognitive decline, and mental faculties remain highly functioning even in later ages;
- *Normal aging*, in which there is some decline in cognitive performance, but not so much that it affects daily activity;
- *Mild cognitive impairment*, in which there is accelerated cognitive decline, but not rising to the level of significantly affecting daily life; and
- *Pathologic aging or dementia*, in which there is accelerated cognitive decline that does impair daily functioning.⁴¹

Approximately twenty to twenty-five percent of seniors have mild cognitive impairment (MCI).⁴² MCI progresses to dementia in about fifteen percent of cases.⁴³

As of 2021, 6.2 million Americans who were sixty-five or older (over eleven percent of seniors) were afflicted with Alzheimer’s dementia.⁴⁴ The prevalence of the disease varies by age. According to the Alzheimer’s Association, 1.72 million people between the ages of sixty-five and seventy-four have the disease, as do 2.25

³⁶ American Psychological Association, *supra* note 34.

³⁷ Eiling Yee et al., *Semantic Memory*, in THE OXFORD HANDBOOK OF COGNITIVE NEUROSCIENCE (Kevin N. Ochsner & Stephen Kosslyn eds. 2013), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199988693.001.0001/oxfordhb-9780199988693-e-023?print=pdf>; American Psychological Association, *supra* note 34.

³⁸ Peters, *supra* note 32, at 85; American Psychological Association, *supra* note 34.

³⁹ Shen, *supra* note 7, at 251.

⁴⁰ *Id.*

⁴¹ *Id.*, at 251-52.

⁴² Judith Graham, *Research Shows that the Prevalence of Dementia Has Fallen in the United States*, WASH. POST (June 16, 2018), https://www.washingtonpost.com/national/health-science/research-shows-that-the-prevalence-of-dementia-has-fallen-in-the-united-states/2018/06/15/636d61ac-6fd1-11e8-bf86-a2351b5ece99_story.html.

⁴³ Harvard Medical School, *Staving off Dementia when You Have Mild Cognitive Impairment*, HARV. HEALTH PUB. (March 30, 2021), <https://www.health.harvard.edu/staying-healthy/staving-off-dementia-when-you-have-mild-cognitive-impairment>.

⁴⁴ Alzheimer’s Association, *2021 Alzheimer’s Disease Facts and Figures*, 17 ALZHEIMER’S & DEMENTIA 3, 19 (2021), <https://www.alz.org/media/Documents/alzheimers-facts-and-figures.pdf>.

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million individuals between the ages of seventy-five and eighty-four, and 2.27 million who are eighty-five and older.⁴⁵

Moreover, Alzheimer's disease accounts for only sixty to eighty percent of dementia cases.⁴⁶ Many people suffer from dementia caused by other conditions, such as cerebrovascular disease, Lewy body disease, frontotemporal lobar degeneration (FTLD), and Parkinson's disease.⁴⁷

Some people develop dementia even before the age of sixty-five.⁴⁸ For example, sixty percent of individuals with FTLD are forty to sixty years old.⁴⁹ Others develop early-onset Alzheimer's disease, though exact figures about the younger demographic are unavailable.⁵⁰

The Mayo Clinic lists the following as signs and symptoms of dementia:

Cognitive changes

- Memory loss, which is usually noticed by someone else
- Difficulty communicating or finding words
- Difficulty with visual and spatial abilities, such as getting lost while driving
- Difficulty reasoning or problem-solving
- Difficulty handling complex tasks
- Difficulty with planning and organizing
- Difficulty with coordination and motor functions
- Confusion and disorientation

Psychological changes

- Personality changes
- Depression
- Anxiety
- Inappropriate behavior
- Paranoia
- Agitation

⁴⁵ *Id.* at 19.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 6-7.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 6.

⁵⁰ Silvaggi, *supra* note 29, at 842 ("Approximately 10–20% of people with early onset dementias (EOD) or mild cognitive impairment (MCI) are aged under 65"); Alzheimer's Association, *Younger/Early-Onset Alzheimer's*, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers/younger-early-onset> (last visited Apr. 30, 2021).

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- Hallucinations⁵¹

According to the Centers for Disease Control and Prevention, fewer than half of people with dementia receive a diagnosis from a physician.⁵² In fact, more than fifty percent of people who are worried about changes in their cognitive abilities do not share their concerns with health care providers.⁵³ Among those who are diagnosed with dementia, only thirty-five percent understand that they have the condition.⁵⁴

Dementia progresses along a continuum of phases. The well-established Global Deterioration Scale describes seven stages for assessing primary degenerative dementia.⁵⁵ They are: 1) no cognitive decline, 2) very mild cognitive decline, 3) mild cognitive decline, 4) moderate cognitive decline, 5) moderately severe cognitive decline, 6) severe cognitive decline, and 7) very severe cognitive decline.⁵⁶ Other experts identify three to five stages of dementia progression.⁵⁷

Alzheimer's disease advances at variable rates.⁵⁸ On average, following diagnosis, patients live between three and eleven years, but some survive for over twenty years.⁵⁹ Many are able to continue working, especially in the early stages of the illness.⁶⁰

Some instances of cognitive decline are caused by medical conditions that are treatable.⁶¹ Examples are thyroid problems, drug side effects, and vitamin

⁵¹ Mayo Clinic, *Dementia: Overview*, <https://www.mayoclinic.org/diseases-conditions/dementia/symptoms-causes/syc-20352013> (last visited Jun. 26, 2021).

⁵² Centers for Disease Control and Prevention, *Advancing Early Detection*, <https://www.cdc.gov/aging/healthybrain/issue-maps/early-detection.html> (last reviewed Feb. 4, 2019).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Barry Reisberg et al., *The Global Deterioration Scale for Assessment of Primary Degenerative Dementia*, 139 AM. J. PSYCHOL. 1136-39 (1982).

⁵⁶ See Geriatric Resources Inc., *Global Deterioration Scale* (Sept. 14, 2005), <https://geriatrictoolkit.missouri.edu/cog/Global-Deterioration-Scale.pdf>.

⁵⁷ See Alzheimer's Association, *Stages of Alzheimer's*, <https://www.alz.org/alzheimers-dementia/stages> (last visited May 5, 2021) (describing three stages of Alzheimer's disease dementia: early, middle, and late); Mayo Clinic Staff, *Alzheimer's Stages: How the Disease Progresses*, MAYO CLINIC (Apr. 29, 2021), <https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/in-depth/alzheimers-stages/art-20048448> (describing five stages: preclinical Alzheimer's disease, mild cognitive impairment, mild dementia, moderate dementia, and severe dementia).

⁵⁸ Mayo Clinic Staff, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ Silvaggi et al., *supra* note 29, at 849 ("support in the workplace may act as a facilitator in enabling patients' ability to carry out daily work tasks"); Fleck, *supra* note 26 ("The degree to which changes in cognitive function may impact workers' job performance varies").

⁶¹ *Cognitive Testing*, MEDLINEPLUS, <https://medlineplus.gov/lab-tests/cognitive-testing/> (last reviewed Dec. 10, 2020).

deficiencies.⁶² In these cases, cognitive deficits may significantly diminish or disappear after medical intervention.⁶³

A variety of factors may influence mental capacity in older age, including diet, exercise, childhood intelligence level, educational attainment, and engagement in intellectually stimulating activities.⁶⁴ Thus, individuals may be able to take limited steps to prevent or slow brain function deterioration.⁶⁵

B. Testing for Cognitive Decline

A large number of tools are available to assess cognitive capacities.⁶⁶ Some tools involve a few minutes of testing and are designed to identify individuals who would benefit from more comprehensive evaluations.⁶⁷ The following are a few examples:

- The *Mini-Cog* takes two to four minutes and measures short-term recall and clock drawing.
- The *Memory Impairment Screen* (MIS) takes four minutes and asks patients to place four words into four categories and then to say the words two or three minutes later.
- The *General Practitioner Assessment of Cognition* (GPCOG) is a two-to-five-minute test that includes recall and clock drawing, and, separately, a caregiver or family member interview about the patient's working memory, mental flexibility, and self-control.
- The *Montreal Cognitive Assessment* (MoCA) takes ten to fifteen minutes and assesses ability to draw a clock, abstract thinking, mental flexibility, working memory, and self-control.
- The *Saint Louis University Mental Status* (SLUMS) is an eleven-item test that takes seven minutes and includes clock drawing, recognition of figures, and other exercises to measure orientation, attention, and short-term memory.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Yuko Hara, *Seven Lifestyle Interventions Evaluated by the WHO for Preventing Cognitive Decline and Dementia*, COGNITIVE VITALITY (Aug. 14, 2019), <https://www.alzdiscovery.org/cognitive-vitality/blog/seven-lifestyle-interventions-evaluated-by-who-prevent-cognitive-decline>; Peters, *supra* note 32, at 86.

⁶⁵ Harvard Medical School, *supra* note 43.

⁶⁶ José Wagner Leonel Tavares-Júnior et al., *Cognitive Assessment Tools for Screening Older Adults with Low Levels of Education: A Critical Review*, 10 FRONTIERS IN PSYCH. 1, 3 (2019), <https://www.frontiersin.org/articles/10.3389/fpsy.2019.00878/full> (asserting that the researchers identified 44 tools).

⁶⁷ Department of Health and Human Services, Centers for Medicare and Medicaid Services, *Cognitive Assessment Tools 2* (Dec. 15, 2017), <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/pdf/Best-Practices-Dementia-Cognitive-Assessment-Tools.pdf>.

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- The Mini-Mental State Examination (MMSE) is a ten-minute test that “assesses orientation, word recall, attention, and visuospatial thinking.”⁶⁸

Various organizations offer self-assessment tools that individuals can use on their own to determine whether to seek medical attention. These include the SAGE exam,⁶⁹ an at-home version of the MMSE,⁷⁰ brief questionnaires offered by Psycom⁷¹ and the AARP,⁷² and more.⁷³

Brief cognitive assessments can yield false positives or negatives.⁷⁴ One study focused on the MMSE, MIS, and animal naming and involved 824 individuals who took all three tests.⁷⁵ It found that 35.7 percent were misclassified by at least one assessment, 13.4 percent were misclassified by at least two assessments, and 1.7 percent were misclassified by all three.⁷⁶ Thus, follow up is required for those with positive results or persistent concerns.

Thorough neuropsychological testing takes several hours and is considerably more reliable.⁷⁷ Testing typically involves a combination of some or all of the

⁶⁸ *Id.* at 3-6. Clock drawing is useful because it measures visual and spatial problems that early dementia patients commonly have and that they demonstrate by spacing numbers on the clock incorrectly. Working memory is short-term memory that enables people to accomplish tasks such as purchasing the correct items at a store. Mental flexibility enables individuals to change what they think about, moving from one matter to another.

⁶⁹ Alissa Sauer, *Self-Administered Gerocognitive Examination Promises to Detect Alzheimer's*, ALZHEIMERS.NET (Oct. 30, 2017), <https://www.alzheimers.net/1-28-15-SAGE-alzheimers-examination>.

⁷⁰ *Online, At-Home & Clinical Tests for Alzheimer's, Dementia & Aging-Related Mental Decline*, DEMENTIA CARE CENTRAL, <https://www.dementiacarecentral.com/alzheimers-online-test/> (last updated Oct. 12, 2020).

⁷¹ *Dementia Test (Self-Assessment)*, PSYCOM, <https://www.psycom.net/dementia-test/> (last updated Jun. 15, 2021).

⁷² Elizabeth Agnvall & Andy Markowitz, *Is It Normal Memory Loss or Early Dementia?*, AARP.ORG (June 9, 2020), <https://www.aarp.org/health/brain-health/info-2015/normal-memory-loss-vs-dementia-quiz.html#quest1>.

⁷³ *Id.*

⁷⁴ Jenna Payesko, *Study Finds Misclassification of Dementia by Brief Cognitive Assessments*, NEUROLOGYLIVE, Dec. 6, 2018, <https://www.neurologylive.com/view/study-finds-misclassification-dementia-brief-cognitive-assessments>; Tresa M. Roebuck-Spencer et al., *Cognitive Screening Tests Versus Comprehensive Neuropsychological Test Batteries: A National Academy of Neuropsychology Education Paper*, 32 ARCHIVES CLIN. NEUROPSYCH. 491, 493-94 (2017).

⁷⁵ Payesko, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ Roebuck-Spencer et al., *supra* note 74, at 494; Ryan W. Schroeder et al., *Neuropsychological Evaluations in Adults*, 99 AM. FAM. PHYSICIAN 101, 101 (2019); Cleveland Clinic, *What is Neuropsychology?*, <https://my.clevelandclinic.org/health/diagnostics/4893-neuropsychological-testing--assessment> (last reviewed Oct. 15, 2020) (stating that two to four hours is the typical length of neuropsychological testing, though exams can take anywhere from one to eight hours).

following: writing, drawing, answering questions, solving puzzles, and doing exercises on a computer.⁷⁸

C. Testing for Alzheimer's Disease Biomarkers

Traditionally, a reliable Alzheimer's disease diagnosis could be made only after the patient's death, through an autopsy.⁷⁹ Now, new technologies make it possible to measure certain biomarkers⁸⁰ to determine whether individuals are at high risk of developing dementia.

Scientists have discovered that brain imaging and spinal fluid tests can detect signs of Alzheimer's disease up to twenty years before symptoms manifest.⁸¹ This is because Alzheimer's disease has particular biomarkers, as described in the following text:

Alzheimer's disease is characterized by two pathological changes in the brain. One is a protein called tau while the other involves the amyloid beta peptide. Both can form clumps of aggregates that progressively accumulate in specific areas of the brain. For tau, individual units of the protein can aggregate into finely-ordered fibrillar structures facilitated by a biochemical process called phosphorylation. Throughout the disease process, amyloid beta and phosphorylated tau (p-tau) are released from the brain into cerebrospinal fluid; the amount of the released proteins are used as reliable surrogate markers for clinical diagnoses of Alzheimer's disease.⁸²

Brain imaging with PET scans, however, is expensive and rarely utilized.⁸³ Likewise, testing cerebrospinal fluid requires a lumbar puncture, which is an uncommon and costly procedure.⁸⁴

Moreover, PET scans and spinal taps do not provide any certainty about a person's future mental status. The presence of biomarkers in asymptomatic people

⁷⁸ Schroeder et al., *supra* note 77; Cleveland Clinic, *supra* note 77.

⁷⁹ Esther Landhuis, *Detecting Alzheimer's Gets Easier with a Simple Blood Test*, SCIENTIFIC AMERICAN (Feb. 4, 2021), <https://www.scientificamerican.com/article/detecting-alzheimers-gets-easier-with-a-simple-blood-test/>.

⁸⁰ A biomarker is "a characteristic that is objectively measured and evaluated as an indicator of normal biological processes, pathogenic processes or pharmacological responses to a therapeutic intervention." Ananya Mandal, *What is a Biomarker?*, NEWS MED. LIFE SCIENCES, <https://www.news-medical.net/health/What-is-a-Biomarker.aspx> (last reviewed Feb. 26, 2019).

⁸¹ *Id.*; Ron Brookmeyer et al., *Forecasting the Prevalence of Preclinical and Clinical Alzheimer's Disease in the United States*, 14 ALZHEIMER'S & DEMENTIA 121, 121 (2018); Matthew W. Lawrence & Jalayne J. Arias, *Alzheimer's Disease Biomarkers: Another Tool for FAA Pilot Screening?*, 6 J. L. BIOSCI. 85, 87 (2019).

⁸² University of Gothenburg, *New Tests Identify Early Changes in Alzheimer's Disease before Symptoms Appear*, SCIENCE DAILY (Dec. 1, 2020), <https://www.sciencedaily.com/releases/2020/12/201201203937.htm>.

⁸³ Ian Fyfe, *Tau Species has Potential for Alzheimer Disease Blood Test*, 16 NATURE REV. NEUROLOGY 521, 521 (2020).

⁸⁴ *Id.*

indicates that they are at increased risk of Alzheimer's disease but does not definitively predict that it will develop.⁸⁵

A new medical advance could make testing for biomarkers much more common and accessible. In 2020, a blood test developed by C₂N Diagnostics that measures beta-amyloid protein buildup became commercially available.⁸⁶ The blood test, called PrecivityAD, is designed for individuals who have early signs of cognitive impairment and are sixty to ninety-one years old.⁸⁷ Currently, it is not covered by insurance or Medicare, but it costs \$1,250, which is far less expensive than a PET scan, whose price tag is approximately \$5000.⁸⁸

At the same time, Swedish researchers announced that they have developed a blood test that can detect elevated levels of the tau protein as much as five years before patients exhibit Alzheimer's disease symptoms.⁸⁹ As detecting disease biomarkers becomes easier and cheaper, employers may well be tempted to try to identify applicants and employees who are at the very earliest stages of cognitive decline or who are at risk of developing the condition in the future.

Blood tests can also be used to assess individual's genetic makeup and to identify genetic variations that are associated with Alzheimer's disease.⁹⁰ Three genetic mutations are linked to early-onset Alzheimer's disease: Amyloid precursor protein (APP) on chromosome 21, Presenilin 1 (PSEN1) on chromosome 14, and Presenilin 2 (PSEN2) on chromosome 1.⁹¹ The APOE ε4 allele⁹² increases a person's chance of developing Alzheimer's disease and has also been linked to

⁸⁵ Brookmeyer et al., *supra* note 81, at 127; Lawrence & Arias, *supra* note 81, at 87.

⁸⁶ Lindsay Carlton, *Alzheimer's Blood Test Available for Purchase, But Not Yet FDA-Approved*, VERYWELL HEALTH (Dec. 7, 2020), <https://www.verywellhealth.com/first-blood-test-alzheimers-available-for-purchase-509015> (indicating that the test is not yet approved by the Food and Drug Administration); Landhuis, *supra* note 79.

⁸⁷ Landhuis, *supra* note 79.

⁸⁸ *Id.* (stating that according to C₂N, "a financial assistance program can bring out-of-pocket costs down to between \$25 and \$400 for eligible patients").

⁸⁹ Anne Lise Stranden, *A Blood Test Can Detect Alzheimer's Five Years before Symptoms Appear*, SCIENCENORWAY.NO (Feb. 11, 2021), <https://sciencenorway.no/ageing-alzheimers-dementia/a-blood-test-can-detect-alzheimers-five-years-before-symptoms-appear/1811843>.

⁹⁰ National Institute on Aging, *Alzheimer's Disease Genetics Fact Sheet*, <https://www.nia.nih.gov/health/alzheimers-disease-genetics-fact-sheet> (last reviewed Dec. 24, 2019).

⁹¹ *Id.*

⁹² An allele "is one of two or more versions of a gene." National Human Genome Research Institute, *Allele*, <https://www.genome.gov/genetics-glossary/Allele> (last visited Jun. 8, 2021).

disease onset at an earlier age.⁹³ Other genetic variants are associated with late-onset Alzheimer's disease.⁹⁴

II. WORKPLACE CONCERNS

Cognitive decline has not escaped the attention of policy makers. Federal law explicitly establishes age limitations for workers in certain public safety jobs because of concern about the physical and mental abilities of older workers.⁹⁵ For example, the law requires air traffic controllers to retire at the age of fifty-six⁹⁶ and pilots to retire at the age of sixty-five.⁹⁷ Members of the foreign service must likewise retire at the age of 65.⁹⁸ The vast majority of employers, however, must grapple with concerns about cognitive decline in the absence of mandatory retirement mandates. They must comply with anti-discrimination statutes, discussed in Part III, while also safeguarding work quality and workplace safety. This is no easy task.

A multitude of factors may induce professionals to postpone retirement.⁹⁹ Older individuals can often maintain good physical health until an advanced age.¹⁰⁰ Some feel that they will lose their identity and sense of purpose once they stop working.¹⁰¹

Many also have inadequate retirement savings and feel they must continue to work to pay their expenses.¹⁰² Thirteen percent of working people who are sixty

⁹³ National Institute on Aging, *supra* note 90 (emphasizing that “Some people with an APOE ε4 allele never get the disease, and others who develop Alzheimer's do not have any APOE ε4 alleles”); Lawrence & Arias, *supra* note 81, at 97.

⁹⁴ Mayo Clinic, *Alzheimer's Genes: Are You at Risk?*, (May 6, 2021), <https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/in-depth/alzheimers-genes/art-20046552>.

⁹⁵ Mark R. Katlic & JoAnn Coleman, *Balancing Safety with Dignity When Evaluating Aging Practitioners*, PHYSICIAN LEADERSHIP (Mar. 1, 2018), <https://www.physicianleaders.org/news/balancing-safety-with-dignity-when-evaluating-aging-practitioners> (listing the following mandatory retirement ages: Federal Bureau of Investigation agent (57), National Park Ranger (57), air traffic controller (56), lighthouse operator (55), nuclear material couriers (57), and custom/border protection officers (57)).

⁹⁶ 5 U.S. Code § 8335(a) (2018); Kate Bleckley, *NAS (National Airspace System) Human Factors Safety Research Laboratory Controller Entry/Retirement Age*, FEDERAL AVIATION ADMINISTRATION, https://www.faa.gov/data_research/research/med_humanfacs/humanfactors/nas/age/ (last modified Oct. 19, 2018).

⁹⁷ 49 U.S.C. § 44729(a) (2018).

⁹⁸ 22 USC § 4052 (2018).

⁹⁹ Robert J. Derocher, *A Gentle Landing: LAPs, Bar Associations Help Lawyers with Age-Related Cognitive Impairment*, 40 ABA BAR LEADER (May-June 2016), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/may-june/a-gentle-landing/.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

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and older have no retirement savings or pensions whatsoever.¹⁰³ One in three baby boomers have between \$0 and \$25,000 in retirement savings.¹⁰⁴ Retirees need money not only for leisure activities, but also for necessities, including health care. Fidelity Investments estimates that a sixty-five-year-old couple will need \$295,000 (in today's dollars) just to pay future medical expenses, such as deductibles, copayments, and the many costs that Medicare does not cover.¹⁰⁵

This Part focuses on three professions: legal practice, the judiciary, and medicine. In all three fields cognitive decline has garnered particular attention, likely because of the competencies they require.

A. Attorneys

Legal ethics expert Professor Peter Joy has stated that “[l]awyers suffering cognitive decline is a growing problem.”¹⁰⁶ Attorneys with cognitive deficits might not be able to analyze their cases’ strengths and weaknesses, formulate appropriate arguments, or understand opposing counsels’ arguments.¹⁰⁷ These problems, in turn, may lead to ethical misconduct, disciplinary measures, and legal malpractice claims.¹⁰⁸

Attorneys have an ethical duty to be vigilant about their colleagues’ job performance and to seek intervention when necessary.¹⁰⁹ The Model Code of Professional Conduct establishes that “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”¹¹⁰

¹⁰³ Board of Governors of the Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2018* (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>, 4.

¹⁰⁴ Northwestern Mutual, *1 in 3 Americans Have Less than \$5,000 in Retirement Savings* (May 8, 2018) <https://news.northwesternmutual.com/2018-05-08-1-In-3-Americans-Have-Less-Than-5-000-In-Retirement-Savings>.

¹⁰⁵ Fidelity Viewpoints, *How to Plan for Rising Health Care Costs* (August 3, 2020), <https://www.fidelity.com/viewpoints/personal-finance/plan-for-rising-health-care-costs#:~:text=How%20much%20is%20needed%20for,health%20care%20expenses%20in%20retirement>. Medicare does not pay for most dental, vision, and hearing care, which can be very expensive. For example, a single hearing aid can cost between \$1,000 and \$6,000. Mandy Mroz, *Hearing Aid Prices*, HEALTHY HEARING (June 4, 2021), <https://www.healthyhearing.com/help/hearing-aids/prices>; Joy Victory, *Medicare Coverage and Hearing Aids*, HEALTHY HEARING (Jun. 5, 2020), <https://www.healthyhearing.com/help/hearing-aids/medicare-cover>.

¹⁰⁶ Hudson, *supra* note 8.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; Michael N. Widener, *The Kindest Cut of All: Invoking Denny Crane, Ethical Standards and Intentional Words for Law Practice Transitions*, 2018 U. ILL. L. REV. ONLINE 242, 248-51 (2018).

¹⁰⁹ MODEL CODE OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 1983).

¹¹⁰ *Id.*

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In 2005, the American Bar Association Commission on Law and Aging and the American Psychological Association published a resource entitled “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.”¹¹¹ It includes a “Capacity Worksheet for Lawyers” to help identify signs of diminished capacity.¹¹² The American Bar Association Commission on Lawyer Assistance Program’s 2014 “Working Paper on Cognitive Impairment and Cognitive Decline” reiterated that lawyers should develop a mental checklist of “red flags” that potentially indicate a colleague can no longer practice law competently.¹¹³ State Lawyer Assistance Programs often become active in helping legal employers assess cases of potential mental impairment and intervene appropriately.¹¹⁴

B. Judges

A growing number of commentators are sounding alarms regarding cognitive decline among judges.¹¹⁵ They relate disquieting anecdotes about the job performance of sitting judges who have been diagnosed with Alzheimer’s disease.¹¹⁶ For example, Cook County Judge Valarie Turner allowed her law clerk to wear a judicial robe and hear traffic cases before being dismissed for inability to fulfill her job duties because of Alzheimer’s disease.¹¹⁷ As a second example, Judge Richard Owen, an eighty-four-year-old federal district court judge in New York, exhibited serious memory lapses and confusion during hearings and trials.¹¹⁸

There is particular concern about federal judges, who have lifetime appointments.¹¹⁹ Many older federal judges take senior status, which enables them to continue earning salaries and to work reduced workloads but to remain on the

¹¹¹ American Bar Association Commission on Law and Aging & the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

¹¹² *Id.* at 23-26.

¹¹³ ABA CoLAP Senior Lawyer Assistance Committee, *Working Paper on Cognitive Impairment and Cognitive Decline* (Apr. 11, 2014), <https://www.alabar.org/assets/2014/08/ALAP-Cognitive-Impairment-and-Decline-Intro-05-22-2015.pdf>.

¹¹⁴ Derocher, *supra* note 99; *see infra* notes 417-420 (providing further information about lawyer assistance programs).

¹¹⁵ Gayatri Devi & Kirk Daffner, *Is Old Ever Too Old? Cognitively Impaired Politicians, Judges and Physicians*, THE HILL (Apr. 14, 2021), <https://thehill.com/opinion/healthcare/547890-is-old-ever-too-old-cognitively-impaired-politicians-judges-and-physicians>; Joseph Goldstein, *Life Tenure for Federal Judges Raises Issues of Senility, Dementia*, PROPUBLICA (Jan. 18, 2011), <https://www.propublica.org/article/life-tenure-for-federal-judges-raises-issues-of-senility-dementia>; Amanda Robert, *How Can Aging Judges Know When It's Time to Hang Up the Robe?*, ABA J. (Dec. 1, 2020), <https://www.abajournal.com/magazine/article/known-when-its-time-to-hang-up-the-robe>.

¹¹⁶ Shen, *supra* note 7, at 282.

¹¹⁷ Devi & Daffner, *supra* note 115; Debra Cassens Weiss, *Judge Who Allowed Law Clerk to Rule on Traffic Cases Is Forced to Retire after Alzheimer's Diagnosis*, ABA J. (Dec. 5, 2017), https://www.abajournal.com/news/article/judge_who_allowed_law_clerk_to_rule_on_traffic_case_s_is_forced_to_retire_af.

¹¹⁸ Goldstein, *supra* note 115.

¹¹⁹ Shen, *supra* note 7, at 242.

bench indefinitely.¹²⁰ Senior status is available to those who are at least sixty-five years old and have served for a minimum of ten years and whose age and years of service add up to the number eighty.¹²¹

The Judicial Conduct and Disability Act of 1980 empowers members of the public to file complaints with the clerk of the appropriate court of appeals alleging that a federal judge is unable to perform his or her duties because of mental disability.¹²² The chief judge then determines whether the complaint warrants investigation by a special committee,¹²³ after which the circuit's judicial council may take appropriate action.¹²⁴ Special committees, however, are rarely convened, and it is even more rare for a judicial council to take formal action.¹²⁵ Most often concerns about federal judges' diminishing capacities are handled informally.¹²⁶ Mechanisms include wellness committees that provide judges with education and counseling about cognitive decline and intervention from colleagues who try to persuade the individual at issue to retire.¹²⁷ Several efforts to legislate a mandatory retirement age for federal judges have failed.¹²⁸

Unlike federal judges, state judges are often elected.¹²⁹ Other state judges are appointed by governors for a set period of time, typically between four and fifteen years.¹³⁰ Thus, many state judges are subject to some level of periodic scrutiny from voters or governors. In addition, thirty-two states and the District of Columbia have mandatory judicial retirement ages, ranging from seventy to seventy-five.¹³¹ While the average age of federal judges is sixty-nine, researchers have estimated that the average age of state judges is 59.6.¹³²

¹²⁰ *Id.* at 243.

¹²¹ *Id.*

¹²² 28 U.S.C. § 351(a) (2018); *United States Courts, FAQs: Filing a Judicial Conduct or Disability Complaint Against a Federal Judge* (June 2016), <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint>.

¹²³ 28 U.S.C. § 353(c) (2018).

¹²⁴ *Id.* § 354(a)(2)-(3).

¹²⁵ Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341, 375 (2019) (“The overwhelming majority of complaints are dismissed without the appointment of a special committee, and of the small number remaining, some are concluded based on corrective action”).

¹²⁶ Shen, *supra* note 7, at 267.

¹²⁷ *Id.* at 267-74; Robert, *supra* note 115.

¹²⁸ Shen, *supra* note 7, at 278-80.

¹²⁹ Brennan Center for Justice, *Judicial Selection: Significant Figures* (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>.

¹³⁰ *Id.*; Institute for the Advancement of the American Legal System, *FAQs: Judges in the United States* 6, https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf (last visited May 29, 2021) (explaining that in many states judges serve a short (e.g. 1-3 year) initial term before being reappointed for a full term and that in “Massachusetts, New Hampshire, and Rhode Island—judges enjoy life tenure or service to a mandatory retirement age of 70”).

¹³¹ Shen, *supra* note 7, at 275.

¹³² *Id.* at 237, 245.

C. Physicians

There is significant concern about cognitive decline in the physician workforce as well.¹³³ Dr. Tia Powell, a leading psychiatrist and bioethicist, warns of a “looming public health crisis of aging physicians.”¹³⁴ Other experts estimate that as many as twenty-eight percent of physicians aged seventy and older who have active licenses currently have mild cognitive impairment or dementia.¹³⁵ The American College of Surgeons issued a “Statement on the Aging Surgeon” in 2016 that urged surgeons to “voluntarily assess their neurocognitive function using confidential online tools” and to disclose any worrisome findings to their workplaces.¹³⁶

A well-known 2018 article published in the *American Journal of Geriatric Psychiatry* is entitled “Cognitively Impaired Physicians: How Do We Detect Them? How Do We Assist Them?”¹³⁷ The authors noted that older physicians benefit from their many years of experience.¹³⁸ However, the writers also stress that “[a]ging affects multiple domains of cognitive functioning relevant to physicians’ professional performance.”¹³⁹ The authors discuss several studies that found that older doctors’ have less successful treatment outcomes than younger clinicians.¹⁴⁰

Some medical employers have undertaken initiatives to address concerns about the job performance of aging health care providers. Yale New Haven hospital decided to require health care providers who were seventy or older and sought reappointment to its medical staff to undergo a neuropsychological assessment.¹⁴¹ From October 2016 through January of 2019, it tested 141 clinicians.¹⁴² Of these, eighteen (12.7 percent) were found to have cognitive deficits that were likely to impair their job performance.¹⁴³ All of the individuals chose to leave their practice or to move “into a closely proctored environment.”¹⁴⁴ However, the Equal Employment Opportunity Commission (EEOC) has sued Yale New Haven

¹³³ Katlic & Coleman, *supra* note 95; Powell, *supra* note 5, at 3.

¹³⁴ Powell, *supra* note 5, at 3.

¹³⁵ Erica Carbajal, *Viewpoint: 5 Strategies to Address Cognitive Impairment among Aging Physicians*, BECKER’S HOSP. REV. (Apr. 21, 2021), <https://www.beckershospitalreview.com/hospital-physician-relationships/viewpoint-5-strategies-to-address-cognitive-impairment-among-aging-physicians.html>.

¹³⁶ American College of Surgeons, *Statement on the Aging Surgeon* (Jan. 1, 2016), <https://www.facs.org/about-acs/statements/80-aging-surgeon>.

¹³⁷ Soonsawat et al., *supra* note 10.

¹³⁸ *Id.* at 632.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 633.

¹⁴¹ Cooney & Balcezak, *supra* note 5, at 179.

¹⁴² *Id.* at 180. The individuals included 125 physicians (88.7%), “5 advanced practice registered nurses, 4 dentists, 3 psychologists, 2 podiatrists, 1 physician associate, and 1 midwife.”

¹⁴³ *Id.* at 180.

¹⁴⁴ *Id.*

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Hospital in federal court for age and disability discrimination because of its testing policy.¹⁴⁵ The EEOC is the federal agency that enforces the federal employment discrimination laws.¹⁴⁶

Hartford Healthcare implemented a very similar “Late Career Practitioner Policy” for its hospitals.¹⁴⁷ Beginning at age seventy, clinicians are subject to an annual reappointment process (rather than a biannual one), which includes a medical exam, vision exam, neuropsychological testing, and performance evaluations.¹⁴⁸ A variety of other institutions across the country have established late career practitioner policies as well, though their details vary.¹⁴⁹

Some efforts to mandate cognitive testing for older physicians were short-lived. Stanford abandoned its cognitive testing requirement in 2012 in response to lobbying by its physicians but retained physical testing and peer review beginning at age 74½.¹⁵⁰ In 2014 Utah’s Intermountain Healthcare established a cognitive testing requirement for physicians over seventy, but this requirement was outlawed in 2018.¹⁵¹ Utah now prohibits employers from requiring physicians to undergo cognitive testing after a certain age “unless the test reflects nationally recognized standards adopted by the American Medical Association.”¹⁵² In 2018 The American Medical Association proposed eight guiding principles “as a basis for developing guidelines for the screening and assessment of senior/late career

¹⁴⁵ Complaint, *Equal Employment Opportunity Commission v. Yale New Haven Hospital*, No. 3:20-cv-187 (D. Conn. filed Feb. 11, 2020), <https://www.wtnh.com/wp-content/uploads/sites/100/2020/02/yale-new-haven-hospital-eeoc-lawsuit.pdf>. See *infra* Parts III.A and III.B for discussion of the Age Discrimination in Employment Act and Americans with Disabilities Act.

¹⁴⁶ U.S. Equal Employment Opportunity Commission, *What Laws Does EEOC Enforce?*, <https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce> (last visited Jul. 7, 2021).

¹⁴⁷ Hartford Healthcare, *Late Career Practitioner Policy*, <https://hartfordhospital.org/file%20library/policies/late-career-practitioner-policy.pdf> (last visited May 29, 2021).

¹⁴⁸ *Id.*

¹⁴⁹ Katlic & Coleman, *supra* note 95. They include: the Arkansas Children’s Hospital, Cooper University Hospital in New Jersey, Lifebridge Health System’s Sinai Hospital, Maryland’s Northwest Hospital, the University of Pittsburgh Medical Center, the University of Pennsylvania, Temple University in Philadelphia, and Virtua Health in New Jersey.

¹⁵⁰ *Id.*

¹⁵¹ Lola Butcher, *Doctors Are Suing over Age-Based Screening Requirements*, QUARTZ (June 25, 2020), <https://qz.com/1872984/doctors-are-suing-over-age-based-screening-requirements/>; Ben Lockhart, *Bill Advances that Would Prohibit Certain Doctor Competency Tests*, DESERT NEWS (Feb. 25, 2018), <https://www.deseret.com/2018/2/26/20640683/bill-advances-that-would-prohibit-certain-doctor-competency-tests>.

¹⁵² Physician Testing Amendments, SB 217, 2018 General Session, State of Utah.

physicians.”¹⁵³ However, the proposal was voted down in large part because of concern about ageism.¹⁵⁴

III. THE FEDERAL ANTI-DISCRIMINATION STATUTES: THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AMERICANS WITH DISABILITIES ACT, AND TITLE VII

Three federal statutes govern employers’ treatment of workers with cognitive decline. They are the Age Discrimination in Employment Act,¹⁵⁵ Title I of the Americans with Disabilities Act,¹⁵⁶ and potentially, Title VII of the Civil Rights Act of 1964.¹⁵⁷ Note that these laws apply only to individuals who are considered employees and not to those who are self-employed or independent contractors.¹⁵⁸ Many contemporary workers, including some doctors and lawyers, are not technically employees, even if they are subject to some organizational policies.¹⁵⁹ This Article focuses on employer-employee relationships. The pertinent provisions of the federal civil rights statutes that protect employees are examined in this Part. The next Part will apply these provisions to employment practices that can affect individuals with cognitive decline.

A. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) establishes that it is unlawful for employers “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”¹⁶⁰ Likewise, employers may not “limit, segregate, or classify” employees in

¹⁵³ AMA Council on Medical Education, *Report 1 of the Council on Medical Education 7* (2018), <https://services.aap.org/globalassets/sonpm/wecan/sonpm--wecanseniorphysicianscompetency.pdf>.

¹⁵⁴ Paul W. Gleason, *Physician Assessments: Ageist or Necessary?*, PSYCHIATRIC TIMES (Apr. 5, 2021), <https://www.psychiatristimes.com/view/physician-assessments-ageist-necessary>.

¹⁵⁵ 29 U.S.C. §§ 621-634 (2018).

¹⁵⁶ 42 U.S.C. §§ 12101-12117 (2018).

¹⁵⁷ 42 U.S.C. §§ 2000e-2000e-17 (2018).

¹⁵⁸ *Flannery v. Recording Industry Ass’n of America*, 354 F.3d 632, 642 (7th Cir. 2004); U.S. Equal Employment Opportunity Commission, *Coverage*, <https://www.eeoc.gov/employers/coverage-0> (last visited June 5, 2021). See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) for a list of factors that courts should consider in determining whether an individual is an employee or an independent contractor.

¹⁵⁹ American Medical Association, *AMA Analysis Shows Most Physicians Work Outside of Private Practice* (May 5, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-analysis-shows-most-physicians-work-outside-private-practice> (noting that in 2020, 50.2% of patient care physicians were employees, 44% were self-employed, and the remainder were independent contractors); Ike Devji, *Classifying ‘Independent Contractors’ in Your Medical Practice*, PHYSICIANS PRACTICE (Aug. 26, 2014), <https://www.physicianspractice.com/view/classifying-independent-contractors-your-medical-practice>; Robert W. Wood, *Even Lawyers Face Independent Contractor - Employee Disputes*, FORBES (Jun. 22, 2017), <https://www.forbes.com/sites/robertwood/2017/06/22/even-lawyers-face-independent-contractor-employee-disputes/?sh=740b08c34064>.

¹⁶⁰ 29 U.S.C. § 623(a)(1) (2018).

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ways that “would deprive or tend to deprive” them of employment opportunities or otherwise adversely affect them because of their age.¹⁶¹

Employers must comply with the ADEA if they have twenty or more employees.¹⁶² Workers are protected by the law if they are forty years of age or older.¹⁶³

The statute is understood to prohibit age-based harassment as well.¹⁶⁴ Courts have recognized that plaintiffs may prevail in a harassment suits if they are subjected to unwelcome harassment that is based on age and affects “a term, condition or privilege of employment” so long as the employer knew or should have known about the harassment and did not “take prompt remedial action.”¹⁶⁵ Persistent, derogatory comments about age can constitute unlawful harassment.¹⁶⁶

The ADEA, however, establishes certain exceptions to its anti-discrimination mandate. Employers are permitted to require individuals who have served in “bona fide executive or high policymaking” positions for at least two consecutive years to retire at the age of sixty-five under certain circumstances.¹⁶⁷ Similarly, employers may set mandatory retirement ages for firefighters and law enforcement officers in accordance with federal, state or local law.¹⁶⁸ Presumably, the ADEA exemptions for these workers are based at least partly on concern about cognitive deficits in older individuals.

In addition, the ADEA permits employers to make adverse age-based decisions with respect to employees if age is a bona fide occupational qualification [BFOQ] that is reasonably necessary for purposes of business operations.¹⁶⁹ A federal regulation explains the BFOQ standard as follows:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by

¹⁶¹ *Id.* § 623(a)(2).

¹⁶² 29 U.S.C. § 630(b) (2018).

¹⁶³ *Id.* § 631(a).

¹⁶⁴ U.S. Equal Employment Opportunity Commission, Harassment, <https://www.eeoc.gov/harassment> (last visited Jul. 9, 2021).

¹⁶⁵ *Norris v. Acadiana Concern for Aids Relief Education and Support*, 421 F.Supp.3d 399, 408 (W.D. La. 2019). *See also*, *Amini v. Rite Aid Corporation*, 819 Fed.Appx. 344, 347 (6th Cir. 2020).

¹⁶⁶ *Landucci v. State Farm Ins. Co.*, 65 F.Supp.3d 694, 709 (N.D. Cal. 2014).

¹⁶⁷ 29 U.S.C. § 631(c)(1) (2018); 29 C.F.R. § 1625.12 (2020).

¹⁶⁸ 29 U.S.C. § 623(j) (2018); 5 U.S.C. § 8335(b) (2018); U.S. Department of the Interior, *Information on Special Retirement for Firefighters and Law Enforcement Officers*, https://www.doi.gov/sites/doi.gov/files/uploads/information_on_special_retirement_for_ffleo.pdf (revised June 19, 2019).

¹⁶⁹ 29 U.S.C. § 623(f)(1) (2018).

reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.¹⁷⁰

It is noteworthy that the ADEA originally permitted colleges and universities to require tenured professors to retire at the age of 70.¹⁷¹ This exemption, however, was abandoned in 1994.¹⁷²

B. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits employers with fifteen or more employees from engaging in disability discrimination and is somewhat more complex than the ADEA.¹⁷³ Specifically, the statute bans disability-based discrimination against qualified individuals with disabilities with respect to application processes, hiring, advancement, termination, compensation, training, and “other terms, conditions, and privileges of employment.”¹⁷⁴ The terms “disability” and “qualified,” however, require further explication. The ADA also specifically addresses how and when employers may conduct medical examinations and make medical inquiries.

1. Disability

Under the ADA, individuals can be deemed to have a disability under three circumstances:

- 1) they have “a physical or mental impairment that substantially limits one or more major life activities”
- 2) they have “a record of such an impairment”
- 3) they are “regarded as having such an impairment.”¹⁷⁵

The statute clarifies the third prong of the disability definition by explaining that it applies “whether or not the impairment limits or is perceived to limit a major life activity.”¹⁷⁶ Accordingly, an employer is prohibited from discriminating against a cognitively impaired individual even if the employer believes the impairment is only mild and does not rise to the level of a mental disability.

¹⁷⁰ 29 C.F.R. § 1625.6(b) (2020).

¹⁷¹ 29 U.S.C. § 631(d) (2018).

¹⁷² Beverley Earle and Marianne DelPo Kulow, *The “Deeply Toxic” Damage Caused by the Abolition of Mandatory Retirement and Its Collision with Tenure in Higher Education: A Proposal for Statutory Repair*, 24 S. CAL. INTERDISCIPLINARY L. J. 369, 369-70 (2015).

¹⁷³ 42 U.S.C. §§ 12111(5)(A) & 12112(a) (2018).

¹⁷⁴ *Id.* § 12112(a).

¹⁷⁵ *Id.* § 12102(1).

¹⁷⁶ *Id.* § 12102(3)(A).

Transitory or minor impairments that last six months or less, such as a broken leg or flu, are not covered by the ADA.¹⁷⁷

The term “major life activities” is defined through a nonexclusive list of examples.¹⁷⁸ Among them are caring for oneself, learning, reading, concentrating, thinking, communicating, and working, all of which are relevant for people with cognitive decline. Major life activities also include major bodily functions such as brain functioning.¹⁷⁹

Episodic disabilities are explicitly covered by the ADA.¹⁸⁰ Thus, a person with cognitive decline who has good days and bad days would not be excluded from protection.

2. *Qualified*

The ADA protects only individuals who are qualified for the job in question.¹⁸¹ But employers may not simply reject or terminate workers who cannot perform all job functions because of a disability. Rather, individuals are deemed qualified if they can perform the essential functions of a job *with* or without an accommodation.¹⁸²

It follows that employers must determine what duties are essential for the job.¹⁸³ In litigation, consideration will be given to the employer’s own judgment regarding essential work functions, and employers are advised to list essential functions in job descriptions.¹⁸⁴ Individuals should not be subjected to adverse action if their disabilities limit them only in performing *marginal* job tasks because these are not of central importance to successful job performance.¹⁸⁵

3. *Direct Threat*

Employees with disabilities are not qualified for jobs in which they would pose a direct threat to themselves or others.¹⁸⁶ A “direct threat” is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”¹⁸⁷

¹⁷⁷ *Id.* § 12102(3)(B).

¹⁷⁸ *Id.* § 12102(2)(A).

¹⁷⁹ *Id.* § 12102(2)(B).

¹⁸⁰ *Id.* § 12102(4)(D).

¹⁸¹ *Id.* § 12112(a).

¹⁸² *Id.* § 12111(8).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 42 U.S.C. § 12113(b) (2018); 29 C.F.R. § 1630.2(r) (2020); U.S. Equal Employment Opportunity Commission, *Persons with Intellectual Disabilities in the Workplace and the ADA* (May 15, 2013), <https://www.eeoc.gov/laws/guidance/persons-intellectual-disabilities-workplace-and-ada#fn21>.

¹⁸⁷ 29 C.F.R. § 1630.2(r) (2020).

The determination as to whether someone would pose a direct threat in the workplace must be based on an individual assessment of medical evidence regarding the person's current (not future) abilities.¹⁸⁸ Four factors are to be considered:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.¹⁸⁹

4. Reasonable Accommodation

Employers, working together with applicants or employees with disabilities, must also determine whether they can provide a reasonable accommodation that would enable competent and safe job performance.¹⁹⁰ Examples of reasonable accommodations that might assist individuals with cognitive decline are job restructuring, adjusted work schedules, part-time work, reassignment to a different position, and modified examinations, training material, and policies.¹⁹¹

Failure to provide a reasonable accommodation to an otherwise qualified individual with a disability constitutes discrimination that is banned by the ADA.¹⁹² Employers may deny needed accommodations only if the accommodations would cause them undue hardship and thus would not be reasonable.¹⁹³

Employers should engage in an informal, interactive process with employees to identify and implement appropriate reasonable accommodations if they cannot immediately come to agreement.¹⁹⁴ An employer cannot unilaterally refuse to accommodate an employee even if the person initially requested an overly cumbersome adjustment.¹⁹⁵ Yet, given several choices, the employer can select the least burdensome accommodation that is effective.¹⁹⁶

Four factors are to be considered in determining whether an accommodation would impose an undue hardship upon an employer:

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ 42 U.S.C. § 12112(b)(5) (2018).

¹⁹¹ *Id.* § 12111(9)(B).

¹⁹² *Id.* § 12112(b)(5).

¹⁹³ *Id.*

¹⁹⁴ 29 C.F.R. § 1630.2(o)(3) (2020); U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

¹⁹⁵ U.S. Equal Employment Opportunity Commission, *supra* note 194.

¹⁹⁶ *Id.*

1. The accommodation's nature and cost;
2. The specific facility's financial resources, including the number of its employees and the impact of the accommodation on the facility's operations;
3. The employer's financial resources (if it has multiple facilities), including its number of employees and facilities; and
4. The employer's type of operation, including workforce composition, structure, and functioning and details concerning its different facilities.¹⁹⁷

5. Medical Examinations and Inquiries

The ADA establishes rules and limitations for medical inquiries and examination.¹⁹⁸ To that end, it considers three phases of employment.¹⁹⁹

First is the application stage. Before extending an offer of employment, an employer may not ask an applicant any medical questions or conduct medical examinations.²⁰⁰ Nevertheless, employers may ask applicants whether they can perform specific job tasks or ask them to demonstrate their ability to do so.²⁰¹ Thus, an employer could ask an applicant for a professor position to give a guest lecture, even if the lecture might reveal indications of cognitive decline.

Second, employers have a window of opportunity between extending an offer of employment and the worker's starting date.²⁰² At this time, employers may conduct whatever examinations they wish so long as all entering employees must undergo them.²⁰³ The only exception is genetic testing, which is prohibited by the Genetic Information Nondiscrimination Act.²⁰⁴ All other testing is permitted, presumably so that employers can determine if employees are physically and mentally qualified for the job with or without reasonable accommodations.²⁰⁵ Test results must be kept confidential, though medical information may be disclosed to supervisors for purposes of accommodation or to first aid and safety personnel for purposes of emergency treatment.²⁰⁶

¹⁹⁷ 42 U.S.C. § 12111(10)(B) (2018).

¹⁹⁸ *Id.* § 12112(d).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 12112(d)(2)(A).

²⁰¹ *Id.* § 12112(d)(2)(B).

²⁰² *Id.* § 12112(d)(3).

²⁰³ *Id.* § 12112(d)(3)(A).

²⁰⁴ *Id.* § 2000ff-1(b).

²⁰⁵ *Id.* § 12112(d)(3). See Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 KAN. L. REV. 517, 519 (2001) (arguing that at this second stage, employers should not be authorized to conduct testing that is not directly relevant to the performance of job duties).

²⁰⁶ 42 U.S.C. § 12112(d)(3)(B) (2018).

Third, after the commencement of employment, any medical inquiries or examinations must be “job-related and consistent with business necessity.”²⁰⁷ No other testing or queries are permitted unless they are part of a voluntary wellness program.²⁰⁸

The ADA establishes a confidentiality mandate with respect to medical information that is gathered during the employment period.²⁰⁹ This confidentiality provision mirrors the one that relates to health data obtained before a worker’s start date.²¹⁰ To safeguard privacy, medical data must be kept separately, in a file that is different from the employee’s general personnel file.²¹¹

C. Title VII of the Civil Rights Act of 1964

In some cases, cognitive testing may run afoul of Title VII of the Civil Rights Act of 1964 (Title VII).²¹² Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.²¹³ This prohibition includes forbidding the use of employment practices that disproportionately disadvantage workers of a particular race, color, religion, sex, or national origin unless the practice is job-related and justified by business necessity.²¹⁴

Employees can prevail in disparate impact cases without proving intent to discriminate.²¹⁵ Underlying the Title VII disparate impact theory is the premise that “some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”²¹⁶

Tests that measure cognitive ability are suspect for having a disparate impact on African Americans because of persistent scoring gaps between White and Black test-takers.²¹⁷ These differences are often attributed to socioeconomic factors such

²⁰⁷ *Id.* § 12112(d)(4)(A).

²⁰⁸ *Id.* § 12112(d)(4)(B).

²⁰⁹ *Id.* § 12112(d)(4)(C).

²¹⁰ *Id.* § 12112(d)(3)(B).

²¹¹ 29 C.F.R. § 1630.14(c)(1) (2020).

²¹² U.S. Equal Employment Opportunity Commission, *Employment Tests and Selection Procedures* (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures>.

²¹³ 42 U.S.C. 2000e-2(a) (2018).

²¹⁴ *Id.* at 2000e-2(k)(1)(A)(i).

²¹⁵ Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

²¹⁶ *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1199 (10th Cir. 2006) (citing *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991)).

²¹⁷ Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 685-86 (2011) (“black-white differences in mean scores on general mental ability tests are typically two to three times larger than differences commonly observed in job performance”); Kathy R. Neal, *EEOC Takes Aim at Target for Discriminatory Pre-Employment Tests*, MCAFEE & TAFT EMPLOYERLINC (Aug. 26, 2021), <https://www.mcafeetaft.com/eeoc-takes-aim-at-target-for-discriminatory-preemployment-tests/>.

as education, household income, and family circumstances that can hamper intellectual development, especially in children.²¹⁸

To establish the business necessity defense in the case of required testing, an employer must prove that the examination is necessary to determine if employees can perform their work safely and efficiently.²¹⁹ The test must, therefore, assess capacities that are relevant to the job at issue.²²⁰

If an employer demonstrates that a challenged practice is job-related and consistent with business necessity, the plaintiff still has an opportunity to prevail. The plaintiff may show that there is an alternative that would work well for the employer in lieu of the action that causes a disparate impact.²²¹ In the language of the Supreme Court, the plaintiff can prove that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’”²²²

The seminal Supreme Court disparate impact decision in the 1971 *Griggs v. Duke Power Co.* case involved testing of employees.²²³ *Griggs* was a class action in which African-American laborers successfully challenged an employer’s requirement of a high school diploma or passing two standardized aptitude tests for purposes of being hired or transferring to a better job.²²⁴ The Supreme Court ruled against the employer because it could not prove that the requirements were related to satisfactory job performance, and both disproportionately disqualified African Americans.²²⁵

IV. APPLYING THE LAW: WHAT EMPLOYERS CAN AND CANNOT DO

Employers must consider a complex body of statutory and regulatory provisions in formulating their approach to workers with suspected or diagnosed cognitive decline.²²⁶ Although dozens of judicial decisions involve individuals with chronic diseases or traumatic injuries that cause cognitive problems, very few address age-related cognitive deficits, which are the subject of this Article.²²⁷ This

²¹⁸ See Jonathan M. Cottrell & Daniel A. Newman, *Explaining the Black–White Gap in Cognitive Test Scores: Toward a Theory of Adverse Impact*, 100 J. APPLIED PSYCH. 1713, 1713 (2015).

²¹⁹ U.S. Equal Employment Opportunity Commission, *supra* note 212.

²²⁰ *Id.*

²²¹ 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2018).

²²² *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

²²³ 401 U.S. 424 (1971); *Pippin*, 440 F.3d at 1199.

²²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971). The two tests were “the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test.” *Id.* at 428.

²²⁵ *Id.* at 428, 436.

²²⁶ See *supra* Part III.

²²⁷ Westlaw and Lexis searches identified the following cases as addressing age-related cognitive decline: *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997); *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276 (7th Cir. 2015); *Gauthier v. Eastern Oregon Correctional Institution*, No. 04-290-HA, 2005 WL 8176974 (D. Oregon Jul. 26, 2005); *Spinelli v. City of New York*, Law Dep't, 3-CV-

Part assesses several potential strategies that employers may consider. It analyzes the law to determine what it permits and forbids employers to do to address concerns about workers' changing intellectual capacities.

A. Mandatory Retirement

Employers generally may not institute mandatory retirement ages.²²⁸ Requiring individuals to retire at a particular age regardless of their ability to continue to perform their job duties would violate the ADEA.²²⁹

Indeed, many older workers are physically and mentally fit to continue working and benefit from far more years of experience than younger employees.²³⁰ Mandatory retirement policies are thus overinclusive and eliminate many highly competent individuals from the workforce. At the same time, they can be underinclusive because some individuals suffer cognitive decline before they reach retirement age.²³¹

The ADEA establishes exceptions to the compulsory retirement ban for workers who are firefighters, law enforcement officers, and bona fide executives or high policymakers.²³² Other federal laws establish further allowances for mandatory retirement ages in jobs that involve public safety, such as air traffic controllers, pilots, and members of the foreign service.²³³ These very specific carve-outs are consistent with the ADEA's BFOQ provision, which, when necessary, allows employers to promote public safety at the expense of age limits.²³⁴

In addition, thirty-two states and the District of Columbia legislate age restrictions for judicial service.²³⁵ In *Gregory v. Ashcroft*, Missouri judges challenged their state constitution's mandatory retirement provision.²³⁶ The Supreme Court held that the requirement that judges retire at age 70 does not violate the ADEA.²³⁷ The Court cited the ADEA's definition of the term "employee" as justification.²³⁸ The law states that "the term 'employee' shall not include any

07112 (GBD)(SN), 2016 U.S. Dist. LEXIS 117860 (S.D. N.Y. Aug. 30, 2016); *Urtnowski v. Unisys Corp.*, No. SACV 07-714 AG (MLGx), 2008 WL 11338024 (C.D. Calif. Nov. 24, 2008); *Valenzisi v. Stamford Bd. of Educ.*, 948 F.Supp. 2d 227 (D. Conn. 2013).

²²⁸ Shaleen Morales Saldarriaga, *Flaming Fifties and Beyond: An International Comparison of Age Discrimination Laws and How the United States Could Improve the Laws for Elderly Women*, 25 *ELDER L. J.* 101, 124-26 (2017) (discussing mandatory retirement).

²²⁹ 29 U.S.C. § 623(a)(1) (2018).

²³⁰ Soonsawat et al., *supra* note 10, at 632.

²³¹ *See supra* notes 48-50 and accompanying text.

²³² 29 U.S.C. §§ 623(i), 631(c)(1) (2018); 29 C.F.R. § 1625.12 (2020).

²³³ 5 U.S.C. Code § 8335(a) (2018); 49 U.S.C. § 44729(a) (2018); 22 U.S.C. § 4052 (2018).

²³⁴ *See supra* notes 169-170 and accompanying text; *EEOC v. Exxon Mobile Corp.*, 560 F. App'x 282, 283 (5th Cir. 2014) (affirming dismissal of a challenge to Exxon's policy requiring corporate pilots to retire at age 60 and accepting Exxon's BFOQ affirmative defense).

²³⁵ Shen, *supra* note 7, at 275.

²³⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 455 (1991).

²³⁷ *Id.* at 467.

²³⁸ 29 U.S.C. § 630(f) (2018).

person elected to public office in any State or political subdivision ... or an appointee on the policymaking level....”²³⁹ The Supreme Court determined that this language is broad enough to include judges.²⁴⁰ The Court further found that the retirement mandate did not violate the Equal Protection clause under the “rational basis” review standard for age-related classifications.²⁴¹

If none of the ADEA’s specific exemptions apply, the statute’s anti-discrimination mandate must govern employers’ retention and termination decisions.²⁴² Thus, the majority of employers cannot institute forced retirement policies.

B. Mandatory Cognitive Testing Beginning at a Particular Age

Several medical employers have instituted cognitive testing requirements for individuals who reach particular ages (often age seventy).²⁴³ Because of concern about patient welfare, such policies may appear to be sound.²⁴⁴ Non-medical employers may find this approach appealing as well, but it is legally impermissible. While it might be tempting to argue that the law should be altered to allow for more liberal testing policies, its restrictions are logically and ethically sensible.

In 2020 the EEOC sued Yale New Haven Hospital because of its policy requiring clinicians who are seventy or older to undergo neuropsychological screening for purposes of initial appointment or reappointment.²⁴⁵ The EEOC asserts that the Late Career Practitioner Policy violates both the ADEA and the ADA, and the agency is right to challenge the practice.²⁴⁶

1. ADEA Violation

When older workers must endure testing that younger workers are spared merely because they have reached a particular birthday, they are subjected to discrimination with respect to their “terms, conditions, or privileges of employment” because of their age.²⁴⁷ Working without being suspected of having cognitive deficits and without being tested for them is a condition or privilege of

²³⁹ *Id.*

²⁴⁰ Gregory, 501 U.S. at 467 (“In the context of a statute that plainly excludes most important state public officials, “appointee on the policymaking level” is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.”).

²⁴¹ *Id.* at 470, 473.

²⁴² U.S. Equal Employment Opportunity Commission, *EEOC Informal Discussion Letter* (Dec. 18, 2017), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-318>.

²⁴³ See *supra* notes 141-151.

²⁴⁴ California Public Protection and Physician Health, Inc., *Assessing Late-Career Practitioners: Policies and Procedures for Age-based Screening* 5-6 (2015), <https://www.cppph.org/wp-content/uploads/2015/07/assessing-late-career-practitioners-adopted-by-cppph-changes-6-10-151.pdf> (discussing the clinical case for assessing late-career practitioners).

²⁴⁵ Complaint, *supra* note 145, at 5-6.

²⁴⁶ *Id.* at 6-8. See also, Ilene N. Moore, *Screening Older Physicians for Cognitive Impairment: Justifiable or Discriminatory?*, 28 HEALTH MATRIX 95, 99-100 (2018).

²⁴⁷ 29 U.S.C. § 623(a)(1) (2018).

employment. Furthermore, when an employer scrutinizes older employees who are performing adequately in order to identify cognitive deficits but does not do the same with younger people, it can be said “to limit, segregate, or classify ... employees” in ways that could deprive them “of employment opportunities or otherwise adversely affect” their status as employees because of their age.²⁴⁸

The ADEA’s BFOQ provision would not save an employer’s mandatory testing policy. The BFOQ affirmative defense applies when age itself “is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”²⁴⁹ In the case of cognitive testing, the employer is not in truth concerned with the worker’s age, but rather with his or her mental acuity. The employer intends to retain older employees, so long as they are not cognitively impaired, and thus the age-based assessment policy would fall outside the boundaries of the BFOQ defense.

The ADEA further permits employers to treat older individuals differently “where the differentiation is based on reasonable factors other than age.”²⁵⁰ But when an employer tests older but not younger employees, the distinction is quite clearly based solely on age, rendering this provision inapplicable as well.

2. ADA Violation

The ADA permits employers to subject existing employees to medical queries or examinations only if those tests or inquiries are “job-related and consistent with business necessity.”²⁵¹ Testing all employees in a certain age group regardless of whether they exhibit any job performance problems is not justified by business necessity. Such testing would not reveal whether individual can complete job tasks competently, because persons with lower scores can remain effective workers.²⁵²

Some employers may argue that a high level of mental acuity itself is vital for job performance because of the intellectually challenging nature of the work. But if that is the case, it would defy reason to test only workers who are beyond a certain age.²⁵³ Testing only older employees would leave deficits that develop at younger ages undetected.²⁵⁴

Instead, employers should evaluate all employees’ work quality periodically and assess whether low performers require consultation with a medical expert.²⁵⁵

²⁴⁸ *Id.* at § 623(a)(2).

²⁴⁹ 29 U.S.C. § 623(f)(1) (2018).

²⁵⁰ *Id.*

²⁵¹ 42 U.S.C. §12112(d)(4)(A) (2018).

²⁵² *See supra* note 60 and accompanying text.

²⁵³ *See infra* Part IV.C. for discussion of cognitive testing for all employees.

²⁵⁴ *See supra* notes 48-50 and accompanying text.

²⁵⁵ Stern, 788 F.3d at 294 (“We have held that an employer does not have to wait for a disabled employee in a sensitive position to injure someone before it can evaluate the employee’s fitness for duty”). *See infra* Part IV.E for discussion of permitted employer conduct.

Testing employees purely because of their age does not comport with the ADA's medical inquiry rules and, more importantly, does not serve employers' need for a competent workforce.²⁵⁶

3. *Disparate Impact Concerns*

Cognitive testing of older employees may not only violate the ADEA and ADA but may also have a disparate impact on members of minority groups in violation of Title VII.²⁵⁷ According to experts, African American individuals, on average, achieve lower scores than whites on cognitive tests.²⁵⁸ These differences may be explained by socioeconomic factors such as educational background, reading ability, and financial wellbeing and may not reflect one's ability to think or perform one's job.²⁵⁹ Thus, if routine testing is conducted, Black employees may be disproportionately and incorrectly identified as having cognitive deficits and consequently be subjected to adverse employment actions.

Cognitive tests have not escaped the attention of the EEOC. In *EEOC v. Ford Motor Co. and United Automobile Workers of America*, the EEOC sued defendants on behalf of a nationwide class of African Americans who failed to obtain positions in an apprenticeship program after taking a cognitive test.²⁶⁰ The test in question was the Apprenticeship Training Selection System (ATSS), a written cognitive test that evaluated verbal, numerical, and spatial reasoning in order to measure mechanical aptitude.²⁶¹ The ATSS disproportionately disadvantaged African American applicants and thus, the EEOC asserted that it violated Title VII's disparate impact provision.²⁶² According to the EEOC, Ford continued to use the ATSS even after the development of less discriminatory selection procedures that would serve its needs.²⁶³ The parties settled the case for \$8.55 million in monetary damages, and Ford agreed to replace the ATSS with a selection procedure that would be designed by a jointly chosen industrial psychologist.²⁶⁴

²⁵⁶ 42 U.S.C. §12112(d)(4)(A) (2018).

²⁵⁷ U.S. Equal Employment Opportunity Commission, *supra* note 212.

²⁵⁸ Kala M. Mehta et al., *Black and White Differences in Cognitive Function Test Scores: What Explains the Difference?*, 52 J. AM. GERIATR. SOC. 2120, 2120 (2004); Jennifer Weuve et al., *Cognitive Aging in Black and White Americans: Cognition, Cognitive Decline, and Incidence of Alzheimer Disease Dementia*, 29 EPIDEMIOLOGY 151, 151 (2018).

²⁵⁹ Mehta et al., *supra* note 258, at 2124. The study notes that "after adjustment for socioeconomic factors and other variables, the difference in scores between blacks and whites decreased substantially." *Id.* at 2126. See also Weuve et al., *supra* note 258, at 155 ("Educational attainment, as measured by years of education, appeared to mediate a substantial fraction but not the totality of the racial differences in baseline cognitive score").

²⁶⁰ *EEOC v. Ford Motor Co. and United Automobile Workers of America*, JVR No. 806671, 2004 WL 3951846 (S.D. Ohio 2004).

²⁶¹ U.S. Equal Employment Opportunity Commission, *supra* note 257.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*; U.S. Equal Employment Opportunity Commission, *EEOC, Ford, UAW, Class Members Voice Approval of Landmark Race Discrimination Settlement* (Jun 1, 2005),

Employers who require all of their older employees to undergo cognitive testing may face claims of disparate impact if they take any action based on those scores. Even if they do not, African American employees may claim that they were subjected to discrimination with respect to the “terms, conditions, or privileges of employment” because test outcomes that suggest cognitive impairment caused them stress and unhappiness.²⁶⁵ To defend against those claims, employers would have to prove that the particular examination is necessary to maintain a competent workforce and that no less discriminatory alternative exists.²⁶⁶ As argued above, the business necessity defense will fail with respect to cognitive testing of older employees.²⁶⁷

4. *Privacy Concerns*

Employers who require cognitive examinations will be obligated to ensure the results’ confidentiality.²⁶⁸ They would be able to disclose testing outcome data only to appropriate personnel for purposes of first aid, ADA compliance investigations, and making employment decisions, such as providing reasonable accommodations.²⁶⁹ The well-known HIPAA Privacy Rule does not apply to employers. It applies only to health plans, health care clearinghouses, health care providers who transmit health information electronically for purposes of HIPAA-relevant transactions, and their business associates.²⁷⁰ The employer’s duty of confidentiality arises instead from the ADA.²⁷¹

Despite the statutory privacy protection, employees might distrust employers and fear that their results will be improperly disclosed.²⁷² They may also fear that they will be terminated or demoted at the first sign of any deficit, even if they can still perform their jobs well. It may be tempting for employers to select them for layoffs, claiming financial hardship or to eliminate their positions, claiming that they are no longer needed.

To reassure workers about privacy, employers might turn to a different strategy. Employers could instruct older employees to undergo testing but not require them

<https://www.eeoc.gov/newsroom/eeoc-ford-uaw-class-members-voice-approval-landmark-race-discrimination-settlement-1>.

²⁶⁵ 42 U.S.C. § 2000e-2(a)(1) (2018); Jill Jin, *Screening for Cognitive Impairment in Older Adults*, 323 JAMA 800, 800 (2020) (“One potential harm is that labeling a person with a progressive illness (for which there is little treatment) may cause stress, depression, and lower quality of life.”).

²⁶⁶ See *supra* notes 214-222 and accompanying text.

²⁶⁷ See *supra* Parts IV.B.2 and IV.B.3.

²⁶⁸ See *supra* notes 209-211 and accompanying text.

²⁶⁹ 29 CFR § 1630.14(c) (2020).

²⁷⁰ 45 C.F.R. §§ 160.102-160.103 (2020); 42 U.S.C. §17934 (2018).

²⁷¹ See *supra* notes 209-211 and accompanying text.

²⁷² Morris B. Hoffman, *A Commentary on Professor Shen’s Aging Judges*, 81 OHIO ST. L.J. 167, 175 (2020) (discussing cognitive testing of judges and asserting that “[n]o one knows better than judges that there is no such thing as inviolate privacy”).

to disclose their outcomes. In doing so, employers would rely on low scoring individuals to retire on their own initiative or to request accommodations.²⁷³ Under such a system, the employer could ask for proof that an examination took place but would never obtain test results. Thus, it would not be vulnerable to accusations of privacy violations or discrimination. However, employers would have to trust employees to react appropriately to their scores and to approach the employer when test outcomes raise concern about work abilities.²⁷⁴ It may well be too much to expect all employees to do so.²⁷⁵ Those with true cognitive deficits may not be able to fully comprehend their condition or to have a reasonable conversation with their employer about it. Others will be in denial or will be unwilling to risk demotion or job loss.

C. Mandatory Cognitive Testing for All Employees

To avoid violating the ADEA, employers might test all workers, regardless of age, for cognitive impairment, perhaps at regular intervals. Professor Francis Shen has suggested that this approach be applied to judges.²⁷⁶ He proposes that state and federal judges be required to take cognitive health assessments at least every five years so that they can determine if they are suffering from cognitive decline and need to step down.²⁷⁷ While the assessments would be mandatory, their results would be confidential and available only to the individual tested.²⁷⁸ Mandatory, periodic testing of all employees, however, may be no less problematic than testing only older employees.

1. ADA and Disparate Impact Concerns

For most jobs, employers would likely have significant difficulty proving that testing all employees for cognitive decline, regardless of whether they have any work difficulties, is truly consistent with business necessity, as required by the ADA.²⁷⁹ According to the EEOC, “[i]n most instances, an employer's need to make disability-related inquiries or require medical examinations will be triggered by evidence of **current** performance problems or observable evidence suggesting that a particular employee will pose a direct threat.”²⁸⁰

²⁷³ See Shen, *supra* note 7, at 238.

²⁷⁴ Hoffman, *supra* note 272, at 180.

²⁷⁵ *Id.*

²⁷⁶ Shen, *supra* note 7, at 238.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ 42 U.S.C. § 12112(d)(4)(A) (2018).

²⁸⁰ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)* (July 26, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

Employers may be permitted to deviate from this principle with respect to jobs that affect public safety.²⁸¹ Employers may routinely test workers such as firefighters and police officers but only so long as the examinations are “narrowly tailored to address specific job-related concerns.”²⁸² It is doubtful that general cognitive tests administered to the entire workforce meet the standard of carefully targeting particular work performance problems.

One notable exception is the Federal Aviation Administration’s requirement that pilots undergo neuropsychological assessments for possible neurocognitive impairments.²⁸³ This federal agency policy is justifiable because pilots are responsible for the lives of hundreds of people every day, and even small lapses in concentration or mental capacity can be catastrophic.

Otherwise, employers with broad testing requirement may violate not only the ADA, but also Title VII. Testing all workers regardless of age raises even greater disparate impact concerns than an age-based policy because larger numbers of workers would be involved. Furthermore, if testing does have a disparate impact on African American workers, employers would find it very difficult to establish that testing all employees, regardless of age and job performance, is justified by business necessity.²⁸⁴

Consequently, as a rule, employers should seek neuropsychological testing only for individuals who exhibit job performance problems that may be associated with cognitive deficits. It is not impossible that a court would support a policy of testing all individuals whose work is intellectually challenging and of high impact, such as physicians, just as exceptions are made for individuals in public safety positions.²⁸⁵ Yet, even a court that is sympathetic to employers should insist that the tests be validated, avoid disparate impact to the extent possible, and be tailored to the relevant job skills to meet the business necessity standard.²⁸⁶

2. Cost and Employee Buy-In

Testing all employees may be prohibitively expensive for employers.²⁸⁷ Thorough testing that lasts several hours costs hundreds of dollars.²⁸⁸ Private and

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Federal Aviation Administration, Guide for Aviation Medical Examiners, https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/dec_cons/disease_prot/neurocog/ (last modified Jan. 17, 2020).

²⁸⁴ See *supra* notes 214, 219 and accompanying text.

²⁸⁵ See *supra* notes 281-283 and accompanying text.

²⁸⁶ See *supra* notes 219-220 and accompanying text.

²⁸⁷ Hoffman, *supra* note 272, at 177.

²⁸⁸ See *id.* at 177 (citing \$1000 as the price for a “bare bones cognitive battery”); Etheridge Psychology, *Counseling and Psychological Testing*, <https://www.etheridgepsychology.com/price-list> (last visited June 4, 2021) (advertising neuropsychological evaluation for \$900.00); UCLA Psychology, *Psychological Assessment and Testing*, [36](https://www.psych.ucla.edu/centers-</p></div><div data-bbox=)

public health insurers are unlikely to cover the cost of testing individuals who have no symptoms that signal a need for testing.²⁸⁹ Insurers generally cover only “medically necessary” treatments and diagnostic procedures.²⁹⁰ Thus, employers would have to bear the cost.²⁹¹

In addition, employees are likely to be unenthusiastic and even resentful of a testing requirement, especially one that applies at any age.²⁹² They may view testing as cumbersome, stressful, and demeaning. They may also feel that their employers do not trust and value them and are continually looking for evidence of mental deficits.

One final concern bears repeating. Many employees may worry about the privacy of their test results and about what adverse actions they may trigger.²⁹³ Concern could deepen as employers obtain increasing amounts of information through repeated testing. Employers will learn if there is any deviation from workers’ initial test scores and may subject them to special scrutiny or seek to eliminate them from the workforce even if they are still performing well.

D. Testing Employees for Alzheimer’s Disease Biomarkers

New technologies enable clinicians to measure Alzheimer’s disease biomarkers to determine whether individuals are at high risk of developing dementia.²⁹⁴ These include PET scans, spinal taps, blood tests, and genetic tests.²⁹⁵ This section will assess the degree to which the law restricts the use of such tools.

1. ADA Constraints

The ADA generally does not permit employers to subject employees to predictive testing.²⁹⁶ All testing must be “job-related and consistent with business necessity,” which means that it must relate to individuals’ current ability to perform

[programs/clinic/psychological-assessment-testing](#) (last visited June 4, 2021) (advertising 3-hour dementia screening for \$350);

²⁸⁹ Mark Hall & Gerard Anderson, *Health Insurers’ Assessment of Medical Necessity*, 140 U. PA. L. REV. 1637, 1640-41 (1992) (stating that terms such as “medical necessity” determine health insurance coverage); Hoffman, *supra* note 272, at 178; Christopher Melton, *Medical Necessity and False Claims: The Intersection of Clinical Decisionmaking and Liability*, 22 J. HEALTH CARE COMPLIANCE 23, 24 (2020) (“the medical necessity of billed services is an explicit condition for their payment by the government”).

²⁹⁰ Hall & Anderson, *supra* note 289, at 1640-41.

²⁹¹ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA* (Jul. 27, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#12>.

²⁹² Hoffman, *supra* note 272, at 174 (“No one likes to be told he or she must submit to a medical examination, let alone a mental capacity examination”).

²⁹³ *See supra* Part IV.B.4.

²⁹⁴ *See supra* Part I.C.

²⁹⁵ *Id.*

²⁹⁶ 42 U.S.C. § 12112(d)(4)(A) (2018). *See supra* note 280 and accompanying text.

the job, not to how their ability might be transformed in the future.²⁹⁷ Seeking information about individuals' risks of developing cognitive decline in later years is not justified by business necessity because there is no certainty that deficits will actually develop or that people will still be working for the employer if cognitive problems do arise.²⁹⁸ Furthermore, recall that under the ADA, a worker poses a direct threat only in cases of a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."²⁹⁹ No such risk exists before even the earliest cognitive symptoms are evident, and thus predictive testing should be impermissible.

The EEOC has explained that employers may test workers in public safety jobs periodically to ensure that they are not at imminent risk of health problems such as heart attacks or strokes that could impede their job performance in a manner that endangers the people they serve.³⁰⁰ Such tests, however, are different from the Alzheimer's disease biomarker tests at issue in this section. Discovering that a police officer's blood pressure reading raises concerns about an imminent stroke could directly benefit the public.³⁰¹ By contrast, determining that it is possible that a person will suffer cognitive decline at some point in the future provides no conclusive information regarding immediate hazards. Instead, employers should remain vigilant about their workers' job performance and detect cognitive difficulties if they emerge.

2. *The Limits of the ADA*

It is important to understand that although employers are precluded from seeking predictive information from employees, the law does not forbid them to use the data if they come to possess it.³⁰² For example, if an employee volunteers that she underwent testing that revealed beta-amyloid protein buildup, no ADA provision prevents the employer from terminating her based on concern that she will develop a mental disability in the future.³⁰³ The ADA protects individuals who have current or past disabilities or who are perceived as having a current physical or mental impairment.³⁰⁴ But, as I have argued in prior work, the law does not cover circumstances in which an employer believes the person is currently healthy

²⁹⁷ *Id.*; U.S. Equal Employment Opportunity Commission, *supra* note 280.

²⁹⁸ See *supra* notes 81, 85, 89 and accompanying text (explaining that some tests are designed to detect Alzheimer's disease biomarkers many years before symptoms emerge and that the presence of such biomarkers does not guarantee that the disease will manifest).

²⁹⁹ 29 C.F.R. §1630.2(r) (2020). See *supra* Part III.B.3 for discussion of direct threat.

³⁰⁰ U.S. Equal Employment Opportunity Commission, *supra* note 280.

³⁰¹ *Id.*

³⁰² Sharon Hoffman, *Big Data and the Americans with Disabilities Act*, 68 HASTINGS L. J. 777, 779 (2017).

³⁰³ *Id.*

³⁰⁴ 42 U.S.C. § 12102(1) (2018). See *supra* Part III.B.1 (discussing the definition of "disability" in the ADA).

but might develop a disability in the future.³⁰⁵ This legislative gap is becoming increasingly worrisome as the development of predictive tools accelerates.³⁰⁶

Moreover, there are two circumstances in which employers would be authorized to test for Alzheimer's disease biomarkers. Employers who believe, based on concrete evidence, that an employee is suffering from cognitive problems that are adversely affecting job performance should be able to require physiological testing, such as the PrecivityAD blood test, to determine if a worker currently has signs of Alzheimer's disease.³⁰⁷ However, the available diagnostic tools are extremely expensive, and employers are more likely to rely on cognitive testing instead.³⁰⁸ In addition, the ADA permits biomarker testing during the interval between receipt of a bona fide job offer and the worker's start date, so long as all accepted applicants undergo the same testing.³⁰⁹ The tests' current cost and their predictive uncertainties, however, makes it unlikely that many employers will pursue this option for the time being.³¹⁰

3. *The Genetic Information Nondiscrimination Act*

As for genetic testing, it is out of the question for employers because of the Genetic Information Nondiscrimination Act (GINA).³¹¹ This law bars employers from engaging in genetic-based discrimination.³¹² Employers cannot seek genetic information about workers through testing or otherwise.³¹³ Moreover, employers are barred from using any genetic data they happen to possess to demote, terminate, or otherwise discriminate against employees.³¹⁴ Thus, an employer could not fire a worker because the individual's genetic data reveal vulnerability to future cognitive decline.³¹⁵

E. Permitted Cognitive Testing and Employment Actions

While employers are restricted with respect to medical inquiries and exams, the ADA does not forbid or even discourage testing at all times.³¹⁶ Indeed, it may be important to obtain medical evidence as to whether an individual remains qualified

³⁰⁵ Hoffman, *supra* note 302, at 779.

³⁰⁶ *Id.* at 784-86 (discussing disease prediction and the risk of employment discrimination).

³⁰⁷ *See supra* notes 86-88 and accompanying text.

³⁰⁸ *See supra* note 88 and accompanying text; Part I.B (discussing cognitive testing).

³⁰⁹ 42 U.S.C. § 12112(d)(3) (2018). *See also supra* notes 202-206 and accompanying text.

³¹⁰ *See supra* notes 85, 88 and accompanying text

³¹¹ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 and 42 U.S.C.).

³¹² 42 U.S.C. § 2000ff-1 (2018).

³¹³ 42 U.S.C. § 2000ff-1(b) (2018). Genetic information is defined as including (i) an individual's genetic tests, (ii) the genetic tests of an individual's family members, and (iii) the manifestation of a disease or disorder in an individual's family members. 42 U.S.C. §§ 2000ff (4)(A) (2018).

³¹⁴ 42 U.S.C. § 2000ff-1(a) (2018).

³¹⁵ *Id.*

³¹⁶ 42 U.S.C. § 12112(d)(4)(A) (2018).

for the job in question or will pose a direct threat in the workplace.³¹⁷ This Part examines the circumstances under which testing is lawful along with employers' obligations if testing reveals cognitive decline.

1. *Lawful Testing*

Employers may require employees who are exhibiting current job performance problems to consult a physician about neuropsychological assessment.³¹⁸ ADA jurisprudence includes numerous cases in which employers lawfully required employees to pursue cognitive testing. For example, in *Stern v. St. Anthony's Health Ctr.*, with which this Article opened, St. Anthony's required Dr. Stern to undergo a fitness for duty examination after he exhibited signs of cognitive decline.³¹⁹ Likewise, in *Duignan v. City of Chicago*, the defendant appropriately directed the plaintiff, a police officer, to undergo psychological testing because of conduct that occurred while she was in a paranoid delusional state stemming from her Huntington's disease.³²⁰

Employers can require an employee to undergo examination by a health care provider that the employer selects.³²¹ Employers need not defer to a worker's choice of clinician.³²² However, employers must pay the cost of services provided by the clinicians they choose.³²³

If testing is conducted, the selected screening tool or tools must be provably appropriate for discerning whether an individual can perform the job tasks in question.³²⁴ The cognitive abilities required for one profession may not be the same as those needed for other professions.³²⁵ In addition, not all cognitive tests are equally reliable.³²⁶ Employers must be careful to refer employees to experts who

³¹⁷ *Id.* §§ 12111(8), 12112(a), 12113(b).

³¹⁸ *See supra* note 280.

³¹⁹ 788 F.3d 276, 282 (7th Cir. 2015).

³²⁰ 275 F. Supp.3d 933, 935-36 (N.D. Ill. 2017).

³²¹ U.S. Equal Employment Opportunity Commission, *supra* note 291.

³²² *Id.*

³²³ *Id.*

³²⁴ California Public Protection and Physician Health, Inc., *supra* note 244, at 18 (noting that proper screening requires attention to the choice of the evaluator, the screening instrument(s) used, and the process the evaluator follows"); Equal Employment Opportunity Commission, *supra* note 212 ("Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used.").

³²⁵ Katrina A. Armstrong & Eileen E. Reynolds, *Opportunities and Challenges in Valuing and Evaluating Aging Physicians*, 323 JAMA 125, 126 (2020) ("research is needed to determine what assessments best predict [physicians'] clinical outcomes"); Hoffman, *supra* note 272, at 177 ("The cognitive tools required to be a stand-up comic, for example, are likely to be quite different than those required to be a judge.").

³²⁶ Shen, *supra* note 7, at 297 (discussing various assessment tools and their strengths and weaknesses); Kelvin K. F. Tsoi et al., *Cognitive Tests to Detect Dementia: A Systematic Review and Meta-Analysis*, 175 JAMA INTERNAL MED. 1450, 1455-57 (2015).

can choose suitable tests.³²⁷ As the workforce ages and employers increasingly seek cognitive testing for low performers, the testing industry may need to increase and refine its offerings so that examinations more directly relate to different work competencies.³²⁸

Employers are also permitted to conduct almost limitless examinations, including neuropsychological testing, during the window of time between extending a bona fide job offer and the commencement of employment, so long as all accepted applicants undergo the same testing.³²⁹ As I have argued in prior work, the distinction between preemployment and postemployment testing makes little sense, and there is no reason for employers to obtain information that is not illuminating as to whether individuals can perform their jobs.³³⁰ For example, employers need not know that there is some possibility that a worker will develop dementia in several years or decades.³³¹

Some employers for whom mental acuity is a priority may wish to conduct testing in order to identify existing cognitive deficits that did not become apparent during the application process. Others may wish to have baseline scores to which they could compare later scores for weak performers with suspected dementia who undergo assessments.³³² However, testing all entering employees could be very expensive for employers and could generate resentment on the part of those who are asked to take cognitive tests.³³³ Employers could also risk facing charges of disparate impact or disability discrimination if employees believe that they were disadvantaged because of their scores.³³⁴

2. Reasonable Accommodation

Testing outcomes indicating an employee has a cognitive disability that impedes job performance will trigger the employer's duty of reasonable accommodation.³³⁵ Ideally, therefore, cognitive testing should pave a path for problem solving and prolonging employees' working lives. The assessment of whether an employee can be accommodated should be based on multiple layers of information, including the individual's job performance record; conversations with

³²⁷ Shen, *supra* note 7, at 294-96 (discussing matters that should be considered in developing a cognitive testing toolbox for judges).

³²⁸ *Id.* at 291 ("To develop an effective tool for assessing capacity in the judicial brain, we need to first wrestle with the question: Capacity to do what?").

³²⁹ 42 U.S.C. § 12112(d)(3) (2018). See also *supra* notes 202-206 and accompanying text.

³³⁰ Hoffman, *supra* note 205, at 519.

³³¹ See *supra* notes 81, 89 and accompanying text.

³³² Benjamin T. Mast et al., *APA Guidelines for the Evaluation of Dementia and Age-Related Cognitive Change*, AM. PSYCH. ASS'N (Feb. 2021), p. 15, <https://www.apa.org/practice/guidelines/guidelines-dementia-age-related-cognitive-change.pdf> (discussing baseline testing).

³³³ See *supra* Part IV.C.2.

³³⁴ See *supra* Parts IV.B.2 and B.3.

³³⁵ See *supra* Part III.B.4.

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the employee, supervisors, and perhaps medical experts; cognitive testing results, and any other available data.³³⁶

The Job Accommodation Network offers many suggestions for accommodating individuals with cognitive decline.³³⁷ It advises that employers do the following to assist workers with memory problems:

- Use voice activated recorder to record verbal instructions
- Provide written information
- Provide checklists
- Prompt employee[s] with verbal cues (reminders)
- Post written or pictorial instructions on frequently-used machines.³³⁸

British researchers who conducted a comprehensive literature review compiled an additional list of potential accommodations:

- Changing work schedules, or reducing hours
- Arranging meetings for times when employees are likely to be at their best
- Simplifying routines, and allocating tasks separately instead of all at once
- Reducing noise and distraction
- Using technology (e.g. computerized diaries) to function as reminders of meetings and deadlines
- Moving to a less senior role and accepting a lower wage and less responsibility
- Having one or two colleagues as supporters
- Assistance with planning for the future e.g. deciding when the time is right to leave work
- Identify who else in the workplace needs to know about the diagnosis (clients as well as co-workers).³³⁹

It is acceptable for an employer to demote an individual with cognitive difficulties if that is the best way to enable the individual to continue working.³⁴⁰ It is often unpleasant for managers to initiate demotions, so they may hesitate to do so, but a lower level of responsibility may be an ideal solution in cases of cognitive

³³⁶ Armstrong, *supra* note 325, at 126 (discussing the “multiple sources of information” that are needed to evaluate physicians’ ability to perform their job).

³³⁷ Job Accommodation Network, *Intellectual or Cognitive Impairments* (Nov. 3, 2011), <https://thearc.org/wp-content/uploads/forchapters/JAN%20Accommodation%20and%20Compliance%20Series.pdf>.

³³⁸ *Id.*, at 8. See also, Job Accommodation Network, *About Alzheimer’s Disease*, <https://askjan.org/disabilities/Alzheimer-s-Disease.cfm> (last visited Jun. 18, 2021) (providing suggestions for accommodations that address executive functioning deficits, time management problems, memory loss, and difficulties with organization/planning/prioritization).

³³⁹ Louise Thomson et al., *Managing Employees with Dementia: A Systematic Review*, 69 OCCUPATIONAL MED. 89, 94 (2018).

³⁴⁰ Jeff Hyman, *Second Chances: Demote Them Before You Fire Them*, FORBES, Aug. 29, 2018, <https://www.forbes.com/sites/jeffhyman/2018/08/29/demote/?sh=3c48c8a83195>.

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decline.³⁴¹ The ADA itself lists job restructuring, adjusted work schedules, part-time work, and reassignment to a different position as potential accommodations.³⁴² It does not preclude a change of title and salary as a consequence of such modifications.³⁴³ The EEOC confirms that appropriate reductions in salary may accompany reassignments.³⁴⁴

Courts have denied employers summary judgment when questions exist as to whether they have made adequate efforts to identify and implement reasonable accommodations. In one case, *Carrico v. CNA Ins.*, a staff attorney suffered a brain injury in a car accident and had lasting cognitive impairment.³⁴⁵ The court found that there was a genuine issue of material fact as to whether defendant violated the ADA when it failed to temporarily reduce the plaintiff's caseload.³⁴⁶ In *Foster v. City of Oakland*, the plaintiff, a recreation specialist, had "difficulties with word retrieval, sequencing, ... multi-tasking and irritability" after a head injury.³⁴⁷ The court ruled that a triable issue of fact existed as to whether defendant met its reasonable accommodation obligation when it required plaintiff to continue running two recreation centers by himself but offered him help with budgeting issues.³⁴⁸

Note that if cognitive decline is mild, it may not rise to the level of a disability.³⁴⁹ Under the ADA, only conditions that substantially limit a major life activity are disabilities.³⁵⁰ However, the ADA's "regarded as" provision prohibits employers from discriminating against employees whom they regard as having impairments, such as those with mild cognitive deficits that are not fully disabling.³⁵¹ At the same time, employers are not required to accommodate conditions that are not disabilities.³⁵² To illustrate, employers cannot terminate employees based on their having non-disabling, mild cognitive decline so long as they are performing satisfactorily. But employers need not reduce such employees'

³⁴¹ *Id.* (noting that according to one report, 54% of human resources professionals stated that their company had never demoted an employee); *How Common Are Demotions at Work?*, CBIA (Aug. 15, 2018), <https://www.cbia.com/news/hr-safety/workplace-demotions/> (reporting that only 3% of individuals who are 55 or older have their positions downgraded).

³⁴² 42 U.S.C. § 12111(9)(B) (2018).

³⁴³ *Id.*

³⁴⁴ U.S. Equal Employment Opportunity Commission, *supra* note 194.

³⁴⁵ *Carrico v. Cna Ins.*, No. LA CV18-01445 JAK (JPRx), 2020 WL 5797698, 2 & 15 (C.D. Calif. June 1, 2020).

³⁴⁶ *Id.* at 15.

³⁴⁷ *Foster v. City of Oakland*, 649 F. Supp. 2d 1008, 1012 & 1014 (N.D. CA 2009).

³⁴⁸ *Id.* at 1023.

³⁴⁹ 42 U.S.C. § 12102(1) (2018).

³⁵⁰ *Id.*

³⁵¹ *Id.* § 12102(3)(a) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

³⁵² *Id.* § 12201(h).

workloads as accommodations to make jobs easier for them. Admittedly, there is no clear line between disabling and non-disabling cognitive impairments. An employer that does not wish to accommodate a worker with cognitive deficits because it believes the condition is not severe enough to constitute a disability may face legal battles. On the other hand, workers who wish to challenge employers' refusal to accommodate them would be in the awkward position of having to argue that their deficits are worse than employers think they are. Doing so could otherwise disadvantage them and may not be an approach many choose to take.

3. *Termination of Employment*

Employers are permitted to terminate employees who cannot fulfill their job duties if no reasonable accommodations are available.³⁵³ The ADA does not aim to propagate incompetent workforces or the retention of employees who are a danger to themselves or others.³⁵⁴ In fact, in some cases, it would be irresponsible for employers to retain workers who could cause harm to clients, customers or patients. Employers with incompetent employees potentially risk malpractice liability and other severe consequences.

Thus, in *Stern v. St. Anthony's Health Center*, the appellate court found that defendant was justified in firing Dr. Stern because no reasonable accommodation would have enabled the cognitively impaired psychologist to perform the essential functions of his job.³⁵⁵ Similarly, in *Adams v. District of Columbia*, the court granted defendant's motion for summary judgment because plaintiff, an information technology specialist who had suffered a stroke, would not be able to perform the essential functions of his job even if he were allowed to work from home, as he requested.³⁵⁶

Tenured professors are no exception, and they too can be fired if they can no longer perform their jobs competently with or without accommodation.³⁵⁷ Tenure entitles professors to due process but not to lifetime employment regardless

³⁵³ U.S. Dept. of Labor Office of Disability Employment Policy, *Employers and the ADA: Myths and Facts*, <https://www.dol.gov/agencies/odep/publications/fact-sheets/americans-with-disabilities-act> (last visited Jun. 16, 2021) (explaining the circumstances under which employers may fire employees with disabilities).

³⁵⁴ U.S. Equal Employment Opportunity Commission, *supra* note 186.

³⁵⁵ *Stern*, 788 F.3d at 279.

³⁵⁶ *Adams v. District of Columbia*, 50 F. Supp. 3d 47, 57 (D. D.C. 2014).

³⁵⁷ American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> (last visited Jun. 21, 2021) (stating that the services of those with academic tenure "should be terminated only for adequate cause"); American Association of University Professors, *Termination & Discipline (2004)*, <https://www.aaup.org/issues/appointments-promotions-discipline/termination-discipline-2004> (updated Aug. 2006) (outlining grounds for dismissal, including immoral behavior, neglect of duty, incompetence, and ethical misconduct) [hereinafter AAUP]; Rabban, *supra* note 6, at 39-40.

of the quality of their work.³⁵⁸ Some universities have detailed policies specifying grounds and procedures for termination of tenured professors.³⁵⁹ For-cause discharge of tenured academics is rare, but universities need not retain faculty members who are in fact incapable of providing a quality education to their students or fulfilling other professional duties.³⁶⁰

V. STATUTORY REVISIONS

While most of the anti-discrimination laws' guidance is balanced and sound, the emergence of predictive cognitive testing capabilities necessitates two changes to the ADA. The statute should prohibit discrimination based on predictions of future illness and should disallow preemployment testing that is not job-related.

A. Expanding the Definition of Disability

New testing technologies, such as PET scans, spinal taps, and blood tests, can enable employers to learn that individuals are at risk of developing dementia in the coming years or decades.³⁶¹ The ADA was enacted in 1990,³⁶² and, based on the diagnostic tools that were available at the time, the statute sensibly focused on existing and past disabilities.³⁶³ However, over thirty years later, the possibility of discrimination based on predictions of future illness can no longer be ignored. Consequently, the statutory scope must be extended to cover individuals who are currently healthy but are subject to adverse action because employers believe they are at risk of developing health problems. A simple and effective modification is to revise the “regarded as” prong of the definition of “disability” to include individuals “who are perceived as likely to develop physical or mental impairments in the future.”³⁶⁴

This change would align the ADA with GINA, which prohibits discrimination based on predictive genetic information.³⁶⁵ Now that health predictions can be

³⁵⁸ AAUP, *supra* note 357; *The Truth About Tenure in Higher Education*, DIVERSITYINHIGHEREDUCATION.COM, <https://diversityinhighereducation.com/articles/The-Truth-About-Tenure-in-Higher-Education> (last visited Jun. 21, 2021).

³⁵⁹ See e.g., University of California Office of the President, *General University Policy Regarding Academic Employees: APM - 075 - Termination for Incompetent Performance* (Sep. 23, 2020), <https://www.ucop.edu/academic-personnel-programs/files/apm/apm-075.pdf>; University System of Georgia, *Board of Regents Policy Manual, 8.3.9 Discipline and Removal of Faculty Members*, https://www.usg.edu/policymanual/section8/policy/C245#p8.3.4_notice_of_employment_and_resignation (last visited Jun. 21, 2021).

³⁶⁰ Rabban, *supra* note 6, at 39, 53.

³⁶¹ See *supra* Part I.C.

³⁶² United States Department of Justice Civil Rights Division, *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm (last visited Jul. 11, 2021).

³⁶³ 42 U.S.C. §12102(1) (2018) (defining “disability”).

³⁶⁴ Hoffman, *supra* note 302, at 787.

³⁶⁵ 42 U.S.C. §2000ff-1 (2018).

made by means other than genetic testing, it makes little sense to prohibit discrimination based on genetic variants but not other disease biomarkers.³⁶⁶

The proposed amendment would provide much-needed protection to employees who undergo predictive testing. Employers are highly incentivized to avoid the risks of productivity problems, liability arising from employee mistakes, and large medical costs that sick employees might generate.³⁶⁷ Without a statutory prohibition, it may be quite tempting for employers who learn of test results indicating dementia susceptibility to terminate or reject employees no matter how well they can currently function in the workplace.

B. Modifying the ADA's Testing Guidelines

More puzzling than the gap in the ADA's definition of disability is the ADA's distinction between preemployment and post-employment testing.³⁶⁸ During an employee's tenure, testing is restricted to examinations that are "job-related and consistent with business necessity," but this limitation does not apply to testing conducted during the interval between a worker's job offer and start date.³⁶⁹ It is difficult to understand why the drafters believed an employer might need information about incoming workers that is not job-related.

Now that such information can include risk assessments for future dementia, it is particularly critical that this distinction be eliminated. Without changes to the definition of disability (as suggested above) and the medical examinations standard, employers would be able to test for dementia biomarkers and then withdraw employment offers from individuals who might develop future cognitive decline no matter how qualified they are to perform the job at present.³⁷⁰ Moreover, employers would not need to conduct costly testing themselves if testing was previously done and is documented in an individual's medical record. Employers can simply ask incoming workers to sign authorizations for release of their medical records, and such requests are commonly made.³⁷¹ Consequently, the ADA's medical inquiry and examination standard for incoming employees should be identical to the standard for those who are already employed, and all testing that is not job-related should be categorically prohibited.³⁷²

³⁶⁶ Hoffman, *supra* note 302, at 788-89.

³⁶⁷ *Id.* at 779.

³⁶⁸ 42 U.S.C. § 12112(d)(3) (2018); *supra* notes 202-206 and accompanying text.

³⁶⁹ 42 U.S.C. § 12112(d)(3)-(4) (2018).

³⁷⁰ *See supra* Part V.A.1. Employers could also conduct extensive neuropsychiatric assessments, but they would violate the ADA if they withdraw job offers from individuals who already have low scores because they perceive them to be currently mentally impaired. *See supra* notes 349-352 and accompanying text.

³⁷¹ Hoffman, *supra* note 302, at 780.

³⁷² Hoffman, *supra* note 205, at 519.

VI. ADDITIONAL RECOMMENDATIONS

It is critical for both employers and employees to do their part to ensure that workers with cognitive deficits are accommodated if at all possible and that workplaces remain safe and productive. Professional associations can also make significant contributions to addressing the challenges of cognitive decline in the workplace. Below are detailed recommendations for workers, their employers, and professional associations.

A. The Employee's Role

Employees who are concerned that they may be experiencing cognitive decline should consult their physicians and undergo testing.³⁷³ If cognitive deficits are indeed evident, individuals should discuss their ability to work and potential accommodations with their doctors.³⁷⁴

Employees face a dilemma with respect to disclosure of their condition. Certainly, it can be very uncomfortable to discuss the matter with employers, and workers may render themselves vulnerable to scrutiny, suspicion, stigmatization, and even adverse employment decisions.³⁷⁵ But nondisclosure can be much worse. Doctors could injure patients, lawyers could lose cases, and most professionals could cause harm to their clients and customers if they perform poorly. Harmful mistakes can lead to guilt, job loss, and legal liability.

Individuals who are aware of cognitive decline that is affecting their job performance or could soon do so should approach their employers and request accommodation.³⁷⁶ Experts caution that workers should initiate discussion with employers before their performance begins to suffer and they are subject to criticism or disciplinary action.³⁷⁷

Many employers know little about dementia.³⁷⁸ Employees may be wise to refer employers to educational materials, such as literature prepared by the Job Accommodation Network and the Society for Human Resource Management.³⁷⁹

³⁷³ See *supra* Part I.B (discussing cognitive testing).

³⁷⁴ Diane Blum, *I've Just Been Diagnosed with Alzheimer's. Can I Still Work?*, ALZHEIMER'S ASS'N. (Mar. 31, 2014), <https://www.alzheimersblog.org/2013/05/21/ive-diagnosed-alzheimers-work/>.

³⁷⁵ Andrew Soergel, *Businesses Navigate Dementia Conversations with Older Workers*, CLAIMS J. (Jan. 30, 2019), <https://www.claimsjournal.com/news/national/2019/01/30/288957.htm> ("For some, disclosing dementia to an employer could open the door to workplace adjustments. For others, there's fear of stigmatization or even termination.").

³⁷⁶ Kathleen Allen, *Alzheimer's and Employment*, BRIGHTFOCUS Foundation (Jan. 16, 2020), <https://www.brightfocus.org/alzheimers/article/alzheimers-and-employment>.

³⁷⁷ *Id.*

³⁷⁸ *Id.*; Diane Blum, *supra* note 374. See *infra* Part VI.B.1 for discussion of the need for training.

³⁷⁹ Job Accommodation Network, *supra* note 338; *Employing People with Cognitive Disabilities*, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/cognitivedisabilities.aspx> (last visited Jun. 22, 2021).

People with early onset Alzheimer’s disease or other dementias who cannot work safely and effectively even with accommodations may be able to obtain income and health care coverage through federal safety net programs or private insurance.³⁸⁰ Those who develop Alzheimer’s disease before the age of sixty-five are considered to have early onset.³⁸¹ The Social Security Administration includes early onset Alzheimer’s disease, frontotemporal dementia, Lewy body dementia, and other dementias in its Compassionate Allowances (CAL) initiative.³⁸² The CAL initiative enables those with listed conditions to have expedited access to Social Security Disability Insurance and Supplemental Security Income.³⁸³ In addition, some employers offer disability insurance that will cover employees who must stop working because of dementia.³⁸⁴

B. The Employer’s Role

Employers have the most important role to play in addressing the challenges of cognitive deficits in the workplace. This Part develops recommendations for the following interventions: 1) employer training regarding cognitive decline, 2) inclusion of opportunities to obtain preliminary cognitive testing and education about dementia in workplace wellness programs, and 3) careful attention to assessing all workers’ job performance at regular intervals and responding to suspected and confirmed cases of cognitive decline appropriately.

1. Training

Contemporary employers commonly provide training to their managers and supervisors on topics such as sexual harassment and diversity.³⁸⁵ As the American workforce ages, they should add training about cognitive decline to their initiatives. Workplace training programs are often criticized for being ineffective or even

³⁸⁰ Alzheimer’s Association, *Social Security Disability*, <https://www.alz.org/help-support/caregiving/financial-legal-planning/social-security-disability> (last visited Jun. 22, 2021); USI Affinity, *Disability Insurance Helps to Protect Your Income*, 22 *LAWYERS J.* 5, 5 (Feb. 28, 2020).

³⁸¹ *Early Onset Alzheimer’s Disease*, HEALTHLINE, <https://www.healthline.com/health/alzheimers-disease/early-onset-alzheimers> (last reviewed Dec. 21, 2016).

³⁸² Alzheimer’s Association, *supra* note 380.

³⁸³ *Id.*; Social Security Administration, *Compassionate Allowances*, <https://www.ssa.gov/compassionateallowances/> (last visited Jun. 22, 2021). *See also*, Brandy Bauer, *SSI vs. SSDI: the Differences, Benefits, and How to Apply*, NAT’L COUNCIL ON AGING (Nov. 23, 2020), <https://www.ncoa.org/article/ssi-vs-ssdi-what-are-these-benefits-how-they-differ> (explaining Social Security Insurance and Social Security Disability Insurance).

³⁸⁴ Job Accommodation Network *supra* note 338.

³⁸⁵ *See* Edward H. Chang et al., *Does Diversity Training Work the Way It’s Supposed To?*, SHRM (Jul. 18, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/how-to-make-diversity-training-work.aspx> (“Virtually all *Fortune* 500 companies offer diversity training to their employees.”); Society for Human Resource Management, *Sexual Harassment Prevention Training for Supervisors* (Jun. 19, 2020), <https://www.shrm.org/resourcesandtools/tools-and-samples/presentations/pages/supervisorsexualharassmenttraining.aspx>.

counterproductive.³⁸⁶ It is important that training about cognitive deficits be developed, validated, and conducted by highly skilled professionals in the areas of gerontology, psychology, human resources, and law.³⁸⁷ Input from older employees and advocacy organizations such as the AARP and Alzheimer's Association would also be valuable. While some educational materials already exist,³⁸⁸ experts should continue to develop training programs that are engaging and interactive.

Training should equip employers to identify job performance problems that are potentially associated with cognitive deficits, to engage in conversations with employees in a sensitive manner, to determine which, if any, accommodations are appropriate, and to comply with legal requirements. To that end, supervisors and managers should learn about dementia symptoms³⁸⁹ and the requirements of all relevant laws.³⁹⁰

It is important that training and discussion of cognitive decline not generate a hostile environment and harassment for older workers.³⁹¹ For this reason, I recommend that training be restricted to supervisors and managers rather than to all employees. Only those in a position to intervene need to undergo training, and programs should emphasize the need to be supportive and find accommodations, if at all possible. They should also explain that age-based harassment is itself legally actionable.³⁹²

Training can provide ample advice that will facilitate decision making. For example, the Job Accommodation Network advises employers to consider the following questions to identify appropriate accommodations:

1. What limitations is the employee experiencing?
2. How do these limitations affect the employee and the employee's job performance?
3. What specific job tasks are problematic as a result of these limitations?
4. What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
5. Has the employee been consulted regarding possible accommodations?

³⁸⁶ Julia Carpenter, *When Workplace Trainings Can Backfire*, CNN MONEY (Jan. 29, 2018), <https://money.cnn.com/2018/01/29/pf/diversity-harassment-trainings/index.html>; Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PNAS 12255, 12255 (2019); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (Jul.-Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

³⁸⁷ Developing detailed blueprints for training programs is beyond the scope of this article.

³⁸⁸ See *supra* note 379 and accompanying text.

³⁸⁹ See *supra* note 51 and accompanying text.

³⁹⁰ See *supra* Part III.

³⁹¹ See *supra*, notes 164-166.

³⁹² *Id.*

6. Once accommodations are in place, would it be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?³⁹³

Other experts emphasize the importance of observing employees, recording problems, and discussing specific performance shortcomings with them rather than vague or general concerns.³⁹⁴ It is also vital to maintain compassion for employees who are struggling at work.³⁹⁵ These suggestions and others, along with simulations and trainer feedback could help employers navigate the very difficult terrain of cognitive deficits.

2. *Wellness Programs*

Employers could offer basic cognitive testing to older employees through wellness programs. In 2019, eighty-four percent of employers with two-hundred or more employees that offered health benefits had workplace wellness programs.³⁹⁶ Short tests such as the Mini-Mental State Examination or the Montreal Cognitive Assessment could be conducted by qualified professionals who would advise workers with scores that raise concern to visit their doctors and seek more thorough testing.³⁹⁷ Those professionals, however, should also explain that brief cognitive testing is of limited reliability and should not cause panic and that sometimes cognitive deficits are caused by treatable problems such as drug side effects.³⁹⁸

Voluntary cognitive testing that is available through wellness programs would be consistent with the federal anti-discrimination laws. The ADA explicitly permits employers to offer wellness programs that include medical inquiries and testing.³⁹⁹ All individually identifiable testing results must remain confidential and not be shared with the employer.⁴⁰⁰ It is also appropriate to offer the testing option only to older workers (e.g. starting at the age of 70). The ADEA does not cover reverse

³⁹³ Job Accommodation Network *supra* note 338.

³⁹⁴ Tia Benjamin, *How to Deal With a Senior Employee Who Is Becoming More Forgetful*, SMALL BUSINESS CHRON. (last visited Jun. 24, 2021); Beth Brown, *When Memory Loss Affects the Workplace*, EMPLOYERS COUNCIL (Dec. 18, 2017), <https://blog.employerscouncil.org/2017/12/18/when-memory-loss-affects-the-workplace/>.

³⁹⁵ Brown, *supra* note 394.

³⁹⁶ Karen Pollitz & Matthew Rae, *Trends in Workplace Wellness Programs and Evolving Federal Standards*, HENRY J. KAISER FAMILY FOUND. (Jun. 9, 2020).

³⁹⁷ See *supra* note 68 and accompanying text (discussing a variety of cognitive tests).

³⁹⁸ See *supra* notes 61-63 and 74-76.

³⁹⁹ 42 U.S.C. § 12112(d)(4)(B) (2018).

⁴⁰⁰ *Id.* § 12112(d)(4)(C); U.S. Equal Employment Opportunity Commission, *EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act* (May 17, 2016), <https://www.eeoc.gov/regulations/eeocs-final-rule-employer-wellness-programs-and-title-i-americans-disabilities-act>.

discrimination, so it is not unlawful to deprive younger employees of a testing opportunity that is available to those who are older.⁴⁰¹

Voluntary testing for which the employer pays would help individuals who are worried about cognitive decline determine whether their concerns are justified. It would provide assurance to those without deficits and encourage others to pursue further assessments. A medical diagnosis of cognitive decline would enable employees to request accommodations, ideally prolonging their ability to work productively and safely.

In addition, wellness programs could offer educational sessions about dementia. The Alzheimer's Association has developed one-hour modules with titles such as "10 Warning Signs of Alzheimer's" and "Dementia Conversations: Driving, Doctor Visits, Legal and Financial Planning."⁴⁰² This information could help workers determine whether they should seek testing and provide guidance to those who are diagnosed with cognitive deficits.

3. Taking Appropriate Action

Employers should not establish mandatory retirement ages (unless explicitly permitted to do so by law) and should not require all employees to undergo cognitive testing beginning at a certain age.⁴⁰³ They also should not require the entire workforce to obtain periodic cognitive testing or test workers for predictive dementia biomarkers.⁴⁰⁴ Instead, they must pursue a much more individualized approach.

At regular intervals, employers should conduct thorough performance assessments of all employees, regardless of their position or length of service.⁴⁰⁵ The evaluations should be fair, transparent, and designed to correctly identify work deficiencies.⁴⁰⁶ Among many other benefits, regular evaluations will enable well-trained reviewers to determine if any workers should be referred to medical experts for possible cognitive testing.⁴⁰⁷

⁴⁰¹ See *General Dynamics Land Systems, Inc., v. Cline*, 540 U.S. 581, 600 (2004).

⁴⁰² Alzheimer's Association, *Workplace Education Program*, <https://www.alz.org/wi/helping-you/education-programs/workplace-education-program> (last visited Jun. 24, 2021).

⁴⁰³ See *supra* Parts IV.A and IV.B.

⁴⁰⁴ See *supra* Parts IV.C. and IV.D.

⁴⁰⁵ Mark Murphy, *Here's Why You Still Need to Conduct Performance Reviews With Your Employees*, FORBES (Nov. 4, 2018), <https://www.forbes.com/sites/markmurphy/2018/11/04/heres-why-you-still-need-to-conduct-performance-reviews-with-your-employees/?sh=5d589c8d19f8>.

⁴⁰⁶ U.S. Equal Employment Opportunity Commission, *5. I'm Conducting Performance Evaluations*, <https://www.eeoc.gov/employers/small-business/5-im-conducting-performance-evaluations> (last visited Jun. 30, 2021).

⁴⁰⁷ See *supra* Part VI.B.1 for a discussion of employer training.

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It is particularly important to document performance problems before requesting that employees consult a physician about testing.⁴⁰⁸ If recorded performance failures suggest that an employee is experiencing cognitive deficits,⁴⁰⁹ the employer should discuss the specific examples with the individual and instruct the worker to consult a doctor regarding testing.

Employers should not treat workers with performance problems arising from cognitive decline more harshly than workers who have long-term difficulty functioning for other reasons. Doing so may itself constitute discrimination under the ADA.⁴¹⁰ Employers should communicate openly with employees and ensure that their response to performance shortcomings is lawful and proportionate to the problem.

If test results confirm the presence of a cognitive disability, the employer must engage in an interactive process with the employee to identify one or more reasonable accommodations, as discussed at length above.⁴¹¹ The employer need not provide the employee's first-choice accommodation if a less burdensome change would be effective.⁴¹² All parties should keep in mind that in some instances, the best solution might be a reduction in responsibilities even if it is accompanied by a corresponding cut in salary.⁴¹³

In some cases, however, it is equally important for employers to be willing to terminate employees who cannot be accommodated. Some employers find it daunting or unpalatable to confront the problem and will do everything to avoid discharging low performers.⁴¹⁴ But retaining incompetent employees is a risky business. People depend on their doctors, professors, attorneys, and other professionals for their health, education, and welfare. Employers must protect both the public and employees from the consequences of allowing individuals to continue working when they simply cannot. Employers could ease the pain of a termination by helping those who are eligible for social security or disability insurance benefits pursue those resources.⁴¹⁵

⁴⁰⁸ Carole Fleck, *supra* note 26, Suzanne Lucas, *How to Handle an Employee in Mental Decline*, INC. (Mar. 11, 2021), <https://www.inc.com/suzanne-lucas/how-to-handle-an-employee-in-mental-decline.html>.

⁴⁰⁹ *See supra* note 51 and accompanying text (discussing signs of cognitive decline).

⁴¹⁰ 42 U.S.C. § 12112(a) (2018).

⁴¹¹ *See supra* Parts III.B.4 and IV.E.2.

⁴¹² *See supra* note 196 and accompanying text.

⁴¹³ *See supra* notes 340-344.

⁴¹⁴ Hyman, *supra* note 340 (“Most executives are slow to part ways with underperformers. Typically, they give the person an opportunity to turn things around. A second chance. A third chance. Anything to avoid the tough conversation.”).

⁴¹⁵ *See supra* notes 380-384 and accompanying text.

C. The Role of Professional Associations

Professional associations should focus on cognitive decline among professionals and undertake initiatives to help workers and employers manage difficult situations.⁴¹⁶ State bar associations have taken the lead in this area, instituting programs about “learning to spot cognitive decline” and “interventions to gracefully guide lawyers toward retirement.”⁴¹⁷

Lawyer assistance programs (LAP) help lawyers and judges who are facing mental health challenges, including cognitive deficits, and they receive many calls from concerned colleagues.⁴¹⁸ The New Mexico Supreme Court Lawyer Succession and Transition Committee developed a video entitled “How to Identify and Respond to Issues of Cognitive Impairment” and a “Succession Planning Handbook For New Mexico Lawyers.”⁴¹⁹ The New Mexico Judges and Lawyers Assistance Program has run seminars throughout the state using these materials.⁴²⁰

LAP initiatives constitute a useful precedent for other professional organizations. The American Medical Association, state medical societies, the American Association of University Professors, and many others would do well to offer their constituents similar programs and support mechanisms.⁴²¹ Professional societies could also work with testing developers to better tailor tests to identifying mental capacities and skills that are necessary for particular work competencies.⁴²²

VII. CONCLUSION

Cognitive decline is an extremely complicated and sensitive workplace challenge. There is no simple solution, and properly addressing it requires knowledge, interpersonal skills, and goodwill. Careful analysis of the ADEA, ADA, and disparate impact provision of Title VII yields strong guidance as to prohibited and permissible employer conduct. The statutes demand individualized assessment of employees rather than blanket policies regarding retirement or

⁴¹⁶ See *supra* notes 111-114, 136 and accompanying text.

⁴¹⁷ Derocher, *supra* note 99.

⁴¹⁸ *Id.*; American Bar Association, *Directory of Lawyer Assistance Programs*, https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/ (last visited Jun. 25, 2021); American Bar Association, *Intervention and Impairment Assistance*, https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/interventionandimpairmentassistance/ (last visited Jun. 25, 2021).

⁴¹⁹ Derocher, *supra* note 99; *How to Identify & Respond to Issues of Cognitive Impairment* (2013), <https://www.youtube.com/watch?v=s788vx4LWSw>; Charles D. Noland et al., *Succession Planning Handbook For New Mexico Lawyers* (July 2014), <https://www.sbnm.org/Portals/NMBAR/forMembers/Succession/SuccessionHandbook.pdf>.

⁴²⁰ Derocher, *supra* note 99.

⁴²¹ American Association of University Professors, *About the AAUP*, <https://www.aaup.org/about-aaup> (last visited Jun. 25, 2021); American Medical Association, *About*, <https://www.ama-assn.org/about> (last visited Jun. 25, 2021); The Physicians Foundation, *Medical Societies and Associations*, <https://physiciansfoundation.org/medical-societies-and-associations/> (last visited Jun. 25, 2021).

⁴²² See *supra* notes 324-327 and accompanying text.

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mandatory cognitive testing. Revising the ADA to prohibit discrimination based on predictions of future illness and to disallow preemployment testing that is not job-related would provide workers with further needed protections.

Identifying and responding to cognitive decline quickly can enable employees to obtain reasonable accommodations and continue to work productively. It can also help protect employers and workers from legal liability and promote the safety and welfare of the people they serve. Many stakeholders have a role to play in responding to concerns about employee cognitive deficits: workers, employers, cognitive testing developers, the human resources community, and professional associations. Much work remains to be done to develop appropriate tools and training strategies for what is very likely to be a growing phenomenon in the American workplace.