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The ADA Restoration Act: Defining Disability Down

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Last week, with the backing of big business groups, organized labor, and disability rights groups, the House of Representatives passed an amended version of the ADA [Americans with Disabilities Act] Restoration Act (ADARA, H.R. 3195). Though touted by supporters as a moderate compromise, the legislation greatly expands the class of Americans who are "disabled," and thus legally entitled to special treatment. This new classification would impose a heavy burden on employers, especially small businesses, while actually disadvantaging those who have serious disabilities. At a time when economic growth has slowed and unemployment has begun to tick upward, Congress should avoid policies that reduce businesses' flexibility, raise the cost of labor, promote inflation, and dampen America's economic competitiveness in the global market.

Everyone Is Disabled

Congress passed the Americans with Disabilities Act in 1990 to help disabled Americans participate in public life.[1] The ADA was focused on Americans with genuine disabilities that prevented them from performing major life functions. The ADARA would transform the ADA into legislation covering most Americans.

The ADA covers Americans with "a physical or mental impairment that substantially limits one or more major life activities."[2] The House legislation retains this definition but redefines the term "major life activity" to deprive it of nearly all meaning and supplies loose "rules of construction" to render

Talking Points

- The ADA Restoration Act would water down the definition of disability, potentially allowing the bulk of American workers to claim disability status and the protections associated with that status for mild and even temporary impairments, such as asthma and tennis elbow.
- Employers providing accommodations to disabled workers often require the assistance of professionals, such as lawyers, ergonomics consultants, and compliance experts. Big businesses can spread these costs across their workforce, leaving small businesses, with fewer workers, at a competitive disadvantage.
- Abuse of the ADA also burdens honest workers and the public, who have to shoulder greater responsibilities or make due with poor service.
- "Defining down disability" harms those who are truly disabled and aided by the current ADA. If nearly all workers are "disabled," the playing field is once again tilted against those whom proponents of the original ADA sought to help.

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nearly all impairments disabilities requiring ADA compliance.[3]

Under the bill, "a major life activity" is nearly anything one might (or might not) do in a day. The text includes a non-exclusive list of activities: "performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Further, the definition also includes "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Any impairment that "materially restricts" a person from doing any of these activities or his body from performing these operations would constitute a disability for the purposes of the law.

Additionally, the legislation mandates that the meaning of the term "disability" be "construed broadly" in every possible way. According to these interpretive rules, an impairment that "substantially limits" a single "major life activity" (i.e., just about anything a person might do) is a disability. That the impairment might be episodic or in remission (or, by implication, temporary) does not prevent it from being a disability. And strangest of all, the determination of whether an impairment rises to the level of being a disability would be made without reference to any mitigating measures, such as medication, hearing aids, or "learned behavioral or adaptive neurological modifications," an apparent reference to an individual's ability to learn to work around an impairment.

There is one telling exception, however, to the rule that ameliorative measures be disregarded. The legislation specifically exempts from the rule "ordinary eyeglasses or contact lenses," which, unlike all other mitigating measures, may be considered when determining whether an individual is disabled. The drafters of this legislation must have concluded that, without this specific exception, a person who wears eyeglasses or contact lenses to correct an ordinary visual impairment would be "disabled" and so entitled to all of the law's protections—a scenario that would bring more than half of all Americans and 64 percent of those of working age under the ADA.[4]

This exception, however, is a small patch on a big hole: It applies only to those with minor visual impairments but does not exempt from ADA coverage all those who suffer other impairments of similarly limited severity. This concern is not hypothetical. Courts have found a variety of minor yet prevalent conditions to be impairments, including back and knee strains, high cholesterol, erectile dysfunction, headaches, and tennis elbow.[5] All of these minor, possibly fleeting conditions—most of which can be entirely remediated by medicine, exercise, or changes in diet—could qualify as disabilities, triggering all of the ADA's protections.

As an example, consider asthma. It is a common medical condition, affecting approximately 20 million Americans, that under current law is unlikely to be found a disability.[6] Most asthma sufferers are able to manage the condition by avoiding harmful behaviors like smoking; filtering the air in their homes can also reduce irritants. Asthma attacks, for most asthmatics, are infrequent and easily treated with an inhaler and rest. In short, few individuals

1. *See* 42 U.S.C. § 12101.
2. 42 U.S.C. § 12102(2)(A).
3. ADA Amendments Act of 2008, H.R. 3195, 110th Cong. § 3 (as passed by House, June 25, 2008).
4. Statistics on Eyeglasses and Contact Senses, http://www.allaboutvision.com/resources/statistics-eyewear.htm (last visited June 30, 2008).
5. *See* JEFFREY MCGUINESS, H.R. POL'Y ASS'N, MISNAMED 'ADA RESTORATION ACT' GOES FAR BEYOND REVERSAL OF TARGETED COURT DECISIONS 4 (2007).
6. Am. Acad. of Allergy, Asthma, and Immunology, Asthma Statistics, http://www.aaaai.org/media/resources/media_kit/asthma_statistics.stm (last visited June 30, 2008); *see, e.g.,* Tangires v. The Johns Hopkins Hospital, 79 F. Supp. 2d 587. 595 (D. Md. 2000), *aff'd* 230 F.3d 1354 (2000).

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with asthma find that the condition substantially limits any major life activity, as those words are commonly used and understood. ADARA, however, would turn that understanding on its head. Asthma affects the operation of the respiratory system, which the bill considers to be a "major life activity." Exclude all mitigating measures from the inquiry—avoiding cigarette smoke, inhalers, air filters, exercise, etc.—and it would be difficult to conclude that asthma, in its entirely untreated state, does not "materially restrict" operation of the respiratory system. This approach, of course, is highly artificial; few people would be so reckless as to leave untreated a potentially life-threatening but easily mitigated condition. Yet that is exactly what ADARA presumes.

The result: Nearly any worker suffering any kind of ailment—permanent or not, curable or not, *actually disabling* or not—could be deemed disabled and have the right to demand a variety of accommodations from his employer.

Burdens on Business

Legally defining any worker in less than perfect health as disabled does more than highlight Congress's disconnect from the real world. It would also severely disrupt businesses by extending the burdensome accommodation process granted to disabled workers to most employees.

Under the ADA, businesses with more than 15 employees must make "reasonable accommodations" in their hiring processes, workplace environments, and job duties to allow otherwise qualified employees who are disabled to work.[7] Reasonable accommodations are those that do not impose "undue hardship" on the employer and generally consist of shifting job tasks to other employees, altering when and how job tasks are performed, or providing a disabled employee with unlimited leave that does not result in termination.[8] Common accommodations that the government has stated rarely impose an undue hardship include installing ramps and accessible restrooms, hiring interpreters for the deaf or blind, and soundproofing portions of the workplace.[9]

If a disability prevents an employee from performing his duties entirely, the employer must reassign the employee to any vacant position of similar pay and status for which he is qualified.[10] At the same time, an employer may not disclose to other employees that any of these changes are being made to accommodate a disability; such a disclosure of "medical information" is a violation of the ADA.[11]

Big businesses have the structure in place—general counsel offices, compliance experts, disability consultants—to make these accommodations in a relatively efficient manner. For a small business, however, the costs of compliance on a per-employee basis are far higher. To accommodate a single disabled employee, a small employer may need to bring in a number of outside experts, including a labor lawyer, an ADA consultant, and even an ergonomics expert or engineer. These expenses have a serious impact on the bottom line. By requiring the expertise of outside professionals, such laws put small businesses at a competitive disadvantage to larger firms, which can spread increased costs across their entire workforce.

ADA Abuses

Though burdensome to businesses, there are good public policy reasons to ensure that disabled Americans are not excluded from public life. But it makes no sense to extend the employer accommodation requirements to most employees. Doing so would give irresponsible employees an opening to use the law to skip work and dump their responsibilities onto co-workers.

7. 42 U.S.C. § 12113(b)(5).
8. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html (last visited June 30, 2008) [hereinafter EEOC Guidance].
9. U.S. DEP'T OF JUST., A GUIDE FOR PEOPLE WITH DISABILITIES SEEKING EMPLOYMENT (2000), *available at* www.usdoj.gov/crt/ada/workta.htm.
10. EEOC Guidance, *supra* note 8.
11. *Id.*

Doctors cannot prove the existence of some medical conditions, such as chronic headaches or back pain. Under ADARA, perfectly healthy workers could fake common illnesses, claim impairment, and demand that their employer accommodate them by giving them time off from work whenever their symptoms occur. Instead of protecting the rights of the disabled, the law would allow irresponsible workers to skip work at any time and to demand that they be given the best working hours.

Such a scenario may sound farfetched, but it is exactly how some workers have misused the Family and Medical Leave Act (FMLA).[12] Many workers abuse FMLA leave to avoid working undesirable shifts, such as night shifts.[13] Others use it to take time off at will. One worker claimed continual medical leave for a sprained shoulder, only to appear on the front page of the sports section the next day for bowling 300 in a local tournament.[14] Another worker used FMLA leave to depart work two hours early on Fridays and arrive four hours late on Monday, in order to avoid the "stress" of rush hour traffic.[15] Extending the ADA to require companies to accommodate any worker with any impairment would make it even easier for irresponsible workers to manipulate the system and take time off at will.

Abuses of the ADA and other protection laws also burden diligent workers and the public. When an employee demands time off on short notice to accommodate an impairment, his employer may not have the time to hire and train a temporary employee. The employer must then transfer the absent worker's tasks to his co-workers who did show up for work that day. Such co-workers then must deal with their entire original workload, plus the additional work. When employees use the law to get out of undesirable shifts, responsible co-workers must take those shifts instead.

And when there are not enough co-workers to cover the tasks and the job cannot be done, it is the public that suffers. This already happens with FMLA leave. For example, several school-bus drivers in Fairfax County (Virginia) Public Schools use the law to get out of arriving at work on time. As a result, parents must drive their children to school before work, or the children must wait until another bus driver finishes his run, causing them to arrive at school well after classes have started.[16]

Extending the ADA to cover most impairments would make the abuses of FMLA leave seem minor. Irresponsible workers could demand that their employer give them time off work whenever they want it and without notice. Their co-workers and the public, in addition to their employers, would suffer.

Endangering Jobs and the Economy

Disciplining or terminating the employment of a worker with a disability (or even failing to make a reasonable accommodation, which courts may find to be "constructive termination") is an action fraught with risk, because the employee may file a discrimination charge with the U.S. Equal Employment Opportunity Commission (EEOC) challenging the propriety of the employer's action. Due to the great expense of defending against ADA charges and the possibility of having to pay the employee's attorneys' fees and punitive damages, many employers are reluctant to fire or discipline employees claiming disabilities, even when the firing or discipline is justifiable.

Workers who believe that they have suffered discrimination, such as an employer's refusal to implement a proposed accommodation or a firing

12. James Sherk, The Heritage Foundation, Use and Abuse of the Family and Medical Leave Act: What Workers and Employers Say (2007), *available at* http://www.heritage.org/Research/Labor/sr16.cfm.
13. *Id.*
14. *Id.*
15. *Id.*
16. Public Comment, Fairfax County Public Schools, in response to a request for information on the Family and Medical Leave Act from the Employment Standards Administration, Wage and Hour Division, of the Department of Labor, Document ID: ESA-2006-0022-0550.

due to disability, may file a complaint with the EEOC.[17] Employees filed 15,575 ADA charges against employers in 2006.[18] After investigation, the EEOC found only 23.4 percent of these charges presented meritorious claims and resolved most of those administratively, resulting in $48.8 million in settlements.[19] It also determined, however, that 60.3 percent of charges filed involved "no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation."[20]

If the employee is dissatisfied with the EEOC's resolution, he may request a "right-to-sue" letter from the EEOC and then file suit in federal court.[21] The damages available to a wronged employee under the ADA can be significant, providing a strong incentive for employees to sue their employers. A court judgment may include back pay from the time of the discrimination; compensatory damages of up to $300,000 for such injuries as emotional distress, inconvenience, and mental anguish; attorneys' fees; punitive damages of up to $300,000; "front pay" for anticipated future losses due to the discrimination; and injunctive relief, such as reinstatement.[22]

By forcing employers to go through a risky, costly, and time-consuming process to lay off employees who can claim that even a minor or temporary condition is a disability, ADARA would undermine a fundamental premise of American labor law: the doctrine of "at-will" employment. This doctrine states that businesses have no legal obligation to continue to employ a worker once they have hired him or her. Businesses employ workers "at will" and can replace them with another worker at any time.

In other countries, such as France and Italy, companies do not have the legal right to lay off employees. Instead, workers are generally entitled to keep their job once they are hired. A company that hires a worker who turns out to be unproductive or not a team player faces great difficulty removing that employee. Similarly, a company that becomes more efficient and needs fewer workers to get the job done cannot easily tailor its workforce to the demands of its tasks.

On the surface, this policy appears to help workers, because once hired they have little concern about losing their jobs. However, making it difficult for employers to lay off employees makes them reluctant to hire new employees in the first place. Businesses do not want to take the risk of being stuck with unproductive or unneeded workers. France, Italy, and other countries that severely restrict at-will employment have far higher unemployment rates than the United States because their less flexible labor laws discourage employers from creating new jobs.[23] France's current unemployment rate is higher than the worst unemployment rate recorded during the past two U.S. recessions.[24]

ADARA would severely weaken the at-will employment doctrine that makes the American

17. Filing a Charge of Employment Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html (last visited June 30, 2008).
18. Americans with Disabilities Act of 1990 (ADA) Charges, http://www.eeoc.gov/stats/ada-charges.html (last visited June 30, 2008).
19. *Id.*
20. *Id.*
21. Federal Laws Prohibiting Job Discrimination: Questions And Answers, http://www.eeoc.gov/facts/qanda.html (last visited June 30, 2008).
22. MELINDA CATERINE, WHAT IS MY CASE WORTH? (2005).
23. Hugo Hopenhayn & Richard Rogerson, *Job Turnover and Policy Evaluation: A General Equilibrium Analysis,* 101 J. POL. ECON. 915, 938 (1993); Adriana D. Kugler & Gilles Saint-Paul, Inst. for the Stud. of Labor, *Hiring and Firing Costs, Adverse Selection and Long-term Unemployment,* IZA Discussion Paper 134 (2000).
24. Press Release, OECD, *OECD Standardised Unemployment Rate falls to 5.5% in October 2007*, (Dec. 10, 2007), *available at* http://www.oecd.org/dataoecd/43/34/39757287.pdf (showing France has an unemployment rate of 8.1 percent). The U.S. unemployment rate hit a high of 6.3 percent in June 2003, and 7.8 percent in June 1992.

labor market so strong. Under ADARA, most employees could claim they have an impairment, such as asthma or chronic stress, and sue if they were either laid off or not hired in the first place, contending discrimination.[25] Even when the employment decision had nothing to do with the claimed impairment, the employer would still face expensive litigation. This expense would make employers reluctant to hire new workers in the first place. The ADA has had precisely this unintended effect. Because it made hiring and firing disabled workers more expensive, businesses employed fewer individuals with disabilities after the ADA took effect.[26]

Protecting the ability of disabled Americans to participate in the economy is a noble goal, but ADARA would damage U.S. labor markets even as the economy weakens. Congress should protect the labor market flexibility that causes U.S. employers to create more jobs than European countries without at-will employment.

Defining Disability Down

Society—including businesses, community organizations, families, and individuals—does not have unlimited resources to provide comfort to all those in need. Inevitably, expanding the concept of disability to include those who do not suffer limitations stemming from genuine disability will divert resources—and perhaps compassion—from those who truly need and deserve them. In this way, ADARA may hurt those who currently enjoy protection under the ADA. Fewer truly disabled individuals, for example, would be able to obtain job reassignment as a reasonable accommodation if reassignment slots are taken up by non-disabled individuals suffering fleeting impairments. If no slots are available, employers could lay off these disabled employees.

Similarly, one goal of the ADA, according its sponsors, was to put qualified but disabled workers on a "level playing field" with other workers. If all workers are disabled, however, then the playing field is once again tilted against those whom proponents of the original ADA sought to help.

Conclusion

The ADA Restoration Act would water down the definition of disability, potentially allowing the bulk of American workers to claim disability status and the protections associated with that status. Such a scenario would fundamentally undermine the basic employer–employee relationship, to the detriment of businesses, responsible and diligent workers, and the public at large. Worst of all, the ADARA could actually backfire and harm the employment prospects of the truly disabled by diluting the protections the ADA provides.

Making most workers legally disabled is a radical step that threatens to have huge impacts on the economy and the social fabric, by diluting the significance of disability and compassion for it among the public at large. The consequences of "defining disability down," weighed against the small or even negative benefit to those who are truly disabled, counsels great caution before embarking on such a radical course.

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25. Courts have recognized back strain and headaches as impairments. *See* Benoit v. Technical Manufacturing Corp., 331 F.3d 166 (1st Cir. 2003); Sinclair Williams v. Stark, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).

26. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 957 (2001).