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The Senate's ADA Amendments Act: Only Half Bad

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Most Americans would probably be surprised to learn that, with the economy slowing and unemployment ticking up, Congress is hard at work on legislation that would increase the regulatory burden on employers, even as it considers further economic stimulus proposals. Yet, toward the top of Congress's agenda for the year is the ADA [Americans with Disabilities Act] Amendments Act (S. 3406), a version of which has already passed the House (H.R. 3195) and will, according to observers, sail through the Senate. Lacking the numbers to block this legislation, conservatives in Congress still have the opportunity to at least ameliorate its potential negative effects by insisting on a bill that does not uproot nearly two decades of experience under the ADA and throw employment disability law into chaos. The way to do that is to build on the superior Senate version of the legislation.

Replacing a Cipher with a Cipher. It is particularly important that the definition of "disability" be clear so that employers can meet their obligations under the law with minimal confusion and expense. Under current law, a disability is defined as "a physical or mental impairment that substantially limits one or more major life activities."[1] Whether an individual is disabled determines whether an employer must investigate and implement accommodations and whether an employer is subject to liability under the ADA for failing to do so.

The House's proposed legislation would radically amend this definition. Unlike the original ADA Restoration Act, which would have done away with the concept of "disability" altogether, the current House bill maintains the ADA's three-prong core definitional text. But it would define "substantially limits" to mean "materially restricts" for the purposes of the first prong of the definition of disability. Thus, any impairment that "materially restricts" a person from performing any major life activity (e.g., eating, concentrating, or sleeping) would constitute a disability for the purposes of the law. The purpose of this change, according to its drafters, is to overturn the Supreme Court's decisions in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and related cases that served to limit the coverage of the ADA's protections.[2]

The main problem with expanding the ADA's coverage in this manner is that, in the context of disability law, the phrase "materially restricts" has no established meaning. It is wholly absent from the statutory law, regulatory texts, and court decisions. Even dictionaries provide several contradictory meanings. The legislative history—to which some judges resort when statutory language, as here, is vague—provides no clear answer either. It counsels that "materially restricts" is "intended to be a less stringent standard to meet" than that propounded in *Williams*.[3] Elsewhere, the drafters advise that

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"'materially restricted' is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation."[4] Some suggest, however, that the phrase may be susceptible to meanings that would render "stomach aches, a common cold, mild seasonal allergies, or even a hangnail" disabilities.[5]

The impact of this uncertainty on employers could be severe. It is evident that, under the House bill, accommodation costs would rise, as more workers become entitled to more accommodations. That, after all, is the point of the legislation. But at the same time that a much larger portion of the workforce would fall under the ADA's protections, the law would also become far more uncertain, driving up compliance costs and legal expenses. Although the House bill is supported by some business lobbies (representing mostly larger corporations), it is small businesses that are likely to suffer disproportionately, as is usually the case when there is regulatory complexity or legal uncertainty.

The Senate's More Sensible Approach. The Senate's version of the legislation commendably avoids the major infirmity of the House bill, the "materially restricts" language. While the Senate bill is still intended to overrule *Williams* and other Supreme Court interpretations of the ADA, it takes a far more measured approach than the House's legislation.

Two changes made between passage of the House bill and introduction of the Senate bill are especially important. First, the Senate bill simply omits the redefinition of "substantially limits" to mean "materially restricts." This ensures that the case law developed since enactment of the original ADA retains some relevance in future disability cases. This advances legal certainty, cutting down on unnecessary litigation and reducing the burden and expense of compliance. Legal clarity is also advanced by absence of a new, empty standard, which could take years for the courts to clothe with consistent, predictable meaning.

Second, the Senate bill revises the House's command that the definition of disability "shall be construed broadly" to achieve the ADA's purposes. As several commentators noted, this was an unusual formulation, for it encouraged the courts to read beyond the actual words of the legislation in their construction of its meaning. Though "broad construction" provisions are hardly unusual, they usually direct the reader to some specific end, such as including a particular item within a standard or keeping in mind a particular factor. Here, however, was a bare order to put a thumb on the scale, further undermining legal certainty and consistency of results. The Senate bill corrects this poor draftsmanship, clarifying that the act is to be constructed "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[6] Arguably, this provision has little meaning (courts should, of course, construe a statute as its terms require), but that is a far better result than statutory obfuscation.

In short, the Senate bill, while still advancing ill-conceived policies at a time when the nation can least afford to do so, is far less damaging and irresponsible than its House counterpart.

Next Steps. Ideally, Congress would leave the ADA as it is. But if legislation is inevitable, as seems to be the case, there are several ways in which the Senate bill might be amended so as to reduce its impact on the economy and jobs:

First, if Congress wishes to overrule the Supreme Court's holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), in which the Court ruled that mitigating measures would be considered in determin-

1. The Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A).
2. H. Rep. No. 110-730 Part 1, at 6 (2008).
3. H. Rep. No. 110-730 Part 1, at 6 (2008).
4. *Ibid.*, at 10.
5. H. Rep. No. 110-730 Part 2, at 30 (2008).
6. This parallels language used in the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 42 U.S.C. § 2000cc-3(g).

ing whether a disability exists, it should do so in a narrower way than in the current bills. Specifically, both bills, as drafted, exclude ameliorative measures from the disability determination but for ordinary eyeglasses and contact lenses. In this, the bill's drafters recognize that mild visual impairments are not disabilities and that according them legal protection would be unduly expensive and counterproductive. Congress should extend this reasoning and, at the least, exclude from the mitigating measures rule other prevalent ameliorative devices, such as most hearing aids and joint braces, and perhaps even, as the bills would currently bar from consideration, "learned behavioral or adaptive neurological modifications," an apparent reference to an individual's ability to learn to work around an impairment.

Second, Congress should restore to its bills guideposts used by the courts to determine the scope of the ADA. Congress's intention this time around is obviously to expand coverage, but there is great debate about exactly how far. Rather than punt that issue to the courts, Congress should continue to state its best estimate of how many Americans it intends to be covered by the act.

Third and finally, Congress should take a hard look at the compliance costs of the ADA and consider advancing job creation and economic growth by exempting more small businesses from the act's coverage. At present, the ADA employment provisions do not apply to businesses employing fewer than 15 workers, and neither the House nor the Senate legislation would change this. This exemption is an acknowledgement that complying with the ADA is difficult and costly and that it puts smaller businesses at a disadvantage relative to their larger competitors.[7] Small businesses, as has been well documented in the economics and finance literature, are the driver of employment growth, particularly when larger firms are reluctant to increase headcount.[8] If Congress wishes to give a boost to the economy and to those seeking employment, it could do far worse than to inch up the exemption threshold to 25 or even 50 employees.

Limit the Damage. The Senate's ADA Amendments Act represents a real and tangible improvement over the House version, which would have abandoned a large body of important case law, throwing the employment disability law into disarray. In contrast, the Senate's approach, while still bad policy on the whole, is far less damaging to the law, and for that reason, its impact on the economy, the international competitiveness of U.S. businesses, and employment is likely to be far less. Now is not the right time to expand ADA coverage, but if legislation is inevitable, Congress should still reject approaches that muddy the meaning of the law and would inflict unnecessary pain across the economy.

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7. The exception parallels that of Title VII of the Civil Rights Act of 1964, which is less burdensome on employers than the ADA due to the nature of the classification and the ADA's accommodation process.
8. See generally, David L. Birch, *Job Creation in America: How Our Smallest Companies Put the Most People to Work* (New York: Macmillan, Free Press, 1987).