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ADA Restoration Act: Undermining the Employer-Employee Relationship

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Congress passed the Americans with Disabilities Act in 1990 with the noble aim of ensuring that disabled Americans could participate as fully as possible in the regular activities of everyday life, such as working and accessing public facilities. The cornerstone of the law, which balances its benefits for the disabled with its burden on the rest of society, is that its protections are limited to those with an actual disability, defined as "a physical or mental impairment that substantially limits a major life activity." The ADA Restoration Act (ADARA, S. 1881, H.R. 3195) would dissolve this limitation, making disability status and protections available to nearly all Americans, such as those who wear eyeglasses or suffer "tennis elbow." This loose standard would hit employers especially hard, because they would have to go to great lengths, at potentially great expense, to accommodate minor "impairments" and would face tremendous risks in disciplining or firing employees suffering from such minor impairments. This standard would chip away at the fundamental nature of the employer–employee relationship. Before it makes such a radical change, Congress should consider the impact that it would have across the economy and on so many employers and diligent workers.

Everyone Is Disabled. Congress passed the Americans with Disabilities Act (ADA) to protect the ability of disabled Americans to participate in public life. The Act was focused on protecting Americans with genuine disabilities that prevented them from performing major life functions. The Americans with Disabilities Restoration Act would transform the ADA into legislation covering virtually every American.

The ADA covers Americans with "a physical or mental impairment that substantially limits one or more major life activities." Abandoning the idea of disability as limitation of a major life activity, ADARA would extend the ADA to cover any "physical or mental impairment."[1] Specifically, an impairment is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting 1 or more…body systems" or "any mental or psychological disorder."[2] The legislation specifically states that determination of an impairment should not consider whether the affected individual may take corrective measures to remedy the impairment (e.g., eyeglasses) or whether the condition manifests any symptoms.[3]

Such impairments, as defined in the act, include the sort of minor, sometimes fleeting, ailments that affect all people from time to time. Anyone with less than perfect health would be "disabled." Courts have found a variety of minor conditions to be impairments, including back and knee strains, high cholesterol, erectile dysfunction, headaches, and tennis elbow.[4] A worker with poor vision, but who wears contact lenses that restore 20/20 sight, would be "disabled."

Burdensome Accommodation Process. Legally defining any worker in less than perfect health as

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disabled does more than highlight Congressional disconnect from the real world. It would severely disrupt businesses by extending the burdensome accommodation process that they must grant to disabled workers to virtually every employee.

Under Title I of the current Americans with Disabilities Act, 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.[5] There is no special procedure for requesting accommodations.[6] A worker who is able to demonstrate a disability need only ask his employer for the accommodation that he believes to be necessary and then "work together" with the employer to determine an appropriate accommodation.[7] ADA obligations can be triggered very informally. "I need six weeks off to get treatment for a back problem" is enough to trigger duties under the law.[8]

Reasonable accommodations are defined as those that do not impose "undue hardship" on the employer.[9] An undue hardship may be, for example, an accommodation so costly that it causes the employer to "go broke or suffer other excruciating financial distress."[10] Reasonable accommodations 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.[11] Common accommodations that the government has stated rarely impose an undue hardship include:

- time off for someone who needs treatment for a disability;
- physical changes, such as installing a ramp or modifying a workspace or restroom;
- sign language interpreters for people who are deaf or readers for people who are blind;
- providing a quieter workspace or making other changes to reduce noisy distractions for someone with a mental disability;
- supplying training and other written materials in an accessible format, such as in Braille, on audio tape, or on computer disk; and
- providing TTYs for use with telephones by people who are deaf, and hardware and software that make computers accessible to people with vision impairments or who have difficulty using their hands.[12]

If a disability prevents an employee from performing his duties entirely, the employer must reassign the employee to any vacant position for which he is qual-

1. S. 1881, § 4.
2. *Ibid*.
3. *Ibid*.
4. See Jeffrey McGuiness, "Misnamed 'ADA Restoration Act' Goes Far Beyond Reversal of Targeted Court Decisions," H.R. Policy Association *Memorandum* No. 07-114, September 28, 2007, p. 4.
5. 42 U.S.C. § 12113 (b)(5).
6. "To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.' " Equal Employment Opportunity Commission, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," October 17, 2002, at *www.eeoc.gov/policy/docs/accommodation.html*.
7. *Ibid*. On determining the appropriate reasonable accommodation, see 29 C.F.R. § 1630.2 (o)(3).
8. This is a verbatim example from EEOC guidance. Equal Employment Opportunity Commission, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act."
9. 42 U.S.C. § 12112 (b)(5)(A).
10. See *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995).
11. Equal Employment Opportunity Commission, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act."
12. U.S. Department of Justice, "A Guide for People with Disabilities Seeking Employment," October 2000, at *www.usdoj.gov/crt/ada/workta.htm*.

ified of similar pay and status.[13] 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 itself a violation of the ADA.[14]

Enables Shirking. 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 every employee.

If Congress does so, then any worker with any impairment could insist that their employer change their working condition to meet their needs. This will not be a problem with conscientious employees. Irresponsible employees, however, could use the law to skip work at will and dump their responsibilities on their co-workers.

Doctors cannot prove the existence of some medical conditions, such as chronic headaches or back pains. Under ADARA, perfectly healthy workers could fake common illnesses, claim impairment, and demand that their employer accommodate them by giving them time off 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.

This may sound farfetched, but it is exactly how some workers have misused the Family and Medical Leave Act (FMLA).[15] Many workers misuse FMLA leave to avoid working undesirable shifts, such as night shifts.[16] 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.[17] Another worker used FMLA leave to leave work two hours early on Fridays and arrive four hours late on Monday, to avoid the "stress" of rush hour traffic.[18] 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.

Burdens Co-workers and the Public. Abuses of the ADA and other protection laws burden diligent workers and the public, not just employers. When an employee calls in and demands time off on short notice to accommodate their impairment, companies do not have the time to hire and train a temporary employee. Instead they must transfer their tasks to their co-workers who showed up for work that day. They must deal with their entire original workload, plus the additional work. When some workers use the law to get out of undesirable shifts, like night shifts, it means their responsible co-workers must take those shifts instead.

And when there are not enough co-workers to cover the tasks, the job cannot be done, hurting the public who relies on employers to provide essential services. This already happens with FMLA leave. Several school-bus drivers in Fairfax County Public Schools, for example, use the law to avoid coming to work on time. When this happens, parents must either drive their children to school before work, or the children must wait until another bus driver finishes his run, arriving at school well after class has started.[19]

Extending the Americans with Disabilities Act to cover any impairment, no matter how insignificant and fleeting, would make the abuses of FMLA leave

13. Equal Employment Opportunity Commission, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act."
14. *Ibid*.
15. James Sherk, "Use and Abuse of the Family and Medical Leave Act: What Workers and Employers Say," Heritage Foundation *Special Report* No. 16, August 28, 2007, at *www.heritage.org/Research/Labor/sr16.cfm*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. Public comment of 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.

seem minor. Almost any irresponsible worker could demand that their employer give them time off work whenever they want it, without notice. Their co-workers and the public, not just their employers, would suffer.

Expensive Litigation. 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 risks, because the employee may file a discrimination charge with the 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 based on grounds other than disability.

Workers who believe that they have suffered discrimination, such as an employer refusing to make a certain proposed accommodation or a firing due to disability, may file a complaint with the EEOC within 180 days (300 days in some states) of the alleged discrimination.[20] The EEOC will notify the employer of the charge and usually attempt to arrange a mediation and settlement agreement.[21] In EEOC proceedings, employees may seek certain accommodations, hiring, promotion, reinstatement, back pay, and attorneys' fees.[22] Employees filed 15,575 ADA charges against employers in 2006.[23] The EEOC found, after investigation, only 23.4 percent of these charges to state meritorious claims and resolved most of those administratively, resulting in $48.8 million in settlements.[24] It also determined, however, that fully 60.3 percent of charges filed involved "no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation."[25]

If the employee is dissatisfied with the EEOC's resolution, for whatever reason, he may request a "right-to-sue" letter from the EEOC and then file suit in federal court.[26] Typically, an employee must prove that he (1) has a disability, (2) is qualified for the job (i.e., that he could perform the job with reasonable accommodation), and (3) suffered an adverse employment action because of his disability.[27] The usual issues of contention in an ADA case are whether a specific job function is essential, meaning that the employee must be qualified to perform it, and whether an accommodation that might allow the employee to perform an essential function represents an undue burden. Under current law, the employee bears the burden of proving his qualification for the job while employers may prove, as a defense, that a proposed accommodation would be an undue burden.

The damages available to a wronged employee under the ADA can be significant. They 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.[28]

One provision of ADARA would shift the burden of proving an employee's qualification to the

20. U.S. Equal Employment Opportunity Commission, "Filing a Charge of Employment Discrimination," December 20, 2007, at *www.eeoc.gov/charge/overview_charge_filing.html*.
21. U.S. Department of Justice, "A Guide for People with Disabilities Seeking Employment."
22. *Ibid*.
23. U.S. Equal Employment Opportunity Commission, "Americans with Disabilities Act of 1990 (ADA) Charges," February 26, 2007, at *www.eeoc.gov/stats/ada-charges.html*.
24. *Ibid*.
25. *Ibid*.
26. U.S. Equal Employment Opportunity Commission, "Federal Laws Prohibiting Job Discrimination: Questions And Answers," May 22, 2002, at *www.eeoc.gov/facts/qanda.html*.
27. See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).
28. Melinda Caterine, "What Is My Case Worth?" American Bar Association, August 2005.

employer, requiring the employer to show that the employee is not qualified to perform the essential functions of a job.[29] This would entail intensive investigation into the employee's background, education, physical and mental capabilities, and experience. This change runs counter to the common legal practice of placing burdens of proof on those parties most easily able to bring the relevant facts to light—in this case, as current law recognizes, the employee.[30]

Undermines "At-Will" Employment. By forcing employers to go through a risky, costly, and time-consuming process to lay off any employee who could claim any impairment, the ADARA would undermine a fundamental premise of American labor law, the doctrine of "at-will" employment. That 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 at any time they choose.

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 and finds that he is unproductive or not a team player faces great difficulty removing that employee. Similarly, a French 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.[31] France's current unemployment rate is higher than the worst unemployment rate recorded during the past two U.S. recessions.[32]

ADARA would severely weaken the at-will employment doctrine that makes the American labor market so strong. Under ADARA, any employee could claim impairment, such as back strains or headaches, and sue if they were either laid off or not hired in the first place, contending discrimination.[33] 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 Americans with Disabilities Act has had precisely this unintended effect. Because it made hiring and firing disabled workers more expensive, businesses employed fewer of them after the Act took effect.[34]

Protecting the ability of disabled Americans to participate in the economy is a noble goal, but the ADARA would damage U.S. labor markets even as the economy weakens. Congress should protect the labor market flexibility that causes employers to

29. S. 1881, § 7.

30. See Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence* (3rd Ed.), § 3.1.

31. Hugo Hopenhayn and Richard Rogerson, "Job Turnover and Policy Evaluation: A General Equilibrium Analysis," *The Journal of Political Economy,* Vol. 101, No. 5, October 1993, pp. 915–938; Kugler, Adriana D. & Saint-Paul, Gilles, 2000. "Hiring and Firing Costs, Adverse Selection and Long-term Unemployment," IZA Discussion Papers 134, Institute for the Study of Labor.

32. OECD, OECD New Release: OECD Standardised Unemployment Rate falls to 5.5% in October 2007," December 10, 2007, at *www.oecd.org/dataoecd/43/34/39757287.pdf*. The report shows 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. Historical U.S. unemployment rates: Bureau of Labor Statistics/Haver Analytics.

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

34. Daron Acemoglu and Joshua D. Angrist, 2001. "Consequences of Employment Protection? The Case of the Americans with Disabilities Act," Journal of Political Economy, University of Chicago Press, vol. 109(5), pp. 915-957.

create far more jobs than European countries without at-will employment.

If Everyone Is Disabled, No One Is. Society—including businesses, community organizations, families, and individuals—does not have unlimited resources to provide comfort to all those who may need it. Inevitably, expanding the concept of disability to include those who do not suffer limitations stemming from 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 Americans with Disabilities Act. 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 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, making disability status and protections available to any worker. In this way, it 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 making employers even more wary of hiring such workers and accommodating their special needs.

Making the protections of the ADA available to all workers 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. Before making such a radical change, with far-reaching effects but few benefits for those truly disabled, Congress should consider its risks and detriments.

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