COMPLIANCE COSTS OF THE AMERICANS WITH DISABILITIES ACT

I. Introduction

The Americans with Disabilities Act\(^1\) (the Act) was enacted to prevent discrimination against the estimated 43 million Americans\(^2\) with disabilities and to ensure their integration into mainstream life.\(^3\) The Act created a private right of action with the potential for compensatory and punitive damages of up to \$300,000.\(^4\)

The purpose of the Act is, in part, to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”\(^5\) Commentators opine that the Act will “transform the landscape of American society,”\(^6\) and “[do] some-

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2. See infra notes 23-24 and accompanying text for a detailed breakdown.


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thing important for American business,'” as well as “change the way most businesses conduct their employment practices.” Notwithstanding its laudable purpose, there are considerably more questions than answers when considering the practical effects of this legislation.

Commentary on how the Act translates into compliance costs for employers has straddled the fence. Some commentators believe that the Act “will place an onerous burden on employers,” while others believe that “[t]he potential benefits are far larger than the drawbacks.” Because the Act has just recently become law, no one really knows what costs it will impose on an employer. In addition, although lawmakers received considerable input from potentially affected employers during the legislative process, many employers remain concerned that they will be unable to satisfy the Act’s numerous requirements.


8. FASMAN, supra note 3, at vi.

9. See, e.g., Disabilities Act Raises Questions for Employers Over Health Insurance, DAILY LAB. REP. (BNA) (Mar. 16, 1992) [hereinafter Disabilities Act] (reporting that “[m]any private-sector employers are confused about their health insurance obligations under the [Act]’s”; Thomas H. Barnard, The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?, 64 ST. JOHN’S L. REV. 229, 229 (1990) (“[T]he [Act] is also likely to create major difficulties for employers trying to comply with the new law, and thus it may become a source of frequent litigation.”); FASMAN, supra note 3, at 2 (“Compliance with the [Act] will not be easy, because the scope of the new law is so unclear.”); Meg Fletcher & Sara J. Harty, Law to Help Disabled May Injure Employers, BUS. INS., Jan. 27, 1992, at 1 (collecting statements from insurance professionals who differ as to the Act’s likely impact on health insurance and workers’ compensation insurance costs).

10. Barnard, supra note 9, at 252.


12. “From May 9, 1989[,] to July 26, 1990[,] the Americans with Disabilities Act was subject to numerous amendments, negotiations, markups, and compromises. Throughout this process, the business community’s concerns were considered and addressed.” Mayerson, supra note 6, at 5-6 (citing THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE, BUREAU OF NATIONAL AFFAIRS, INC. 35-62 (1990)).

13. For example:

Health insurance issues, a major concern of employers in recent years, has [sic] a new dimension with the advent of the Americans with Disabilities Act. [M]any private sector employers are “thinking and worrying about” their health insurance obligations under the law, according to business
The intent of this note is to provide a general outline of those provisions of the Act which will most affect an employer's day-to-day operations, as well as to provide an idea of where, why, and, to the extent possible, how much of an employer's financial resources will be expended through compliance. Because the financial effect of the Act is still being debated, the analysis here is drawn from legal and business commentary and from speculation found in trade journals and the popular press.¹⁴

Section II provides some background on the Americans with Disabilities Act, including key Congressional findings and the Act's purpose. Additionally, the Act's four subchapters: employment,¹⁵

groups and disability advocates interviewed by BNA.

Employer Concern About Health Care Now Focused on Requirements under ADA, DAILY REP. FOR EXECUTIVES (BNA), Mar. 11, 1992, at C-1 [hereinafter Employer Concern].

See also Meg Fletcher, New Policies Cover Employment Claims: Firms For Rise in Discrimination Suit, Bus. Ins., Mar. 23, 1992, at 2 (reporting that new insurance policies are being offered to employers who fear that the Act and other federal employment legislation may expand liability).


public services,16 public accommodations and services operated by private entities,17 and miscellaneous provisions,18 will be outlined.

As this note is primarily concerned with the first subchapter of the Act, which contains the employment provisions, Section III analyzes these provisions in more detail. Finally, Section IV analyzes the costs with which compliance with those provisions may entail with respect to four major areas: costs associated with the provision of "reasonable accommodations,"19 higher health insurance rates,20 higher workers' compensation rates,21 and increased employment-related litigation expenses.22

II. THE ACT: AN OVERVIEW

A. Congressional Findings and Purposes

Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . ."23 This startling

16. Id. §§ 12,131-12,165.
17. Id. §§ 12,181-12,189.
18. Id. §§ 12,201-12,213.
19. Id. § 12,112(b)(5)(A). See infra Section IV(A).
21. The Act has no provisions specifically regarding workers' compensation insurance. See infra Section IV(C).
23. Id. § 12,101(a)(1). This incredible statistic is the first fact listed in the Congressional findings and purposes section of the Act. This figure is apparently gleaned from statistics found in The Scope of Physical Disability in America—Populations Served (The National Center for Medical Rehabilitation Research), reprinted in From ADA to Empowerment—Work: The Key to Opportunity [hereinafter From ADA to Empowerment] (distributed at the Meeting of the President's Committee on Employment of People with Disabilities, Radisson Hotel, Wilmington, Delaware, Mar. 4, 1992, and on file with author). The report found:
— 22 million people have hearing impairments,
— 2 million people are deaf,
— 120,000 people are totally blind,
— 60,000 people are legally blind,
— 2 million people have epilepsy,
— 1.2 million people are partially or completely paralyzed,
— 1 million people use wheelchairs,
— 9.2 million people have developmental disabilities such as cerebral palsy,
— 2.1 million people have speech impairments, and,
— 2 million to 2.5 million people have mental retardation.
Id. The National Institute on Mental Health further estimates that there are 5
statistic translates into approximately 8.2 million people with disabilities who want to work, but cannot find a job. Congress also found that:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
* * * *

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
* * * *

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . .

The Act’s statements of purpose are:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

million people with mental illness. Id. All of these disabilities would clearly meet the definitional requirements of "disability" within the Act. 42 U.S.C. § 12,102(2) (1988 & Supp. II 1988).


(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.\textsuperscript{26}

Unfortunately, as discussed below, these laudable purposes may be lost in a maze of ambiguous language and private rights of action for compensatory and punitive damages.

\textbf{B. Employment}

The first subchapter of the Act requires employers, employment agencies, labor organizations, and joint labor-management committees\textsuperscript{27} to institute nondiscriminatory practices in application procedures, hiring, advancement, as well as discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.\textsuperscript{28} The prohibition against discrimi-

\textsuperscript{26} \textit{Id.} \textsuperscript{2} § 12,101(b). "This historic Act is the world's first comprehensive declaration of equality for people with disabilities." President George Bush, Statement on signing the Americans with Disabilities Act of 1990, in \textit{Worklife}, supra note 7, at 9. The laudable purpose of the Act is to provide civil rights protections for persons with disabilities which parallel rights established by the federal government for women and minorities. John L. Wodatch, \textit{ADA: What it Says, in Worklife}, supra note 7, at 27. The section of the Act prohibiting employment discrimination includes the same employers and remedies contained in Title VII of the Civil Rights Act of 1964. Mayerson, supra note 6, at 7 (citing 42 U.S.C. § 2000e (1988)).


\textsuperscript{27} \textit{Id.} \textsuperscript{2} § 12,111(2) (indicating these agencies are "covered entities" under the Act).

\textsuperscript{28} \textit{Id.} \textsuperscript{2} § 12,112(a). The burden upon the employer clearly encompasses all matters directly related to employees and also includes neutral practices.

The [Act] does not require a plaintiff to prove that the discrimination in employment was based \textit{solely} on a disability. Instead, a violation occurs where discrimination on the basis of a disability is a factor. Like Title VII of the Civil Rights Act of 1964, the [Act] prohibits both intentional discrimination and unintentional discrimination. A neutral employment practice that adversely impacts disabled employees ("disparate impact")
nation also precludes pre-offer medical examinations and other health related inquiries. Employers are only permitted to inquire into the medical background of an applicant if it is directly related to a job function.

The Act also imposes an affirmative duty upon private employers to make "reasonable accommodations" for qualified employees and applicants who have disabilities, but only if the accommodation would not "impose an undue hardship" on the employer. The Act states that an employer will be liable for discrimination by:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .

"Disability" is defined broadly as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

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may be challenged under the [Act].
30. Id. §§ 12,112(c)(1), (2). For example, an employer hiring outdoor construction workers may ask if the applicant is capable of working outside for eight hours a day in any weather, but may not ask if the applicant has a heart condition. Similarly, an employer hiring a word processor may ask if the applicant can use a word processor, but not whether the applicant has a visual impairment. FASMAN, supra note 3, at 27. "Even a generic question that asks 'do you have any physical or mental conditions that would prevent you from performing your job functions?' cannot be asked. Only inquiries about the ability to perform specific job-related functions—'can you do x?'—are permissible." Id.
32. Id. § 12,102(2). Major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities." H.R. REP. No. 485, 101st
C. Public Services

The second subchapter of the Act relates primarily to public transportation.33 It generally bans discrimination by any state or local government that operates a transportation system, even if the system does not receive federal financial support.34 It contains provisions regulating access to public transportation, including the implementation of architectural and access design changes to public transportation facilities and vehicles.35

D. Public Accommodations and Services Operated by Private Entities

The third subchapter of the Act prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ."36 It provides a detailed list of those places considered public accommodations, which includes virtually every type of business generally reliant upon the mass public


The definition of disability does not include "simple physical characteristics," such as eye or hair color. Fasman, supra note 3, at 8. "Moreover, because only physical or mental impairments are included in the definition, environmental, cultural and economic disadvantages are not covered." Id.

The meaning of these provisions and their key components will be discussed below. It is clear, however, that "even after [the] regulations are issued, their meaning and validity will be challenged in the courts, which will interpret the regulations and the law and decide, finally, what Congress intended when it passed the statute." Id. at 3.

The Equal Employment Opportunity Commission (EEOC), which will be the primary enforcement agency for the Act, was charged with issuing regulations within one year of the Act's enactment date. Pursuant to this mandate, regulations were published at Equal Employment Opportunity for Individuals with Disabilities, 29 C.F.R. pt. 1630 (1991). However, these regulations do not provide much insight into the meaning of many key terms and have been assailed for merely restating the statute. See, e.g., Disabilities Act, supra note 9, at A-1 (reporting statement by Charles Goldman, an advocate for people with disabilities: "[The] EEOC needs to tell employers how to deal with the insurance industry in the 'real world.'").


34. "The [Act] strikes a responsible balance between providing accessible transportation and protecting the economic viability of local transit providers." Wodatch, supra note 26, at 28.

35. This section draws from the Rehabilitation Act of 1973. See generally Dempsey, supra note 14 (reviewing the major legislative and regulatory attempts designed to enhance the mobility of the disabled).

for its financial survival.\(^3^7\) It mandates the provision of auxiliary aids and services\(^3^8\) and the removal of architectural barriers.\(^3^9\) However, as with the employer provisions, such accommodations do not have to be made if doing so would cause an "undue burden" upon the responsible entity.\(^4^0\) The rights, remedies, and procedures established under the Civil Rights Act of 1964\(^4^1\) apply to anyone subjected to discrimination in violation of these provisions, or to anyone who has reasonable grounds to believe that he or she is about to be subjected to discrimination in violation of the provisions as a result of new construction and alterations.\(^4^2\)

37. The comprehensive list of businesses which are considered public accommodations includes:

(A) an inn, hotel, motel, or other place of lodging . . . ;
(B) a restaurant, bar, or other establishment serving food or drink;
(C) a motion picture house, theater, concert hall, stadium . . . ;
(D) an auditorium, convention center . . . ;
(E) a bakery, grocery store, clothing store . . . ;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor . . . ;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery . . . ;
(I) a park, zoo, amusement park . . . ;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter . . . ; and
(L) a gymnasium, health spa, bowling alley, golf course . . . .

Id. § 12,181(7).

38. "Auxiliary aids and services" includes:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) acquisition or modification of equipment or devices; and
(D) other similar services and actions.

Id. § 12,102(1).

39. Id. § 12,182(b)(2)(A)(iv).

40. Id. § 12,182(b)(2)(A)(iii). This is the only reference to "undue burden" in the Act. Presumably, it means the same thing as "undue hardship," which is a defined term. See id. § 12,111(10).


E. Miscellaneous

The final subchapter of the Act contains a number of miscellaneous provisions that do not fit into the aforementioned sections—the most significant of which relates to insurance. According to the insurance provision, the Act shall not be construed to prohibit or restrict:

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this [Act] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this [Act] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of [this Act].

This provision allows an employer to alter existing health insurance plans, provided that proper actuarial procedures are followed. Employer-provided health care plans may be tailored to exclude or limit certain procedures and treatments, such as mental health coverage; however, an employer may not deny health insurance coverage solely on the basis of disability or the diagnosis received solely because that person is a "transvestite." 42 U.S.C. § 12,208 (1988 & Supp. III 1988). It further provides that homosexuality and bisexuality are not impairments and, thus, not disabilities under the Act. Id. § 12,211(a). "Disability" also does not include: "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." Id. § 12,211(b).

43. For example, this subchapter provides that a person shall not be considered disabled solely because that person is a "transvestite." 42 U.S.C. § 12,208 (1988 & Supp. II 1988). It further provides that homosexuality and bisexuality are not impairments and, thus, not disabilities under the Act. Id. § 12,211(a). "Disability" also does not include: "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." Id. § 12,211(b).

44. Id. § 12,201(c). See 29 C.F.R. § 1630.16(f) (1991).

45. Employer Concern, supra note 13, at C-2.
by an employee. An employer may continue to offer insurance policies that limit coverage of preexisting conditions, provided that the policies are made available to all employees on an equal basis, and are not used to circumvent the provisions of the Act.

III. Employment Provisions

This section of the note explores the interrelationship of "reasonable accommodation" and "undue hardship," referred to in Section II(B). Because employers are required to take affirmative steps to make a "reasonable accommodation" for a "qualified individual with a disability" (unless the employer would experience "undue hardship" by doing so), the definition of "reasonable accommodation" and "undue hardship" is significant to the determination of employer liability under the Act.

Under the Act, "reasonable accommodation" may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

46. Perritt, supra note 14, § 4.25.
47. Id.
The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

49. Id. § 12,112(b)(5)(A). See infra notes 54-58 and accompanying text.
An employer will be liable for discrimination if it refuses to make a reasonable accommodation for an otherwise qualified individual. The list of reasonable accommodations described in the Act is not exhaustive, nor was it intended to be. The history of the Act specifically anticipates and requires that the reasonableness of any proposed accommodations be considered on a case-by-case basis. Given the broad definition of disability, it is impossible to foresee the content, scope, and cost of accommodations that may be required under the Act.

An employer will not have to make a reasonable accommodation if it can prove that it would experience "undue hardship" by doing so. The nature of undue hardship is described under the Act as follows:

(A) In general
   The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
(B) Factors to be considered

52. Senator Edward Kennedy submitted a report on behalf of the Committee on Labor and Human Resources stating:
   "The decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under sections 501, 503, and 504 of the Rehabilitation Act of 1973."
53. "Disability" under the Rehabilitation Act of 1973 and various state laws has been interpreted by different courts to include AIDS, diabetes, high blood pressure, heart disease, sensitivity to smoke, back injuries, epilepsy, arthritis, alcoholism, and back problems. Weatherspoon, supra note 14, at 268 & nn. 35-44.
   The new law defines disability so ambiguously that whether or not a person has been excluded from a job unfairly will often be impossible to determine with any confidence. Are people handicapped—and hence entitled to special consideration—simply because they cannot work under stressful conditions or because they object to any criticism of their work that may mean a return to alcohol or drug dependency? Lawsuits arguing these and many other strange positions are possible under the new law.
   Civil rights legislation has plenty of weaknesses, but ambiguity about who is included isn't one of them. Discrimination is banned on the basis of characteristics that are usually easily determined, such as race, gender, or religion.
   Becker, supra note 24, at 14.
In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this [Act];

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operations of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 55

Most employers will have difficulty proving an undue hardship under this factor-based test, 56 especially larger and more financially stable employers. The legislative history of the Act establishes that merely because costs rise above a certain de minimis level, the financial burden will not be considered an undue hardship. 57 An

55. Id. The regulations further provide that the impact of the accommodations upon the “operation” of the site, including the “impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business,” must be considered in the undue hardship analysis. 29 C.F.R. § 1630.2(p)(2)(v) (1991); 29 C.F.R. § 1630.15(d) (1991). This additional factor recognizes the “practical realities of the workforce and the importance of avoiding disruptive forces.” Postol & Kadue, supra note 14, at 722-23.

56. Postol & Kadue, supra note 14, at 722. “[A]n employer will never know that it qualifies for the defense until the court rules, for there is no ‘safe harbor.’” Id. Proposed, but defeated, amendments to the Act would have provided that any costs above 10% of a person’s salary would be an undue hardship per se. Id. at 722 n.128 (citing H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3., at 41 (1990)).

57. This is in contrast to religious accommodation under title VII of the Civil Rights Act in regard to which the Supreme Court has held that an employer need not accommodate someone with a religious belief if the accommodation is above a de minimis cost. S. Rep. No. 116, 101st Cong., 1st Sess. 36 (1989) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)); Gardner & Campanella, supra note 14, at 39-40 (same).
undue hardship defense may also fail where the cost, however great, is shown to be a small portion of an employer's budget.\textsuperscript{59}

Studies indicate that over seventy percent of all accommodations will cost less than $500, and that fifty percent will cost less than $50, or nothing at all.\textsuperscript{59} Also, costs incurred in providing reasonable accommodations for disabled employees may be lessened if the employer qualifies for a tax credit or deduction.\textsuperscript{60} Additionally, the Act provides that if an employer asserts that it cannot make a reasonable accommodation, it must allow the disabled employee to supply or pay for the accommodations that present undue hardship to the employer.\textsuperscript{61} Other sources, such as a state vocational rehabilitation agency, may also provide funding.\textsuperscript{62}

\textbf{IV. Analysis of Compliance Costs}

The remainder of this note provides an analysis of the potential compliance costs that the Act creates for private employers. These


\textsuperscript{59} Questions and Answers on Americans with Disabilities Act, reprinted in From ADA to Empowerment, supra note 23. See also Fletcher & Harty, supra note 9, at 85 ("An EEOC study estimates that the total cost of all changes to satisfy the reasonable accommodation provision will be $261 per accommodation on average.").

\textsuperscript{60} Fasman, supra note 3, at 2.

While Congress mandated an accessible America, it did not require that accessibility be purchased regardless of cost. To ease the financial burden of complying with the [Act], Congress provided a limited tax break so that businesses could make physical alterations when necessary for employment and public accommodation situations. Businesses with less than $1 million in gross receipts or with fewer than 30 full-time employees will be eligible for a tax credit. These small businesses will have to pay the first $250 of any accommodation cost. Above $250, the employer would qualify for a 50\%, non-refundable credit of up to $5,000. Costs above $5,000 qualify for a tax deduction of up to $15,000. All businesses not fitting into the less than $1 million or fewer than 30 full-time employees are limited to the $15,000 tax deduction. Expenditures that qualify for these tax breaks include, but are not limited to: removal of architectural, communication, transportation or other physical barriers; purchase or modification of needed equipment; and provision of technical assistance for employers and employees to comply with the Act.


\textsuperscript{61} S. Rep. No. 116, 101st Cong., 1st Sess. 36, 37 (1989). For example, if the proposed accommodation costs $2,000 and this would impose an undue hardship upon the employer, the employee can provide the amount needed, perhaps $500, to place the employer's accommodation cost within the "reasonable" level.

\textsuperscript{62} Id. at 36.
costs are impossible to predict with accuracy, and it is uncertain whether, overall, the Act will increase or decrease certain costs.\footnote{63} Further, because it is the express intent of the Act that undue hardship be considered on a case-by-case basis, and because cost is the paramount factor in establishing undue hardship, an employer faced with a lawsuit must firmly establish its costs when it refuses to make a reasonable accommodation—an almost impossible burden to meet.

\[A. \textit{Cost of Reasonable Accommodation}\]

The Equal Employment Opportunity Commission (EEOC) estimates the cost of the average reasonable accommodation to be $261.\footnote{64} It is difficult to imagine that an employer could claim that $261 is an undue hardship; such a finding would essentially vitiate the purpose of the Act. Moreover, because of the availability of public funding and the possibility that a disabled employee may contribute toward the cost of accommodation, evidence suggests that in most cases compliance will not be financially difficult.\footnote{65}

In certain situations, however, the scope of the accommodation could cost thousands of dollars. For large employers, the aggregate cost of accommodating all of their disabled employees may be considerable. Also, the costs of certain individual accommodations, such as a talking calculator, are fixed and readily ascertainable while other costs, such as lost production time and training time for a new device, although intangible, are nonetheless real and must also be borne by the employer.\footnote{66} These intangible costs are generally in-

\begin{footnotesize}
\footnote{63. Meg Fletcher, \textit{ADA's Effect on Work Comp Largely Unknown}, Bus. Ins., Mar. 16, 1992, at 11 ("Over time, the [Act] has the potential to both increase and decrease an employer's workers compensation payouts and related costs.").}
\footnote{64. See supra note 59.}
\footnote{65. According to the Job Accommodation Network, a service of the President's Committee on Employment of People with Disabilities:
\begin{itemize}
\item 31\% of all accommodations cost nothing,
\item 50\% cost less than $50.00,
\item 69\% cost less than $500.00, and
\item 88\% cost less than $1,000.00.
\end{itemize}
\textit{From ADA to Empowerment, supra} note 23. The seminar materials also indicate that The Job Accommodation Network will provide free technical assistance on providing accommodations.}
\footnote{66. The nature of the accommodation will coincide with the "essential functions of the employment position." 42 U.S.C. § 12,111(8) (1988 & Supp. II 1988). For example, an essential function of a person who loads boxes onto trucks is that that person ensures that the boxes are placed onto the truck. If the person regularly does so manually, but develops a bad back, the employer cannot remove that
capable of precise measurement and an employer may have difficulty
detailing such costs in a discrimination suit.

The phrase itself—undue hardship—illustrates that an employer
will be required to provide accommodations and incur costs which
are considered due hardship. An employer’s willingness to make
certain accommodations when costs are reasonable may work against
him if he later believes that a new, similarly-priced, accommodation
is unreasonable.

Clearly, an employer hires employees who will provide it with
the best return for its dollar. Therefore, if the only difference between
two applicants is that one has a disability requiring an accommo-
dation, regardless of the cost, it would be economically prudent to
hire the non-disabled person in order to avoid the cost. However,
the Act provides that an employer must choose the disabled person
over the non-disabled person if the former is more qualified and if
the reasonable accommodation cost does not present an undue hard-
ship. An employer may circumvent this requirement simply by inter-
viewing enough applicants so that the eventual hiree’s qualifications
are on par, at least on paper, with the qualifications of any disabled
applicants who would have required an accommodation. This activity
itself, of course, would represent a cost to the employer.

B. Cost of Health Insurance

Employer-sponsored group health plans insure sixty-five percent
of all Americans under age sixty-five. The Act prohibits an employer

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employee without first determining if it can provide a reasonable accommodation. In this case, a conveyor belt or forklift may be all that the employee requires to complete the “essential function” of the job. The lost time and production involved in the reasonable accommodation process will probably be too ethereal to calculate.

For another example of the “reasonable accommodation process,” see 29 C.F.R. § 1630.9 (1992) (Appendix-Interpretive Guidance).

67. Nowhere in the Act or legislative history are these compliance costs considered.

Employers must incur costs in hiring members of the protected class, whether in the form of direct expenses, management time, or foregone output; the larger or more profitable the business, the greater the obligation.

The duty to accommodate raises the ante for making careful decisions about which workers are covered and to what extent, yet the law provides little guidance with which to make these decisions. Under the best of circumstances, such decisions would be costly for American businesses and for the consumers of their products.


68. FASMAN, supra note 3, at 24-26.

from discriminating against qualified employees or applicants in the type or amount of health insurance offered simply because it fears a rate increase.\textsuperscript{70} An employer must offer insurance to disabled employees on the same basis that it offers insurance to other employees.\textsuperscript{71} The Act does not address, however, whether an employer will be subject to liability if it reduces a disabled employee’s health insurance.\textsuperscript{72}

Also, the Act binds insurance companies to its nondiscrimination rules and prohibits them from making rate changes on anything other than acceptable actuarial data.\textsuperscript{73} However, the Act is unclear on whether an employer could, for example, provide an insurance policy that had limits of $1 million on hospital costs, except for AIDS or alcohol-related expenses, which are covered disabilities under the policy.\textsuperscript{74} Employers with only a few employees may be particularly concerned, as one disabled employee may incur substantial health care usage and “double the small employer’s health insurance costs.”\textsuperscript{75}

The Act explicitly prohibits pre-offer medical examinations and background checks into an applicant’s medical history unless the same procedures are adopted for all employees, except where the information sought is specifically traceable to an essential job function.\textsuperscript{76} Thus, an employer cannot screen persons who are predisposed to certain work-related or non-work-related injuries or illnesses. Some commentators argue this will, at least in the long term, increase health insurance costs.\textsuperscript{77} Ultimately, the Act’s impact on the cost of health insurance may be impossible to calculate.

\textbf{C. Cost of Workers’ Compensation Insurance}

The Act’s greatest potential to increase an employer’s costs is in regard to workers’ compensation insurance rates.\textsuperscript{78} Under the Act,

\begin{itemize}
\item \textsuperscript{70} See supra text accompanying notes 44-47.
\item \textsuperscript{71} Disabilities Act, supra note 9, at A-1.
\item \textsuperscript{72} Id. Nancy Fulro, a human resources attorney with the United States Chamber of Commerce, suggests that employers who do plan to cut back on insurance offered “leave a paper trail,” documenting “what they are doing and why.” Id. The cost of health insurance which provides comprehensive treatment for AIDS, mental health, and neonatal care is exorbitant. Id.
\item \textsuperscript{73} Id. at A-2. See 42 U.S.C. § 12,201(c) (1988 & Supp. II 1988).
\item \textsuperscript{74} Disabilities Act, supra note 9, at A-2. According to Arlene Mayerson, an attorney with the Disability Rights Education and Defense Fund, placing such a limit on insurance coverage would probably be illegal under the Act. Id.
\item \textsuperscript{75} Id. at A-3.
\item \textsuperscript{76} See supra notes 29-30 and accompanying text.
\item \textsuperscript{77} Fletcher & Harty, supra note 9, at 1.
\item \textsuperscript{78} Schiff & Miller, supra note 1, at 45.
\end{itemize}
an employer cannot deny employment to a qualified employee or applicant with a disability because of the fear that its workers' compensation rates may increase. 79 Because the Act limits an employer's abilities to perform medical examinations on applicants to ensure that they are physically capable of performing the job, 80 an employer may unwittingly place employees in unsuitable positions which could result in more workplace injuries. 81

The Act also does not answer the question of who will be responsible for the cost of making a reasonable accommodation that would allow an injured employee to return to work. If the workers' compensation insurers are held responsible, these costs will eventually be reflected in increased premiums. 82 On the other hand, the Act's focus on returning disabled employees to the work force as quickly as possible may reduce insurance rates because of the decreased time an employee will be on disability. 83 Unfortunately, there are more questions than answers regarding the Act's effect on workers' compensation rates. It is likely to be a ripe area for litigation as employers

79. 42 U.S.C. § 12,112(c) (1988 & Supp. II 1988). Of course, rates are unlikely to increase with the addition of one employee, even if that employee has a history of workers' compensation claims. However, large employers in traditional blue-collar settings with regular turnover may find their rates increasing because of the likelihood that new employees are more prone to actual or feigned injury.

""I think [the Act] will increase work [compensation] costs because of the seeming inability of employers to screen employees for hidden or unnoticeable disabilities,' . . . ."" Fletcher & Harty, supra note 9, at 85 (quoting Paul Brown, director of governmental affairs for the Risk & Insurance Management Society, Inc.).


81. See Editorial, The $300,000 Question, Bus. Ins., Feb. 3, 1992, at 8 (indicating that more workplace injuries may result from employers' inability to test applicants). "'If employers want to perform medical examinations after extending offers they must examine all applicants for that type of job whether disabled or not.'" Schiff & Miller, supra note 1, at 60.

82. Another unanswered question is: Will a workers' compensation insurer still have to pay temporary total disability benefits when an employer fails to make reasonable accommodations so an injured employee can return to work? Fletcher & Harty, supra note 9, at 85.

The costs of vocational rehabilitation required by the various state workers' compensation statutes is generally covered by insurance as arising under those laws. By contrast, rights arising under discrimination law are not insured. The dilemma will likely arise where an insurer offers the employee vocational rehabilitation into a new trade. If the employee rejects rehabilitation and instead insists on accommodation, the insurer may be discharged from its liability thereby transferring the costs back to the employer.

Schiff & Miller, supra note 1, at 62.

83. Fletcher & Harty, supra note 9, at 85.
and their insurers attempt to push the compliance costs on one another.

The existing uncertainties surrounding health insurance rates and workers' compensation insurance rates, while they must be litigated to some extent, could have been better addressed in the Act and regulations. The Act provides that the fear of increased insurance costs cannot be used to deny employment to a qualified disabled applicant. The real problem, however, is the gradual rate increases which will inevitably result from the Act. The Act, because of its provision eliminating the use of pre-offer medical examinations, will introduce persons into the work force who previously had been excluded because of their predisposition to illness or injury. It may have been unethical for employers to infer from past medical records that an individual posed an increased workers' compensation risk; however, it is a certainty that insurance companies will increase their rates in response to the greater risk these individuals now represent.

\section*{D. Cost of Litigation}

In addition to reinstatement, back pay, front pay, and injunctive relief, the Act provides for compensatory and punitive damages for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, based on the size of an employer.\footnote{Pub. L. No. 102-166, § 1977A(b), 105 Stat. 1071 (1991). The Act provides the remedies available under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.} For a company with 15 to 100 employees, damages per claimant cannot exceed $50,000 a year; for 101 to 200 employees, $100,000; for 201 to 500 employees, $200,000; and for a company with more than 500 employees, damages cannot exceed $300,000 a year.\footnote{Pub. L. No. 102-166, § 1977A(b)(3), 105 Stat. 1071 (1991). The 1991 Civil Rights Act provides that in cases involving reasonable accommodations, compensatory and punitive damages cannot be awarded where the employer "demonstrates good faith efforts" to make a reasonable accommodation. \textit{Id.} § 1977A(a)(3).} Congress is already introducing legislation that could either expand or eliminate these caps.\footnote{\textit{1991 Civil Rights Act Expands ADA Remedies}, 1 BNA's AM. WITH DISABILITIES ACT MANUAL NEWSL. 2, Feb. 1992, at 9.} The Act also provides for recovery of attorney's fees.\footnote{The relevant section of the Act states:

In any action or administrative proceeding commenced pursuant to this [Act], the court or agency, in its discretion, may allow the prevailing
tains many ill-defined terms, litigators will be kept busy for the foreseeable future, 88 which is unfortunate considering that the money spent interpreting the Act could be used in more worthy areas. 89

The EEOC expects that the Act will generate more than 12,000 additional charges of employment discrimination per year. 90 Given the wide-ranging provisions of the Act and the vagueness of the statute and regulations, an employer may be forced to seek legal counsel to ensure it is in compliance with the Act before being sued. 91 An onslaught of litigation must be expected from an Act which specifically contemplates interpretation on a case-by-case basis.

Under the Act, an aggrieved person must first seek administrative relief through the EEOC, which will investigate and attempt to conciliate the claim. 92 To maintain an action, either the aggrieved individual or the EEOC must file formal charges within 180 days of the alleged violation. 93 Although a claimant must obtain a "right-to-sue" letter from the EEOC before it or the EEOC can bring suit, in other employment discrimination matters, the EEOC has typically

party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.


88. See Barnard, supra note 9, at 252 (commenting that the meanings of "disabled," "qualified individual with a disability," "reasonable accommodation," and "undue hardship" will "induce considerable litigation"). The vagueness of the Act's language may "foster wasteful and counterproductive litigation." Nancy Fulco, The U.S. Chamber of Commerce Concerned But Committed, reprinted in Worklife, supra note 7, at 18.

89. See Weaver, supra note 67, at 16 ("With ambiguous legal standards, resources that could have been devoted to the severely disabled or to other valued uses will be siphoned off to creating new jobs for attorneys, medical and vocational experts, and people with less severe or nonexistent disabilities."). See also Review and Outlook: The Lawyer's Employment Act, WALL ST. J., Sept. 11, 1989, at A18 (providing a highly critical analysis of the Act because of the potential for excessive litigation beneficial only to the participating attorneys).

90. The annual number of complaints is expected to increase from 60,000 to 72,000, or 20%. Fletcher & Harty, supra note 9, at 85. In the first 52 days after the employment provisions went into effect (July 26, 1992), 450 employment discrimination charges were filed with the EEOC. Title I Charges with EEOC Up to 450, 1 BNA'S AM. WITH DISABILITIES ACT MANUAL NEWSL., Oct. 1992, at 55.

91. Jay W. Seeman, ADA Compliance Requires Help of Experts, Nat'l L.J., Mar. 2, 1992, at 14 (letter to the Editor). But cf. Briefs, 1 BNA'S AM. WITH DISABILITIES ACT MANUAL NEWSL., June 1992, at 36 (the Act will be a success if employers stay away from "'high-priced lawyers who are going around the country terrifying everyone about the law'" (quoting EEOC Chairman Evan Kemp, Jr.)).

92. Parry, supra note 42, at 294.

93. Id.
granted such letters upon request.\textsuperscript{94} The relative ease with which an applicant or employee can bring suit and the apparent desire of many of the 43 million disabled Americans to maximize their rights,\textsuperscript{95} coupled with the Act's ambiguous language, may ultimately result in legal fees being the most costly element of the Act.

Of course, more explicit definitions may not reduce litigation. Realistically, there is no way to avoid excessive litigation with a law that provides a private right of action to so many people, grants fees to plaintiff's attorney, provides for compensatory and punitive damages, and is designed to be tested on a case-by-case basis.

The potential for numerous civil suits, inuring primarily to the benefit of attorneys, has been one of the Act's major criticisms.\textsuperscript{96} The Act's extremely broad definition of disability,\textsuperscript{97} which creates the large number of potential plaintiffs, the likelihood that such claims will be covered by insurance,\textsuperscript{98} and the opportunity to earn a contingency fee plus costs, could promote excessive, and potentially meritless, litigation.

Additionally, the related costs of litigation, including the costs associated with creating a paper trail as a precaution, can never be recovered. The expense of lost time due to lawsuits, new insurance policies, and paid deductibles will undoubtedly be ignored when an employer cries "undue hardship" when faced with litigation.

V. Conclusion

The Act is designed to ensure that the nation's private employers and entities that provide public services do not discriminate against

\textsuperscript{94} Fletcher & Harty, supra note 9, at 85.

\textsuperscript{95} See generally Worklife, supra note 7 (collecting appraisals of the Act from many disabled advocates).

\textsuperscript{96} See, e.g., Becker, supra note 24, at 14 (stating that the Act is a "make-work project for lawyers" which "can be expected to be a boon to litigation"); Review and Outlook, supra note 90 (opining that the Act "will mostly benefit lawyers who will cash in on the litigation that will force judges to, in effect, write the real law").

\textsuperscript{97} See Becker, supra note 24, at 14 (questioning the congressional finding that 43 million Americans are disabled and need coverage under the Act); Review and Outlook, supra note 90 (same). Proponents of the Act will be quick to point out that the Act merely states that there are 43 million disabled Americans, and does not purport to claim that there are 43 million working-age disabled Americans. However, the vague definition of disability and a growing population could ultimately produce such a number.

\textsuperscript{98} Ed Pouzar, ADA Should Spur RMs to Eye Personnel Policies, Nat'l Underwriter, Sept. 21, 1992, at 57 (discussing the concerns of risk managers regarding new policies which relate to liabilities created under the Act).
the disabled. More specifically, the Act provides that if an employer denies a job to an otherwise qualified disabled applicant, the employer must be prepared to prove that it did so only because it would suffer an undue hardship to accommodate that individual's disability.

However, by including so many persons under its provisions, the Act may provide a cause of action to many who simply do not need it or who never knew they were "disabled" until the Act told them they were.

The purpose of an antidiscrimination law is to provide a group that has historically been discriminated against with rights already enjoyed by other similarly situated groups. While the purpose of such a law cannot be attacked, the substance can and should be where it will lead to wasteful litigation. The Act has countless nebulous terms in need of definition and the regulations have failed to eliminate questions that have already arisen.

No one can accurately predict how many unemployed disabled persons will find work because of the Act, but it is clear that the Act will result in undeterminable costs to all employers and, ultimately, to consumers. Whether society in general will benefit from the Act is a matter for future determination.

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