

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Major Problems with ADA

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To follow, are the concerns voiced thus far with regard to the Americans with Disabilities Act (ADA). I also believe there are ways to strengthen the Act that will benefit all parties impacted by this legislation.

**Definition of disability** -- The ADA includes a provision which would allow an individual, "regarded as having an impairment" to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected as having AIDS.

**Equal Treatment Standard** -- The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that may not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

**Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections** -- The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious diseases or infection would extend coverage to individuals with AIDS or individuals regarded as having AIDS.

**Anticipated discrimination** -- The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or believes he/she is about to be discriminated against on such a basis. It is unclear how a case of anticipated discrimination would be proved or disproved.



**Clarification of language** in the bill has been a concern of the small business community. Such terms as "reasonable accommodation, undue hardship, readily achievable, and good faith effort" are in need of further clarification and definition.

**Access to varied and multiple penalties** -- The ADA would allow an individual who successfully sues because of discrimination on the basis of a disability, to obtain injunctive relief and attorney's fees and and/or compensatory and punitive damages in employment cases and those involving public accommodations and services operated by private entities. An individual could obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases). In cases involving telecommunications relay services an individual could seek a private cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administration action (which would cease and desist orders and fines). Clarification of remedies across titles is needed and perhaps a more uniform manner of enforcement mechanisms.

**Allowance of suits in cases of both intentional and unintentional discrimination** -- Because of the phrase "fail to" in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA appears to prohibit practices with an adverse impact, regardless of intent, on individuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow them to avoid such discrimination.

**Inclusion of section 504 references in ADA** -- Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The ADA includes references in section 504 in its provisions pertaining to transportation that now apply to recipients of Federal financial assistance covered by section 504.

**Burden of proof** -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.



**Cost:** While it is obvious that there will be tremendous costs associated with the enactment of this landmark legislation -- the costs to society will only increase by not dealing with issues of inaccessibility and discrimination against individuals with disabilities. It has been researched that disabled people want to work but cannot get hired and that inaccessible transportation is an impediment to employability and full integration in society. Currently 67% of people with disabilities are unemployed. The private sector will play a fundamental role in hiring people with disabilities, however a major education mission must coincide with this legislation in understanding its intent and compliance.

**A technical assistance section is needed to benefit all parties, (especially the employer or any entity) in understanding the intent of the ADA and effective implementation. Under section 504 and the Fair Housing Amendments of 1988 there is technical assistance available to carry out its mandate of non discrimination practices. Incorporating a technical assistance section to educate and assist parties impacted by this legislation would not only assist in its implementation but reduce costs and litigation by clarifying the intent and mandated requirements. Employers and entities required to carry out the mandates of this legislation will need to be educated on meeting reasonable accommodation and accessibility standards. Examples might include the following:**

Currently, there exists a Job Accommodation Network (JAN) in Virginia which is an international information network and consulting resource to enable qualified workers with disabilities to be hired and retained. It brings together information from many sources about practical ways of making accommodations for employees and applicants and can supply information on required standards in meeting Federal mandates and assuring compliance.

Also available as a resource for counsel and education under a technical assistance section is the President's Committee on Employment of Persons with Disabilities, the Architectural Transportation Barrier Compliance Board and The National Council on Disability -- all of whom can offer assistance and education to anyone impacted by this legislation. Employers and entities will have concerns and questions which must be addressed after enactment.

You authored a \$35,000 tax exemption section in the tax code for the expenditure in making any facility or public transportation vehicle owned or leased by the taxpayer accessible. This section could be amended to include expenditures towards reasonable accommodation and/or technological adaptation & devices and communication aids. I am certain all impacted parties of this legislation would welcome such an exemption.



Small Businesses and the private sector has shared concerns that this legislation appears punitive with no incentives to assist them in fullfilling compliance. They have asked that a **tax credit** be considered given the expenses that may occur in making reasonable accommodations. If the goal is to prohibit discrimination against individuals with disabilities and provide opportunities for full integration for persons with disabilities -- it appears fair to provide incentives for those who will assist in assuring a barrier free society where opportunities provide greater employability and remove individuals from the dependency rolls and onto the taxpaying rolls.

