NFIB

National Federation of
Independent Business

Americans with Disabilities Act
S. 933 as Reported

CURRENT LEGISLATION

The Americans with Disabilities Act (ADA) was introduced on May 9, 1989 in the Senate and the House. The bill seeks "to establish a clear and comprehensive prohibition of discrimination on the basis of disability" in employment, public accommodations, private businesses, public services, transportation and telecommunications. On August 2, 1989, S. 933 was reported out of the Senate Labor and Human Resources Committee by a vote of 16-0. However, several senators referred to problems that still needed to be addressed.

BACKGROUND

Currently, federal contractors and recipients of federal aid must comply with the non-discrimination and affirmative action requirements of Sections 503 and 504 of the Rehabilitation Act to accommodate the disabled in return for receiving federal monies.

The ADA bill goes much farther than the Rehabilitation Act in that it applies to the vast majority of businesses in America even though these businesses receive no quid pro quo from the government. The ADA bill imposes costly requirements on businesses and provides for unlimited damage awards even if the discrimination was unintentional. And the bill is so broadly worded that business owners will never know if they are in compliance with the law.

ACTION NEEDED

A number of positive modifications were made in the Committee compromise bill, particularly in the employment provisions. However, much remains to be done to fairly balance the needs of the disabled with the ability of business owners to meet those needs. Below are several points that merit consideration and action.

1. A business owner can be forced to pay up to $50,000 for the first violation and $100,000 for subsequent violations plus unlimited monetary damages for not accommodating a customer, client or visitor with a disability. No administrative remedy is available under this section of the bill, unlike the employment section of the bill and prior civil rights laws. Keep in mind that one half of all businesses in America start up with less than $20,000 in total capital.

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2. The ADA bill covers 900 types of disabilities. A business owner must accommodate all 900 types before any individual requests accommodation. For example, a business owner will have to purchase equipment for the deaf or provide a trained interpreter even if a hearing impaired person never enters the business. The bill does not use the more reasonable standard of addressing a known disability, but rather places the burden on the business owner to prepare for every possibility.

3. No differentiation is made between willful refusal to accommodate the disabled and unintentional violations of the law. It would be appropriate to differentiate between the two, providing for administrative relief in unintentional cases and reserving higher penalties for egregious cases.

4. A small business exemption is included in the employment section of the bill, as is present in past civil rights laws. However, there is no small business exemption with respect to the public accommodations section (accommodating customers, clients, and visitors). Since no studies have been conducted to determine the cost of compliance in this sweeping legislation, it would be reasonable and fair to include an exemption at this time.

5. No recognition of a good faith effort on the part of the business owner is included in the ADA bill. As presently drafted, a business owner could be sued if the owner fails to provide a specific type of accommodation even if a good faith effort is made to provide for other types.

6. The ADA bill requires retrofitting of existing structures when the structures are altered. However, the bill does not define what constitutes an alteration. A better approach would be to institute a standard of 50% of the value of the building, such as that incorporated in Pennsylvania law. This would give a business owner a clear understanding of what is expected.

7. No incentives are included in the bill to assist a business owner with voluntary compliance. Currently, Section 190 of the IRS Code permits a $35,000/year deduction for structural changes to accommodate the disabled. The cap should be lifted and the deduction should be broadened to included non-structural types of accommodations required by the bill such as raised desks, varied counter heights, wider aisles and the like.

8. In new construction, accommodation must be made for all "potential places of employment". However, the term is not defined. According to proponents of the bill, this might include catwalks, boiler rooms, stockrooms and the like. As currently drafted, compliance will be impossible without clear guidelines.

9. The bill retains language that states a business owner can be sued if a disabled person believes discrimination is "about to" occur. Such broad language needs to be dropped or significantly narrowed to clearly state what is intended at the outset.

10. The bill states that reasonable accommodation must be made unless it creates an undue hardship. However, the definition of undue hardship, an action requiring "significant difficulty or expense", is so subjective that no business owner will ever know when the requirements of the bill are met. While attempts have been made to clarify this language, they have not succeeded as yet. Further modification is necessary.

CONCLUSION

The purpose of civil rights legislation is to provide fairness. Unfortunately, the ADA bill provides access to the disabled <u>at the expense</u> of others. While much can and should be done to assist the disabled, fairness for <u>all</u> Americans should be the guiding principle. Appropriate modifications in the bill can lead to this result.

Dear Colleague:

The National Federation of Independent Businesses (NFIB) recently circulated a memo describing a number of alleged problems with S. 933, the Americans with Disabilities Act of 1989 (ADA). Each of those concerns appears to be based on either an misreading or misinterpretation of the ADA. In order to facilitate your review of the actual provisions of the ADA, which the Senate will be considering shortly, we have prepared a memorandum explaining how the concerns raised by the NFIB are, in fact, met by the legislation. That memo is attached for your review.

If you have any further questions, please do not hesitate to contact our staff: . We look forward to passing, with your help, a historic piece of legislation for people with disabilities and for all of America.

Sincerely,

Final

RESPONSE TO NFIB MEMORANDUM CONCERNING THE AMERICANS WITH DISABILITIES ACT OF 1989

Following is a summary of statements made by the National Federation of Independent Businesses (NFIB) in a recent memo regarding the Americans with Disabilities Act (ADA), and responses based on the provisions of the bill.

1. NFIB statement: A business owner could be forced to pay "up to $50,000 for the first violation and $100,00 for subsequent violations plus unlimited monetary damages" for not accommodating a customer with a disability.

Response: This statement is completely misleading. The NFIB's description ignores the major compromise sought and achieved by the Bush Administration before it lent its support to the ADA. Under that compromise, the right of individual plaintiffs to bring large damage actions against employers or businesses was deleted from the bill. In its place, the Administration suggested that authority be given solely to the Attorney General to bring suits where there was a demonstrated pattern or practice of discrimination. In those cases, limited damages would be available: a court could assess defined civil penalties of up to $50,000 for the first violation and up to $100,00 for subsequent violations, if the court concluded that it would "vindicate the public interest." In addition, if the Attorney General requested it, monetary damages could be given to the aggrieved person. The ADA specifically does not allow individual plaintiffs to bring actions for "unlimited monetary damages," as suggested by the NFIB. (See ADA, sec. 308, pp. 85-87; Committee Report, pp. 76-77).

2. NFIB concern: Employees who use drugs casually cannot be fired. An employee who causes an accident in the workplace while under the influence of drugs or alcohol can avoid all sanctions such as firing or demotion by claiming he is addicted to drugs.

Response: Both of these statements are flat misstatements of the ADA. As a result of the insistence of the Administration and others, there was extensive discussion and modification of the coverage of drug addicts and alcoholics under the ADA in order to ensure that nothing in the ADA would be contrary to the goal of achieving drug-free workplaces. The ADA therefore explicitly allows employers to take sanctions against those who use illegal drugs or alcohol in the workplace and against those who are simply under the influence of illegal drugs

or alcohol. In addition, the ADA explicitly allows employers to conduct drug tests of applicants and employees and to make employment decisions based on those tests. The NFIB's hypothetical is, in fact, explicitly rejected by the ADA. (See ADA, sec. 103(c), pp. 52-53; Committee Report, pp. 40-42).

3. NFIB statement: A business owner will have to accommodate 900 types of disabilities under the ADA; a business owner will have to make all kinds of accessibility modifications (provide ramps, wider aisles) even if a "wheelchair-bound person" never enters the business; owners will have to provide telecommunication devices for the deaf (TDD's) and interpreters for the blind "upon request."

Response: The ADA has a carefully thought-out framework for providing access to businesses for people with disabilities. This framework is based directly on Section 504 of the Rehabilitation Act of 1973, a law which has operated without difficulty or major expense for 15 years. Just like Section 504, the ADA covers all people with "physical or mental impairments" (the bill does not list 900 disabilities) and requires that businesses modify policies or provide additional aids for people with disabilities if such actions would not place an undue burden on the business. An owner does not have to guess about the modification or aid a person with a particular disability may need -- the person will usually make that need clear. Further, owners do not have to provide TDDs and interpreters "upon request." The ADA explicitly provides that such aids must be provided only if they do not place an undue burden on the business, which includes consideration of financial cost. [See especially Committee Report, p. 64, noting that the Committee does not intend that individual stores and businesses must provide TDD's.) Finally, the physical access requirements for existing businesses are minimal under the ADA. The bill explicitly provides that such changes must be made only if they are "able to be carried out without much difficulty or expense." These minimal changes should be made regardless of whether a person who uses a wheelchair has ever entered the business in the past. In fact, the reason for making these minimal changes is to ensure that people who have not even attempted to enter a business in the past because of accessibility problems can now gain access. (See ADA, sec. 301(5), 302(b)(2)(ii)-(iii), pp. 70, 74-75; Committee Report, pp. 63-66.)

4. NFIB statement: There is no differentiation made in the ADA between "willful refusal to accommodate the disabled and unintentional violations of the law." Such a distinction should be made, with "higher penalties for egregious cases."

Response: The ADA is patterned directly on Section 504,

which does not include higher penalties for willful violations. Under Section 504, there have not usually been instances of "wilful refusals" to accommodate people with disabilities. Rather, most cases deal with whether an accommodation would be effective and whether it would pose an undue burden. In any event, it is disingenuous, and indeed somewhat illogical, to recommend "higher penalties" under the ADA for egregious, willful violations. Under the compromise ADA, the right to seek any type of monetary penalties, including any form of punitive damages, has been removed for individual plaintiffs. Therefore, the only remedy under the ADA for plaintiffs, for any type of violation, is injunctive relief--for which it is difficult to create "higher" and "lower" types. If the NFIB wishes to recommend that punitive damages for egregious cases be reinserted in the bill for willful violations, it should present the suggestion in that form.

5. NFIB statement: The "small business exemption" in the bill is inadequate. While businesses have an exemption in the employment section of the ADA (employers with 15 or fewer employees are not covered), there is no exemption for the public accommodations section of the bill.

Response: The small business exemptions in the ADA track the exemptions that exist in other civil rights laws. Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, religion or national origin, exempts employers with 15 or fewer employees. The ADA adopts the same exemption. By contrast, Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations on the basis of race, religion or national origin, does not have a small business exemption. This differentiation is logical: the point of a public accommodations provision is to ensure that people with disabilities (or people of a certain race) can gain access into public places, such as restaurants, movie theatres and stores. The fact that such a business may have only five or ten employees is irrelevant to the issue of providing access. To the extent that the NFIB is concerned about the requirement to provide auxiliary aids for people with disabilities, the ADA effectively incorporates a small business exemption in the public accommodations area by not requiring such provisions if they would impose an undue burden. Consideration of the size of the business and the cost of the accommodation are the explicit factors that are to be taken into account in deciding whether an action would be an undue burden. In addition, as part of the compromise with the Administration, the concerns of small businesses were taken into account in the area of new construction, by providing an exemption for installing elevators in facilities that are less than three stories high or have less than 3,000 square feet per story. (See ADA, sec. 101(4) and (9); 302(b)(2)(A), 302(b)(2)(A)(vi) and

303(b), p. 44 and pp. 46-47; p. 74 and 76.)

6. NFIB statement: No recognition of a "good faith effort" is made in the ADA. A business owner could be sued "if the owner fails to provide a specific type of accommodation even if a good faith effort was being made to provide for other types."

Response: This statement is misleading. As the Committee Report makes clear in great detail, an accommodation must simply meet two basic requirements: it must achieve its purpose (that is, it must allow the person to perform the essential functions of the job), and it may not impose an undue hardship. Within those two requirements, the employer has great flexibility to decide what accommodation it chooses to provide. If an accommodation achieves its purpose, an employee cannot get a court to substitute another accommodation which he or she may have preferred. As the Committee Report states clearly: "In situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity." See Committee Report, p. 35. The same is true for modification of policies and provision of aids under the public accommodations section. As the Report makes clear, for example, a restaurant would not be required to provide menus in braille if it provided a waiter or other person who was willing to read the menu. Report, p. 63. Therefore, contrary to the NFIB's implication, there is not only one accommodation or aid that is the "right" accommodation under the ADA, with the unlucky employer who has in "good faith" provided another reasonable accommodation or aid suddenly discovering in court that it has not chosen the magical "right" one. Employers and businesses have flexibility under the ADA to provide a range of effective accommodations or aids.

7. NFIB statement: The ADA requires retrofitting of existing structures when the structures are "altered," but the bill "does not define what constitutes an alteration." This makes it difficult for owners to know how to comply with the law.

Response: This statement is misleading. The bill provides specific guidance with regard to what type of alterations are covered, the Committee Report provides further guidance, and regulations to be issued by the Attorney General will, as regulations always do, provide yet more guidance in probably great detail. We think it is safe to say that lack of information and clarity will not be the barrier to compliance in this area. The bill provides that "structural alterations" that "affect the usability of the facility" require accessible altered portions and "major structural alterations" that "affect the usability of the facility" require accessibility of the services

to the altered portions. See ADA, sec.302(b)(2)(A)(vi), p. 76. The Committee Report explains that the term "structural" means "elements that are a permanent or fixed part of the building, such as walls, suspended ceilings, floors, or doorways." The Report further explains that "major structural alterations" refers to "structural alterations or additions that affect the primary functional areas of a building, e.g., the entrance, a passageway to an area in the building housing a primary function, or the areas of primary functions themselves. For example, structural alteration to a utility room in an office building would not be considered major." Committee Report, p. 67.

8. NFIB statement: No incentives are included in the ADA to help a business owner with voluntary compliance. The current tax deduction of $35,000/year for structural changes is inadequate.

Response: The issue of providing financial assistance to businesses who make changes for physical access is, and should be, separate from establishing in the law the basic civil rights for people with disabilities. Section 504 of the Rehabilitation Act did not provide extra financial assistance when it established its requirements. The $35,000/year deduction currently in the tax code, which was sponsored by Senator Dole, is an excellent start for the separate issue of providing assistance to business owners, and the NFIB is encouraged to work with the sponsors of the ADA as we explore further alternatives.

9. NFIB statement: In new construction, "accommodation" must be made for all "potential places of employment." However, this term is "poorly defined" and may include places such as boiler rooms and stockrooms.

Response: The term "potential places of employment" is defined in the bill and further explained in the Committee Report. As a preliminary matter, there is no requirement of "accommodation" for potential places of employment. At the Administration's request, it was clarified in the bill that the term "potential places of employment" was relevant only for purposes of new construction. "Potential places of employment" are defined in the statute as places that are intended for nonresidential use (i.e., that are intended for commercial use) and whose operations affect commerce. The purpose of the provision is straightforward: there are many new buildings that, at the time of design and construction, do not yet have established tenants that would qualify as "public accommodations" under the ADA, but are simply designed for some commercial use. This provision makes clear that, for purposes of new construction, such places must be built accessible so that when

business tenants ultimately occupy the building, it will already be accessible. The Committee Report further explains that regulations concerning "potential places of employment" will "cover the same areas in a building as existing design standards. Thus, unusual spaces that are not duty stations, such as catwalks and fan rooms, would continue to lie outside the scope of design standards." Because every state currently has in place design standards for construction, there will be guidance in this area for compliance. (See ADA, sec. 301(2), and 303(a), p. 67 and p. 79; Committee Report, p. 69.)

10. NFIB statement: The ADA provides that reasonable accommodation must be made unless it creates an undue hardship. However, the definition of undue hardship is "so subjective that no business owner will ever know when the requirements of the bill are met."

Response: This statement flies directly in the face of 15 years of experience under Section 504 of the Rehabilitation Act of 1973 and ignores major modifications made in the compromise ADA. Based on requests from the business community, the ADA introduced this year deleted a new standard that had been used in last year's ADA and returned to the terminology and standard of Section 504. That standard requires that accommodations that cause an "undue hardship" need not be undertaken. This change was made so that businesses could draw on the 15 years of experience and caselaw under Section 504 so that they would know "when the requirements of the bill were met." In response to requests from the Administration and the business community, the term "undue hardship" was further defined in the bill to include a specific standard (actions requiring "significant difficulty or expense") and to explicitly include the three factors set forth in the Section 504 regulations (size of business, type of operation and cost of accommodation). The standard and practice under the ADA will thus be the same as that already clearly set forth and applied under Section 504 for the past 15 years.