



August 11, 2020

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

The National Federation of the Blind opposes the inclusion of the Americans with Disabilities Act (ADA) in section 181 of the SAFE TO WORK Act (S. 4317), and strongly urges the removal of all references to the ADA in this section. On July 27, 2020, you introduced the SAFE TO WORK Act as part of a package of COVID-19 relief measures. Section 181 of the bill would suspend certain provisions of the Americans with Disabilities Act during the COVID-19 pandemic to protect the financial health and viability of employers and other covered entities such as retailers and other service providers. However, the ADA already allows for flexibility in regard to compliance as we have outlined below. Furthermore, as the nation's largest organization of blind Americans, the National Federation of the Blind asserts that the fundamental civil rights of individuals with disabilities should not be put on hold for any reason.

The current concern expressed by some is that employers fear being sued under Title I for failing to provide accommodations if an accessibility barrier is erected as an effort to combat the spread of COVID-19. With respect to employers, Title I of the ADA covers such entities and contains numerous protections for them. It is certainly true that Title I defines a failure to provide reasonable accommodations as a form of discrimination actionable under the law. Title I states that "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" (42 U.S.C. Sec. 12112(b)(5)(A)) is a form of discrimination.

The key point here is that any covered employer can always argue that providing accommodations creates undue hardship. Undue hardship is defined as:

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

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 chapter;

(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 operation 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 workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(42 U.S.C. Sec. 12111(10)).

So, when applying these sections of Title I to circumstances caused by the pandemic, a business which has suffered severe financial hardship can argue that it is unable to provide requested accommodations due to financial burden or other factors. The current legislative proposal would eviscerate the employment rights of blind individuals and others with disabilities by the actions of any employer regardless of whether that employer was suffering true financial harm. Existing law adequately protects employers suffering from the pandemic. According to the 2018 American Community Survey conducted by the US Census Bureau, 69.1 percent of blind Americans were either unemployed or underemployed. Eliminating our employment protections will only lead to greater economic harm for our population.

With respect to retailers and other service providers, generally speaking, Title III covers such entities. Title III says: "No individual shall be discriminated against 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 by any person who owns, leases (or leases to), or operates a place of public accommodation," (42 U.S.C. Sec. 12182(a)). Title III defines discrimination in a variety of ways, but pertinent to this discussion is the following:

For purposes of subsection (a) of this section, discrimination includes:

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and

services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden; (42 U.S.C. Sec. 12182(b)(2)(A)).

Like Title I, Title III contains significant protections and defenses for places of public accommodations. With regard to covered entities affected by the pandemic, the defenses contained in Title III apply in multiple ways.

Title III also permits an "undue burden" defense when it would become financially difficult to permit modifications or provide auxiliary aids and services. Under current law, those Title III entities financially ravaged by the pandemic already possess significant protection from further economic ruin as might be caused by carrying out obligations under the ADA.

The language contained in the SAFE TO WORK Act, or any other similar measure, is far too broad and is entirely unnecessary. In 1990, Congress crafted the ADA in a manner to extend substantial civil rights protections to those with disabilities but also included provisions that afford employers and other covered entities meaningful safeguards from undue hardship and fundamental alterations. If the targeted provisions of the ADA are suspended, it will do great harm to individuals with disabilities. During the height of a pandemic or other national crisis, it is the time to protect civil rights carefully and vigorously, not eliminate them.

Sincerely,



Mark A. Riccobono, President
National Federation of the Blind

cc: The Honorable Mitch McConnell
The Honorable Chuck Schumer
The Honorable Nancy Pelosi
The Honorable Kevin McCarthy