Assistive Technology and the Americans with Disabilities Act

Endearing Employers to these Reasonable Accommodations

Marianne DelPo Kulow† & Scott Thomas††

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†.  B.A. Harvard University, M.A. University of Liverpool, J.D. Boston University School of Law; Gregory H. Adamian Professor of Law, Department of Law, Taxation and Financial Planning, Bentley University, Waltham, MA.

††. B.A. University of Connecticut, J.D. & LL.M. in Taxation, Quinnipiac University School of Law; MST Program Director and Assistant Professor of Tax and Law, Department of Law, Taxation and Financial Planning, Bentley University, Waltham, MA.

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I. INTRODUCTION

The exponential growth of technology over the past thirty years has had a dramatic impact on all aspects of our lives, including our education and our work. In both of these spheres, new technologies are at times seen as liabilities. For example, electronic communication capability has both diminished students’ interpersonal communications skills and smudged the line between work and leisure time, allowing employers to expect off-hours access to employees—who increasingly feel tethered to their work 24/7. Automation has arguably reduced the amount of emotional intelligence learning in classrooms and demonstrably eliminated some jobs.


Nonetheless, new technologies are just as often experienced as assets. For example, the internet’s immediate access to massive amounts of information has certainly enriched the classroom\(^5\) and opened up global markets.\(^6\) Increased computer speed and capacity has both revolutionized homework\(^7\) and facilitated flexible hours\(^8\) and remote work\(^9\)—enabling workers to juggle work and family responsibilities in unprecedented ways.

One type of rapidly advancing technology that has impacted education much more so than the workplace is “assistive technology.”

All forms of technology that improve the “functional capabilities” of individuals with disabilities—from low-tech apparatuses that lower the height of a desk to high-tech voice-activated devices—are collectively


termed “assistive technology” by federal law. In coining this term, the Technology-Related Assistance for Individuals with Disabilities Act of 1988 acknowledged the huge potential of assistive technology to enhance the lives of Americans with disabilities and to reduce the costs of disabilities to society. This opportunity to reduce societal costs associated with disabilities included the “expenditures associated with . . . education . . . and . . . employment.” To these ends, the Act, along with its successor, the Assistive Technology Act of 1998, set out to increase awareness of and access to assistive technology. These Acts have been largely successful in achieving this goal in an educational setting but notably less so in U.S. workplaces.

As advances in assistive technologies have progressed rapidly, U.S. classrooms, recognizing assistive technology’s ability to enormously...
increase the inclusion of those among us with disabilities, have made huge strides in effectively incorporating these technologies.\textsuperscript{17} In contrast, employers—despite a willingness to invest in other technologies that show promise for increasing productivity\textsuperscript{18} and employment\textsuperscript{19}—have been much slower to utilize assistive technologies to increase their employment of workers with disabilities.\textsuperscript{20}

The underutilization of assistive technology in the workplace\textsuperscript{21} is unfortunate because, although these technologies have made it easier and less expensive for businesses to employ workers with disabilities,\textsuperscript{22}

\textit{making tools and emerging practices, Monash University Research Rpt. #: 0413-022-026-RR1, at 6 (April 3, 2013) (in a study reviewing assistive technologies (AT) for those with brain and spinal cord injuries, the authors report that AT “are a rapidly developing area of practice” and “the use of AT to ameliorate and enable people with disabilities to achieve participation in communication, community activities, self-care, productivity and leisure is constantly being updated.”) See also Matt Petronzio, 10 Ingenious Inventions for People with Disabilities, MASHABLE (Sept. 12, 2013), https://mashable.com/2013/09/12/assistive-technology/#bmMxGNo9sE [https://perma.cc/KX95-NJRX] (illustrating by example the vast and ever-growing array of AT).}


\textsuperscript{20}. See Moss and Burrus, \textit{supra} note 15; see also Sara Furguson, \textit{Assistive Technology as a Reasonable Accommodation}, CTR. FOR DISABILITY RIGHTS (last visited May 29, 2018), http://cdnmc.org/blog/advocacy/assistive-technology-as-a-reasonable-accommodation/ [https://perma.cc/?FXD-29ZG] (“Since 1990, assistive technology (AT) has improved opportunities for successful implementation of the ADA’s equal employment provisions. Unfortunately, employers may decide to not hire a disabled applicant simply because they lack knowledge about the use of assistive technology. . . . [T]here are several myths about assistive technology. These include employers believing that AT is a luxury, costs will be too high, execution is too complicated, and thinking that a medical or other professional must be involved.”).

\textsuperscript{21}. See Moss and Burrus, \textit{supra} note 15.

\textsuperscript{22}. See, e.g., Furguson, \textit{supra} note 20; Wendy Strobel & Jennifer Todd McDonough, \textit{Workplace Personal Assistance Service and Assistive Technology}, 18 JOURNAL OF VOCATIONAL REHABILITATION 107, 110 (Jan. 2003) (stating that, even as early as 2003, many assistive technologies, particularly “low tech[nologies]” were inexpensive); JOB ACCOMMODATION NETWORK (JAN), \textit{WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT} (Sept. 1, 2017) (providing annually updated research findings addressing the costs and benefits of job accommodations), https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628
Americans with disabilities remain dramatically underemployed. According to the latest data available from the U.S Bureau of Labor Statistics, in 2018, 19.1 percent of persons with a disability were employed, compared to 65.9 percent of those without a disability. This paper explores the underdeveloped role of available assistive technology in closing this employment gap between workers with disabilities and those without disabilities and argues that carefully structured laws can help to increase workplace assistive technology utilization, thereby positively impacting both the lives of Americans with disabilities and the U.S. economy.

Despite the increased availability and affordability of assistive technology, detailed in Part II, there is considerable employer misunderstanding about the costs of assistive technology acquisition and implementation. Many employers do not realize that the cost of assistive technology is actually quite low. For example, a government-funded survey of employers, conducted annually since 2004, reveals that “a high percentage (59%) of accommodations cost absolutely nothing to make ($0), while the rest . . . had a typical cost of only $500.” Employers also fear the hassle of integrating assistive technology into the workplace. This often-unfounded fear, coupled with misinformation on costs, contributes to the underemployment of people with disabilities.

Employer misinformation about assistive technology also causes unnecessary litigation. As discussed in detail in Part III, federal law requires most employers to attempt to adapt the workplace environment, when affordable, to accommodate workers with disabilities. Hence, failure to take such measures violates federal law. In 2017 alone, government enforcement actions cost employers $7.1 million in monetary relief to


24. Id.


26. See JAN, supra note 22 (noting the results of a survey that JAN conducts annually through a contract from the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP)).

27. See JAN, supra note 22.

28. Id.

29. Id.

30. See Kaye, supra note 25, at 529.

disabled workers. This figure excludes attorney fees and other costs associated with defending against these claims. Much of this cost could have been avoided by proactive employer adoption of assistive technology.

Finally, many employers appear unaware that there are tax incentives in place to encourage the employment of people with disabilities and that there are a number of other proven benefits to employing workers with disabilities, such as increased retention, attendance, productivity, morale, and public image. These benefits, detailed in Part IV, have a positive financial impact, offsetting the minimal costs of assistive technology. Unaware of the low costs of assistive technology, the risk of legal costs for failure to acquire it, and the financial benefits associated with employing workers with disabilities, employers cannot accurately conduct cost-benefit analyses regarding the acquisition of assistive technology. The authors seek to correct this situation.

This paper will first provide an overview of the dramatic growth of effective and affordable assistive technology, with illustrative examples of assistive technology’s potential benefit both to workers with disabilities and to their employers. The next section will review a selection of the copious litigation that has resulted from employer lack of awareness about assistive technology’s availability, low cost, and simple implementation. The paper will then detail the tax, retention, attendance, productivity, morale, and public image advantages of employing workers with disabilities. The paper will conclude with a concrete proposal to address these issues with a goal of increasing the employment of workers with disabilities by educating


33. The percentage of discrimination claims filed with the EEOC that are disability claims has grown every year since 2008, from 22.4% in 2008 to 32.2% in 2018. Charge Statistics (Charges filed with EEOC) FY 1997 through FY 2018, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/G9C6-VP2T]. Within EEOC ADA claims, there has been a 40% increase in reasonable accommodation claims over the past eight years: in 2010 there were 8,400 reasonable accommodation claims under the ADA and in 2017 there were 11,754 such claims; the increase in the number of reasonable accommodation claims over these years (11,754 – 8,400 = 3,354) represents a 40% increase over the 2010 number of 8,400 claims (3,354/8,400).

34. See Kaye, supra note 25 at 531 (reporting that “over half ["ADA-recalcitrant" employers surveyed] said that tax breaks for hiring and retaining workers with disabilities would be very helpful,” indicating a lack of awareness that these already exist and, hence, a need to inform employers of tax incentives); see also Financial Incentives for Hiring People with Disabilities, NAT’L CTR. WORKFORCE & DISABILITY, http://www.onestops.info/article.php%3Farticle_id=55&subcat_id=701.html [https://perma.cc/7ES9-42G2] (last visited Feb. 24, 2019) (indicating a need to inform employers of tax incentives).

employers that these employment arrangements can often be win-win situations with minimal cost and unexpected benefits to the employer.

II. THE ASSISTIVE TECHNOLOGY EXPLOSION: MORE, BETTER, CHEAPER

Technology once limited to military use, or even science fiction, is now widely available and affordable. For example, the navigation algorithm developed for military bomb disposal units is now utilized in a variety of automated vehicles, including self-propelling home vacuums, costing as little as $300. Perhaps even more dramatically, the infamous Star Trek scenes of Captain Kirk speaking directly to the ship’s computer are today played out daily in people’s homes with voice commands to such devices as Alexa at a low cost of $100. While we accept these advances in our homes with delight, many workplaces have yet to recognize their value. This is particularly true in the realm of using new technology to accommodate workers with disabilities.

Unbeknownst to many employers, there is a plethora of new devices available to assist people with disabilities. These include: stair-climbing wheelchairs; bionic arms; a self-steadying spoon for those with Parkinson’s disease; smart belts to detect and to warn of epileptic seizures; braille smartphones; a head-strapped device to identify colors for the color-blind; an eye movement tracker to permit those who cannot move to use devices by blinking; and face-tracking software for Google Glasses to permit those with autism to recognize and better understand facial expressions. Many of these technologies are moving from prototype to market very rapidly.

36. Petronzio, supra note 16 (referring to the ninth item on the list).
41. Adaptive assistive technologies for people with disabilities, PHYS.ORG (Jul. 18, 2013), https://phys.org/news/2013-07-technologies-people-disabilities.html (discussing current European efforts to individualize AT, author notes that assistive technologies “have developed rapidly in recent years, allowing people with motor disabilities to live more independent and comfortable lives. Now assistive technology systems that can open a door, turn on a light or connect to the internet at the blink of an eye, a head movement or even a thought, are being made more flexible and customizable for individual users.”) See also, The Role Of Assistive Technology In Supporting Disabled Learners, TEACH THOUGHT STAFF, Aug. 30, 2017 https://www.teachthought.com/technology/the-role-of-assitative-
One example is a screen reader, which is a software program that allows blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display.42 A popular disability news website lists 80 screen reader models, not counting computers with built-in features.43 These various devices were designed for home use to improve the quality of life for people with disabilities.44 However, many of these devices—such as bionic arms, eye movement trackers, and screen readers—are of equal or greater value when used in the workplace because each removes a barrier—either physical or cognitive—to employment opportunities once off-limits to workers with disabilities.45

Of equal significance to the growing number of devices and technologies is the high quality that some core assistive technologies have now attained. Two examples of these that are extremely useful in the workplace are voice-recognition software and “smart” hearing aids.46 Both of these technologies, along with the equally valuable screen reader, are now significantly refined and relatively affordable. Voice-recognition software, such as that used in Amazon’s Echo for home use, is now of such a high quality that it reliably facilitates the use of computers and other equipment by people with limb loss, paralysis, or even carpal tunnel syndrome.47 Hearing aids with Bluetooth capabilities are easily managed through smartphones, use GPS to automatically adjust to different daily

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44. See Petronzio, supra note 16 (describing the typical daily use of several of these technologies).

45. Indeed, the Technology-Related Assistance for Individuals with Disabilities Act of 1988 foresaw that devices designed for home use would and should find their way into both classrooms and workplaces. See 29 U.S.C. § 2(a)(4) (repealed 1998) (“Although the development of assistive technology devices . . . is still in its early stages, there already exists a substantial number of . . . devices . . . that . . . could be used in . . . activities such as . . . education, . . . employment, . . . and other aspects of daily living.”).


locations, and interface with phones and other screens to provide seamless adaptation to different audio environments. The high quality and reliability of each of these technologies levels the field for workers with disabilities in unprecedented ways. They are also now affordable for many businesses as well as for individuals with disabilities.

Much like the price points of technologies designed for home use, the costs of these more obviously workplace-focused technologies have also become increasingly more reasonable. The same three examples from above illustrate this shift. Many versions of office-quality voice-recognition software are now available free and the top-rated voice recognition software has two low price points: $150 and $300. The highest rated smart hearing aids now start at $1200. Screen reader prices “now range from free to $1200.” These are typical, not isolated, examples. Indeed, to the surprise of many, most assistive technology price points are much lower than even a decade ago. For example, many people with paraplegia no longer need to purchase expensive personalized vehicles. Instead, those with paraplegia who drive for a living may now purchase a simple $180 snap-on adaptor, which immediately converts any vehicle to one with hand controls that can be driven without the use of one’s legs.


51. See AM. FOUNDATION FOR THE BLIND, supra note 42; DISABLED WORLD, supra note 43.

52. See generally INSTITUTE OF MEDICINE COMMITTEE ON DISABILITY IN AMERICA, Assistive and Mainstream Technologies for People with Disabilities, in THE FUTURE OF DISABILITY IN AMERICA 183, 184 (Marilyn J. Field & Alan M. Jette, eds., 2007) (noting numerous examples of assistive technologies that, both by improved quality and decreased costs, “have moved into the realm of general use and availability.”)

53. See JAN, supra note 22.

Importantly, though understandably, employers’ assistive technology awareness has not kept pace with the rocket-speed developments of wider variety, higher-quality, and lower-cost assistive technologies.\(^{55}\) Many employers cling to three persistent workplace myths about assistive technology: 1) no relevant or adequate assistive technology exists; 2) the available high-quality assistive technology is expensive; and 3) assistive technology is time-consuming and/or will negatively impact co-workers or clients.\(^{56}\)

The examples above can each be used to illustrate how out of touch with reality these beliefs have become. Consider the $180 snap-on adaptor. The National Highway Traffic Safety Administration, in acknowledgment of the wide variety, improved quality, and affordability of adaptive devices for disabled drivers, has issued a brochure to support disabled drivers.\(^{57}\) Moreover, due to their wide availability and lower costs, many individuals with disabilities purchase these technologies and therefore already possess them when they apply for a job.\(^{58}\) Employers then have zero assistive technology acquisition costs. Indeed, the Job Accommodation Network lists such hand controls as a suggested accommodation for workers with paraplegia.\(^{59}\) Nonetheless, it is questionable whether a taxi company would be aware of the high quality and low cost of this technology. Indeed, in a suit brought by the EEOC on behalf of a disabled Las Vegas taxi driver, the taxi company in question refused to hire an applicant with an amputated arm, despite the fact that the man had an excellent driving record with his prosthesis.\(^{60}\) Given the reservations about a device as common as a

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\(^{55}\) See Moss and Burris, supra note 15. See also Kaye, supra note 25, at 533–35; JAN, supra note 22; Oder, supra note 25.

\(^{56}\) CORNELL UNIVERSITY ILR SCHOOL, EMPLOYMENT AND DISABILITY INSTITUTE, ASSISTIVE TECHNOLOGY ACCOMMODATIONS AND THE AMERICANS WITH DISABILITIES ACT 4–5 (2011), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1296&context=edicollect [https://perma.cc/6MUV-YU89]. See also Moss and Burris, supra note 15 (noting that “negative attitudes and a lack of information still stand as barriers to the hiring and retention of workers with disabilities.”)


\(^{60}\) EEOC v. Vegas Western Cab Company, Case No. 2:09-cv-01888-GMN-PAL, as reported by EEOC at Vegas Western Cab to Pay $30,000 for Rejecting a Disabled Applicant in EEOC Suit, EEOC
prosthesis, one can only wonder how receptive a taxi company would be to a paraplegic applicant with hand controls. The cases below will demonstrate how deleterious such outdated beliefs can be.

III. THE LITIGATION EXPLOSION: THE COST OF IGNORING ADA “REASONABLE ACCOMMODATION” REQUIREMENTS

Title I of the federal Americans with Disabilities Act (ADA) and its 2008 amendments (the ADA Amendments Act of 2008 (ADAAA)) forbid workplace discrimination against “qualified” individuals with disabilities.61 Under the statutory definition of “qualified,” a worker must be able to complete the essential functions of the job with or without a “reasonable accommodation.”62 The statute then explains that employers must provide accommodations to qualified workers, unless doing so would create an “undue hardship.”63 An “undue hardship” under the ADA is one that either is too costly or has too great an impact on others.64

Advances in education laws65 and effective use of assistive technology in classrooms66 are generating ever more “qualified” workers with disabilities because more individuals with disabilities are attaining the requisite education to perform the essential functions of more jobs.67 More

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64. 42 U.S.C. § 12111(10). As a result of this statutory language, an accommodation is only “unreasonable” if it is too costly or has too great an impact on others. Id.
65. See, e.g., Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1142 (1990) (amending the name to Individuals with Disabilities Education Act); Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587 (1991) (initially passed in 1975 as the Education for All Handicapped Children Act, IDEA represented milestone legislation that vastly improved access to free public schools for disabled students, previously largely excluded from the U.S. public school system, with only at-home tutoring or state institutions as educational options); Individuals with Disabilities Education Act Amendment of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (incorporating changes that included: participation of students with disabilities in standardized state testing; updated individualized education program (IEP) rules, including increased emphasis on general curriculum participation; enhanced parent participation in eligibility and placement decisions; streamlined student evaluation and re-evaluation requirements; new requirements for annual documentation of student’s academic progress; increased availability of mediation to resolve parent-school differences; updated disciplinary procedures for students with disabilities; and expansion of the upper age limit for children to be identified as developmentally delayed from 5 to 9); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (adding regulations that made changes in several areas, including methods to identify students with learning disabilities, early intervening services, highly qualified teachers, discipline, and meeting accessibility standards). The Individuals with Disabilities Education Act is codified as amended at 20 U.S.C. §§ 1400–82 (2012).
66. See Lynch, supra note 17; Stanberry & Raskind, supra note 17.
67. See, e.g., LAURE HORN & LARRY BOBBITT, STUDENTS WITH DISABILITIES IN POSTSECONDARY EDUCATION: A PROFILE OF PREPARATION, PARTICIPATION, AND OUTCOMES (U.S.
students with disabilities are graduating from high school than ever before. In 2015, 70% of young people with disabilities graduated from high school, compared to a mere 27% twenty years earlier. A different measure of graduation rates, the four-year adjusted cohort graduation rate (ACGR), which captures those graduating within four years of entering high school, suggests that in 2015 roughly 65% of students with disabilities graduated high school within that time frame, compared to approximately 82% of the total population of students. This number is highly likely to increase because, according to the National Education Association, the number of U.S. students enrolled in special education programs has risen 30% over the past ten years and “[t]hree out of every four students with disabilities spend part or all of their school day in a general education classroom.” Moreover, college students with disabilities are an increasing proportion of students in higher education. In 1995, 26% of high school graduates with disabilities pursued a postsecondary education; in 2005, 46% of high school graduates with disabilities enrolled in post-secondary schools; and, in 2011, 60% of high school graduates with disabilities engaged in some form of postsecondary education.

Current U.S. education law, like the ADA, requires that schools reasonably accommodate students with disabilities, and these


69. Id.

70. IDEA/Special Education, NAT’L EDUC. ASSN., http://www.nca.org/specialed [https://perma.cc/NH3E-XBQS] (last visited Mar. 26, 2019) (stating that “[n]o three decades ago, these same children would have been isolated in separate institutions or simply kept at home, with little or no chance of ever becoming independent, productive, taxpaying citizens”).


73. NEWMAN ET AL., supra note 72.

74. See Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. § 1401(14) (2012) (defining the “individualized education program” to which students are entitled); 34 C.F.R. § 104.44 (2017) (defining the “academic adjustments” to which older students are entitled).
accommodations increasingly involve the use of assistive technology.\(^\text{75}\)
Therefore, those who have passed through U.S. schools since the 1990 passage of the Individuals with Disabilities Education Act (IDEA)\(^\text{76}\) are both aware of their legal rights to reasonable accommodations and familiar with effective use of assistive technology for this purpose.\(^\text{77}\)
Armed with the educational and certification requirements necessary to successfully complete a wide range of jobs, these graduates with disabilities are already comfortable utilizing assistive technology and are well versed in its availability. They also know that federal education law has already determined that the costs of the assistive technology that they effectively utilized in the classroom are "reasonable."\(^\text{78}\)
As they enter the workforce, they are therefore increasingly likely to demand the reasonable accommodations in the workplace that Title I of the ADA guarantees.

Disability discrimination lawsuits are on the rise.\(^\text{79}\)
In particular, lawsuits based on an employer’s failure to provide a reasonable accommodation to facilitate employment of a worker with a disability are outstripping all other disability claims. The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with processing all types of federal discrimination claims, including race, gender, religion, age, and disability. The portion of EEOC cases that are disability claims has grown every year since 2008, when that percentage sat at 20.4\% of all federal discrimination claims filed.\(^\text{80}\)
Now surpassed only by race discrimination and retaliation claims, disability cases were 32\% of EEOC discrimination claims in the 2017 fiscal year.\(^\text{81}\)
Furthermore, and importantly, among these disability discrimination claims, there has been a 40\% increase over the past eight years in reasonable accommodation

\(^{75}\) See, e.g., JOEL MITTLER, Assistive Technology and IDEA: Regulations, in TECHNOLOGY INTEGRATION: PROVIDING ACCESS TO THE CURRICULUM FOR STUDENTS WITH DISABILITIES 81–85 (C. Warger ed., 2007); see also Lynch, supra note 17; Stanberry & Raskind, supra note 17.

\(^{76}\) See supra note 66 and parentheticals therein.

\(^{77}\) Stephen B. Thomas, College Students and Disability Law, 33(4) THE J. OF SPECIAL EDUC., 248, 248–57 (2000) (discussing the increased demand for accommodations by college students with disabilities, author notes that this increase “can be attributed primarily to the fact that many current college students received either an Individualized Education Program (IEP) . . . or a service plan (as is required by Section 504) while in elementary and secondary schools, and have become increasingly aware of their rights to accommodation while in higher education.).

\(^{78}\) Id.

\(^{79}\) Americans with Disabilities Act Lawsuits Up 28 Percent in FY 2016, TRACREPORT (October 27, 2016), https://trac.syr.edu/tracreports/civil/444/ [https://perma.cc/8CE8-NLQU] (documenting that lawsuits for employment discrimination under the ADA rose 24.9\% from 2008 to 2016). This trend is even more dramatic if one compares 2007 to 2012, when lawsuits for employment discrimination under the ADA rose 89.6\%. Increase in Employment Discrimination Lawsuits Under the Americans with Disabilities Act, TRACREPORT (May 30, 2012), https://trac.syr.edu/tracreports/civil/282/ [https://perma.cc/2A2W-UW4D].

\(^{80}\) Charge Statistics (Charges filed with EEOC) FY 1997 through FY 2017, supra note 33.

\(^{81}\) Id.
As illustrated by the cases discussed below, this trend is likely attributable to a combination of more employees asserting their rights and more employers inappropriately refusing to accommodate these employees.

Two recent non-technology reasonable accommodation cases address the common failure of employers to engage in an adequate case-by-case process for considering an employee’s accommodation request. In the first of these cases, the employer, Valley Life, agreed to pay $100,000 in March 2017 to settle a lawsuit based on the company’s failure to provide reasonable accommodations to four employees with disabilities who required extended leave. Valley Life had a strict leave policy and, when each of the four employees with disabilities requested a leave, Valley Life simply denied the request without any dialogue to determine if a policy exception should be made as a form of reasonable accommodation.

It is notable that the correlative consent decree included an agreement that Valley Life would train managers about the company’s legal obligation to explore a variety of possible accommodations before deciding that an employee cannot be reasonably accommodated. This goes beyond what is currently explicitly required in the EEOC’s own published guidelines and is consistent with the authors’ proposal for change.

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82. In fiscal year 2010, there were 8,400 reasonable accommodation claims filed with the EEOC. See [Statutes by Issue (Charges Filed with EEOC) FY 2010 - FY 2017](https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm). In fiscal year 2017, there were 11,754 reasonable accommodation claims filed with the EEOC. See also supra note 33.

83. There are various examples of non-technology reasonable accommodation claims that generally illustrate the growing willingness of employees to assert their ADA rights. For example, in a pending reasonable accommodation claim, Walmart fired an employee with a disability who had successfully worked for the company for six years merely because a new manager refused to continue an established accommodation. Michelle Diament, [Walmart Sued for Denying Reasonable Accommodations](https://www.disabilityscoop.com/2017/09/28/walmart-sued-accommodations/24230/).

84. EEOC v. ValleyLife, Civil Action No. 2:15-cv-00340-GMS, as reported in [Disability Services Company to Pay $100,000 to Settle EEOC Disability Discrimination Lawsuit](https://www1.eeoc.gov//eeoc/newsroom/release/3-28-17.cfm?renderforprint=1).

85. Id. (“Valley Life fired employees with disabilities rather than provide them with reasonable accommodations due to its inflexible leave policy. The policy compelled the termination of employees who had exhausted their paid time off and/or any unpaid leave to which they were eligible under the Family Medical Leave Act (FMLA).”).


87. See infra Section V.B.
employees with disabilities who need them. It’s good business, and it’s also the law.\(^88\)

In a second case that illustrates employers’ lack of interactive evaluations of accommodation requests, UPS agreed to pay $2 million to ninety current and former employees over a similar situation in which employees with disabilities were fired due to an inflexible absence policy after failing to individually engage in dialogues to attempt tailored efforts to reasonably accommodate their specific situations.\(^89\) Both of these cases involve inflexible leave policies and serve as expensive reminders to businesses that the ADA’s reasonable accommodation requirement includes an interactive process with each individual worker with a disability to explore a variety of possible reasonable accommodations for that person.\(^90\)

This interactive requirement is vital in the area of assistive technology, where a manager may be unaware or dismissive of assistive technology as too expensive or onerous to meet the ADA’s definition of a “reasonable accommodation.”\(^91\) For example, in one case, the EEOC alleged that a hotel refused to hire an applicant as a receptionist because she was blind, even though the woman had worked five years in a similar position for an international hotel chain, and the Oregon Commission for the Blind had offered to provide a technical consultant, assistive technology, and any training required to help her do the job.\(^92\) The hotel agreed to pay the applicant $35,000 in compensatory damages.\(^93\) Three years later, a similar situation arose in Colorado when a blind applicant for a customer service representative job was turned away and told “the company was not set up to handle blind people.”\(^94\) At trial, the EEOC produced evidence that the applicant had been trained to perform customer service jobs with the aid of screen-reading technology and that the company never attempted to install the technology nor even contacted the State Division of Vocational Rehabilitation, an agency that often paid some or all of the costs of

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88. Disability Services Company to Pay $100,000 to Settle EEOC Disability Discrimination Lawsuit, supra note 84.
90. Admittedly, the EEOC published Enforcement Guidance provides little detail about this required process. See infra Section V.B.
91. See supra notes 63, 64 and accompanying text.
94. Id. (referencing EEOC v. EchoStar Communications Corp., No. 02-CV-0581-RPM-BNB, 2005 U.S. Dist. LEXIS 48732 (D. Colo. Sept. 8, 2005)).
implementing this type of assistive technology. The jury awarded $2,000 in back pay, $5,000 in compensatory damages, and $8 million in punitive damages. These two cases should have served as a wakeup call to employers that: a) they have a legal obligation to explore assistive technology accommodations; and b) financial and training support for assistive technology is readily available.

Instead, companies continue to pay the price of ignoring these basic realities. In one particularly illustrative case, AT&T agreed to pay $250,000 and to reinstate an employee with a disability after refusing his request for assistive technology as a reasonable accommodation. The worker became visually impaired due to diabetes after eight years of successful employment and requested the use of assistive technology software, which would allow him to use computers and programs to perform the essential functions of his job as a switch technician. The employer never even responded to the worker’s request and eventually fired the worker. After first investigating and attempting to reach a pre-litigation settlement through its conciliation process, the EEOC filed a lawsuit that resulted in the $250,000 settlement and reinstatement of the worker with the originally requested assistive technology. In announcing the settlement, the EEOC Director publically reiterated the interactive effort requirement, stating that “It is important for employers to take accommodation requests from qualified employees with disabilities seriously and to respond to them in a

95. Id.
96. Id. (noting that the punitive damages awarded in the 2005 jury verdict in EEOC v. EchoStar Communications Corp. were reduced in accordance with the ADA’s statutory damages cap of $300,000).
97. See, e.g., EEOC FY2005 PERFORMANCE AND ACCOUNTABILITY REPORT, STRATEGIC OBJECTIVE 1.3.2 (JUSTICE AND OPPORTUNITY: EEOC’S HIGH IMPACT LITIGATION AND PUBLICITY EFFORTS SUBSEQUENTLY CHANGE WORKFORCE STATUS OF AFFECTED GROUPS AND/OR IMPROVES EMPLOYMENT POLICIES, PRACTICES, OR PROCEDURES IN AFFECTED WORKPLACES) (2005). https://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2005/achieving_results.html?obj1 [https://perma.cc/39BH-TWFM] (noting that EEOC v. EchoStar Communications was one of five FY2005 cases identified as “high impact litigation” and announcing its hopes, in APPENDIX B: HIGH IMPACT LITIGATION, that EchoStar Communications would both: a) have “far reaching implications” because, while “breakthroughs in computer technology have opened up doors to individuals with disabilities . . . some employers have closed those doors by relying on stereotypical notions associated with disability even in the face of evidence of workable, inexpensive technology-based reasonable accommodations;” and b) raise consciousness of these issues, and increase the likelihood that other applicants with disabilities will be given the opportunity to show their qualifications and be judged based on their abilities rather than their disabilities.”).
99. Id.
100. Id.
101. Id.
102. Id.
timely manner. The requirement by federal law to engage in the interactive process with an employee cannot be ignored.” 103 The EEOC Regional Attorney for this case added, “We hope employers take note of this case as an example of how all workers may participate productively in the workforce, and how stereotypes about an employee’s disability cannot and should not determine an employee’s fate in any company.” 104

As the AT&T case dramatically illustrates, employers risk running afoul of their legal obligation to provide reasonable accommodation to qualified workers with disabilities when they refuse a request for an assistive technology accommodation without appropriately investigating the availability and costs of relevant assistive technology. When an employee can point to an available and affordable assistive technology solution, the employer truly ignores the accommodation request at its peril. As the AT&T case illustrates, when employers rely on the “undue burden” 105 exception to the ADA accommodation rule to justify a refusal to hire or to retain a worker with a disability, they must be prepared to demonstrate, as the ADA requires for this defense, that the requested assistive technology would be too costly or have too high an impact on co-workers or clients. 106 These assertions are often made without first exploring the facts, relying instead on outdated assumptions that plaintiffs, such as the AT&T employee, know to be false. 107 This failure to engage in individualized cost research flies in the face of the EEOC’s explicit published and posted ADA Enforcement Guidance:

Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized

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103. Id.
104. AT&T to Pay $250,000 and Reinstate Employee to Settle EEOC Disability Discrimination Lawsuit, supra note 98.
106. The concept of an “undue burden” has been repeatedly defined as a “requested modification that poses ‘significant difficulty or expense.’” Davis v. Flexman, 109 F. Supp. 2d 766, 788 (S. D. Oh., 1999). See The Future of Disability In America, supra note 15, at 455, 492, n. 54 (explaining that “changes to the work environment or process that allow a person with a disability to enjoy equal employment opportunity,” including “making facilities accessible, restructuring jobs, modifying work schedules, reassigning the worker to a more suitable position if one is available, and modifying equipment or devices,” are all reasonable accommodations under ADA Title I unless such an accommodation creates an undue burden for the employer, and that factors used to assess an “undue burden” defense under ADA Title I “require balancing the cost and nature of the accommodation or aid with the financial resources of the facility and the impact of the accommodation or aid on its operations.”); see also CORNELL UNIVERSITY ILR SCHOOL, EMPLOYMENT AND DISABILITY INSTITUTE, supra note 56, at 4–5; Furguson, supra note 20; Is it expensive to provide assistive technology on the job?, ACCESSIBLE TECH, http://accessibletech.org/assist_articles/general/assistive_technology_expensive.php [https://perma.cc/4EZD-U834] (last visited Mar. 27, 2019).
107. See CORNELL UNIVERSITY ILR SCHOOL, EMPLOYMENT AND DISABILITY INSTITUTE, supra note 56, at 4–5; Furguson, supra note 20; Is it expensive to provide assistive technology on the job?, supra note 106.
assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. . . . The ADA’s legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference . . . An employer cannot claim undue hardship based on employees’ (or customers’) fears or prejudices toward the individual’s disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees.108

Predictably, inaccurate employer assumptions about assistive technology’s availability, quality, costs, and impact on others have contributed to the previously noted spike in “reasonable accommodation” litigation.109 These claims are costly for employers to defend and are most commonly resolved in favor of plaintiffs.

IV. ADVANTAGES OF EMPLOYING WORKERS WITH DISABILITIES

A widespread lack of awareness of the many positive impacts of employing workers with disabilities is another type of business ignorance that contributes to the underemployment110 of qualified workers with disabilities in an era of affordable and high quality assistive technology. Ironically, many businesses who neglect their legal obligations under the ADA and ADAAA are unaware not only of the risk that they are taking of having to defend costly losing lawsuits. They are also unaware that accommodating workers with disabilities can actually benefit the company.111 There are at least three types of well-established advantages to employing people with disabilities: 1) tax advantages; 2) retention and attendance advantages; and 3) productivity, co-worker morale, and public

109. Recall there were 8,400 reasonable accommodation claims filed with the EEOC in fiscal year 2010, and 11,754 filed in fiscal year 2017. See Statutes by Issue (Charges Filed with EEOC) FY 2010-FY 2017, supra note 82.
110. See supra notes 23, 24 and accompanying text; infra notes 196–199 and accompanying text.
image advantages. Each of these contributes positively to a company’s bottom line.\textsuperscript{112} Therefore, increasing employer awareness of these advantages can provide additional incentives to employ more workers with disabilities. We discuss tax advantages first as these are the most readily quantifiable and therefore, arguably, the best way to encourage initial hires. We then present evidence of increased retention, attendance, productivity, morale, and public image—each of which an employer will be better able to observe and to quantify within their particular enterprise once they have direct experience with a worker with a disability. This progression is mirrored in authors’ proposal, detailed in Section V, which seeks to increase the use of assistive technology as an ADA reasonable accommodation by improving both tax incentive awareness and ADA regulations and tax incentive awareness, thereby giving employers firsthand knowledge of the various non-ADA reasons to employ workers with disabilities.

\textbf{A. Tax Advantages}

The Internal Revenue Code currently provides two tax incentives for those who employ non-veteran\textsuperscript{113} individuals with disabilities: 1) the disabled access credit; and 2) the barrier removal tax deduction. Businesses may use the disabled access credit and the barrier removal tax deduction together in the same tax year, if the expenses meet the requirements of both sections.\textsuperscript{114} However, the businesses must reduce their barrier removal tax deductions by the amount of the disabled access credit claimed in the same tax year.\textsuperscript{115}


\textsuperscript{113} Employing a veteran with a disability creates additional tax advantages, such as the work opportunity tax credit. See I.R.C. § 51 (2012).

\textsuperscript{114} Id. §§ 44, 190.

\textsuperscript{115} Id. § 44(d)(7)(A).
1. Disabled Access Credit

The disabled access credit, enacted in 1990, provides a limited amount of funding for employer efforts to make businesses more accessible.\(^\text{116}\) Under the current disabled access credit, a company qualifying as an “eligible small business” is entitled to a nonrefundable tax credit for “eligible access expenditures” incurred to make the business accessible to individuals with disabilities.\(^\text{117}\) An “eligible small business” is any employer that had gross receipts (less returns and allowances) for the preceding tax year that did not exceed $1,000,000 or that employed no more than thirty full-time employees during the preceding tax year.\(^\text{118}\) The credit is 50% of the amount of the “eligible access expenditures” for a year that exceed $250 but that do not exceed $10,250.\(^\text{119}\)

“Eligible access expenditures” include reasonable and necessary amounts that an “eligible small business” paid or incurred for the purpose of enabling the business to comply with the requirements of the Americans with Disabilities Act of 1990.\(^\text{120}\) These include expenditures: (1) “for the purpose of removing architectural, communication, physical, or transportation barriers that prevent a business from being accessible to or usable by individuals with disabilities”\(^\text{121}\); (2) “to provide qualified interpreters or other effective methods of making aurally delivered materials available to hearing-impaired individuals”\(^\text{122}\); (3) “to provide qualified readers, taped texts, and other effective methods of making visually delivered materials available to visually impaired individuals”\(^\text{123}\); (4) “to acquire or modify equipment or devices for disabled individuals”\(^\text{124}\); or (5) “to provide other similar services, modifications, materials, or equipment.”\(^\text{125}\) Congress limited the available credit to adaptations to existing facilities by excluding new construction from the list of “eligible access expenditures.”\(^\text{126}\)

\(^{116}\) Id. § 44.
\(^{117}\) I.R.C. § 44.
\(^{118}\) Id. § 44(b).
\(^{119}\) Id. § 44(a).
\(^{120}\) Id. § 44(c)(1).
\(^{121}\) Id. § 44(c)(2)(A).
\(^{122}\) I.R.C. § 44(c)(2)(B).
\(^{123}\) Id. § 44(c)(2)(C).
\(^{124}\) Id. § 44(c)(2)(D).
\(^{125}\) Id. § 44(c)(2)(E).
\(^{126}\) Id. § 44(c)(4).
2. Barrier Removal Tax Deduction

The barrier removal tax deduction provides funding for employer efforts to remove barriers to the mobility of people with disabilities. Congress enacted the deduction in 1976 “to encourage the more rapid modification of business facilities and vehicles to overcome widespread barriers that hampered the involvement of people with disabilities and the elderly in economic, social and cultural activities.”

The cost of an improvement to a business asset is normally a capital expense that does not permit an immediate deduction of the costs of the improvement. Instead of an immediate expense, an employer would ordinarily deduct depreciation expense over the life of the asset. One of the exceptions to this capitalization rule includes the barrier removal deduction. Under current law, the most one can deduct as a cost of removing barriers to people with disabilities for any tax year is $15,000, though one can add any costs over this limit to the basis of the property and depreciate these excess costs.

The barrier removal tax deduction provides this immediate expense to “qualified architectural and transportation barrier removal expenses.” These expenses include any expenditures made “for the purpose of making any facility or public transportation vehicle owned or leased by the taxpayer for use in connection with his trade or business more accessible to, and usable by, handicapped and elderly individuals.” The Treasury Regulations describe the facility and public transportation conformity requirements. A facility is all or any part of buildings, structures, equipment, roads, walks, parking lots, or similar real or personal property. A public transportation vehicle is a vehicle, such as a bus or railroad car, that provides transportation service to the public. As stated above, an expense is not deductible unless it is attributable to removing an

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127. See I.R.C. § 190.


129. Id. §§ 167(a), 168(a) (describing general depreciation rules).

130. Id. I.R.C. § 190.

131. Id. I.R.C. § 190(c).


133. I.R.C. § 190(a)(1).

134. Id. § 190(b).


136. Id. § 1.190-2(a)(1).

137. See id. § 1.190-2(a)(2). In addition, this deduction does not require that employers engage in a transportation service business and employers may service customers with these vehicles without loss of the benefit of the deduction.
existing architectural or transportation barrier. However, the italicized language indicates that assistive technology that removes barriers by rendering the business’ building, equipment, or other personal property more accessible would be deductible. These are expenditures for the purpose of making any facility or public transportation vehicle more accessible to or usable by people with disabilities. Thus, expenditures for the acquisition or implementation of assistive technology that would achieve these purposes should be covered.

Research related to the effectiveness of both the Disabled Access Credit and the Barrier Removal Tax Deduction as incentives in closing the workers with disabilities-hiring gap is limited and inconclusive. Certain changes to the amounts of, eligibility for, and availability of information about these tax opportunities may increase their effectiveness. The authors detail in Section V below their proposal to expand each of these incentives (Prong One), as well as to implement measures to increase awareness of these tax advantages (Prong Two), so as to promote the hiring of individuals with disabilities and to close the hiring gap between those with a disability and those without a disability.

B. Other Bottom Line Advantages

One of the most compelling reasons to use tax benefits to financially incentivize employers to hire workers with disabilities is that these hires quite often financially benefit employers in additional unexpected ways that can only be seen once the worker with a disability is on the job. Paradoxically, flying in the face of employer resistance to workers with disabilities, the addition of these workers has repeatedly and extensively been demonstrated to positively impact businesses’ bottom lines in a variety of indirect ways, detailed below. Hence, once an employer chooses to hire a worker with a disability for tax reasons, they would then have the

139. See I.R.C. §§ 167(a), 168(a) (describing general depreciation rules).


141. See Persons with a Disability: Labor Force Characteristics Summary, supra note 23.

first-hand experience necessary to more accurately value additional employees with disabilities. This financial value typically flows from increases in retention, attendance, productivity, morale, and public image.

1. Retention and Attendance

Employers who hire workers with disabilities are often pleasantly surprised to find that these employees surpass workers without disabilities in both retention and attendance. For example, in a three-year study of 25 Chicago businesses, retail sector employees stayed on the job nearly 24 months longer than their counterparts without disabilities and employees with disabilities in the hospitality sector stayed on the job over 50 months longer than their counterparts without disabilities. Indeed, many studies indicate that workers with disabilities stay on the job longer. While overall retention rates vary by industry, in industries with high rates of turnover, increasing retention can save enormous costs in rehiring and retraining. For example, one study of a call center that employs both workers without disabilities and people who are blind, visually impaired, or have some other disability found that the workers with disabilities had a retention period of 1.7 years, compared to only 0.9 years for their counterparts without disabilities. These results have been replicated in a variety of other industries with high turnover rates, such as fast food restaurants, where turnover rates average about 75%, compared to an average of less than 40% in all other industries, representing a fast food

143. See Hernandez & McDonald, supra note 112 at 12.

144. See Valentini Kalargyrou, People with Disabilities: A New Model of Productive Labor, HOSPITALITY ADMIN. MGMT. COMMONS 1–2 (2012) https://www.disabled-world.com/disability/employment/disability-employment-information.php [https://perma.cc/AU49-ZQWE]; Proceedings of the 2012 advances in Hospitality and Tourism Marketing and Management Conference in Corfu, Greece (summarizing studies on retention of workers with disabilities, including: the Hernandez and McDonald Chicago Economic Impact Study, supra note 116, in which, across three industry sectors, employees with disabilities stayed on the job 4.26 months longer than employees without disabilities, with even more impressive differences in the retail and hospitality sectors than in the healthcare sector; Pizza Hut’s “Jobs Plus Program,” which has over 4,000 participants, over two-thirds of them with disabilities, and whose the turnover rate among people with disabilities is much lower, just 20%, compared to their non-disabled coworkers who have a turnover rate of 150%; a study of the Chicago Marriott, which also experienced lower overall turnover rate (32%) after it began hiring people with disabilities, compared to the rest of the hotel industry (50% turnover rate); and a study of a Washington Mutual Inc. call center which had a turnover rate of 8% among people with disabilities, compared to a rate of 45% overall). See also J.J. Laabs, Individuals with disabilities augment Marriott work force, 73(9) PERSONNEL J. 46–51 (1994); S.T. Romano, For firms, hiring disabled people offers a big payback, 26(14) CRAIN’S CHICAGO BUSINESS 9 (2003) (detailing Washington Mutual call center study).

industry retention rate of less than 25%. For example, Pizza Hut experiences an annual turnover rate of 150% of its workers without disabilities, meaning that for every 10 workers Pizza Hut hires, all 10 quit and are replaced and then, before the end of a year, another five of the replacement workers have also quit. In comparison, Pizza Hut has only a 20% turnover rate for its workers with disabilities. A Walgreens pilot program of hiring workers with disabilities for 10% of its distribution center workforce resulted in a similar impact: turnover for workers with disabilities was 48% lower than for workers without disabilities. As each of these examples indicates, hiring workers with disabilities often significantly reduces the high cost of staff turnover.

In addition to staying on the job longer, workers with disabilities demonstrate lower rates of absenteeism than their co-workers without disabilities. In the study of 25 Chicago businesses, employees with disabilities across three industry sectors had 1.24 fewer days of scheduled absences than workers without disabilities and, in the retail sector, employees with disabilities had .53 fewer days of unscheduled absences than workers without disabilities. In the Walgreens’ pilot program, workers with disabilities, on average, had 40% fewer “lost days” due to illness or injury than their colleagues without disabilities and the workers with disabilities who filed workers compensation claims for job-related injuries had time-off expenses that were 73% lower than those for workers


149. See, e.g., DuPont de Nemours and Company, Equal to the Task II: 1990 DuPont Survey of Employment of People with Disabilities (Wilmington, DE, 1993) (having tracked their employees with disabilities since 1973, including specific studies in 1973, 1981, and 1990, DuPont reports that 86% of their employees with disabilities (representing a variety of physical, cognitive, and emotional disabilities) were rated above average or average in their attendance).

150. Only in the hospitality sector did workers with disabilities have more unscheduled absence than workers without disabilities. Hernandez & McDonald, supra, note 112 at 13.
without disabilities. Carolina Fine Snacks, a small nutritional snack company that was struggling with high turnover, replaced ten of its twenty workers with individuals with disabilities and found that, not only did the six-month turnover rate drop from 80% to less than 5%, but absenteeism also decreased from 20% to less than 5% and tardiness decreased from 30% to 0%. Not surprisingly, productivity rose from approximately 60-70% to 85-95% of capacity.

2. Increased Productivity, Co-Worker Morale, and Public Image

Hiring workers with disabilities can improve profitability beyond the direct cost savings of higher retention and lower absenteeism rates. One way this occurs, as noted in the Carolina Fine Snacks example above, is through increased productivity. In another example, the Walgreens study revealed that in 10 out of 31 locations, employees with disabilities were more productive than their counterparts without disabilities and, in 18 of the remaining 21 locations, both groups were equally productive. Moreover, Walgreens reported that their warehouse where 40% of the workers had a disability was its most productive warehouse. Explanations for this increased productivity phenomenon range from attitudes of the workers with disabilities, to increased efficiencies associated with longer times on the job due to higher retention, and decreased impacts of absent employees.

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151. See Kaletta, supra note 148 at 68.
153. Fact Sheet 3: Why Hire People with Disabilities?, supra note 158, at 3; Griffin, supra note 152.
154. Lindsay, supra note 35 at 634 (concluding, from extensive review of 39 studies spanning a decade of relevant research, that the “benefits of hiring people with disabilities included improvements in profitability (e.g., profits and cost-effectiveness, turnover and retention, reliability and punctuality, employee loyalty, company image)”); Jim Baumer, Thriving Companies Tap Disabled Workers, JOBS IN THE U.S., https://www.jobsintheus.com/news/Thriving-Companies-Tap-Disabled-Workers/30.html [https://perma.cc/ZG74-BEEM] (last visited Mar. 28, 2019).
155. Kaletta, supra note 148 at 63.
156. David Maloney, Ready, Willing, and Disabled (September 9, 2016) http://www.dcvelocity.com/articles/20160915-ready-willing-and-disabled/ [https://perma.cc/MN7V-LGTC] (describing a visit to Walgreens’ Anderson, South Carolina distribution center, where more than 40 percent of the workers had mental or physical disabilities, and noting that this facility was Walgreens’ most productive distribution center, with more dependable employees than the typical distribution center worker and with a turnover rate that was half of other Walgreens facilities). See also Fact Sheet 3: Why Hire People with Disabilities?, supra note 158; Geri Spieler, Can Disabled Workers Increase Warehouse Productivity? SUPPLY CHAIN DRIVE (Sept. 15, 2016), https://www.supplychaindrive.com/news/warehouse-disability-hiring/426424/ [https://perma.cc/GX98-TNKZ].
on team work.\textsuperscript{157} Whatever the reason, multiple sources comment on this increased productivity,\textsuperscript{158} which is viewed as having an indirect impact on profitability by increasing output without increasing costs.\textsuperscript{159}

Another frequently noted advantage of employing workers with disabilities is the positive impact of these workers on the morale of their co-workers without disabilities.\textsuperscript{160} For example, in the Chicago Economic Impact study, employers overwhelmingly found that, in addition to having notably “low absenteeism rates and long tenures,” their employees with disabilities were “loyal, reliable, and hardworking” and contributed to “an overall positive work environment.”\textsuperscript{161}

Finally, hiring workers with disabilities can lead to a competitive advantage through an improved company image that can attract more customers. One national marketing survey of 803 randomly selected consumers found that 92 percent “felt more favorable toward companies that hire people with disabilities,” and 87 percent said they “would prefer to give their business to such companies.”\textsuperscript{162} Another paper, which reviewed

\begin{footnotesize}
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\item \footnote{157. See, e.g., Kevin Hindle, Jock Noble, & Brian Phillips, Are Workers with a Disability Less Productive? An Empirical Challenge to a Suspect Axiom, Proceedings of Anzam 99 Conference, Univ. of Tasmania (September 8, 1999) http://www.kevinhindle.com/publications/337.Disability%20ANZAM%20Version%202015199.pdf (describing methodology of studying productivity of both workers with disabilities and those without, authors explain that the “construct of productivity” included measurements of “Length of Service,” “Absentee Days,” Logon Ratio” (which was the “total hours spent actually making phone calls as a percentage of the total paid hours”), “Contact Efficiency” (which was the “percentage of total customer contact hours”), “Upgrade Effectiveness” (which was “the sale of additional features of a service to a client”), and “New scale effectiveness (which was “the sale of a completely new service or product”); Lindsay, supra note 35 at 634.

\item \footnote{158. See, e.g., Kaletta, supra note 155, at 63; Hindle, supra note 157 (concluding from their study data that the “axiom that workers with a disability are less productive is dead” and that this axiom “is no longer an axiom” but, rather, “a myth”).

\item \footnote{159. See, e.g., Kaletta, supra note 155 at 63 (stating that “When it comes to analyzing the costs and benefits of including employees with disabilities in the regular DC workforce, the company believes that productivity” is one of “two key measures”).

\item \footnote{160. See, e.g., JAN supra note 22 (listing as Finding #4 of its annual survey that employers who hire and retain workers with disabilities by providing accommodations “experience multiple direct and indirect benefits,” including an increase in overall company morale at 63% of businesses surveyed). See also Lindsay, supra note 35 at 1 (noting that, among findings of the “benefits of hiring people with disabilities” were improvements in “employee loyalty,” “innovation,” “work ethic,” “inclusive work culture,” and “ability awareness”).


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39 relevant studies spanning a decade of research, found that “competitive advantage,” created by “diverse customers” and “customer loyalty,” was a commonly noted “benefit” of hiring people with disabilities. 163

Employers are beginning to take note of these various positive impacts that employees with disabilities have on the workplace. 164 And, programs that work to connect employers with qualified workers with disabilities now focus as much of their outreach to businesses on these indirect positive impacts as they do on the direct benefits. For example, Transitions to Work, a non-profit organization in Boston that trains workers with disabilities and matches them with Massachusetts employers, 165 lists as its first reason to hire a worker with a disability “Higher Productivity. Employees with disabilities typically exhibit higher loyalty, lower turnover, and contribute to the collegiality of the workplace.” 166 Transitions to Work then proceeds to list these additional reasons: “Public Relations. Inclusive hiring positively impacts a company’s image. Diversity and Morale. All employees report a higher degree of workplace satisfaction when working in integrated teams.” 167

Despite these advances, many sources note that businesses are initially reticent to hire workers with disabilities and only believe in these workers’ positive impacts once they actually employ workers with disabilities. 168 Therefore, in the absence of a national outreach effort that mirrors the state-
level outreach work of Transitions to Work, there is a need to use other tools to spread the word that ADA compliance can actually be a financially self-serving act for many businesses. The authors propose coaxing employers into hiring their first worker with a disability both by tightening enforcement of the already existent ADA reasonable accommodation standard, and by more immediately rewarding employers by enhancing the current tax advantages. Once employers have workers with disabilities on the payroll, the other financial benefits of employing workers with disabilities—increased retention, attendance, productivity, co-worker morale, and public image—will present themselves and perpetuate the practice of hiring more workers with disabilities.

V. A TWO-PRONGED PROPOSAL

We know that many employers consider hiring a person with a disability as risky. We also know that once employers hire a worker with a disability, they are often likely to have a positive experience and to be more open to hiring more workers with disabilities.169 Thus, it is vital to encourage employers to make that first hire. While we might hope that employers would hire workers with disabilities for social justice reasons, and indeed, some do,170 businesses have a financial duty to their shareholders and are most often driven by profitability. Therefore, the first recommended step is to enhance the current tax incentives available to employers when they hire or retain a worker with a disability so as to ensure that such hires are immediately and obviously cost-effective.

A. Prong One: Increase Amount And Availability Of Tax Incentives

As stated above, the Internal Revenue Code currently provides tax incentives in the form of the disabled access credit and the barrier removal tax deduction for those who employ individuals with disabilities. The authors propose the expansion of each of these incentives in an effort to promote the hiring of individuals with disabilities and to close the hiring gap between workers with disabilities and those without disabilities.


1. Disabled Access Credit

When adjusted for inflation and the growth of businesses, the amount of the credit and the current limit on the definition of an “eligible small business” have fallen far from the original intent of Congress when it enacted the standard in 1990. \[171\] Since enactment, Congress has not adjusted the definition to account for inflation or the growth of businesses. \[172\] First, adjusting for inflation using the consumer price index would increase the maximum credit from $5,000 to approximately $10,000. \[173\] In addition, the gross receipts cap on the definition of an “eligible small business” would increase from $1,000,000 to approximately $2,000,000 using the consumer price index as a measure of inflation. \[174\]

When Congress enacted the disabled access credit in 1990, the U.S. Small Business Administration defined a “small business” as one with a maximum of 50 employees or 1,000 employees, depending on the industry classification of the business. \[175\] With respect to a gross receipts measure, a “small business” could have gross receipts of an amount that approached $10,000,000 for certain industry classifications. \[176\] Currently, the definition of “small business” used by the United States Small Business Administration varies based on the number of employees and average annual receipts. \[177\] Depending on the industry classification of a business, a “small business” could be defined as one with a maximum of 250 employees or a maximum of 1,500 employees and the average annual gross receipts could be defined as one with a maximum of $750,000 to $38,500,000. \[178\]

Since the credit amount has not kept up with inflation nor has the definition of “eligible small business” been updated to align with the definition of “small business” by the U.S. Small Business Administration, Congress should adjust both. Indeed, on April 17, 2018, a bill was introduced in the House of Representatives that would make these very types of proposed adjustments. \[179\] If passed, the bill would amend the

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\[172\] See id.; I.R.C. § 44(a).


\[174\] Id.


\[176\] Id. at 226.

\[177\] 13 C.F.R. § 121.201 (2018).

\[178\] Id.

Internal Revenue Code to: (1) increase the annual limitation for eligible access expenditures from $10,250 to $20,500; (2) require the $20,500 limit to be annually adjusted for inflation after 2018; and (3) increase the gross receipts limitation for an eligible small business from $1,000,000 to $2,500,000. The authors support this bill but would propose expanding the credit even further by increasing the credit limitation to $50,000 and by removing the “small business” eligibility requirement entirely. These changes would make the credit both more lucrative and more available to a greater number of entities.

2. Barrier Removal Tax Deduction

As described above, the barrier removal tax deduction provides funding for employer efforts to remove barriers to the mobility of people with disabilities. This tax deduction allows for immediate expensing of qualified architectural and transportation expenditures in an amount that does not exceed $15,000, though one can add any costs over this limit to the basis of the property and depreciate these excess costs. The cap on the deduction has fluctuated since the deduction’s enactment in 1976 at $25,000 of qualified expenditures per tax year. After December 31, 1983, Congress increased the deduction limit to $35,000 per tax year. On November 5, 1990, Congress reduced the maximum deduction to $15,000—a level below even its original amount. Merely adjusting this lowest amount for inflation would increase the maximum deduction to slightly less than $30,000. However, adjusting the original $25,000 deduction for inflation would increase the maximum deduction to an amount in excess of $110,000. This seems more aligned with the original congressional intent for the deduction. Therefore, the authors propose adjusting the deduction limitation to $110,000.

The authors also propose expanding the deduction to include the cost of addressing communication and electronic “barriers” in today’s modern workplace. This conclusion follows from the General Accounting Office’s report on the effectiveness of the deduction given the changes to

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180. See id.
181. See I.R.C. § 190.
182. Id. § 190(c).
183. See Treas. Reg. § 1.190-1(b).
186. See Omnibus Budget Reconciliation Act of 1990, § 11611(a), (c).
188. Id.
technology. That report concludes that such expansion may be warranted to create more general applicability for the deduction. The authors note that with the favorable depreciation changes in the Tax Cuts and Jobs Act, some of these purchases may already be fully deductible under the bonus depreciation rules, permitting a full expensing of certain qualified purchases. However, the immediate expensing provisions are scheduled to sunset, and some states may not conform to the immediate expensing provisions in the Tax Cuts and Jobs Act for state corporate income tax calculation purposes. Therefore, the authors would still support the overall expansion of the credit and deduction. In addition, the credit and deduction expansion may also assist with the education of employers about the advantages of employing workers with disabilities. As described below, this education of employers would likely work best in conjunction with an outreach program announcing an expanded credit.

3. A Long-Established Need to Increase Usage and Effectiveness of the Tax Incentives

The most recent government report (GAO Report) on the effectiveness of business tax incentives was released by the United States General Accounting Office in December 2002. At the time of the report, U.S. Census data reported that more than 17 million working-age individuals had a self-reported disability that limited their ability to work. The most recent correlative data available is for 2014. In that year, nearly 25 million working-aged Americans (defined as ages 18-64) had a disability that limited their ability to work. The GAO data also showed that the unemployment rate for those who have a disability was more than twice as high as those without a disability. As of 2017, those numbers have shown

189. See GAO-03-39, supra note 128, at 25.
190. See id.
192. See I.R.C. § 168(k).
193. See I.R.C. § 168(k)(6).
195. See GAO-03-39, supra note 128.
196. Id. at 1.
197. See DANIELLE M. TAYLOR, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2014 4, 14 (2018) (using Table 1 to compute the total number of Americans ages 18-64 with a disability (46,238,000) and the reported finding on p. 14 that 46.3% of working-aged adults who had a disability did not have a work limitation, leaving 53.7% (24,829,806) of this group who did have such a limitation.)
198. See GAO-03-39, supra note 128, at 1.
little improvement, with the unemployment rate for those with a disability at 9.2% and those without a disability at 4.2%.\footnote{199}

The GAO Report addressed both the barrier removal credit and the disabled access credit.\footnote{200} The GAO Report concluded that only a small proportion of the employers took advantage of the credits studied.\footnote{201} About 1 out of 680 corporations and 1 out of 1,570 individuals with a business reported the disabled access credit on their tax returns for 1999.\footnote{202} The study was unable to determine the exact usage of the barrier removal deduction as the Internal Revenue Service could not provide the necessary data.\footnote{203} However, the GAO Report concluded that the usage of the barrier removal deduction was likely limited based on its interviews.\footnote{204}

The GAO Report described difficulties with gathering the necessary information to study the effectiveness of the tax incentives. With respect to the effectiveness of the tax incentives in closing the hiring gap, the GAO Report stated:

Little information is available regarding the effectiveness of the incentives on encouraging the hiring, retention, and accommodation of workers with disabilities, and data limitations preclude conclusively determining their effectiveness. Studies and information provided by disability researchers and others knowledgeable about the incentives indicated that some employers considered tax incentives in recruiting and hiring disadvantaged workers.\footnote{205}

Despite its inability to reach a definitive conclusion on effectiveness, the GAO Report suggested options for increasing the usage and effect of existing employer tax incentives, such as increasing and improving government outreach and education, increasing the dollar value of the incentives, and expanding the number of workers, businesses, and accommodations that qualify for the incentives.\footnote{206} The first prong of the authors’ proposal is consistent with the GAO Report in that it proposes an expansion of the eligibility requirements for the types of employers and costs, as well as substantial increases to the dollar value of the incentives.

The authors have located no study on the usage and effectiveness of these tax incentives since the GAO Report’s release. However, it appears

\footnote{199} Persons with a Disability: Labor Force Characteristics Summary, supra note 23, at 2.

\footnote{200} The GAO Report also discussed the Work Opportunity Tax Credit, which is outside the scope of this article. The authors chose not to address the Work Opportunity Tax Credit as it addresses employment-related tax incentives that do not exclusively apply to employees with disabilities. See GAO-03-39, supra note 128.

\footnote{201} See GAO-03-39, supra note 128, at 4, 14.

\footnote{202} Id.

\footnote{203} Id. at 3, 10.

\footnote{204} Id. at 5.

\footnote{205} Id. at 5, 15–16.

\footnote{206} Id. at 21–27.
that education and outreach efforts have occurred. The U.S. Department of Labor,207 the Civil Rights Division of the U.S. Department of Justice,208 the U.S. Small Business Administration,209 and numerous organizations promoting the needs of people with disabilities have promoted the availability of tax incentives for hiring workers with disabilities. Some state governments have also joined the outreach and education effort.210 The second prong of the authors’ proposal, regarding increasing awareness of both the tax and other advantages of hiring workers with disabilities, is consistent with this trend.

B. Prong Two: Increase Employer Responsibility To Research And To Document Responses To Applicant/Employee Accommodation Requests.

It is unclear how many employers are even aware of the current tax advantages of employing a worker with a disability.211 Since many employers continue to believe that employment of a worker with a disability will be costly, it would seem that even those employers who are aware of the relevant tax laws believe that the costs of employment will swallow any tax savings.212 Sadly, this calculation is often made with inaccurate cost figures in one or more of these three cost categories: 1) assistive technology acquisition costs; 2) assistive technology implementation costs and/or training costs for workers with disabilities; and 3) costs of integrating into the workforce a worker with a disability in terms of impact on co-workers and/or clients.213 Each of these possible costs is typically much lower than an employer expects.214

When employers are aware of the tax laws and have accurate cost figures, they can accurately compare the costs and the tax savings and be properly incentivized by the tax break, especially the proposed higher break. To address the issues of tax incentive awareness and accurate


211. See GAO-03-39, supra note 128, at 5; see also supra Section V.A.3.

212. See Judy Owen, supra note 161 (referencing entrepreneurs and citing their works therein).

213. Id.

214. Id.
assistive technology cost assessment, the authors propose an addition to current EEOC regulations. The authors would explicitly require that when a qualified worker with a disability applies for a job (or an employee acquires a disability but remains qualified), an employer must explore a variety of possible accommodations, including available assistive technology, its acquisition and implementation costs, and its impact on others. Equally importantly, under the enhanced regulation, the employer would be required to document this process.

Currently, the EEOC provides quite detailed instructions on how employees must formally request accommodations. However, even though it is the agency charged with enforcing the ADA, the EEOC provides only the most vague and general rule for how an employer must respond to such a request:

What must an employer do after receiving a request for reasonable accommodation?

The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed. The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual’s functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained (emphasis added).

This rule requires absolutely no documentation and no threshold investigation of the cost and feasibility of the applicant/employee’s request. It also allows employers to decide for themselves whether to consider and to investigate an assistive technology accommodation as well as the form and extent of the dialogue with the employee/applicant, leaving it optional.


216. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, supra note 86, at Requesting Reasonable Accommodation section 5 (regarding what an employer must do after receiving a request for a reasonable accommodation).
whether to ask clarifying questions or to investigate outside resources. Such a bare bones requirement allows, if not encourages, an employer to do a minimal investigation into the accommodation request and to dismiss it with no documentation of having actually researched the costs and feasibility of the request. The authors propose a tightening of this enforcement rule to require that an employer include assistive technology in its investigation of possible accommodations and document its investigation into possible accommodations, including their costs and impacts. This process will ensure that employers are rejecting only those truly unreasonable or burdensome accommodation requests. If the documented investigation of the accommodation request reveals that an assistive technology accommodation is affordable and feasible, an employer would then be required to use assistive technology as a reasonable accommodation.

In all cases involving qualified applicants or workers with disabilities, the employer would be required to file paperwork demonstrating that it had thoroughly explored and either implemented an accommodation or found all investigated accommodations, including assistive technology, to be an “undue burden” to implement. In the former case (the accommodation, possibly assistive technology, is feasible and affordable), upon receipt of the required paperwork, the EEOC would promptly inform the employer that they are qualified for the two relevant tax credits—thus increasing awareness of these incentives—and provide information about available resources to maximize the positive impacts of employing a worker with a disability. In the latter case (all accommodations, including assistive technology, are unfeasible or too costly), the employer would be required to document the reasons or costs for this conclusion, and the employee (or prospective employee) would be given an opportunity to challenge the employers’ justifications or figures via a parallel form. If the EEOC finds the employer’s documented reasons or costs to be accurate, the EEOC would accept them. If the employers’ reasons or costs are erroneous, rather than fine or otherwise penalize the employer, the EEOC would simply educate the employer about the true costs and require the employer to attempt to accommodate the worker with a disability.

This proposed regulation would force employers to learn about assistive technology and to reject only those accommodations that are truly an undue hardship. This, in turn, would decrease costly and unnecessary litigation. The time and other resources invested in the initial research into the cost and feasibility of the reasonable accommodation request would be minimal compared to the resources expended to defend a legal claim. The proposed enhanced regulation would also increase awareness of relevant and, hopefully, increased tax incentives. Finally, coming full circle, employment of workers with disabilities has been shown to change employers’ attitudes about these productive, loyal employees, so this two-
pronged proposal should have a secondary effect of increasing employer willingness to employ more workers with disabilities in the future.

CONCLUSION

There is a growing need to offset misperceptions about the costs of utilizing assistive technology to employ qualified workers with disabilities. Thirty years after passage of the Technology-Related Assistance for Individuals with Disabilities Act, the gap is growing between classroom and workplace attainment of the Act’s goals. Unchecked, the avalanche of more, better, and cheaper assistive technology, coupled with employer ignorance, will likely lead to an even greater gap, while unnecessarily leaving unimproved the underemployment rates of people with disabilities and wasting resources on costly litigation. In contrast, being proactive about this issue not only avoids having employers, plaintiffs with disabilities, and the EEOC needlessly expend resources on litigation, but also addresses both the ongoing underemployment of people with disabilities and the untapped benefits of employing more of them. The authors’ proposed legal modifications, taken together, offer a practical and promising mechanism to better ensure that employers are fully aware of the low costs and high benefits of employing workers with disabilities. Thus, by achieving the goal of endearing employers to the use of assistive technologies as reasonable accommodations for workers with disabilities, we will create a win-win situation for all stakeholders.