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ADA and the Goose That Lays Golden Eggs

The Americans with Disabilities Act of 1990 has been billed as a truly landmark piece of legislation, a bill of rights for persons with disabilities. Its goals of increasing access and employment for persons with disabilities and eliminating discrimination against this group of Americans are beyond reproach. But is the ADA the best way to accomplish these goals?

Killing the Goose ...

ADA is a rights-based approach. A fundamental problem with the rights-based approach is its failure to perceive social change from a relational perspective. In the context of job creation and business, employers need employees and employees need employers. The more mutually beneficial and interdependent this relationship, the more successful it will be. Instead, ADA can be used to pit employees against employers, offering one party the carrots while brandishing the stick at the other. In such a confrontational environment, what is guaranteed is employment for lawyers and a new breed of professionals spawned by the law, called ADA consultants. What is not guaranteed is willing and genuine involvement of employers in providing access and employment of persons with disabilities.

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The rights-based approach, because it is dependent on legislation and its enforcement by courts, is invariably adversarial, resulting in win-lose situations instead of the win-win propositions that traditionally lead to successful satisfaction of both parties. While taking into account the agenda of people with disabilities, it ignores the agenda of employers. ADA for many employers is perceived, however inaccurately, as all stick and no carrots for business. Instead of any benefit, ADA offers business another layer of bureaucratic regulations and threats of litigation at a time when business perceives itself as being overregulated and sued to death. (In addition to environmental protection, worker safety, and product liability laws, consider also such social change laws as the Civil Rights Act of 1964, the Age Discrimination Act of 1967, Sections 503 and 504 of the Rehabilitation Act of 1973, the Vietnam-Era Veterans Readjustment Assistance Act of 1974, the Pregnancy Discrimination Act of 1978, the Immigration Reform and Control Act of 1986, and the Family Leave Act of 1993). Business is, after all, the primary source of jobs. Using the stick too often can kill the goose that lays the golden eggs.

...And the Egg Hunters

In a symbiotic relationship, win-lose propositions ultimately result in lose-lose outcomes for all involved. Will the rights-based ADA approach lead to greater employment of persons with disabilities or to covert sabotage of such opportunities for persons with disabilities? Will it lead to the promotion of the intent of the law or obsequious focus on the letter of the law while simultaneously circumventing its intent? Will it lead to reduced discrimination and greater acceptance of persons with disabilities or greater hostility both towards the law and, by association, to the persons protected by the law? The sword could cut both ways. In a society based on individual rights, there is a place for laws that protect rights. However, should the legislation of rights be the leading strategy in our struggle to end discrimination and underemployment of persons with disabilities or be our weapon of last resort?

What's Good for the Goose is Good for the Gander

Creating win-win situations entails taking into account and harmonizing the agendas of all parties involved in a way that leads to mutual satisfaction. The ADA has taken into careful account the agenda of persons with disabilities. The second half of this equation is to take into account the agenda of the employer. A critical item in the agenda of business is profitability. What mechanisms can be created that would increase the profitability of business while making persons with disabilities attractive as employees? Consider one such mechanism that could have the government paying half the wages of any person with a disability hired, with these payments continuing for the duration of their employment. (Alternatively, such subsidies could be designed on a sliding scale depending on factors such as the severity of disability). Persons with disabilities then become a valuable resource to business instead of being perceived as a threat to their profitability. This would not only be an incentive to hire but an incentive to train and advance the employee to higher wage-earning levels. The higher the promotion, the greater the savings to business. Payroll is often the highest business cost. A company that hires only persons with disabilities effectively slashes its payroll costs by half! Choosing a person with disabilities over an equally qualified nondisabled person becomes not a question of avoiding the punitive effects of law but the sanest business choice.

Under this subsidy approach, reasonable accommodation (which is a vague and scary term for employers) the cost of accommodations could be shared. Generic accommodations directed towards a larger group of society as a whole (e.g. automatic doors, ramps, accessible bathrooms, etc.) become the cost of business enforced by ADA. Employee-specific accommodations become the responsibility of the person with a disability. When accommodations are paid for by somebody else, the temptation is to fight for the Cadillac. When responsibility for accommodations is shifted to the recepient of the benefits of such accommodations, solutions that are practical, efficient, and inexpensive are more likely to be sought. Ownership of such accommodations also promotes self-esteem and better protection and use of assistive devices.

Divining the economic feasibility of such an approach is a challenge. However, it should take into account the combination of savings and additional revenue from: reduced litigation costs; increased tax dollars from employed persons with disabilities; reductions in disincentives such as SSI and SSDI, welfare, and workers' compensation payments; and increase in business profits and taxes. Include in these projections the intangible effects of increased worker self-esteem, employer cooperation, and more positive attitudes towards persons with disabilities as persons of value.

The Goose, the Eggs, the Carrots, and the Sticks

The Americans with Disabilities Act of 1990 is the most radical attempt at social change since the Civil Rights Act of 1964. The goals of this act are clearly beyond reproach. But how they are accomplished and which is the most effective approach should be open to greater debate and honest evaluation of outcomes. What kind of a reflection is it on our society that it needs laws like the ADA to force it to treat fellow citizens with fairness and decency? The same, of course, can be said about laws against stealing and murder. However, to argue the need for laws against discrimination on this basis is to place discrimination on a par with stealing or murder. Perhaps it is, but discrimination, unlike stealing and murder, is amenable to other approaches. Instead of punitive laws, behaviors promoting discrimination and equal access can also be shaped by incentives. While one cannot offer incentives for persons not to steal or kill, one can offer incentives for persons not to discriminate. Which approach, carrots or sticks, would most likely and effectively accomplish the goals of ADA? Should we use carrots to feed the goose to keep it laying more eggs or should we use sticks to beat up on the goose to get it to produce more golden eggs?

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