

## First Race, Then Sex, Now Disability: The Fight Towards Increased and Equal Employment of Individuals With Disabilities

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**FIRST RACE, THEN SEX, NOW DISABILITY: THE FIGHT  
TOWARDS INCREASED AND EQUAL EMPLOYMENT OF  
INDIVIDUALS WITH DISABILITIES**

By: Wallis Levy Granat\*

**INTRODUCTION**

Think about a typical morning. 7:00 a.m.: You hear the dreaded alarm and moan as “Superstition” plays. You somehow manage to hit snooze and buy yourself another ten minutes of peaceful bliss. 7:10 a.m.: You roll over, turn the alarm off, and instinctually grab your iPhone. You check Facebook, your email, your Instagram, and your Chase bank account to make sure nothing has changed since you went to sleep. 7:15 a.m.: You reluctantly get out of bed and turn the lights on. 7:20 a.m.: You grab your favorite Tommy Hilfiger shirt and finish getting dressed. 7:25 a.m.: You turn on the television and *Pirates of the Caribbean* starring Kiera Knightley and Orlando Bloom is playing. 8:00 a.m.: You get in the car, check the traffic to work on Waze, and turn the radio on to hear that Justin Timberlake is playing the 2018 Super Bowl halftime show.

\* Associate, Mendes & Mount LLP. Articles Editor, J. C.R. & ECON. DEV. 2018-2019. St. John's University School of Law '19. This paper is dedicated to Stacey, Steven, and Emory, to whom I would be nothing without.

You can thank Albert Einstein,<sup>1</sup> Stevie Wonder, Alexander Graham Bell,<sup>2</sup> Franklin D. Roosevelt,<sup>3</sup> Thomas Edison,<sup>4</sup> Tommy Hilfiger,<sup>5</sup> Kiera Knightley,<sup>6</sup> Orlando Bloom,<sup>7</sup> and Justin Timberlake<sup>8</sup> for making your morning possible. So why these particular people? Interestingly, they are all individuals with disabilities.<sup>9</sup> While they defied the odds and went on to achieve greatness in their fields, many people with disabilities are not as fortunate.

Under federal disability nondiscrimination laws, such as the Americans with Disabilities Act (“ADA”),<sup>10</sup> a person has a

<sup>1</sup> See M. Alex Johnson, *It’s Albert’s world. We just live in it.*, NBC NEWS, [http://www.nbcnews.com/id/7318567/ns/technology\\_and\\_science-science/t/its-alberts-world-we-just-live-it/#.Wf3VVLazOu4](http://www.nbcnews.com/id/7318567/ns/technology_and_science-science/t/its-alberts-world-we-just-live-it/#.Wf3VVLazOu4) (last updated Apr. 19, 2005, 12:06 PM) (explaining how Einstein is the reason we have alarm clocks and GPS signals); see also Hazel Muir, *Einstein and Newton showed signs of autism*, NEW SCIENTIST (Apr. 30, 2003), <https://www.newscientist.com/article/dn3676-einstein-and-newton-showed-signs-of-autism/> (stating that while it is impossible to make a definite diagnosis of someone who is no longer alive, autism expert Simon Baron-Cohen believes that Albert Einstein suffered from Asperger syndrome).

<sup>2</sup> See Nyack Library, *Did You Know: What Einstein, Churchill, and Mozart Have in Common?*, NYACK NEWS AND VIEWS (Jan. 25, 2016), <http://nyacknewsandviews.com/2016/01/dyk20160125/> (stating that Alexander Graham Bell was believed to have suffered from dyslexia); *Stevie Wonder Fast Facts*, CNN, <https://www.cnn.com/2013/06/07/us/stevie-wonder-fast-facts/index.html> (last updated Aug. 15, 2019, 3:29 PM).

<sup>3</sup> See *History of the FDIC*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/history/> (last updated Sept. 5, 2019).

<sup>4</sup> See Robert Traynor, *The Deafness of Edison*, HEARING HEALTH & TECH. MATTERS (Feb. 19, 2013), <https://hearinghealthmatters.org/hearinginternational/2013/the-deafness-of-edison-part-i/> (suggesting that Edison had a hearing impairment from early on in his life).

<sup>5</sup> See The Understood Team, *Tommy Hilfiger, Fashion Icon With Dyslexia, Gives Advice to His Younger Self in a New Campaign*, UNDERSTOOD (May 19, 2017), <https://www.understood.org/en/community-events/blogs/making-a-difference/2017/05/19/tommy-hilfiger-fashion-icon-with-dyslexia-gives-advice-to-his-younger-self-in-a-new-campaign>.

<sup>6</sup> See Ben Child, *Keira Knightley dealt with dyslexia by reading Sense and Sensibility script*, THE GUARDIAN (Jan. 31, 2012, 6:47 AM), <https://www.theguardian.com/film/2012/jan/31/keira-knightley-dyslexia-sense-sensibility>.

<sup>7</sup> See Meghan Neal, *Dyslexia’s Special Club: Actor Orlando Bloom Speaks Out*, HUFFPOST, [https://www.huffingtonpost.com/2010/06/09/dyslexias-special-club-ac\\_n\\_602380.html](https://www.huffingtonpost.com/2010/06/09/dyslexias-special-club-ac_n_602380.html) (last updated Nov. 17, 2011) (confirming that at the age of seven, Bloom was tested and diagnosed with dyslexia).

<sup>8</sup> See Steve “Frosty” Weintraub, *Justin Timberlake Interview – THE LOVE GURU*, COLLIDER (June 16, 2008), <http://collider.com/justin-timberlake-interview-the-love-guru/>.

<sup>9</sup> See Johnson, *supra* note 2; *History of the FDIC*, *supra* note 4; Traynor, *supra* note 5; Child, *supra* note 7; Neal, *supra* note 8; Weintraub, *supra* note 9.

<sup>10</sup> See Americans with Disabilities Act, 42 U.S.C. §§ 12102-12213 (2018); see also *Facts About the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-ada.cfm> (last visited Oct. 30, 2017). Passed in

disability if they (1) have “a physical or mental impairment that substantially limits one or more major life activities;” (2) “have a record of such impairment; or” (3) are “regarded as having such an impairment.”<sup>11</sup> Today, people with disabilities represent the largest minority in the United States.<sup>12</sup> In 2015, it was estimated that as high as 12.6% of Americans reported having a disability, which represents an increase from previous years.<sup>13</sup> However, the Center for Disease Control (“CDC”) estimates that, 22% of adults living in the United States have a disability.<sup>14</sup> As the largest minority, people with disabilities represent an important, yet often overlooked demographic, especially in the employment context.<sup>15</sup>

Across the United States, people with disabilities represent “the largest source of untapped potential.”<sup>16</sup> According to a 2017 Bureau of Labor Statistics Jobs Report, only 29.7% of working age

1990, the ADA “prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* The Act applies to “employers with 15 or more employees, including state and local governments.” *Id.*

<sup>11</sup> 42 U.S.C. § 12102.

<sup>12</sup> See *Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals*, U.S. DEPT OF LAB., <https://www.dol.gov/odep/pubs/fact/diverse.htm> (last visited Oct. 30, 2017).

<sup>13</sup> See *Disability Statistics*, CORNELL U., <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1> (last visited Jan. 11, 2018); see also LEWIS KRAUS, 2016 DISABILITY STATISTICS ANNUAL REPORT, U. N.H., (2016), [https://disabilitycompendium.org/sites/default/files/user-uploads/2016\\_AnnualReport.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf). The percentage of people with disabilities in the United States rose from 11.9% in 2010 to 12.6% in 2013, 2014, and 2015. See *id.*

<sup>14</sup> See *CDC: 53 Million Adults in the US Live with a Disability*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2015/p0730-us-disability.html> (last updated July 30, 2015).

<sup>15</sup> See Sarah Blahovec, *Politicians Ignore Disability, and It's a Big Problem*, HUFFPOST, [http://www.huffingtonpost.com/sarah-blahovec/politicians-ignore-disability-and-its-a-big-problem\\_b\\_7784824.html](http://www.huffingtonpost.com/sarah-blahovec/politicians-ignore-disability-and-its-a-big-problem_b_7784824.html) (last updated July 13, 2016) (“[A] Rutgers University study noted that 15.6 persons with disabilities voted in the 2012 election, a number which is 4.5 times the discrepancy of votes between Mitt Romney and President Obama.”); see also Paolo Gaudiano & Ellen Hunt, *Richard Branson Supports People With Disabilities—Here Are Six Ways You Can Do It, Too*, FORBES (Oct. 31, 2016, 2:46 PM), <https://www.forbes.com/sites/audiano/hunt/2016/10/31/richard-branson-supports-disabilities/#4b0fae75788e> (“[I]n the U.S. alone, people with disabilities control an estimated \$544 billion in annual disposable income.”)

<sup>16</sup> See Art Frick, *nTIDE July 2017 Jobs Report: Job Gains for Americans with Disabilities Contribute to Strength of Labor Market*, RES. ON DISABILITY (Aug. 4, 2017), <http://www.researchondisability.org/news-features/2017/08/04/ntide-july-2017-jobs-report-job-gains-for-americans-with-disabilities-contribute-to-strength-of-labor-market>.

people with disabilities are employed.<sup>17</sup> One survey conducted by the Department of Labor (“DOL”) in 2008 found that only 8.7% of companies had hired people with disabilities in the past year.<sup>18</sup> Another survey of 219 Fortune 500 companies revealed that only 1 out of every 227, or 0.44%, of directors and executives had a disability.<sup>19</sup> Even when qualified, people with disabilities are still less likely than their counterparts without disabilities to receive interest from employers.<sup>20</sup> These statistics show that while employers say they are willing to hire people with disabilities, “their behavior is not consistent with their attitudes.”<sup>21</sup>

The problem with these statistics is that while they show the employment rate of people with disabilities is grossly disproportionate to the employment rate of nondisabled people, they do not accurately depict the true number of people with disabilities.<sup>22</sup> In 2017, 22% of Americans had a disability,<sup>23</sup> yet only 29.7% of such individuals were employed.<sup>24</sup> This was

<sup>17</sup> See BUREAU OF LAB. STAT., U.S. DEP’T LAB., USDL-18-0335, THE EMP. SITUATION – FEBRUARY 2018 (2018).

<sup>18</sup> See CESSI, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES, OFF. DISABILITY AND EMP. POL’Y, U.S. DEP’T LAB. 1, 3 (Nov. 2008), <https://www.dol.gov/odep/research/SurveyEmployerPerspectivesEmploymentPeopleDisabilities.pdf>.

<sup>19</sup> See ROBERT MENENDEZ, CORPORATE DIVERSITY REPORT, 3, 11, 20 (Aug. 2010), <https://www.menendez.senate.gov/imo/media/doc/CorporateDiversityReport2.pdf>.

<sup>20</sup> See generally Katie Sola, *Discrimination Against Disabled Applicants Sadly ‘Not Surprising’*, *NDRN Director*, FORBES (Nov. 3, 2015, 4:09 PM), <https://www.forbes.com/sites/katiesola/2015/11/03/discrimination-disabled-job/#6c091abf5331>. The National Bureau of Economic Research submitted 6,016 fake applications to junior and senior positions at accounting firms. See *id.* One third mentioned having Asperger’s Syndrome, one third mentioned a spinal cord injury, and one third did not disclose anything. See *id.* The applicants without disabilities were 26% more likely to get interest from employers over their disabled peers. See *id.*

<sup>21</sup> See Mark L. Lengnick-Hall ET AL., *Why Employers Don’t Hire People With Disabilities: A Survey of the Literature*, CEREBRAL PALSY RES. FOUND., <http://www.cprf.org/studies/why-employers-dont-hire-people-with-disabilities-a-survey-of-the-literature/> (last visited Oct. 30, 2017).

<sup>22</sup> See Deidre McPhillips, *Counting the World’s Invisible Minority*, U.S. NEWS (Sept. 7, 2016, 10:41 AM), <https://www.usnews.com/news/best-countries/articles/2016-09-07/lack-of-international-data-on-disability-issues-hampers-advocates> (“disability statistics on a global scale are almost nonexistent”); see also Juan M. Sempertegui, *Dollars and Cents: The Business Value of Diversity and Inclusion*, A.B.A. (Aug. 20, 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/08/02\\_sempertegui/](https://www.americanbar.org/groups/business_law/publications/blt/2016/08/02_sempertegui/) (“In terms of attorney employment, a 2012 study from the Washington State Bar Association found that 21 percent of its members have a disability, but yet employers nationwide frequently report less than 1 percent of their employees as having a disability.”)

<sup>23</sup> See CDC: *53 Million Adults in the US Live with a Disability*, *supra* note 15.

<sup>24</sup> See Frick, *supra* note 17.

compared to the 78% of Americans without disabilities, of which, 95.9% were employed.<sup>25</sup> One reason for this problem is that disability is overlooked when discussing diversity in the employment context.<sup>26</sup> This means that companies are not including disability in their hiring initiatives. Since 1980, the employment of other minority groups has increased while “labor force participation for U.S. persons with disabilities has decreased.”<sup>27</sup> Additionally, “there are significantly fewer employee resource groups that target employees with disabilities (58%) vs. other diversity groups (78%).”<sup>28</sup> The top four companies on Fortune’s 2016 list of 50 Best Places to Work for Diversity, include detailed statistics on sex and race.<sup>29</sup> They do not, however, include any statistics about employees with disabilities.<sup>30</sup> While many companies have diversity policies regarding race, ethnicity, and sex, the same is not true for disability.<sup>31</sup> The companies that do include disability are in the minority.<sup>32</sup> Additionally, the inequality in hiring can be attributed to the fact that people are uneducated about the extent of the problem since disability is not

<sup>25</sup> See *id.*

<sup>26</sup> See Aimee Picchi, *Americans with Disabilities Still Can’t Land Jobs*, CBS NEWS (July 26, 2017, 6:00 AM), <https://www.cbsnews.com/news/americans-with-disabilities-still-cant-land-jobs/> (“When it comes to the workforce, pushes for greater diversity often overlook disabilities.”). One of the United States’ leading research organizations, the Pew Research Center, conducts research on over 225 topics but not disability. See Blahovec, *supra* note 16.

<sup>27</sup> See Grace Donnelly, *See How Your State Ranks In Employment Among Workers with Disabilities*, FORTUNE (Feb. 28, 2017), <http://fortune.com/2017/02/28/disability-employment-rank/>; see also Mary Bailey, *At JPMorgan Chase & Co. Diversity and Inclusion is Helping People Build Careers and Independence*, HUFFPOST, [https://www.huffpost.com/entry/diversity-and-inclusion-part-5\\_b\\_59945bd6e4b0a88ac1bc38b5?guccounter=1](https://www.huffpost.com/entry/diversity-and-inclusion-part-5_b_59945bd6e4b0a88ac1bc38b5?guccounter=1) (last updated Aug. 17, 2017) (“[P]eople with disabilities were historically underrepresented and left out of the conversation.”).

<sup>28</sup> *New Data Reveal Tracking Disability in the Workforce Becoming Standard Practice among Leading Employers*, NAT’L ORG. ON DISABILITY (June 16, 2016), <https://www.nod.org/new-data-reveal-tracking-disability-in-the-workforce-becoming-standard-practice-among-leading-employers/>.

<sup>29</sup> See *The 50 Best Workplaces for Diversity*, FORTUNE, <http://fortune.com/best-workplaces-for-diversity/2016/> (last visited Jan. 11, 2018).

<sup>30</sup> See *id.*

<sup>31</sup> See LESLIE PAIGE WOLFSON, ASS’N CORP. COUNS., *THE LAW VERSUS BEST PRACTICES: ARE PEOPLE WITH DISABILITIES INCLUSIVE IN YOUR DIVERSITY POLICIES?* 64 (Oct. 2016) (“The idea of using well thought out, written, and documented best practices for diversity and inclusion is commonplace when dealing with race, ethnicity, and gender, but is noticeably absent when we study the population of people with disabilities.”).

<sup>32</sup> See *id.*

tracked like other minorities.<sup>33</sup> Without knowing the true number of individuals with disabilities or the true number of individuals with disabilities currently in the workforce, we cannot begin to solve the problem.

It is commonly said that insanity is doing the same thing over and over again and expecting different results. By this definition, America is insane. At least 22% of the American population has a disability,<sup>34</sup> but are not reporting it out of fear.<sup>35</sup> This silence keeps the public uneducated and unaware of the problem regarding the employment of individuals with disabilities. Since people do not know there is a problem, individuals with disabilities are not hired and not put in positions to make meaningful changes, thus resulting in the current problem repeating itself over and over again, which is insane.<sup>36</sup>

However, this should not be the case, as today, it is illegal to discriminate on the basis of disability, just like it is for race and sex.<sup>37</sup> In the eyes of the law, all three are protected equally.<sup>38</sup> Not only are there laws in place designed solely to protect people with disabilities,<sup>39</sup> there are more laws to protect people with disabilities alone than race and sex.<sup>40</sup> The three most important laws protecting the rights of individuals with disabilities are the Americans with Disabilities Act of 1990 (“ADA”),<sup>41</sup> the Individuals with Disabilities Education Act (“IDEA”),<sup>42</sup> and the Rehabilitation

<sup>33</sup> See generally McPhillips, *supra* note 23.

<sup>34</sup> See CDC: *53 Million Adults in the US Live with a Disability*, *supra* note 15.

<sup>35</sup> See *infra* pp. 29-30 and note 181.

<sup>36</sup> See Martin Luther King Jr., Address at Cornell College (Oct. 15, 1962) (transcript available at <http://news.cornellcollege.edu/dr-martin-luther-kings-visit-to-cornell-college/>) (“I am convinced that men hate each other because they fear each other. They fear each other because they don’t know each other, and they don’t know each other because they don’t communicate with each other, and they don’t communicate with each other because they are separated from each other.”)

<sup>37</sup> See generally Americans with Disabilities Act, 42 U.S.C. §§ 12102-12213 (2018).

<sup>38</sup> See 42 U.S.C. § 2000e-2 (2008).

<sup>39</sup> See Air Carrier Access Act, 49 U.S.C. § 41705 (2018); see also Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (2018); see also Telecommunications Act, 47 U.S.C. § 255 (2018); see also Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. §20101 (2018) (original version at 42 U.S.C. § 1973ee (1965)).

<sup>40</sup> See Equal Pay Act of 1963, 29 U.S.C. § 206 (2018); see also Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2018); see also Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (2018).

<sup>41</sup> See 42 U.S.C. §§ 12102-12213.

<sup>42</sup> See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1419 (1990).

Act of 1973.<sup>43</sup> The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications.<sup>44</sup> The IDEA requires public schools to make a free, appropriate public education available to all eligible children with disabilities, in the least restrictive environment appropriate to their individual needs.<sup>45</sup> Finally, the Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.<sup>46</sup> There are also laws in place that protect all three: race, sex, and disability, such as the Fair Housing Act, which prohibits housing discrimination.<sup>47</sup>

The Equal Employment Opportunity Commission (“EEOC”) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.<sup>48</sup>

The Commission has recognized the importance of tracking minorities in the employment context since 1966, when it created the EEO-1 Report as a way to ensure employers were complying with the newly passed Civil Rights Act of 1964.<sup>49</sup> The EEO-1 Report, otherwise known as The Employer Information Report, requires that companies list how many employees are male,

<sup>43</sup> See Rehabilitation Act of 1973, 29 U.S.C. § 701 (2019).

<sup>44</sup> See 42 U.S.C. §§ 12102-12213.

<sup>45</sup> See 20 U.S.C. §§ 1400-1419.

<sup>46</sup> See 29 U.S.C. § 701.

<sup>47</sup> See 42 U.S.C. § 3604(a)-(f) (2018) Sections (a) through (e) of the Act make it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person,” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” See *id.* Section (f) of the Act extends this coverage to individuals with disabilities. See *id.*

<sup>48</sup> *About EEOC: Overview*, U.S. EQUAL OPPORTUNITY EMP. COMMISSION, <https://www.eeoc.gov/eeoc/> (last visited Oct. 30, 2017). The EEOC has the power to investigate discrimination charges against employers covered under the law. See *id.* This includes most employers with at least fifteen employees. See *id.*

<sup>49</sup> See *Early Enforcement Efforts*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/history/35th/1965-71/early\\_enforcement.html](https://www.eeoc.gov/eeoc/history/35th/1965-71/early_enforcement.html) (last visited Oct. 30, 2017). The Commission has since expanded to protect other groups of people, including those with disabilities. See *id.*



female, black or African Americans, Native Hawaiian or other Pacific Islander, Asian, American Indian or Alaska Native, or two or more races.<sup>50</sup> The EEO-1 Report must be filed by all private employers who are subject to Title VII of the Civil Rights Act of 1964 that have (1) 100 or more employees, (2) fewer than 100 employees but who are affiliated with another company that employs 100 or more employees, or (3) met certain requirements as a federal contractor.<sup>51</sup> Currently, the EEO-1 Report is the only mandatory report employers must fill out regarding the diversity of their employees.<sup>52</sup> As disability is not included, people remain in the dark about the true extent of the problem regarding the lack of employment of people with disabilities.

This note proposes that the EEOC should expand the EEO-1 Report to include the reporting of employees with disabilities by type of disability to help shed light on, and fix the lack of employment of people with disabilities.<sup>53</sup> Part I of this Note discusses the history of the EEOC and the EEO-1 Report and the reasons why disability is similar to race and sex, which are currently included in the EEO-1 Report. Part II identifies three benefits companies can receive by employing individuals with disabilities. Part III explains how tracking the employment of people with disabilities is consistent with historical trends, the government's stance on the issue, and the future of the workforce. Part IV argues that disability should be included in the EEO-1 Report and explains why it should be reported by type of disability. Finally, this Part will address any remaining counterarguments.

## I. DISABILITY IS NOT THAT DIFFERENT FROM RACE AND SEX

The EEOC was originally created to stop discrimination based on race and sex. One year after its creation, the EEOC created the

<sup>50</sup> See *Employer Information Report EEO-1*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm>. Employers must also breakdown this information by job category. See *id.*

<sup>51</sup> See *EEO-1: Who Must File*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/eeo1survey/whomustfile.cfm> (last visited Jan. 11, 2018).

<sup>52</sup> See *Equal Employment Opportunity Certification*, L.A. DEP'T PUB. WORKS, <https://bca.lacity.org/Uploads/eeo/Federal%20EEO.pdf> (last visited Oct. 10, 2019).

<sup>53</sup> There are many types of disabilities. It is important to differentiate because each has its own unique characteristics.

EEO-1 Report to stop discriminatory practices.<sup>54</sup> There are four main reasons why tracking disability in the report is the next logical step from tracking race and sex: anyone can become disabled at any time, there are more disabled people than there are members of any racial minority, disability is broader than race and sex, and the disability rights movement is similar to the civil rights and women's rights movements.

#### *A. The History of the EEOC and EEO-1 Report*

The EEOC was established under the Civil Rights Act of 1964 to enforce Title VII, which “prohibited discrimination based on race, color, national origin, sex, religion, and retaliation.”<sup>55</sup> Today, the EEOC is charged with enforcing any laws subsequently enacted that prevent discrimination based on disability.<sup>56</sup> As discrimination charges continued to increase between 1965 and 1971, the EEOC realized it needed “a more wholesale assault on discriminatory practices.”<sup>57</sup> In 1966, it authorized the reporting of employment status of minorities and women in private employment through the EEO-1 Report.<sup>58</sup> The EEOC has since acknowledged that the report is “an invaluable tool to pinpoint possible zones of employment discrimination, and to identify major patterns of exclusion and discrimination practices in select industries, job categories, and geographic areas.”<sup>59</sup> The data collected in the EEO-1 Report is used for “enforcement, self-

<sup>54</sup> See *Early Enforcement Efforts*, *supra* note 50. After the first EEO-1 Reports were submitted, the EEOC sponsored a series of public hearings, which focused on the industries the reports identified as having the highest rates of exclusion and discrimination. *Id.*

<sup>55</sup> See *Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html>. The Civil Rights Act “address[ed] not only discrimination in employment, but also discrimination in voting, publication accommodations, and education as well.” *See id.* The EEOC became a five-member bipartisan commission with the “power to receive, investigate, and conciliate complaints where it found reasonable cause to believe that discrimination had occurred.” *See id.* It did not have power to bring its own suits. *See id.* It was not until 1972 when Congress approved the Equal Employment Opportunity Act that the EEOC was given the power to bring lawsuits against private companies. *See id.*

<sup>56</sup> See 42 U.S.C. § 2000e-4 (2018); 42 U.S.C. §§ 12102-12213 (2018); 29 U.S.C. § 701 (2018).

<sup>57</sup> See *Early Enforcement Efforts*, *supra* note 50.

<sup>58</sup> *See id.* (requiring an EEO-1 Report for companies with 100 or more employees).

<sup>59</sup> *See id.*

assessment by employers, and research.”<sup>60</sup> It is also “shared with other authorized federal agencies in order to avoid duplicate collection of data and reduce the burden placed on employers.”<sup>61</sup>

### *B. Reasons Disability Should Be Reported Like Race and Sex*

There are four reasons why tracking disability, in addition to race and sex, makes sense. First, disability is more permeable than race and sex.<sup>62</sup> Individuals may go from the status of disabled to nondisabled “with the help of biomedicine or rehabilitation,” and “*anyone* can become disabled at any time, and, barring sudden or accidental death, most people *will* eventually become disabled to a significant degree.”<sup>63</sup> It has been said that disability is an “open club where anyone can join at any time, not by choice, but by circumstances.”<sup>64</sup> In today’s day and age, even “immutable” traits, like sex, are subject to change.<sup>65</sup> Just as anyone can become disabled at any time, one can voluntarily change his or her sex, thus making disability even more like sex.<sup>66</sup>

Second, there are more people with disabilities than there are members of any given racial minority in the United States.<sup>67</sup> The

<sup>60</sup> See *EEO Reports / Surveys*, *supra* note 53.

<sup>61</sup> *Id.* (“Although the data is confidential, aggregated data is available to the public.”)

<sup>62</sup> See G. Thomas Couser, *Disability as Diversity: A Difference With A Difference*, *A J. ENG. LANGUAGE, LITERATURES ENG. AND CULTURAL STUD.* 95, 97 (2005).

<sup>63</sup> *Id.*

<sup>64</sup> See Paul Anomah-Kordieh, *Disability and employment struggle- personal lessons: Paul Anomah-Kordieh at TEDxLabone*, TEDx TALKS (Apr. 28, 2014), <https://www.youtube.com/watch?v=UCxdtD25mVg>.

<sup>65</sup> Joan Wallach Scott, *The Persistence of Gender Inequality: How politics constructs gender, and gender constructs politics*, INST. FOR ADVANCED STUDY, Social Science, (2018), <https://www.ias.edu/ideas/scott-gender-inequality>.

<sup>66</sup> See Janell Ross, *How easy is it to change the sex on your birth certificate?*, WASH. POST (May 18, 2016, 7:30 AM), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm\\_term=.148f58be8ed7](https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm_term=.148f58be8ed7). “10 states . . . allow individuals who can provide a notarized doctors note that a person has received the treatment deemed necessary by the individual and their doctor to live their life in a way that is consistent with their gender identity to do so.” *Id.* This is the same “standard that is required by the Social Security Administration for Social Security cards, as well as U.S. passports and birth certificates.” *Id.*

<sup>67</sup> See CDC: *53 Million Adults in the US Live with a Disability*, *supra* note 15; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited Jan. 11, 2018). The Census Bureau found that 13.4% of the American population was Black or African American and 5.9% were Asian. *QuickFacts: United States supra*.

largest racial minority as of July 1, 2016, was Hispanic or Latino, which only made up 17.8%<sup>68</sup> of the American population as compared to the disabled population that consists of at least 22%.<sup>69</sup>

Third, disability is broader in the sense that both race and sex are encompassed within disability.<sup>70</sup> “Disability is fundamental also in that it may ‘trump’ other minority statuses. That is, for people who differ in more than one way from the hegemonic identity (middle-class white male heterosexual normate), certain impairments—such as blindness or deafness—may function as their ‘master’ status, their primary defining characteristic.”<sup>71</sup> In many instances, individuals with disabilities consider their disability to be their primary defining characteristic because it has a greater impact on their life than their race or sex.<sup>72</sup>

Fourth, the disability rights movement is often compared to the civil rights movement and the women’s rights movement in that it “followed a similar pattern . . . challenging negative attitudes and stereotypes, rallying for political and institutional change, and lobbying for the self-determination of a minority community.”<sup>73</sup> In comparing the movements to each other, it strengthens the claim for including disability.<sup>74</sup> Margaret Price, assistant professor at

<sup>68</sup> *See Id.*

<sup>69</sup> *See CDC: 53 Million Adults in the US Live with a Disability, supra* note 15.

<sup>70</sup> *See generally* Couser, *supra* note 63, at 96, 100-01. “Furthermore, because of the way this minority is constituted, it is arguably more heterogeneous than those of race, gender, class, and sexual orientation. Disabilities may affect one’s senses or one’s mobility; they may be static or progressive, congenital or acquired, formal (affecting the shape of the body) or functional, visible or invisible.” *Id.* at 96. However, “precisely because disability constitutes the one minority anyone can join, it may be the form of diversity that generates the most anxiety and discomfort in others.” *Id.* at 101.

<sup>71</sup> *Id.* at 97.

<sup>72</sup> *See* David Wasserman, Adrienne Asch, Jeffrey Blustein & Daniel Putnam, *Disability: Definitions, Models, Experience*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Metaphysics Research Lab, Stanford University Summer 2016 ed., 2016), <https://plato.stanford.edu/entries/disability/> (“Disability becomes a ‘master status,’ preventing people from playing any adult social role and eclipsing sex, race, age, occupation, or family.”).

<sup>73</sup> EUNYOUNG KIM & KATHERINE C. AQUINO, *DISABILITY AS DIVERSITY IN HIGHER EDUCATION 7* (Eunyoung Kim & Katherine C. Aquino eds., 2017) (“Students with disabilities, similar to students from traditionally racially and ethnically marginalized groups, face the vulnerabilities these stereotypes threaten.”).

<sup>74</sup> *See generally* Pamela Brandwein & Richard K. Scotch, *The Gender Analogy in the Disability Discrimination Literature*, 62 OHIO ST. L.J. 465, 466-68 (2001). Comparing gender to disability helps legitimize the disability claim. *Id.* at 467. Since “we learn by importing understandings from one context to another . . . [I]nsights about one area of

Spelman College, “found that students at Spelman are eager to compare the experiences of disability and racial oppression.”<sup>75</sup> One student explained how the disability movement and civil rights movement are similar in that freedom and justice for all, are seen in both.<sup>76</sup> Additionally, individuals with disabilities are often incorrectly stereotyped like people of different races.<sup>77</sup> One stereotype is that all people with disabilities or all people with a specific disability are the same.<sup>78</sup> “People are so afraid of variety that they try to fit everything into a tiny little box with really specific labels.”<sup>79</sup>

There are ten commonly recurring stereotypes in the media about people with disabilities that have been perpetuated since the 1960’s.<sup>80</sup> These stereotypes include the disabled person as pitiable and pathetic, as an object of curiosity or violence, as sinister or evil, as the super cripple, as atmosphere, as laughable, as her/his own worst enemy, as a burden, as non-sexual, and as

difference may be relevant and instructive to other areas of difference.’ Indeed, law often proceeds by analogy.” *Id.*

<sup>75</sup> See Margaret Price, *Disability as Diversity: A Thematic Approach*, *BLOGGER: CCCC BLOG* (Sept. 24, 2009), <http://cccc-blog.blogspot.com/2009/09/disability-as-diversity-thematic.html> (discussing quotes by students comparing disability and race).

<sup>76</sup> See *id.* (“Just as the Civil Rights Movement was a movement protesting unequal treatment and limited access (Jim Crow laws), the disability movement is one demanding recognition of human equality and value.”)

<sup>77</sup> See *Myths and Facts About People with Disabilities*, *EASTERSEALS*, <http://www.easterseals.com/explore-resources/facts-about-disability/myths-facts.html> (last visited Jan. 11, 2018). There are many stereotypes that are incorrect regarding individuals with disabilities. *Id.* Such as, they do not want to discuss their disability, they lead very different lives than people who are not-disabled, and they are victims or heroes for overcoming their disability. *Id.*

<sup>78</sup> See *generally Common Portrayals of Persons with Disabilities*, *MEDIASMARTS*, <http://mediasmarts.ca/diversity-media/persons-disabilities/common-portrayals-persons-disabilities> (last visited Sep. 10, 2019).

<sup>79</sup> People tend to diagnose autism with really specific check-box descriptions, but in reality, it’s a whole variation as to what we’re like. For instance, my little brother, he’s very severely autistic. He’s nonverbal. He can’t talk at all. But I love to talk. People often associate autism with liking math and science and nothing else, but I know so many autistic people who love being creative. But that is a stereotype, and the stereotypes of things are often, if not always, wrong. For instance, a lot of people think autism and think Rain Man immediately. That’s the common belief, that every single autistic person is Dustin Hoffman, and that’s not true. But that’s not just with autistic people, either. I’ve seen it with LGBTQ people, with women, with POC people. People are so afraid of variety that they try to fit everything into a tiny little box with really specific labels.

Rosie King, *How autism freed me to be myself*, *TED* (2014), [https://www.ted.com/talks/rosie\\_king\\_how\\_autism\\_freed\\_me\\_to\\_be\\_myself/transcript#t-12974](https://www.ted.com/talks/rosie_king_how_autism_freed_me_to_be_myself/transcript#t-12974).

<sup>80</sup> See Colin Barnes, *Disabling Imagery And The Media*, *BRIT. COUNCIL ORG. DISABLED PEOPLE* (2018).

being unable to participate in daily life.<sup>81</sup> Thus, disability should be tracked the same as race and sex because in addition to sharing many similarities, it also impacts more people.

## II. WHY YOUR NEXT EMPLOYEE SHOULD HAVE A DISABILITY

Increasing the number of qualified employees with disabilities in the workforce has numerous benefits. First, hiring people with disabilities can have a positive impact on other workers as well as help retain and gain new customers.<sup>82</sup> Second, there are currently three existing tax programs that employers can qualify for when they hire people with disabilities.<sup>83</sup> Finally, people with disabilities make for good employees, which makes for good business.<sup>84</sup>

### *A. Disabled Employees Have a Positive Impact on Clients and Other Employees*

One study found that overall, 92% of consumers are more favorable to companies who hire individuals with disabilities, and 87% specifically said they would rather give their business to a company that hires individuals with disabilities.<sup>85</sup> By hiring employees with disabilities, companies can tap into the \$544 billion in annual disposable income that is controlled by people with disabilities.<sup>86</sup> Including friends and family of people with disabilities, that number increases to \$6.9 trillion.<sup>87</sup> Walgreens stated that “because of our investing efforts in employing individuals with [intellectual or developmental disabilities] at the retail locations, customers often tell us that Walgreens has become their pharmacy of choice.”<sup>88</sup> When a company hires an individual

<sup>81</sup> *See id.*

<sup>82</sup> *See infra* Part II(A).

<sup>83</sup> *See infra* Part II(B).

<sup>84</sup> *See infra* Part II(C).

<sup>85</sup> *See* Gary N. Siperstein et al., *A National Survey of Consumer Attitudes Towards Companies that Hire People with Disabilities*, 24 J. VOCATIONAL REHABILITATION 3, 3 (2006).

<sup>86</sup> *See* Gaudiano, *supra* note 16.

<sup>87</sup> *Id.*

<sup>88</sup> *See* Eric Davis, *What Your D&I Policy Is Missing: Employing People With Intellectual And Developmental Disabilities*, INST. CORP. PRODUCTIVITY (Oct. 15, 2014),

with disabilities, it sends a message to the disabled community and their friends and family that, as a group, they are valued.

Additionally, non-disabled employees benefit from the hiring of people with disabilities.<sup>89</sup> Non-disabled employees can learn how to make the workplace more inclusive, new ways to approach things, new ways of thinking about things, and how to be more empathetic to people (including people with disabilities and customers).<sup>90</sup> Individuals with disabilities are thought of as enduring greater conflict, and it is proven they can have a positive influence on those enduring less conflict.<sup>91</sup> “[T]hus, employees with disabilities can be a motivation to their co-workers. This can help encourage employees to be more empathetic towards people undergoing hardships, including your customers.”<sup>92</sup>

### *B. Three Tax Reasons to Hire Individuals with Disabilities*

There are currently three tax incentive programs that employers can apply for when hiring qualified individuals with disabilities.<sup>93</sup> First, the disabled access credit provides a credit to “eligible small business[es]” who incur “reasonable” expenditures in providing access to persons with disabilities.<sup>94</sup> Second, “[t]he Architectural Barrier Removal Tax Deduction encourages businesses of any size to remove architectural and transportation barriers to the mobility of persons with disabilities and the

<https://www.i4cp.com/trendwatchers/2014/10/15/what-your-d-i-policy-is-missing-employing-people-with-intellectual-and-developmental-disabilities#.VD-EFUITNKk.twitter>.

<sup>89</sup> See Sandy Murillo, *Top 5 Benefits of Hiring People with Disabilities*, CHI. LIGHTHOUSE (Oct. 6, 2016), <http://chicagolighthouse.org/sandys-view/top-5-benefits-hiring-people-disabilities/> (explaining the positive impact disabled workers can have on other employees).

<sup>90</sup> See generally *id.*

<sup>91</sup> See *7 Benefits of Hiring People with Disabilities*, DISABILITYCAMPAIGN.ORG, [http://disabilitycampaign.org/media/filer\\_public/38/a4/38a4890a-fde0-41ec-8db7-d7a22f3c0ffd/7-benefits-of-hiring-a-person-with-a-disability.pdf](http://disabilitycampaign.org/media/filer_public/38/a4/38a4890a-fde0-41ec-8db7-d7a22f3c0ffd/7-benefits-of-hiring-a-person-with-a-disability.pdf) (last visited Jan. 11, 2018) (explaining how the hardships individuals with disabilities face can be a tool to help those who have not faced hardships).

<sup>92</sup> *Id.*

<sup>93</sup> See generally *Tax Benefits for Businesses Who Have Employees with Disabilities*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> (last visited Oct. 30, 2017).

<sup>94</sup> 26 U.S.C. § 44 (2019).

elderly.”<sup>95</sup> Finally, the Work Opportunity Tax Credit (“WOTC”) “provides employers [financial] incentives” in the form of tax credits “for hiring individuals from certain target groups who have consistently faced significant barriers to employment.”<sup>96</sup>

### *C. People with Disabilities Make Good Employees*

Study after study has shown that employers are happy with their employees who have disabilities.<sup>97</sup> In one survey, three-fourths of employers said that their employees with disabilities ranked “good or very good on work quality, motivation, engagement, integration with co-workers, dependability, and attendance.”<sup>98</sup> Another study “found that workers with disabilities had a turnover rate 48% lower than that of the nondisabled population, with medical costs 67% lower and time-off expenses 73% lower.”<sup>99</sup> Finally, the Office of Disability Employment Policy<sup>100</sup> has endorsed individuals with disabilities by stating

<sup>95</sup> *Tax Benefits for Businesses Who Have Employees with Disabilities*, *supra* note 94; see 26 U.S.C.S. § 190 (“A taxpayer may elect to treat qualified architectural and transportation barrier removal expenses which are paid or incurred by him during the taxable year as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction.”).

<sup>96</sup> *Tax Benefits for Businesses Who Have Employees with Disabilities*, *supra* note 94; see 26 U.S.C.S. § 51 (“An individual is a member of a targeted group if such individual is – a vocational rehabilitation referral,” [which means] “any individual who is certified by the designated local agency as – having a physical or mental disability, for such individual, constitutes or results in a substantial handicap to employment.”).

<sup>97</sup> See Elizabeth Picciuto, *Hiring People With Disabilities Isn't Just the Right Thing to Do—It's Good for Business*, DAILY BEAST, <https://www.thedailybeast.com/hiring-people-with-disabilities-isnt-just-the-right-thing-to-doits-good-for-business> (last updated Apr. 14, 2017, 2:39 PM); see also Sara Cann, *The Debate Behind Disability Hiring*, FAST COMPANY (Nov. 26, 2012), <https://www.fastcompany.com/3002957/disabled-employee-amendment> (discussing statistics on why people with disabilities are good employees).

<sup>98</sup> Picciuto, *supra* note 98. See *7 Benefits of Hiring People with Disabilities*, *supra* note 92, at 2 (“Employees with disabilities bring unique skills, experiences, and understanding that can enhance your products and services. Their knowledge of assistive technology and other innovations can help your company increase productivity . . . [f]urthermore, people with disabilities make good team players as they are accustomed to working in collaboration with others, such as caregivers or physicians, to achieve a goal; they may do very well in positions that require partnerships and collaboration.”).

<sup>99</sup> Cann, *supra* note 98 (discussing the study by the American Society of Safety Engineers on its distribution centers).

<sup>100</sup> *About ODEP*, OFF. DISABILITY EMP. POL'Y, U.S. DEPT' LAB., <https://www.dol.gov/odep/about/> (last visited Oct. 30, 2017) (“The Office of Disability Employment Policy (ODEP) is the only non-regulatory federal agency that promotes policies and coordinates with employers and all levels of government to increase workplace success for people with disabilities.”).



that, [p]erhaps more than any other group of people, individuals with disabilities have the ability to adapt to different situations and circumstances. As employees, they add to the range of viewpoints businesses need to succeed, offering fresh ideas on how to solve problems, accomplish tasks and implement strategies.<sup>101</sup>

Thus, to stay competitive and even get ahead, companies should strongly consider hiring individuals with disabilities.

### III. SOCIETAL TRENDS CALL FOR THE TRACKING OF EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES

There are three main reasons why tracking disability is important and consistent with societal trends. First, tracking race and sex reduced the number of discrimination charges filed, and including disability will likely have the same effect.<sup>102</sup> Second, it would be consistent with prior and current government action designed to increase the employment of individuals with disabilities.<sup>103</sup> Third, the workforce will soon consist primarily of millennials who consider disability just as important as race and sex.<sup>104</sup>

#### *A. Tracking Race and Sex Lowered the Number of Discrimination Charges and the Same Could Be True for Disability*

Due to the high number of disability related charges consistently filed with the EEOC, the government should be tracking disability the same way it does race and sex. “In 1971, a New York judge described people with disabilities as ‘the most discriminated [against] minority in our nation.’”<sup>105</sup> In its 1984 report to Congress, the National Council on Disability stated that “disability discrimination accounted for the largest amount of

<sup>101</sup> *Diverse Perspectives*, *supra* note 13.

<sup>102</sup> *See infra* Part III(A).

<sup>103</sup> *See infra* Part III(B).

<sup>104</sup> *See infra* Part III(C).

<sup>105</sup> Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015, 6:00 A.M.), [https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm\\_term=.60e23432856f](https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.60e23432856f).

discrimination claims.”<sup>106</sup> In 1994, two years after the passage of the ADA, “disability related charges constitute[d] 20.7[%] of all charges filed with the [EEOC].”<sup>107</sup> In 2016, there were more charges filed with the EEOC for disability discrimination than sex discrimination.<sup>108</sup> The numbers show that, in 2016, 35.3% of all charges filed were race related, 29.4% were sex related, and 30.7% were disability related.<sup>109</sup> While the number of race and sex related charges has continued to drop over the years, disability charges has been on the rise since 2002.<sup>110</sup> The tracking of race and sex in private employment via the EEO-1 Report is therefore one of the reasons for the decline in the number of discrimination charges and it can be inferred that the same would be true for disability.

*B. Tracking Disability is Consistent with the Actions of the Government*

Over the years, the government has demonstrated its commitment to the employment of individuals with disabilities. It logically follows from the government’s actions that adding disability to the EEO-1 Report is the next step. In 2010, President Obama issued Executive Order 13548 to increase the federal employment rate of individuals with disabilities.<sup>111</sup> Obama called on federal agencies to hire an additional 100,000 people with disabilities over a five-year period.<sup>112</sup> In 2014, the Workforce Innovation and Opportunity Act was put into place, making the employment of people with disabilities a national priority.<sup>113</sup> Additionally, the employment of people with disabilities has

<sup>106</sup> NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT (1984) [https://ncd.gov/progress\\_reports/Jan1984](https://ncd.gov/progress_reports/Jan1984).

<sup>107</sup> *Milestones: 1994*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/50th/milestones/1994.cfm> (last visited Jan. 11, 2018).

<sup>108</sup> *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Dec. 29, 2019).

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* The number of charges filed relating to race have continued to drop since 2008 and gender since 2012. *Id.* Disability charges have dropped each year since 2002 except for 2008. *Id.*

<sup>111</sup> *See* Exec. Order No. 13,548, 75 Fed. Reg. 45039 (July 26, 2010).

<sup>112</sup> *See id.*

<sup>113</sup> *See* Workforce Innovation and Opportunity Act 29. U.S.C. §§ 3101-3344 (2018).

consistently been a bipartisan issue that continues to be discussed regardless of which party is in control.<sup>114</sup>

Additionally, the DOL's Office of Disability Employment Policy ("ODEP") has several programs in place that are designed to help increase the employment rate of individuals with disabilities.<sup>115</sup> First, the Employer Assistance and Resource Network on Disability Inclusion is a "service that educates employers about effective strategies for recruiting, hiring, retaining and advancing people with disabilities."<sup>116</sup> Second, the Workforce Recruitment Program for College Students with Disabilities "connects federal and private sector employers nationwide with highly motivated college students and recent graduates with disabilities who are eager to prove their abilities in the workplace through summer or permanent jobs."<sup>117</sup> Third, "the Job Accommodation Network (JAN) provides free, expert advice on workplace accommodations that may be necessary to assist qualified individuals with disabilities apply for a job and maximize their productivity once onboard."<sup>118</sup> Finally, "the Campaign for Disability Employment offers a variety of media assets, including video public service announcements, all designed to encourage employers and others to recognize the value and talent people with disabilities add to America's workplaces and economy."<sup>119</sup> Thus, in creating these programs, the federal government has shown its commitment to increasing the employment rate of individuals with disabilities, and now disability in the workforce must be tracked to measure and ensure the success of these programs.

<sup>114</sup> See Alison Barkoff & Emily B. Read, *Employment of People with Disabilities: Recent Successes and an Uncertain Future*, 42 A.B.A. HUM. RTS. MAG. (discussing how most action taken to increase the employment rate of people with disabilities is a result of bipartisan efforts, including the ADA, Workforce Innovation and Opportunity Act, and Achieving a Better Life Experience Act).

<sup>115</sup> See *Hiring People with Disabilities*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/disability/hiring> (last visited Jan. 11, 2018).

<sup>116</sup> *Id.*

<sup>117</sup> *Workforce Recruitment Program*, U.S. DEP'T LAB., <https://www.dol.gov/odep/wrp/> (last visited Mar. 15, 2018).

<sup>118</sup> *Hiring People with Disabilities*, *supra* note 116.

<sup>119</sup> *Id.*

*C. Tracking Disability is Consistent with the Attitudes of Millennials: The Future of the Workforce*

Millennials are defined as people born between 1981-2000.<sup>120</sup> Today, more than one in three employees is a millennial, making them the largest share of the American workforce.<sup>121</sup> It is estimated that by 2025, they will make up 75% of the workforce.<sup>122</sup> Millennials and the ODEP share the same view: “although the term [diversity] is most often used to refer to differences among individuals such as ethnicity, sex, age and religion,” the definition is broader and encompasses people with disabilities.<sup>123</sup> In addition to having an expansive definition of diversity, millennials mark the first generation to feel they do not have to hide their differences to advance in the workplace.<sup>124</sup> A survey conducted by Deloitte University Leadership Center for Inclusion found that millennials are 21% more likely than other age groups to disagree with the statement that they must shield their identities at work.<sup>125</sup> Another study found that almost half of millennials give importance to a diverse work environment in their job search.<sup>126</sup> Finally, one study found that 64% of millennials are comfortable discussing diversity in the workforce, which is higher than any other generation.<sup>127</sup> Therefore, tracking the employment statistics of individuals with disabilities is not only vital to ensuring that the past does not repeat itself but is also consistent with the

<sup>120</sup> See *American Generation Fast Facts*, CNN, <http://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts/index.html> (last updated Aug. 17, 2019, 9:36 AM).

<sup>121</sup> See Sarab Kochhar, *Millennials@Work: Perspectives on Diversity & Inclusion*, INST. FOR PUB. REL., (Dec. 6, 2016), <http://www.instituteforpr.org/millennialswork-perspectives-diversity-inclusion/>.

<sup>122</sup> See *Starting This Graduation Season, Millennials Officially Become the Majority of the Workforce. Is Your Organization Ready?*, PANOPTO (May 4, 2015), <https://www.panopto.com/blog/starting-this-graduation-season-millennials-officially-become-the-majority-of-the-workforce-is-your-organization-ready/>.

<sup>123</sup> See *Diverse Perspectives*, *supra* note 13.

<sup>124</sup> See CHRISTIE SMITH & STEPHANIE TURNER, *THE RADICAL TRANSFORMATION OF DIVERSITY AND INCLUSION THE MILLENNIAL INFLUENCE*, 15 (2015) (“Millennials are refusing to check their identities at the doors of organizations today, and they strongly believe these characteristics bring value to the business outcomes and impact.”).

<sup>125</sup> See *id.*

<sup>126</sup> See Kochhar, *supra* note 122.

<sup>127</sup> See *id.*

federal government's dedication to hiring more disabled workers and the future of the American workforce.

IV. THE PROPOSAL: INCREASING THE EMPLOYMENT RATE OF  
INDIVIDUALS WITH DISABILITIES WILL NOT HAPPEN UNLESS AND  
UNTIL EMPLOYERS ARE HELD ACCOUNTABLE FOR THEIR  
EMPLOYMENT DECISIONS

Because of the inadequacy of statistics on the employment of people with disabilities in the private sector and the low percentage of individuals with disabilities hired, this note proposes that the EEO-1 Report should track the number of employees with disabilities by type of disability to ensure the greatest chance of increasing the employment rate of individuals with disabilities. Tracking disability should be done according to a five-year plan, which phases in different types of disabilities. The tracking will hold employers accountable for their employment decisions and ultimately lead to the increased hiring and promotion of individuals with disabilities, as it did with race and sex. Finally, although critics argue that tracking disability could have several negative consequences, these arguments are without merit.

*A. Why Statistics are Needed to Prove and Solve the Problem*

1. The Data That Exists Won't Solve the Problem

According to the DOL, "credible, consistent data is critical to creating change."<sup>128</sup> For example, in the legal field, while there are general employment statistics on the employment of individuals with disabilities, there are significantly less statistics than other

<sup>128</sup> *Disability Employment Statistics*, U.S. DEPT LAB., <https://www.dol.gov/odep/topics/DisabilityEmploymentStatistics.htm> (last visited Jan. 11, 2018); see also Joyce E.A. Russell, *How to create change in the workplace*, WASH. POST (Dec. 1, 2013), [https://www.washingtonpost.com/business/capitalbusiness/how-to-create-change-in-the-workplace/2013/11/27/9d62f8de-5548-11e3-835d-e7173847c7cc\\_story.html?utm\\_term=.602c927cc892](https://www.washingtonpost.com/business/capitalbusiness/how-to-create-change-in-the-workplace/2013/11/27/9d62f8de-5548-11e3-835d-e7173847c7cc_story.html?utm_term=.602c927cc892). John Kotter is known for his eight-step process for positive changes. Step one is to create a sense of urgency around the need to change. A good way to show the need for change is through data, which must be strong enough to enable people to give extra effort to go beyond the status quo. See Russell, *supra* note 129.

categories like race and sex.<sup>129</sup> The first time the government officially tracked the employment of individuals with disabilities was in 2008; however, it was and is not adequate.<sup>130</sup> First, in 2008, the ODEP conducted the Survey of Employer Perspectives on the Employment of People with Disabilities.<sup>131</sup> While it was the first comprehensive survey that examined the “employer side of issues related to recruiting, hiring, advancing and retaining people with disabilities,” it was a one-time study.<sup>132</sup> The study highlighted the fact that most employment statistics regarding the employment of people with disabilities come from “nationally representative surveys.”<sup>133</sup>

Second, other surveys have been voluntary, and therefore, the data may not be complete. For example, additional questions were added to the monthly Current Population Survey (“CPS”), to help determine the employment status of people with disabilities in 2008.<sup>134</sup> This marked the first time the “labor force status of people with disabilities” was officially tracked.<sup>135</sup> Conducted by the Census Bureau for the Bureau of Labor Statistics, the CPS is,

a monthly sample survey of about 60,000 households that provides statistics on employment and unemployment in the United States. The collection of data on persons with a disability is sponsored by the Department of Labor’s Office of Disability Employment Policy.<sup>136</sup>

The problem with the CPS is that participation is voluntary and participants do not need to, or often do not, answer any question

<sup>129</sup> See *Reasonable Accommodations For Attorney’s With Disabilities*, EEOC.GOV, <https://www.eeoc.gov/facts/accommodations-attorneys.html> (last updated Dec. 20, 2017) (“there is little reliable data on the representation of individuals with disabilities in the legal field”).

<sup>130</sup> See CESSI, *supra* note 19 at 6.

<sup>131</sup> See *id.* at 1. “ODEP conducted a 15-minute telephone survey of a representative sample of senior executives representing 12 industries by company size: small (5-14 employees), medium (15-249 employees), and large companies (250 or more employees),” in twelve different industries. *Id.*

<sup>132</sup> See *id.* The survey was “designed to provide a source of nationally representative statistics on the employment of people with disabilities from the perspective of employers.” *Id.*

<sup>133</sup> See *id.* These surveys include “the Survey of Income and Program Participation, American Community Survey, National Health Interview Survey, and soon the Current Population Survey.” *Id.*

<sup>134</sup> See *Disability Employment Statistics*, *supra* note 129.

<sup>135</sup> See *id.*

<sup>136</sup> News Release, Bureau Lab. Stat., U.S. Dep’t Lab., Persons with a Disability: Labor Force Characteristics (June 21, 2017).

they deem “too personal,” which includes questions about disability.<sup>137</sup>

## 2. How Releasing Diversity Data Leads to Change

While some companies have internal diversity initiatives in place, they are not working, which is why it is time for the EEOC to include disability, thus forcing employers to join the twenty-first century.<sup>138</sup> Currently, the EEOC cannot release data derived from compliance surveys (like the EEO-1 Report); however, employers can choose to publicly release the information, which is what began happening in 2014.<sup>139</sup> Due to increasing pressure that escalated in 2013 by current and former employees, shareholders, government agencies, political activists, and the public at large, many companies began publicly releasing this information.<sup>140</sup> In

<sup>137</sup> *Current Population Survey (CPS) Respondents*, BUREAU LAB. STAT., <https://www.bls.gov/respondents/cps/faqs.htm> (last visited Jan. 11, 2018).

<sup>138</sup> See *Stephanie Russell-Kraft, Companies Use Diversity Data to Hold Law Firms Accountable*, BLOOMBERG BIG LAW BUS. (Apr. 3, 2017), <https://biglawbusiness.com/companies-use-diversity-data-to-hold-law-firms-accountable/> (“Stacy Hawkins, who teaches diversity courses at Rutgers Law School, said many such in-house programs have existed over the past ten to fifteen years, and yet law firms have only achieved marginal gains in expanding their rosters and leadership positions beyond white men”); see also Jennifer Garcia-Alonso et al., *Getting the Most from Your Diversity Dollars*, BOS. CONSULTING GROUP (June 21, 2017), <https://www.bcg.com/publications/2017/people-organization-behavior-culture-getting-the-most-from-diversity-dollars.aspx> (concluding in a study by the Boston Consulting Group of over 17,500 employers that “[a]lthough more than 90% of companies have some sort of gender-diversity program in place . . . only one in four women feel that they have personally benefited from such programs.”).

<sup>139</sup> 42 U.S.C. § 2000e-8(e) (2018) (“It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.”); see Salvador Rodriguez, *These Are the Major Tech Companies That Still Have Yet to Release Diversity Report*, INC., (Mar. 31, 2017) <https://www.inc.com/salvador-rodriguez/tesla-snap-diversity-reports.html>.

<sup>140</sup> See Deb DeHaas, ET AL., *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards*, HARV. L. (Feb. 5, 2019), <https://corpgov.law.harvard.edu/2019/02/05/missing-pieces-report-the-2018-board-diversity-census-of-women-and-minorities-on-fortune-500-boards/>; Johana Bhuiyan, *Uber has published its much sought after diversity numbers for the first time*, RECORD (Mar. 28, 2017, 1:15 PM), <https://www.record.net/2017/3/28/15087184/uber-diversity-numbers-first-three-million-former-employees/>; see also Ellen McGirt, *Apple Shareholders Take on Diversity*, FORTUNE (Feb. 9, 2017), <http://fortune.com/2017/02/09/apple-shareholders-take->

May 2014, Google became the first major tech company to release its diversity data on gender and ethnicity publicly.<sup>141</sup> By August 2014, “at least 14 other tech companies” had released this data like Google, including Apple, Facebook, Twitter, LinkedIn, Hewlett-Packard, Yahoo, and eBay.<sup>142</sup>

Two major benefits resulted from companies releasing diversity data. First, companies become more diverse. For example, in 2014, 30% of all Google employees were female and 61% percent were white.<sup>143</sup> In 2017, the number of females increased to 31% and the number of white employees decreased to 56%.<sup>144</sup> While the numbers have not changed drastically, companies such as Google and Apple are more diverse today than they were.<sup>145</sup> One reason for the increase is that companies are forced to follow through on any plans or promises made to the public.<sup>146</sup> A second reason is some companies have started linking executive bonuses to diversity hiring goals.<sup>147</sup> One example is Intel, which has

on-diversity/ (current shareholders); Tracey Lien, *Lyft's first diversity report shows it — like many tech companies — is mostly white and male*, L.A. TIMES (June 1, 2017, 12:35 PM), <http://www.latimes.com/business/technology/la-fi-tn-lyft-diversity-20170601-story.html> (current employees); Associated Press, *Google to Release Diversity Data About Workforce*, NBC (May 14, 2014, 10:42 PM), <https://www.nbcbayarea.com/news/local/Google-to-Release-Diversity-Data-About-Workforce-259332771.html> (activists).

<sup>141</sup> See Laszlo Bock, *Getting to Work on Diversity at Google*, GOOGLE: OFFICIAL BLOG, <https://googleblog.blogspot.com/2014/05/getting-to-work-on-diversity-at-google.html> (last updated May 31, 2014) (“We’ve always been reluctant to publish numbers about the diversity of our workforce at Google. We now realize we were wrong, and that it’s time to be candid about the issues. Put simply, Google is not where we want to be when it comes to diversity, and it’s hard to address these kinds of challenges if you’re not prepared to discuss them openly, and with the facts.”).

<sup>142</sup> JP Mangalidan, *How tech companies compare in employee diversity*, FORTUNE (Aug. 29, 2014), <http://fortune.com/2014/08/29/how-tech-companies-compare-in-employee-diversity/>.

<sup>143</sup> See Bock, *supra* note 142.

<sup>144</sup> See Grace Donnelly, *Google's 2017 Diversity Report Shows Progress Hiring Women, Little Change for Minority Workers*, FORTUNE (June 29, 2017), <http://fortune.com/2017/06/29/google-2017-diversity-report/>.

<sup>145</sup> See Megan Rose Dickey, *Apple Releases First Diversity Report Under New VP of Diversity and Inclusion*, TECHCRUNCH (Nov. 9, 2017, 3:00 PM), <https://techcrunch.com/2017/11/09/apple-diversity-report-2017/>. From 2016 to 2017, the number of white employees decreased 2%. *Id.*

<sup>146</sup> See generally *The Damage Brands Suffer From Breaking Promises*, FORBES (Oct. 15, 2015, 10:29 PM), <https://www.forbes.com/sites/onmarketing/2015/10/15/the-damage-brands-suffer-from-breaking-promises/#7f611f363b14>.

<sup>147</sup> Nick Statt, *Microsoft says it will tie executive bonuses to diversity hiring goals*, VERGE (Nov. 18, 2016, 6:02 PM), <https://www.theverge.com/2016/11/18/13681738/microsoft-diversity-goals-executive-bonuses-women-in-tech>; Russell-Kraft, *supra* note 139 (“Microsoft . . . announced in 2015



surpassed its diversity hiring goals since it began linking executive compensation to meeting diversity goals in 2015.<sup>148</sup> Finally, large companies, like Facebook and Hewlett-Packard, are using their influence to hold other companies accountable for diversity, like the law firms that they hire.<sup>149</sup>

Second, releasing diversity data keeps the conversation going and helps educate people.<sup>150</sup> The more people discuss the employment of individuals with disabilities, the more comfortable people will be with the idea; and the more comfortable people get, the more likely they are to get behind the cause. Thus, by including disability in the EEO-1 Report, there is a strong likelihood the same individuals and groups who once pressured companies to hire more women and ethnic minorities will similarly apply pressure to increase the number of employees with disabilities.<sup>151</sup>

that it would pay an annual bonus of up to 2 percent to firms that meet specific diversity targets in their leadership ranks.”).

<sup>148</sup> See Statt, *supra* note 148.

<sup>149</sup> See generally Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html>. Facebook has announced “that women and ethnic minorities must account for at least 33% of their law firms teams” and Hewlett-Packard requires that their law firm has at least one diverse “relationship partner” or diverse partner who performs “at least 10 percent of the billable hours worked on HP matters.” *Id.* Hewlett-Packard also imposes consequences for failure to comply: a 10 percent “diversity holdback” fee. *Id.*

<sup>150</sup> See Rich Bellis, *Why it Matters for Tech Companies to Release Diversity Data on Time*, FAST COMPANY (Dec. 15, 2016), <https://www.fastcompany.com/3066248/why-it-matters-for-tech-companies-to-release-diversity-data-on-time> (“The whole point of releasing diversity data—regularly—is to keep that conversation going in the first place.”).

<sup>151</sup> See Jessica Guynn, *Jesse Jackson to Uber: Release diversity data*, U.S.A. TODAY, <https://www.usatoday.com/story/tech/news/2017/01/05/jesse-jackson-uber-diversity-data/96173986/> (last updated Jan. 5, 2017, 6:14 PM) (“Silicon Valley and the tech industry, at your best, can be a tremendously positive change agent for the world . . . [a]t your worst, you can institutionalize old patterns of exclusion and de facto segregation”); see also Benjamin Snyder, *Apple CEO Tim Cook ‘not satisfied’ with company’s poor diversity*, FORTUNE (Aug. 12, 2014), <http://fortune.com/2014/08/12/apple-diversity-report/>. In 2014, Apple’s CEO, Time Cook said that the “definition of diversity goes far beyond the traditional categories of race, gender, and ethnicity,” and should include “sexual orientation, veteran status and those with disabilities.” *Id.*

*B. A Five-Year Plan Tracking Disability, By Type, is the Best Way to Fix the Problem*

First, the EEOC must define the term “disability” for the purposes of the EEO-1 Report.

To be consistent with current federal laws, the definition should be the same as the one used in the ADA, that a person is disabled if he or she (1) has “a physical or mental impairment that substantially limits one or more major life activities;” (2) has “a record of such impairment, or;” (3) is “regarded as having such an impairment.”<sup>152</sup> Using the ADA definition makes the most sense since employers are already familiar with, and must abide by it.

Second, employers must track disability by type, so the EEOC will be best able to identify general patterns of discrimination, specific disabilities that need attention, and possible remedies. Tracking disability by type is equivalent to the current tracking of specific races.<sup>153</sup> Under the ADA’s definition of disability, there are no official “types” of disabilities.<sup>154</sup> The types of disabilities the EEO-1 Report tracks should be adjusted according to the five-year plan set forth below to allow for the greatest chance of success.<sup>155</sup> There are several reasons why a plan that breaks down the types of disabilities from two to six over a five-year period has a good chance of being successful.<sup>156</sup> First, it is less overwhelming for

<sup>152</sup> 42 U.S.C. § 12102 (2019).

<sup>153</sup> See generally *Employer Information Report EEO-1*, supra note 51 (listing all the races that the report currently tracks).

<sup>154</sup> See generally *The ADA: Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/adaqa1.cfm> (last visited Sept. 24, 2019). “The ADA defines an ‘individual with a disability’ as a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.” *Id.*

<sup>155</sup> See generally Amy Morin, *Change Doesn’t Happen Overnight: It Happens In These Five Stages*, FORBES (Mar. 17, 2014, 9:01 AM), <https://www.forbes.com/sites/amymorin/2014/03/17/change-doesnt-happen-overnight-it-happens-in-these-five-stages/#578ebff94f51>. Psychologists Carlo DiClemente and James O. Prochaska identified five stages of change: precontemplation, contemplation, preparation, action, and maintenance. See *id.* It is not until stage four (action) that behavior begins to change. *Id.*

<sup>156</sup> See *infra* Part IV(B) 1, 2, 3; see also News Release, U.S. Office Pers. Mgmt., Federal Agencies Exceed Disability Hiring Goal (Oct. 27, 2016). In 2010, President Obama called on federal agencies to hire an additional 100,000 employees with disabilities over a five-year period. See *id.* The order required that certain actions be taken within 60 days and 120 days, each agency must designate a senior-level official to be responsible, and the program was to be reviewed each year. See Increasing Federal Employment of Individuals With Disabilities, 75 Fed. Reg. 45039 (July 6, 2010). By 2015, the federal government had

employers. Second, there is likely to be some resistance at first, so a gradual plan allows people to develop a better understanding of the different types of disabilities and the importance of breaking disability down by type. Finally, a five-year plan allows enough time to move through the five stages of change and achieve a positive result.<sup>157</sup>

### 1. Year One

Disability should be broken down into two categories: physical disabilities and non-visible disabilities. Physical disability should include any impairment that affects mobility or movement.<sup>158</sup> Non-visible should include all other impairments recognized under the ADA. This breakdown is the easiest way for employers to obtain information regarding employees with disabilities since there is a strong likelihood employees will still be hesitant to disclose their disabilities in the first year. Even if employees do not self-identify, employers can still likely determine which employees have a physical disability. Additionally, one study

hired well over 100,000 individuals with disabilities. *See* News Release, U.S. Office Pers. Mgmt., *supra* note 157. The five-year period allowed for the program to be reviewed annually and provide any necessary changes to ensure success as well as give federal agencies the chance to develop well thought out strategies for recruiting and retaining employees instead of being rushed. *See* Increasing Federal Employment of Individuals With Disabilities, *supra* note 157.

<sup>157</sup> *See* Marc Perry, *5 Stages of Change Model: Which Stage Are You In?*, BUILTLEAN (Nov. 27, 2017), <https://www.builtlean.com/2010/06/01/5-stages-of-change-model-which-stage-are-you-in/>. In phase one, precontemplation, people defend their current patterns of behavior and might not even recognize that there is a problem that needs to be changed. *See id.* In phase two, contemplation, people consider the possibility of change but are not ready to the first step. *See id.* It is likely that employers will remain in this phase for at least one year because the report is only filed once a year. In phase three, preparation, people do one of two things: they either take the first small step or continue to do nothing. *See id.* After year three, it is hopeful that employers will be more accepting of individuals with disabilities and individuals with disabilities will be more willing to disclose their disability. During phase four, action, people begin making meaningful changes. *See id.* Finally, in phase five, maintenance, people are safely at the point where they can avoid temptation to return to their previous behavior. *See id.* By the end of year five, it is hopeful that the stereotypes about disabled people have changed and more individuals with disabilities will be hired.

<sup>158</sup> *See General Information on Physical Disabilities*, HANDICAPS WELFARE ASS'N, <https://hwa.org.sg/general-information-on-physical-disabilities/> (last visited Sept. 22, 2019).

Examples include Cerebral Palsy, quadriplegia, paraplegia, and Muscular Dystrophy. *See id.*

found that 86% of people with a visible disability voluntarily disclosed their disability to their employer.<sup>159</sup>

## 2. Year Three

The categories should be further broken down to include sensory disabilities, physical disabilities, mental illness, and other health impairments. Sensory disabilities should include any impairment affecting the senses.<sup>160</sup> Mental illness should include any “health conditions involving changes in emotion, thinking, or behavior.”<sup>161</sup> “Other health impairments” should include all other impairments recognized under the ADA—excluding those recognized in year one. The expansion in categories represents the belief that employees will begin to feel more comfortable disclosing their disabilities to employers because, at this time, companies will have started recognizing the importance of hiring and promoting employees with disabilities. At the three-year mark, it is likely that any company who did not have a disability hiring policy before will have implemented one, and thus, the number of individuals with disabilities hired will begin to increase.<sup>162</sup>

## 3. Year Five

In the final year of the plan, “other health impairments” should be broken down even further. The categories should now be sensory disabilities, physical disabilities, mental illness,

<sup>159</sup> See “Disabilities in the Workplace” Survey: *Employees with a Visible Disability Report Greater Work Satisfaction than Those with a Non-Visible Disability*, WORKING MOTHER (Oct. 20, 2016, 7:00 AM), <https://www.workingmother.com/disabilities-in-workplace-survey-employees-with-visible-disability-report-greater-work-satisfaction>.

<sup>160</sup> See *What is Sensory Impairment?*, ECL.ORG (Aug. 25, 2017), <https://www.ecl.org/about/latest-news/blog/2017/08/25/what-is-sensory-impairment> (“Sensory impairment is the common term used to describe Deafness, blindness, visual impairment, hearing impairment and Deafblindness.”).

<sup>161</sup> *What is Mental Illness?*, AM. PSYCHIATRY ORG., <https://www.psychiatry.org/patients-families/what-is-mental-illness> (last visited Dec. 29, 2019). Examples of mental illness include: anxiety, schizophrenia, obsessive compulsive disorder, bipolar disorder, and depression. See *Directory: Types of Mental Illness*, NAT’L ALLIANCE ON MENTAL ILLNESS CAL., <https://namica.org/resources/mental-illness/types-mental-illness/> (last visited Dec. 29, 2019).

<sup>162</sup> See Megan Rose Dickey, *supra* note 146. Since first releasing their diversity data in 2014, 2017 is the first year that “Facebook has increased the overall representation of black employees.” *Id.*

neurological disorders, non-physical developmental disabilities, and other health impairments. Neurological disorders include “any condition that is caused by a dysfunction in part of the brain or nervous system, resulting in physical and/or psychological symptoms.”<sup>163</sup> Non-physical developmental disabilities should include any impairment that affects cognitive abilities as well as all intellectual disabilities comprised of people with “limited mental capacity and difficulty with adaptive behaviors.”<sup>164</sup> The “other health impairments” category remains the same; however, because new categories have been added, there are fewer disabilities in this category.<sup>165</sup> After year five, more millennials will be in the workforce, making it a more tolerant place.<sup>166</sup> At this time, employers should have a better understanding of individuals with disabilities and employees as well as the public will begin to hold companies accountable.

### *C. Counterarguments*

#### 1. Tracking Disability Creates an Additional Burden on Employers

Employers are likely to argue that including disability by type in the EEO-1 Report will place an additional burden on them. During the Obama administration, it was announced that the EEO-1 Report would be expanded to include W-2 pay data and

<sup>163</sup> *What is a Neurologic Disorder?*, CHILD NEUROLOGY FOUND., <http://www.childneurologyfoundation.org/patients-or-caregivers/living-neurological-condition/what-is-a-neurologic-disorder/> (last visited Oct. 30, 2017). Common examples include: learning disabilities, epilepsy, Tourette’s syndrome, Parkinson’s disease, and multiple sclerosis. See *Disabled World, A to Z List of Neurological Disorders*, DISABLED WORLD DISABILITY INFO, <https://www.disabled-world.com/health/neurology/disorders-list.php> (last updated Sept. 23, 2019).

<sup>164</sup> *Intellectual and Developmental Disabilities*, NAT’L. INST. HEALTH, <https://report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=100> (last updated Mar. 29, 2013). This category includes: autism spectrum disorder, down syndrome, and ADD/ADHD. See *id.*

<sup>165</sup> See *Other Health Impairments*, PROJECT IDEAL, <http://www.projectidealonline.org/v/health-impairments/> (last visited Sept. 22, 2019). Examples of other health impairments: asthma, diabetes, cardiac conditions, and cancer. See *id.*

<sup>166</sup> See Smith & Turner, *supra* note 125, at 6.

hours worked by employees.<sup>167</sup> In August 2017, President Trump, acting through the Office of Management and Budget<sup>168</sup> (“OMB”), issued a memorandum to the EEOC announcing it was “initiating a review and immediate stay” of the proposed changes to the EEO-1 Report.<sup>169</sup> In its memorandum, OMB cited two main reasons for the stay. The OMB expressed concern “that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.”<sup>170</sup> Several groups, including the U.S. Chamber of Commerce, also argued against the proposed changes.<sup>171</sup> However, the “burdens” identified in support of the argument for not including pay data are not justified if disability is added to the EEO-1 Report. The need for tracking disability is much greater than the need for pay data and thus, justifies the increased “burden” placed on employers because of the benefit it will provide. Pay data would indicate inequality in payment of people who are already employed, whereas tracking disability would indicate how many people are employed in the first place. We cannot even track pay inequality among disabled workers since we are still unsure how many disabled workers are employed. Additionally, unlike pay, which is influenced by a variety of factors, how many disabled employees a company has is black and white.<sup>172</sup> Another reason the proposal to include pay

<sup>167</sup> See Lisa Nagele-Piazza, *Employers: Start Planning How to Pull Pay Data for EEO-1 Reports*, SOC’Y FOR HUM. RESOURCE MGMT., <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/start-planning-how-to-pull-pay-data-for-eeo-1-reports.aspx> (last visited Sept. 19, 2019).

<sup>168</sup> See OFF. MGMT. & BUDGET, <https://www.whitehouse.gov/omb/> (“The Office of Management and Budget (OMB) serves the President of the United States in overseeing the implantation of his vision across the Executive Branch. Specifically, OMB’s mission is to assist the president in meeting his policy, budget, management, and regulatory objectives and to fulfill the agency’s statutory responsibilities.”).

<sup>169</sup> Neomi Rao, *EEO-1 Form: Review and Stay*, OFF. MGMT. & BUDGET, EXEC. OFF. PRESIDENT, (Aug. 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

<sup>170</sup> *Id.*

<sup>171</sup> See Robin Shea, *EEO-1 “pay data” requirement is on hold*, LEXOLOGY (Aug. 30, 2017), <https://www.lexology.com/library/detail.aspx?g=6f2679b9-78b6-45df-ad7f-031dfb1b1ba>. Another group opposed was congressional Republicans. See *id.*

<sup>172</sup> See Stephen Miller, *White House Suspends Pay-Data Reporting on Revised EEO-1 Form*, SOC’Y FOR HUM. RESOURCE MGMT. (Aug. 31, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/revised-eeo-1-form-suspended.aspx>. The Society for Human Resource Management argued against the proposed changes saying that collecting pay data “[would] not help identify unlawful pay

data failed was because the EEOC did not follow the proper procedure.<sup>173</sup> If a proposal to include disability followed the proper steps, there is a greater likelihood that it would be approved.

## 2. Tracking Disability Will Not Force People to Disclosure Their Disabilities

Under the ADA, an employer cannot ask you if you are disabled or ask about the nature of your disability. An employer can ask if you can perform the duties of the job with or without reasonable accommodation. An employer can also ask you to describe or to demonstrate how, with or without reasonable accommodation, you will perform the duties of the job.<sup>174</sup>

Even with these rules in place, employers can still obtain adequate and accurate information on disability in the workplace. First, employers can give employees the opportunity to self-disclose in their application or self-identification form.<sup>175</sup> Second, employers can ask employees to disclose their disabilities anonymously.<sup>176</sup> Opponents might argue that employees will not disclose their disabilities, thus making the data collected by the EEO-1 Report inaccurate and a waste of time.<sup>177</sup> Some reasons

discrimination” because pay is influenced by many factors including: “employee’s chosen career path—previous jobs, experience, education, performance and geographic locations, along with level of responsibility.” *Id.* Additionally, they argued that “employees holding positions within the same broad EEO-1 job category also varies significantly because these individuals perform very different work” and there is “no way for the EEOC to understand this legitimate reason for pay differences within this job category under the proposed data collection.” *Id.* (internal quotation marks omitted).

<sup>173</sup> Rao, *supra* note 170, at 1. (“[T]he public did not receive an opportunity to provide comment on the method of submission to the EEOC.”).

<sup>174</sup> *The ADA: Your Employment Rights as an Individual with a Disability*, U.S. EQUAL OPPORTUNITY EMP. COMMISSION, <https://www.eeoc.gov/facts/ada18.html> (last updated May 9, 2019).

<sup>175</sup> See Sarah von Schrader et al., *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate*, 26 EMP. RESPONSIBILITIES & RTS. J. 237, 240 (2013) (suggesting two ways that employers can gather information about their employees with disabilities).

<sup>176</sup> See *id.* (“This would allow employers to collect information on disability in the workplace generally and make comparisons to employees without disabilities. While it would not be possible to track individual employees with disabilities with the same level of detail as in the first option, this approach would help employers better understand disability within their workforce and improve organizational decision making about related policies and practices.”).

<sup>177</sup> Kevin Whitelaw, *Defining Diversity: Beyond Race And Gender*, NPR, (Jan. 13, 2010, 12:12 AM) <http://www.npr.org/templates/story/story.php?storyId=122327104> (“Some of these areas are also very hard to track because of legal restrictions when it comes to

why employees do not disclose their disabilities to employers are “concerns that it would result in lowered expectations, lack of respect, isolation from co-workers, a decrease in job responsibility, being passed over for promotion, or increased likelihood of termination.”<sup>178</sup> While the numbers reported in the initial years will likely be lower than the real numbers, there is a strong likelihood that the number of people who disclose disabilities will increase over time.<sup>179</sup> Additionally, the DOL notes that companies can increase disclosure rates.<sup>180</sup> If employees are not disclosing their disabilities, it might indicate that an employer must make additional changes to make the work environment more tolerable and friendly towards people with disabilities. By making the necessary changes, disclosure rates will therefore increase.

### 3. Employers Will Be Forced to Hire Unqualified Workers

Individuals without disabilities might argue that the costs of hiring individuals with disabilities are too high and that employers will feel pressure to hire people with disabilities

employers asking about their workers’ religion, sexual preference or certain other characteristics”); See von Schrader et al. *supra* note 176, at 240.

<sup>178</sup> See von Schrader et al. *supra* note 176, at 240.

<sup>179</sup> See Sarah von Schrader, *Risk and Respect – what to know about disclosing mental illness at work*, CONVERSATION (Dec. 5, 2014, 5:48 AM), <http://theconversation.com/risk-and-respect-what-to-know-about-disclosing-mental-illness-at-work-34398> (“Disclosure can also have a positive impact for others with similar disabilities. One person said, ‘I am not ashamed of my disability, and I would hope that my disclosure would help someone else with a disability in seeking employment’”); Mary B. Young & Michelle Kan, *Do Ask, Do Tell*, CONFERENCE BOARD 14, <https://de.nlx.org/pdfs/do-ask-do-tell.pdf> (last visited Mar. 11, 2018) (“When 15 percent of the workforce self-identifies as employees with disabilities and/or as allies, we’ll see a similar phenomenon as we saw with the LGBT population. . . . The gay population became less stigmatized as more people came out, and allies became more visible and vocal, especially in industries (such as retail and technology) that have worked to create a LGBT-friendly workplace.”).

<sup>180</sup> See Rebecca R. Hastings, *Are Your Employees Comfortable Disclosing Disabilities?*, SOC’Y FOR HUM. RESOURCE MGMT. (Jan. 26, 2012), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/comfortabledisclosingdisability.aspx> (“[A]n employee’s willingness to reveal a disability is an indicator of their comfort level with sharing personal information, which is an indicator of workplace climate and inclusiveness.”). Thus, companies who are more inclusive have a higher chance of having their employees reveal their disabilities.



regardless of whether they are qualified.<sup>181</sup> Employers are afraid that people with disabilities will be less productive, cost them money because of increased insurance and workplace accommodations, sue them if they are fired, and have a negative impact on other employees and customers.<sup>182</sup> While these fears are understandable of an uneducated employer, they are not supported by statistics.<sup>183</sup>

In one study conducted by ODEP, 59% of employers said accommodations needed by employees with disabilities “cost absolutely nothing.”<sup>184</sup> Another study found that “workers with disabilities had a turnover rate 48% lower than that of the nondisabled population, with medical costs 67% lower and time-off expenses 73% lower.”<sup>185</sup> Furthermore, the ADA only applies to “qualified” individuals, meaning “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>186</sup> While the end goal of including disability on the EEO-1 Report is to increase the number of individuals with disabilities who are hired and promoted due to an increase in awareness and understanding, employers have no requirement to hire employees simply because they have a disability.

## CONCLUSION

If a tree falls in the forest and nobody hears it, does it really make a sound? Today, the United States is stuck in a vicious cycle. People have disabilities but hide them because they are afraid of

<sup>181</sup> See *Employers and the ADA: Myths and Facts*, U.S. DEP'T LAB., <https://www.dol.gov/odep/pubs/fact/ada.htm> (last visited Mar. 14, 2017) (explaining that the ADA does not require employers to hire unqualified workers).

<sup>182</sup> See Lengnick-Hall et al., *supra* note 22 (explaining the various reasons why employers are hesitant to hire individuals with disabilities and how they are not backed by statistics).

<sup>183</sup> See *id.*; see also *infra* Part II of this note.

<sup>184</sup> Beth Loy, *Accommodation and Compliance Series Workplace Accommodations: Low Cost, High Impact*, JOB ACCOMMODATION NETWORK, <https://www.shrm.org/hr-today/news/hr-magazine/Documents/LowCostHighImpact.pdf> (last updated Sept. 1, 2017).

<sup>185</sup> Cann, *supra* note 98 (study was conducted by the American Society of Safety Engineers).

<sup>186</sup> 42 U.S.C. § 12111(8) (2018).

being discriminated against in the workplace.<sup>187</sup> Because people with disabilities remain hidden, people do not talk about it and people are not educated.<sup>188</sup> Since people remain unaware and uneducated, companies do not hire, recruit, or promote people with disabilities.<sup>189</sup> Because people with disabilities are not in positions to make meaningful changes, things remain the way they are. Thus, the cycle repeats and since nobody heard the tree fall, nobody cares.

The EEOC was created by Title VII of the Civil Rights Act of 1964.<sup>190</sup> Its mission was to stop unlawful employment discrimination based on race, sex, color, religion, and national origin.<sup>191</sup> Today, the EEOC is charged with enforcing federal laws that are designed to protect over double the number of categories.<sup>192</sup> What was once only five groups has turned into twelve: “race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.”<sup>193</sup> It is time for society to once

<sup>187</sup> Michelle Klampe, *Self-identifying as disabled and developing pride in disability aid overall well-being*, OR. ST. U., (Aug. 28, 2017), <http://oregonstate.edu/ua/ncs/archives/2017/aug/self-identifying-disabled-and-developing-pride-disability-aid-overall-well-being> (“Disability identity is a critical step in accepting a disability and helps reduce the stigma surrounding the label . . . Disability pride is still a rare thing . . . Many people hide their disabilities to avoid discrimination.”).

<sup>188</sup> See SANE AUSTRALIA, *A LIFE WITHOUT STIGMA 6* (SANE Australia ed., 2016) (“The Wesley Mission study (2007) found that one in three (32%) would not feel comfortable working with a colleague who has mental illness. Two-thirds (66%) would not be comfortable with their child sharing a unit with someone who had a mental illness, and 71% did not believe people with mental illness could be trusted in positions of high responsibility”). Katherine Switz, a Harvard Business School graduate founded the Stability Network (an advocacy group that highlights successful working individuals who also live with a mental illness) in 2013. See Jeannie Yandel, *Katherine Switz Has A Mental Illness- And She Wants You To Know About It*, KUOW (Apr. 16, 2015, 2:33 PM), <https://www.kuow.org/stories/katherine-switz-has-mental-illness-and-she-wants-you-know-about-it>. She details how difficult it was to find leaders for her group because people were not willing to share their stories. See *id.* At most, they would only give their first name or their full name but not their title or job. See *id.*

<sup>189</sup> See SANE AUSTRALIA, *supra* note 189, at 8.

<sup>190</sup> See Dawn Rosenberg McKay, *Title VII of the Civil Rights Act of 1964: Preventing Employment Discrimination*, BALANCE CAREERS, <https://www.thebalancecareers.com/title-vii-of-the-civil-rights-act-of-1964-525697#targetText=When%20Title%20VII%20of%20the,as%20well%20as%20job%20applicants> (last updated June 25, 2019).

<sup>191</sup> See *Know Your Rights: Title VII of the Civil Rights Act of 1964*, AM. ASS'N U. WOMEN, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/>.

<sup>192</sup> See *Overview*, *supra* note 49.

<sup>193</sup> See *id.*

again change. The EEO-1 Report should include disability, by type, to ensure that individuals with disabilities are just as protected and progressing the same as other minorities in the workforce.

“This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, North and South: ‘All men are created equal . . . .’”<sup>194</sup> It was true in 1965 when Lyndon B. Johnson said it to Congress and it is certainly true today: the law recognizes the importance of protecting individuals with disabilities and now, it is time that employers do too.

## EEO-1 REPORT Figure 10.8

SOURCE: U.S. EEOC (2006).

**Section D – EMPLOYMENT DATA** OF 100 – Page 2

Employment in this establishment – Report all personnel full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Show the appropriate figure on all lines and in all columns. Blank spaces will be considered as zero.

Job Categories	Number of Employees (Report employees in only one category)															Total Col. A–O
	Race/Ethnicity															
	Hispanic or Latino		Not-Hispanic or Latino													
	Male													Female		
Male	Female	White	Black or African American	Native American or Other People's Tribes	Asian	Spanish Speaking or Alaska Native	Two or more races	White	Black or African American	Native American or Other People's Tribes	Asian	Spanish Speaking or Alaska Native	Two or more races			
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers: 1.1																
First/Mid-Level Officials and Managers: 1.2																
Professionals: 2																
Technicians: 3																
Sales Workers: 4																
Administrative Support Workers: 5																
Craft Workers: 6																
Operatives: 7																
Laborers and Helpers: 8																
Service Workers: 9																
<b>TOTAL: 10</b>																
<b>PREVIOUS YEAR TOTAL: 11</b>																

1. Date(s) of payroll period used: \_\_\_\_\_ (Omit on the Consolidated Report.)

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<sup>194</sup> Lyndon B. Johnson, President, Address to Congress at the Signing of the Voting Act (Mar. 15, 1965) (transcript available at LBJ Presidential Library).