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## **Without Accommodation**

Jennifer B. Shinall

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## Without Accommodation

JENNIFER BENNETT SHINALL\*

*Under the Americans with Disabilities Act (ADA), workers with disabilities have the legal right to reasonable workplace accommodations provided by employers. Because this legal right is unique to disabled workers, these workers could, in theory, enjoy greater access to the types of accommodations that are desirable to all workers—including the ability to work from home, to work flexible hours, and to take leave. This Article compares access to these accommodations, which have become increasingly desirable during the COVID-19 pandemic, between disabled workers and nondisabled workers. Using 2017–2018 data from the American Time Use Survey’s Leave and Job Flexibilities Module, I find that disabled workers report far less access to these pandemic-relevant accommodations than do nondisabled workers. I further present evidence that disabled workers’ lower rates of access to pandemic-relevant accommodations are due, in part, to occupational segregation. Because disabled workers are more likely to work in jobs that are not amenable to working from home, working flexible hours, and taking temporary leave, the results raise concerns about many disabled workers’ ability to maintain their employment during the pandemic. The results further highlight the inherent weaknesses of the ADA and the need for additional supporting legislation—including short-term insurance and educational funding programs—for disabled workers.*

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*“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”*

– Title I of the Americans with Disabilities Act, § 101(8)

#### INTRODUCTION

The COVID-19 pandemic has taken a toll on all of society, but the toll has been particularly grave for historically disadvantaged workers. Workers from racial and ethnic minority groups,<sup>1</sup> as well as female workers,<sup>2</sup> have already been the subject of

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1. See, e.g., Ctrs. for Disease Control & Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups* (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/L3NW-3JCF>]; MORNING EDITION, *Minority Workers See Highest Levels Of Unemployment From COVID-19 Crisis* (Nat. Pub. Radio broadcast June 5, 2020); Heather Long, Andrew Van Dam, Alyssa Fowers & Leslie Shapiro, *The COVID-19 Recession Is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/#noop> [<https://perma.cc/8J4Z-HA6C>]; Simon Mongey, Laura Pilossoph & Alex Weinberg, *Which Workers Bear the Burden of Social Distancing Policies*, 6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27085, 2020), <http://www.nber.org/papers/w27085> [<https://perma.cc/SV4G-6PBZ>].

2. See, e.g., Amanda Taub, *Pandemic Will ‘Take Our Women 10 Years Back’ in the Workplace*, N.Y. TIMES, Sep. 26, 2020, at A10; Abby Vesoulis, *If We Had a Panic Button, We’d be Hitting it: Women Are Exiting the Labor Force En Masse—And That’s Bad For Everyone*, TIME (Oct. 17, 2020, 1:12 PM), <https://time.com/5900583/women-workforce-economy-covid/> [<https://perma.cc/9PJQ-Z9GY>]; Nicole Bateman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working Women?*, BROOKINGS INST. (Oct. 2020),

a great deal of media and scholarly attention. Black and Hispanic workers are overrepresented in low-wage, essential workplaces, rendering them even more vulnerable to the disease.<sup>3</sup> For women, who continue to bear disproportionate caretaking responsibilities in many households, school closures have interfered with their ability to work as many hours (let alone, work normal business hours), which could have grave consequences for their long-term earnings trajectories.<sup>4</sup>

Less central in the COVID-19 discussions, however, has been the plight of workers with disabilities. Before the pandemic, over six million labor market participants identified as disabled.<sup>5</sup> Even in the best of times, labor market participation rates, employment rates, and hourly wage rates of disabled workers have lagged significantly behind those of nondisabled workers,<sup>6</sup> and recessions have been historically unkind to disabled workers.<sup>7</sup> Often labeled as the “last hired and first fired,”<sup>8</sup> disabled workers lost their jobs at twice the rate of nondisabled workers

<https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/> [https://perma.cc/AFQ2-JY75]; Talha Burki, *The Indirect Impact of COVID-19 on Women*, 20 LANCET: INFECTIOUS DISEASES 904 (2020); Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26947, April 2020), <http://www.nber.org/papers/w26947> [https://perma.cc/36S6-UAUH].

3. See J. Corey Williams, Nientara Anderson, Terrell Holloway, Ezelle Samford III, Jeffrey Eugene & Jessica Isom, *Reopening the United States: Black and Hispanic Workers are Essential and Expendable Again*, 110 AM. J. PUB. HEALTH 1506, 1506 (Oct. 2020) (“In these sectors, where employees are likely to come into contact with COVID-19 (i.e., high-contact jobs), Blacks and Hispanics are more likely to be employed than are whites.”); see also Molly Kinder & Tiffany N. Ford, *Black Essential Workers' Lives Matter. They Deserve Real Change, Not Just Lip Service*, BROOKINGS INST. (JUNE 24, 2020), <https://www.brookings.edu/research/black-essential-workers-lives-matter-they-deserve-real-change-not-just-lip-service/> [https://perma.cc/P2Z2-8ZKY] (“Black workers are more likely to be essential—and more likely to die.”).

4. See Alan et al., *supra* note 2.

5. U.S. BUREAU OF LAB. STAT., *Economic News Release* (Feb. 24, 2021), <https://www.bls.gov/news.release/disabl.t01.htm> [https://perma.cc/A784-PDK8].

6. Compare U.S. BUREAU OF LAB. STAT., *Employment Status of the Civilian Noninstitutional Population 16 Years and Over, 1985 to Date*, (Jan. 07, 2022), <https://www.bls.gov/web/empsit/cpseea01.htm> [https://perma.cc/7JU5-4NM6] (documenting a labor force participation rate of 63.1% of all individuals sixteen and over in 2019), with U.S. BUREAU OF LAB. STAT., *Employment Status of the Civilian Noninstitutional Population by Disability Status and Selected Characteristics, 2019 Annual Averages*, (Feb. 24, 2021), <https://www.bls.gov/news.release/disabl.t01.htm> [https://perma.cc/KQ4C-N7WM] (documenting a labor force participation rate of 20.8% of all disabled individuals sixteen and over in 2019). See Marjorie Baldwin & William G. Johnson, *Labor Market Discrimination against Men with Disabilities*, 29 J. HUM. RES. 1 (1994); Marjorie Baldwin & William G. Johnson, *Labor Market Discrimination against Women with Disabilities*, 34 IND. RELS. 555 (1995).

7. See Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 IND. RELS. 31 (2003).

8. H. Stephen Kaye, *The Impact of the 2007-09 Recession on Workers with Disabilities*, MONTHLY LAB. REV., Oct. 2010, at 19, 19.

during the Great Recession.<sup>9</sup> Thus, there is reason to worry that the current pandemic-induced recession will be no different than prior recessions.<sup>10</sup>

On the other hand, disabled workers may have an advantage over nondisabled workers in the current labor market: the legal right to reasonable accommodation. The Americans with Disabilities Act (ADA) of 1990 mandates that employers provide (and pay for) reasonable accommodations for disabled workers,<sup>11</sup> a mandate noticeably absent from other employment discrimination statutes, such as Title VII of the 1964 Civil Rights Act.<sup>12</sup> According to the statutory language of the ADA, employers must consider “job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] acquisition or modification of equipment or devices” for disabled workers<sup>13</sup>—the very types of accommodations that all workers, regardless of disability status, are presently seeking from employers due to pandemic-induced changes in work and home conditions. Working from home, flexible working hours, and leave allowances are all recommended as forms of reasonable accommodation for disabled workers in the Equal Employment Opportunity Commission’s (EEOC) ADA Enforcement Guidance.<sup>14</sup> Moreover, in recent years, federal court decisions have supported working from home<sup>15</sup> and

9. *See id.*

10. For example, according to a recent working paper, older workers, who are more likely to be affected by a disability, have seen a greater rise in unemployment than workers ages twenty-five to forty-four since the onset of the pandemic. *See* Truc Thi Mai Bui, Patrick Button & Elyce G. Picciotti, *Early Evidence on the Impact of COVID-19 and the Recession on Older Workers* (Nat’l Bureau Lab. Rsch., Working Paper No. 27448, June 2020), <http://www.nber.org/papers/w27448> [<https://perma.cc/7LLP-PVJT>].

11. 42 U.S.C. § 12111(9).

12. *See* 42 U.S.C. § 2000e.

13. 42 U.S.C. § 12111(9)(B).

14. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, pt. 34, 43, 44, No. 915.002 (Oct. 17, 2002), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/2F76-HTQL>]; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Work at Home/Telework as a Reasonable Accommodation*, (Feb. 2003), available at <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [<https://perma.cc/VFL7-A34R>].

15. An early (and influential) case cast doubt on whether telework could be a reasonable accommodation under the ADA. *See* *Vande Zande v. Wis. Dep’t. of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995) (“Generally, . . . an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.”). But more recent court decisions have come down more favorably with respect to telework, particularly as the costs of telework have decreased significantly for employers and as the ability to tele-supervise has increased. *See, e.g.,* *Yochim v. Carson*, 935 F.3d 586, 592 (7th Cir. 2019) (“‘Reasonable accommodation’ under the relevant statutes includes ‘modified work schedules’ such as . . . compressed schedules and telework.”); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) (“[F]ull-time presence at work is not an essential function of a job simply because an employer says that it is.”); *McMillan v. City of New York*, 711 F.3d 120, 128 n.4 (2d Cir. 2013) (“[W]ork from home . . . [is] potentially problematic because [it is] unsupervised. We have implied, however, that permitting unsupervised work might, in some cases, constitute a reasonable accommodation.”).

flexible working hours<sup>16</sup> as forms of reasonable accommodation for some occupations under the ADA.<sup>17</sup> Consequently, in theory, many disabled workers could have already been well set up with relevant workplace accommodations before the pandemic hit.

Along these lines, this project seeks to compare how access to pandemic-relevant workplace accommodations differed between disabled and nondisabled workers prior to the COVID-19 outbreak. Fortunately, a new dataset allows for precisely this comparison: the American Time Use Survey (ATUS) Leave and Job Flexibilities Module. The ATUS is a survey administered by the Bureau of Labor Statistics (BLS) to a subset of individuals who have recently completed their participation in the Current Population Survey (CPS). Although primarily intended to measure how respondents divide their time between work, childcare, housework, and leisure activities, ATUS surveys administered in 2017 and 2018 included a Leave Module, which asked participants about work schedules, work location, access to workplace leave, and use of workplace benefits. Because the ATUS also asks respondents to self-identify any limiting conditions,<sup>18</sup> the Leave Module can provide unique insight into the comparative, pandemic-relevant workplace accommodations received by workers with limiting conditions immediately before COVID-19.

Analysis of the ATUS Leave Module data paints an especially bleak picture for the fate of disabled workers in the current labor market. In spite of the statutory mandate that employers reasonably accommodate disabled workers, disabled workers were less likely than nondisabled workers to enjoy pandemic-relevant

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16. *See* *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 130 (1st Cir. 2017) (“[R]easonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work.”) (quoting *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1162 (10th Cir. 2014)); *Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014) (“While the appropriateness of flexible working hours as an accommodation in any given case will have to be established, nothing . . . takes such a schedule off the table as a matter of law.”); *McMillan*, 711 F.3d at 126 (“Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment.”).

17. Whether leave can ever be a form of reasonable accommodation under the ADA is a more contentious issue. Federal courts often deny multi-month leave requests as unreasonable, as they can interfere with a disabled worker’s ability to perform the essential functions of her job, although shorter leave requests are often granted as reasonable. *See, e.g.,* *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017) (“[A] long-term leave of absence cannot be a reasonable accommodation. . . . ‘[N]ot working is not a means to perform the job’s essential functions.’ Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”) (quoting *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)); *Echevarria*, 856 F.3d at 131 (“Compliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee’s job responsibilities during the employee’s extended leave.”). *But see* *Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998) (“A leave of absence and leave extensions are reasonable accommodations in some circumstances.”).

18. Specifically, the ATUS asks if a person has a personal care difficulty, vision difficulty, hearing difficulty, mobility limiting difficulty, physical difficulty, or cognitive difficulty.

workplace accommodations prior to the onset of COVID-19. In particular, disabled workers were less likely to have access to paid leave, to be able to work from home, and to have flexible work hours. Much of this lack of access to pandemic-relevant workplace accommodations appears to derive from occupational (and to a lesser extent, industry) segregation of disabled workers.<sup>19</sup>

The relative disadvantage faced by disabled workers in terms of leave and job flexibility access at the onset of the pandemic raises serious concerns about disabled workers' abilities to keep their jobs, remain in the labor market, and maintain their health during the current pandemic. It further raises concerns about the vulnerability of disabled workers during future public health crises. Perhaps more than ever before, the COVID-19 experience makes a compelling argument that the ADA remains inadequate to support individuals with disabilities who participate in the labor market. The Act's reasonable accommodation mandate cannot even bring accommodation access for disabled workers to equipoise with accommodation access for nondisabled workers. If our society is serious about promoting "equality of opportunity, full participation, independent living, and economic self-sufficiency"<sup>20</sup> for individuals with disabilities, additional, long-term supportive legislation—including short-term insurance and job-training programs—is essential.

## II. THE RIGHT TO ACCOMMODATION

Contrary to popular perception, U.S. employees have very few legal rights in the workplace.<sup>21</sup> One landmark study estimated that over 80% of employees believed that applicable workplace laws highly constrained their employers' ability to terminate them.<sup>22</sup> Yet under the doctrine of employment at will, employers need not treat their employees well—or even fairly.<sup>23</sup> As long as their motivations are not

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19. See *infra* note 64 and accompanying text.

20. 42 U.S.C. § 12101(a)(7). This quotation comes from the preamble to the ADA, in which Congress states its legislative purpose for passing the Act.

21. Employee misperceptions of their legal protections in the workplace are pervasive. According to one study, less than 10% understand that their employer can fire them for a good reason, a bad reason, or no reason at all under the doctrine of employment at will. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110–11 (1997) (“[T]his study raises serious doubts about whether workers have the most basic information necessary for understanding the terms on which they have contracted.”).

22. See *id.* at 134 (finding that the vast majority of workers surveyed erroneously believed that lawful reasons for termination were unlawful). Accord Jessica Martin, *Keeping Perspective on Employment-at-Will*, SOURCE (Mar. 31, 2006), <https://source.wustl.edu/2006/03/keeping-perspective-on-employmentatwill/> [<https://perma.cc/44XH-3X48>] (“One of the things that I heard over and over again was that many of the workers came in because they had lost their jobs and felt that they had been treated unfairly. We often had to counsel them that even if what happened to them was unfair, there was nothing we could do about it legally.”).

23. Employment at will allows an employer to terminate an employee at any time, for any reason (unless that reason is a narrowly defined legislative exception, such as employment discrimination). On the flip side, employment at will allows an employee to quit at any time,



discriminatory, U.S. employers can be as unfair and as unaccommodating as they so desire.<sup>24</sup>

Thus, for most U.S. workers, there is no right to workplace accommodation. Just as employers are free to ignore most moral tenets when making employment decisions, they are similarly free to ignore most workers who request even a costless accommodation.<sup>25</sup> Of course, employers may decide that *voluntarily* granting their employees' accommodation requests is a sound business practice that ultimately improves their bottom line, but nothing in the law requires such employer beneficence.<sup>26</sup> Even in times of pandemic, the right to workplace accommodation has remained quite limited. The federal Families First Coronavirus Response Act (FFCRA) extended some paid leave protections to workers, but those protections expired at the end of 2020.<sup>27</sup> As such, employers remain well within their legal rights to deny pandemic-relevant accommodations, including remote work support, to the vast majority of their workers.

The exception to this general rule of nonaccommodation hinges upon disability status.<sup>28</sup> Disabled workers are the only labor market participants for whom employers

for any reason. Employment-at-will is the strong default rule under federal law and under all state laws except Montana. *See, e.g.,* NAT'L CONF. OF STATE LEGISLATURES, *At-Will Employment—Overview*, (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [https://perma.cc/E87T-VTMT] (“Employment relationships are presumed to be ‘at-will’ in all U.S. states except Montana. The U.S. is one of a handful of countries where employment is predominantly at-will.”); Kim, *supra* note 21, at 106–07 (“In theory, employer and employee are free to contract around the at-will presumption, but, in fact, very few do so.”).

24. As one early, but famous case stated, the strong default rule of employment at will allows employers to make employment decisions “for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.” *See Payne v. W. & Atlantic R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915).

25. Contrary to the existing regime, a group of health law scholars have argued for the universal legal right to workplace accommodation, arguing that it would make all workers more productive and additionally reduce the stigma surrounding disabled workers who ask for workplace accommodation. *See* Michael Ashley Stein, Anita Silver, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014).

26. For a business argument on why employers *should* treat employees fairly (even though the law does not compel such behavior), see Joel Brockner, *Why It's So Hard to Be Fair*, HARV. BUS. REV. (Mar. 2006), <https://hbr.org/2006/03/why-its-so-hard-to-be-fair> [https://perma.cc/3H5Q-3MQX].

27. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 177 (2020). For a summary of the Congressional legislation, which guaranteed most workers limited paid leave to quarantine, to care for others in quarantine, and to care for children affected by school closures, see U.S. DEP'T OF LAB., *Families First Coronavirus Response Act: Employee Paid Leave Rights*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [https://perma.cc/82LF-36R7].

28. Note that under Title VII of the 1964 Civil Rights Act, employers also have very limited duties to accommodate employees' religious practices. *See* 42 U.S.C. § 2000e(j). Nevertheless, an employer accommodating a religious belief or practice need not expend more than “*de minimis* cost” on the accommodation. *Trans World Airlines, Inc. v. Hardison*, 432

are legally required to provide—and pay for—workplace accommodations.<sup>29</sup> As such, while an employer who denies a remote desktop license to a nondisabled worker merely sacrifices employee goodwill, an employer who denies a remote desktop license to a disabled worker may risk legal liability under the ADA. Ultimately, whether denial of a requested accommodation to a disabled worker violates the ADA depends both on how “reasonable” the accommodation is and on whether provision of the accommodation would create an “undue hardship” for the employer.<sup>30</sup>

The definitions of reasonability and undue hardship are by no means bright-line rules, which has been the subject of past scholarly criticism, given their difficulty for employers to implement and apply.<sup>31</sup> To interpret these two terms, many courts have relied on some form of cost-benefit analysis, in which the specific needs of the disabled employee, the expected benefit of the requested accommodation, and the expected cost of the requested accommodation are all weighed in the balance.<sup>32</sup> By using cost-benefit analysis, as opposed to bright-line rules, to determine when accommodations are legally mandated, the necessary result is that the very accommodations required for some workers may not be required for other workers.<sup>33</sup>

For any given worker, whether the ADA requires the employer to provide an accommodation will depend heavily on both that worker’s underlying health

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U.S. 63, 84 (1977). In contrast, employer expenditures on disability accommodation are only limited by the rules of reasonability and “undue hardship.” See 42 U.S.C. § 12111(9)–(10).

29. See 42 U.S.C. § 12112(b)(5)(A) (defining disability discrimination as “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

30. See 42 U.S.C. § 12111(9)–(10).

31. See, e.g., Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621, 633 (2020) (“Even assuming the best case scenario, in which the employer has full information and understands the exact accommodation that a worker needs to function in the workplace, imprecise definitions of what it means for an accommodation to be reasonable or to create an undue hardship may leave the employer unable to determine whether he has a legal obligation to provide such accommodation to the worker.”).

32. See, e.g., *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (holding that “[t]he employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs”); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995) (requiring that, to be reasonable, “an accommodation [must have] costs . . . which, facially, do not clearly exceed its benefits”); see also *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259–60 (1st Cir. 2001) (suggesting that courts must weight costs and benefits for both the reasonable accommodation and undue hardship analyses).

33. Along these lines, the ADA also does not require an employer to provide the employee’s first-choice accommodation. *Accord* Elizabeth Pendo, *COVID-19 Employee Health Checks, Remote Work, and Disability Law*, in *WORK LAW UNDER COVID-19* (Sachin S. Pandya & Jeffrey M. Hirsch eds., 2021) (ebook) (“The ADA does not require an employer to provide the specific accommodation that an employee requests, so long as any alternative accommodation it offers adequately address the employee’s unique needs and reasonably accommodates the disability.”).

condition and the nature of the job at issue. Because the ADA defines disability broadly—anyone who is “substantially limit[ed in a] major life activit[y]” may be entitled to a workplace accommodation—the statute covers a wide range of underlying health conditions.<sup>34</sup> As such, accommodations that are reasonable for some workers may not be reasonable for others. A ramp, for instance, may be a reasonable accommodation for a worker in a wheelchair,<sup>35</sup> but for a worker with a hearing impairment, a ramp would not be reasonable (or useful).<sup>36</sup> Thinking about pandemic-relevant accommodations, remote work may be a reasonable accommodation for a worker with a health condition that makes it dangerous to leave home, such as an autoimmune disease or active cancer that renders the worker particularly susceptible to infection.<sup>37</sup> Yet it may not be a reasonable—and therefore, a legally mandated—accommodation under the ADA for a worker in a wheelchair since remote work would not apparently improve that worker’s ability to perform the “essential functions of the job” (despite the fact that the worker may *prefer* to work from home).<sup>38</sup>

The type of job at issue plays a similarly important role in determining whether an accommodation is reasonable. For example, flexible hours may be a reasonable accommodation for workers whose health condition requires regular rest breaks or outpatient treatment (e.g., chemotherapy or radiation treatment for cancer), but only in *some* jobs. Such accommodations may be too onerous for a business that relies on shift work, especially when the shift work is designed to ensure twenty-four-hour coverage for health and safety reasons.<sup>39</sup> A flexible-hours accommodation in heavy industry, utility, and health care jobs—even for the most deserving worker—could

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34. See 42 U.S.C. § 12102(1)(A).

35. *E.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 14, at pt. 10 (finding an employer’s failure to accommodate a wheelchair-bound worker’s ramp from his van to be a violation of the ADA).

36. A more useful accommodation for a hearing-impaired worker might include a TTY device that allows the worker to communicate via telephone. *See id.*

37. *See id.* at pt. 34 (“An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.”).

38. 42 U.S.C. § 12111(8). Reasonable accommodations are, at bottom, intended to enable disabled workers to “perform the essential functions of the employment position.” *Id.* See also U.S. EQUAL EMP. OPPORTUNITY COMM’N, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Mar. 14, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/YC4G-VJMJ>] (“To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.”).

39. *E.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 14 (“Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees’s ability to work.”).

place public safety at risk.<sup>40</sup> Similarly, remote work simply may not be feasible for workers in retail or food services, regardless of how much the worker at issue could benefit from it.<sup>41</sup>

Certainly, not all disabled workers would have been set up with pandemic-relevant accommodations prior to the onset of COVID-19. Legal entitlement to pandemic-relevant accommodations should only extend to disabled workers who (1) have conditions ameliorated by such accommodations, and (2) have jobs amenable to the accommodations. Nonetheless, the presence of *any* legal entitlement to workplace accommodation remains unique to disabled workers. As such, the average disabled worker could have been *better* prepared for the pandemic than the average nondisabled worker, at least in theory.

For the first time ever, disabled workers could have been in a relatively stronger position to weather an economic downturn because of their distinct accommodation rights. The ADA's mandates, of course, did not guarantee that disabled workers were better prepared for COVID-19. Disabled workers could be disproportionately concentrated in jobs not amenable to accommodations such as leave, flexible hours, and remote work. Additionally, the ADA's reasonable accommodation mandate may not work well in practice—as some prior commentators have suggested—due to the lack of bright-line rules and poor enforcement mechanisms in the statute.<sup>42</sup> Even so,

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40. Employers are never required to employ (or accommodate) a disabled worker who “pose a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113(b). Nor are employers required to employ or accommodate a disabled worker whose presence on the job poses a direct threat to her personal health and safety. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 73 (2002).

41. *E.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 14, at pt. 34 (“There are certain jobs in which the essential functions can only be performed at the work site—e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions.”).

42. A large economics literature is highly critical of the ADA, pointing out that wage and employment outcomes of disabled workers have, at best, remained the same and, at worst, declined since the statute's passage. *See, e.g.*, Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 926–49 (2001) (finding that the ADA decreased employment rates of disabled workers); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693, 701 (2000) (finding a decline in employment and wages of disabled men following the passage of the ADA); Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RES. 887, 909 (2004) (finding no effect of the ADA on the labor market outcomes of disabled individuals in the labor market after accounting for changes in labor supply); Kruse & Schur, *supra* note 7, at 61 (finding no effect of the ADA on the labor market outcomes of disabled individuals after considering sensitivities in how disability is defined); *see also* Jennifer Bennett Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, 5 IZA J. LAB. ECON. 1, 2 (2016) (finding no evidence that individuals impacted by Congress's expansion of the disability definition in the ADAAA have improved employment outcomes); Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 802–03 (2018) (finding that pregnant women with complications, who theoretically have access to the Act's protections since the ADAAA, have not seen their employment outcomes improve since the ADAAA). In

if the ADA in any way fulfills its promises of enabling workers “to fully participate in all aspects of society,” the outlook for disabled workers during the current pandemic-induced recession may be more hopeful than in prior recessions.<sup>43</sup> Whether the ADA is actually living up to its promises during this particularly challenging moment is ultimately an empirical question; thus, the following Section turns to the data needed to address this question.

### III. REVIEWING THE DATA

Every year since 2003, the BLS has administered the ATUS to a subset of former CPS participants. The BLS selects approximately half of households that have completed their eighth and final CPS interview for participation in the ATUS, deliberately oversampling minority-identifying households and households with children. Within each selected household, the BLS randomly chooses one person over age fifteen to answer ATUS questions via a telephone interview, which primarily concerns their time use during the prior day.<sup>44</sup>

Although the ATUS has always been principally focused on understanding how individuals spend their time, the ATUS has occasionally included additional modules for select participants.<sup>45</sup> One of these supplemental modules includes the Leave and Job Flexibilities Module,<sup>46</sup> which was administered in 2017 and 2018 to all ATUS participants who were employed, wage and salary workers.<sup>47</sup> The Leave Module includes questions on leave access, leave usage, work schedule, and workplace flexibility.<sup>48</sup>

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prior experimental work, I have argued that the information restrictions created by the statute, particularly at the hiring stage, interfere with the statute’s efficacy in practice. *See* Shinall, *supra* note 31, at 669–81.

43. 42 U.S.C. § 12101(a)(1).

44. ATUS response rates in 2017 and 2018 were between 42%–46%. BUREAU OF LAB. STAT., AMERICAN TIME USE SURVEY USER’S GUIDE 14 (2021), <https://www.bls.gov/tus/atususersguide.pdf> [<https://perma.cc/TRR4-PFG4>].

45. An example of a widely used ATUS module is the Eating and Health Module. For another study using the ATUS Eating and Health Module, see Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101 (2016).

46. The ATUS also included a Leave Module in 2011, but its questions and resulting data are not directly comparable to the 2017–2018 Leave Module and, thus, are excluded from the present study. BUREAU OF LAB. STAT., *supra* note 44, at 20.

47. Self-employed workers were excluded from participating in the module. BUREAU OF LAB. STAT., AMERICAN TIME USE SURVEY (ATUS) DATA DICTIONARY: 2017–2018 LEAVE AND JOB FLEXIBILITIES MODULE DATA VARIABLES COLLECTED IN THE MODULE 3, (2019), <https://www.bls.gov/tus/lvmintcodebk1718.pdf> [<https://perma.cc/R3NR-8VVM>].

48. Because the Leave Module is so new, only one other working paper has used the Leave Module thus far to compare working conditions, leave access, and leave usage between men and women. *See* Alexandre Mas & Amanda Pallais, *Alternative Work Arrangements*, (Nat’l Bureau of Econ. Rsch., Working Paper No. 26605, 2020), <http://www.nber.org/papers/w26605> [<https://perma.cc/H4ZV-SXDW>].

Both the level of detail and the scope of coverage within the ATUS Leave Module are unparalleled for a nationwide, cross-sectional dataset.<sup>49</sup> For example, the CPS asks respondents to the Annual Social and Economic Supplement only limited questions about absence from work in the prior week and whether the absence was paid.<sup>50</sup> A few other nationwide datasets have asked questions about leave-taking and workplace flexibility but limited to particular populations; the Centers for Disease Control and Prevention's Pregnancy Risk Assessment Monitoring System (PRAMS) data, for instance, asks postpartum mothers about workplace support, flexibility, and leave during and after their pregnancies.<sup>51</sup> In the absence of direct information on a broader population of respondents' access to leave and workplace flexibility, most prior empirical studies have instead focused on the effects of changes in state and local legislation mandating such benefits for workers.<sup>52</sup>

The most significant shortcoming of the ATUS Leave Module data is its small size. In essence, the Leave Module is a subsample (employed, wage and salary workers) of a subsample (the ATUS).<sup>53</sup> As a result, the Leave Module contains under 5000 observations each year. Because labor market participation rates are incredibly low among individuals with disabilities—less than 36% of disabled individuals ages

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49. The U.S. Bureau of Labor Statistics' National Longitudinal Surveys (NLSY) panel data do provide some information on participants' access to paid leave and flexible schedules. The shortcomings of these data are the small sample sizes, combined with the fact that they only examine a limited cohort of individuals from year to year (NLSY79 respondents were born between 1957 and 1964, and NLSY97 respondents were born between 1980 and 1984). Including a broad range of ages is meaningful when studying leave-taking and workplace flexibility since the motivations for needing these workplace benefits and usage levels are likely to vary significantly by age.

50. For a useful summary of federal datasets that have asked any questions about leave (and family leave in particular), see BARBARA GAULT, HEIDI HARTMANN, ARIANE HEGEWISCH, JESSICA MILLI & LINDSEY REICHLIN, INST. FOR WOMEN'S POL'Y RSCH., PAID PARENTAL LEAVE IN THE UNITED STATES 17–19 (2014), <https://iwpr.org/wp-content/uploads/2020/09/B334-Paid-Parental-Leave-in-the-United-States.pdf> [<https://perma.cc/X2EN-XBYJ>].

51. See, e.g., CTR'S FOR DISEASE CONTROL & PREVENTION, PRAMS PHASE 8 STANDARD QUESTIONS 6–8 (2017), <https://www.cdc.gov/prams/pdf/questionnaire/Phase-8-Standard-Core-Questions-508.pdf> [<https://perma.cc/98LZ-LDU6>].

52. See, e.g., Jennifer Bennett Shinall, *Protecting Pregnancy*, 106 CORNELL L. REV. 987 (2021) (focusing on the labor market effects of four types of pregnancy protection laws at the state level). The vast majority of papers have relied on the change in access to paid leave in California as the result of 2004 legislation. See Martha J. Bailey, Tanya S. Byker, Elena Patel, & Shanthi Ramnath, *The Long-Term Effects of California's 2004 Paid Family Leave Act on Women's Careers: Evidence from U.S. Tax Data*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 26416, Oct. 2019); Jessica E. Pac, Ann P. Bartel, Christopher J. Ruhm & Jane Waldfogel, *Paid Family Leave and Breastfeeding: Evidence from California*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 25784, 2019); Sarah Bana, Kelly Bedard, & Maya Rossin-Slater, *The Impacts of Paid Family Leave Benefits: Regression Kink Evidence from California Administrative Data*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 24438, 2019); Ann P. Bartel, Maya Rossin-Slater, Christopher J. Ruhm, Jenna Stearns, & Jane Waldfogel, *Paid Family Leave, Fathers' Leave-Taking, and Leave-Sharing in Dual-Earner Households*, 37 J. POL'Y ANALYSIS & MGMT. 10 (2018).

53. See BUREAU OF LAB. STAT., *supra* note 47.

sixteen to sixty-four participate in the labor market, compared with over 75% of nondisabled individuals<sup>54</sup>—the Leave Module only surveys about 150 disabled individuals annually. The size realities of the Leave Module render causal inference techniques difficult with the available data. Still, the Leave Module summary statistics alone can provide a great deal of insight into the relative availability of leave and job flexibility for disabled workers at the onset of the COVID-19 pandemic.

### III. ASSESSING THE ACCOMMODATION GAP

The analysis below includes all respondents to the Leave Module in 2017 and 2018; all estimates are weighted by the Leave Module population weight, which takes into account the ATUS's oversampling strategy in order to make the estimates nationally representative.<sup>55</sup> In all estimates, workers are classified as disabled if they self-identified as having one or more of the following limitations: a vision difficulty, hearing difficulty, personal care difficulty, difficulty performing activities outside the home, difficulty walking or climbing stairs, or a cognitive difficulty.<sup>56</sup> By its very nature, the ATUS's definition of disability is not fully coextensive with the ADA's definition of disability; it may be both overinclusive and underinclusive of individuals who are "substantially limit[ed in a] major life activity."<sup>57</sup> Although this lack of one-to-one correspondence with the ADA is an inherent problem with studying disability in the labor market empirically, the ATUS's definition is sufficiently robust to provide valuable insight with respect to a large number of disabled workers.<sup>58</sup> Finally, all estimates also separate men and women, given the substantial literature indicating that disability has differential (and perhaps, intersectional) effects based on gender.<sup>59</sup>

54. U.S. DEP'T OF LAB., OFF. OF DISABILITY EMP. POL'Y, DISABILITY EMPLOYMENT STATISTICS, <https://www.dol.gov/odep/topics/DisabilityEmploymentStatistics.htm> [<https://perma.cc/V5NV-2HM5>].

55. See BUREAU OF LAB. STAT., *supra* note 47, at 3.

56. The distribution of disabilities among the sample population is given in Appendix Table 1.

57. See 42 U.S.C. § 12102(1)(A).

58. Many labor market datasets, including the CPS prior to 2008, do not ask *any* questions about disability. See, *DIFFANY*, IPUMS CPS, [https://cps.ipums.org/cps-action/variables/DIFFANY#description\\_section](https://cps.ipums.org/cps-action/variables/DIFFANY#description_section) [<https://perma.cc/PBN6-DLWW>] (detailing that the question about "any difficulty" with vision, hearing, personal care, performing activities outside the home, walking or climbing stairs, or cognition was first asked in the June 2008 survey). Moreover, the ATUS's definition of disability is arguably more robust than other large, observational datasets. See, e.g., CTRS FOR DISEASE CONTROL AND PREVENTION, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM (2020), [https://www.cdc.gov/brfss/annual\\_data/2019/pdf/codebook19\\_llcp-v2-508.HTML](https://www.cdc.gov/brfss/annual_data/2019/pdf/codebook19_llcp-v2-508.HTML) [<https://perma.cc/8BKH-TQPU>] (asking about the presence of specific health conditions like hypertension, arthritis, and cancer, but not necessarily about the limitations associated with these conditions).

59. See, e.g., Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CAL. L. REV. 837 (2017); Jennifer Bennett Shinall, *The Substantially Impaired Sex*:

*A. Identifying Pandemic Accommodation Gaps*

Table 1 presents the demographics and basic labor market characteristics of the 2017–2018 Leave Module samples. On average (and in line with prior disability literature), disabled male and female workers are about five years older, are less likely to be married, are less likely to have children, have less education, and have lower hourly wages than their nondisabled counterparts. In terms of job characteristics, disabled workers have high rates of part-time work—disabled women are almost 50% more likely to work part-time than nondisabled women, and disabled men are almost twice as likely to work part-time as nondisabled men. According to Table 2, which presents summary statistics on worker leave access and usage, the gap in paid leave access is significant between disabled and nondisabled workers. Disabled men are approximately 12 percentage points (21%) less likely than nondisabled men to have access to paid leave in their workplaces, while disabled women are about 9 percentage points (16%) less likely than nondisabled women to have access to paid leave. The gaps in access to *unpaid* leave are smaller (and are statistically insignificant for women).

**Table 1. Demographic and Labor Market Characteristics of ATUS Leave Module Sample, by Gender and Disability Status, 2017–2018**

|                              | Nondisabled<br>Men | Disabled<br>Men | Nondisabled<br>Women | Disabled<br>Women |
|------------------------------|--------------------|-----------------|----------------------|-------------------|
| Age                          | 39.55*             | 45.08           | 40.47*               | 45.53             |
| White                        | 0.81               | 0.84            | 0.79                 | 0.79              |
| Black                        | 0.11               | 0.15            | 0.14                 | 0.14              |
| Asian                        | 0.06*              | 0.002           | 0.05                 | 0.03              |
| Hispanic                     | 0.19*              | 0.10            | 0.16                 | 0.11              |
| Married                      | 0.55*              | 0.42            | 0.52*                | 0.42              |
| Child Present                | 0.35*              | 0.20            | 0.37*                | 0.21              |
| Part-Time Worker             | 0.10*              | 0.27            | 0.21*                | 0.31              |
| Full-Time Worker             | 0.90*              | 0.73            | 0.79*                | 0.69              |
| Years of Education           | 14.18*             | 13.26           | 14.65+               | 14.27             |
| Job Has Paid Leave           | 0.70*              | 0.58            | 0.67*                | 0.58              |
| Job Has Unpaid Leave         | 0.78*              | 0.71            | 0.78                 | 0.83              |
| Job Has No Leave             | 0.07               | 0.09            | 0.07                 | 0.06              |
| Real Hourly Wage<br>(\$2018) | \$28.29*           | \$21.95         | \$23.30+             | \$20.19           |
| N                            | 4,460              | 166             | 4,647                | 153               |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. \* indicates a significant difference between disabled/nondisabled sample at 5% Level. + indicates a significant difference between disabled/nondisabled sample at 10% level. All estimates use the ATUS Leave Module sample weight.



**Table 2. Leave Access and Usage in ATUS Leave Module Sample, by Gender and Disability Status, 2017–2018**

|  | Nondisabled<br>Men | Disabled<br>Men | Nondisabled<br>Women | Disabled<br>Women |
|--|--------------------|-----------------|----------------------|-------------------|
| Job Has Paid Leave                             | 0.70*              | 0.58            | 0.67*                | 0.58              |
| Job Has Unpaid Leave                           | 0.78*              | 0.71            | 0.78                 | 0.83              |
| Job Has Any Leave                              | 0.93               | 0.91            | 0.93                 | 0.94              |
| Took Leave Last Week                           | 0.19               | 0.21            | 0.22*                | 0.32              |
| Ever Taken Unpaid Leave                        | 0.29               | 0.29            | 0.33+                | 0.39              |
| Needed to Take Leave Last<br>Month but Did Not | 0.07               | 0.07            | 0.10*                | 0.16              |
| N  | 4,460              | 166             | 4,647                | 153               |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. \* indicates a significant difference between disabled/nondisabled sample at 5% Level. + indicates a significant difference between disabled/nondisabled sample at 10% level. All estimates use the ATUS Leave Module sample weight.

More telling is the Leave Module data on working conditions, presented in Table 3. Although the statutory language of the ADA specifically suggests modified work conditions as a form of reasonable accommodation, disabled workers are less likely to have access to flexible working conditions at their jobs. Disabled male workers are 11 percentage points (58%) less likely to be able to work from home, and disabled female workers are 5 percentage points (20%) less likely to be able to work from home. Similarly, disabled male workers are 11 percentage points (24%) less likely to be able to work flexible hours, and disabled female workers are 17 percentage points (44%) less likely to have access to flexible hours. Moreover, disabled workers are more likely to be on the job at nontraditional hours. Disabled men are 6 percentage points (8%) less likely to work between 6:00 a.m. and 6:00 p.m., while disabled women are 8 percentage points (10%) less likely to work traditional hours. If disabled workers had greater access to flexible hours, then these statistics might be dismissed as disabled workers simply working when they felt able. But given that disabled workers are far less likely to have the luxury of flexible hours on the job, the statistic suggests that disabled workers may be working nonpreferred hours because these are the only jobs they can obtain.

**Table 3. Working Conditions in ATUS Leave Module Sample, by Gender and Disability Status, 2017–2018**

|                         | Nondisabled<br>Men | Disabled<br>Men | Nondisabled<br>Women | Disabled<br>Women |
|-------------------------|--------------------|-----------------|----------------------|-------------------|
| Able to Work from Home  | 0.30*              | 0.19            | 0.30                 | 0.25              |
| Ever Works from Home    | 0.16*              | 0.08            | 0.15+                | 0.10              |
| Never Works from Home   | 0.84*              | 0.92            | 0.85+                | 0.90              |
| Can Work Flexible Hours | 0.57*              | 0.46            | 0.56*                | 0.39              |
| Works Irregular Hours   | 0.03*              | 0.06            | 0.02                 | 0.02              |
| Works 6am – 6pm         | 0.83+              | 0.77            | 0.86*                | 0.78              |
| Works 2pm – 12am        | 0.06               | 0.09            | 0.04*                | 0.11              |
| Works 9pm – 8am         | 0.03               | 0.04            | 0.04                 | 0.05              |
| Works Irregular Shifts  | 0.03               | 0.06            | 0.02                 | 0.02              |
| N                       | 4,460              | 166             | 4,647                | 153               |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. \* indicates a significant difference between disabled/nondisabled sample at 5% Level. + indicates a significant difference between disabled/nondisabled sample at 10% level. All estimates use the ATUS Leave Module sample weight.

### *B. The Greater Usage Hypothesis*

Before jumping to the conclusion that disabled workers are relegated to the least accommodating jobs in the economy through little fault of their own, it is important to consider what is driving the disability gaps in flexible working conditions. One hypothesis may be that disabled workers take greater advantage of the workplace accommodations to which they have access, so employers avoid hiring them in the first place.<sup>60</sup> Yet little evidence in the Leave Module supports the hypothesis that disabled workers take relatively greater advantage of the workplace accommodations to which they have access. Returning to Table 3, disabled workers are less likely to work from home, even when they have the option, and they are more likely to report never working from home than are nondisabled workers. Moreover, according to Table 2, only disabled women—but *not* disabled men—are more likely to report taking leave last week or ever taking unpaid leave. Even still, disabled women are more likely to report coming into work, despite the fact that they needed to take leave last month.

In sum, little evidence exists to support the hypothesis that disabled workers systematically take greater advantage of their workplace benefits than do nondisabled workers. To the extent that employers offer disabled workers fewer pandemic-relevant benefits, another force besides perceived greater usage appears to be driving these gaps.

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60. For experimental evidence suggesting that decisionmakers avoid hiring disabled workers because of the potentially costly accommodation requirements that come along with them, see Shinall, *supra* note 31, at 655–61.

*C. The Part-Time Hypothesis*

Another potential driving force behind the disability gaps in working conditions may be the greater proportion of disabled workers working part-time hours. From a statutory perspective, part-time status excludes workers from most leave protections like the federal Family and Medical Leave Act (FMLA) and its state analogues.<sup>61</sup> On the other hand, part-time status should have no bearing on workers' protection under the ADA and its state analogues.<sup>62</sup> To explore the part-time hypothesis, Table 4 breaks down the gaps in working conditions by disability, gender, and full- or part-time status.

Undoubtedly, part-time workers as a whole are less likely to have access to workplace accommodations like paid leave and the ability to work from home. Indeed, Table 4 indicates that the availability of paid leave and working from home for full-time workers is more than three times the availability for part-time workers. Nonetheless, the gaps between disabled workers and nondisabled workers still exist, even when part-time status is taken into account. Part-time disabled workers are still less likely to be able to work from home or to work flexible hours than part-time nondisabled workers (note that the gaps are particularly large for women). Similarly, part-time disabled workers are also less likely to have access to paid leave than are part-time nondisabled workers. Thus, the results in Table 4 suggest that higher rates of part-time status are not principally responsible for disabled workers' lack of access to pandemic-relevant accommodations.

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61. *See* 29 U.S.C. § 2611(2)(A)(ii) (limiting FMLA coverage to workers who have worked at least 1250 hours during the prior year, which eliminates many part-time workers from coverage).

62. *See* 42 U.S.C. § 12111(5)(A) (limiting coverage to employees of employers with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," with no part-time employee status restriction).

**Table 4. Leave Access, Leave Usage, and Working Conditions in ATUS Leave Module Sample, by Gender, Disability, and Full- or Part-Time Status, 2017–2018**

|   | Men         |           |           |           | Women       |           |           |           |
|---|-------------|-----------|-----------|-----------|-------------|-----------|-----------|-----------|
|   | Nondisabled |           | Disabled  |           | Nondisabled |           | Disabled  |           |
|   | Full-Time   | Part-Time | Full-Time | Part-Time | Full-Time   | Part-Time | Full-Time | Part-Time |
| Job Has Paid Leave                          | 0.75        | 0.24      | 0.72      | 0.18      | 0.78        | 0.26      | 0.76      | 0.19      |
| Job Has Unpaid Leave                        | 0.77        | 0.86      | 0.74      | 0.62      | 0.77        | 0.85      | 0.80      | 0.89      |
| Job Has Any Leave                           | 0.94        | 0.87      | 0.98      | 0.71      | 0.94        | 0.90      | 0.96      | 0.90      |
| Can Work from Home                          | 0.32        | 0.11      | 0.24      | 0.07      | 0.33        | 0.17      | 0.33      | 0.06      |
| Can Work Flexible Hours                     | 0.56        | 0.63      | 0.42      | 0.55      | 0.54        | 0.64      | 0.37      | 0.43      |
| Works Irregular Hours                       | 0.02        | 0.04      | 0.08      | 0.01      | 0.02        | 0.03      | 0.003     | 0.04      |
| Took Leave Last Week                        | 0.20        | 0.16      | 0.24      | 0.11      | 0.24        | 0.18      | 0.30      | 0.37      |
| Ever Taken Unpaid Leave                     | 0.26        | 0.51      | 0.24      | 0.42      | 0.28        | 0.52      | 0.30      | 0.59      |
| Needed to Take Leave Last Month but Did Not | 0.07        | 0.06      | 0.05      | 0.13      | 0.10        | 0.10      | 0.17      | 0.14      |
| N   | 4,143       | 317       | 127       | 39        | 3,730       | 917       | 109       | 44        |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

#### *D. The Job-Type Hypothesis*

Instead of worker usage or part-time status, the disability gaps in access to paid leave and flexible working conditions may be driven by workers' occupation and industry. Some occupations and industries are more likely to provide such accommodations to all their workers—regardless of disability status—because they are more amenable to flexible work, they are more technologically advanced, or they are more progressive in employee benefit offerings.<sup>63</sup> If disabled workers are more

63. Economist Claudia Goldin has noted that some industries, such as law and banking, have been particularly slow to offer flexible working conditions—despite the obvious adaptability of both professions to such accommodations. See Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1117–18 (2014) (“Some changes have occurred organically, often due to economies of scale (as in the cases of physicians, pharmacists and veterinarians), some changes have been prompted by employee pressure (as in the case of various physician specialties such as pediatricians), and other

concentrated in occupations and industries unlikely to provide pandemic-relevant accommodations to all workers, then such segregation<sup>64</sup> could be responsible for the accommodation gaps seen in the aggregated data.

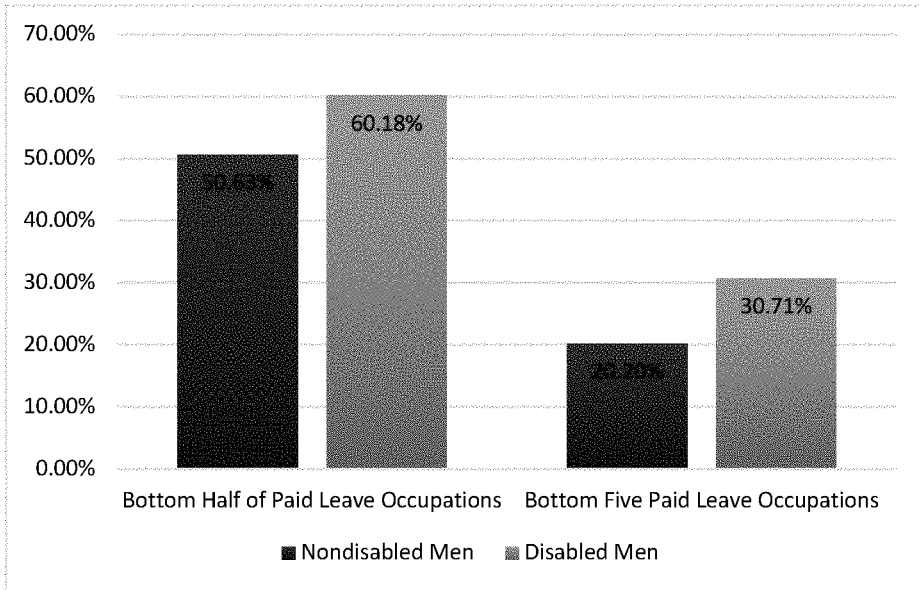
To explore this hypothesis, Appendix Table 2 provides the distribution of workers in each major census occupation category, by gender and disability status; Appendix Table 3 does the same thing for each major census industry category. In both tables, occupations and industries are ranked in order of propensity of providing workers with paid leave. As seen below in Figures 1 through 4, which summarize the principal findings of Appendix Tables 1 and 2, disabled workers are more likely to work in industries and, more especially, occupations in which paid leave is an uncommon employee benefit.

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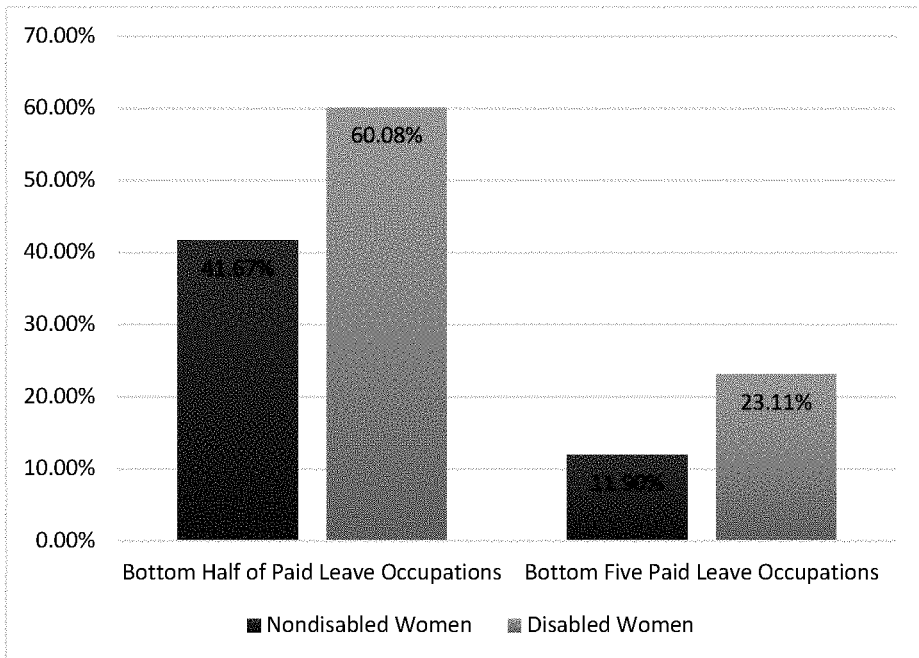
changes have occurred because firms want to reduce labor costs. Not all positions can be changed. There will always be 24/7 positions with on-call, all-the-time employees and managers, including many CEOs, trial lawyers, merger-and-acquisition bankers, surgeons, and the U.S. Secretary of State. But, that said, the list of positions that can be changed is considerable.”).

64. Here, I use the word “segregation” as economists use the term, to signify the overrepresentation of a particular group of workers in an occupation and/or industry. *See, e.g.,* Coral del Rio & Olga Alonso-Villar, *The Evolution of Occupational Segregation in the United States, 1940–2010: Gains and Losses of Gender–Race/ Ethnicity Groups*, 52 *DEMOGRAPHY* 967 (2015) (documenting trends in occupational segregation for women and minorities over seventy years); Bliss Cartwright, Patrick Ronald Edwards, & Qi Wang, *Job and Industry Gender Segregation: NAICS Categories and EEO–I Job Groups*, 134 *MONTHLY LAB. REV.* 37 (2011) (documenting industry segregation by gender in the 2008 EEO-I National Survey of Private Employers).

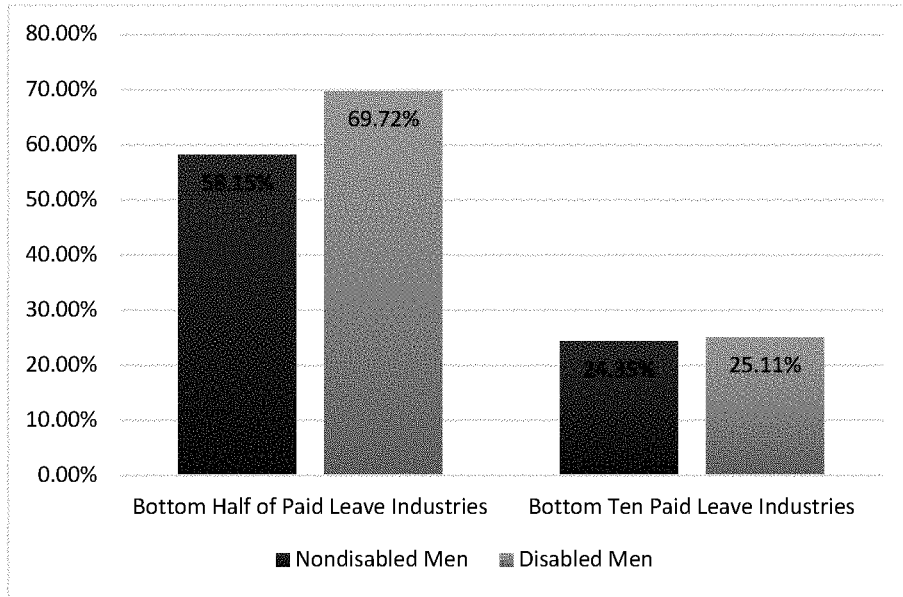
**Figure 1.** Concentration of Male Workers in Occupations with Low Rates of Paid Leave, by Disability Status



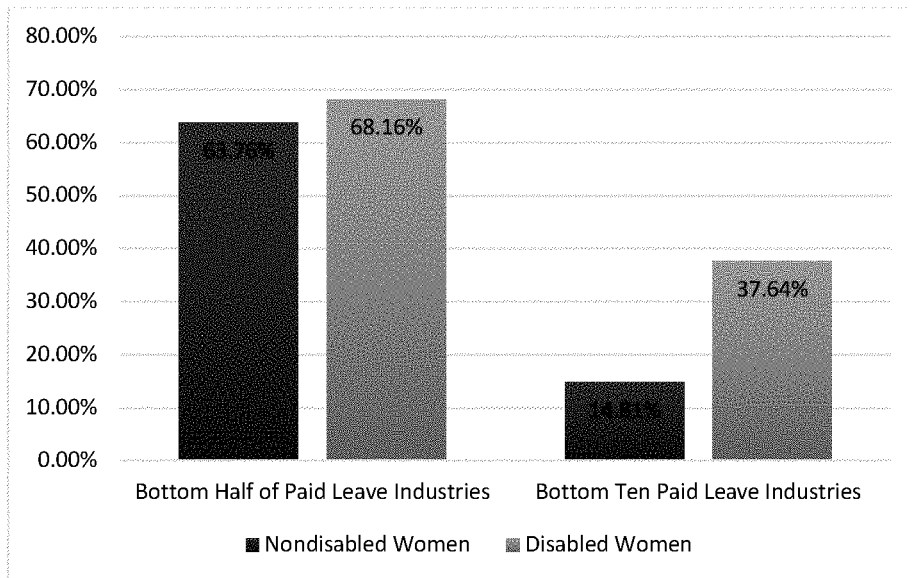
**Figure 2.** Concentration of Female Workers in Occupations with Low Rates of Paid Leave, by Disability Status



**Figure 3.** Concentration of Male Workers in Industries with Low Rates of Paid Leave, by Disability Status



**Figure 4.** Concentration of Female Workers in Industries with Low Rates of Paid Leave, by Disability Status



Figures 1 and 2 illustrate the relative concentrations of male and female disabled workers in occupations with low paid-leave rates. Each figure provides the relative concentration of disabled workers for both the bottom half of occupational categories (in terms of propensity of providing workers with paid leave) and the bottom five occupational categories. As both figures clearly illustrate, disabled workers are far more concentrated in occupations where paid leave is offered to workers at low rates. For instance, 31% of disabled men and 23% of disabled women work in the five occupational categories least likely to offer paid leave (compared with 20% of nondisabled men and 12% of nondisabled women).

Similarly, Figures 3 and 4 illustrate the relative concentrations of male and female disabled workers in industries with low paid-leave rates. Similar to the prior figures, Figures 3 and 4 provide the relative concentration of disabled workers for both the bottom half of industry categories (in terms of propensity of providing workers with paid leave) and the bottom ten industry categories.<sup>65</sup> These figures illustrate some, albeit lesser, segregation of disabled workers in low paid-leave industries. Figure 3 shows a slight concentration of disabled men in the bottom half of paid-leave industries (60% of disabled men versus 58% of nondisabled men). Yet Figure 4 illustrates that disabled women in particular are more concentrated in low paid-leave industries; 38% of disabled women work in the ten industry categories least likely to offer paid leave, compared with only 15% of nondisabled women.

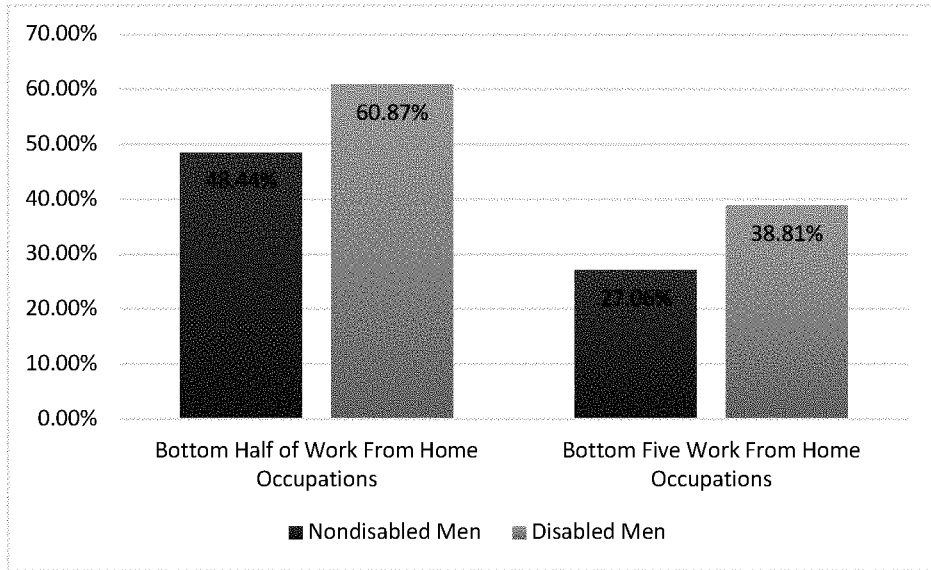
Appendix Tables 4 through 7 repeat the prior exercise of Appendix Tables 2 and 3 for access to work from home (Appendix Tables 4 and 5) and access to flexible work hours (Appendix Tables 6 and 7). These tables strengthen the conclusion that occupational segregation may play a significant role in disabled workers' low rates of access to pandemic-relevant accommodations. Once again, the principal results are summarized below in graphical form. Figures 5 through 8 illustrate the relative concentration of disabled workers in low work-from-home occupations and industries; Figures 9 through 12 illustrate the relative concentration of disabled workers in low flexible-hour occupations and industries.

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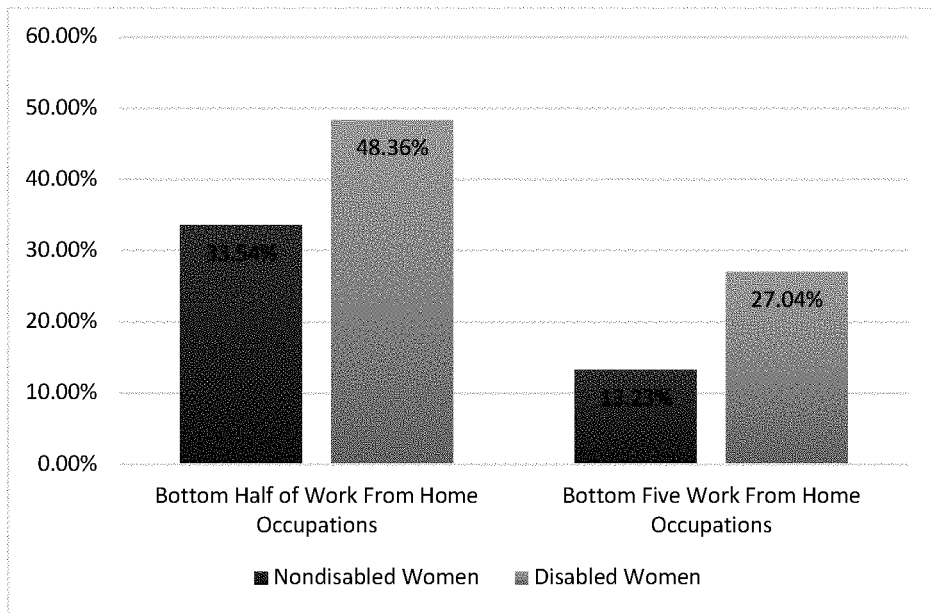
65. Because far more major industry categories exist than occupational categories (compare Appendix Tables 2 and 3), the concentration of workers in the bottom ten industry categories are reported here.



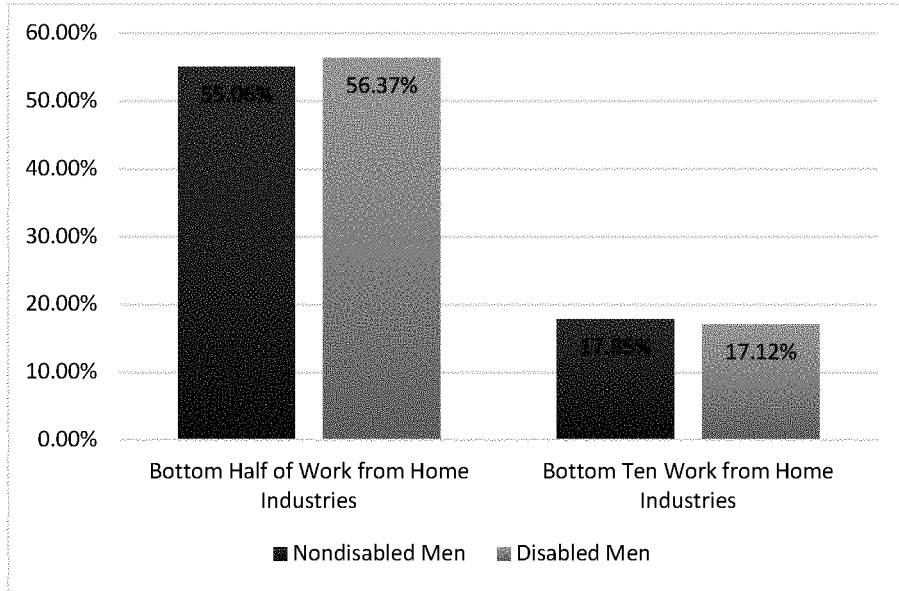
**Figure 5.** Concentration of Male Workers in Occupations with Low Rates of Work from Home, by Disability Status



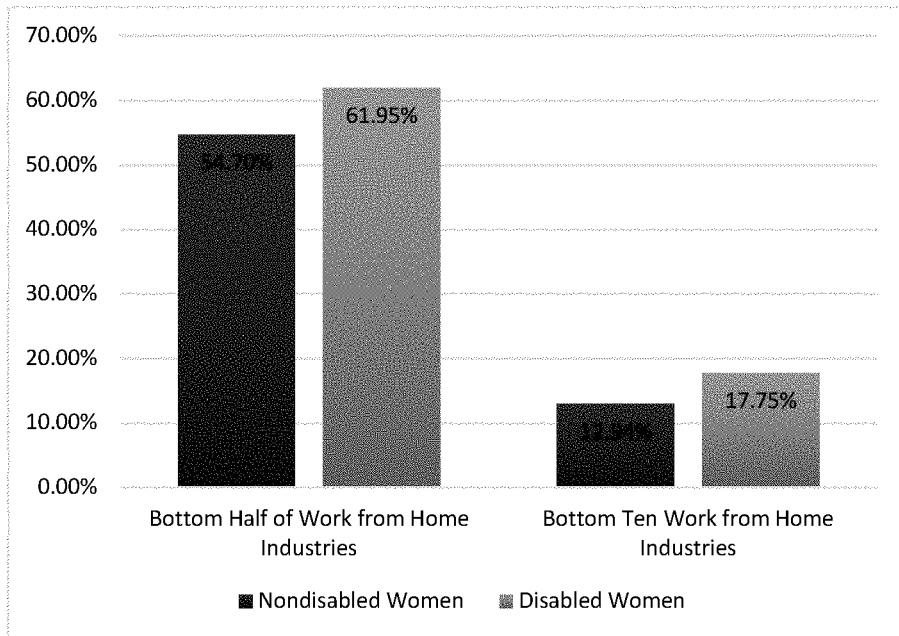
**Figure 6.** Concentration of Female Workers in Occupations with Low Rates of Work from Home, by Disability Status



**Figure 7.** Concentration of Male Workers in Industries with Low Rates of Work from Home, by Disability Status<sup>7</sup>

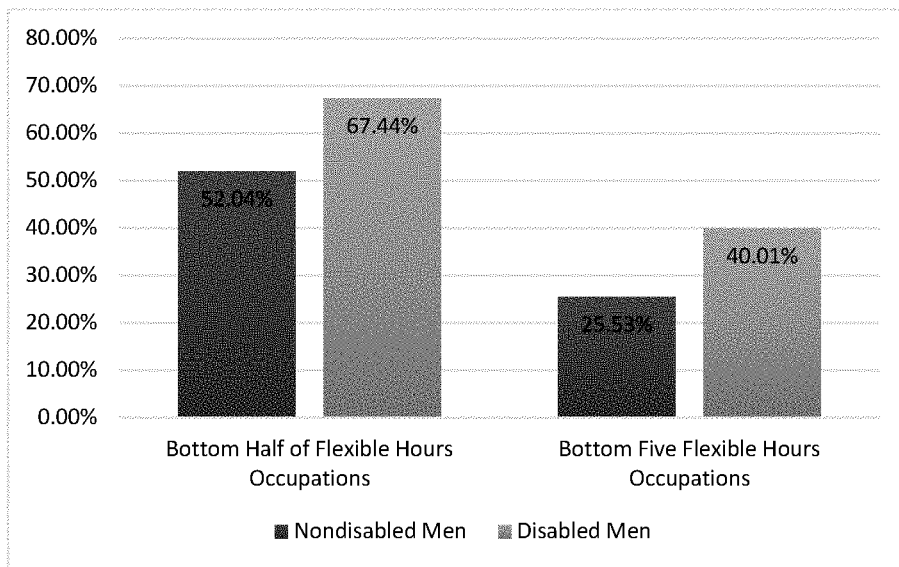


**Figure 8.** Concentration of Female Workers in Industries with Low Rates of Work from Home, by Disability Status

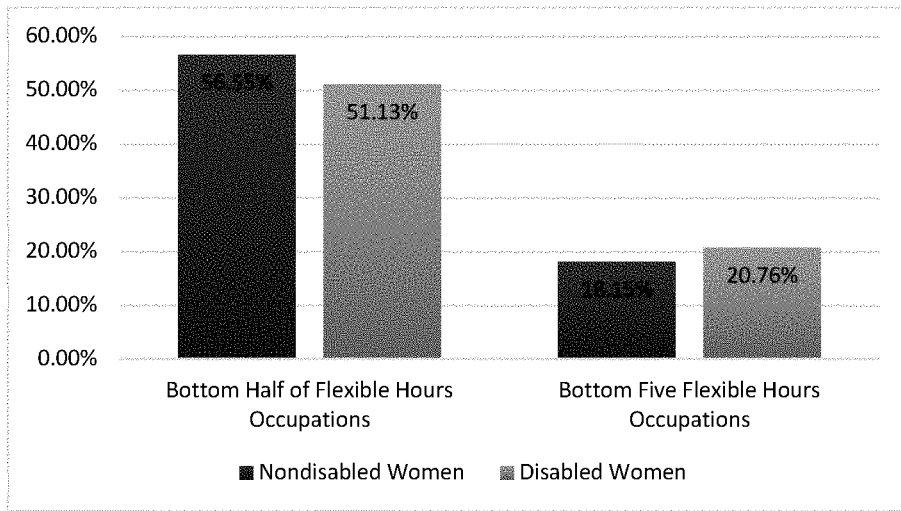


Turning first to Figure 5, disabled men are relatively concentrated in both the bottom half and the bottom five work-from-home occupations. For example, 39% of disabled men, compared to only 27% of nondisabled men, work in the bottom five work-from-home occupations—a difference of 12 percentage points, or 43%. The differential concentrations are even more dramatic for women in Figure 6; 27% of disabled women, versus 13% of nondisabled women, work in the bottom five work-from-home occupations—a difference of 14 percentage points, or 104%. The differential concentrations are less apparent by industry, as seen in Figures 9 and 10; disabled women appear to be slightly overrepresented in low work-from-home industries.

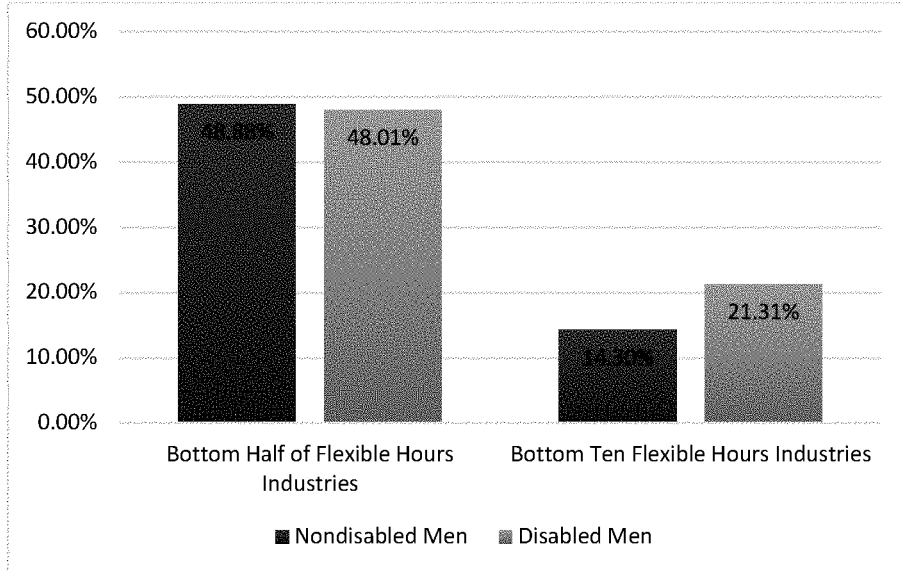
**Figure 9.** Concentration of Male Workers in Occupations with Low Rates of Flexible Hours, by Disability Status



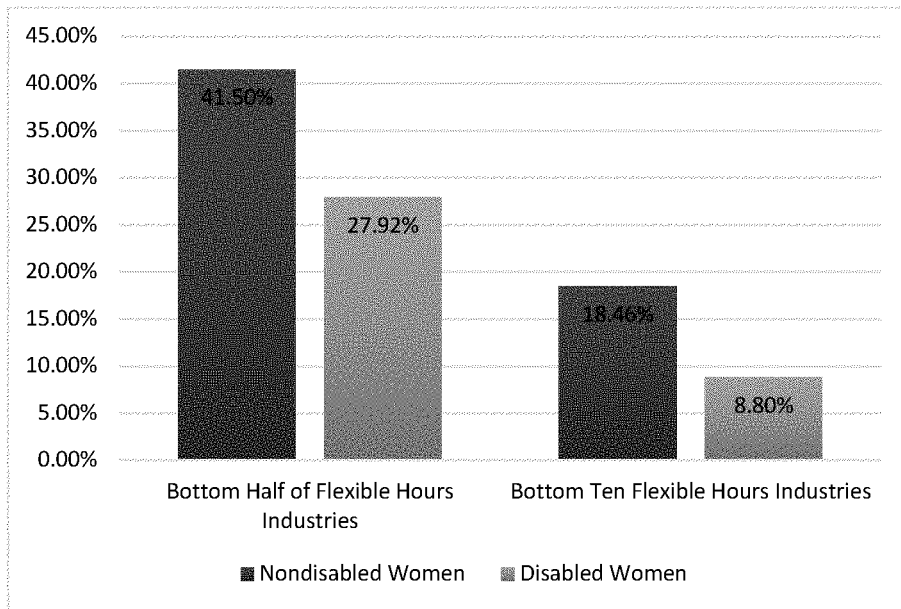
**Figure 10.** Concentration of Female Workers in Occupations with Low Rates of Flexible Hours, by Disability Status



**Figure 11.** Concentration of Male Workers in Industries with Low Rates of Flexible Hours, by Disability Status



**Figure 12.** Concentration of Female Workers in Industries with Low Rates of Flexible Hours, by Disability Status



Finally, Figures 9 through 12 indicate that disabled men, but not disabled women, are relatively overconcentrated in low flexible-hour occupations and industries. According to Figure 9, 40% of disabled men, versus 26% of nondisabled men, work in the bottom five flexible-hour occupations—a difference of 14 percentage points, or 57%. Moreover, as seen in Figure 11, 21% of disabled men, compared to 14% of nondisabled men, work in the bottom ten flexible-hour industries—a difference of 7 percentage points, or 49%.

Taken together, Figures 1 through 12 paint a picture of job-type segregation for disabled workers.<sup>66</sup> According to the 2017–2018 ATUS data, disabled workers were disproportionately concentrated in jobs that lacked pandemic-relevant accommodations prior to the onset of COVID-19. These data raise serious concerns regarding the plight of disabled workers during the pandemic—as they were apparently *less* prepared than were nondisabled workers for the dramatic changes in working conditions over the past year, in spite of the theoretical protections provided by the ADA. The next Section turns to consider why disabled workers are segregated in jobs with low rates of pandemic-relevant accommodations as well as further implications of this occupational and industry segregation.

66. Throughout this Article, the term segregation signifies the overrepresentation of a group of interest (here, disabled workers) in an occupation and/or industry. *See supra* note 64.

## IV. THE IMPLICATIONS OF JOB-TYPE SEGREGATION

The results from the ATUS Leave Module indicate that, prior to the outbreak of COVID-19, disabled workers had lower rates of access to the leave and flexibility accommodations in the workplace that would prove most useful during the pandemic. The prior Section found that much of this lack of access was the result of occupational and industry segregation; this Section considers what particular job types are driving the prior Section's results. Further insight into the job types in which disabled workers are disproportionately concentrated can reveal (1) why disabled workers had lower rates of access to relevant accommodations prior to COVID-19, and (2) whether the ADA is likely to provide additional relief to disabled workers during and after COVID-19. The results have concerning implications for disabled workers' fate in the absence of additional legal safeguards beyond the ADA.

*A. Uncovering the Job Types Driving Segregation*

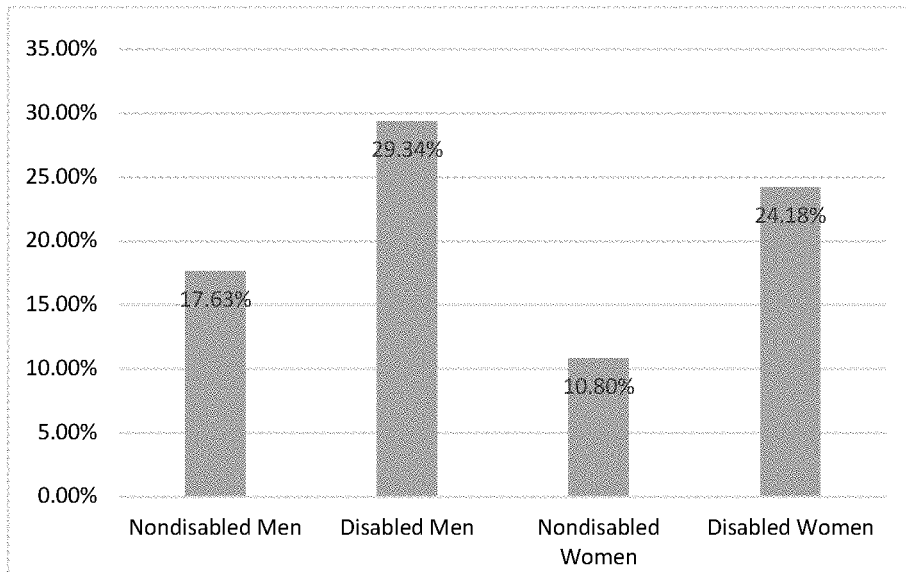
Determining the job types driving the lack of pandemic-relevant accommodations available to disabled workers requires reviewing workers' occupational and industry distributions more closely. A deeper dive into Appendix Tables 2 through 7 reveals three occupational categories in which disabled workers are consistently overrepresented: production occupations, building and grounds cleaning and maintenance, and food preparation and serving related occupations. Furthermore, all three occupational categories regularly appear in the bottom half of the accommodation provision lists. Production, maintenance, and food occupations are three of the five occupations least likely to allow working from home.<sup>67</sup> Similarly, maintenance and food occupations are two of the five occupations least likely to provide workers with paid leave,<sup>68</sup> while production and maintenance occupations are two of the five occupations least likely to provide workers with flexible hours.<sup>69</sup> Figure 13 illustrates just how overrepresented disabled workers are in production, maintenance, and food occupations, where pandemic-relevant accommodations have been historically difficult for workers to obtain.

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67. *See infra* Appendix Table 4.

68. *See infra* Appendix Table 2.

69. *See infra* Appendix Table 6.

**Figure 13.** Percent of Workers in Production, Maintenance, and Food Occupations

As seen in Figure 13, 29% of disabled men, as compared to 18% of nondisabled men work in either a production, maintenance, or food occupation—a differential of 11 percentage points, or 66%. The overrepresentation of disabled women in these three occupational categories is even more dramatic. Figure 13 demonstrates that 24% of disabled women, versus 11% of nondisabled women, work in production, maintenance, or food occupations—a differential of 14 percentage points, or 124%. Because these three occupational categories appear significantly responsible for the lack of pandemic-relevant accommodations available to disabled workers prior to the onset of COVID-19, the future implications for disabled workers in the midst of the pandemic are concerning. The very nature of these three occupations makes the availability of paid leave, working from home, and flexible hours questionable, even in the middle of a global pandemic.

### *B. The Role of the ADA in the Pandemic Labor Market*

Just because disabled workers had less access to pandemic-relevant accommodations prior to COVID-19, as seen in the ATUS data, does not automatically mean disabled workers have less access to such accommodations *during* COVID-19. As discussed in Section II, disabled workers are unique amongst other historically disadvantaged workers in having a legal right to employer-provided, reasonable accommodation under the ADA. Consequently, although disabled workers might have had less access to paid leave, working from home, and

flexible hours before the pandemic,<sup>70</sup> in theory, the ADA could have put disabled workers at a relative advantage to obtain such accommodations once the pandemic began.

But the very nature of the occupations in which disabled workers are concentrated makes this theory of relative advantage questionable. According to most federal courts' interpretation of the ADA, an accommodation must be both "efficacious and . . . proportional to costs," in order to be reasonable,<sup>71</sup> and an accommodation that is excessively costly creates an "undue hardship" on the employer.<sup>72</sup> As previously discussed in Section II, many courts will engage in cost-benefit analysis to assess whether an employer must provide a worker with the requested accommodation under the ADA. The onset of the pandemic may have significantly altered both sides of the cost-benefit analysis. With increased employer investments in remote work technology for all workers (regardless of disability status),<sup>73</sup> the cost of accommodating a disabled worker who needs increased job flexibility may have precipitously declined. At the same time, the benefits of increased worker hour and location flexibility may have steeply increased for many employers.

Yet there are reasons to be concerned that the cost-benefit analysis has *not* changed for many disabled workers during the pandemic. Returning to the occupational data on disabled workers presented in Figure 13, the occupational categories that appear to be driving the over-concentration of disabled workers in low-flexibility jobs include food preparation and serving, production occupations, and maintenance occupations. None of these occupations are amenable to working from home, flexible work hours, or increased leave access; in fact, a recent National Bureau of Economic Research working paper rates all three occupations as high physical proximity and low work from home.<sup>74</sup>

Indeed, the Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on Reasonable Accommodation ("Guidance"), which has historically skewed more liberal than federal court decisions under the ADA,<sup>75</sup> agrees that such

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70. See *infra* Section V.A.

71. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995); see also *Keith v. Cnty. of Oakland*, 703 F.3d 918, 927 (6th Cir. 2013).

72. 42 U.S.C. § 12111(10)(A). Federal circuits differ on whether the employee carries the burden of proving both reasonability and undue hardship, but they ultimately agree to evaluate the evidence presented based on cost-benefit analysis. Compare *Vande Zande*, 44 F.3d at 543 (placing the burden of proving both on the employee and using cost-benefit analysis), with *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995) (placing the burden of proving only reasonability on the employee and using cost-benefit analysis).

73. See, e.g., Annie Nova, *Working from Home? You Might Be Able to Expense a New Desk*, CNBC, <https://www.cnbc.com/2020/06/03/companies-are-paying-for-their-workers-home-offices.html> [<https://perma.cc/5VKM-68FL>] (June 8, 2020, 11:10 AM) ("Companies are paying for their remote employees' desks, chairs and computers and are instituting regular allowances for WiFi and phone costs.").

74. See Mongey et al., *supra* note 1, at 6.

75. Because the EEOC does not typically engage in the traditional notice-and-comment rulemaking process outlined in the Administrative Procedure Act, EEOC Guidance is typically awarded *Skidmore* (not *Chevron*) deference. *Accord Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) ("[The agency] urges that those views [in a guidance manual



jobs are the least conducive to flexible working conditions and remote work: “There are certain jobs in which the essential functions can only be performed at the work site—e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions.”<sup>76</sup> The Guidance goes on to call into question the reasonableness of both leave and flexible working hours as accommodations for disabled workers in such occupations: “If the result of modifying one employee’s work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship” and is not required by the ADA.<sup>77</sup> Given that food preparation and serving, production occupations, and maintenance occupations are largely dependent on working with others, work location, and work hours, even an event like the pandemic may not render job flexibility and leave accommodations reasonable accommodations for disabled workers.

Thus, to the extent that the gap in access to pandemic-relevant accommodations is driven by job-type segregation of disabled workers, the gap is unlikely to be remedied by the ADA. This access gap—and the ADA’s inability to remedy it—is particularly concerning since at least some disabled workers need access to workplace flexibility and leave more than ever before. Because some underlying health conditions place disabled workers at increased risk of morbidity and mortality upon contracting COVID-19,<sup>78</sup> lack of access to better working conditions raises grave concerns about disabled workers’ abilities to keep their jobs in the absence of greater access to leave and workplace flexibility.

### C. The Pandemic Labor Market in Real-Time Data

Unfortunately, the concerns raised in the prior Section are borne out by the early labor market data released since the pandemic’s onset. The monthly labor market data available from the CPS’s Outgoing Rotation Groups has been released through

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published by the EEOC] are entitled to deference under this Court’s decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).”) (emphasis omitted); *see also* Equal Emp. Opportunity Comm’n v. Flambeau, Inc., 846 F.3d 941, 948 (7th Cir. 2017) (“We recognize that that was the EEOC’s position and that the EEOC’s guidelines are an important ‘body of experience and informed judgment’ entitled to some deference. They are not, however, controlling law.”); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 n.5 (10th Cir. 1999) (“While the EEOC’s guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference.”).

76. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 14, at pt. 34.

77. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 14, at pt. 43.

78. *See, e.g., People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/67Q4-MLCX>] (Feb. 25, 2022) (listing a wide range of underlying health conditions that place individuals at increased risk of severe illness upon contracting COVID-19).

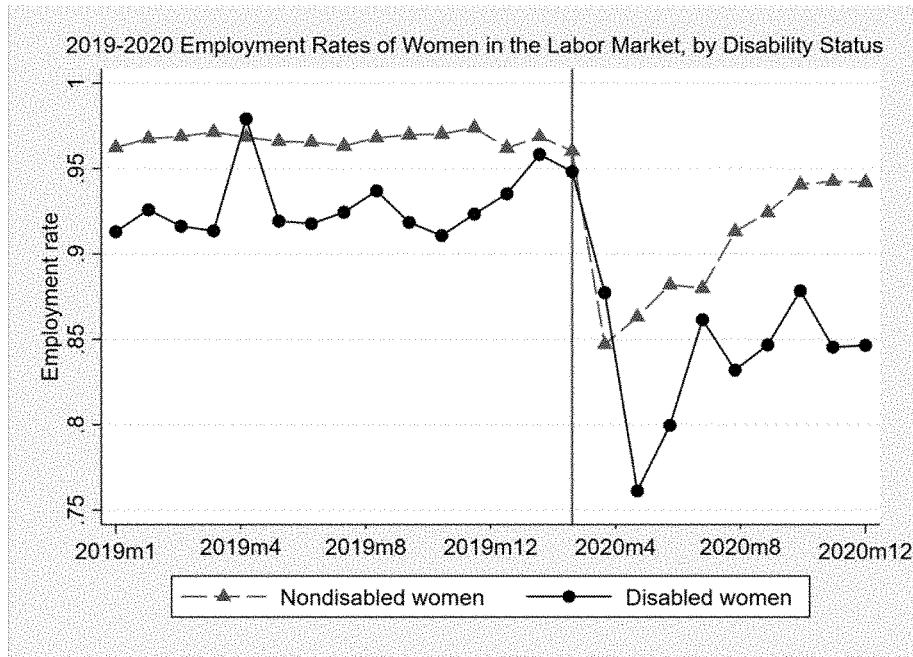
December 2020.<sup>79</sup> As seen in Figures 14 and 15, which graph employment rates by disability status for men and women, the employment disparity between disabled and nondisabled workers has widened substantially since the pandemic's onset.

**Figure 14.** 2019–2020 Employment Rates of Men in the Labor Market, by Disability Status



79. The Outgoing Rotation Group data include CPS participants who are in their fourth or eighth CPS interviews and, as a result, are asked additional labor market questions. See IPUMS CPS, *Outgoing Rotation Group/Earner Study User Notes*, [https://cps.ipums.org/cps/outgoing\\_rotation\\_notes.shtml](https://cps.ipums.org/cps/outgoing_rotation_notes.shtml) [<https://perma.cc/KQX7-FU76>].

**Figure 15.** 2019–2020 Employment Rates of Women in the Labor Market, by Disability Status



From January 2019 to February 2020, the employment rate of nondisabled men was 3.83 percentage points higher than the employment rate of disabled men. That disparity increased to 5.48 percentage points between March 2020 and December 2020—an increase of 43%.<sup>80</sup> Similarly, from January 2019 to February 2020, the employment rate of nondisabled women was 3.97 percentage points higher than the employment rate of disabled women. That disparity increased to 5.85 percentage points between March 2020 and December 2020—an increase of 46%.

CPS data limitations make it difficult to compare these numbers directly to prior recessions; unfortunately, the CPS only began collecting disability information from respondents midway through the Great Recession.<sup>81</sup> Still, what limited comparisons are possible indicate that the current pandemic-induced recession has been at least as

80. Note that the denominator of the employment rate calculations include currently employed individuals as unemployed individuals actively looking for work over the past four weeks, in accordance with the BLS's definition of labor market participation. *See How the Government Measures Unemployment*, U.S. BUREAU OF LAB. STATS. (Oct. 8, 2015), [https://www.bls.gov/cps/cps\\_htgm.htm](https://www.bls.gov/cps/cps_htgm.htm) [<https://perma.cc/NP86-C54J>].

81. The CPS first asked respondents about having a vision difficulty, hearing difficulty, personal care difficulty, difficulty performing activities outside the home, difficulty walking or climbing stairs, or a cognitive difficulty in June 2008. *See supra* note 58 and accompanying text.

harsh on disabled workers as was the Great Recession.<sup>82</sup> The CPS first collected disability information from respondents in June 2008—seven months into the Great Recession—making a comparison of employment rates for months seven through ten<sup>83</sup> of the Great Recession and the COVID-19 Recession possible. Table 5 presents this comparison below.

**Table 5. Comparative Employment Rates of Workers, by Gender and Disability Status, During Months Seven Through Ten of the Great Recession and the COVID-19 Recession**

|                       | Nondisabled<br>Men | Disabled<br>Men | Difference | Nondisabled<br>Women | Disabled<br>Women | Difference |
|-----------------------|--------------------|-----------------|------------|----------------------|-------------------|------------|
| Great<br>Recession    | 94.88%             | 88.74%          | 6.14%*     | 94.66%               | 90.32%            | 4.34%*     |
| COVID-19<br>Recession | 93.30%             | 88.55%          | 4.75%*     | 93.73%               | 85.43%            | 8.30%*     |

*Comparing the Disparity in Nondisabled/Disabled Employment Rates between the Great Recession and the COVID-19 Recession*

|                             | Men   | Women   |
|-----------------------------|-------|---------|
| Raw<br>Difference           | 1.40% | -3.96%* |
| Difference<br>with Controls | 1.79% | -3.62%* |

Notes: Employment rate estimates for months seven through ten of the Great Recession are constructed using the June 2008–September 2008 CPS Outgoing Rotation Group data. Employment rate estimates for months seven through ten of the COVID-19 Recession are constructed using the September 2020–December 2020 CPS Outgoing Rotation Group data. Additional controls in the difference with controls estimate include years of education, age, age squared, Hispanic, Black, Asian, presence of a child, married, major occupation category, major industry category, and state of residence. All estimates use CPS final sample weights. \* indicates a significant difference between disabled/nondisabled sample at 5% Level.

As seen in Table 5, the employment rate disparity between disabled and nondisabled workers was quite substantial during both the Great Recession and the COVID-19 Recession. Although the difference in employment rate disparities between the two recessions was not statistically significant for men, the disparity in employment rates has been substantially larger for disabled women during the COVID-19 Recession than during the Great Recession. The disparity in employment rates between nondisabled and disabled women during the current recession is nearly *double* the gap seen in the last recession.

In sum, the real-time data in Table 5 substantiates the concerns raised by the earlier ATUS Leave Module data: the COVID-19 Recession may be the worst recession yet for disabled workers, and especially for disabled female workers. To the extent that the current disparity in employment rates is driven by occupational

82. The Great Recession began in December 2007 and ended in June 2009. Robert Rich, *The Great Recession*, FED. RESRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-recession-of-200709> [<https://perma.cc/C33Q-65N3>].

83. The comparison ends at ten months since data on only ten months of the COVID-19 Recession are available.

segregation of all disabled workers, the ADA is unlikely to help reduce this disparity during the pandemic. Paid leave, work from home, and flexible hours will rarely be reasonable accommodations for workers in production, food, and maintenance occupations. Thus, to the extent that a disabled worker in such occupations needs to work from home, to work flexible hours, or to take paid leave because of the pandemic, that worker may be forced to make a tough choice—sacrifice their personal health and caretaking needs or sacrifice their job. The current plight of disabled workers during COVID-19 illustrates that the ADA cannot be enough, on its own, to eliminate the disparity in labor market outcomes of disabled and nondisabled workers.

#### V. THE INHERENT LIMITATIONS OF THE ADA

Congress had grandiose goals when passing the ADA in 1990, which included “invok[ing] the sweep of congressional authority”<sup>84</sup> to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency”<sup>85</sup> for individuals with disabilities. Congress’s vision was equally sweeping in the ADA Amendments Act of 2008, which sought to implement “a broad scope of protection to be available under the ADA.”<sup>86</sup> Yet despite the best intentions, the ADA remains insufficient for many disabled individuals in the labor market. The experience of COVID-19 illuminates many of the Act’s critical failures. Disabled individuals disproportionately lack access to the types of accommodations most workers want (and, often, require) to stay in the labor market during the pandemic. The occupational segregation of disabled workers ensures that this access gap is unlikely to close during the pandemic. Critically, the ADA is incapable of closing this access gap; the Act can do very little, if anything, to aid disabled workers whose jobs are less compatible with paid leave, work from home, and flexible hours. As seen in Section V.C, employment is already declining for disabled workers, relative to nondisabled workers, at rates that may exceed prior recessions.<sup>87</sup> But the ADA can do nothing about it.

By no means is this Article the first to draw attention to the insufficiency of the ADA.<sup>88</sup> This Article is not even *my* first attempt to draw attention to the insufficiency

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84. 42 U.S.C. § 12101(b)(4).

85. *Id.* § 12101(a)(7).

86. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553.

87. Employment rates appear to be particularly poor for disabled women in this recession, as compared to the Great Recession. *See supra* Table 5.

88. *See, e.g.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) (arguing that courts have failed to take into account the third-party externalities of reasonable accommodations, and thus undersupplied them); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397 (2000) (arguing that courts should take a subordination-focused approach to interpreting the ambiguous definition of disability in the 1990 version of the ADA); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999) (using the social model of disability to criticize the restrictive definition of disability adopted by courts under the 1990 version of the ADA); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the Disability*

of the ADA.<sup>89</sup> Although legal scholars have largely blamed the ADA's shortcomings on courts' restrictive statutory interpretation,<sup>90</sup> a long line of economics literature has questioned the viability of the ADA's reasonable accommodation model.<sup>91</sup> The plight of disabled workers during COVID-19 lends credence to the economics critique, suggesting that the ADA's limitations go beyond restrictive interpretations by federal courts. Disabled workers are the only workers legally entitled to workplace accommodation,<sup>92</sup> and yet, they continue to lack access to the most necessary accommodations during the pandemic. Thus, the COVID-19 experience highlights how the ADA cannot be a complete solution for disabled workers; it can never, by itself, achieve Congress's lofty goals for the statute.

#### A. Targeted Aid During the COVID-19 Pandemic

The precise legislation needed to supplement the ADA is a more difficult question, but existing legislative models at the state and federal levels provide some insight. In terms of the current moment, the CPS employment data from the pandemic, presented in Section V.C., indicate that disabled workers are worthy candidates for targeted COVID-relief programs. Already Congress has passed legislation that targets individuals of lower socioeconomic status; both stimulus checks, for example,

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*Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999) (arguing that the ambiguous definition of disability in the 1990 Act, and courts' subsequently restrictive interpretations of it, should be amended legislatively).

89. See, e.g., Shinall, *Anticipating Accommodation*, *supra* note 31 (using experimental evidence to argue that the employer ambiguity perpetuated by the ADA's information restrictions makes employers hesitant to hire disabled workers); see also Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, *supra* note 42, at 2 (finding no evidence that obese individuals, who should have been positively impacted by the ADAAA, have improved employment outcomes); Shinall, *The Pregnancy Penalty*, *supra* note 42, at 802–03 (finding no evidence that pregnant women with complications, who should have been positively impacted by the ADAAA, have improved employment outcomes).

90. See *supra* note 88. One recent exception to the general tendency of legal scholars to focus their criticisms on courts' interpretation—as opposed to the ADA model itself—is Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826 (2021) (arguing that the bargaining inequities inherent in the employer-employee relationship render reasonable accommodation mandate ineffective). Otherwise, the legal scholarship that has previously questioned the ADA model itself has primarily come from interdisciplinary law and economics scholars. See, e.g., Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000) (arguing that a reasonable accommodation mandate will lower employment levels of the targeted group since this group has now become relatively costlier to employ); see also *supra* note 89.

91. See, e.g., Acemoglu & Angrist, *supra* note 42, at 926–49 (finding that the ADA decreased employment rates of disabled workers); DeLeire, *supra* note 42, at 701 (finding a decline in employment and wages of disabled men following the passage of the ADA); Hotchkiss, *supra* note 42 (finding no change in employment rates of disabled workers after the ADA after accounting for changes in labor market participation); Kruse & Schur, *supra* note 7 (finding employment rate results were sensitive to the definition of disability).

92. See *supra* Section II.

were only mailed to Americans below a certain income threshold.<sup>93</sup> Similarly, President Biden's administration has recently announced a fourteen-day exclusive application period to the Paycheck Protection Program for businesses with fewer than twenty employees, in hopes that this exclusive period will assist the neediest businesses as well as minority-owned businesses.<sup>94</sup> Yet, thus far, neither administrative nor legislative actions have specifically targeted disabled workers (or the businesses that employ them), even though the data presented throughout Section V suggest that disabled workers may be in particular need of additional relief.<sup>95</sup>

Temporary, targeted aid would certainly be welcomed by disabled workers affected by the COVID-19 pandemic. The problem, of course, with such relief programs is that their relief is temporary; they fail to address the long-term, systemic issues that plague individuals with disabilities in the labor market. Disabled workers who lack paid leave, work from home, and flexible hours accommodations currently face a difficult choice between protecting their health and protecting their job during the current pandemic. *But there are likely to be additional pandemics in the future.* Because the majority of new human diseases are zoonotic in nature (i.e. they derive from animals),<sup>96</sup> many global health experts believe the next public health crisis

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93. The first pandemic stimulus checks paid the full amount (\$1,200) to single filers who earned less than \$75,000 in 2019, paid a scaled-down amount to single filers who earned between \$75,000 and \$99,000 in 2019, and paid nothing to single filers who earned more than \$99,000 in 2019. The second pandemic stimulus checks paid the full amount (\$600) to single filers who earned less than \$75,000 in 2019, paid a scaled-down amount to single filers who earned between \$75,000 and \$87,000 in 2019, and paid nothing to single filers who earned more than \$87,000 in 2019. See Javier Simon, *Coronavirus Stimulus Checks: How Much You'll Get, and When*, SMARTASSET (Feb. 4, 2021), <https://smartasset.com/financial-advisor/coronavirus-stimulus-checks-how-much-will-you-get> [<https://perma.cc/B77Q-T795>].

94. See Morgan Chalfant, *Biden Readies Changes to PPP to Prioritize Small, Minority-Owned Businesses*, THE HILL (Feb. 22, 2021, 5:00 AM), <https://thehill.com/homenews/administration/539811-biden-readies-changes-to-ppp-to-prioritize-small-minority-owned?rl=1> [<https://perma.cc/KYU9-FKMA>]; see also Presidential Statement on Biden-Harris Administration Increases Lending to Small Businesses in Need, Announces Changes to PPP to Further Promote Equitable Access to Relief (Feb. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/22/fact-sheet-biden-harris-administration-increases-lending-to-small-businesses-in-need-announces-changes-to-ppp-to-further-promote-equitable-access-to-relief/> [<https://perma.cc/Y9AV-3WLG>].

95. The need for additional support for disabled workers may persist even after the pandemic concludes. According to a survey of employers conducted by the National Organization of Disability, many still lack adequate disability accommodation processes and disability training for human resources officials. See Allen Smith, *A Million People with Disabilities Have Lost Jobs During the Pandemic*, SOC'Y FOR HUM. RES. MGMT. (Aug. 28, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-unemployment-people-with-disabilities.aspx> [<https://perma.cc/9BPR-G3UP>] ("A survey by NOD of 200 organizations that collectively employ 8.7 million people found that the road back to employment may be difficult for laid-off workers with disabilities, as many companies lack disability-inclusive cultures.").

96. See, e.g., John L. Gittleman, *Preparing Now for the Next Great Pandemic*, WALL ST. J. (Feb. 22, 2021, 3:25 PM), <https://www.wsj.com/articles/preparing-now-for-the-next-great-pandemic-11614025516> [<https://perma.cc/DX5J-HDTE>] ("We know that over 62% of human

could be around the corner.<sup>97</sup> As a result, relying exclusively on temporary aid programs is not only expensive, but short-sighted.

### B. Short-Term Disability Insurance

Fortunately, a legislative model already exists at the state level to aid disabled workers in times of crisis—whether that crisis is a public health emergency or a personal health emergency. Five U.S. states (California, Hawaii, New Jersey, New York, and Rhode Island) and one territory (Puerto Rico) mandate short-term disability insurance coverage for all workers.<sup>98</sup> In the event that a health condition renders an employee temporarily unable to work, these programs reimburse a percentage of the employee’s prior weekly earnings during the period of incapacity.<sup>99</sup> Some state insurance programs additionally support employees whose work capacity is diminished, but not completely destroyed, through support of part-time work and intermittent work.<sup>100</sup> The existing state disability insurance programs are all funded through a payroll tax, the burden of which is split by the employer and employee in some states, or borne entirely by the employee in other states.<sup>101</sup> To qualify for short-term disability benefits, employees apply to the state with a description of their condition, attaching supporting documentation from a health care provider.<sup>102</sup>

emerging diseases derive from zoonoses.”); Jim Robbins, *Heading Off the Next Pandemic*, KAISER HEALTH NEWS (Jan. 4, 2021), <https://khn.org/news/infectious-disease-scientists-preventing-next-pandemic/> [https://perma.cc/8J2S-C53C] (“The spillover of animal, or zoonotic, viruses into humans causes some 75% of emerging infectious diseases.”).

97. See Tom Frieden, *Will We Be Ready for the Next Pandemic?*, WALL ST. J. (Feb. 12, 2021, 11:01 AM), [https://www.wsj.com/articles/will-we-be-ready-for-the-next-pandemic-11613145677?mod=article\\_inline](https://www.wsj.com/articles/will-we-be-ready-for-the-next-pandemic-11613145677?mod=article_inline) [https://perma.cc/5UWU-CSTV] (“We can’t know the character or the timing of the threats ahead, but they are inevitable. There is no time to lose in making preparations.”); Robbins, *supra* note 96 (“Researchers say the clock is ticking.”); see also Dennis R. Burton & Eric J. Topol, *Variant-Proof Vaccines—Invest Now for the Next Pandemic*, NATURE (Feb. 8, 2021), <https://www.nature.com/articles/d41586-021-00340-4> [https://perma.cc/D2MX-MFTR] (“The next pathogen to emerge might be less accommodating.”).

98. See Shinall, *supra* note 52, at 997–98 tbl.1 (providing the enactment dates for all short-term disability insurance mandates in the United States).

99. Reimbursement rates vary widely between state programs, but programs typically provide at least half of the employee’s weekly earnings prior to incapacity. See Shinall, *The Pregnancy Penalty*, *supra* note 42, at 821–22.

100. See, e.g., *Part-Time/Intermittent/Reduced Work Schedule*, EMP. DEV. DEP’T, STATE OF CAL., [https://edd.ca.gov/Disability/Part-time\\_Intermittent\\_Reduced\\_Work\\_Schedule.htm](https://edd.ca.gov/Disability/Part-time_Intermittent_Reduced_Work_Schedule.htm) [https://perma.cc/B5FY-J4J9] (Aug. 1, 2021) (“If your work hours must be reduced as the result of a disability or family care, and you have a wage loss due to being unable to perform your regular or customary work for at least eight consecutive days, you may be eligible to receive DI or PFL benefits.”).

101. See Shinall, *The Pregnancy Penalty*, *supra* note 42, at 825 (noting that the *employee* bears the entire burden of contribution in California and Rhode Island but shares the burden with employer in New Jersey).

102. See, e.g., N.J. Div. of Temp. Disability & Fam. Leave Ins., *Approved Medical*



Upon successful application, all six programs provide at least half a year of disability benefits; indeed, the State of California provides a full year of benefits.<sup>103</sup> A full year of benefits would have been sufficient to get a disabled worker through most of the COVID-19 pandemic.<sup>104</sup> Even with half a year of benefits, a disabled worker who lacked accommodations such as paid leave, work from home, and flexible hours would have had ample time to search for a more accommodating new job. None of these state insurance programs penalize an employee for accepting a

*Practitioners and Healthcare Providers*, N.J. DEP'T OF LAB. & WORKFORCE DEV., <https://www.myleavebenefits.nj.gov/labor/myleavebenefits/worker/resources/approvedmedicalpractitioners.shtml> [<https://perma.cc/LAC9-UUS5>] (providing a list of eligible health-care providers to support an employee's application for short-term disability benefits).

103. Puerto Rico, New York, New Jersey, and Hawaii provide up to twenty-six weeks of disability insurance benefits. *DI 52135.215 Puerto Rico Public Disability Benefits (PDB)*, U.S. SOC. SEC. ADMIN. (Sept. 25, 2008), <https://secure.ssa.gov/poms.nsf/lnx/0452135215> [<https://perma.cc/F6E7-JC5H>] (describing the main features of the Puerto Rico program); N.Y. STATE WORKERS' COMP. BD., *A GUIDE TO DISABILITY BENEFITS 2* (2020), [http://www.wcb.ny.gov/content/main/TheBoard/DB\\_BenefitGuide\\_P20.pdf](http://www.wcb.ny.gov/content/main/TheBoard/DB_BenefitGuide_P20.pdf) [<https://perma.cc/5AC4-CUMG>] (describing the main features of the New York program); N.J. Div. of Temp. Disability & Fam. Leave Ins., *Expectation vs. Reality: When Limitations Affect Your Disability Benefits*, N.J. DEP'T OF LAB. & WORKFORCE DEV., <https://www.myleavebenefits.nj.gov/worker/resources/benefitlimits.shtml> [<https://perma.cc/BML3-697G>] (describing the limitations on the New Jersey program); *About Temporary Disability Insurance*, STATE OF HAW. DISABILITY COMP. DIV., <https://labor.hawaii.gov/dcd/home/about-tdi/> [<https://perma.cc/8GRW-H49F>] (describing the main features of the Hawaii program). Rhode Island provides up to thirty weeks of disability insurance benefits. *Temporary Disability (TDI) FAQ*, STATE OF R.I. DEP'T OF LAB. & TRAINING, <https://dlt.ri.gov/tdi/faq/> [<https://perma.cc/FU3P-ALUM>] (Dec. 30, 2021) (describing the main features of the Rhode Island program). California provides up to fifty-two weeks of disability insurance benefits. *Disability Insurance – Benefits and Payments FAQs*, EMP. DEV. DEP'T, STATE OF CAL., <https://edd.ca.gov/Disability/faqs-benefits-payments.htm> [<https://perma.cc/98Z3-2D5X>] (July 2, 2021) (describing the main features of the California program).

104. This statement is especially true since many states expect to open up COVID-19 vaccination to individuals with underlying health conditions by March 2021. *See, e.g., Governor Cuomo Updates New Yorkers on State Vaccination Program*, N.Y. STATE (Feb. 23, 2021), <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-state-vaccination-program-17> [<https://perma.cc/C7FU-WJDE>] (opening New York vaccination appointments to individuals with underlying health conditions in February 2021); *Hamilton County Adds Groups, Those Over 75 to Vaccine Distribution List*, WTVC (Dec. 30, 2020), <https://newschannel9.com/news/coronavirus/hamilton-county-adds-groups-those-over-75-to-vaccine-distribution-list> [<https://perma.cc/8Y9N-SE6R>] (predicting the eligibility of individuals with underlying health conditions in Tennessee for vaccine appointments in March 2021); *see also* Jacqueline Howard, *COVID-19 Vaccination Is Key for People with Underlying Health Conditions, But Access Varies State to State*, CNN, <https://www.cnn.com/2021/02/12/health/covid-19-vaccine-comorbidities-states-cnn-analysis-wellness/index.html> [<https://perma.cc/H7WA-9EA3>] (Feb. 12, 2021, 6:52 PM) (describing state-by-state variation in access to vaccines for individuals with underlying health conditions).

new, better-fit job during the disability benefits receipt period.<sup>105</sup> Better yet, these programs have the flexibility to support disabled workers throughout a wide variety of health-related, adverse events. Usage of these benefits does not preclude usage of these benefits for a future health event.<sup>106</sup> Furthermore, these benefits are available to workers both in times of public health crises (including the current or future pandemics)<sup>107</sup> and in times of private-health crises (including a new diagnosis or acute health event).<sup>108</sup> In future research—and once more postpandemic data become

105. In addition, note that, under these programs, an employee's job is *not* legally protected if the period of temporary incapacitation exceeds the protection period provided by the FMLA or its state analogues. *See, e.g.*, N.J. Div. of Temp. Disability & Fam. Leave Ins., *FAQ: Temporary Disability Insurance*, N.J. DEP'T OF LAB. & WORKFORCE DEV., <https://www.myleavebenefits.nj.gov/help/faq/tdi.shtml#:~:text=The%20New%20Jersey%20Temporary%20Disability,Medical%20Leave%20Act%20> [<https://perma.cc/VN7B-VJDN>] (“The New Jersey Temporary Disability Insurance Law does not require an employer to hold a job for someone who is receiving Temporary Disability Insurance benefits. However, you may have job protection rights under the federal Family and Medical Leave Act (FMLA).”); N.Y. STATE WORKERS’ COMP. BD., *supra* note 103, at 1 (“Employees who change jobs from one ‘covered’ employer to another ‘covered’ employer are protected from the first day on the new job. Generally, eligible employees do not lose protection during the first 26 weeks of unemployment, provided they are eligible for and claiming unemployment insurance benefits.”).

106. An additional concern that may arise with respect to these benefits is that they could disincentivize disabled workers from ever returning to work. Three key aspects of these programs work against such disincentive. First, unlike federal Social Security disability benefits, state disability insurance benefits are *temporary*, lasting a maximum of one year and requiring a new, independent health event for each application. *See supra* note 103 and accompanying text. Second, the reimbursement rates for all state disability insurance programs are less than 100% of prior wages (in fact, the highest reimbursement rate is in California’s program, which provides up to 70% of prior wages). *See supra* note 99 and accompanying text; *see also Disability Insurance Benefit Payment Amounts*, EMP. DEV. DEP’T, STATE OF CAL., [https://edd.ca.gov/Disability/Calculating\\_DI\\_Benefit\\_Payment\\_Amounts.htm](https://edd.ca.gov/Disability/Calculating_DI_Benefit_Payment_Amounts.htm) [<https://perma.cc/CDT3-4TD2>] (Dec. 9, 2021) (“Your Weekly Benefit Amount (WBA) depends on your annual income. It is estimated as 60 to 70 percent of the wages you earned 5 to 18 months before your claim start date . . .”). Third, the programs do not stand in the way of disabled workers searching for new, better-fit jobs by allowing workers to maintain their temporary benefits, even in the event that they quit their former job and accept a new job during the period of incapacity. *See supra* note 105 and accompanying text.

107. Indeed, some state disability insurance websites explicitly include statements about worker eligibility for benefits because of the COVID-19 pandemic. *See, e.g.*, N.J. Div. of Temp. Disability & Fam. Leave Ins., *supra* note 105 (“[I]f your healthcare provider certifies that you are unable to work because you were diagnosed with COVID-19 or are at high risk for COVID-19 due to an underlying health condition, you may be eligible for Temporary Disability benefits.”); *New York Paid Family Leave COVID-19: Frequently Asked Questions*, N.Y. STATE, <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs> [<https://perma.cc/GK7C-V7QA>] (allowing disability insurance benefits for employees unable to work because of COVID-19).

108. *See, e.g.*, N.J. Div. of Temp. Disability & Fam. Leave Ins., *Temporary Disability Insurance*, N.J. DEP’T OF LAB. & WORKFORCE DEV.,

available—I plan to test empirically whether workers in states with mandatory short-term disability insurance have enjoyed better labor market outcomes than workers in states without mandatory insurance.

### C. Job-Training Programs

Besides mandatory short-term disability insurance, an even longer-term solution for disabled workers would target the critical issue of job-type segregation. In particular, occupational segregation is a key reason that disabled workers lack access to pandemic-relevant accommodations. As long as disabled workers remain overrepresented in occupations such as production, food preparation and serving, and building and grounds cleaning maintenance, they will continue to be poorly equipped to deal with future personal- and public-health crises, relative to nondisabled workers. Such occupations are unlikely ever to become amenable to accommodations such as paid leave, work from home, and flexible hours.<sup>109</sup>

Consequently, a more sustainable solution, which could reduce long-term reliance on governmental aid, is more comprehensive job-training and schooling programs targeted toward individuals with disabilities. Already, the U.S. Department of Labor awards grants to a patchwork of state, local, and private programs aimed at increasing employment of individuals with disabilities.<sup>110</sup> Additionally, the Social Security Administration administers the Ticket to Work Program, which connects individuals receiving long-term Social Security disability benefits with job placement programs, career-counseling programs, and vocational-rehabilitation agencies.<sup>111</sup> These existing programs are certainly steps in the right direction and have been responsible for many individuals with disabilities returning to the labor force.<sup>112</sup>

Yet these programs do little to help disabled workers move into the types of jobs that will provide them with paid leave, work from home, and flexible hours. Jobs that provide such benefits tend to be higher paying and white-collar; more importantly,

<https://www.myleavebenefits.nj.gov/labor/myleavebenefits/worker/tdi/> [<https://perma.cc/9KBJ-MKQ4>] (listing “When You’re Sick, Injured, or Post-Surgery” as qualifying events); *Disability Insurance Eligibility Requirements*, EMP. DEV. DEP’T, STATE OF CAL., [https://edd.ca.gov/Disability/Am\\_I\\_Eligible\\_for\\_DI\\_Benefits.htm](https://edd.ca.gov/Disability/Am_I_Eligible_for_DI_Benefits.htm) [<https://perma.cc/Q3CE-RXKK>] (Dec. 16, 2020) (“You may be eligible for DI if you are unable to work and are losing wages because of your own non-work-related illness, injury, or pregnancy.”).

109. See *supra* text accompanying note 74.

110. See *People with Disabilities*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/training/disabilitytraining> [<https://perma.cc/KG4J-EB92>] (describing the Department’s support of “training and employment assistance programs” for individuals with disabilities).

111. See SOC. SEC. ADMIN., *Phase 2: Ready to Work*, TICKET TO WORK, <https://choosework.ssa.gov/library/your-path-to-work/ready-to-work.html#1> [<https://perma.cc/SFP9-KX8K>] (describing the types of service providers from whom participants in the Ticket to Work Program may choose).

112. For specific examples of individuals who have benefitted from the Ticket to Work Program, see SOC. SEC. ADMIN., *Success Stories*, TICKET TO WORK, <https://choosework.ssa.gov/success-stories/index.html> [<https://perma.cc/JB7K-PDQ8>].

such jobs often have minimum educational requirements.<sup>113</sup> Although existing programs provide vocational training to disabled workers, such training alone is unlikely to move a disabled worker from a blue-collar job into a white-collar job.<sup>114</sup> What is needed, instead, is funding that can support additional schooling for individuals with disabilities. An educational differential between disabled workers and nondisabled workers is evident in the ATUS Leave Module sample,<sup>115</sup> which is consistent with prior research documenting long-standing and persistent educational barriers faced by individuals with disabilities.<sup>116</sup> Rates of bachelor's degree attainment for individuals with disabilities are less than half the rates for individuals without disabilities in the United States.<sup>117</sup> Although the possibility of higher education remains somewhat dependent on the nature of the underlying disability, additional funding could remove the financial barriers to increased schooling for individuals with physical disabilities.<sup>118</sup>

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113. See, e.g., Shinall, *The Pregnancy Penalty*, *supra* note 42, at 812–17 (demonstrating that low-income and low-education workers have systematically worse employment outcomes during pregnancy, likely due to the lack of relevant accommodations provided by their jobs); see also Mongey et al., *supra* note 1, at abstract (“Our results show that workers in low-work-from-home or high-physical-proximity jobs are more economically vulnerable across various measures constructed from the CPS and PSID: they are less educated, of lower income, have fewer liquid assets relative to income, and are more likely renters.”).

114. See *Blue-Collar vs. White-Collar Jobs: Here's the Difference*, INDEED (Nov. 17, 2020), <https://www.indeed.com/career-advice/finding-a-job/difference-between-blue-and-white-collar-jobs> [<https://perma.cc/95GU-LWGQ>] (“White-collar positions typically require some form of higher education.”); Jacquelyn White, *White-Collar vs. Blue-Collar Jobs: What's the Difference?*, THE STREET (Oct. 21, 2019, 3:59 PM), <https://www.thestreet.com/personal-finance/white-collar-vs-blue-collar-jobs-15132749> [<https://perma.cc/55AE-P99L>] (“White-collar jobs often have higher educational requirements than blue collar jobs.”).

115. See *supra* Table 1.

116. See, e.g., Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State-Law Variation: Preliminary Evidence on Educational Participation Effects*, 94 AM. ECON. REV. 447, 450 (2004) (documenting educational differentials by disability status that reduced, but persisted, after the passage of the ADA); see also *Disability & Socioeconomic Status*, AM. PSYCH. ASS'N (2010), <https://www.apa.org/pi/ses/resources/publications/disability> [<https://perma.cc/AHC5-5HV7>] (“According to the 2015 Census, about 15.1 percent of the population age 25 and over with a disability have obtained a bachelor's degree or higher, while 33 percent of individuals in the same age category with no disability have attained the same educational status.”).

117. See *Disability & Socioeconomic Status*, *supra* note 116 (“In a large study of individuals 65 years and older, 20.9 percent of those without a disability failed to complete high school, compared to 25.1 percent and 38.6 percent of individuals with a nonsevere or severe disability. . . .”).

118. Individuals with some intellectual and developmental disabilities may not be eligible to enroll in a college or university. Nonetheless, the major remaining barriers standing between increased enrollment of individuals with physical disabilities in colleges and universities are financial and institutional in nature. See INT'L DISABILITY & DEV. CONSORTIUM, #COSTINGEQUITY: THE CASE FOR DISABILITY-RESPONSIVE EDUCATION FINANCING 22 (2016), <https://www.edu->

And the financial barriers can be significant. Poverty rates for individuals with disabilities ages twenty-one to sixty-four are 2.6 times the poverty rates of their nondisabled counterparts.<sup>119</sup> More than half of individuals living in poverty in the United States have a disability.<sup>120</sup> Indeed, disability scholars have referred to poverty and disability as “a vicious cycle” since disability can cause poverty, and poverty can also cause disability.<sup>121</sup> Because their unemployment rates are so high—even in the best of times—individuals with disabilities are especially susceptible to living in poverty.<sup>122</sup> Furthermore, poverty itself is associated with reduced access to health care, unsafe working conditions, and meager living conditions, which can all lead to higher rates of disability among individuals of lower socioeconomic status.<sup>123</sup>

Beyond providing financial assistance, however, any new schooling programs targeted toward individuals with disabilities must also be streamlined and accessible. Institutional barriers—including insufficient counseling resources, lack of outreach, and inaccessibility—have historically prevented many individuals with disabilities from accessing the current programs that *do* exist.<sup>124</sup> Such barriers exist at all levels

links.org/sites/default/files/media/file/\_CostingEquity\_\_The\_case\_for\_disability-responsive\_education\_financing.pdf [https://perma.cc/KS7M-7J3W] (“Education is often not a priority sector for government or donor investment. The result is inadequate facilities, poorly trained teachers and a lack of accessible learning materials, and the most marginali[z]ed children are paying the price.”); Rebecca Moore, *Students with Disabilities Face Financial Aid Barriers*, NAT’L COUNCIL ON DISABILITY (Sept. 15, 2003), https://ncd.gov/publications/2003/09292003-2 [https://perma.cc/3BKZ-HPGV] (“The disclosure of disability and related expenses does not lead to increased financial aid from colleges and universities. Students personally pay for disability-related accommodations and medical needs when they are not funded by educational, medical or social agencies.”).

119. See W. ERIKSON, C. LEE & S. VON SCHRADER, CORNELL YANG-TAN INST. ON EMP. & DISABILITY, 2018 DISABILITY STATUS REPORT: UNITED STATES 42 (2020), https://www.disabilitystatistics.org/StatusReports/2018-PDF/2018-StatusReport\_US.pdf [https://perma.cc/EVM2-56LC] (demonstrating that 10.0% of working-age, nondisabled individuals are in poverty, while 26.0% of working-age, disabled individuals are in poverty).

120. See *Highlighting Disability / Poverty Connection*, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities, NAT’L COUNCIL ON DISABILITY (Oct. 26, 2017), https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release [https://perma.cc/55ZY-TDZX] (“People with disabilities make up approximately 12 percent of the U.S. working-age population; however, they account for more than half of those living in long-term poverty.”).

121. DEP’T FOR INT’L DEV., DISABILITY, POVERTY, AND DEVELOPMENT I (Feb. 2000), https://hpod.law.harvard.edu/pdf/Disability-poverty-and-development.pdf [https://perma.cc/8PLK-CHCP].

122. See *supra* note 6 and accompanying text.

123. See Mónica Pinilla-Roncancio, *Disability and Poverty: Two Related Conditions*, 63 REVISTA DE LA FACULTAD DE MEDICINA 113, 117 (2015) (Colom.) (“In general, poor individuals face higher risks of becoming chronically ill or impaired. They have low access to health care, high levels of under nourishment and usually work and live in unsafe environments, aspects that result in higher risk of illness and injury.”); see also DEP’T FOR INT’L DEV., *supra* note 121, at 4 (arguing that “[v]ulnerability to poverty and ill-health” cause disability).

124. See Moore, *supra* note 118 (“Many students find it difficult to learn about their right

of the educational counseling system. Secondary-education school counselors may not be sufficiently well trained or well equipped to know about programs targeted toward students with disabilities or even to identify students with disabilities.<sup>125</sup> And these institutional barriers persist at the collegiate level. A 2017 field experiment, for instance, found that high school students previously diagnosed with depression or dyslexia received a relative lack of response and fewer services from college admissions offices than did students without these diagnoses.<sup>126</sup>

For the patchwork of existing job-training programs intended for individuals with disabilities, the model of reaching the programs' targeted audience has largely relied on self-determination.<sup>127</sup> Even the Social Security Administration Ticket to Work Program relies on a model in which individuals with disabilities must find—and choose—the employment network or state vocational rehabilitation agency that will be the best fit for them, without the assistance of any initial counseling resources.<sup>128</sup> Yet the self-determination model is insufficient to reach a broad population of individuals with disabilities. Under the current regime, students with disabilities may be discouraged from pursuing additional education by the difficulty of obtaining relevant information, the uninformed attitude that many counselors hold toward them, and sometimes even the direct discouragement of the counselors with whom they do speak.<sup>129</sup>

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to financial assistance and to navigate the interactions between their sources of support.”).

125. See, e.g., Hongryun Woo, Minkowan Goo & Myungkyung Lee, *A Content Analysis of Research on Disability: American Counseling Association Journals Between 2003 and 2013*, 44 J. MULTICULTURAL COUNSELING & DEV. 228 (2016) (reviewing prior literature on disability identification, disability preparation, accessibility, and perception of disability by high school counselors).

126. Eva Deuchert, Lukas Kauer, Helge Liebert & Carl Wuppermann, *Disability Discrimination in Higher Education: Analyzing the Quality of Counseling Services*, 25 EDUC. ECON. 543 (2017).

127. See James T. Herbert, Barbara S. S. Hong, Soo-yong Byun, William Welsh, Charity Anne Kurz & Heather A. Atkinson, *Persistence and Graduation of College Students Seeking Disability Support Services*, 80 J. REHAB. 22, 29 (2014) (“Given federal regulations that prohibit collecting information concerning disability status as part of college admissions (i.e., Rehabilitation Act of 1973), unless a student has awareness that disability services exist on campus and knows how to access them, students without this knowledge are not able to use them. Perhaps even more problematic is that even with this knowledge, because of the stigma associated with having a disability that continues for college students today, many students do not seek such services even though the potential to benefit from them exists.”) (citation omitted).

128. See SOC. SEC. ADMIN., *supra* note 111 (“After you've thought about your work goals and what help you might need to achieve them, it is time to select a service provider that can help you, or someone you know who is interested in working, achieve these goals. The Ticket Program offers a choice of service providers: Employment Networks (EN) and State Vocational Rehabilitation (VR) agencies.”). Indeed, all that the Administration provides to help program participants make this decision are “fact sheets that will help you determine what type of service provider is right for you.” *Id.*

129. See, e.g., Michele Rivas & Nicole R. Hill, *Counselor Trainees' Experiences Counseling Disability: A Phenomenological Study*, 57 COUNS. EDUC. & SUPERVISION 116, 128

In sum, the occupational segregation of disabled workers is likely to persist in the absence of greater financial resources devoted toward increasing representation of individuals with disabilities in higher education. Only with higher rates of higher education will more disabled workers be able to move into white-collar jobs from blue-collar jobs—and, as a result, move out of jobs that are without accommodation into jobs that are with accommodation. Yet any new program to encourage additional schooling for individuals with disabilities must be thoughtful about the institutional barriers that continue to restrict access. Even the most generous financial support may go partially to waste if not accompanied by sufficient counseling and outreach efforts toward individuals with disabilities.

### CONCLUSION

Although disabled workers are the only employees for whom workplace accommodations are legally mandated, this Article has demonstrated empirically that these workers had systematically lower rates of access to pandemic-relevant accommodation prior to the onset of COVID-19. More critically, the Article has shown that this lack of access to paid leave, working from home, and flexible-hour work schedules derives in substantial part from job-type segregation. Disabled workers are more likely to work in many of the occupations considered most dangerous during the pandemic, due to their high physical proximity and their poor amenability to remote work. In many ways, this job-type segregation is not surprising, given the significant financial and institutional barriers that persist for individuals with disabilities in the educational system.

For now, short-term, targeted aid would provide a welcome relief for disabled workers who have been disproportionately afflicted by COVID-19. Medium-term, mandatory disability insurance would ensure that disabled workers have a safety net whenever the next public- or private-health crisis strikes. But long-term strategies are equally critical. In the absence of long-term solutions that assist individuals with disabilities to move into higher-skilled professions, they will remain without the accommodations they need—and, thus, highly vulnerable to future pandemics.

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(2018) (“The participants in this study described feelings of inadequacy and anxiety about meeting the needs of clients with disabilities while concluding that their counseling program curriculum silenced disability.”); Stephanie W. Cawthon & Emma V. Cole, *Postsecondary Students Who Have a Learning Disability: Student Perspectives on Accommodations Access and Obstacles*, 23 J. POSTSECONDARY EDUC. & DISABILITY 112, 123 (2010) (“[A]n average of 48% [of surveyed students] reported that they received no guidance on who to contact in the [Office of Students with Disabilities] at their university, what accommodations or services they may need from their university, how to document their disability for their university, or discuss their most recent evaluation.”); Moore, *supra* note 118 (“Students with disabilities often feel unwelcome on college campuses because of financial aid officers’ responses to their need for financial assistance. In addition, many feel that vocational rehabilitation counselors discourage them from pursuing a baccalaureate or graduate degree, and emphasize vocational training instead. Students then are left to worry about how to fund their postsecondary education on their own.”).

## APPENDIX

**Appendix Table 1. Difficulties Identified by Disabled Sample Respondents in ATUS Leave Module Sample, 2017–2018**

|   | Men   | Women |
|---|-------|-------|
| Vision Difficulty   | 0.11* | 0.23  |
| Hearing Difficulty  | 0.37  | 0.30  |
| Personal Care Difficulty  | 0.07  | 0.08  |
| Difficulty Performing Activities Outside Home Alone                 | 0.13  | 0.12  |
| Difficulty Walking or Climbing Stairs                               | 0.30* | 0.43  |
| Cognitive Difficulty (Remembering, Concentrating, Making Decisions) | 0.32  | 0.25  |
| Multiple Difficulties   | 0.18* | 0.33  |
| N   | 166   | 153   |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. \* indicates a significant difference between disabled/nondisabled sample at 5% Level. + indicates a significant difference between disabled/nondisabled sample at 10% Level. All estimates use the ATUS Leave Module sample weight.



**Appendix Table 2. Major Occupational Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Receive Paid Leave, 2017–2018**

| Occupation Category  | Percent of All Workers in Occupation Who Get Paid Leave | Percent of Nondisabled Men in Occupation | Percent of Disabled Men in Occupation | Percent of Nondisabled Women in Occupation | Percent of Disabled Women in Occupation |
|--|---|--|---------------------------------------|--|---|
| Architecture and engineering occupations                           | 88.00%  | 5.56%                                    | 1.20%                                 | 0.96%                                      | 0.61%                                   |
| Community and social service occupations                           | 88.00%  | 1.14%                                    | 1.67%                                 | 2.58%                                      | 3.15%                                   |
| Computer and mathematical science occupations                      | 86.00%  | 6.32%                                    | 3.23%                                 | 2.53%                                      | 1.48%                                   |
| Legal occupations  | 85.00%  | 1.08%                                    | 0.33%                                 | 1.09%                                      | 0.00%                                   |
| Management occupations   | 84.00%  | 11.25%                                   | 9.10%                                 | 10.54%                                     | 8.76%                                   |
| Life, physical, and social science occupations                     | 80.00%  | 1.79%                                    | 2.14%                                 | 1.08%                                      | 1.20%                                   |
| Installation, maintenance, and repair occupations                  | 80.00%  | 5.59%                                    | 4.85%                                 | 0.14%                                      | 0.29%                                   |
| Business and financial operations occupations                      | 78.00%  | 4.44%                                    | 3.34%                                 | 6.49%                                      | 2.18%                                   |
| Health-care practitioner and technical occupations                 | 78.00%  | 2.56%                                    | 1.71%                                 | 11.77%                                     | 9.74%                                   |
| Protective service occupations                                     | 77.00%  | 2.87%                                    | 4.42%                                 | 0.96%                                      | 0.33%                                   |
| Office and administrative support occupations                      | 74.00%  | 6.78%                                    | 7.85%                                 | 20.19%                                     | 12.18%                                  |
| Production occupations   | 71.00%  | 8.51%                                    | 10.58%                                | 3.43%                                      | 7.06%                                   |
| Education, training, and library occupations                       | 68.00%  | 3.68%                                    | 4.21%                                 | 11.61%                                     | 11.23%                                  |
| Arts, design, entertainment, sports, and media occupations         | 61.00%  | 1.92%                                    | 0.44%                                 | 2.15%                                      | 0.81%                                   |
| Sales and related occupations                                      | 60.00%  | 7.61%                                    | 5.64%                                 | 7.24%                                      | 10.04%                                  |
| Transportation and material moving occupations                     | 58.00%  | 8.28%                                    | 8.55%                                 | 2.02%                                      | 2.86%                                   |
| Health-care support occupations                                    | 57.00%  | 0.43%                                    | 0.05%                                 | 3.32%                                      | 4.97%                                   |
| Building and grounds cleaning and maintenance                      | 54.00%  | 4.10%                                    | 15.03%                                | 2.51%                                      | 2.47%                                   |
| Farming, fishing, and forestry occupations                         | 41.00%  | 1.15%                                    | 0.92%                                 | 0.41%                                      | 0.00%                                   |
| Construction and extraction occupations                            | 36.00%  | 8.09%                                    | 9.27%                                 | 0.19%                                      | 0.00%                                   |
| Personal care and service occupations                              | 34.00%  | 1.84%                                    | 1.76%                                 | 3.93%                                      | 5.99%                                   |
| Food preparation and serving related occupations                   | 32.00%  | 5.02%                                    | 3.73%                                 | 4.86%                                      | 14.65%                                  |
| <b>Percent of Workers in Bottom Half of Paid Leave Occupations</b> | ---   | <b>50.63%</b>                            | <b>60.18%</b>                         | <b>41.67%</b>                              | <b>60.08%</b>                           |
| <b>Percent of Workers in Bottom Five Paid Leave Occupations</b>    | ---   | <b>20.20%</b>                            | <b>30.71%</b>                         | <b>11.90%</b>                              | <b>23.11%</b>                           |

**Appendix Table 3. Major Industry Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Receive Paid Leave, 2017–2018**

| Industry Category                                | Percent of All Workers in Industry Who Get Paid Leave | Percent of Nondisabled Men in Industry | Percent of Disabled Men in Industry | Percent of Nondisabled Women in Industry | Percent of Disabled Women in Industry |
|--|---|--|-------------------------------------|--|---------------------------------------|
| Internet publishing and broadcasting             | 100.00%   | 0.07%                                  | 0.00%                               | 0.02%                                    | 0.00%                                 |
| Internet service providers and data processing   | 100.00%   | 0.08%                                  | 0.00%                               | 0.08%                                    | 0.00%                                 |
| Beverage and tobacco product manufacturing       | 96.00%  | 0.19%                                  | 0.64%                               | 0.10%                                    | 0.00%                                 |
| Transportation equipment manufacturing           | 91.00%  | 3.15%                                  | 0.83%                               | 0.80%                                    | 0.53%                                 |
| Public administration                            | 91.00%  | 5.16%                                  | 9.68%                               | 5.24%                                    | 2.27%                                 |
| Insurance  | 88.00%  | 1.57%                                  | 1.78%                               | 2.73%                                    | 0.92%                                 |
| Computer and electronic product manufacturing    | 87.00%  | 1.26%                                  | 1.74%                               | 0.53%                                    | 0.59%                                 |
| Textile, apparel, and leather manufacturing      | 87.00%  | 0.32%                                  | 0.00%                               | 0.29%                                    | 0.43%                                 |
| Publishing industries (except internet)          | 86.00%  | 0.41%                                  | 0.00%                               | 0.32%                                    | 0.00%                                 |
| Finance  | 86.00%  | 3.02%                                  | 1.80%                               | 3.93%                                    | 4.37%                                 |
| Machinery manufacturing                          | 85.00%  | 1.63%                                  | 2.07%                               | 0.57%                                    | 0.00%                                 |
| Miscellaneous and not specified manufacturing    | 85.00%  | 1.23%                                  | 0.70%                               | 1.05%                                    | 0.38%                                 |
| Petroleum and coal products manufacturing        | 85.00%  | 0.20%                                  | 0.63%                               | 0.06%                                    | 0.00%                                 |
| Utilities  | 85.00%  | 1.91%                                  | 0.75%                               | 0.30%                                    | 1.21%                                 |
| Other information services                       | 85.00%  | 0.09%                                  | 0.00%                               | 0.42%                                    | 1.24%                                 |
| Mining   | 84.00%  | 0.74%                                  | 0.57%                               | 0.18%                                    | 0.00%                                 |
| Paper manufacturing and printing                 | 84.00%  | 0.70%                                  | 1.19%                               | 0.46%                                    | 0.51%                                 |
| Chemical manufacturing                           | 83.00%  | 1.13%                                  | 0.00%                               | 0.55%                                    | 0.00%                                 |
| Primary metals and fabricated metal products     | 81.00%  | 2.22%                                  | 1.53%                               | 0.53%                                    | 0.43%                                 |
| Wholesale trade                                  | 81.00%  | 3.21%                                  | 0.57%                               | 1.54%                                    | 1.28%                                 |
| Professional, scientific, and technical services | 81.00%  | 9.16%                                  | 2.41%                               | 7.23%                                    | 7.99%                                 |
| Telecommunications                               | 80.00%  | 0.83%                                  | 0.00%                               | 0.43%                                    | 0.00%                                 |
| Hospitals  | 80.00%  | 2.30%                                  | 1.93%                               | 8.37%                                    | 9.52%                                 |
| Broadcasting (except internet)                   | 77.00%  | 0.35%                                  | 0.14%                               | 0.21%                                    | 0.17%                                 |
| Nonmetallic mineral product manufacturing        | 75.00%  | 0.62%                                  | 0.87%                               | 0.17%                                    | 0.00%                                 |
| Electrical equipment, appliance manufacturing    | 75.00%  | 0.31%                                  | 0.44%                               | 0.16%                                    | 0.00%                                 |
| Wood product manufacturing                       | 74.00%  | 0.42%                                  | 0.00%                               | 0.10%                                    | 0.00%                                 |

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|   |        |        |        |        |        |
|---|--------|--------|--------|--------|--------|
| Rental and leasing services                   | 74.00% | 0.36%  | 0.93%  | 0.12%  | 0.54%  |
| Plastics and rubber products manufacturing    | 72.00% | 0.37%  | 0.00%  | 0.18%  | 0.00%  |
| Waste management and remediation services     | 72.00% | 0.52%  | 0.41%  | 0.04%  | 0.00%  |
| Transportation and warehousing                | 70.00% | 5.75%  | 7.02%  | 2.35%  | 1.87%  |
| Educational services                          | 69.00% | 7.56%  | 16.02% | 15.61% | 7.61%  |
| Health care services, except hospitals        | 69.00% | 2.55%  | 3.15%  | 11.76% | 2.87%  |
| Motion picture and sound recording            | 68.00% | 0.32%  | 0.00%  | 0.15%  | 0.00%  |
| Social assistance                             | 67.00% | 0.66%  | 1.04%  | 4.44%  | 0.65%  |
| Membership associations and organizations     | 65.00% | 0.90%  | 1.16%  | 1.81%  | 2.23%  |
| Real estate                                   | 63.00% | 1.65%  | 1.31%  | 1.27%  | 2.47%  |
| Food manufacturing                            | 62.00% | 1.76%  | 1.41%  | 1.32%  | 0.33%  |
| Management of companies and enterprises       | 62.00% | 0.13%  | 0.00%  | 0.27%  | 5.10%  |
| Furniture and fixtures manufacturing          | 60.00% | 0.56%  | 0.00%  | 0.28%  | 1.71%  |
| Retail trade                                  | 60.00% | 10.29% | 12.16% | 9.25%  | 5.14%  |
| Traveler accommodation                        | 53.00% | 1.05%  | 0.93%  | 1.69%  | 12.68% |
| Forestry, logging, fishing, hunting, trapping | 50.00% | 0.12%  | 1.57%  | 0.08%  | 0.00%  |
| Repair and maintenance                        | 49.00% | 1.75%  | 0.55%  | 0.22%  | 0.00%  |
| Administrative and support services           | 48.00% | 3.77%  | 4.91%  | 2.58%  | 16.47% |
| Agriculture                                   | 47.00% | 1.71%  | 1.43%  | 0.27%  | 0.00%  |
| Arts, entertainment, and recreation           | 47.00% | 2.33%  | 1.66%  | 1.80%  | 0.34%  |
| Construction                                  | 44.00% | 8.85%  | 7.32%  | 0.87%  | 0.95%  |
| Personal and laundry services                 | 36.00% | 0.49%  | 1.62%  | 1.33%  | 5.58%  |
| Food services and drinking places             | 27.00% | 4.25%  | 5.12%  | 5.68%  | 1.62%  |
| Private households                            | 6.00%  | 0.03%  | 0.00%  | 0.29%  | 0.00%  |

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**Percent of Workers in Bottom Half of Paid Leave Industries**


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--- 58.15% 69.72% 63.76% 68.16%

**Percent of Workers in Bottom Ten Paid Leave Industries**


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--- 24.35% 25.11% 14.81% 37.64%

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Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

**Appendix Table 4. Major Occupational Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Can Work from Home, 2017–2018**

| Occupation Category  | Percent of All Workers in Occupation Who Can Work from Home | Percent of Nondisabled Men in Occupation | Percent of Disabled Men in Occupation | Percent of Nondisabled Women in Occupation | Percent of Disabled Women in Occupation |
|--|---|--|---------------------------------------|--|---|
| Computer and mathematical science occupations                          | 75.44%  | 6.32%                                    | 3.23%                                 | 2.53%                                      | 1.48%                                   |
| Business and financial operations occupations                          | 64.58%  | 4.44%                                    | 3.34%                                 | 6.49%                                      | 2.18%                                   |
| Architecture and engineering occupations                               | 59.92%  | 5.56%                                    | 1.20%                                 | 0.96%                                      | 0.61%                                   |
| Legal occupations  | 58.24%  | 1.08%                                    | 0.33%                                 | 1.09%                                      | 0.00%                                   |
| Management occupations   | 58.18%  | 11.25%                                   | 9.10%                                 | 10.54%                                     | 8.76%                                   |
| Life, physical, and social science occupations                         | 56.99%  | 1.79%                                    | 2.14%                                 | 1.08%                                      | 1.20%                                   |
| Arts, design, entertainment, sports, and media occupations             | 53.86%  | 1.92%                                    | 0.44%                                 | 2.15%                                      | 0.81%                                   |
| Community and social service occupations                               | 46.71%  | 1.14%                                    | 1.67%                                 | 2.58%                                      | 3.15%                                   |
| Education, training, and library occupations                           | 34.01%  | 3.68%                                    | 4.21%                                 | 11.61%                                     | 11.23%                                  |
| Sales and related occupations  | 29.64%  | 7.61%                                    | 5.64%                                 | 7.24%                                      | 10.04%                                  |
| Office and administrative support occupations                          | 24.77%  | 6.78%                                    | 7.85%                                 | 20.19%                                     | 12.18%                                  |
| Health-care practitioner and technical occupations                     | 15.09%  | 2.56%                                    | 1.71%                                 | 11.77%                                     | 9.74%                                   |
| Protective service occupations   | 12.66%  | 2.87%                                    | 4.42%                                 | 0.96%                                      | 0.33%                                   |
| Personal care and service occupations                                  | 10.02%  | 1.84%                                    | 1.76%                                 | 3.93%                                      | 5.99%                                   |
| Installation, maintenance, and repair occupations                      | 9.80%   | 5.59%                                    | 4.85%                                 | 0.14%                                      | 0.29%                                   |
| Construction and extraction occupations                                | 8.00%   | 8.09%                                    | 9.27%                                 | 0.19%                                      | 0.00%                                   |
| Health-care support occupations  | 6.49%   | 0.43%                                    | 0.05%                                 | 3.32%                                      | 4.97%                                   |
| Building and grounds cleaning and maintenance                          | 4.79%   | 4.10%                                    | 15.03%                                | 2.51%                                      | 2.47%                                   |
| Production occupations   | 4.27%   | 8.51%                                    | 10.58%                                | 3.43%                                      | 7.06%                                   |
| Farming, fishing, and forestry occupations                             | 3.87%   | 1.15%                                    | 0.92%                                 | 0.41%                                      | 0.00%                                   |
| Food preparation and serving related occupations                       | 3.44%   | 5.02%                                    | 3.73%                                 | 4.86%                                      | 14.65%                                  |
| Transportation and material moving occupations                         | 3.26%   | 8.28%                                    | 8.55%                                 | 2.02%                                      | 2.86%                                   |
| <b>Percent of Workers in Bottom Half of Work from Home Occupations</b> | ---   | <b>48.44%</b>                            | <b>60.87%</b>                         | <b>33.54%</b>                              | <b>48.36%</b>                           |
| <b>Percent of Workers in Bottom Five Work from Home Occupations</b>    | ---   | <b>27.06%</b>                            | <b>38.81%</b>                         | <b>13.23%</b>                              | <b>27.04%</b>                           |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

**Appendix Table 5. Major Industry Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Can Work from Home, 2017–2018**

| Industry Category                                       | Percent of All Workers in Industry Who Can Work from Home | Percent of Nondisabled Men in Industry | Percent of Disabled Men in Industry | Percent of Nondisabled Women in Industry | Percent of Disabled Women in Industry |
|---|---|--|-------------------------------------|--|---------------------------------------|
| Internet publishing and broadcasting                    | 88.59%  | 0.07%                                  | 0.00%                               | 0.02%                                    | 0.00%                                 |
| Internet service providers and data processing services | 81.02%  | 0.08%                                  | 0.00%                               | 0.08%                                    | 0.00%                                 |
| Publishing industries (except internet)                 | 77.87%  | 0.41%                                  | 0.00%                               | 0.32%                                    | 0.00%                                 |
| Insurance   | 73.10%  | 1.57%                                  | 1.78%                               | 2.73%                                    | 0.92%                                 |
| Professional, scientific, and technical services        | 67.77%  | 9.16%                                  | 2.41%                               | 7.23%                                    | 7.99%                                 |
| Miscellaneous and not specified manufacturing           | 65.99%  | 1.23%                                  | 0.70%                               | 1.05%                                    | 0.38%                                 |
| Mining  | 58.07%  | 0.74%                                  | 0.57%                               | 0.18%                                    | 0.00%                                 |
| Membership associations and organizations               | 56.07%  | 0.90%                                  | 1.16%                               | 1.81%                                    | 2.23%                                 |
| Finance   | 55.76%  | 3.02%                                  | 1.80%                               | 3.93%                                    | 4.37%                                 |
| Telecommunications                                      | 55.26%  | 0.83%                                  | 0.00%                               | 0.43%                                    | 0.00%                                 |
| Broadcasting (except internet)                          | 55.08%  | 0.35%                                  | 0.14%                               | 0.21%                                    | 0.17%                                 |
| Computer and electronic product manufacturing           | 54.55%  | 1.26%                                  | 1.74%                               | 0.53%                                    | 0.59%                                 |
| Chemical manufacturing                                  | 50.05%  | 1.13%                                  | 0.00%                               | 0.55%                                    | 0.00%                                 |
| Real estate   | 49.42%  | 1.65%                                  | 1.31%                               | 1.27%                                    | 2.47%                                 |
| Beverage and tobacco product manufacturing              | 47.54%  | 0.19%                                  | 0.64%                               | 0.10%                                    | 0.00%                                 |
| Motion picture and sound recording industries           | 46.08%  | 0.32%                                  | 0.00%                               | 0.15%                                    | 0.00%                                 |
| Forestry, logging, fishing, hunting, and trapping       | 44.09%  | 0.12%                                  | 1.57%                               | 0.08%                                    | 0.00%                                 |
| Transportation equipment manufacturing                  | 41.77%  | 3.15%                                  | 0.83%                               | 0.80%                                    | 0.53%                                 |
| Petroleum and coal products manufacturing               | 37.56%  | 0.20%                                  | 0.63%                               | 0.06%                                    | 0.00%                                 |
| Management of companies and enterprises                 | 36.24%  | 0.13%                                  | 0.00%                               | 0.27%                                    | 5.10%                                 |
| Wholesale trade   | 31.75%  | 3.21%                                  | 0.57%                               | 1.54%                                    | 1.28%                                 |
| Educational services                                    | 31.67%  | 7.56%                                  | 16.02%                              | 15.61%                                   | 7.61%                                 |
| Public administration                                   | 29.93%  | 5.16%                                  | 9.68%                               | 5.24%                                    | 2.27%                                 |
| Textile, apparel, and leather manufacturing             | 27.15%  | 0.32%                                  | 0.00%                               | 0.29%                                    | 0.43%                                 |
| Furniture and fixtures manufacturing                    | 27.10%  | 0.56%                                  | 0.00%                               | 0.28%                                    | 1.71%                                 |
| Machinery manufacturing                                 | 26.64%  | 1.63%                                  | 2.07%                               | 0.57%                                    | 0.00%                                 |

|   |        |        |        |        |        |
|---|--------|--------|--------|--------|--------|
| Paper manufacturing and printing              | 25.91% | 0.70%  | 1.19%  | 0.46%  | 0.51%  |
| Administrative and support services           | 25.42% | 3.77%  | 4.91%  | 2.58%  | 16.47% |
| Health care services, except hospitals        | 24.72% | 2.55%  | 3.15%  | 11.76% | 2.87%  |
| Utilities                                     | 24.36% | 1.91%  | 0.75%  | 0.30%  | 1.21%  |
| Electrical equipment, appliance manufacturing | 23.25% | 0.31%  | 0.44%  | 0.16%  | 0.00%  |
| Social assistance                             | 22.69% | 0.66%  | 1.04%  | 4.44%  | 0.65%  |
| Primary metals and fabricated metal products  | 18.39% | 2.22%  | 1.53%  | 0.53%  | 0.43%  |
| Wood product manufacturing                    | 17.87% | 0.42%  | 0.00%  | 0.10%  | 0.00%  |
| Construction                                  | 17.05% | 8.85%  | 7.32%  | 0.87%  | 0.95%  |
| Hospitals                                     | 16.85% | 2.30%  | 1.93%  | 8.37%  | 9.52%  |
| Nonmetallic mineral product manufacturing     | 15.97% | 0.62%  | 0.87%  | 0.17%  | 0.00%  |
| Personal and laundry services                 | 15.10% | 0.49%  | 1.62%  | 1.33%  | 5.58%  |
| Rental and leasing services                   | 14.96% | 0.36%  | 0.93%  | 0.12%  | 0.54%  |
| Food manufacturing                            | 14.58% | 1.76%  | 1.41%  | 1.32%  | 0.33%  |
| Retail trade                                  | 14.12% | 10.29% | 12.16% | 9.25%  | 5.14%  |
| Plastics and rubber products manufacturing    | 13.99% | 0.37%  | 0.00%  | 0.18%  | 0.00%  |
| Other information services                    | 13.65% | 0.09%  | 0.00%  | 0.42%  | 1.24%  |
| Arts, entertainment, and recreation           | 13.49% | 2.33%  | 1.66%  | 1.80%  | 0.34%  |
| Traveler accommodation                        | 13.40% | 1.05%  | 0.93%  | 1.69%  | 12.68% |
| Repair and maintenance                        | 11.96% | 1.75%  | 0.55%  | 0.22%  | 0.00%  |
| Transportation and warehousing                | 11.24% | 5.75%  | 7.02%  | 2.35%  | 1.87%  |
| Waste management and remediation services     | 8.17%  | 0.52%  | 0.41%  | 0.04%  | 0.00%  |
| Agriculture                                   | 7.72%  | 1.71%  | 1.43%  | 0.27%  | 0.00%  |
| Food services and drinking places             | 6.50%  | 4.25%  | 5.12%  | 5.68%  | 1.62%  |
| Private households                            | 5.47%  | 0.03%  | 0.00%  | 0.29%  | 0.00%  |

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|   |     |               |               |               |               |
|---|-----|---------------|---------------|---------------|---------------|
| <b>Percent of Workers in Bottom Half of Work from Home Industries</b> | --- | <b>55.06%</b> | <b>56.37%</b> | <b>54.70%</b> | <b>61.95%</b> |
| <b>Percent of Workers in Bottom Ten Work from Home Industries</b>     | --- | <b>17.85%</b> | <b>17.12%</b> | <b>12.94%</b> | <b>17.75%</b> |

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Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

**Appendix Table 6. Major Occupational Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Can Work Flexible Hours, 2017–2018**

| Occupation Category  | Percent of All Workers in Occupation Who Can Work Flexible Hours | Percent of Nondisabled Men in Occupation | Percent of Disabled Men in Occupation | Percent of Nondisabled Women in Occupation | Percent of Disabled Women in Occupation |
|--|--|--|---------------------------------------|--|---|
| Computer and mathematical science occupations                          | 82.92%   | 6.32%                                    | 3.23%                                 | 2.53%                                      | 1.48%                                   |
| Architecture and engineering occupations                               | 82.39%   | 5.56%                                    | 1.20%                                 | 0.96%                                      | 0.61%                                   |
| Life, physical, and social science occupations                         | 78.09%   | 1.79%                                    | 2.14%                                 | 1.08%                                      | 1.20%                                   |
| Management occupations   | 74.64%   | 11.25%                                   | 9.10%                                 | 10.54%                                     | 8.76%                                   |
| Community and social service occupations                               | 73.26%   | 1.14%                                    | 1.67%                                 | 2.58%                                      | 3.15%                                   |
| Business and financial operations occupations                          | 72.47%   | 4.44%                                    | 3.34%                                 | 6.49%                                      | 2.18%                                   |
| Legal occupations  | 68.05%   | 1.08%                                    | 0.33%                                 | 1.09%                                      | 0.00%                                   |
| Food preparation and serving related occupations                       | 66.46%   | 5.02%                                    | 3.73%                                 | 4.86%                                      | 14.65%                                  |
| Sales and related occupations  | 66.09%   | 7.61%                                    | 5.64%                                 | 7.24%                                      | 10.04%                                  |
| Arts, design, entertainment, sports, and media occupations             | 60.12%   | 1.92%                                    | 0.44%                                 | 2.15%                                      | 0.81%                                   |
| Personal care and service occupations                                  | 57.01%   | 1.84%                                    | 1.76%                                 | 3.93%                                      | 5.99%                                   |
| Office and administrative support occupations                          | 56.37%   | 6.78%                                    | 7.85%                                 | 20.19%                                     | 12.18%                                  |
| Protective service occupations   | 45.03%   | 2.87%                                    | 4.42%                                 | 0.96%                                      | 0.33%                                   |
| Health-care support occupations  | 44.95%   | 0.43%                                    | 0.05%                                 | 3.32%                                      | 4.97%                                   |
| Health-care practitioner and technical occupations                     | 44.76%   | 2.56%                                    | 1.71%                                 | 11.77%                                     | 9.74%                                   |
| Installation, maintenance, and repair occupations                      | 43.72%   | 5.59%                                    | 4.85%                                 | 0.14%                                      | 0.29%                                   |
| Transportation and material moving occupations                         | 42.43%   | 8.28%                                    | 8.55%                                 | 2.02%                                      | 2.86%                                   |
| Building and grounds cleaning and maintenance                          | 42.13%   | 4.10%                                    | 15.03%                                | 2.51%                                      | 2.47%                                   |
| Farming, fishing, and forestry occupations                             | 41.69%   | 1.15%                                    | 0.92%                                 | 0.41%                                      | 0.00%                                   |
| Construction and extraction occupations                                | 33.67%   | 8.09%                                    | 9.27%                                 | 0.19%                                      | 0.00%                                   |
| Education, training, and library occupations                           | 32.07%   | 3.68%                                    | 4.21%                                 | 11.61%                                     | 11.23%                                  |
| Production occupations   | 30.30%   | 8.51%                                    | 10.58%                                | 3.43%                                      | 7.06%                                   |
| <b>Percent of Workers in Bottom Half of Flexible Hours Occupations</b> | ---  | <b>52.04%</b>                            | <b>67.44%</b>                         | <b>56.55%</b>                              | <b>51.13%</b>                           |
| <b>Percent of Workers in Bottom Five Flexible Hours Occupations</b>    | ---  | <b>25.53%</b>                            | <b>40.01%</b>                         | <b>18.15%</b>                              | <b>20.76%</b>                           |

Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

**Appendix Table 7. Major Industry Distribution of Workers in ATUS Leave Module Sample, Ordered by Percent of Workers Who Can Work Flexible Hours, 2017–2018**

| Industry Category                                   | Percent of All<br>Workers in<br>Industry Who Can<br>Work Flexible<br>Hours | Percent of<br>Nondisabled<br>Men in<br>Industry | Percent of<br>Disabled<br>Men in<br>Industry | Percent of<br>Nondisabled<br>Women in<br>Industry | Percent of<br>Disabled<br>Women in<br>Industry |
|---|--|---|--|---|--|
| Internet svc providers and data processing services | 100.00%  | 0.08%   | 0.00%  | 0.08%   | 0.00%  |
| Management of companies and enterprises             | 92.34%   | 0.13%   | 0.00%  | 0.27%   | 5.10%  |
| Computer and electronic product manufacturing       | 84.89%   | 1.26%   | 1.74%  | 0.53%   | 0.59%  |
| Insurance   | 79.52%   | 1.57%   | 1.78%  | 2.73%   | 0.92%  |
| Professional, scientific, and technical services    | 79.43%   | 9.16%   | 2.41%  | 7.23%   | 7.99%  |
| Publishing industries (except internet)             | 77.30%   | 0.41%   | 0.00%  | 0.32%   | 0.00%  |
| Motion picture and sound recording industries       | 76.85%   | 0.32%   | 0.00%  | 0.15%   | 0.00%  |
| Membership associations and organizations           | 73.42%   | 0.90%   | 1.16%  | 1.81%   | 2.23%  |
| Internet publishing and broadcasting                | 71.84%   | 0.07%   | 0.00%  | 0.02%   | 0.00%  |
| Food services and drinking places                   | 71.34%   | 4.25%   | 5.12%  | 5.68%   | 1.62%  |
| Rental and leasing services                         | 66.52%   | 0.36%   | 0.93%  | 0.12%   | 0.54%  |
| Other information services                          | 64.80%   | 0.09%   | 0.00%  | 0.42%   | 1.24%  |
| Beverage and tobacco product manufacturing          | 64.43%   | 0.19%   | 0.64%  | 0.10%   | 0.00%  |
| Mining  | 64.24%   | 0.74%   | 0.57%  | 0.18%   | 0.00%  |
| Finance   | 63.40%   | 3.02%   | 1.80%  | 3.93%   | 4.37%  |
| Telecommunications                                  | 62.55%   | 0.83%   | 0.00%  | 0.43%   | 0.00%  |
| Private households                                  | 61.58%   | 0.03%   | 0.00%  | 0.29%   | 0.00%  |
| Real estate   | 60.97%   | 1.65%   | 1.31%  | 1.27%   | 2.47%  |
| Retail trade  | 60.83%   | 10.29%  | 12.16%                                       | 9.25%   | 5.14%  |
| Chemical manufacturing                              | 60.11%   | 1.13%   | 0.00%  | 0.55%   | 0.00%  |
| Personal and laundry services                       | 58.33%   | 0.49%   | 1.62%  | 1.33%   | 5.58%  |
| Administrative and support services                 | 57.89%   | 3.77%   | 4.91%  | 2.58%   | 16.47%   |
| Public administration                               | 57.79%   | 5.16%   | 9.68%  | 5.24%   | 2.27%  |
| Machinery manufacturing                             | 56.66%   | 1.63%   | 2.07%  | 0.57%   | 0.00%  |
| Traveler accommodation                              | 55.66%   | 1.05%   | 0.93%  | 1.69%   | 12.68%   |
| Health care services, except hospitals              | 54.98%   | 2.55%   | 3.15%  | 11.76%  | 2.87%  |



|   |        |       |        |        |       |
|---|--------|-------|--------|--------|-------|
| Miscellaneous and not specified manufacturing     | 54.01% | 1.23% | 0.70%  | 1.05%  | 0.38% |
| Forestry, logging, fishing, hunting, and trapping | 53.89% | 0.12% | 1.57%  | 0.08%  | 0.00% |
| Wholesale trade                                   | 53.82% | 3.21% | 0.57%  | 1.54%  | 1.28% |
| Broadcasting (except internet)                    | 52.86% | 0.35% | 0.14%  | 0.21%  | 0.17% |
| Social assistance                                 | 52.48% | 0.66% | 1.04%  | 4.44%  | 0.65% |
| Transportation equipment manufacturing            | 52.37% | 3.15% | 0.83%  | 0.80%  | 0.53% |
| Arts, entertainment, and recreation               | 51.45% | 2.33% | 1.66%  | 1.80%  | 0.34% |
| Agriculture                                       | 50.39% | 1.71% | 1.43%  | 0.27%  | 0.00% |
| Transportation and warehousing                    | 49.07% | 5.75% | 7.02%  | 2.35%  | 1.87% |
| Repair and maintenance                            | 47.19% | 1.75% | 0.55%  | 0.22%  | 0.00% |
| Hospitals   | 47.00% | 2.30% | 1.93%  | 8.37%  | 9.52% |
| Utilities   | 46.18% | 1.91% | 0.75%  | 0.30%  | 1.21% |
| Paper manufacturing and printing                  | 45.87% | 0.70% | 1.19%  | 0.46%  | 0.51% |
| Furniture and fixtures manufacturing              | 44.87% | 0.56% | 0.00%  | 0.28%  | 1.71% |
| Construction                                      | 42.59% | 8.85% | 7.32%  | 0.87%  | 0.95% |
| Food manufacturing                                | 42.42% | 1.76% | 1.41%  | 1.32%  | 0.33% |
| Primary metals and fabricated metal products      | 41.89% | 2.22% | 1.53%  | 0.53%  | 0.43% |
| Electrical equipment, appliance manufacturing     | 41.63% | 0.31% | 0.44%  | 0.16%  | 0.00% |
| Wood product manufacturing                        | 39.10% | 0.42% | 0.00%  | 0.10%  | 0.00% |
| Plastics and rubber products manufacturing        | 38.13% | 0.37% | 0.00%  | 0.18%  | 0.00% |
| Textile, apparel, and leather manufacturing       | 37.60% | 0.32% | 0.00%  | 0.29%  | 0.43% |
| Petroleum and coal products manufacturing         | 37.58% | 0.20% | 0.63%  | 0.06%  | 0.00% |
| Nonmetallic mineral product manufacturing         | 37.44% | 0.62% | 0.87%  | 0.17%  | 0.00% |
| Educational services                              | 37.25% | 7.56% | 16.02% | 15.61% | 7.61% |
| Waste management and remediation services         | 25.53% | 0.52% | 0.41%  | 0.04%  | 0.00% |

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**Percent of Workers in Bottom Half of Flexible Hours Industries**

---                      **48.88%**                      **48.01%**                      **41.50%**                      **27.92%**

**Percent of Workers in Bottom Ten Flexible Hours Industries**

---                      **14.30%**                      **21.31%**                      **18.46%**                      **8.80%**

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Notes: Sample includes all adults ages 18 to 65 from the ATUS Leave Module who are employed for wages or salary. All estimates use the ATUS Leave Module sample weight.

