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# BECOMING VISIBLE

JENNIFER BENNETT SHINALL\*

## *I. Introduction*

For some U.S. workers, the COVID-19 pandemic has meant becoming less visible, as many workplaces have shifted away from in-person obligations, allowing these workers to hide behind the virtual platforms of Zoom, Slack, and remote desktop apps. This sense of reduced visibility in the workplace has resulted in a variety of humorous gaffes, including accidental background blunders,<sup>1</sup> unintended no-pants shots,<sup>2</sup> and even a Supreme Court justice flushing the toilet during oral argument.<sup>3</sup> Still, for other U.S. workers, the COVID-19 pandemic has meant becoming *more* visible—not in terms of apparel choices or grooming habits, but in terms of a far more serious matter: their underlying health conditions.

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1. Even senators are not immune from virtual background embarrassment; a recent CNN interview with former U.S. Senator Bob Corker went viral for a strange piece of art in his background. See Drew Mackie (@drewgmackie), TWITTER (Jan. 8, 2021, 11:25 AM), <https://twitter.com/drewgmackie/status/1347595255026126848>. Indeed, Zoom backgrounds have become such an item of fascination during the pandemic that Room Rater, which rates media figures' Zoom backgrounds, has become a Twitter phenomenon during the pandemic. See Heather Schwedel, *Rating the Trendy Twitter Account That's Rating Everyone's Living Rooms*, SLATE (Apr. 28, 2020, 2:44 PM), <https://slate.com/human-interest/2020/04/room-rater-twitter-account-rated.html>.

2. Although numerous examples of clothing mishaps in virtual settings exist, perhaps the most famous one is a Good Morning America reporter who appeared on camera in April in a suit jacket, but no pants. See Alaa Elassar, *A Reporter Went on Air Wearing a Suit Coat and No Pants, Not Realizing Everyone Could See His Legs*, CNN (Apr. 29, 2020, 9:22 AM ET), <https://www.cnn.com/2020/04/28/us/good-morning-america-will-reeve-no-pants-trnd/index.html>. Clothing mishaps were apparently such a problem among Florida lawyers at the beginning of the pandemic that a Florida judge had to publish a letter “asking attorneys to get out of bed and put on some clothes before attending court cases via Zoom, after complaining that lawyers have appeared shirtless, still in bed and some even poolside while attending meetings remotely.” Danielle Wallace, *Florida Judge Urges Lawyers to Get Out of Bed and Get Dressed for Zoom Court Cases*, FOX NEWS (Apr. 15, 2020), <https://www.foxnews.com/us/florida-coronavirus-judge-lawyers-zoom-shirtless-bed-poolside-dressed>.

3. Fred Barbash, *Oyez. Oyez. Was That a Toilet Flush in the Middle of a Supreme Court Live-Streamed Hearing?*, WASH. POST (May 7, 2020, 6:24 AM CDT), <https://www.washingtonpost.com/nation/2020/05/07/toilet-flush-supreme-court/>.

Some workers' health conditions may have always been apparent to their coworkers and supervisors. Workers with obesity, especially in its more severe forms, are not able to hide their condition. Pregnant women in their second and third trimesters may similarly find themselves increasingly unable to conceal their condition (to the extent they so desire). In contrast, many common health conditions remain invisible to coworkers and supervisors: hypertension and high cholesterol, for example, are not apparent in the absence of a serious complication.

And yet, many of these invisible health conditions place workers at substantial risk upon contracting COVID-19. According to the Centers for Disease Control and Prevention (CDC), conditions like hypertension and high cholesterol place an individual at increased risk of morbidity and mortality upon contracting COVID-19.<sup>4</sup> As a result, the pandemic has transformed such health conditions, which were typically a nonissue at work, into a considerable danger. Nor are these two particular cardiovascular conditions unique; scientific research has identified a whole host of underlying health conditions—many of which are invisible—that place individuals “at increased risk of severe illness from COVID-19.”<sup>5</sup>

The number of workers whose underlying health condition has suddenly become significant to their workplace safety is substantial. To put into context just how many workers have COVID-exacerbating conditions, Table 1 details the prevalence of the most common exacerbating conditions identified by the CDC and other scientific research among U.S. workers ages eighteen to sixty-five who are currently employed outside the home.<sup>6</sup>

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4. See *COVID-19: People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

5. *Id.*

6. All of the conditions listed in Table 1 appear on the CDC's current list of health conditions that may put individuals at increased risk of severe COVID-19 infection, with the exception of depressive disorders. See *id.* Despite its absence on the CDC's official list, at least two research studies have linked diagnosis with a psychiatric disorder (including anxiety and depression) with increased risk of COVID-19 morbidity and mortality. See QuanQiu Wang, Rong Xu & Nora D. Volkow, *Increased Risk of COVID-19 Infection and Mortality in People with Mental Disorders: Analysis from Electronic Health Records in the United States*, 20 *WORLD PSYCHIATRY* 124, 128–29 (2021); Luming Li, Fangyong Li, Frank Fortunati & John H. Krystal, *Association of a Prior Psychiatric Diagnosis with Mortality Among Hospitalized Patients with Coronavirus Disease 2019 (COVID-19) Infection*, 3 *JAMA NETWORK OPEN*, no. 9, Sept. 2020, at 2–3.

TABLE 1. PREVALENCE OF COVID-EXACERBATING HEALTH CONDITIONS AMONG U.S. WORKERS, AGES 18 TO 65, 2017-2018 BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM DATA

Overweight (25 < BMI < 30)	36.5%
Obesity (BMI ≥ 30)	30.4%
High Cholesterol	26.4%
Hypertension	24.6%
Depressive Disorder	16.0%
Current Smoker	15.0%
Asthma	13.1%
Diabetes	6.4%
Ever Had Cancer (Other than Skin)	3.7%
COPD, Emphysema, or Chronic Bronchitis	3.0%
Prior Heart Attack	1.6%
Kidney Disease	1.5%
Currently Pregnant	0.8%
PERCENT OF WORKERS WHO HAVE AT LEAST ONE OF THE ABOVE CONDITIONS	82.2%

Notes: All estimates are derived from the Behavioral Risk Factor Surveillance System (BRFSS) combined 2017 and 2018 data, using sample weights.<sup>7</sup> Estimates include all workers ages 18 to 65 who are employed for wages. Estimates exclude self-employed and unemployed workers.

According to Table 1, over 80% of U.S. workers have one or more COVID-exacerbating health conditions. Since having one of the above health conditions may render in-person work a dangerous proposition in times of pandemic, far more workers will be forced to ask their employer for a health-related accommodation, such as working remotely, than ever before. In the process of asking for accommodations, many workers will necessarily have to become visible to their employers as a result of the pandemic—that is, they will have to reveal a previously invisible health condition.

This Article will consider the consequences of a large number of workers making their health conditions known to their employers during the pandemic. Becoming visible will likely have short-term costs for both employers and employees—in terms of health-status discrimination, privacy, and administrative burdens. Nonetheless, this Article will ultimately argue that becoming visible also has a major benefit: improved

7. For the raw BRFSS data, see *Survey Data & Documentation*, CTRS. FOR DISEASE CONTROL & PREVENTION: BEHAV. RISK FACTOR SURVEILLANCE SYS., [https://www.cdc.gov/brfss/data\\_documentation/index.htm](https://www.cdc.gov/brfss/data_documentation/index.htm) (last visited May 25, 2021).

information flow between employers and employees. Although the long-run cost-benefit analysis of increased health-status visibility during the pandemic remains to be seen, increased visibility ultimately has the potential to improve the employer-employee relationship.

## II. *Why Become Visible?*

Before further considering the consequences of a large number of workers revealing their health conditions to employers during the pandemic, the first issue to address is why employees will have to reveal their health conditions in the first place. Federal law does not require employers to accommodate an employee in the workplace *unless that employee is disabled*.<sup>8</sup> Thus, even in times of pandemic, an employee only has the legal right to accommodations like working from home if the employee can prove that she has a disability. The Americans with Disabilities Act of 1990 (ADA)<sup>9</sup> and its public-sector analogue, the Rehabilitation Act Amendments of 1992,<sup>10</sup> do not list health conditions that qualify as disabilities. Instead, these statutes take a vaguer approach, defining disability as (A) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,” (B) “a record of such an impairment,” or (C) “being regarded as having such an impairment.”<sup>11</sup>

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8. Title VII does provide limited accommodation rights for religious practices, but such accommodations cannot impose more than a “*de minimis* cost” on employers. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). In contrast, reasonable accommodation rights under federal disability law require employers to provide and pay for accommodations that pass a cost-benefit analysis and do not impose an “undue hardship” on the employer. *See* 42 U.S.C. § 12111(9)–(10). For an argument that *all* workers should have the right to reasonable accommodation, regardless of disability status, see Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 738 (2014) (arguing that any worker who could benefit from an employer-provided reasonable accommodation should be entitled to one).

9. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.).

10. Pub. L. No. 102-569, 106 Stat. 4344 (codified as amended in scattered sections of 29 U.S.C.). Note that ADA and Rehabilitation Act case law is interchangeable for the purposes of determining the existence of a disability, a reasonable accommodation, and an adverse employment action, as Congress expressly wrote the ADA in 1990 and amended the Rehabilitation Act in 1992 to make the two acts interchangeable. *See* 29 U.S.C. § 794(d) (“The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . .”).

11. 42 U.S.C. § 12102(2).

Assuming that an employee can prove that her hypertension or high cholesterol substantially limits a major life activity like working—which, in theory, should be easier during a pandemic—that employee would have the legal right to reasonable accommodation. Yet proving the right reasonable accommodation necessarily involves revealing information about the employee’s underlying health condition. Although the ADA limits what employers can and cannot ask during the “interactive process”<sup>12</sup> of determining an appropriate accommodation for an employee, employers are perfectly within their rights to ask an employee about “the nature or severity of the disability” if such an inquiry is “job-related and consistent with business necessity.”<sup>13</sup> Asking about the nature of an employee’s underlying health condition is almost certainly job-related and consistent with business necessity if the employee is asking the employer to provide and pay for a reasonable accommodation in the workplace.<sup>14</sup> Along these lines, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing the ADA, reaffirmed in its recent COVID-19 guidance to employers that “if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee’s disability necessitates an accommodation.”<sup>15</sup> Consequently, if an employee wants a workplace accommodation due to an

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12. *See id.* § 12112(d)(4)(A). Although an employer is not required to engage in such a process under the statutory language of the ADA, the Equal Employment Opportunity Commission (EEOC) encourages employers to engage in an interactive process to determine the most suitable accommodation for a disabled worker. According to the EEOC’s Enforcement Guidance, “A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer.” *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Oct. 17, 2002), [https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N\\_109\\_](https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_109_) [hereinafter *Enforcement Guidance*]. Moreover, “as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.” *Id.*

13. 42 U.S.C. § 12112(d)(4)(A).

14. *See Enforcement Guidance, supra* note 12 (“When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.”).

15. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter *What You Should Know*].

underlying health condition, employers are perfectly within their legal rights to ask for more information on that health condition.

In some sense, the EEOC almost encourages employers to ask for medical documentation as part of the interactive process in order to arrive at an ideal accommodation for the employee.<sup>16</sup> Moreover, in the event that a worker seeks a COVID-related accommodation under a statute other than the ADA—such as under the federal Family and Medical Leave Act<sup>17</sup> or a state short-term disability law<sup>18</sup>—virtually all available state and federal statutes similarly allow employers to require medical certification.<sup>19</sup> Thus, the large number of COVID-exacerbating conditions—and the large number of workers who may want a workplace accommodation as a result—makes it almost inevitable that employers will learn much more about their employees’ underlying health conditions during the pandemic than ever before.

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16. See *Enforcement Guidance*, *supra* note 12 (“An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. . . . In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.”); see also *What You Should Know*, *supra* note 15 (“Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the ‘essential functions’ of his position (that is, the fundamental job duties).”).

17. The Family and Medical Leave Act (FMLA) is a possible federal statutory source of COVID-related accommodation. The FMLA provides unpaid leave to full-time employees of large employers who have a “serious health condition.” See 29 U.S.C. § 2612(a)(1)(D). Just like the ADA, however, the FMLA allows employers to require medical certification that the employee’s illness (like a COVID-19 diagnosis or exacerbating health condition) constitutes a serious health condition. See 29 U.S.C. § 2613(a). Consequently, even if a worker sought accommodation under the FMLA (as opposed to the ADA), the worker would almost certainly have to reveal new medical information to their employer.

18. Currently, short-term disability insurance laws are on the books in six U.S. jurisdictions: New York, New Jersey, Rhode Island, Hawaii, California, and Puerto Rico. These statutes mandate short-term disability insurance for workers with serious health conditions. For a detailed discussion of these laws, see Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 809–12 (2018); see also Jennifer Bennett Shinall, *Protecting Pregnancy*, 106 CORNELL L. REV. (forthcoming 2021) (manuscript at 11–12) (on file with author).

19. See, e.g., 29 U.S.C. § 2613(b) (outlining the requirements for FMLA certification).



### III. Will There Be More Discrimination?

If more employees are revealing their health conditions than ever before, employers will necessarily gain new information upon which to base their employment decisions. As such, employees may be rightfully concerned that employers will use this new information negatively and take adverse employment actions against them because of their health status. To the extent that employees' COVID-exacerbating health conditions<sup>20</sup> are associated with a high degree of stigma,<sup>21</sup> such concerns may be well warranted.

Assessing the level of stigma associated with various health conditions is not immediately straightforward, yet possible due to the pioneering research of Marjorie Baldwin, Chung Choe, and Heonjae Song. In a recent paper, these authors surveyed hundreds of U.S. college students, asking them to rate the level of social acceptance associated with twenty-two common health conditions on a scale of one (no acceptance) to five (full acceptance).<sup>22</sup> Their results have mixed implications for workers during the COVID-19 pandemic.

For many workers, the good news is that asthma, diabetes, heart disease, and lung disease were among the least stigmatized health conditions.<sup>23</sup> Consequently, workers with these conditions may not need to be as concerned about revealing their health status to employers in seeking a COVID-related accommodation. The average rating for all of these conditions was four or above (indicating high acceptance), suggesting that the likelihood of ensuing employment discrimination against these workers is low.<sup>24</sup>

For other COVID-exacerbating conditions, however, the news is less optimistic. In the ranking of stigmatizing health conditions, depression and obesity were approximately halfway down on the list, indicating moderate

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20. See *supra* Table 1 (listing common COVID-exacerbating health conditions).

21. See, e.g., *Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/stigma-and-discrimination> (last visited May 25, 2021).

22. The researchers also surveyed several hundred college students in Korea to provide a comparative analysis between the two countries. See Chung Choe, Marjorie L. Baldwin & Heonjae Song, *A Hierarchy of Stigma Associated with Mental Disorders*, 23 J. MENTAL HEALTH POL'Y & ECON. 43, 50 (2020).

23. The average rating for asthma was 4.42, and the average rating for diabetes was 4.31. The average rating for heart disease was 4.07, and the average rating for lung cancer (the only other lung disease tested by the researchers) was 3.97. *Id.*

24. A score of 4 on the researchers' scale signified "high acceptance," or "a person with this disability would be acceptable as a friend." See *id.* at 45.

(but not full) acceptance.<sup>25</sup> Indeed, participants ranked these conditions as more stigmatizing than blindness, amputation, and deafness.<sup>26</sup> Yet the very bottom of the list of stigmatizing conditions was dominated by other mental health conditions, alcohol use disorders, and drug use disorders.<sup>27</sup> From these data, the researchers hypothesized that “[n]egative stereotypes that blame” individuals with such conditions and the “portray[al] of the prognosis as hopeless” were responsible for participants consistently labeling them with the highest degree of stigma.<sup>28</sup>

The fact that society alienates individuals with mental illness and substance abuse disorders is hardly news; Baldwin, Choe, and Song’s recent research provides empirical support to prior psychology research documenting the high degree of stigma associated with these conditions.<sup>29</sup> Still, this high degree of stigma is particularly concerning during the COVID-19 pandemic. Even as other entertainment expenses have declined due to pandemic-related closures, alcohol sales have skyrocketed, increasing by as much as 50%.<sup>30</sup> For many, a drink (or two or three) in the evening has been the only bright spot at the end of yet another bleak day in

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25. The average rating for depression was 3.65, and the average rating for obesity was 3.62. *Id.* at 50. Bolstering these authors’ empirical findings on obesity is a long line of research verifying the existence of weight-related stigma in the workplace. For a discussion of this research, see Jennifer Bennett Shinall, *Unfulfilled Promises: Discrimination and the Denial of Essential Health Benefits Under the Affordable Care Act*, 65 DEPAUL L. REV. 1235, 1265–69, 1273–74 (2016); see also Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 131–39 (2015).

26. See Choe, Baldwin & Song, *supra* note 22, at 50.

27. The average rating for bipolar disorder was 3.05, and the average rating for alcohol use disorder was 3.01. The average rating for schizophrenia was 2.70, and the average rating for drug use disorder was 2.39. *Id.* A score of 2 on the researchers’ scale signified “low acceptance,” or “people would try and avoid a person with this disability.” See *id.* at 45.

28. *Id.* at 53; see also Colleen L. Barry et al., *Stigma, Discrimination, Treatment Effectiveness, and Policy: Public Views About Drug Addiction and Mental Illness*, 65 PSYCHIATRIC SERV. 1269, 1270–72 (2014); Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1329–33 (1999).

29. See, e.g., Choe, Baldwin & Song, *supra* note 22, at 53; see also Adrian Thomas, *Stability of Tringo’s Hierarchy of Preference Toward Disability Groups: 30 Years Later*, 86 PSYCHOL. REP. 1155, 1155–56 (2000).

30. See Thor Christensen, *COVID-19 Pandemic Brings New Concerns About Excessive Drinking*, AM. HEART ASS’N (July 1, 2020), <https://www.heart.org/en/news/2020/07/01/covid-19-pandemic-brings-new-concerns-about-excessive-drinking> (“Nielsen reports alcohol sales in stores were up 54% in late March compared to that time last year, while online sales were up nearly 500% in late April.”).

isolation.<sup>31</sup> Along these lines, recent public health research has documented a 14% increase in drinking during the pandemic, as well as a 41% increase in heavy drinking among women.<sup>32</sup> Nor are the increases in substance use unique to alcohol; use of marijuana,<sup>33</sup> opioids,<sup>34</sup> and other drugs have also increased significantly.<sup>35</sup>

At the same time, mental health issues have also intensified as a result of the pandemic. A 2021 survey of Americans conducted by the Kaiser Family Foundation found a threefold increase in anxiety and depressive disorder symptoms from 2019.<sup>36</sup> A CDC survey found similarly startling numbers—

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31. *See id.* (“According to a Morning Consult poll of 2,200 U.S. adults conducted in early April, 16% of all adults said they were drinking more during the pandemic, with higher rates among younger adults: One in 4 Millennials and nearly 1 in 5 Gen Xers said they had upped their alcohol intake.”); *see also* Brian Mann, *Hangover from Alcohol Boom Could Last Long After Pandemic Ends*, NPR (Sept. 11, 2020, 4:57 AM ET), <https://www.npr.org/2020/09/11/908773533/hangover-from-alcohol-boom-could-last-long-after-pandemic-ends> (“[H]ealth care experts caution there could be serious consequences for millions of Americans that linger long after COVID-19 has passed. ‘I get worried when people think about alcohol as a tool to unwind, a tool to cope with stress and anxiety,’ said Dr. Lorenzo Leggio, a researcher with the National Institute on Alcohol Abuse and Alcoholism.”).

32. *See* Michael S. Pollard, Joan S. Tucker & Harold D. Green, *Changes in Adult Alcohol Use and Consequences During the COVID-19 Pandemic in the US*, 3 JAMA NETWORK OPEN, no. 9, Sept. 2020, at 3.

33. *See, e.g.*, Chris Roberts, *Are You Treating COVID-19 with Marijuana? Researcher Targets Pandemic’s Affect [sic] on Cannabis Habits*, FORBES (Sept. 8, 2020, 6:00 AM EDT), <https://www.forbes.com/sites/chrisroberts/2020/09/08/are-you-treating-covid-19-with-marijuana-researcher-targets-pandemics-affect-on-cannabis-habits/?sh=1dd4c2ad166a>; Brendan Bures, *How the Coronavirus Pandemic Is Increasing Global Demand for Marijuana*, CHI. TRIB. (July 1, 2020, 10:57 AM), <https://www.chicagotribune.com/marijuana/sns-tft-coronavirus-increases-global-marijuana-demand-20200701-oygaxryb7vhcjfeu44cgacicaa-story.html>.

34. *See* Danielle F. Haley & Richard Saitz, *The Opioid Epidemic During the COVID-19 Pandemic*, 324 JAMA 1615, 1615–16 (2020); *Overdose Deaths Accelerating During COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2020), <https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html>.

35. *See* Mark E. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm>.

36. From January to June of 2019, only 11.0% of survey participants reported symptoms of anxiety or depressive disorder. By January 2021, 41.1% of participants reported such symptoms. *See* Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>.

40.9% of its survey respondents reported “at least one adverse behavioral or mental health condition” in late June 2020.<sup>37</sup>

The takeaway from all these statistics is threefold. First, more Americans than ever before may be on the threshold of a mental health issue or substance abuse disorder.<sup>38</sup> Second, for those individuals who were already diagnosed with such a health condition prior to the pandemic, both the symptoms and severity may have escalated during the pandemic (in the worst case scenario, leading to relapse or death).<sup>39</sup> Third, and particularly concerning, is the extent to which individuals with mental health conditions may be also using drugs and alcohol to cope; such substance use may only exacerbate their underlying mental health condition.<sup>40</sup>

Because all available data indicate that mental health and substance abuse conditions are likely to be exacerbated by the COVID-19 pandemic, both new diagnoses and relapses are certain to afflict the U.S. workforce. Moreover, the number of workers affected could be significant; turning back to the data in Table 1, 16% of working adults already had a depressive disorder diagnosis *prior to the pandemic*.<sup>41</sup> Reliable data on working adults with an active or former substance abuse problem is more difficult to

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37. See Czeisler et al., *supra* note 35.

38. See Panchal et al., *supra* note 36 (stating that research “links social isolation and loneliness to poor mental health” and “shows that job loss is associated with increased depression, anxiety, distress, and low self-esteem and may lead to higher rates of substance use disorder and suicide”).

39. See Hao Yao, Jian-Hua Chen & Yi-Feng Xu, *Patients with Mental Health Disorders in the COVID-19 Epidemic*, 7 LANCET PSYCHIATRY e21, e21 (2020) (“People with mental health conditions could be more substantially influenced by the emotional responses brought on by the COVID-19 epidemic, resulting in relapses or worsening of an already existing mental health condition because of high susceptibility to stress compared with the general population.”); Mahua Jana Dubey et al., *COVID-19 and Addiction*, 14 DIABETES & METABOLIC SYNDROME: CLINICAL RES. & REVS. 817, 817 (2020) (“There is surge of addictive behaviors (both new and relapse) including behavioral addiction in this period. Withdrawal emergencies and death are also being increasingly reported.”); Emre Mutlu & A. Elif Anil Yagcioglu, *Relapse in Patients with Serious Mental Disorders During the COVID-19 Outbreak: A Retrospective Chart Review from a Community Mental Health Center*, EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE (Oct. 26, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7587161/#CR1> (“An outbreak, such as the coronavirus disease 2019 (COVID-19), may facilitate relapse of psychotic disorders through outcome, such as social distancing, lockdown or change in the priority of health services . . .”).

40. See Pollard, Tucker & Green, *supra* note 32, at 3 (“[E]xcessive alcohol use may lead to or worsen existing mental health problems, such as anxiety or depression, which may themselves be increasing during COVID-19.”).

41. See *supra* Table 1.

source. Nonetheless, the available data similarly suggests that a sizeable population of workers (and particularly, younger workers) may succumb to a substance abuse disorder during the pandemic. In 2018, for example, 10.1% of adults ages eighteen to twenty-five admitted having an alcohol abuse disorder, and 7.6% of adults in this age range admitted having an illicit drug abuse disorder.<sup>42</sup>

The unfortunate reality is that, if exacerbated severely enough, mental health and substance abuse conditions *can* interfere with the ability to work. An increasing number of workers with these diagnoses may require an accommodation from their employers, such as a temporary leave of absence or flexible working hours to seek treatment, during the pandemic. And as previously highlighted in Part II, asking for an accommodation allows employers to gain access to information about the employee's diagnosis.<sup>43</sup> While new information about an underlying health condition may not be harmful for all employees who ask for a pandemic-related accommodation, it may be harmful for employees with mental health and substance abuse conditions. The high degree of stigma associated with these conditions may (consciously or unconsciously) cause some employers to rethink an employee's capabilities, character, and even their trustworthiness. Such thoughts could ultimately lead to an adverse employment action. As a result, workers with mental health and substance abuse conditions may fall victim to employment discrimination more frequently because of the COVID-19 pandemic.

#### *IV. Will There Be Less Privacy?*

From the discussion in the prior Part, it follows that employee privacy must diminish during the pandemic. In order to ask for an accommodation necessitated by the pandemic, most employees will have to reveal some amount of medical information to their employers.<sup>44</sup> Revealing medical information to employers is not automatically harmful for employees, but it could easily turn harmful if employers misuse employee medical information. Using employee medical information as a basis for taking an

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42. Note that these percentages include *all* adults, not just working adults. The percentages are significantly lower for adults ages twenty-six and older: 5.1% of adults in this age range admitted to an alcohol use disorder, and 2.2% of adults in this age range admitted to an illicit drug use disorder. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH 33–34 (Aug. 2019).

43. See *supra* notes 12–15 and accompanying text.

44. See *supra* notes 12–15 and accompanying text.

adverse employment action (i.e., discriminating) against an employee would be an obvious example of misuse.<sup>45</sup> Yet even without an illegal misuse of medical information per se, employers may still harm employees by using their information in a manner that conflicts with employees' personal preferences. Revealing employee medical information to coworkers or other third parties, while not necessarily illegal, may go against employees' wishes.<sup>46</sup>

The good news for employees is that, under many circumstances, federal law imposes strict confidentiality requirements on employers who receive employee medical information. The ADA requires that "information obtained regarding the medical condition or history" of an applicant<sup>47</sup> or employee<sup>48</sup> as the result of an employer medical examination or inquiry must be "collected and maintained on separate forms and in separate medical files and [be] treated as a confidential medical record."<sup>49</sup> Employers who receive such confidential medical information are not legally authorized to share it, save with a narrow group of recipients—supervisors and managers (to the extent necessary for a workplace accommodation), first responders (in the event the employee requires emergency medical treatment), and government officials investigating employer ADA compliance.<sup>50</sup> All other sharing of employees' confidential medical information violates the statute.<sup>51</sup> Thus, even though employees can never fully erase or undo an unauthorized breach of their medical privacy, employees may at least have legal recourse against their employers for the breach under the ADA.

Nonetheless, employee privacy rights under the ADA have a significant limitation: they only attach if the employer receives employee medical information *as the result of a medical examination or inquiry*.<sup>52</sup> In other words, if an employee reveals medical information outside of an employer

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45. See 42 U.S.C. § 12112(d)(1) ("The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.").

46. See *infra* notes 50–52 and accompanying text.

47. 42 U.S.C. § 12112(d)(3)(B).

48. See *id.* § 12112(d)(4)(C) ("Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).").

49. *Id.* § 12112(d)(3)(B).

50. See *id.* § 12112(d)(3)(B)(i)–(iii).

51. See *generally id.* § 12112(d)(3)(B).

52. See *id.* § 12112(d) (applying its restrictions only to employer "medical examinations and inquiries").

officially requesting such information, then employer confidentiality requirements may not attach.

Perhaps the limitations of the ADA's confidentiality requirements are nowhere better seen than in a relatively recent Seventh Circuit case, *EEOC v. Thrivent Financial for Lutherans*.<sup>53</sup> Here, employee Gary Messier unexpectedly missed work one day and failed to notify his employer, Thrivent, regarding the reason for his absence. In response to Thrivent's repeated phone calls and emails regarding his whereabouts, Messier at last responded with a medical information dump, detailing his long history with a migraine condition.<sup>54</sup> When Thrivent later revealed Messier's migraine condition to another employer calling for a reference check, Messier filed a charge with the EEOC for breach of the ADA's confidentiality requirements.<sup>55</sup>

The Seventh Circuit held that Thrivent had *not* violated the ADA because it had not received Messier's medical information as the result of a medical examination or inquiry; therefore, Thrivent had no duty to keep Messier's medical history confidential.<sup>56</sup> As the court explained:

[P]revious courts have required—at minimum—that *the employer already knew something was wrong with the employee before initiating the interaction* in order for that interaction to constitute a 42 U.S.C. § 12112(d)(4)(B) inquiry. . . . [Here, Messier] could have had transportation problems, marital problems, weather-related problems, housing problems, criminal problems, motivational problems, a car or home accident, or perhaps he simply decided to quit his job . . . .<sup>57</sup>

The major lesson of *Thrivent* is that unsuspecting employees can unwittingly forfeit their medical privacy rights. And once those rights are forfeited, the employee loses control over how and to whom their employer reveals medical information.<sup>58</sup> Employees who are regularly in the habit of

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53. 700 F.3d 1044 (7th Cir. 2012).

54. The email admitted that it was “[p]robably a lot more than either of you wanted to know.” *See id.* at 1047.

55. In fact, the reference check was conducted by an agency hired by Messier himself. Messier suspected that Thrivent was saying negative things about him to prospective employers after “three prospective employers [had] lost interest in him after conducting reference checks.” *See id.*

56. *See id.* at 1052 (“Thrivent did not violate the requirements of 42 U.S.C. § 12112(d) by revealing Messier's migraine condition to RMI because the statute did not apply.”).

57. *Id.* (emphasis added).

58. *See id.*

engaging in casual water cooler talk, putting their foot in their mouth, or oversharing are particularly susceptible to having medical information shared contrary to their personal preferences. Employees need not use any “magic words” to keep their medical information confidential,<sup>59</sup> but they should take care to reveal this information only (1) in response to an employer inquiry, (2) in a private setting, and (3) after the employer has knowledge that the employee has a medical condition. In the absence of such care, employees are susceptible to losing control of their medical privacy when seeking pandemic-related accommodations in the workplace.

#### *V. Will There Be Greater Administrative Burdens?*

Following from the discussion in the prior Part, the potential for increased administrative burdens is obvious. Assuming that employees reveal their medical information appropriately to employers during accommodation requests, such revelations trigger strict employer confidentiality requirements under the ADA.<sup>60</sup> Not only must employers maintain this information “on separate forms and in separate medical files,”<sup>61</sup> but they must also construct internal firewalls to ensure that such information is shared solely on a need-to-know basis.<sup>62</sup> Otherwise, failure to take such measures will open up employers to liability under the ADA.<sup>63</sup>

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59. See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (“[T]o request accommodation, an individual may use ‘plain English’ and need not mention the ADA or use the phrase ‘reasonable accommodation.’” (quoting U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES 19 (Mar. 1997))).

60. See 42 U.S.C. § 12112(d)(3)(B).

61. *Id.*

62. Recall from the prior Part that employee medical information obtained from a medical inquiry or examination can only be shared with supervisors and managers in order to implement a workplace accommodation, first responders, and some government officials. See *id.* § 12112(d)(3)(B)(i)–(iii). To share employee medical information outside this narrow set of circumstances gives rise to employer liability under the ADA. Thus, employers must develop security measures to shield this sensitive information from most other employees. *Breach of Confidentiality of Personnel Records*, EMP. L. FIRMS, <https://www.employmentlawfirms.com/resources/employment/employee-rights/breach-confidentiality-hr-retaliation-employee-options> (last visited May 26, 2021) (“Under the ADA, for example, medical records and information must be kept in a file that’s separate from the employee’s regular personnel file, and must be kept confidential (for example, in a separate locked file cabinet or online behind a secure firewall).”); see also *HIPAA and ADA Confidentiality Rules Require Coordination*, HR.COM (Nov. 22, 2002), [https://www.hr.com/en/communities/labor\\_relations/hipaa-and-ada-confidentiality-rules-require-coordi\\_eacz2b13.html](https://www.hr.com/en/communities/labor_relations/hipaa-and-ada-confidentiality-rules-require-coordi_eacz2b13.html).

63. See, e.g., *Breach of Confidentiality of Personnel Records*, *supra* note 62.



Yet the greater administrative burdens that will inevitably result from more workplace accommodation requests are not unique to employers. Employees are also likely to experience greater administrative hassle in *providing* medical information to their employers. Employees have to make contact with their doctor (not always the easiest task with a busy medical practice) and follow up to make sure the appropriate forms and records are sent to their employer in a timely fashion.<sup>64</sup> Furthermore, besides the time cost, employees may incur a monetary cost. Many medical practices charge patients fees to pull health records and fill out employers' medical certification forms.<sup>65</sup> Such fees can run as high as \$50 per form, which may be particularly onerous for low-wage workers.<sup>66</sup>

And speaking of greater expenditures, employers may expect yet another source of increased costs as a result of increased pandemic-related accommodation requests: paying for the accommodations themselves. As discussed in Part II, employers must provide *and pay for* reasonable

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64. Although the ADA does not have a statutory time limit for an employee to provide their employers with medical information, the FMLA allows employers to require medical certification from employees within fifteen calendar days, even for unforeseeable leave. See 29 C.F.R. § 825.313(b) (2020) (“Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided.”).

65. See Consumer Reports, *Patients Are Now Being Billed for Some Services That Once Were Free*, WASH. POST (Feb. 23, 2015), [https://www.washingtonpost.com/national/health-science/patients-are-now-being-billed-for-some-services-that-once-were-free/2015/02/23/698399f4-8479-11e4-9534-f79a23c40e6c\\_story.html](https://www.washingtonpost.com/national/health-science/patients-are-now-being-billed-for-some-services-that-once-were-free/2015/02/23/698399f4-8479-11e4-9534-f79a23c40e6c_story.html) (“Federal law and laws in most states authorize doctors to charge reasonable fees for photocopying. . . . The charges may include costs for photocopying and the labor it requires, supplies, postage and preparing a summary—rather than a full record—of a patient’s history. Ditto for fees for pulling charts and filling out forms for camp and school physicals, and for forms relating to disability, returning to work, gym releases and family medical leave.”); Linda Zespy, *Should You Charge for It?*, PHYSICIANS PRAC. (Nov. 15, 2004), <https://www.physicianspractice.com/view/should-you-charge-it> (“The practice of charging for nonclinical paperwork has become more common as the volume of such paperwork has exploded.”).

66. See Zespy, *supra* note 65 (“Fees typically range from \$5 to \$50, depending on the nature of the service performed, the amount of time it takes to complete, and what the physician’s time is worth on an hourly basis.”); Kristen Gerencher, *Doctors Stick Patients with Paperwork Fees*, MARKETWATCH (June 1, 2011, 12:01 AM ET), <https://www.marketwatch.com/story/doctors-stick-patients-with-paperwork-fees-2011-06-01> (“Per-item fees, where they exist, have risen in the past few years, practice-management experts say, and typically range \$5 to more than \$20 a pop. On the high end, the fee can rival or exceed your office-visit copay, depending on your health plan.”).

accommodations for workers who qualify as disabled under the ADA.<sup>67</sup> While the costs associated with providing accommodations are limited by rules of reasonability and undue burden on the employer, the costs to the employer may still be nonzero.<sup>68</sup>

Nevertheless, the increased costs that result from increased accommodation requests during the pandemic may not be so onerous for employers in the end. First, there may be economies of scale for commonly requested pandemic-related accommodations. Business software licenses for applications commonly needed for out-of-office work (e.g., Zoom, Slack, remote desktop applications) may cost the same, regardless of whether three employees or thirty employees use them. Moreover, businesses may be able to take advantage of bulk discounts for technological equipment commonly needed for out-of-office work (e.g., webcams, microphones, computer equipment). Second, the costliness of workplace accommodations for employers may be overhyped. Data from a recent Job Accommodation Network survey of employers indicate that 56% of workplace accommodations cost the employer nothing.<sup>69</sup> Of the workplace accommodations that are costly, 39% have a one-time cost, and the median expenditure by employers is \$500 per accommodation.<sup>70</sup>

In sum, both employers and employees can expect some increased administrative burdens—in the form of more time expenditures on paperwork and more cost expenditures on accommodations—as a result of greater needs for workplace accommodation during the COVID-19 pandemic. Although these expenditures may be more onerous for small businesses and low-wage workers, they are not necessarily insurmountable. Becoming visible via a workplace accommodation request is not free for either employers or employees, but it is unlikely to break the bank.

#### *VI. Is There Any Good News?*

The prior Parts have delivered a series of bad news. Because more employees are likely to request workplace accommodations during the pandemic—and have to make their health conditions visible to employers

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67. *See supra* note 8.

68. *See supra* note 8.

69. *See Benefits and Costs of Accommodation*, JOB ACCOMMODATION NETWORK (Oct. 21, 2020), <https://askjan.org/topics/costs.cfm> (“Most employers report no cost or low cost for accommodating employees with disabilities.”).

70. *Id.* The most recent Job Accommodation network study found that 56% of accommodations were costless, 39% had a one-time cost, 4% had an ongoing cost, and 1% had both one-time and ongoing costs. *See id.*

as a result—employer discrimination may increase, employee privacy may decrease, and both employer and employee costs may increase. The prior Part may suggest that increased visibility of employee health conditions will inevitably lead to a net loss for workers and businesses, but this Part will cast a somewhat more optimistic view. Increased visibility of employee health conditions will increase information flow between employers and employees. And a growing body of empirical evidence indicates that better information flow in the workplace is positive for all parties involved.

Workplace information restrictions are often well-intentioned—meant to protect employees from harmful stereotyping and discrimination—but they often result in unintended, negative consequences for workers.<sup>71</sup> These measures have gained traction in recent years as a way to improve labor market outcomes of historically disadvantaged groups in the labor market. Familiar examples of workplace information restrictions include ban-the-box laws, which prohibit employers from asking applicants about their criminal records;<sup>72</sup> salary history bans, which prohibit employers from asking applicants about their prior earnings history;<sup>73</sup> and restrictions on family-status inquiries, which discourage employers from asking workers about their marital and parental status.<sup>74</sup>

Ban-the-box laws are a prime example of a well-intentioned, information-restricting law that may backfire. These laws are intended to improve labor market outcomes of black men, who have disproportionately high rates of criminal history—according to a 2017 study, by 2010 33% of black men in the United States had been convicted of a felony, compared to

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71. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 52 (2016) (“Undoubtedly, this [EEOC] guidance is well-intentioned and instituted in recognition that these factors may be used to discriminate . . .”).

72. Thirty-six states currently prohibit public employers from asking applicants about criminal history, and fourteen states extend the prohibition to both private and public employers. See Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (Sept. 30, 2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

73. Nineteen states currently prohibit employers from asking applicants about their prior salary. See *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions*, HR DIVE (Aug. 7, 2020), <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>.

74. See *Pre-Employment Inquiries and Marital Status or Number of Children*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [http://www.eeoc.gov/laws/practices/inquiries\\_marital\\_status.cfm](http://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm) (last visited May 26, 2021).

8% of the total U.S. adult population.<sup>75</sup> The idea is that employers will focus on an applicant's qualifications without being distracted by potentially extraneous information about the past.<sup>76</sup> Nonetheless, a 2018 resume audit study found that ban-the-box laws harmed black applicants far more than it helped them.<sup>77</sup> In jurisdictions without these laws, white applicants received 7% more callbacks than did similarly qualified black applicants. In jurisdictions with these laws, white applicants received an incredible 43% more callbacks.<sup>78</sup> The study authors hypothesized that employers responded to the information restrictions introduced by ban-the-box laws by assuming that all black applicants had a criminal record and, thus, exhibited increased resistance to hiring them.<sup>79</sup>

Similar conclusions have resulted from recent studies on salary history bans. These laws—which prohibit employers from asking an applicant about his or her previous salary—are particularly intended to improve the labor market outcomes of women and minorities, who famously continue to endure substantial pay gaps.<sup>80</sup> Although these bans sound good in theory, the problem is that they do not prohibit applicants from *volunteering* their prior salary.<sup>81</sup> Along these lines, two recent economics studies have both concluded that the bans may do more harm than good because of market unraveling.<sup>82</sup> When the market unravels, applicants with high prior salaries are more likely to volunteer them to employers; applicants with low prior

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75. See Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1808 (2017).

76. Avery & Lu, *supra* note 72.

77. See generally Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2018).

78. See *id.* at 191.

79. See *id.* (“[T]he pattern observed here is most consistent with a stereotyping model . . . in which small real-world differences are greatly exaggerated.”).

80. See, e.g., James Spindler & Jeff Meli, *Salary History Bans and Gender Discrimination* 4 (Jan. 20, 2021) (unpublished manuscript) (available at <http://ssrn.com/abstract=3361431>) (“The general impetus for salary history bans is to combat the gender pay gap.”).

81. See Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AEA PAPERS & PROC. 215, 215 (2020) (“Although bans forbid employers from seeking historical salaries, applicants under the bans are still permitted to *voluntarily* and *without prompting* disclose salary history information.”).

82. See *id.*; see also Spindler & Meli, *supra* note 80, at 6 n.11, 48. Unraveling occurs when “a growing number of workers are compelled to disclose (to differentiate themselves from low types).” Agan, Cowgill & Gee, *supra* note 81, at 219.

salaries are more likely to keep them secret.<sup>83</sup> As a result, employers make negative assumptions about applicants who fail to volunteer their prior salaries.<sup>84</sup> A recent theoretical economics model has outlined a mechanism for ban-related market unraveling,<sup>85</sup> and another 2020 economics study has used survey data to highlight how applicant volunteering of prior salary can undermine these bans.<sup>86</sup>

Yet another lesson of unintended consequences arose from a 2016 study on workplace information restrictions.<sup>87</sup> This study did not focus on a law, but rather on highly influential EEOC guidance discouraging employers from asking applicants about marital and parental status, out of concern that such questions are used to discriminate against women.<sup>88</sup> The authors conducted an experimental vignette study centered on middle-aged women applying to jobs after a career break—a population highly likely to have taken a career break because of family obligations.<sup>89</sup> Because of the influential EEOC guidance, employers rarely ask about such resume gaps in an interview setting.<sup>90</sup> Nonetheless, the study authors found that women

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83. See Agan, Cowgill & Gee, *supra* note 81, at 218.

84. See *id.* at 215 (“Voluntary disclosure raises the potential for adverse selection and ‘unraveling.’”).

85. Indeed, the model finds negative effects of salary history bans even in the absence of voluntary applicant disclosure. It studies, in particular, the effects of salary history bans on job switching, finding that they “trap[] high-performing women by imposing greater switching costs on them.” See Spindler & Meli, *supra* note 80, at 1.

86. Agan, Cowgill & Gee, *supra* note 81, at 219.

87. See Hersch & Shinall, *supra* note 71.

88. See *id.* at 52–54; see also *Pre-Employment Inquiries and Marital Status or Number of Children*, *supra* note 74 (“Questions about marital status and number and ages of children are frequently used to discriminate against women and may violate Title VII if used to deny or limit employment opportunities. . . . Even if asked of both men and women, such questions may be seen as evidence of intent to discriminate against, for example, women with children.”).

89. See Hersch & Shinall, *supra* note 71, at 76–79 (outlining the different scenarios in the vignette study).

90. See *id.* at 52 (“These restrictions largely derive from an overly broad reading—and, sometimes, a misreading—of Title VII case law by employers, employees, and even the Equal Employment Opportunity Commission (EEOC), the federal agency entrusted with enforcing the Act.”); see also Jenny Che, *10 Questions Employers Can’t Ask You in a Job Interview*, HUFFINGTON POST (Apr. 9, 2015, 4:19 PM ET), [http://www.huffingtonpost.com/2015/04/09/off-limits-questions-job-interviews\\_n\\_7028050.html](http://www.huffingtonpost.com/2015/04/09/off-limits-questions-job-interviews_n_7028050.html) (“Here are the questions interviewers should never ask but sometimes do anyway: . . . Are you married? . . . Do you have children or plan to?”); *How to Ask Legal Interview Questions*, MONSTER, <http://hiring.monster.com/hr/hr-best-practices/recruiting-hiring-advice/interviewing-candidates/legal-job-interview-questions.aspx> (last visited May 26, 2021) (“Questions about marital status and

who *volunteered* a family- or child-related reason for their resume gap were far more likely to be offered a job than women who remained silent about their resume gap.<sup>91</sup> Based on these results, the authors recommended “removing personal issues and family matters from the category of unmentionables.”<sup>92</sup> This study demonstrated yet another instance of workplace information restrictions appearing to harm the very category of workers they were meant to protect.

Although the above studies focus on very different legal policies and target populations, they all tell a remarkably similar story: restricting the flow of information between employer and employee can backfire. Instead of helping targeted workers obtain a job, make career advancements, and get a raise, these restrictions can leave these workers with fewer jobs, worse careers, and lower earnings.

Behavioral economic theories of choice under uncertainty can explain *why* workplace information restrictions often come with such negative consequences. First, when employers must choose between two equally qualified candidates (who presumably should have the same expected productivity), they will choose the less risky candidate.<sup>93</sup> This theory, known as risk aversion, can explain why employers may choose a white candidate over an equally qualified black candidate in the presence of a ban-the-box law: The employer views the black candidate as more likely to have a criminal record and, thus, as riskier.<sup>94</sup> Second, when employers must choose between two candidates who appear otherwise equal, employers will

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family issues are discouraged except as they relate to job performance . . . .”); *Illegal Interview Questions and Female Applicants*, FINDLAW (Dec. 10, 2018), <http://employment.findlaw.com/hiring-process/illegal-interview-questions-and-female-applicants.html#sthash.RHIEV7C.dpuf> (“Despite warnings to the contrary, some employers ask inappropriate questions during the job interview process that border on illegality including questions about a female applicant’s family life, marital status, and child rearing plans.”).

91. See Hersch & Shinall, *supra* note 71, at 85 (finding that employers preferred a job candidate who volunteered the reason for their resume gap over a job candidate who remained silent more than 80% of time).

92. *Id.* at 90.

93. See Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621, 635 (2020) (“Risk aversion theorizes that, given the choice between two bets with the same expected value, an individual will choose the less risky bet.”).

94. See *supra* notes 78–80 and accompanying text; see also Hersch & Shinall, *supra* note 71, at 87 (“Whether the subject of the information is family status, criminal history, or disability accommodation, underserved groups are best served when they can have open and honest conversations with their employers.”).

choose the candidate for whom they have more complete information.<sup>95</sup> This theory, known as ambiguity aversion, can explain why employers choose candidates who volunteer information on prior salary and family status over those who remain silent.<sup>96</sup>

Along these lines, I have argued in a prior Article that the information restrictions set forth in section 13 of the ADA,<sup>97</sup> which inhibit conversations between employer and applicant about health status at the interview stage, can undermine the hiring of disabled workers because of ambiguity aversion.<sup>98</sup> When a worker with a visible health condition comes in for a job interview, the employer is not able to ask about the nature of the worker's health condition, the need for accommodation, or the potential cost of a necessary accommodation *until after making an employment offer*.<sup>99</sup> But unfortunately, experimental evidence and observational data suggest that disabled workers may never make it to the employment offer stage.<sup>100</sup> Employers may be scared away by the uncertainty surrounding the workers' visible condition (and the costs that may or may not come with that condition), and, as the theory of ambiguity aversion predicts, will prefer a less ambiguously costly (i.e., a not visibly disabled) applicant every time.<sup>101</sup>

Because of the information restrictions imposed by the ADA, employers have been limited heretofore in their ability to have honest conversations with workers about their health status, their need for workplace flexibility, and accommodation more generally. Restricting such honest conversations

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95. See Shinall, *supra* note 93, at 634 (“According to the theory [of ambiguity aversion], when the expected value of the two risks are identical, individuals will prefer the less ambiguous risk over the more ambiguous risk.”).

96. See Hersch & Shinall, *supra* note 71, at 87–88 (arguing that the negative consequences associated with job candidates' failure to explain a resume gap is the result of ambiguity aversion).

97. See 42 U.S.C. § 12112(d)(2)(A) (“[A] covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”).

98. See Shinall, *supra* note 93, at 669–73 (arguing against restricting conversations about health status during the interview stage).

99. See 42 U.S.C. § 12112(d)(3) (clarifying that medical inquiries and examinations may only be made by employers “after an offer of employment has been made to a job applicant”).

100. See Shinall, *supra* note 93, at 668.

101. See *id.* at 640–69 (using experimental evidence to support the hypothesis that employer ambiguity aversion, particularly at the time of hiring, may be responsible for the poor wage and employment outcomes of disabled workers that have persisted since the passage of the ADA).

may lead employers to assume the worst (particularly in terms of their bottom lines) any time they discover that a worker has a health condition. Under the ADA, employers are only allowed to have honest conversations with their workers about health when the worker's health becomes a problem, making it natural for employers to assume the worst. Yet as Table 1 reveals, the vast majority of U.S. workers live with an underlying health condition—some of which require no workplace accommodation, some of which require a free accommodation, and some of which only require an accommodation in special circumstances (like a pandemic).

Increased dialogue about health between employers and employees may be the true upshot of so many workers making their health conditions visible during the COVID-19 pandemic. Yes, this dialogue necessarily diminishes employee privacy. But for the first time, employers will see just how many of their workers have been thriving in the workplace for years, despite having an invisible health condition. In time, these conversations should reduce employer ambiguity regarding the role that health plays with respect to workplace productivity. With any luck, this increased information flow will teach employers *not* to assume the worst whenever a future employee makes an accommodation request.

### *VII. Conclusion*

As seen in Table 1, a large percentage of U.S. workers are likely to need a workplace accommodation during the COVID-19 pandemic due to their underlying health conditions. Although increased demand for workplace accommodations may reduce employee privacy, increase employer and employee costs, and even increase employment discrimination in the short run, the long-run effects of increased accommodation demand may be more optimistic. The pandemic marks the first time since the advent of the ADA that employers will be able to have conversations about health with a large portion of their workforce.

Increasing information flow has more potential to ameliorate negative stereotypes about the effects of health in the workplace than avoiding the conversation altogether. Information restrictions feed erroneous employer perceptions that health problems are uncommon, and only a few, needy workers will ever require accommodation. In contrast, the pandemic has revealed that underlying conditions are the rule, not the exception among workers. It has further revealed just how many workers can benefit from



increased workplace flexibility.<sup>102</sup> The increased visibility of health in the workplace that has resulted from the pandemic may not be a net positive for all employees or all employers. Indeed, this Article has repeatedly highlighted the potential for short-run losses for both employers and employees. Nonetheless, in the long run, the large number of workers whose health status has become visible during the COVID-19 pandemic may ultimately work to undermine the stigma surrounding the ability to be productive at work with a medical condition.

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102. See Hersch & Shinall, *supra* note 71, at 90 (“Stifling honest conversations about personal and family matters, we suspect, does nothing to improve workplace flexibility. In fact, it may sustain and exacerbate the continued intransigence of certain industries to changes in employee working conditions by allowing employers to remain ignorant of what their workers require to accommodate their personal and family lives.”).