

Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?

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I.

INTRODUCTION

The employment relationship is heavily regulated terrain. *Laissez-faire* is not the rule of law. Instead, employment mandates, which require employers to provide certain benefits to their employees or prohibit employers to act in a discriminatory manner, are becoming the most significant method used to regulate labor markets. Traditionally employment mandates have been grouped into three distinct categories: anti-discrimination mandates, accommodation mandates, and universal mandates. The assumption was that each type of mandate operated differently within labor markets, and that one type can be embraced (e.g., anti-discrimination mandates), while rejecting the others (e.g., universal mandates or accommodation mandates).

This Article revisits the discourse about the similarities and differences between the three types of mandates. The existing literature analyses the issue by contrasting anti-discrimination mandates with accommodation mandates. This Article broadens the discussion, adding universal mandates to the analysis. It argues that universal mandates, that is, mandates that require employers to provide benefits to all workers, such as a safe work environment, protected family and medical leave or overtime pay, are substantially similar to both anti-discrimination mandates and accommodation mandates. Indeed, the three types of mandates are analytically identical; they operate in and affect labor market outcomes in the same manner. These similarities have been overlooked in the literature, which usually assumes that there is a qualitative difference between universal mandates, which apply to all employees, and targeted mandates, which apply to discrete groups of employees.¹

The insight that the three types of mandates are similar is important for a number of reasons: First, it undermines the commonly held view that what is bothersome about accommodation mandates, as opposed to anti-discrimination mandates, is that accommodation mandates entail compliance costs which deter employers from hiring the accommodated

1. Christine Jolls, *Accommodation Mandates*, 53 *Stan. L. Rev.* 223 (2000); John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 *STAN. L. REV.* 897 (2000). *But see*, Yoram Margalioth, *Some Simple Economics of Mandated Benefits Revisited: Efficiency and Redistribution Effects*, presented at the 12th Annual Meeting of ALEA, Harvard University (May 5th, 2002).

group members.² In other words, the traditional view is that compliance with accommodation mandates comes at the expense of the non-accommodated group members,³ an outcome which is objectionable on intra-employee redistributive grounds.⁴ However, when contrasting accommodation mandates with universal mandates, instead of the usual comparison of accommodation mandates and anti-discrimination mandates, it becomes apparent that what is bothersome about accommodation mandates is not the cost issue per se, as compliance with universal mandates entail costs as well. Universal mandates require employers to provide benefits, like overtime pay, health insurance, or job security. These benefits add labor costs, which we expect the employer to incur. Since both types of mandates entail costs, it is not only the cost issue that is troubling about accommodation mandates. The reason cost is an issue in the accommodation mandate realm is because compliance costs are understood to be discrete and are associated only with the employment of accommodated group members, rather than all employees.⁵ In other words, accommodation mandates do not impose costs on the employment of non-accommodated group members. Accepting this proposition reveals that what is at issue with accommodation mandates is equity and redistributive considerations.

Realizing that disparate compliance costs, and not compliance cost in

2. See Sherwin Rosen, *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 21, 23 (Carolyn L. Weaver ed., 1991) ("Nonetheless, there is an obvious difference between the earlier law and the one being considered now [the Americans with Disabilities Act (ADA)]: race and sex need have no relationship to productivity per se, but this is not true of most of the disabilities covered by the pending legislation. Indeed, the need for costly accommodation arises precisely because of differences between disabled and nondisabled [sic] workers. . . . From the employer's perspective, the costs of accommodating disabled workers will be a barrier to increasing employment opportunities."); Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 178 (1999) ("Because employers must pay for their employees' accommodations, those who happen to have employees who need accommodations bear the entire cost of this federally mandated benefit system. . . . [T]his system creates inequities among employers, because some employers have a higher percentage of disabled employees than others. Perversely, the more an employer does to further the goals of the ADA by hiring individuals with disabilities, the more the employer is likely to be burdened economically by the costs of accommodation. Not only is this inequitable, but it also gives employers an economic incentive to violate the ADA by rejecting disabled job applicants.")

3. Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 730 (1994) ("Thus, the ADA operates as a tool which redistributes wealth from consumers and the labor force as a whole to the disabled persons who choose to invoke it.")

4. This argument against accommodation mandates is not unlike the objections voiced against affirmative action policies. Friedland, *supra* note 2 at 173-174 ("Although the ADA purports to be an anti-discrimination statute, many of its provisions specifically require that employers, landlords, and other public entities treat some disabled people differently from able-bodied people, not equally with them."); see also Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C.L. REV. 901, 951-952 (2000) (discussing the distributive justice arguments for accommodation mandates in the ADA context).

5. Jolls, *supra* note 1, at 243-246.

general, is the main objection to the concept of accommodation mandates, leads one to ask whether the issue of disparate compliance cost is unique to accommodation mandates or whether it is present in all mandates. This Article demonstrates that universal mandates usually entail disparate compliance costs in relation to discrete groups of workers, and that they always entail redistributive consequences, as employees place different values on the benefits provided by the employer.⁶

More importantly, the analytic equivalence between the three types of mandates reveals that, at the end of the day, all three mandates are intra-employee redistribution tools and should be evaluated on this basis. There are three key factors that determine the redistribution outcomes of all three categories of mandates. These three factors are: (1) the scope of coverage of the mandate; (2) the employers' compliance costs with the mandate for each demographic group of employees; and (3) the value assigned to the mandate by the different demographic groups of employees. That all mandates operate in and affect labor market outcomes in the same manner highlights that one cannot object to the model of accommodation mandates while embracing schemes of universal mandates or anti-discrimination mandates, or vice versa. The impact of a mandate is determined by the groups of employees that tend to be covered, the employers' compliance costs, and the value assigned to the mandate by the various groups of employees covered. It is not determined by the assignment of a mandate to the universal, accommodation, or anti-discrimination rubric. That there is no clear-cut distinction between the various kinds of mandates leads to the conclusion that they are situated on a continuum. Their labor market outcomes are governed by three parameters of their design: coverage, cost, and valuation distribution by different groups of employees.

This Article proceeds as follows: Part II details current understandings of the unique characteristics and labor market impact of each type of mandate. Part II also explains why the three parameters used to evaluate the labor market effects of employment mandates are coverage, the employers' compliance costs, and the workers' valuation of the mandate. Part III summarizes recent criticism of the artificial distinction between anti-discrimination mandates and accommodation mandates. Parts IV, V, and VI demonstrate the equivalence between the three types of mandates with respect to coverage, cost, and value, respectively. Empirical data on universal mandates such as the Family and Medical Leave Act of 1993⁷

6. See Margalioth, *supra* note 1 (for a similar discussion of the distributive effects of universal mandated benefits). See also, Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991) (discussing generally that consumer warranty mandates carry redistribution outcomes among groups of consumers who place disparate value on the warranty).

7. Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654 (2002).

(hereinafter, the “FMLA”) and the overtime requirements of the Fair Labor Standards Act 1938⁸ (hereinafter, the “FLSA”) are presented to support the main argument of the Article: that the impact of universal mandates is equivalent to that of anti-discrimination mandates or accommodation mandates. The final section offers some preliminary conclusions.

II.

THE DIFFERENT TYPES OF MANDATES AND THE IMPACT OF MANDATED BENEFITS ON LABOR MARKETS

A. Definitions of the Three Types of Mandates

This Article refers to three categories of employment mandates. The first category, universal mandates, includes mandates that require employers to provide their employees with certain benefits. Universal mandates are directed to workers as a whole, and exclusion is usually based on the design of the workplace or the job in question,⁹ but not the employees’ personal traits. They include benefits such as employer-provided health insurance,¹⁰ unpaid medical leave,¹¹ workers compensation,¹² unemployment insurance,¹³ safety and health standards,¹⁴ minimum wage and over time pay,¹⁵ uniform standards for employee pension and benefit plans,¹⁶ protection against unjust dismissal,¹⁷ and

8. Fair Labor Standards Act, 29 U.S.C §§ 207- 219 (2002).

9. All universal mandates exempt particular sectors, whether determined on the basis of the size of the workplace, industries, or characteristics of the job performed by an individual employee. The issue of coverage is discussed in Part IV, *infra*.

10. HAW. REV. STAT. §§ 21-393 (1985) (Hawaii is the only state that mandates employer provided health insurance).

11. Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654 (2002) (entitling employees to take up to 12 weeks of unpaid job protected leave, for specified family and medical reasons). The FMLA is discussed in length in sections IV.B and VI.D.ii. *infra*.

12. Workers compensation insurance provides cash payments and medical benefits to workers who incur a work related injury or illness. The mandates are state based.

13. Social Security Act, 42 U.S.C.S. §§ 401-504 (2002) (providing for federal old-age, survivors, disability insurance benefits, and grants to states for unemployment compensation).

14. Occupational Safety and Health Act (OSHA), 29 U.S.C.S. §§ 651-678 (2002) (requiring employers to furnish each employee with work and a workplace free from recognized hazards that can cause death or serious physical harm).

15. Fair Labor Standard Act, 29 U.S.C.S. §§ 207-219 (2002).

16. Employee Retirement and Income Security Act (ERISA), 29 U.S.C.S. §§ 1001-1461(2002) (establishing uniform standards for employee pension and welfare benefit plans, including minimum participation accrual and vesting requirements, fiduciary responsibilities, reporting and disclosure).

17. Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 239-2-904 (2000) (mandating a cause of action for any employee who had completed the employer’s probationary period and was discharged either in violation of the employer’s written policies or without good cause). Montana is the only state to legislate a just cause dismissal protection mandate. Most states

advanced notification in the case of plant closing.¹⁸ Obviously, universal employment mandates involve costs. They force the employer to incur additional labor costs in order to comply with the standards set forth by the mandate.

The second category is anti-discrimination mandates. These mandates are mainly associated with Title VII of the Civil Rights Act of 1964, (hereinafter, "Title VII"),¹⁹ the Equal Pay Act, (hereinafter, the "EPA"),²⁰ and the Age Discrimination in Employment Act, (hereinafter, the "ADEA").²¹ Anti-discrimination mandates prohibit discriminatory labor market treatment of individuals on the basis of group membership. They define which groups are protected against discriminatory behavior and what type of behavior is discriminatory. In the abstract, discriminatory action could be understood to include those cases in which discriminating based on group membership is irrational from an economic perspective.²² If this were the case, anti-discrimination mandates could be categorized as no-cost mandates as they would not require employers to incur additional labor costs to comply with the non-discrimination standard. They would only require employers to address employment decisions in an economically rational manner, by disregarding personal traits that are irrelevant to the workplace decision at question.

The third category, accommodation mandates, includes mandates such as the reasonable accommodation provision of the American With Disabilities Act of 1990 (hereinafter, the "ADA"),²³ the Pregnancy Discrimination Act of 1978 (hereinafter, the "PDA"),²⁴ and the duty of reasonable accommodation of religious observances and practices of Title

acknowledge through court decisions one or more of the three common law exceptions to the employment at will doctrine. See Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3-11 (general survey of the at-will exceptions and their judicial status in different states).

18. Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C.A. §§ 2101-2109 (2002) (requiring employers to give sixty days notice of plant closings to their employees and state and local officials).

19. 42 U.S.C.A. § 2000e-17 (2002) (outlawing discrimination on the basis of race, sex, national origin, color and religion).

20. The Equal Pay Act (EPA), 29 U.S.C. § 206 (d)(1) (1982). The Act was enacted in 1963, as an amendment to the Fair Labor Standards Act of 1938, in order to remedy the problem of sex discrimination in wage setting.

21. Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2002) (prohibiting discrimination on the basis of age against individuals over the age of forty).

22. See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840-852 (2001).

23. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2002). Sections 12112(a), (b)(5) require employers to provide "reasonable accommodation" to the protected class of disabled individuals, unless doing so would present "undue hardship."

24. 42 U.S.C. § 2000e(k) (2002) (prohibiting an employer from providing less health insurance coverage for pregnancy related medical expenses than for other medical conditions).

VII.²⁵ A unifying characteristic of accommodation mandates is that they require employers to incur distinct costs associated with the accommodated group, such as disabled workers, pregnant workers, or religious employees. The costs are caused by the accommodation requirement. For example, if an employer is required to accommodate the needs of an employee confined to a wheelchair by incorporating ramps at the workplace, this translates into additional labor cost incurred only on behalf of the disabled employee. Likewise, an employer who must provide a health insurance program that covers maternity disability incurs additional labor costs associated with the employment of women of childbearing age and married men in the relevant age group.²⁶

These categories are ideal types, presented only to enable conceptualization of the different mandates. Indeed, the objective of this Article is to demonstrate that they are indistinguishable, and therefore should be treated as one category. But even in their ideal form one can point out common characteristics. Both universal mandates and accommodation mandates confer costs on employers. The commonly assumed difference is that, in the accommodation context, the additional costs are confined to the employment of the accommodated group of employees, whereas in the universal context, costs are incurred on behalf of all employees. Both anti-discrimination mandates and accommodation mandates relate to identifiable and restricted groups of employees, such as individuals with disabilities, individuals over forty, and specific racial, national and, religious groups. This attribute has caused these mandates to be referred to as “targeted mandates.”²⁷

25. 42 U.S.C. § 2000e(j) (2002) (explicitly requiring the reasonable accommodation of an employee’s or applicant’s religious observance or practice).

26. For a study identifying the groups of employees which are accommodated by the PDA mandate and the PDA compliance costs, see Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, (1994).

27. Jolls coined this phrase in relation to accommodation mandates and I broaden it to include anti-discrimination mandates as well. See Jolls *supra* note 1, at 226-229.

Table 1 sketches a matrix, which summarizes the distinct characteristic of each ideal type of mandate:

Table 1: Features of the Mandates

Parameter Mandate	Coverage of Mandate	Employers' Cost of Providing Benefit	Value Assigned to the Benefit by Employees
Anti-Discrimination	Discrete groups of employees "protected group members"	No compliance costs	Binary valuation: protected group members assign value, while other workers do not
Accommodation	Discrete groups of employees "accommodated group members"	Compliance costs incurred only on behalf of accommodated group members	Binary valuation: accommodated group members assign value, while other workers do not
Universal	All employees meeting coverage requirements	Compliance costs are incurred equally on behalf of all covered employees	Unified valuation: all employees assign similar value to benefit

B. Impact of Mandated Benefits on Labor Market

This subsection briefly summarizes the current view of the manner in which mandated benefits impact labor markets. I start by analyzing the case of a universal mandate. The accommodation mandate and anti-discrimination mandate are discussed in the next section.

The basic model is Lawrence Summer's partial equilibrium price theory model,²⁸ which is commonly used²⁹ to analyze related issues. In

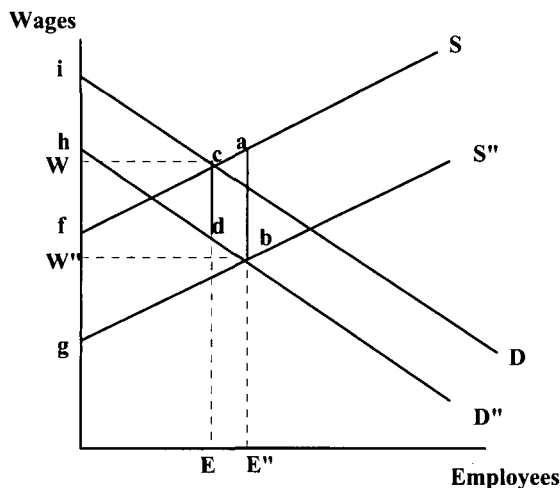
28. Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989).

29. See, e.g., Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided*

this model, a mandated benefit program requires the employer to provide covered employees with a certain benefit. This is a non-waivable benefit that the parties, employer and employee, cannot contract around. The mandated benefits must be provided, regardless of the actual preferences of the employees. Mandated benefits increase the employer's labor costs, and there is at least the possibility that some or all of these higher costs will be passed on to employees in the form of lower wages.³⁰

Graph 1 denotes the changes that occur when a mandated benefit program is introduced:

Graph 1: The Impact of a Universal Mandate on the Labor Market



S and D represent the supply and demand curves prior to the implementation of the mandated benefit.³¹ W and E represent the corresponding wage and employment rates in the pre-mandate environment. When the mandate is introduced, the demand curve, D', shifts leftwards. The magnitude of this shift, cd, represents the employer's cost of providing

Insurance: Lessons from Workers' Compensation Insurance, in TAX POLICY AND THE ECONOMY 111, (David Bradford ed., 1991); Dwight R. Lee, *Why Workers Should Want Mandated Benefits To Lower Their Wages*, 34 ECON. INQUIRY 401 (1996); Susan N. Houseman, *The Effects of Employer Mandates*, in GENERATING JOBS 154 (Richard B. Freeman and Peter Gottschalk eds., 1998); Jolls, *supra* note 1, at 230; Margalioth, *supra* note 1.

30. Adjusting wages may take time due to short-term wage rigidities. But in the long run, employers will be able to shift benefit costs to their employees by not raising nominal wage levels, or by offering lower wages to newly recruited employees.

31. The supply and demand curves are drawn as straight lines for clarity. The analysis would not change if they were drawn as curves.

the benefit to his or her employees.³² Similarly, when the mandate is introduced, the supply curve, S'' , shifts rightward. The distance between S and S'' , ab , represents the value placed on benefit by marginal employees.³³ In Graph 1, all employees place the same value on the benefit³⁴ and this value is greater than the employers' cost of providing the mandate ($ab > cd$). Therefore, while wages fall from W to W'' , employment levels rise from E to E'' , as more individuals are willing to supply their labor at the lower wage with the mandated benefit. Employees' aggregate surplus³⁵ rises ($W''bg > Wcf$), as does the employers' aggregate surplus ($W''hb > Wic$). In this case the mandate is efficient, but this is not always the case. In other instances, the magnitude of the shift of the demand curve, which represents the employers' cost of providing the benefit, may be greater than the magnitude of the shift of the supply curve, which represents the value placed on the benefit by employees ($cd > ab$). In this scenario employees value the benefit less than the cost of providing the benefit. Thus, employment levels ($E > E''$) and wages ($W > W''$) would fall.³⁶

When we turn to the case of the ideal accommodation mandate, the effect of the mandate is similar. The only difference is that the shifts in supply and demand depicted in Graph 1 relate to the supply of and the demand for the accommodated group of employees; while the supply and demand for the non-accommodated group of employees remains intact.³⁷ As a result, one needs to differentiate between labor supply and demand for the accommodated workforce and the remaining workforce. However, despite this distinction, interdependence between the two labor markets brings about redistributive outcomes.³⁸

In the no cost anti-discrimination case, we also need to differentiate between the labor market of protected group members and the labor market for non-protected group members. Like the accommodation case scenario,

32. Employers adjust their labor demand at each wage level by taking into account the added cost of the mandate. Ultimately a new labor demand curve is formed, which parallels the former one, the distance between the new and the old curves equaling the costs of providing the mandate for each employee. This does not hold true for cases in which compliance costs are not equal for every employee. See *infra* Graph 2.

33. Marginal employees are those employees who are on the margin of participating in the labor market or withholding their labor at the going wage. Their valuation of the benefit is important because this valuation will determine the wage decrease associated with the mandate.

34. S'' parallels S . This constraint will be relaxed in section VI.

35. "Surplus" is the added net gain to all employees from the implementation of the mandate.

36. For the analysis of these cases, see Lee, *supra* note 29.

37. See Jolls, *supra* note 1, at 240. Jolls defines the key difference between accommodation mandates (targeted mandates) and universal mandates is that "when an accommodation mandate is imposed, the willingness to supply labor rises exclusively or disproportionately for the group to which the accommodation is targeted . . . and the total marginal revenue product of labor falls exclusively or disproportionately for this group." *Id.*

38. *Id.* This issue is discussed in section V.B.i, *infra*.

there is no direct impact on the supply and demand of non-protected group members. However, the non-discrimination requirements should affect labor demand, as employers are now required to equalize the demand for qualified protected group members with the demand for non-protected group members at the going, non-discriminatory wage level.³⁹ This should result in an outward shift or increase in the demand for this group of employees. Since, in the ideal case, the anti-discrimination mandate does not confer monetary compliance costs on employers,⁴⁰ no counterforce will depress the demand for protected group members. The supply of labor of protected group members should increase as well. Protected employees, who, expect to enjoy equal treatment in the workplace, will be more willing to supply their labor. This parallels the increase of labor supply of the accommodated groups in accommodation mandates.

The price theory partial equilibrium model shows that labor market outcomes of mandated benefits are determined largely by three important factors: (1) which employees are covered, (2) the costs of providing the benefit, and (3) the valuation of the benefit by employees affected (covered and non-covered).⁴¹

III.

ACCOMMODATION AND ANTI-DISCRIMINATION MANDATES

This section outlines the main arguments that there is no clear-cut distinction between anti-discrimination mandates and accommodation mandates. This point is important for the main argument of this Article, that universal mandates are indistinguishable from the other types of mandates. If accommodation mandates are equivalent to anti-discrimination mandates, and universal mandates are equivalent to accommodation mandates, then anti-discrimination mandates are also equivalent to universal mandates.⁴²

39. John J. Donohue III, *Is Title VII Efficient?* 134 U. PA. L. REV. 1411, 1426 (1986). Donohue analyzes the impact of enforcement of anti-discrimination mandates, such as Title VII, on the labor market.

40. Anti-discrimination mandates do, however, confer psychological costs on employers who are required to associate with certain group members, who they prefer to avoid. Such costs are not deemed legitimate and are not included in this model.

41. Another key factor in determining labor market outcomes of mandated benefits is the relative elasticities underlying the supply and demand curves. The fact that labor supply is relatively inelastic and that labor demand is relatively elastic allows employers to shift significant percentages of the costs associated with the provision of the mandated benefit to their employees, regardless of employee valuation of the benefit provided. Because this issue does not affect the discussion of this Article, cross-elasticities of demand and supply for labor will not be addressed. For a discussion of this issue, see Sharon Rabin Margalioth, *Cross Employee Redistribution Effects Of Mandated Employee Benefits* (Apr. 2002) (unpublished manuscript on file with author).

42. If $a=b$ and $b=c$ then $a=c$ or $a=b=c$.

A. The Traditional Argument for Differentiation

Prior discussions of mandates have concentrated on differentiating the various types of targeted mandates.⁴³ Specifically, prior work has contrasted anti-discrimination mandates with accommodation mandates, omitting any analysis of universal mandates.⁴⁴ The usual treatment of this issue draws a distinction between the anti-discrimination provisions of Title VII, which are understood to prohibit disparate treatment of equally qualified individuals,⁴⁵ and accommodation mandates, such as the ADA, which require employers to reasonably accommodate qualified individuals with disabilities.⁴⁶

The distinction between the two types of mandates is formulated in the following manner:⁴⁷

Compliance with anti-discrimination mandates does not confer additional monetary costs on the employer, as she is merely required not to discriminate on the basis of characteristics which are irrelevant in the labor market. According to this view, the anti-discrimination mandate, in a sense, a form of costless regulation since its objective is not to impose additional costs in relation to the employment of protected group members, but rather to eliminate irrational economic behavior associated with employers' animus and stereotyping of protected group members. The notion is similar to Aristotle's arithmetic definition of equality,⁴⁸ which emphasizes that inequality (i.e., discrimination) surface whenever individuals are treated disparately on the basis of irrelevant traits or are treated alike although they differ in relevant traits.⁴⁹

On the other hand, accommodation mandates are understood to confer real monetary costs on the employer, who is obligated to reasonably accommodate the needs of otherwise qualified individuals.⁵⁰ For this

43. See *supra* notes 2-5.

44. *Id.*

45. Whether under the disparate treatment or disparate impact branches of the law.

46. 42 U.S.C. §§ 12101-12213 (2002). Sections 12112(a), (b)(5).

47. For commentators supporting the view that these are two distinct categories, see *supra* notes 2-5; See also Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 310-311 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2-4, 9 (1996).

48. Aristotle explained the principle of equality as follows: "Things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood." ARISTOTLE, *NICOMACHEAN ETHICS* 118 ¶ 1131a-b (Martin Ostwald, trans., Bobbs-Merrill, 1962).

49. Mark Kelman, without reference to Aristotle, conveys the same idea when stating that prohibiting simple discrimination does not necessitate group membership, as it is costless (based on irrelevant traits), and it is only for practical reasons that we require group membership to trigger the "right." Kelman, *supra* note 22, at 834-35.

50. See, e.g., Issacharoff & Nelson, *supra* note 47, at 317-18: "In other anti-discrimination contexts, however, the cost burdens are to greater or lesser extents constrained by the underlying

reason, anti-discrimination mandates are sometimes conceptualized as requiring “equal” treatment, as opposed to the “special” treatment required by the accommodation mandate. In other words, anti-discrimination mandates confer a negative duty not to discriminate, whereas accommodation mandates impose a positive obligation to accommodate.⁵¹

The emphasis on the cost issue stems from the argument that if accommodation mandates entail costs which are incurred by the employer only in relation to the employment of a discrete group of employees, the economic incentive to hire or continue to employ these workers decreases. Recognition of this incentive enables one to evaluate the merits of accommodation mandates and to assess whether they adequately advance the interests of their intended beneficiaries.

In this traditional analysis of mandates, there is apparently no need to address universal mandates, which require the provision of certain benefits to all employees. While universal mandates also confer costs on employers, the compliance costs, unlike those related to accommodation mandates, are assumed to be identical in relation to all employees. Thus, universal mandates, are assumed not to alter employers’ preferences for one group of employees over another, nor to redistribute resources between groups of workers.⁵²

B. The Case of Equivalence: Accommodation and Anti-Discrimination

Recently, a few commentators have tackled the question of whether the cost parameter associated with accommodation mandates is a meaningful differentiator between anti-discrimination and accommodation mandates. Their unequivocal answer has been no.⁵³ The following is a summary of the main points raised to support this proposition.

The concept of anti-discrimination mandates, unfettered by cost considerations, is an ideal concept.⁵⁴ Three decades of judicial precedent

equality norm. In other words, the costs imposed result from the failure to treat like candidates for employment in like fashion. The ADA eschews this formal equality command by directing that the finding of a disability affecting a major life activity triggers a duty of reasonable accommodation. The use of the formal discrimination model allowed Congress to disclaim the clear cost consequences of the burden of accommodation it shifted onto employers. The ‘unfunded mandate’ quality of the obligation was magnified by the undefined scope of the ensuing responsibility to accommodate.”

51. See Karlan and Rutherglen, *supra* note 47, at 9: “Title VII, for instance, essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it. The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination.”

52. See Jolls, *supra* note 1, at 230-231; Donahue, *supra* note 1, at 900-901.

53. The clearest views are presented in Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) and Kelman, *supra* note 22. An antecedent is Karlan & Rutherglen, *supra* note 51, at 9-10, 14-20, but they conclude that other factors determine that these are distinct groups of mandates.

54. If it were true that anti-discrimination mandates are costless, it would not be necessary to limit

show that compliance with anti-discrimination mandates involves distinct costs. Therefore, rather than differentiate between accommodation and anti-discrimination mandates in a binary manner, we should learn to view them as a continuum, or a linear progression, from no compliance costs (ideal anti-discrimination mandates) to significant compliance costs (accommodation mandates with high compliance costs).

Disparate impact law⁵⁵ presents a case within Title VII, which resembles accommodation requirements in many aspects.⁵⁶ As Christine Jolls contends: "Employers are often required by disparate impact law to incur special costs in response to the distinctive needs or circumstances of particular groups and these requirements may arise in situations in which the employer had no intention of treating the group differently on the basis of group membership."⁵⁷ Disparate impact law may require employers to excuse particular groups of employees from facially neutral grooming rules, which serve the employer's business interests and which were adopted solely for that reason.⁵⁸ Disparate impact law also imposes special costs when prohibiting facially neutral selection criteria that disproportionately disadvantage a particular protected group.⁵⁹ Examples are height and weight requirements, which tend to exclude women at a higher rate than men.⁶⁰ Striking down English only policies is yet another manifestation of a disparate impact law that resembles an accommodation mandate.⁶¹

the mandate to identifiable groups. We could then utilize the Aristotle definition of equality, which is not restricted to group membership, but rather draws the line of equality on individual "sameness" or "differences" with relationship to the relevant traits.

55. Disparate impact theory acknowledges that discrimination may also take place when a neutral criterion disproportionately disfavors protected group members without any "business necessity" justification. Disparate impact was embraced by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 436 (1971) (holding that Title VII prohibits employment practices with disparate impact that cannot be shown to be related to job performance) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (same). In the Civil Rights Act of 1991, Congress codified its definition of disparate impact for Title VII cases. See 42 U.S.C. § 2000e-2 (1991).

56. For the most comprehensive discussion of the overlap of disparate impact law and accommodation mandates, see Jolls, *supra* note 53, at 651-66.

57. *Id.* at 652.

58. Jolls discusses, for example, the case of a no-beard grooming rule implemented in response to perceived customer concerns about bearded employees, an otherwise neutral business reason. This grooming rule disfavors black males suffering from the skin condition pseudofolliculitis barbae, which makes shaving impossible for a significant number of black men, but has no such effects on white males. The no-beard rule was found by some courts as having an unlawful disparate impact on black men. See, e.g., *Bradley v. Pizzaco of Nebraska, Inc.*, 939 F.2d 610 (8th Cir. 1991). Jolls argues that an employer whose grooming rules are outlawed is required to incur special costs in response to the distinctive needs of a particular group of workers (black men in the no-beard example). Jolls, *supra* note 53, at 653-56.

59. Jolls outlines various selection criteria which courts found unjustified under disparate impact law. Jolls, *supra* note 53, at 656-58.

60. *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977).

61. See Jolls, *supra* note 53, at 658-60.

Disparate impact law not only addresses instances in which anti-discrimination law requires employers to incur special costs in relation to the hiring or employment of protected groups of employees. It also shows that, like accommodation mandates, discrimination law is also about discriminatory outcomes that lack malice.

Other aspects of anti-discrimination law also resemble accommodation requirements. The following scenarios described by Kenneth Arrow⁶² involve straightforward discriminatory practices (i.e., intentional discrimination), and, in this sense, they depart from the notion of accommodation, which is usually viewed as malice-free.⁶³ Nonetheless, these examples defy the ideal concept that discriminatory behavior is economically irrational. Indeed, they show that discriminatory behavior can be economically rational. If profit-maximizing behavior is banned by discrimination law, then discrimination law requires employers to incur costs in order to comply with anti-discrimination mandates. These costs are incurred on behalf of the distinct group of employees that belong to the protected group.

Three decades ago, Kenneth Arrow identified cases in which intentional discrimination is economically rational.⁶⁴ According to Arrow, when employers intentionally exclude protected group members based on the preferences of customers or co-workers, and when employers utilize measures of rational statistical discrimination, intentional discrimination is profitable.⁶⁵ Title VII, for example, bans employers from refusing to hire male candidates for a flight attendant position, even when the employer contends that the policy is driven by monetary considerations of aligning the profile of the flight attendant with customer preferences.⁶⁶ Even where it is profitable, however, employers must refrain from engaging in sex discrimination. Employers must offer convincing evidence of a Bona Fide Occupational Defense, (hereinafter, a "BFOQ"),⁶⁷ which is more than a

62. Kenneth J. Arrow, *Models of Job Discrimination*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 83 (Anthony H. Pascal ed., 1972).

63. Kelman, *supra* note 22, at 848-854, argues that since statistical discrimination and customer preferences driven discrimination present cases of intentional discrimination these types of discrimination belong in the "simple discrimination" rubric and not the "dynamic discrimination" rubric, which is defined similarly to the accommodation mandate. From the plaintiffs' standpoint, she is singled out because of her group membership and therefore is a victim of simple discrimination. However, Kelman agrees that the employer is driven by profit maximizing incentives, and that a discriminatory criteria is malice free in that sense.

64. Arrow, *supra* note 62, at 83.

65. *Id.*

66. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 302-04 (N.D. Tex. 1981).

67. 42 U.S.C. 2000e-2(e). There is no BFOQ defense available for race-based decisions. The most frequently applied test for the BFOQ defense is the "essence of the business" test announced by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971). Under this test, a BFOQ defense is valid only if an employer must discriminate between employees to ensure

showing of some loss of profit, in order to justify discriminatory practices based on customer or co-worker preferences.⁶⁸ This duty to incur costs to avoid Title VII liability resembles the costs employers incur accommodating certain groups under accommodation mandates. In both cases, employers must abandon the profit maximizing calculus in favor of inclusion of members of protected groups.

A similar point can be made about rational statistical discrimination.⁶⁹ The second prong of the BFOQ affirmative defense requires employers to show that "all or substantially all" group members are unable to perform the job in question.⁷⁰ This requirement prevails in both sex⁷¹ and age⁷²

that a job is performed. It follows that if an employee of either sex can perform the job in dispute or properly carry out the functions of the business, then an employer cannot discriminate between employees on the basis of sex.

68. See *Wilson*, 517 F. Supp. at n. 25: "Southwest's argument that its primary function is 'to make a profit,' not to transport passengers, must be rejected. Without doubt the goal of every business is to make a profit. For purposes of BFOQ analysis, however, the business 'essence' inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order." The court found that sex was not a BFOQ for employment because sex was not an essential function of the airline's business. Southwest failed to prove that the "customer preference for females was so strong" that the airline would lose its customers without its female-only hiring policies." *Id.* For a market oriented discussion of customer preference based BFOQ, see Rachel L. Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493.

69. Rational statistical discrimination occurs when the employer is correct in her perceptions about the relative average productivity of each group. In these cases, the hiring decisions she makes will be beneficial in that her costs will be minimized. See Richard Epstein, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW* 59 (1992). If those perceptions are inaccurate (irrational), and driven by stereotypes, banning these decisions will lead to economic efficiency. An in between case is when the perceptions are statistically accurate but reliance on them enhances the probability that they will remain accurate. The classic example of the self-fulfilling nature of statistical discrimination regards the perception that women have an increased probability of quitting their jobs. Because of this perception regarding quit probabilities, employers hiring women may be expected to provide them less firm-specific training, as there is a shorter expected period over which to recoup that investment in the worker's human capital. Women, however, seeing their male colleagues being given more training, may be expected to have an increased probability of quitting because there is less attachment to the firm. See Susan Schwochau and Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?* 21 BERKELEY J. EMP. & LAB. L. 271, n.34 (2000). Banning decisions based on self-fulfilling accurate indicators may entail short term monetary losses, but will in the long run prove efficient.

70. In *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the court announced the following standard: "The principle of nondiscrimination requires that . . . in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

71. In the *Weeks* case, the employer's concern was that women were not strong enough for the position at issue. The court found that the defendant failed to meet its burden of proving a BFOQ defense, as the defendant did not introduce evidence concerning the lifting capabilities of women. Thus, the court ruled that Southern Bell failed to meet its burden of proving that "all or substantially all" women could not safely and efficiently perform the duties of a switchman. *Id.*

72. The leading age discrimination case in this context is *Western Air Lines, Inc. v. Criswell*, 472

discrimination cases. An employer may be reluctant to hire older candidates for jobs requiring exceptional physical strength, assuming rationally that, on average, older candidates are not as strong as their younger peers. Nonetheless, anti-discrimination law under the ADEA requires employers to conduct individual physical tests to inquire whether the individual employee is able to perform the tasks in question, even though the age predictor gives a good rough estimate of which individuals will not be able to perform the job. Only when the employer can prove that “all or substantially all” members of the protected group cannot perform the job, can he utilize the discriminatory criterion. This narrow interpretation of the BFOQ affirmative defense hardly leaves any room for practices of rational statistical discrimination, even when rational statistical discrimination is fueled by profit maximizing objectives. Legal requirements to abandon age as a rational statistical indicator in favor of evaluation of individual employees is equivalent to accommodation mandates, since these requirements shift the costs associated with the employment of protected group members to their employers.

From the other end of the mandates spectrum, accommodation mandates themselves are not always interpreted as conferring substantial costs on employers. For example, Title VII incorporates a duty to accommodate religious needs.⁷³ This duty, similar in language to the ADA duty of reasonable accommodation, has been interpreted narrowly by the courts. In *Trans World Airlines, Inc. v. Hardison*⁷⁴ the Supreme Court held that an accommodation of religion constitutes an undue hardship if it imposes more than a de minimis burden on the operation of the employer’s business.⁷⁵ Hardison’s de minimis interpretation of undue hardship pales in comparison to the undue hardship standard that governs ADA reasonable accommodation cases.⁷⁶ Likewise, in the *Ansonia* ruling⁷⁷ the Court further

U.S. 400 (1985). In *Criswell*, the Court announced that an employer is required to show that it had a factual basis for believing all or substantially all of the employees over the age qualification would be unable to safely and efficiently perform the duties of their job. If the employer is unable to meet this standard, then it must demonstrate that it is “impossible or highly impractical” to identify on an individualized basis whether those candidates over the age qualifications could safely and efficiently perform their job duties. *Id.* at 414.

73. 42 U.S.C. 2000e(j) (2002): “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Title VII’s accommodation principle applies only to religion and was added via a 1972 amendment.

74. 432 U.S. 63 (1977).

75. *Id.* at 84.

76. Undue hardship in the ADA context means an accommodation that requires “significant difficulty or expense.” In enacting the ADA, Congress explicitly rejected the de minimis standard developed in *Hardison*. H.R. Rep. No. 101-485, pt.3, at 4 (1990), reprinted in 1990 U.S.C.C.A.N. 327, 350. For comparison of the two standards, see Peggie R. Smith, *Accommodating Routine Parental Obligations In An Era of Work-Family Conflict: Lessons From Religious Accommodation*, 2001 Wts. L.

restricted the scope of the employer's duty to accommodate an employee's religious beliefs, holding that an employer did not have an obligation to consider the reasonable accommodation preferred or suggested by the employee, or to even select an accommodation that least burdened the employee. The religious accommodation story indicates that labeling mandates as accommodation requirements can be meaningless.⁷⁸

Thus, despite the prevalence of employing cost as a factor to differentiate between anti-discrimination and accommodation mandates, both mandates impose similar costs on employers.

IV.

THE ISSUE OF COVERAGE

The most significant distinction between universal mandates and targeted mandates is supposedly the fact that universal mandates cover all employees, while targeted mandates cover discrete groups of employees.⁷⁹ This differentiating factor, however, is artificial for a number of reasons.

All mandated benefit programs exempt particular sectors, depending on factors such as the size of the establishment, the industry, or the specific job or jobs. The statement that "universal mandates are directed to all, or virtually all workers"⁸⁰ is, therefore, inaccurate. One can argue that the coverage requirement of "all workers" for universal mandates refers to mandates with coverage provisions that are correlated to industries, the size of the establishment, or the job design, but not to the demographic characteristics of the workers themselves. Targeted mandates, on the other hand, cover discrete groups of employees according to their demographic characteristics.⁸¹ This differentiator, however, is also misleading. The coverage provisions of universal mandates, while facially neutral, may impact discrete demographic groups of employees differently. That is, when

REV. 1443, 1481.

77. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986).

78. Some commentators argue that the Supreme Court standard in these cases leaves no substantive value to the religious accommodation requirement. See Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 799 (1997) (observing that as a result of the de minimis standard, the Act only provides workers in need of religious accommodation with "hypothetical protection"); David E. Retter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 COLUM. HUM. RTS. L. REV. 63, 83 (1979) (concluding that decisions post-*Hardison* allow employers to deny workers accommodations by resorting to hypothetical costs or by invoking the objections of co-workers).

79. Jolls, *supra* note 1, at 230.

80. Donahue, *supra* note 1, at 897.

81. Jolls, *supra* note 1, at 231. Jolls embraces this nuanced definition of accommodation mandates: "An 'accommodation mandate' is a requirement that employers take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers". Under this definition, the accommodated workers must comprise a demographic group that is identifiable in advance of the commencement of the employment relationship.

we turn to empirical data to determine which workers are actually covered by the mandate, we find that coverage is correlated to demographic characteristics. Since coverage of universal mandates is correlated, indirectly, to demographic characteristics, such mandates resemble targeted mandated programs. I present such data in relation to the overtime pay requirements of the FLSA and the unpaid leave entitlements under the FMLA.

Conversely, examining the coverage of targeted mandates reveals that some targeted mandates, especially Title VII, are universal in their coverage. Title VII, for example, protects workers from discriminatory behavior on the basis of race, sex, national origin, color, and religion. Each individual belongs to a specific sex or racial group and is, therefore, covered by Title VII.⁸² While it is true that Title VII impacts the well-being of minority group members to a greater extent, and that this is the way the public perceives the statute, white males have also utilized Title VII to attack alleged discriminatory workplace practices on the basis of race and sex.⁸³ The language of the statute, which is not limited to minority membership, can be, and has been applied, symmetrically. In my view it is the impact of usage and not coverage, which leads us to view Title VII as a targeted mandate.

A. Overtime Pay Mandate Coverage

The FLSA,⁸⁴ a universal mandate, requires the payment of a mandatory minimum wage and overtime pay of one and a half times the base wage for each hour worked above the weekly maximum of 40 hours.⁸⁵ The mandate has two objectives: (1) to restrict the weekly hours individual employees

82. Other targeted mandates, notably the ADA and ADEA, are genuinely targeted. The ADA covers only individuals with a "disability" and the ADEA covers only individual over the age of 40. Prohibiting age discrimination could have been structured in a universal manner by banning work related decisions that take account of age altogether. Some commentators also interpret disparate impact law to cover only minority disadvantaged group members, concluding that disparate impact law is a targeted anti-discrimination mandate. See Donahue, *supra* note 1, at 898. Donahue correctly notes that his conclusion is based on theory alone, as no case has yet addressed this issue. Donahue also argues that the first prong of a disparate impact case, finding a practice that adversely affects a member of a "protected" class, should not be met for the group of white males, since white males are not deemed "protected" under the disparate impact doctrine as apposed to the disparate treatment doctrine. *Id.* at n.2.

83. See e.g., *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

84. 29 U.S.C. §§ 201-219 (2002).

85. 29 U.S.C. § 207 (a)(1)(2002). Since the inception of FLSA, the parameters of overtime pay have remained fixed at time and a half for weekly hours beyond 40. Initially, in 1938, the standard workweek stood at 44 and then fell to 42 in 1939, but since 1940 it has remained at 40 hours per week. The statute does not regulate daily work schedules, only weekly work schedules. Therefore, an employer is in compliance as long as straight hours do not exceed 40, regardless of how many hours are worked in any given day.

work by taxing an employer who works his employees above the maximum, and (2) to allow work sharing and expand employment rates.⁸⁶ By taxing overtime, the FLSA may encourage employers to employ additional workers at the standard wage, rather than to pay incumbent employees overtime pay.⁸⁷

Coverage of the overtime mandate is neutral on its face. Exemptions are based on the characteristics of the job at question, not the demographic characteristics of the person performing the job. Some exemptions relate to both minimum wage and overtime pay⁸⁸ and some only to overtime pay.⁸⁹ The most important exemption relevant to both minimum wage and overtime pay is section 213(a)(1) of the FLSA, which exempts executive, administrative, professional, and outside sales workers (hereinafter, the "EAP" exemption).⁹⁰ In 1999, 65.7% of workers who were exempt from overtime pay requirements were exempt under the EAP exemption.⁹¹ It is by far the most significant exemption for both minimum pay and over time pay requirements.⁹²

In 1999, only 66.8% of all wage and salary workers were subject to the FLSA overtime provisions;⁹³ 33.2% of all wage and salary employees were not statutorily entitled to overtime pay, as they fell in one of the many exemptions. This translates to some 39.5 million non covered workers.⁹⁴

86. Garrett Reid Krueger, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1099 (1995).

87. Empirical evidence, however, suggests that this is not the way labor markets operate. See *infra* notes 161-62 and accompanying text.

88. Incorporated mainly in the various subsections of 29 U.S.C. § 213(a) (2002). But see 29 U.S.C. § 206(f) (2002) and 29 U.S.C. § 213(d) (1994).

89. Incorporated mainly in the various subsections of 29 U.S.C. § 213(b) (2002).

90. 29 U.S.C. § 213 (a)(1) (2002) exempts: "Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)." (internal citation omitted).

91. Minimum Wage and Over Time Hours Under the Fair Labor Standards (U.S Dept. of Labor, Wage and Hours Division, Jan. 2001) at 28, tbl. 4.

92. Other minimum wage and overtime pay exemptions are specific, and testify mainly to the success of special interest lobbying groups. Some examples of exempted employees are: seasonal recreational establishments; persons employed in the catching, cultivating, or first canning of fish or shellfish; employees of local newspapers with circulations of less than four thousand; any individuals employed as an outside buyer of poultry, eggs, cream, or milk in their natural state; employees engaged in the processing of maple sap into sugar or syrup; and taxicab operators. See 29 U.S.C. 213(a)-(b) (2002).

93. Minimum Wage and Over Time Hours Report (2001), *supra* note 91, at 27 tbl. 3.

94. *Id.*

One can hardly label these coverage rates as “universal” or “directed to all or virtually all workers.”

Even if we turn to the more substantive definition of universal mandates, drawing the line between mandates that build upon job characteristics (universal) rather than demographic characteristics (targeted), the picture is still ambiguous. As mentioned above, the EAP exemption is the most significant exemption under the FLSA, since it exempts the largest number of employees. Analyzing which racial groups are exempted under the EAP, white workers are over-represented in this exempted category,⁹⁵ while Black and Hispanic workers are under-represented.⁹⁶ This means that the overtime pay coverage and exemption provisions impact minority workers favorably, as they tend to be covered to a greater extent than their participation rates in the labor market. A similar pattern emerges if we look at how exemptions are related to the employees’ sex. Women tend to be covered to a greater extent than men.⁹⁷ Furthermore, when we examine employee exemptions by race and gender classifications, the disparity of coverage is the most significant.⁹⁸

The empirical data pertaining to the EAP exemption provides a good example of the manner in which the coverage provisions of universal mandates tend to impact demographic groups disparately. There is no qualitative difference between the anti-discrimination provisions of Title VII, which adopt a symmetric coverage design that impacts minority workers to a greater extent, and the coverage scheme of the FLSA, which covers all employees on its face, but covers more minorities and women in implementation. Even if we compare accommodation mandates or anti-discrimination mandates that cover only discrete groups (the ADA or the ADEA), with the FLSA coverage scheme, there are only quantitative differences in coverage. The coverage of the ADA or ADEA in relation to the demographic characteristics at question is binary; employees are either covered or not. The FLSA scheme, on the other hand, is more subtle. That an employee is a Hispanic female does not indicate that she is covered by the overtime mandate. However, the likelihood that she is covered is much higher than would be the case for a white male. Coverage under the FLSA

95. Unfortunately, the Minimum Wage and Over Time Hours Report (2001), *supra* note 91, does not include demographic categorization for the other exemptions.

96. Minimum Wage and Over Time Hours Report (2001), *supra* note 91, at 30 tbl. 6. White workers make up 73% of all wage and salary employees, but 83% of all EAP exemptees. Conversely, Black and Hispanic employees make up 11.7% and 10.8% of all wage and salary employees, respectively, but only 7.2% and 4.5% of all exemptees.

97. *Id.*

98. *Id.* White male workers are the most likely to be exempt. They make up 38.2% of all wage and salary employees but 45.6% of all exemptees. Hispanic female employees are the most likely to be covered by the statute. They constitute 4.5% of all wage and salary employees, and only 2.2% of exempt workers under the EAP.

is determined by job classification, but there are connecting threads between job classification and demographic characteristics. We cannot, therefore, base the difference between the three types of mandates on their coverage schemes. None cover all employees, and all are correlated to some degree to demographic characteristics.

B. Family and Medical Leave Act Coverage

The impact of the coverage provisions of the Family and Medical Leave Act of 1993, (hereinafter, the "FMLA"), are similar to the overtime coverage provisions. The FMLA further shows that universal mandate coverage provisions disparately impact demographic groups.

The FMLA requires employers to provide up to twelve weeks of unpaid, job protected leave to employees who need time off for a reason specified under the Act.⁹⁹ The coverage provisions consist of two accumulating conditions: the size of the establishment and length of service plus hours worked by the employee. Establishments are covered if they have at least fifty employees working at locations within a seventy-five mile radius.¹⁰⁰ Employees must work for a covered establishment for at least one year and 1,250 hours over the previous twelve month period.¹⁰¹

In the year 2000 61.7% of all employees worked in a covered worksite and met the eligibility requirements of job duration and number of hours worked,¹⁰² while 14.9% of all employees worked in a covered establishment but failed to meet the other eligibility requirements.¹⁰³ The remaining 23.3% of the workforce did not work in a covered worksite.¹⁰⁴ This is another example of a universal mandate that barely covers 60% of the workforce.

The coverage and eligibility requirements of the FMLA favor Black, Hispanic, and Asian workers over White workers.¹⁰⁵ They also favor

99. The FMLA's five categories of protected unpaid leave are: maternity related leave; parents caring for a newborn, newly adopted child, or a newly placed foster child; leave to take care of a child, spouse or parent who has a serious health condition; and leave to treat one's own serious health condition. 29 U.S.C. § 2612(a)(1).

100. 29 U.S.C. § 2611(2)(B)(ii) (2002).

101. 29 C.F.R. § 825.110(a)(1)-(2) (2000).

102. David Cantor et al., *Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys, 2000 Update* (Rockville, MD, Westat, 2001) available at <http://www.dol.gov/asp/fmla/toc.htm>, tbl. A2-3.1. For a summary of the findings of this survey, see Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17.

103. Cantor, *supra* note 102, at tbl. A2-3.1.

104. *Id.*

105. Cantor et al.'s survey reveals that: "About three-quarters of covered and eligible employees (75.3%) identify themselves as White non-Hispanic, 11.1 percent identify as Black non-Hispanic, 7.7 percent as Hispanic, and 3.3 percent as Asian. Compared to all other employees, however, covered and eligible employees are significantly more likely to identify as Black non-Hispanic, Hispanic, or Asian."

workers with more education,¹⁰⁶ workers earning higher wages, workers who are married or have been married,¹⁰⁷ and workers in the age group of twenty-five to sixty-four.¹⁰⁸ Cantor et al. found coverage and eligibility to be neutral as to sex and to the presence of children under eighteen in the household.¹⁰⁹ Again, we find that the neutral requirements pertaining to the definition of a covered establishment coupled with the equally neutral requirement of job duration and number of hours worked, impact disparately the coverage of distinct demographic groups. The conclusion that universal mandate coverage schemes are qualitatively similar to targeted mandates is apparent, as was the case with overtime pay mandates.

V.

THE ISSUE OF COST

A. Preliminaries

The previous section confronted the view that anti-discrimination and accommodation mandates are exclusionary in the sense that they cover identified discrete groups of employees, as opposed to universal mandates, which are presumed to be inclusionary, and offering coverage to all employees. At this point, for clarity, we can accept this common misperception as accurate.

Scholars usually point out that accommodation law burdens employers with additional labor costs. The discussion concentrates mainly on whether these additional costs create incentives for employers to avoid hiring members of groups entitled to workplace accommodation.¹¹⁰ It is rarely articulated clearly that the disparate costs associated with the employment

Id., at section 3.2.2 (Characteristics of Eligible Employees). See also, *Id.*, at Appendix, tbls. A2-3.3 (Demographic Profiles of Covered, Covered and Eligible, and Non-Covered).

106. "Nearly all (96.3%) covered and eligible employees have at least a high school education. Compared to other employees, covered and eligible workers are significantly less likely to have less than a high school education, and significantly more likely to have graduated from college (27.0%) or to have attended graduate school (13.2%)." *Id.*, at section 3.2.2.

107. "Nearly 70 percent (69.5%) of covered and eligible employees are married or living with a partner; an additional 11.0 percent are separated, divorced, or widowed. Covered and eligible employees are somewhat less likely than other employees to be never married (19.5%). Consistent with being married and having more education, covered and eligible employees have significantly more annual family income than do other employees." *Id.*

108. "Over 40 percent of covered and eligible employees are age 35-49 (42.8%). Covered and eligible employees are significantly more likely to be between the ages of 25 and 64, and less likely to be younger than 25 or older than 64, compared to all other (i.e., non-covered or non-eligible) employees." *Id.*

109. "Covered and eligible employees did not differ significantly from other employees in terms of gender or the presence of children under 18 in the household." *Id.*

110. See *supra* note 2 and accompanying text.

of the accommodated group are the issue rather than the additional labor costs generally. This haziness is the consequence of contrasting accommodation mandates with discrimination mandates, as this comparison highlights labor costs in general, since accommodation mandates are understood to be associated with costs and anti-discrimination are erroneously thought to be costless.¹¹¹

The more telling comparison regarding the labor costs of mandates contrasts accommodation mandates with universal mandates. This comparison reveals that both mandates carry costs, in the sense that they impose additional labor costs on the employer. Further, such a comparison reveals that all mandates require the employer to incur these costs in relation to the employment of specific groups of employees. This finding flies in the face of traditional analyses of universal mandates in which cost is erroneously understood to be associated with the employment of all employees.¹¹²

B. Formalizing the Issue of Cost

The preliminary discussion emphasized several important points, which will serve as building blocks for my argument that the cost factor is not an accurate differentiator between the various types of mandates. First of all, cost may be present in the enforcement of all three types of mandates. Moreover, the presence of disparate compliance costs is a feature of accommodation mandates¹¹³ and of universal mandates.

The unique aspect of accommodation mandates is supposedly that cost is incurred only in relation to the accommodated group of employees. Therefore, the downward shift in demand is restricted to this group of employees, as their employment becomes relatively more expensive, whereas demand for the non-accommodated group of employees remains stable.¹¹⁴ A change in the supply of labor is also restricted to accommodated group members, as they are the sole beneficiaries of the mandate.¹¹⁵ This binary cost structure results in unique redistributive outcomes, allegedly absent from universal mandates.¹¹⁶ This subsection explains in detail the redistribution outcomes of accommodation mandates,

111. See discussion in subsection III. B (clarifying why discrimination mandates entail compliance costs).

112. See discussion in subsection IV (clarifying that universal mandates do not cover “all employees”).

113. This includes accommodation mandates in the guise of anti-discrimination mandates. For discussion of examples of disguised accommodation mandates see *supra* notes 55-72 and accompanying text.

114. See Jolls, *supra* note 1, at 240-242.

115. See *supra* note 37 and accompanying text.

116. See Jolls, *supra* note 1, at 237 (“Mandates directed to workers as a whole have very limited distributive potential within this framework.”).

and then evaluates whether they are unique. The conclusion is that the distribution outcomes of accommodation mandates are also present in the case of universal mandates.

1. Christine Jolls's Model of Redistribution Effects of Accommodation Mandates.

Jolls's model embraces the traditional assumptions that accommodation mandates confer additional labor costs on employers only in relation to the employment of the accommodated group, while universal mandates confer such costs in relation to the employment of all employees.¹¹⁷ Under this model employers are discouraged from employing members of the accommodated group, as their employment is relatively more expensive than that of non-accommodated group members.¹¹⁸ As a result, an economic incentive arises to discriminate against the accommodated group members.

However, accommodation mandates are usually supplemented with non-discrimination mandates, in that they prohibit discrimination against the accommodated group of workers with regard to employment levels or wages.¹¹⁹ If these non-discrimination mandates are binding and enforced properly, and no differential wages or employment levels are tolerated, redistribution effects should benefit the accommodated group members at the expense of the non-accommodated group members.¹²⁰

Employers, who are prohibited from adjusting wages and/or employment demand for accommodated group members, must spread the labor costs associated with the mandate across their entire workforce. This results in redistribution, since all workers are paying for the cost of the mandated benefit, in the form of lower wage rates and/or lower employment levels, while only the accommodated group of employees benefits from the mandate.¹²¹

117. See Jolls, *supra* note 1 at 240-241.

118. See Jolls, *supra* note 1, at 260.

119. See Jolls, *supra* note 1, at 241; also "accommodation mandates are directed to groups protected under general anti-discrimination law. As a result, legal restrictions will prohibit employers from paying less to workers to whom accommodation mandates are targeted and from refusing to hire or retain these individuals. Thus, for example, employers cannot (lawfully) respond to the mandate of reasonable accommodation of disabled workers under the Americans with Disabilities Act (ADA) by paying these workers less or refusing to hire them in the first place. If the legal restrictions just described are fully binding on employers, then workers in the two groups will face the same labor demand curve despite the difference. . . in their total marginal revenue products of labor."

120. See Jolls, *supra* note 1, at 243-254.

121. One must note that, because the accommodation mandate is worthless to the non-accommodated fraction of the workforce, there will be no change in the supply curve of this group.

Jolls offers empirical data that suggests that enforcement of accommodation mandates is usually not binding, at least not simultaneously across wage and employment levels.

The PDA¹²² is an accommodation mandate requiring employers to treat pregnancy like any other disability. It mandates that, if an employer provides health insurance with general hospital and medical coverage to his employees, it must also include coverage of maternity-related hospital and medical expenses. Jolls argues that when employers are able to offset the costs of compliance with the PDA by paying women lower wages, they will do so. Employers shift PDA related costs to women through segregated workplaces.¹²³ Segregated workplaces allow employers to shift the costs of the PDA mandate to the beneficiary group of employees.¹²⁴ As a result, no costs are passed on to the non-beneficiary group of employees and no intra-employee redistribution takes place.

If employers cannot pay different wages to the accommodated group, employers can pass the costs of the mandated benefit to the accommodated group by employing fewer members of the accommodated class of workers.¹²⁵ This scenario applies to the employment of disabled workers under the ADA accommodation requirement. Under the ADA, demand for disabled employees falls, while demand for non-disabled employees remains intact.¹²⁶ This results in lower rates of employment of disabled employees. Here, redistribution takes place among the members of the accommodated group, but not between the accommodated and non-accommodated groups. Disabled employees, finding themselves unemployed as a consequence of the high costs of the mandate, are “financing” the accommodation of their employed group members.¹²⁷ This line of argument is similar to the objection to minimum wage mandates, that enforcement of minimum wage results in unemployment, with the

122. 42 U.S.C. 2000e(k) (2002).

123. See Jolls, *supra* note 1, at 283-284.

124. Jolls relies heavily on Gruber, *supra* note 26, which examines the impact of State PDA laws on the wages and employment of women. The study found a reduction in wages of married women of childbearing age relative to the wages of the workers least likely to be affected by the mandate (workers beyond childbearing age and unmarried male workers of childbearing age). It also documented that relative employment level of married women of childbearing age stayed the same or rose with the mandate. See Jolls, *supra* note 1, at 286.

125. Employing fewer members of the accommodated group will lower labor costs for the employer because there are less employees for which costly accommodation is to be provided.

126. For this proposition Jolls relies on two recent studies finding that employment levels of disabled individuals have fallen since the enactment of the ADA, while wage levels for these individuals were not depressed. Daron Acemoglu & Joshua Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. OF POLIT. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000). See Jolls, *supra* note 1, at 276 nn.104 & 105.

127. See Jolls, *supra* note 1, at 276 nn.104 & 105.

unemployed “paying with their job” for the higher wages paid to their still employed peers.¹²⁸

2. Accommodation Mandates and Universal Mandates—Cases of Equivalence with Relation to Cost

Jolls contrasts the accommodation framework with the universal mandate framework, assuming that, in the universal mandate case, there are no disparate costs in providing the mandated benefit. For universal mandates, identical cost is assumed to attach to the employment of all workers. In the accommodation case, the division of cost is assumed to be binary with no cost pertaining the non-accommodated group, and identical cost pertaining to employment of the accommodated group. Both assumptions, however, are too restrictive.

Complying with a universal mandate, such as the requirement to provide health insurance,¹²⁹ bestows disparate costs in relation to different groups of employees. Health insurance premiums are higher for older workers, women workers, and workers with preexisting health problems.¹³⁰ If there are disparate costs associated with universal mandates, the redistribution affects identified by Jolls in relation to accommodation mandates are relevant to universal mandates. The employer essentially has three options when confronted with this scenario. He can average the costs of the mandate across his entire workforce,¹³¹ thereby redistributing wealth from the employees for which compliance is less costly to those for which compliance is more costly. This case is equivalent to the redistribution effects in a well-enforced accommodation mandate. Second, the employer can attempt to proportionally target the cost shifting. That is, the employer can ascribe to each employee the exact costs associated with providing the

128. See generally, Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI L. REV. 405 (1997) (emphasizing that even if minimum wage increases the earnings of low wage workers as a group, it creates winners and losers among that group. It benefits low-wage workers, able to find and keep their job, at the expense of those who lose their job).

129. Hawaii is the only state to legislate a universal employer provided health insurance mandate. See *supra* note 10.

130. David M. Studdert, *Direct Contracts, Data Sharing and Employee Risk Selection: New Stakes for Patient Privacy in Tomorrow's Health Insurance Markets*, 25 AM. J. L. AND MED. 233, 251 (1999) (stating that “direct involvement in calculation of risk-adjusted payments will inevitably highlight particular types of services, employee age groups and even racial groups that are generating disproportionate costs. Self-funded employers must meet these costs head-on, through higher premiums; employers buying insured products face experience-rated mark-ups.”).

131. Studdert finds this scenario plausible due to the bureaucratic simplicity of this option, and the fact that targeting high risk employees may defy the ADA. Studdert agrees, however, that economic theory should drive employers to target high-risk employees and deny them health insurance coverage or employment. *Id.* at 251-253.

employee with the mandated benefit. This scenario is, however, highly implausible. It is bureaucratically burdensome and defies notions of equity in the workplace that are of importance to employees.¹³² In any case, this outcome is identical to cases in which accommodation mandates are not enforced on the equal pay front, resulting in the depression of wages of the accommodated group.¹³³ The last alternative is that an employer encountering a universal mandate with disparate compliance costs will attempt to avoid the employment of those workers for which compliance costs are relatively higher.¹³⁴ This strategy produces an outcome similar to cases in which the accommodation mandate is not fully enforced on the employment front.¹³⁵

One may contend that the above examples simply prove that mandates with disparate costs are, in fact, accommodation mandates and not universal mandates.¹³⁶ However, this reasoning simply re-categorizes all universal mandates as accommodation mandates and it frustrates the notion of two distinct groups of mandates.¹³⁷ Furthermore, this argument does not accord with Jolls's definitions, under which accommodation mandates grant benefits only to discrete groups of employees while universal mandates apply to all workers.¹³⁸ Even where universal mandates entail disparate compliance costs, they still apply, at least theoretically, to all workers.

Graph 2 depicts the case in which a universal mandate entails disparate compliance costs in relation to different groups of employees. For simplification, in this example, all employees value the benefits of the mandate identically (s' parallels s).¹³⁹ Although the design of the model is different from the accommodation model,¹⁴⁰ the outcome is similar.

132. See generally TRUMAN BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION (1999).

133. See Gruber, *supra* note 26 and accompanying text.

134. In the health insurance context, see COMMITTEE ON EMPLOYER-BASED HEALTH BENEFITS, INSTITUTE OF MEDICINE, EMPLOYMENT AND HEALTH BENEFITS: A CONNECTION AT RISK 246 (Marilyn J. Field & Howard Shapiro, eds., 1993) ("As long as employers' payments for employee health benefits vary depending on the health status of their workers, employers will still have an incentive to avoid high-risk or high-cost workers or dependents").

135. See *supra* notes 125-128 and accompanying text.

136. Jolls, *supra* note 1, at 261 (rejecting this notion, asserting that her two group model is distinguishable on distributional grounds from a heterogeneous group model).

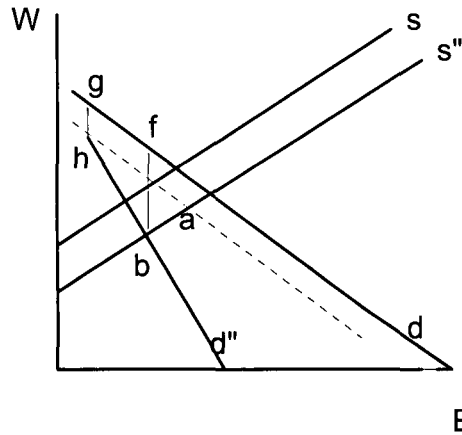
137. This is of course congenial with my views that all mandates are alike, and should not be grouped into separate categories.

138. Jolls, *supra* note 1, at 230-231.

139. Disparate valuation is discussed in section V.C, *infra*.

140. The universal model does not assume that workers are distinguished into two groups, but that they differ along a continuum. There is only one supply and one demand curve. The variation in cost of providing the benefit to different employees is captured in the relative slopes of the pre- and post-mandate demand curves.

Graph 2: The Impact of a Universal Mandate with Disparate Compliance costs



Disparate compliance costs associated with providing the mandate to different groups of employees is represented in the graph by the line d'' , which does not parallel the initial demand curve, d . The new equilibrium point is b , the intersection of d'' and s'' , and the average compliance cost per employee at this equilibrium point is bf , or the distance from d to d'' at the equilibrium point. For a limited group of employees the average compliance costs are much lower, represented by the line, gh .¹⁴¹ If there was an infinite supply of low compliance cost employees, and the employer could hire only these workers,¹⁴² the demand curve would parallel the dotted line and employment rates and wages would be higher, represented by the equilibrium point, a . In the scenario represented by the graph, where the employer is prohibited from hiring only low compliance cost employees, low compliance cost employees subsidize high compliance cost employees. This scenario is similar to an accommodation mandate, even though the universal mandate applies to all workers.

141. The steeper slope of the new demand curve d'' (compared to d) can be interpreted in two ways. One would assume that as demand rises, compliance costs with the mandate per employee rise as well, irrespective of the identity of the employees. For example, compliance per four employees is relatively cheaper than compliance per eight employees. This could happen if, for example, costs of administrating the benefit plan are negligent when there are few employees but become more expensive as employment levels rise. Economies of scale make the assumption of rising average compliance costs per employee unlikely. In any case, this interpretation has nothing to do with intra-redistribution effects of mandates, as the low compliance costs are not traced to individual employees. Another interpretation, which I embrace in my argument, is that there are a few employees for which compliance costs are low, like low risk individuals for health insurance purposes. As demand rises, the pool of low risk employees diminishes and employers must seek other candidates which are higher risk. This results in rising average compliance costs per employee, and the new demand curve is steeper than the original one.

142. Anti-discrimination law may prohibit the employer from restricting demand to this group of employees.

VI. THE ISSUE OF VALUATION

A. Preliminaries

Another limitation of the distinction between accommodation mandates and universal mandates is that the emphasis put on cost disregards, for the most part, the valuation side of the equation. While costs are an important factor when assessing redistribution outcomes of mandates, the value assigned to the mandated benefit by the covered employees is equally important. If employees attach different values to mandated benefits, distributional outcomes are inevitable, even if we accept the restriction that the cost of providing the benefit is the same for all covered employees.¹⁴³

Valuations of benefits in the universal mandate case are assumed to be identical, with all employees placing the same value on the provision of the mandate. In the case of accommodation mandates, valuation is assumed to be binary, with accommodated group members sharing the same valuation of the benefit, and with all other employees assigning no value to the mandate. These assumptions are, again, too restrictive.

B. Determining Employee Valuation of Mandated Benefits

The simplest approach to estimating employee assigned value is to equate the employer's cost with the employee's valuation of the benefit. While this approach may be a rough estimate when valuing voluntarily provided employer benefits,¹⁴⁴ it is irrelevant in the regulatory realm, where the employer is compelled to provide the benefit, irrespective of employee valuation of the benefit.

Economists developed the concept of cash equivalent value to measure the value of non-cash benefits to individuals.¹⁴⁵ Cash equivalent value is the least amount of money a person is willing to accept in exchange for not receiving the non-cash benefit. This approach attempts to determine how much better off an employee is made by the non-cash benefit by asking what the minimum amount of additional cash compensation that an individual requires to be just as well off as he would be if he received the

143. See Margalioth, *supra* note 1 (pointing out that all mandated benefits may entail some element of redistribution from employees who place low values on the benefits to employees who place high values on them, and that this distinction may lead to perverse outcomes, such as redistribution along wealth, gender, and family status lines).

144. Regarding voluntary benefits, when there is no government intervention in the form of taxes or subsidies I assume that the employer's cost equals employee valuation. In such cases, the cost criteria is a good measure of employee valuation.

145. The concept of cash equivalent value in the context of employer provided benefits is treated in Jack E. Triplett, ed. *Essay on Labor Costs*, in MEASUREMENT OF LABOR COST 1-60 (Jack E. Triplett, eds. 1983).

non-cash good. The cash equivalent value approach thus indicates how much of his or her wage an employee would be willing to give up in order to enjoy the mandated benefit. The problem is that estimations of cash equivalent values are difficult to generate, both because the data requirements are extensive and because of the complex issues involved in the actual estimation once data is available.¹⁴⁶

The cash equivalent value approach also has theoretical problems. Willingness to pay is, at least partly, a function of wealth. An extremely poor employee might not be willing to pay anything for health insurance, as all of his wages are going toward the purchase of basic goods such as food, clothing, and housing. Nonetheless if health insurance were provided, he or she would benefit from it. It would seem odd to say that health insurance has no value to that employee. In other words, unwillingness to pay may indicate the high value the employee places on money, rather than the low value the employee places on health insurance. Certain benefits, like health insurance, are benefits that certain employees would want if they had more money.

Theoretical differences aside, since I am looking into intra-employee redistribution outcomes, equivalent cash value is the best option for valuation. That a worker benefits from a mandate that he was not willing to pay for (i.e., because he cannot afford it), does not undermine my claim that regressive redistribution results. If other workers put relatively greater value on the benefit, for whatever reason, redistribution is present.

Within the price theory model, represented in Graph 1, the magnitude of the shift in the supply curve subsequent to the provision of the mandate represents the cash equivalent value of the benefit for workers. Since the supply curve represents the number of employees willing to work at any given wage rate, the rightward shift in the supply curve, caused by the introduction of the mandate, indicates that more workers are willing to work at a lower wage rate. Employees are willing to work for lower wages because they value the benefit provided by the mandate. The wage cut they are willing to accept¹⁴⁷ is, therefore, the cash equivalent value of the benefit.

C. Formalizing Employee Valuation of Universal Mandated Benefits

In this subsection I assume that the cost of providing the mandated benefit is identical for all employees,¹⁴⁸ while valuation of the benefit by

146. Melissa Famulari & Marilyn E. Manser, *Employer-Provided Benefits: Employer Cost Versus Employee Value*, MONTHLY LAB. REV., Dec. 1989, at 24.

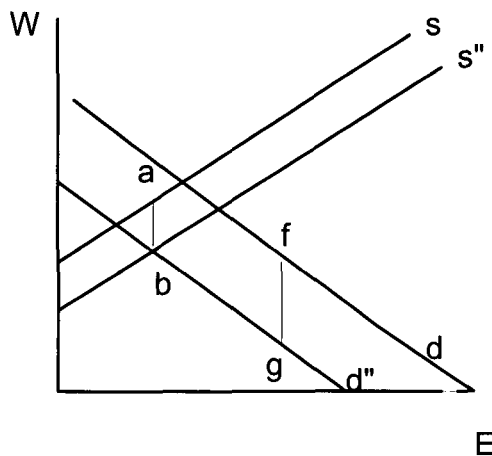
147. The magnitude of the shift from S to S' in graph 1.

148. This simplifies the discussion. Nothing in the analysis would change if costs were disparate.

employees varies may vary. If it is true that the value each employee assigns to the benefit is correlated to group membership, then intra-employee redistribution effects can be inferred.¹⁴⁹ For example, if, on average, wealthier employees assign greater value to job security than less prosperous workers,¹⁵⁰ regressive distribution follows from implementing just cause legislation. Conversely, if women value unpaid medical and family leave benefits more, on average, than men, the FMLA may result in progressive redistribution affects.¹⁵¹ These conclusions withstand my assumption that the cost of providing the benefit is equal for all covered employees.

Graph 3 describes the different possible redistributive outcomes when a universal mandate is implemented.¹⁵² The magnitude and slope of the shift of the supply curve, S'' , represents the cash equivalent value of the mandated benefit.

Graph 3a: Equal Valuation of a Universal Mandate



149. See Margalioth, *supra* note 1.

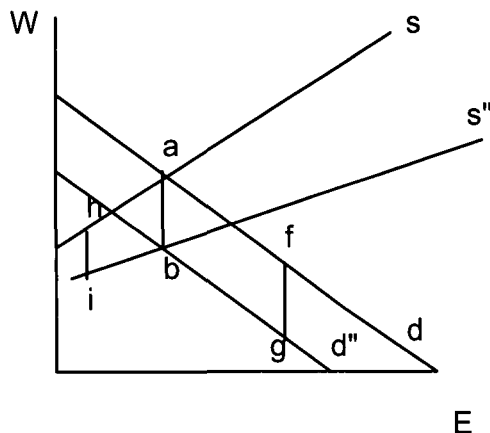
150. See *infra* notes 161-162 and accompanying text.

151. This example is discussed in Section VI.D.ii, *supra*.

152. The analysis of redistribution effects in the case of disparate employee valuation of universal mandates draws strongly on Richard Craswell's discussion of a similar issue—the redistribution effects of heterogeneity in consumers' valuation of consumer protection mandates, such as product liability. See Craswell, *supra* note 6. See also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 611-12 & App. B(1) (1982). Jolls acknowledges that the Craswell model has parallels to her model, but then elaborates why there are "important differences" between the models. Jolls *supra* note 1, at 261. My argument is that the source of the distributive outcomes may be different in the two models but the redistributive outcomes themselves are identical and therefore cannot be distinguished on a substantive basis.

In this case, the employer's cost of providing the benefit is identical for all employees (d parallels d''), as is the cash equivalent value of the mandated benefit assigned by employees (s parallels s''). Here, no intra-employee redistribution occurs. This case correlates to traditional assumptions of the effects of universal mandates.¹⁵³

Graph 3b: Infra-Marginal Employees Valuing The Benefit Less Than Marginal Employees¹⁵⁴

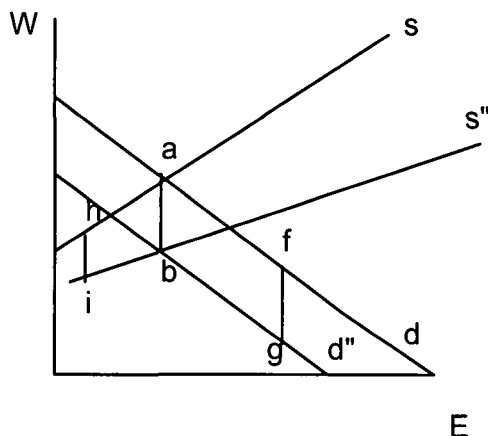


In this example, valuation of the benefit by employees is discrete (s does not parallel s''). Infra-marginal employees value the benefit less than marginal employees, $ab > hi$. Redistribution takes place from infra-marginal employees to marginal employees.

153. See commentators cited in *supra* note 28 and 29.

154. According to the price theory model, in labor markets in which different employees attach different values to a specific benefit, the size of the accompanying wage decrease will be determined largely by the valuation held by those employees who are on the margin between participating in this labor market or withholding their labor at the going wage. These employees are the marginal employees. Infra marginal employees are employees for whom the going wage is above their reservation wage to participate in the labor market.

Graph 3c: Infra-Marginal Employees Valuing The Benefit More Than Marginal Employees



This case resembles the case depicted in graph 3b. Here, however, infra-marginal employees value the benefit more than marginal employees, $hi > ab$. Redistribution takes place from marginal employees to infra-marginal employees.

A narrative example may clarify the above discussion. Suppose state legislators are contemplating a universal mandate of just cause discharge in the employment setting. Under the mandate, employees have some job security and could be discharged only for good cause. The going wage per hour in a certain labor market, pre-mandate, is \$20. Adminstrating the new just cause discharge rule adds an average cost of \$4 per hour, per employee. In each of the three different graphs, this could be illustrated by $fg = \$4$.

If marginal employees value the job security provision at \$4, its exact cost, (in Graph 2a, $ab = 4$), hourly wages will drop to \$16 per hour, with the value of the combined package of wages plus job security rights remaining intact at \$20 per hour for marginal employees. If all infra-marginal employees also value the job security at \$4,¹⁵⁵ no redistribution occurs. All employees simply trade \$4 of wages for a benefit they all value at exactly \$4. As a result, both employment levels and employee welfare are left unchanged.

Another possibility is that infra-marginal employees value just cause protection at more than \$4, a situation illustrated in Graph 2c above.¹⁵⁶ This group of employees includes all workers that were willing to work for \$20 before the just cause mandate and who value the mandate at greater than \$4. This group also includes a group of new individuals who, under the at-will regime, were uninterested in the job (i.e., unwilling to work for \$20 per

155. Graph 2a illustrates this special case, in which valuation is identical for all employees.

156. All employees situated on "s" to the left of point b will gain from the introduction of the mandate.

hour), but attach great value to job security, such that they are now willing to work. If some of these workers value the just cause provision at \$10, and were previously willing to work for an hourly wage of \$22, they will now be willing to participate in the labor market and their net gain from the just cause mandate is \$4.¹⁵⁷ At the same time, some infra-marginal workers do not fare as well under the new mandate. Employees who value just cause provision at less than its cost are worse off. An employee whose reservation wage is \$10 will continue to work even if she puts zero value on the job security clause, since wages will not fall below \$10. However, since this employee loses \$4 per hour in wages in exchange for something she values at \$0, the employee incurs a net loss of \$4 per hour.¹⁵⁸ In addition, some individuals will drop out of this labor market. This will be the case whenever an employee values the combined package of wages plus job security at less than \$20.¹⁵⁹

The analysis becomes more complicated when marginal employees value the just cause provision at more or less than its cost to their employer ($ab \neq fg$). When this happens, the wage cut will not equal the valuation ascribed to the benefit by marginal employees. If marginal employees value the benefit more than its cost, the wage cut will be more than the employer's cost, but less than the value placed on it by marginal employees.¹⁶⁰ Infra-marginal employees will gain from the introduction of just cause protection even if they value this benefit less than marginal employees, so long as their value exceeds wage reductions. Again, any infra-marginal employee who values the job security provision at less than the wage cut incurred is made worse off by the mandate and subsidizes the gains of other employees.

If marginal employees value the job security provision less than the employer's cost, wage reductions will occur at a rate less than the full cost, but greater than valuation by marginal employees. However, any infra-marginal employees who value the job security provision more than the wage decrease they incur are made better off by the mandate. All other infra-marginal employees are made worse off by the mandate, as the wage cuts exceed the value they place on the mandate.

157. They are paid \$16 for performing a job they would be willing to take for \$12 an hour (22 minus 10).

158. Prior to the implementation of the mandate her net gain was \$10 (20 minus 10). Now her net gain is only \$6 (16 minus 10). Thus her net loss is \$4 (10 minus 6).

159. A person willing to work at \$18 and valuing the job security at \$1 will drop out of the labor market. This person would only be willing to accept a wage cut of \$1, to \$17, which is more than the going wage of \$16.

160. See Lee, *supra* note 29. See also Craswell, *supra* note 6, at 372 ("Paradoxical as it may seem, the rules whose costs are most heavily passed on are also the rules that will benefit consumers the most.").

If we generalize from the above examples, we can extract the following rule: the more employees value the mandate in comparison to the wage cut they suffer, the better off they are made by the mandate and the more their welfare increases. Conversely, the lesser an employee values the benefit in comparison to the wage cut incurred, the worse off the employee is made. In either case, redistribution takes place among the workers, with value flowing from employees who value the mandate less to employees who value the mandate more. These distributional outcomes are similar to the distributional outcomes for accommodation mandates.

D. Real World Examples of the Disparate Valuation of Universal Mandates

From a distributional standpoint, it is important to identify the winners and losers of a proposed mandated benefits scheme. More often than not, the distribution of who values the employment mandate more or less is not random, but is linked to other characteristics of great importance. If, for example, women or other minority group members put less value on job security¹⁶¹ than marginal employees, mandating job security provisions redistributes wealth from women and minorities to other groups of employees.¹⁶²

For many of the employment mandates, we can infer a positive correlation between wealth and the value placed on the benefit. This inference stems from the law of diminishing returns, by which the marginal value of money to the wealthy may be lower even if the enjoyment of the mandated benefit is hypothetically be the same. Just as each new television set means less to the buyer with multiple televisions, each additional wage dollar means less to the wealthy worker. Wealthy workers may therefore value non-cash benefits more, as they value money less. Higher income employees would demand more of any normal good¹⁶³ than lower income

161. There is no good data on employee valuation of job security provisions. However, we can hypothesize at least two reasons why women will attach, on average, less value to job security: (1) women have less attachment to the labor market, and (2) women have, on average, lower wages and are thus less willing to pay for any benefit.

162. Indirect support for the thesis that mandating job security is regressive can be found in DAVID H. AUTOR, JOHN DONOHUE III AND STEWARD J. SCHWAB, *THE COSTS OF WRONGFUL DISCHARGE LAWS*, (Nat'l Bureau of Econ. Research, Working Paper No. w9425, 2001, *available at* <http://www.nber.org/papers/W9425> (last visited Jan. 10, 2003)). This study purports to examine the impact of the three common law exceptions to the at-will doctrine on the labor market. One of the many findings of the study was that the exceptions had only limited impact on employment levels, even among the groups most impacted by the implied contract exception. Educated young males had a decrease in employment levels of 1.9%, and younger, less educated females had a decrease in employment levels of 1.1 %. No impact was detected for the older better-educated portion of the workforce. *Id.* at tbl. 4. The drop in employment levels can be interpreted as indicating low value assignment to job security by these demographic groups. Nonetheless, one should be cautious in relying on these findings, as the main finding of the study was that the "at will exceptions" did not result in significant employment or wage rate changes. *Id.* at 4, 41-44.

163. This is a good which people want more of as their income increases.

workers. Indeed, some commentators estimate that there is an income elasticity for non-wage benefits greater than one. That is, a one percent increase in income leads to a greater than one percent increase in demand for non-cash benefits.¹⁶⁴ If this is true, all other things being equal, higher paid employees place a higher value on non-wage benefits than lower paid employees.¹⁶⁵ Redistribution effects of mandated non-wage benefits according to this hypothesis are always regressive.

Scrutinizing specific mandates under the cash equivalent value measure is not as easy a task as endorsing the general claim that there is a tendency to prefer non-cash benefits over cash wages as wealth increases. In a graph, the cash equivalent value of a mandate can easily be represented by the magnitude and slope of the shift in the labor supply curve, but tracking these changes, in the real world, by affected group is an onerous task.¹⁶⁶ I have not been able to find surveys or studies that address this issue directly.¹⁶⁷

A close approximation of valuation of mandated benefits is to identify which groups of employees tend, on average, to take advantage of the benefit more often. This is, admittedly, a relative measurement and cannot tell us precisely the cash equivalent value of the benefit at question. However, such an approach can tell us if women workers value the benefit more, on average, than men, or if minority workers value the benefit more than non-minority workers. A finding that one group of employees utilizes the benefit, on average, more than other groups would support an inference that the group values the benefit relatively more than those other groups. For redistribution inquires, such an approach may suffice, and we can confidently infer that, assuming equal cost of providing the benefit, that there are redistribution outcomes, with wealth flowing from the under-utilizing group of employees to the over-utilizing group of employees.

This sort of inquiry is feasible only in relation to mandates in which we can observe group based employee utilization. Some mandates, such as those directed at the health and safety of the workplace, cannot be measured in terms of group-based utilization. Once safety and health standards are implemented in the workplace, all incumbent employees enjoy them. To

164. See Stephen A. Woodbury, *Substitution Between Wage and Nonwage Benefits*, 73 AM. ECON. REV. 166 (1983).

165. See Joseph Bankman, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH. U. L. Q. 597, 603 (1994).

166. See Famulari and Manser, *supra* note 146, for a survey of the methodological problems associated with gathering reliable cash equivalent data.

167. Information on the cost of providing many of the employee mandated benefits is readily available in the Employee Cost Index (ECI), published on a regular basis by the Bureau of Labor Statistics. See generally, BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY - COMPENSATION COST TRENDS, available at <http://www.bls.gov/ncs/ect/home.htm> (last visited Jan. 10, 2003).

assess valuation of this benefit, we would need to measure the cash equivalent value of the mandate directly. However, other benefits, such as family and medical leave rights, overpay guarantees, and anti-discrimination protection, can be evaluated through the utilization rates of demographic groups. That an employee has a right to take unpaid leave or to receive overtime pay does not necessitate that he or she will take leave or work over time, respectively. In these special cases, we can observe which groups take greater advantage of the benefits.

1. Overtime Pay

The costs of complying with the overtime provisions of the FLSA are identical for all employees.¹⁶⁸ However, valuation, according to utilization criteria, varies along gender lines, and the FLSA thus represents a case in which wealth is transferred from women to men. As mentioned earlier, in 1999, only 66.8% of salary and wage employees were covered by the overtime pay provisions of the FLSA¹⁶⁹ and coverage tended to favor women and minority employees.¹⁷⁰

Overtime pay is relevant mainly to minimum wage earners. Studies show that, for employees earning more than the minimum wage, the firm and the workers are indifferent between combinations of straight time and overtime wage rates that result in the same level of weekly compensation.¹⁷¹ Standard wages of workers earning more than the minimum wage can be adjusted down in order to keep their overall wage intact. Empirical evidence supports the claim that overtime pay regulation has no discernible impact on overtime hours, as straight time hourly wages adjust to changes in overtime premium.¹⁷² This means that employers push regular hour

168. The overtime pay requirement of "time and a half of the standard wage" represents an equal cost mandate. On behalf of each covered employee working overtime, the employer will have to pay a premium of time and a half of the regular pay.

169. See *supra* note 93 and accompanying text.

170. See "Minimum Wage and Overtime Hours Report (2002)," *supra* note 96 and accompanying text.

171. See John Addison and Barry T. Hirsh, *The Economic Effects of Employment Regulation: What Are the Limits?*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125 (Bruce E. Kaufman ed., IRRA, 1997). "The argument that an overtime premium will increase employment is weakened further by the possibility that as a result of the premium the straight-time wage will decrease so that the wages hours combination is of equivalent value to workers. That is, the availability of jobs offering overtime hours may result in an equilibrium straight-time wage that is slightly lower than it would be in the absence of the premium." *Id.* at 141-142 (internal citation omitted).

172. See Stephen J. Trejo, *The Effects of Overtime Pay Regulation on Worker Compensation*, 81 AM. ECON. REV. 719 (1991); Stephen J. Trejo, Does the Statutory Overtime Premium Discourage Long Workweeks? (IZA Discussion Paper No. 373, Oct. 2001). Stephen Trejo's empirical work on the effect of expanded coverage of overtime pay mandates on work schedules supports the compensating differential model in which work schedules are largely unaffected and straight hour wages are adjusted to mitigate the increased costs of overtime hours. It rejects the alternative model, according to which the

wages down in order to keep total compensation steady.¹⁷³ Thus, employers comply with the FLSA overtime pay requirements without distorting the wage rates yielded by the equilibrium of the supply and demand for labor. In other words, straight hour wages are set beneath the equilibrium wage, so that employers can pay time and a half for overtime, while holding total compensation at the rate dictated by market forces.

This scenario harms employees who do not engage in overtime work, as their standard wages are depressed. The FLSA is thus a good example of a universal mandate that costs the employer the same to provide the benefit to each employee, but nonetheless results in redistributive outcomes similar to those of accommodation mandates. Compliance with the overtime pay mandate benefits workers who work overtime at the expense of employees who do not engage in overtime work. As with an accommodation mandate, the benefit accrues only to the accommodated group of employees, while compliance costs are spread among all workers in the form of depressed wages.

The following data reveals that women who work full-time¹⁷⁴ tend to work, on average, fewer hours than men. This indicates that women are adversely affected by the time and a half pay requirements of the FLSA, as their straight hour wages are adjusted downward to keep total compensation constant.¹⁷⁵ Based on the Current Population Survey of 2001, (hereinafter, the "CPS"),¹⁷⁶ women subsidize, through shorter work schedules and depressed straight hour pay, the time and a half pay requirement of the FLSA, which is disproportionately enjoyed by men. This is disturbing, considering that, in terms of coverage, the mandate is favorable to women.¹⁷⁷

According to the CPS the average weekly work hours for women holding full-time wage and salary jobs in the nonagricultural industries was

demand for overtime hours is decreased with the introduction of overtime mandates. This latter model of the FLSA, which assumes that overtime pay will promote work-sharing and boost employment rates, is not substantiated by empirical work.

173. This conforms to Summer's partial equilibrium model.

174. I limit my comparison to full-time employees, as this is the group of employees most likely to engage in overtime work. Full-time work is defined as thirty-five hours or more, per week. Individuals working part-time are highly unlikely to work overtime. Empirical data also demonstrates that straight hour wages of part time workers are lower than those of full time workers Michael K. Lettau, *Compensation in Part-Time Jobs versus Full-Time Jobs: What If the Job Is the Same?* 56 *ECONOMIC LETTERS* 101 (1997); Susan N. Houseman, *Why employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 *INDUS. & LAB. REL. REV.* 149, 159, 161 (2001). Therefore for our purposes should be treated as a separate labor market.

175. This is according to Trejo's findings on the effect of mandatory overtime pay on straight hour wages. See Trejo, *supra* note 172.

176. Bureau of Labor Statistics, unpublished data from the Current Population Survey (on file with author).

177. Data showing that FLSA coverage provisions favor women is discussed *supra* note 97 and accompanying text.

40.9 hours a week in 2001, compared to 44.2 hours for men.¹⁷⁸ This translates into a gap of 3.3 hours per week. A further breakdown of the numbers reveals that the disparity is even greater. There are approximately 96,176,000 wage and salary workers working full-time (i.e., more than thirty-five hours per week) in the non-agricultural industries. Of these workers, approximately 36,651,000 work more than forty-one hours per week, and are thus potentially eligible for overtime pay.¹⁷⁹

An analysis of the data by gender reveals that men, on average, were more likely to work those longer hours: The more weekly hours a worker works, the more likely it is that the worker is a male worker. In the group of workers working full-time, 57.6% are men and 42.5% are women. Of those working exactly forty hours a week, only 54% are men and 46% are women. When we consider the group of workers working more than forty hours per week, the rate of female participation drops dramatically. Of the groups of workers eligible for overtime, 67.5% are men and only 32.5% are women. This means that two out of three workers who may be eligible¹⁸⁰ for overtime pay are men. In the extended workload category, composed of workers who work more than forty-nine hours per week, 72.2% are men. Thus, in the group of workers eligible for at least nine hours of overtime pay seven out of ten are men.

The overtime provision of the FLSA is an example of a universal mandate which impacts labor market outcomes in a manner similar to the way accommodation mandates impact the labor market. Overtime mandates redistribute wealth, on average, from women, who tend to have shorter work schedules, to men, who tend to work longer hours. The only difference between overtime pay and accommodation mandates is that such redistribution goes undetected, as the overtime pay provision of the FLSA is perceived to be a neutral universal mandate which is not associated with intra-employee redistributive outcomes.

2. *The Family and Medical Leave Act*

The second case to be examined is the FMLA. Under the FMLA, the costs of providing the benefit are disparate, as most employer costs are incurred on behalf of employees who chose to take advantage of the unpaid leave.¹⁸¹ Valuation is also disparate. Following the utilization scale,

178. Current Population Survey, *supra* note 176 at tbl. 29B. Of course, some of these individuals are working in exempt jobs. However, this is a good rough estimate.

179. This translates into 38.1% of all full-time employees; 13,437,000 workers work between 41 and 48 hours per week (41% of all full time workers) and 23,214,000 work more than 49 hours per week, (24% of all full time workers), making them eligible for at least 9 hours of overtime pay.

180. Some of these workers are exempted from the statute.

181. Some costs are general costs, such as administrative costs, incurred by employers regardless of specific utilization of the benefit.

workers who take unpaid leave are assumed to attach higher value to the mandate.

While the FMLA mandates unpaid leave, there are compliance costs involved, since the employer has an obligation to continue health insurance payments on behalf of employees on family and medical leave.¹⁸² These costs have been estimated at around \$250 per year for each employee taking leave.¹⁸³ Other costs associated with the leave include the costs of hiring replacement workers or redesigning work assignment among incumbent employees. However, there are no good estimates for these latter costs.¹⁸⁴

One-sixth of all employees, or 23,830,000 employees, took leave for a family or medical reason in the eighteen month period prior to a 2000 Department of Labor FMLA survey.¹⁸⁵ The survey reveals that the most common reason that employees take protected leave is to take care of their own health.¹⁸⁶ Only 2.4% of employees reported they needed leave but could not take it.¹⁸⁷ The low percentage of frustrated leave takers enables us to assume that employees who need leave take it, and furthermore, that the demographic groups of employees who exercised their right to leave are the groups that, on average, value the mandate more.

The 2000 survey analyzed the demographic characteristics of leave takers compared to all other employees.¹⁸⁸ The survey reveals that those taking leave differ significantly from other employees in a number of ways: (1) leave takers were more likely to be female (58.1%), relative to other employees (46.8%); (2) leave takers were more likely to be married/living with a partner (75.0%) and less likely to have never been married (12.3%) relative to other employees (65.7% and 24.2%, respectively); and (3) leave takers were much more likely to have children living with them (59.6%) than were other employees (36.7%). In terms of age, employees aged twenty-five to thirty-four were over-represented (27.8%, as compared to 21.8% for other employees). This data indicates that the FMLA positively impacts women in the twenty-five to thirty-four age range with children, as

182. 29 U.S.C. § 2614 (c) (2002). The employee can be required to repay his employer for health insurance costs if he or she fails to return to work from his leave.

183. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281, 283 (1999).

184. *See id.*

185. Balancing the Needs of Families and Employers, *supra* note 102, at section 2.1.1.

186. The main reason for taking leave was one's own health (37.8% of all FMLA leave takers), followed by the need to care for newborn, a newly adopted child or a newly placed foster child (24.4%). Taking leave to care for an ill child (13.5%), for maternity-related reasons (10.9%), and to care for an ill parent (10.6%) were the next most common reasons, caring for an ill spouse was the least common reason. *Id.* at section 5.2.

187. The most common reason for not taking leave was inability to afford it (cited by 77.6% of those who needed leave but did not take leave). *Id.* at section 2.2.4.

188. *Id.* at section 2.1.3.

well as other workers with children.¹⁸⁹ These groups took advantage of the FMLA unpaid leave to a greater extent than other groups of workers. These are the groups of employees, which, on average, value the mandate more and most benefit from its existence.

No adverse effects on the wages of women with young children were reported.¹⁹⁰ This means that costs associated with the mandate were equalized and spread among all groups of employees. This redistribution effect parallels the redistribution effect of a well-functioning accommodation mandate, in that all workers share the costs of an employer-provided benefit, which a specific group of employees, in this case women with young children, value and utilize the most.

The FMLA is a universal mandate, in the sense that its coverage and eligibility requirements are determined by factors other than the demographic characteristics of the worker. However, the probability that some groups exercise this right more often, coupled with the fact that the costs of the FMLA are incurred only when employees take leave, demonstrates that universal mandates are indistinguishable from accommodation mandates. The impact of the FMLA is identical to the impact of accommodation mandates.

VII.

CONCLUSION

The endeavor to catalog employment mandates according to formal distinctions must be replaced with a substantive measure of these mandates. Employment mandates are cross-employee distributional tools and should be evaluated on this basis, regardless of the title they carry. The impact of a mandate, how it operates and affects real life labor markets, determines the nature of the mandate. There is no meaningful distinction between anti-discrimination and accommodation mandates, just as there is no meaningful distinction between accommodation mandates and universal mandates. All mandates are situated on a continuum and their labor market outcomes are governed by three parameters of their design: coverage, cost, and valuation distribution by different groups of employees.

189. *Id.*

190. See Waldfogel, *supra* note 183, at 296-299.