

The ADA and COLLECTIVE BARGAINING ISSUES

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. It has been updated in 2001 by Laurie M. Johnston, Esq., True, Walsh & Miller, LLP, Ithaca, New York from the original, which she wrote in 1997.

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Cornell University currently serves as the Northeast Disability and Business Technical Assistance Center. Cornell is also conducting employment policy and practices research, examining private and federal sector employer responses to disability civil rights legislation. This research has been funded by the U.S. Department of Education National Institute on Disability and Rehabilitation Research (Grant #H133A70005) and the Presidential Task Force on Employment of Adults with Disabilities.

The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/surveyresults.html.

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org.

What is the Americans with Disabilities Act?

The purpose of the Americans with Disabilities Act (ADA) is to protect and guarantee access and participation for persons with disabilities in employment, public accommodations, public services, transportation, and telecommunications. Title I of the ADA prohibits discrimination against qualified individuals with disabilities in all terms and conditions of employment, e.g., recruitment, pre-employment screening, hiring, benefits, promotions, layoff and termination. Employers of 15 or more employees are subject to Title I of the ADA, as are labor organizations, employment agencies, and joint labor-management committees.

Under the ADA, an employer may not deny an individual with a disability the opportunity to apply for a job because of a request for a reasonable accommodation during the application process. Nor may an employer deny employment opportunity to a qualified applicant or employee with a disability because of a request or need for a reasonable accommodation in order to perform the essential functions of the job. An employer is not required to provide an accommodation if it would be an undue hardship on it to do so.

How does the ADA affect Unionized Employers?

Private sector employers whose employees are represented by a union are subject to the ADA and the National Labor Relation Act (NLRA). Under the NLRA, the union is the exclusive representative of the employees, and an employer is prohibited from dealing directly with employees concerning terms and conditions of employment. Furthermore, the NLRA prohibits an employer from implementing any change in the terms and conditions of employment without offering the union an opportunity to bargain over the proposed changes.

The ADA prohibits employers and unions from entering into collective bargaining agreements that discriminate against individuals protected by the ADA.

What Obligations does a Union have under the ADA and the NLRA?

The employment discrimination provisions of the ADA apply to unions as employers and as bargaining agents. Under the NLRA, a union has a duty of fair representation; that is, a requirement that the union act reasonably, in a non-discriminatory fashion and in good faith, with respect to the employees it represents. This duty might require the union to assist an employee in requesting a reasonable accommodation and working with an employer in determining the reasonable accommodations available to the employee

What is a “Reasonable Accommodation” under the ADA?

A **reasonable accommodation** is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for a qualified individual with a disability to participate and enjoy equal employment opportunity. The primary purpose of a reasonable accommodation is to enable a qualified individual with a disability to perform the essential functions of the position.

Reasonable accommodations include modification or adjustment of the application process to enable qualified individuals with disabilities to apply, making facilities readily accessible to and usable by persons with disabilities, modifying work schedules, reassignment to a vacant position, reallocating non-essential job functions, and acquisition or modification of equipment or devices. An employer is not required to create “light duty” positions and it is not a reasonable accommodation to reallocate essential job functions.

An employer is not required to provide an accommodation if it would create an **undue hardship** for the employer. Whether a reasonable accommodation creates an undue hardship is a factual issue depending on factors such as the type of accommodation, its cost, and the size and nature of

the business. The terms of a collective bargaining agreement may be relevant in determining whether a particular accommodation would cause undue hardship, and should be reviewed and considered when an employee makes a request for a reasonable accommodation. An employer cannot assert that a requested accommodation will present an undue hardship merely because the employer is a party to a collective bargaining agreement.

What is the Reasonable Accommodation Process?

The ADA regulations require the individual with a disability and the employer engage in an interactive process to determine whether a reasonable accommodation exists. First, the individual with a disability must request a reasonable accommodation. If the employer has not already done so, it should determine the essential functions of the position at issue. The employer and the individual must then determine the job-related limitations imposed by the individual’s disability, which may require a discussion and information about the individual’s medical condition, and how those limitations could be overcome by a reasonable accommodation. The possible accommodations should be evaluated, and an effective accommodation selected. While the employee’s preference is considered, the employer has the discretion to choose between equally effective reasonable accommodations.

The ADA requires that medical information concerning job applicants and employees be kept confidential and maintained in files separate from personnel records. Persons involved in the reasonable accommodation process who have access to this type of information have a continuing obligation to maintain the confidentiality of medical information.

Is an Employer Required to Meet its Obligations under the ADA and the NLRA?

Employers must comply with both statutes, and to balance the interests presented by an employee requesting a reasonable accommodation under the ADA and its obligations under the NLRA with respect to its relationship with the union and the requirements of a collective bargaining agreement. The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for the enforcement of the ADA, has rejected the position that a reasonable accommodation imposes an undue hardship simply because it would violate a collective bargaining agreement. The EEOC has asserted that the employer first should determine if it could provide a reasonable accommodation that would remove the workplace barrier without violating the collective bargaining agreement. If there is no such accommodation, then the employer and union should attempt to negotiate a variance to the collective bargaining agreement that conflicts with a requested reasonable accommodation, such as a "light duty" assignment or transfer to another position with different physical and mental requirements, where no other effective accommodation exists and other workers would not be unduly burdened. An employer cannot use the existence of a collective bargaining agreement as its reason not to offer or implement a reasonable accommodation unless it can show that the request would have an adverse affect on the other employees in the bargaining unit.

The General Counsel for the National Labor Relations Board (NLRB), the federal agency responsible for enforcement of the NLRA, has stated that for a reasonable accommodation that does not affect terms and conditions of employment, for instance, putting a desk on blocks, providing a ramp, Braille signage or providing an interpreter, an employer would not have to negotiate with the union representing its employees, and the employee could request these accommodations directly from the employer.

Employers would be required to negotiate with the union if the requested accommodation would cause a

material, substantial, or significant change in the terms and conditions of employment, such as requiring some change in the collective bargaining agreement.

Most courts considering the relationship between collective bargaining agreements and reasonable accommodation have found that a proposed accommodation that would adversely affect the seniority rights of other employees would not be reasonable, and therefore, an employer and union refusing such an accommodation would not violate the ADA. The parties, the employer, the union, and the individual requesting the accommodation, however, would still be required to engage in the good faith interactive process to determine whether any other type of accommodation was available.

What Proactive Approaches are Available to Employers and Unions to Meet the Requirements of the ADA and the NLRA?

Employers and unions may be able to eliminate or reduce the potential conflicts between the ADA and the NLRA through collaborative long-range planning.

Employers and unions can create a cooperative environment with respect to their obligations under the ADA and the NLRA. At the outset, the employer and the union might review their collective bargaining agreement to ensure that individuals are not subject to disability discrimination. The employer and the union may also begin to consider including in the contract specific protections or safeguards for individuals with disabilities, procedures for the reasonable accommodation process, or development of a light duty program.

Employers and unions might also present educational programs on the ADA, for instance, open discussions on the effects of the ADA on the work environment by both management and union personnel.

A joint employer-union committee might be formed to discuss and consider ADA compliance issues. The labor-management committee might consider requests for reasonable accommodation and work with employees in the informal interactive process of

determining a reasonable accommodation. The committee might also assist in the determination of the essential functions of the job, review what type of accommodations are needed, and what type of accommodations are available or are possible within the context of the collective bargaining agreement.

The ADA has specific protections for employee medical information, and both employers and unions have an obligation to keep employee medical information confidential. To the extent that medical information is needed in the determination of a reasonable accommodation, the information could be provided by the employee. The EEOC has also stated that the ADA does allow the employer and the union to share with each other medical information necessary to the reasonable accommodation process.

What Role Can the Shop Steward Play in Assisting Implementation of the ADA?

The union steward or business agent is the person in the union with whom each member may have direct contact – to whom members bring their problems and grievances, from whom members get information and who has access to employees during the work day. The union can disseminate vital information about the ADA through the shop steward or business agent to its members, such as the illegality of discrimination against individuals with disabilities and how the reasonable accommodation process works.

Conclusion

These proactive approaches will serve both the employer and union with respect to their obligations under the ADA, to provide reasonable accommodation, and under the NLRA, to bargain where necessary over reasonable accommodations that effect changes in the terms and conditions of employment. Most of all, these proactive approaches will foster positive and productive work environments for employers and unions, and further the goal of the ADA, the inclusion and appreciation of persons with disabilities in the work place and society.

Resources

ADA Disability and Business Technical Assistance Center Hotline,
800/949-4232 (voice/TTY).

U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(800) 669-4000 (voice)
(800) 800-3302 (TTY)
(800) 666-EEOC (publications).
<http://www.eeoc.gov>

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5000 (Voice)
(202) 637-5058 (Fax)
<http://www.aflcio.org/>

Disclaimer

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