



The ADA and Collective Bargaining Issues

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, including 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 individual with a disability is a person who: has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Courts determine whether an individual is substantially limited in performing a major life activity by comparing the performance of the person in question to that of most people in the general population. The impairment need not prevent or severely limit an individual's major life activity in order to be considered "substantially" limiting. Also, the fact that an individual uses mitigating measures (such as medication or equipment, for example) to minimize the effects of the impairment has absolutely no bearing upon whether it substantially limits a major life activity.

Under the ADA, an employer may not deny anyone the opportunity to apply for a job because of a request to reasonably accommodate his or her disability during the application process, nor may an employer deny an employment opportunity to a qualified employee with a disability because he or she needs a reasonable accommodation in order to perform the job's essential functions. An employer is not required to provide any accommodation that would impose an undue hardship on it, however.

How does the ADA affect Unionized Employers?

Private sector employers whose employees are represented by a union are subject to both the ADA and the National Labor Relations 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 the 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, the union must 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 in working with the employer to determine the reasonable accommodations available to that employee.

What is a "Reasonable Accommodation" under the ADA?

A reasonable accommodation is any modification or adjustment to a job, employment practice, or work environment that makes it possible for a qualified individual with a disability to participate and to enjoy an 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 the 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, reassigning a person with a disability to a vacant position, re-locating non-essential job functions, and acquiring or modifying equipment or devices. An employer is not required to create "light duty" positions, and the reallocation of essential job functions is not a reasonable accommodation.

Furthermore, 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 that depends upon factors such as the type of accommodation, its cost, and the size and nature of the business. The employer should consider the terms of a collective bargaining agreement in determining whether a particular accommodation would cause undue hardship. However, an employer cannot assert that a requested

accommodation presents an undue hardship merely because the employer is party to a collective bargaining agreement.

What is the Reasonable Accommodation Process?

Under the ADA, the individual with a disability and the employer engage in an interactive process to determine whether a reasonable accommodation exists. Once the individual with a disability requests an accommodation and the employer determines the essential functions of the position at issue, the parties must then determine what limitation(s) the individual's disability impose on the job. The parties evaluate accommodations that would allow the individual to overcome job limitations and then select an effective and reasonable accommodation, if available. While the employee's preference is considered, the employer has the discretion to choose between equally effective reasonable accommodations.

The individual with a disability may disclose medical information to the employer during the reasonable accommodation process. The ADA requires that employers keep medical information concerning job applicants and employees confidential and maintain it 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 its confidentiality.

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

Employers must balance the interests of employees seeking accommodation under the ADA against the employer's NLRA obligations regarding the union and the collective bargaining agreement. The Equal Employ-

ment 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. Rather 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 that part of the collective bargaining agreement that conflicts with a requested reasonable accommodation (such as a "light duty" assignment or a transfer to a position with different physical and mental requirements). 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 greater that adverse affect, the more likely it is that the accommodation is not reasonable.

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 need not negotiate with the union representing its employees, and the employee could request the accommodations directly from its 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 a change in the collective bargaining agreement itself.

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 is 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 consider including in the contract specific protections or safeguards for individuals with disabilities, procedures for the reasonable accommodation process, or a light duty program.

Employers and unions could also present educational programs on the ADA, such as open discussions on the effects of the ADA on the work environment by both management and union personnel.

A joint employer-union committee could be formed to discuss and consider ADA compliance issues. The labor-management committee could 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 essential job functions, review necessary accommodations, and analyze what accommodations are available or possible within the context of the collective bargaining agreement.

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 workplace and society.

Resources

ADA Disability and Business Technical
Assistance Center Hotline
800.949.4232 (voice/TTY)

Job Accommodation Network
918 Chestnut Ridge Road, Suite 1
Morgantown, WV 26506-6080
800 ADA-WORK (voice/TTY)
<http://askjan.org/>

Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
800.669.4000 (voice)
800.669.6820 (TTY)
800.669.3362 (voice) or 800.669.3302 (TTY) for
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/>

National Labor Relations Board
1099 14th Street, NW - Suite 5530
Washington, DC 20570-0001
202.208.3000 (voice)
202.208.3013 (fax)
<http://www.nlr.gov/>

Disclaimer

This material was produced by the Employment and Disability Institute in the Cornell University ILR School. Development of the original brochure series was funded by a grant from the National Institute on Disability and Rehabilitation Research (NIDRR) (grant #H133D10155). Content updates were funded by NIDRR grant number H133 A110020. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.

The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Commission or the publisher. EEOC interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance.

Cornell University is authorized by NIDRR to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). You should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at:
<http://www.eeoc.gov>

About this Brochure

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, Director, Employment and Disability Institute, Cornell University ILR School.

This publication was written in 1997 and updated in 2001 by Laurie M. Johnson, Esq., True Walsh and Miller LLP. It was updated in 2010 by Elizabeth Reiter, independent legal consultant, Ithaca, N.Y.

These updates, and the development of new brochures, were funded by Cornell, the National ADA Center Network, and other supporters.

The full text of this brochure, and others in this series, can be found at www.hrtps.org.

More information on accessibility and accommodation is available from the ADA National Network at 800.949.4232 (voice/ TTY), www.adata.org.

Contact Information

Susanne M. Bruyère, Ph.D., CRC
Director, Employment and Disability Institute
Cornell University
ILR School
201 Dolgen Hall
Ithaca, New York 14853-3201

Voice: 607.255.7727

Fax: 607.255.2763

TTY: 607.255.2891

Email: smb23@cornell.edu

Web: www.edi.cornell.edu

To view all the brochures in this series, please visit:

www.hrtips.org

