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## Disabling Employers: Problems with the ADA's Confidentiality Requirement in Unionized Workplaces

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# DISABLING EMPLOYERS: PROBLEMS WITH THE ADA'S CONFIDENTIALITY REQUIREMENT IN UNIONIZED WORKPLACES

"In the past disability has been the cause of shame. This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity . . . . This stigma scars for life."

- Judith Heuman of the World Institute on Disability  
testifying in the House of Representatives<sup>1</sup>

## I. INTRODUCTION

The social stigma accompanying a disability often exceeds the physical or mental limitations actually imposed by the handicap.<sup>2</sup> In 1990 Congress addressed this problem by enacting the Americans with Disabilities Act (ADA or the Act).<sup>3</sup> Title I of the ADA prohibits employers from discriminating against individuals on the basis of disability.<sup>4</sup> Specifically, the Act

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1. S. REP. NO. 116, 101st Cong., 2d Sess. 16 (1989).

2. *Id.* at 15; 42 U.S.C. § 12101(a)(7) (Supp. IV 1992). Arlene Mayerson of the Disabilities Rights Education and Defense Fund testified that "[f]or example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities and being deemed an 'unfit parent.'" S. REP. NO. 116, *supra* note 1, at 15-16.

3. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

4. The ADA states:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (Supp. IV 1992).

The ADA further defines discrimination to include participation in contractual relationships that effectuate discrimination, *id.* § 12112(b)(2), use of standards, criteria and tests that effectuate discrimination, *id.* § 12112(b)(3), discrimination because of a relationship with an individual with a disability, *id.* § 12112(b)(4), and failure to accommodate a disabled employee, *id.* § 12112(b)(5).

The scope of the ADA extends beyond employment discrimination, to strike at the whole spectrum of disability discrimination. Title II specifies that no qualified individual with a disability may be discriminated against by a department, agency, special purpose district, or other instrumentality of a state or local government. 42 U.S.C. § 12132 (Supp. IV 1992). This title specifically includes requirements applicable to public transportation provided by public transit authorities. *Id.* § 12143. Title III of the ADA incorporates public accommodations and services operated by private entities within the scope of the Act. *Id.* §§ 12181-12189. In particular, Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation operated by a private entity. *Id.* § 12182(a). Title IV mandates that telephone services offered to the general public include interstate and intrastate relay services so that individuals who use nonvoice terminal

requires employers to provide “reasonable accommodations” to enable “otherwise qualified” disabled individuals to perform normal job functions.<sup>5</sup>

The ADA also places stringent restrictions on the ability of employers to conduct medical examinations and inquiries.<sup>6</sup> An employer<sup>7</sup> must treat all medical information obtained concerning a disabled employee or job applicant as a confidential medical record.<sup>8</sup> The Act provides only three exceptions to the confidentiality requirement.<sup>9</sup> First, an employer may

devices because of a disability (i.e., deaf persons) are afforded communications capabilities equivalent to those provided to individuals able to use voice telephone services. 47 U.S.C. § 225 (Supp. III 1991). Finally, Title V contains miscellaneous provisions such as a prohibition against retaliation, 42 U.S.C. § 12203 (Supp. IV 1992), and a clear statement that states are not immune from actions in federal court for violation of the ADA. *Id.* § 12202.

5. 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992); *see infra* Part II.

6. 42 U.S.C. § 12112(d) (Supp. IV 1992). In order for an employer to make a medical examination or inquiry of an employee, the exam must be “job related and consistent with business necessity.” *Id.* § 12112(d)(4)(A). Medical exams or inquiries may be “job related and necessary” under certain circumstances such as the following: (1) when an employee has difficulty performing his or her job effectively, a medical examination may be necessary to determine whether the employee can perform the essential job functions with or without accommodation; (2) when an employee becomes disabled, it may be necessary to examine the employee to determine if the employee’s condition meets the statutory definition of “disability”; (3) when an employee requests an accommodation on the basis of disability, a medical examination may be necessary to determine if the employee has a disability covered by the ADA and to help identify an effective accommodation; (4) when federal, state or local laws require medical examinations, employers are generally free to conduct these examinations without risking a violation of the ADA; and (5) when employees voluntarily choose to take part in medical examinations as part of a “wellness” program (e.g., blood pressure testing and cholesterol screening), these examinations are also considered to be “job related” if conducted according to certain guidelines. EQUAL EMPLOYMENT OPPORTUNITIES COMM’N, AMERICANS WITH DISABILITY ACT TITLE I TECHNICAL ASSISTANCE MANUAL § I-6.6 (1992) [hereinafter TAM].

7. According to the ADA, “[a] covered entity may require a medical examination . . . if . . . information obtained regarding the medical condition or history of the applicant is . . . treated as a confidential medical record.” 42 U.S.C. § 12112(d)(3) (Supp. IV 1992) (emphasis added); *see also id.* § 12112(d)(4)(C). The ADA defines “covered entity” to include an “employer, employment agency, labor organization, or joint labor-management committee.” *Id.* § 12111(2).

One could make an argument that because a labor organization is a covered entity, unions should have access to a disabled employee’s medical records. This contrived reading, however, stretches the literal language of the text beyond its practical application. Only an entity that actually requires an examination and obtains information is a “covered entity” for purposes of the confidentiality provision. *See id.* § 12112(d)(3). Moreover, any entity that incurs the obligation of confidentiality imposed by § 12112(d)(3) must keep that information confidential from all other entities, regardless of whether the other entities would qualify as “covered” entities. If a labor union or any other entity fitting the definition of a “covered entity” could gain access to a particular employer’s confidential information, the confidentiality requirement would be meaningless.

8. 42 U.S.C. § 12112(d)(3) (Supp. IV 1992).

9. Section 12112(d)(3)(B) states that information obtained through employment entrance examinations or voluntary medical examinations

disclose to supervisors and managers medical information necessary to provide a reasonable accommodation.<sup>10</sup> Second, the employer may alert, in some circumstances, first aid and safety personnel to an employee's medical history.<sup>11</sup> Finally, the ADA imposes upon employers an obligation to provide government officials with medical information that is relevant to insure compliance with the Act.<sup>12</sup>

The narrowness of these exceptions illustrates the stigma associated with being disabled. In our society, a personal medical problem is too often considered a weakness that should be concealed.<sup>13</sup> Thus, many disabled people are reluctant to reveal their disabilities.<sup>14</sup> Congress recognized that

regarding the medical condition or history of the applicant [or employee must be] collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record, except that —

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) governmental officials investigating compliance with this Act shall be provided relevant information on request.

42 U.S.C. § 12112(d)(3)(B) (Supp. IV 1992).

10 *Id.*; see *supra* text accompanying note 5.

11. 42 U.S.C. § 12112(d)(3)(B)(ii) (Supp. V 1993).

12. *Id.* § 12112(d)(3)(B)(iii).

13 James G. Frierson, *An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality*, 43 LAB. L.J. 308, 312 (1992). This is particularly true in the case of AIDS and HIV. Judge Brotman, in *Doe v. Borough of Barrington*, 729 F. Supp. 376, 384 (D.N.J. 1990), noted that "[s]ociety's moral judgments about the high risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind . . . . The potential for harm in the event of a nonconsensual disclosure is substantial." This "potential for harm" is demonstrated by the hysterical public reaction to AIDS. The plaintiffs in *Borough of Barrington* cited several examples that support Judge Brotman's statement: a teacher infected with the AIDS virus was dismissed from her job; a landlord refused to rent an apartment to male homosexuals for fear of AIDS; neighbors firebombed the home of hemophiliac children who tested positive for AIDS; doctors refused to treat patients suspected of having AIDS; workers refused to use the same truck as a coworker with AIDS; police filed charges of attempted murder against an AIDS victim who spat at them; a judge required an AIDS victim to wear a surgical mask while in his courtroom; children with AIDS were denied access to schools; homosexuals with rashes and colds were fired from their jobs for fear of AIDS; paramedics refused to treat a heart attack victim for fear that he had the AIDS virus; police officers refused to drive an AIDS victim to the hospital; police demanded that they receive rubber gloves and masks for dealing with all homosexuals; and funeral directors were urged not to embalm the bodies of AIDS victims. *Id.* at 384 n.8 (citations omitted).

AIDS is a particularly potent example because society attaches heightened privacy concerns to medical conditions that are contagious or considered loathsome. Frierson, *supra*, at 312. However, Frierson noted that many people are reluctant to disclose other disabilities such as cancer, learning disabilities and mental illness.

14. Many disabilities, such as paralysis or blindness, are apparent to all observers. These disabilities create few problems of confidentiality. However, the majority of disabilities covered under

strict confidentiality is essential to encourage disabled individuals to assert their right to accommodation under the Act.<sup>15</sup>

The demands of confidentiality in unionized workplaces, however, may hinder an employer's ability to reasonably accommodate a disabled employee without breaching its obligations under the National Labor Relations Act (NLRA)<sup>16</sup> or a collective bargaining agreement. Consider the following situation:<sup>17</sup> A warehouse supervisor hires an employee afflicted with Crohn's disease,<sup>18</sup> a digestive disorder that causes chronic diarrhea and creates the need for urgent, unplanned rest room visits. The supervisor allows the employee to take breaks and use the bathroom at the employee's discretion. Pursuant to a collective bargaining agreement, other employees are only allowed to take rest breaks at certain times.<sup>19</sup> In fact, employees are subject to a penalty for leaving at times other than those specified, even to use the rest room. Other employees become angry and

the ADA are not as obvious. Impaired hearing, lack of vision in one eye, inability to handle stressful decisions, manic depressive illness, paranoid schizophrenia, depressive neurosis, mental retardation, back injuries, osteoarthritis in the hip, dyslexia, diabetes, epilepsy, heart disease, asthma, kidney problems, alcoholism, severe allergies, and HIV/AIDS have all been found to be legal disabilities. BUREAU OF NATIONAL AFFAIRS, *THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE* 82-83 (1992).

15. Stephen M. Crow & Sandra J. Hartman, *ADA Versus NLRA: Is a Showdown Imminent over Reasonable Accommodation?*, 44 LAB. L.J. 375, 379 (1993).

16. 29 U.S.C. §§ 151-169 (1988); *see* Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1988) (encompassing and amending the NLRA).

17. This hypothetical was provided by Frierson, *supra* note 13, at 308.

18. *See* Antonsen v. Ward, 571 N.E.2d 636 (N.Y. 1991) (holding that Crohn's disease is a disability for purposes of the New York Human Rights Law which defines "disability" as "a physical or mental impairment").

19. The ADA defines discrimination to include:

participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with [a] . . . labor union).

42 U.S.C. § 12112(b)(2) (Supp. IV 1992). The legislative history supports interpreting this provision to mean that "an employer cannot use a collective bargaining agreement to accomplish what it might otherwise be prohibited from doing under this Act." H.R. REP. No. 485, 101st Cong., 2d Sess. 63 (1990). As an example, the committee report suggested that an employer may not enter into a collective bargaining agreement containing physical criteria that cause individuals with disabilities to be disparately impacted, unless such criteria are job-related and consistent with business necessity. *Id.*; *see also supra* note 6. However, it was not Congress' understanding that § 12112(b)(2) restricted or affected collective bargaining rights. In fact, when asked about the effect of this provision during the floor debates, Representative Mineta, one of the Act's primary sponsors, responded, "Let me assure the gentleman that nothing in ADA is intended to restrict or prohibit labor organizations and employers from entering into collective bargaining agreements or labor-protective arrangements." 136 CONG. REC. H4625 (daily ed. July 12, 1990) (statement of Rep. Mineta).

complain to their union representative that management, by not penalizing the new employee, is breaking the terms of their agreement.<sup>20</sup>

The employer in this hypothetical faces a difficult dilemma. By complying with the ADA's reasonable accommodation requirements,<sup>21</sup> the employer has committed a facial violation of the collective bargaining agreement.<sup>22</sup> The ADA's strict confidentiality requirement, however, prevents the employer from disclosing information about the employee's medical condition to the union representative. Thus, the employer cannot establish an affirmative defense to an action for breach of the collective bargaining agreement.<sup>23</sup>

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20. This scenario may give rise to problems other than those created by the competing obligations under the NLRA. For example, if the employee is white and the other employees are black or Asian, claims of race discrimination may be brought against the employer. If the employee is young and the other employees are older, the other employees may allege that the employer is discriminating against them because of age. If nothing else, the apparent favoritism shown to the disabled employee may damage employee morale. Frierson, *supra* note 13, at 308; see also Lawrence R. Levin, *Watch Your Step: ADA Raises Subtle Issues of Confidentiality*, CORP. LEGAL TIMES, Feb. 1993, at 31.

To date there have been no charges filed with the EEOC that involve the attitudes of coworkers toward people with disabilities. The EEOC recognizes this as a troubling issue, but Peggy Mastroianni of the EEOC policy division stated that workers' negative attitudes towards an employer's reasonable accommodation will not likely support a defense of undue hardship. *Co-Workers' Attitudes Toward Accommodations Must Be Considered by Employers*, Conference Told, Daily Labor Rep. (BNA), May 19, 1994, at A-19.

21. See *supra* note 7-9.

22. A facial breach of the collective bargaining agreement represents the most problematic situation for an employer, because the confidentiality rules limit an employer's ability to establish an affirmative defense against a discrimination charge. See *infra* Part III.D. However, an employer has an incentive to accommodate the employee even if doing so requires a facial breach of a collective bargaining agreement. The only potential penalty under the NLRA is a cease and desist order, whereas a violation of the ADA may subject the employer to monetary damages. These damages may include punitive damages and may be as much as \$300,000. See *infra* note 30 and accompanying text.

While the threat of monetary damages (or compassion for the employee) may motivate the employer to breach the terms of the collective bargaining agreement rather than risk liability under the ADA, in most of the cases involving conflicts between collective bargaining agreements and the Rehabilitation Act the employer chose not to breach the agreement. See *infra* Part IV.B. Rather, Rehabilitation Act employers generally refused to accommodate the disabled employee. One distinction between these earlier cases and the hypothetical presented here is that the majority of the earlier cases involved accommodations that would have required the employer to ignore the provisions of a bona fide seniority system. Another distinction is that, unlike the ADA, the text of the Rehabilitation Act did not affirmatively mandate accommodation. Reasonable accommodation was merely a suggested remedy in the interpretative regulations accompanying the Rehabilitation Act. See *infra* note 45.

23. Breach of a collective bargaining agreement implicates the NLRA and gives rise to a federal cause of action. Section 301(a) of the Labor-Management Relations Act provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having

Moreover, the hypothetical employer's refusal to disclose may also constitute a violation of the NLRA.<sup>24</sup> The NLRA imposes a duty on the employer to provide the union with relevant information necessary to the union's performance of its duties.<sup>25</sup> The NLRA also forbids an employer from unilaterally implementing significant, material changes in working conditions.<sup>26</sup> Because the confidentiality requirement forecloses the possibility of having the union present at accommodation discussions, the employer may face potential liability for unilateral changes.<sup>27</sup> Furthermore, the employer may be guilty of "direct dealing."<sup>28</sup> The NLRA requires employers and unions to adjust collectively differences that arise during the life of a collective bargaining agreement.<sup>29</sup> However, if the employer does disclose or refuses to reasonably accommodate the disabled worker, he has violated the ADA and could be liable for employment discrimination, which could, in turn, lead to large penalties.<sup>30</sup> Thus, while the ADA requires employers to reasonably accommodate disabled employees, the Act's confidentiality requirement hampers a unionized employer's ability to do so. This Note explores the problems presented by this conflict.<sup>31</sup>

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1988); *see infra* Part III.D.

24. Section 8 of the NLRA states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1988).

25. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *see infra* Part III.A.

26. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

27. *See infra* Part III.B.

28. *See infra* Part III.C.

29. Section 9(a) authorizes an employer and employee to meet and adjust grievances only to the extent that "the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: [and *p*] provided further, That the bargaining representative has been given opportunity to be present at such adjustment." 29 U.S.C. § 159(a) (1988); *see infra* Part III.C.

30. The Civil Rights Act of 1991 sets limitations on the amount of compensatory damages available in an ADA suit. 42 U.S.C. 1981a (Supp. IV 1992). In the case of a respondent who has more than 500 employees, the courts may award \$300,000 to each complaining party for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses and punitive damages. *Id.* § 1981a(b)(3)(D). Additionally, the court may award back pay and interest on back pay. *See id.* § 1981a(b)(2).

31. The scope of this Note is limited to problems created by the confidentiality requirement. It will not address all of the potential conflicts between an employer's affirmative obligations under the ADA and collective bargaining agreements. In particular, this Note does not include a discussion of whether the existence of a conflicting collective bargaining agreement is evidence of undue hardship per se that would provide the employer with an affirmative defense to the disabled employee's discrimination claim. For purposes of this discussion, I will assume that no such per se rule exists. This assumption is primarily based on statements from the EEOC that suggest that a collective bargaining agreement

Part II provides a brief overview of Title I of the ADA. Part III examines potential conflicts between the role of confidentiality in the reasonable accommodation process and the employer's duties under the NLRA. Part IV proposes that Congress amend the confidentiality clause of the ADA to allow for disclosures of an employee's medical records to union representatives. This amendment would enable employers to reasonably accommodate disabled employees and effectuate the congressional aim of bringing disabled people into the economic and social mainstream of American life.<sup>32</sup> At the same time, the amendment would preserve the long-standing goals of collective bargaining embodied in the NLRA.<sup>33</sup> Finally, Part V provides several practical suggestions that employers can implement immediately to protect themselves against liability arising from these conflicting requirements.

## II. OVERVIEW OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act represents a fundamental shift in America's treatment of the disabled. Rather than provide charity, the Act

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"may be relevant," but is not determinative, in deciding what constitutes an undue hardship. 29 C.F.R. § 1630.2(n)(3)(v) (1993). Employment attorney Eric Stahlhut asserts that "the ADA is unclear whether an employer may plead a collective bargaining agreement as a defense to a request for reasonable accommodation," but he concludes that the text of the ADA, the legislative history of the Act, and the language quoted above suggest that "collectively bargained rights should not automatically trump a disabled person's request for accommodation." Eric H.J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71, 74, 93 (1993). For further discussion on the relationship between collective bargaining agreements and undue hardship, see Richard A. Bales, Note, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161 (1992); Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DET. C.L. REV. 925 (1991).

Additionally, this Note will not address the union's conflicting statutory obligations. Under the fair representation requirement of the NLRA, the union has a duty to represent the interests of all bargaining unit employees. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (holding that the union's designation as exclusive bargaining representative "includes a statutory authority to represent all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct"). If a union fails to seek a reasonable accommodation for a disabled union member, the union may violate its duty of fair representation with regard to the disabled employee. Similarly, if the union enters into a reasonable accommodation agreement that has an adverse impact on other bargaining unit employees, the union may breach its duty of fair representation to the other employees. See *Crow & Hartman*, *supra* note 15, at 379; Jerry Hunter, *Potential Conflicts Between Obligations Imposed on Employers and Unions by the National Labor Relations Act and the Americans with Disabilities Act*, 13 N. ILL. U. L. REV. 207, 211 (1993).

32. See *infra* note 36 and accompanying text.

33. See *infra* notes 59-62 and accompanying text.



seeks to empower disabled people by granting them protection of their civil liberties.<sup>34</sup> In protecting disabled employees, the ADA adopts the approach of numerous earlier bills that champion the rights of the individual.<sup>35</sup> Like the ADA, these legislative precedents sought to protect individual workers through statutory and judicial rules imposing universal work norms.<sup>36</sup>

The ADA has its direct origins in the Rehabilitation Act of 1973,<sup>37</sup> which provides vocational rehabilitation for the handicapped.<sup>38</sup> Section 504 of the Rehabilitation Act prohibits discrimination against disabled persons by any "program or activity" that receives federal funding.<sup>39</sup> This prohibition gained strength when the Department of Health, Education and Welfare's (HEW)<sup>40</sup> implementing regulations created an affirmative obligation on the part of employers to reasonably accommodate disabled workers.<sup>41</sup> Section 504 soon became the cornerstone upon which all disability discrimination in employment claims were based. However, because of the Rehabilitation Act's limited applicability, discrimination against the disabled remained pervasive.<sup>42</sup> The ADA seeks to remedy this

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34. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 426 (1991). The movement for disabled persons' rights was spurred by the accomplishments of African-American and other minority communities, as well as the passage of the Civil Rights Act of 1964. *Id.* at 427.

35. See generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991) (citing Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act as examples).

36. Bales, *supra* note 31, at 164.

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the federal government plays a central role in enforcing these standards . . . .

S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989); 42 U.S.C. § 12101(b) (Supp. IV 1992).

37. 29 U.S.C. §§ 701-794 (1988).

38. *Id.* § 701.

39. Section 504 states: "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (1988).

40. HEW is the department responsible for the implementation of the Rehabilitation Act. Congress has vested responsibility for implementation of the ADA in the Equal Employment Opportunities Commission (EEOC).

41. Bales, *supra* note 31, at 168. This affirmative obligation was created by defining "qualified handicapped person" as a disabled person who "with or without reasonable accommodation, can perform the essential functions of the position in question." 29 C.F.R. § 1613.702(f) (1993).

42. Stahlhut, *supra* note 31, at 72. Stahlhut provides three reasons for the failure of the Rehabilitation Act. First, the coverage of the Act was limited only to the federal government, federal contractors and recipients of federal funds. Second, there was little legislative history on section 504.

problem by expanding the coverage to nonfederally funded employers and institutions.<sup>43</sup> The ADA now requires employers to perform a three-part analysis when considering a disabled job applicant or employee.<sup>44</sup> First, the employer must determine whether the applicant or the employee is a "qualified individual with a disability."<sup>45</sup> Assuming the applicant or employee meets this test, the employer must next determine whether the

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This absence, combined with the broad language of the Act, created questions as to the exact nature of the burden that Congress intended to impose on federal employers. Finally, despite the fact that the HEW regulations implementing the Act provided substantial guidance, courts were hesitant to give the regulations a broad reading. Stahlhut's article suggests that the courts were fearful that the scope of the regulations exceeded the scope of congressional intent. In particular, courts attached a fairly limited reading to section 504's duty to reasonably accommodate the disabled. *Id.* at 72 n.15.

43. For purposes of coverage under the Americans with Disabilities Act, an "employer" is generally defined as "a person engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 12111(5)(A) (Supp. IV 1992). The federal government, any corporation owned by the government, and any tax-exempt private membership club (other than a labor organization) is explicitly excluded from this definition. *Id.* § 12111(5)(B).

44. David S. Doty, Note, *The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990: Collective Bargaining Agreements in a New Era of Civil Rights*, 1992 B.Y.U. L. REV. 1055, 1058 (1992).

45. See 42 U.S.C. §§ 12112(a), 12111(8) (Supp. IV 1992). The ADA defines a "qualified individual with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8); see also 29 C.F.R. § 1630.2(m) (1993). The ADA's broad definition of disability can encompass any person who has ever had a substantially limiting physical or mental impairment or who may even be "regarded as having such an impairment." Section § 12102(2) states in relevant part: "The term 'disability' means, with respect to an individual . . . (1) a physical or mental impairment that substantially limits one or more major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (Supp. IV 1992).

According to the EEOC interpretive regulations, disabilities that fall within category one include the following: physiological disorders, cosmetic disfigurement, anatomical loss affecting certain body systems, and mental or psychological disorders. 29 C.F.R. § 1630.2(h)(1)-(2) (1993). Major life activities include, but are not limited to, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i). Category two, a record of an impairment, protects those people who have a history of disability or have been misclassified as having a disability in the past. *Id.* § 1630.2(k). Category three, being regarded as having an impairment, grants statutory protection to those discriminated against because of societal attitudes toward their disability. *Id.* § 1630.2(f). Transvestitism and other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from the use of illegal drugs, homosexuality and bisexuality are specifically exempted from the Act's definition of a disability. 42 U.S.C. § 12211(a) (Supp. IV 1992); see also 29 C.F.R. § 1630.3(d) (1993). A disabled person is "qualified" if he or she "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires." 29 C.F.R. § 1630.2(m) (1993). "Essential function" is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires." *Id.* § 1630.2(n).

disabled individual can perform the “essential functions” of the job.<sup>46</sup> Finally, if the disabled person can perform the essential job functions, the employer must determine whether the ADA requires the employer to make a “reasonable accommodation” of the disabled person’s needs.<sup>47</sup>

If an applicant or employee has a disability, but is qualified and can perform the essential functions of the job, then the employer must reasonably accommodate the individual’s known<sup>48</sup> disabilities,<sup>49</sup> unless the employer proves that such an accommodation would entail “undue hardship.”<sup>50</sup> Reasonable accommodations range from improving the accessibility of existing facilities to providing special equipment or personnel necessary to aid a disabled person’s job performance.<sup>51</sup> “Undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business.<sup>52</sup>

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46. See 42 U.S.C. § 12111(8) (Supp. IV 1992). This limitation suggests Congress’ intent to avoid forcing employers to hire disabled employees whose disabilities would interfere substantially with their ability to perform the job in question. See H.R. REP. NO. 485, *supra* note 19, at 55-56. However, Congress also expressed concern that giving an employer wide discretion in defining the skills necessary for job performance might allow an employer to exclude disabled applicants merely for their inability to perform peripheral tasks. Thus, Congress refused to give employers complete discretionary control. See *id.* at 55.

Congress instructed the courts to consider, when adjudicating ADA claims, the employer’s definition of the essential job functions, but explained that an employer’s definition is neither conclusive nor presumptive. 42 U.S.C. § 12111(8) (Supp. IV 1992). The EEOC regulations outline a number of different factors that may be considered in determining the essential function of a particular job, including: the terms of a collective bargaining agreement, the employer’s judgment, written job descriptions prepared before advertising or interviewing applicants for the job, the amount of time spent on a given function, the consequences of not requiring the incumbent to perform the function, the work experience of past incumbents of the job, and the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3) (1993).

47. See *infra* note 51 and accompanying text.

48. The Act does not impose a duty on a covered entity to accommodate either unknown disabilities or disabilities that an employer should have known. 29 C.F.R. § 1630.9(a) (1993).

49. 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992).

50. *Id.* The employer bears the burden of demonstrating that the accommodation will in fact cause undue hardship. 29 C.F.R. § 1630.15(d) (1993).

51. Section 12111(a) states that a reasonable accommodation may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters.

42 U.S.C. § 12111(a) (Supp. IV 1992).

52. “Undue hardship” is defined as any “action requiring significant difficulty or expense.” 42 U.S.C. § 12111(10) (Supp. IV 1992); see also 29 C.F.R. app. § 1630.2(p) (1993).

Determining the presence of undue hardship is an amorphous procedure. The ADA itself provides little instruction.<sup>53</sup> The Act does outline four factors for courts to consider in determining whether a particular accommodation constitutes an undue hardship. However, each of these factors focuses on the economic cost of the accommodation to the employer.<sup>54</sup>

Fortunately, the Equal Employment Opportunities Commission's (EEOC) guidelines are more illustrative. These guidelines explicitly note that to prove "undue hardship" under the ADA, an employer must show more than a "de minimis" burden.<sup>55</sup> Additionally, the regulations state that an employer may demonstrate that a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business.<sup>56</sup> In this regard, the guidelines explicitly state that "[t]he terms of a collective bargaining agreement may be relevant."<sup>57</sup> This express mention of collective bargaining agreements represents a departure from the individual rights model discussed above<sup>58</sup> and suggests that Congress intended the ADA to work in conjunction with previously established federal labor law.

### III. THE NLRA—CREATING CONFLICTS WITH CONFIDENTIALITY

In contrast to the individual rights approach adopted by the ADA, the NLRA embodies the ideology of industrial pluralism.<sup>59</sup> Industrial pluralism is a theory of social interaction between employers and employees that advocates empowering workers with mechanisms of bargaining strength so they may negotiate on equal footing with employers.<sup>60</sup> In furtherance of

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53. Doty, *supra* note 44, at 1060.

54. The first factor for a court to consider is the nature and cost of the accommodation. Second, courts may consider the overall financial resources of the facility actually providing the accommodation in relation to the cost of the accommodation to be provided. Third, courts may consider the overall resources of the covered entity as a whole. Fourth, courts may examine the types of operations conducted by the covered entity. In evaluating this last factor, the geographic separateness and the administrative or fiscal relationship between the entity and its facility or facilities is relevant. 42 U.S.C. § 12111(10) (Supp. IV 1992).

55. 29 C.F.R. app. § 1630.15(d) (1993).

56. *Id.*

57. *Id.*; see also *id.* § 1630.2(n)(3)(6).

58. See *supra* notes 34-36 and accompanying text.

59. Bales, *supra* note 31, at 162.

60. *Id.* The NLRA intends to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (1988).

this ideology, the NLRA confers no substantive rights on employees<sup>61</sup> but rather encourages communication between employers and employees in order to achieve a “friendly” resolution of disputes.<sup>62</sup> Thus, one of the primary means of promoting the aims of industrial pluralism is collective bargaining. The individual rights approach of the ADA, however, in conjunction with its confidentiality provision, creates serious problems for the employer in meeting its obligation to bargain collectively. Collective bargaining imposes a duty on the employer to disclose all information necessary to promote equal bargaining,<sup>63</sup> to refrain from making unilateral changes,<sup>64</sup> and to deal directly with the union as the exclusive bargaining representative of unit members.<sup>65</sup> Because the ADA focuses on the needs of individual employees, it frustrates employers’ attempts to fulfill their bargaining duties. In addition, the ADA may hamper an employer’s ability to assert an affirmative defense to an allegation of breach of a collective bargaining agreement.<sup>66</sup>

#### A. *Duty to Furnish Information and Confidentiality*

Section 8(a)(5) of the NLRA implements the essential aims of collective bargaining. It imposes a duty on employers to bargain collectively and in good faith with the exclusive representative of the employees.<sup>67</sup> Equally important for successful collective bargaining is the availability to both parties of adequate information.<sup>68</sup> In *NLRB v. Truitt Manufacturing Co.*,<sup>69</sup> the Supreme Court held that section 8(a)(5) requires employers to provide union representatives<sup>70</sup> with all information relevant to contract negotia-

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61. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981); *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395, 402 (1952) (“[T]he [NLRA] does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.”) (citations omitted).

62. 29 U.S.C. § 151 (1988) declares that the policy intention of the NLRA was to “remov[e] certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.”

63. See *infra* Part III.A.

64. See *infra* Part III.B.

65. See *infra* Part III.C.

66. See *infra* Part III.D.

67. 29 U.S.C. § 158(a)(5) (1988); see *supra* note 24 and accompanying text.

68. PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 650 (3rd ed. 1992).

69. 351 U.S. 149 (1956).

70. Unions owe the employer a reciprocal duty to provide the employer with information under section 8(b)(3) of the NLRA. *Local 13, Detroit Newspaper Printing & Graphic Communications Union*

tions.<sup>71</sup> This duty extends to all labor relations throughout the life of the collective bargaining agreement. Thus, section 8(a)(5) creates a potential problem for employers. To further the goals of collective bargaining and the policy of industrial pluralism, section 8(a)(5) requires an employer to share information. The ADA, however, in an attempt to foster individual liberty and protect personal privacy, requires that employers keep some of this same information confidential.

The employer's duty to furnish information, however, is not absolute.<sup>72</sup>

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v. NLRB, 598 F.2d 267, 270-71 (D.C. Cir. 1979).

71. *Truitt*, 351 U.S. at 152. The *Truitt* Court reasoned that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . . If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Id.* at 152-53.

It remains uncertain whether the failure to supply information constitutes a per se violation of an employer's duty to bargain or merely evidence of bad faith. The *Truitt* Court failed to provide a clear answer to this question. The Court stated:

We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence . . . . The inquiry must also be whether or not under the circumstances . . . the statutory obligation to bargain in good faith has been met.

*Id.* at 153.

In his concurring opinion, Justice Frankfurter argued that the Board's application of a per se standard was improper. *Id.* at 157 (Frankfurter, J., concurring). The majority of the courts since *Truitt* that have adopted a rule requiring evidence of bad faith "under the circumstances of the particular case." *See, e.g.,* *Woodworkers Local 6-7 & 6-22 v. NLRB* (Pine Indus. Relations Comm.), 263 F.2d 483, 485 (D.C. Cir. 1959); *J.I. Case Co. v. NLRB*, 253 F.2d 149, 152 (7th Cir. 1958), *enforcing as amended*, 118 N.L.R.B. 520 (1957). However, there are courts that view failure to provide information as a per se violation. *See Curtis-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965) (holding that once the union establishes that information is relevant, for the employer to refuse to provide that information would constitute a per se violation of the employer's duty to bargain).

The employer's duty is predicated on the need of the union for information that will promote "intelligent representation of the employees." *Westinghouse Elec. Corp.*, 239 N.L.R.B. 106, 107 (1978) (citation omitted), *modified on other grounds sub nom.* *International Union of Elec., Radio & Mach. Workers v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980). The duty to furnish information is a statutory obligation that exists independent of any agreement between the parties. *American Standard, Inc.*, 203 N.L.R.B. 1132 (1973). However, the union may waive their right to access certain information as part of a collective bargaining agreement. *See infra* Part V.C.

72. In addition to the affirmative defense of confidentiality, other employer affirmative defenses to disclosure exist. In *NLRB v. Movie Star, Inc.*, 361 F.2d 346 (6th Cir. 1966), the court held that an employer is relieved of its duty to furnish information where the employer's failure to do so is attributed to a breakdown in negotiations between the employer and the union that is not due to the employer's lack of good faith. *Id.* at 349-350. The NLRB has relieved an employer of its duty to provide information where the employer based its refusal on the assertion that the union had bargained away its right to information. *Hughes Tool Co.*, 100 N.L.R.B. 208, 209 (1952). Some courts have even inferred a waiver of the union's right to receive information from the union's bargaining conduct. *Square D Co. v. NLRB*, 332 F.2d 360, 365-66 (9th Cir. 1964); *Berklinc Corp.*, 123 N.L.R.B. 685, 687 (1959). However, such a finding is rare.

In *Detroit Edison Co. v. NLRB*,<sup>73</sup> the Supreme Court held that an employer did not commit an unfair labor practice when it refused to disclose, without written consent from the employees, psychological aptitude test scores linked with employee names.<sup>74</sup> The Court recognized the sensitive nature of such information.<sup>75</sup> In light of this sensitivity and the minimal burden that compliance with the company's offer would have placed on the union, the Court reasoned that disclosure was not required.<sup>76</sup> Consistent with the *Detroit Edison* decision, the National Labor Relations

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73. 440 U.S. 301 (1979).

74. *Id.* at 320. The collective bargaining agreement in effect in *Detroit Edison* specified that promotions within a given unit were to be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different." *Id.* at 304-05. Under these terms, management could deny a promotion to an employee who performed poorly on the company's aptitude tests even if that employee held seniority over other employees. *Id.* at 305. However, these promotion decisions were made subject to the collective bargaining agreement's dispute resolution process. *Id.* This process included the possibility of arbitration whenever there was a claim that the employer had arbitrarily or discriminatorily bypassed an employee. *Id.*

The union in *Detroit Edison* filed a grievance claiming that the company had bypassed senior employees in violation of the collective bargaining agreement. *Id.* at 307. The union further requested access to the company's records relating to the testing of employees for promotions. *Id.* This information, the union asserted, was necessary to prepare for the arbitration procedure. *Id.* Although the union did receive information that demonstrated the validity of the testing methods used, the company refused to release the actual tests used or a listing of employees' names paired with their scores. *Id.* The company presented three valid concerns. First, the company argued that releasing the requested information would destroy the integrity of the tests for future use. *Id.* at 308. Second, the company wanted to protect the privacy interests of its employees. *Id.* Finally, the company demonstrated that, in the past, lower-scoring employees had received unfavorable treatment from their coworkers when test scores were disclosed. *Id.* at 319.

The situation presented in *Detroit Edison* is distinguishable from the hypothetical situation presented in Part I. See *supra* notes 17-20 and accompanying text. In *Detroit Edison* a facial breach of the collective bargaining agreement did not occur. Bypassing senior employees for valid reasons was entirely within the employer's discretion. Furthermore, it was the union in *Detroit Edison* that needed the information in order to prove that the company's actions were, in fact, arbitrary. In contrast, in the hypothetical scenario, it is the employer that is seeking disclosure in order to present an affirmative defense to the charge of breaching the collective bargaining agreement. See *infra* Part III.D.

75. *Detroit Edison*, 440 U.S. at 318. The Court took judicial notice of the "sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence." *Id.* The Court further noted that "[a] person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation." *Id.* at 318 n.16 (citations omitted). However, not all information contained in one's personnel file is per se confidential and an employer must show that harm will result from disclosure. *Midwest Communications v. NLRB*, 844 F.2d 511, 515-16 (8th Cir.), cert. denied, 488 U.S. 824 (1988).

76. The Court was also persuaded by the absence of evidence that the company had fabricated a concern for employee confidentiality only to frustrate the union's attempts to fulfill its responsibility. *Detroit Edison*, 440 U.S. at 319-20. The union was not completely denied access to the employees' scores. Rather, disclosure was conditioned on employee consent. *Id.* at 319.

Board (NLRB or the Board), when reviewing a disclosure dispute, balances the employer's reason for disclosure against the union's need for the information.<sup>77</sup> Based on this balancing, the Board will determine the type and extent of the disclosure required.

The NLRB also recognizes that employers have a substantial interest in protecting the confidentiality of employees' medical records.<sup>78</sup> In *Johns-Manville Sales Corp.*,<sup>79</sup> the Board upheld an employer's refusal to grant the union access to a particular employee's medical records.<sup>80</sup> The union requested the names of employees who had been "red-tagged," indicating that they had been diagnosed with pneumoconiosis.<sup>81</sup> Because the union and the employer had entered into an agreement that granted red-tagged employees certain additional seniority rights,<sup>82</sup> the union argued that it needed to know the identity of the red-tagged employees to enable it to administer and police the bargaining agreement effectively.<sup>83</sup> The Board rejected this argument, reasoning that there "exists a legitimate aura of confidentiality in the identities of those individuals who have been identified as having a certain medical disorder."<sup>84</sup> Although the Board found the medical information relevant, it did not believe that the union's need clearly outweighed the workers' confidentiality interests.<sup>85</sup>

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77. See HARDIN, *supra* note 68, at 162-64 (3d ed. Supp. 1990-92). In *Detroit Edison*, the Court refused to articulate an absolute rule. 440 U.S. at 318. Rather, the Court stated:

A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8(a)(5) turns upon "the circumstances of the particular case" . . . and much the same may be said for the type of disclosure that will satisfy that duty.

*Id.* at 314-15 (quoting *Truitt*, 351 U.S. at 153).

The party asserting the need for confidentiality bears the burden of proof. *Pertec Computer Corp.*, 284 N.L.R.B. 810, 811 (1987); *Washington Gas Light Co.*, 273 N.L.R.B. 116 (1984).

78. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983).

79. 252 N.L.R.B. 368 (1980).

80. *Id.*

81. *Id.* Pneumoconiosis is a lung disease.

82. *Id.*

83. *Id.* The union claimed that, in order to protect these workers, it must be able to contact the workers. *Id.*

84. *Id.* The Board concluded that such information was not absolutely necessary to the fulfillment of the union's duties. *Id.* The union could meet its responsibilities by informing all bargaining unit employees of the rights associated with being "red-tagged," and by making them aware that the union was willing to help them enforce their rights. *Id.* Red-tagged employees could then seek out the union's assistance if they needed it. *Id.*

85. *Id.*; see also *United Aircraft Corp.*, 192 N.L.R.B. 382, 390 (1971), *modified on other grounds*, *Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975) (holding that an employer's failure to supply the union with a record of employees' physical disabilities and infirmities did not violate



Decisions following *Johns-Manville* have required disclosure only in the absence of any threat that the individual names of persons identified as suffering from certain medical disorders would be discovered.<sup>86</sup> In *LaGuardia Hospital*,<sup>87</sup> the Board compelled the employer to provide the union with certain notations on patients' medical charts that the union argued were necessary to resolve the labor dispute.<sup>88</sup> The Board distinguished the case from *Johns-Manville* because the focus of the dispute was not on providing the names of patients, but on information contained in their charts.<sup>89</sup> Thus, the Board determined that the threat to privacy was not present.<sup>90</sup>

In light of the decisions in *LaGuardia Hospital* and *Johns-Manville*, it seems unlikely that the NLRB would require disclosure in the hypothetical situation described in Part I.<sup>91</sup> In the hypothetical scenario, the employer

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section 8(a)(5) in light of the confidential nature of a physician's report); *Hanlon & Wilson Co.*, 267 N.L.R.B. 1264 (1983) (holding that, because of the highly confidential nature of medical records, an employer had no duty under section 8(a)(5) to disclose individual employee medical records to the union where the union refused to inform the employer of the general purpose for which such information was sought).

86. See *infra* notes 87-90 and accompanying text; see also *Oil, Chem. & Atomic Workers*, 711 F.2d at 363 (holding that, because the Board's orders permitted the deletion of any information that could be reasonably used to identify specific employees, the employer could not validly assert a confidentiality defense to an allegation of breach of its section 8(a)(5) duties); *Plough, Inc.*, 262 N.L.R.B. 1095, 1096 (1982) (holding that the employer violated section 8(a)(5) by failing to provide the bargaining agent with the results of employee physicals "to the extent that that information [did] not include individual medical records from which identifying data [had] not been removed").

87. 260 N.L.R.B. 1455 (1982).

88. *Id.* The dispute in *LaGuardia Hospital* surrounded the disciplining of two nurses for mismedicating patients. *Id.* at 1458-59. The union claimed that certain patients' medical records were necessary to demonstrate whether the nurses had, in fact, mismedicated the patients. *Id.* at 1462. The hospital refused to turn over the charts, claiming that to do so would violate both the hospital's stated confidentiality policy and the New York State Health Code. *Id.* at 1460.

89. *Id.*

90. *Id.* at 1463.

91. The NLRB has indicated that in the event of a conflict between the ADA's confidentiality requirement and the NLRA's duty to provide information, the Board will not adopt a per se approach. Rather, the Board will engage in a balancing of the parties' countervailing interests. See *supra* notes 77-90 and accompanying text. Before doing this, however, the Board will direct the parties to bargain in search of any possible means of accommodating the interests of all of the parties. *NLRB; Memorandum on Collective Bargaining and ADA*, Americans with Disabilities Act Manual (BNA) at 70:1021 (Aug. 7, 1992) [hereinafter General Counsel's Memorandum] (memorandum from NLRB General Counsel, Jerry M. Hunter, to NLRB field personnel); Hunter, *supra* note 31, at 211; Yvonne Dixon, *NLRA v. ADA: Conflicts Raise Thorny Issues*, ACCOMMODATING DISABILITIES, Nov. 1992, at 9.

Additionally, the NLRB and the EEOC have mutually agreed that, when any charged is filed with the NLRB alleging a violation of § 8(a)(5) and the resolution of that claim would involve an

breached the terms of the collective bargaining agreement when it accommodated an employee with Crohn's disease. The disabled employee's identity is already known (though the employee's disabled status is not);<sup>92</sup> therefore, forcing the employer to release the employee's medical records would violate the employee's privacy rights by revealing that the employee is disabled.<sup>93</sup> Courts have repeatedly refused to force employers to reveal medical information under similar circumstances,<sup>94</sup> determining that the employee's confidentiality interests outweigh any interest the union<sup>95</sup> might have in disclosure and use of the information.<sup>96</sup>

Although courts are unlikely to force employers to breach their employee's confidentiality under the above circumstances, employers must endure the application of the balancing test each time the union demands disclosure of medical information. Thus, employers still face uncertainty when determining how to comply with section 8(a)(5) of the NLRA.

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interpretation of the defendant's duties under the ADA, the General Counsel of the NLRB will consult with the EEOC's Office of Legal Counsel regarding the applicability of the ADA. *EEOC, NLRB Issue Joint Memo Coordinating Enforcement Efforts*, 60 U.S.L.W. 2337 (Nov. 30, 1993).

92. See *infra* note 93. The outcome may be different where the employee has not been identified. See *supra* notes 79-85 and accompanying text.

93. Note that other employees were aware of which employee was given preferential treatment because they witnessed the employee taking frequent rest breaks. See *supra* notes 17-20 and accompanying text.

94. See *supra* note 86. In addition, the employer can assert that the ADA provides a statutory basis for nondisclosure.

95. The union's interest is quite marginal. Arguably, the union may need the information to police the terms of the collective bargaining agreement. However, because the employer facially breached the agreement, the union can pursue its claim without the employee's medical records. Only the employer needs disclosure because the employer must assert the ADA as an affirmative defense. See *infra* Part III.D.

96. According to the Third Circuit, courts should consider the existence of an express statutory mandate when deciding whether an intrusion into an individual's privacy is justified. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

The employer can also argue that disclosure is unreasonable because the union would not achieve disclosure if a public employee were involved. Under the Federal Labor-Management Relations Act (FLMRA), 5 U.S.C. §§ 7101-7135 (1988), which governs public sector labor-management relations, a conflicting statutory obligation generally relieves an employer of its duty to provide confidential information. *Id.* § 7114(b)(4)(B). The FLMRA requires federal agencies to furnish information that is "reasonably available and necessary for the full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" and that is "not prohibited by law." *Id.*; see also *FLRA v. United States Dep't of the Treasury*, 884 F.2d 1446, 1448 (D.C. Cir.) (holding that the "not prohibited by law" language in § 7114(b)(4)(B) implies that the FLMRA is subordinate to the Privacy Act), *cert. denied*, 493 U.S. 1055 (1989). Thus, the ADA's confidentiality requirement overrides the federal employer's obligation to furnish information under the FLMRA. The NLRA and the FLMRA present similar definitions of collective bargaining and similar aims, *id.* at 1458 (Ginsburg, J., concurring), so Congress probably intended for them to treat confidentiality similarly.

### B. Unilateral Changes and Confidentiality

Solving the problem created by the employer's duty to furnish information under section 8(a)(5) does not eliminate the problems in unionized workplaces created by the ADA's confidentiality requirement. The above discussion merely suggests that the employer may be under no conflicting statutory obligation to disclose the nature of the employee's disability. A second problem arises when the employer unilaterally seeks to alter the terms of the collective bargaining agreement.

As mentioned earlier, section 8(a)(5) of the NLRA creates a duty for an employer to bargain collectively<sup>97</sup> with the union.<sup>98</sup> Section 8(d) refines this duty by mandating that parties to a collective bargaining agreement refrain from materially altering the terms and conditions of employment contained in the agreement without the consent of the other party.<sup>99</sup> Thus, if an employer unilaterally makes an accommodation under the ADA that is deemed to be a material alteration of the terms and conditions of employment, the employer may be liable under the NLRA for breaching his duty to bargain collectively.<sup>100</sup>

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97. See *supra* note 24.

98. The union's duty to bargain collectively is found at 29 U.S.C. § 158(b)(3) (1988).

99. *Id.* § 158(d). In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer committed a per se violation of its § 8(a)(5) duty to bargain in good faith by implementing changes in sick-leave, merit-wage, and general wage policies without consulting the union. *Id.* at 743. The Court reasoned:

A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.

*Id.*; see also *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063 (1973) (holding that lowering wages during the term of a contract is an act of bad faith); *Oak Cliff-Golman Baking Co.*, 202 N.L.R.B. 614 (1973).

100. An employer may unilaterally implement a change regarding a nonmaterial subject of bargaining without violating this obligation. In the reasonable accommodation context, changes such as providing a handicap ramp, supplying an interpreter, adding braille signage, or putting a desk on blocks would probably not violate the NLRA. *Crow & Hartman*, *supra* note 15, at 377; *Hunter*, *supra* note 31, at 211. It is unclear whether the NLRB would regard as material the unilateral changes implemented in the hypothetical described in Part I. However, an accommodation that involves a material change, such as an alteration in a seniority system, a change in the pay system, a modification in standards of performance or a change in job classification, is likely to be a considered a change in the terms and conditions of employment. See, e.g., *Katz*, 369 U.S. at 744-47 (holding that an employers' grant of merit increases, change in sick leave policy, and change in wage system violates the NLRA's prohibition on unilateral dealing); *NLRB v. American Mfg. Co.*, 351 F.2d 74, 79 (5th Cir. 1965) (holding that an employer's grant of wage increase under pressure from the Interstate Commerce Commission is a material change under the NLRA); *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th

The NLRB allows employers to make unilateral changes where such changes are necessary to comply with legal obligations.<sup>101</sup> However, where the law leaves the employer with some discretion regarding compliance, the employer must negotiate changes necessary to comply.<sup>102</sup> Because of the inherently discretionary nature of the ADA, the employer will rarely be able to raise statutory compliance as a defense to unilateral alterations.<sup>103</sup> Thus, in an attempt to accommodate a disabled employee, the employer risks violating sections 8(a)(5) and 8(d).<sup>104</sup>

To avoid the problem of unilateral action, an employer might insist that the union take part in all reasonable accommodation conferences that may involve the need for material alterations. In the event of a conflict between an accommodation and the terms of the collective bargaining agreement, the employer and the union could negotiate a solution.<sup>105</sup> To safeguard

Cir 1965) (holding that an employer's implementation of wage increases is a material change under the NLRA); *McLean v. NLRB*, 333 F.2d 84, 87 (6th Cir. 1964) (holding that an employer's grant of health insurance violates the NLRA's prohibition of unilateral dealing); *NLRB v. Citizens Hotel Corp.*, 326 F.2d 501, 505-06 (5th Cir. 1964) (holding that the employer's discontinuance of employees' Christmas bonuses was a material change under the NLRA); *NLRB v. Central Ill. Pub. Serv. Co.*, 324 F.2d 916, 918 (7th Cir. 1963) (holding an employer's unilateral discontinuance of employee discount without affording the union an opportunity to discuss and negotiate an unfair labor practice); *Rangaire Acquisition Corp.*, 309 N.L.R.B. 1043 (1992) (holding the elimination of a 15-minute extended lunch break on Thanksgiving a "material, substantial, and significant change"); *Peelle Co.*, 289 N.L.R.B. 113, 114 (1988) (finding that an employer's grant of wage increases violated § 8(a)(5) of the NLRB).

101. Hunter, *supra* note 31, at 209. An employer is not always liable for making unilateral changes. For example, the NLRB permitted employers to implement affirmative action plans unilaterally in response to Executive Order 11246. *Crow & Hartman*, *supra* note 15, at 377.

102. Hunter, *supra* note 31, at 209 (citing *Murphy Oil USA, Inc.*, 286 NLRB Dec. (CCH) 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB Dec. (CCH) 1070, 1073 (1964)).

103. Hunter, *supra* note 31, at 209. According to Hunter, "in most cases, an employer has sufficient discretion under the ADA to warrant requiring it to afford a union notice and an opportunity to bargain about a proposed accommodation." *Id.* Hunter notes three features of the ADA that demonstrate its inherently discretionary nature. First, the ADA does not mandate a particular accommodation. Therefore, an employer need not provide the "best" accommodation, but rather an accommodation that is sufficient to meet the needs of the disabled employee. *Id.*; see also H.R. REP. No. 485, *supra* note 19, at 40. Second, the ADA's "undue hardship" defense allows employers considerable leeway in denying particular accommodations. Hunter, *supra* note 31, at 209. Third, the EEOC's interpretative guidelines allow an employer to defend claims of failure to accommodate by asserting conflicting statutory obligations. *Id.*

104. See, e.g., *Southern Cal. Edison*, 284 N.L.R.B. 1205, 1210-11 (1987) (holding that an employer's unilateral change in temporary work assignment practices for disabled employees violated § 8(a)(5)); *Jones Dairy Farm v. NLRB*, 909 F.2d 1021 (7th Cir. 1990) (holding that an employer's midterm implementation of a rehabilitation program for temporarily disabled employees violated § 8(a)(5)), *enforcing* 295 N.L.R.B. 113, 113-16 (1989).

105. Erika F. Rottenberg, Comment, *The Americans with Disabilities Act: Erosion of Collective Rights?*, 14 BERKELEY J. EMPLOYMENT & LAB. L. 179, 187 (1993). Having the union present at the

the integrity of the collective bargaining agreement, the union and the employer can draft a memorandum of understanding which would bind both parties to the negotiated resolution.<sup>106</sup> But this solution runs afoul of the confidentiality requirement. Employers must keep an employee's medical history private. They cannot disclose information about the employee's disability. Without this information, however, the union cannot participate meaningfully in accommodation planning.<sup>107</sup> Thus, the employer must either refuse to accommodate the employee or risk liability for unilateral alterations.

### C. *Direct Dealing and Confidentiality*

The employer's obligation to deal exclusively with the union as the employees' bargaining representative creates an additional conflict.<sup>108</sup>

negotiation table raises puzzling questions that are beyond the scope of this Note. First, when the union or the employer requests bargaining over a proposed accommodation, may the other party refuse to bargain pursuant to § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1988), which grants either party the ability to refuse to discuss any modification of the agreement during the term of the contract? Second, if the parties fail to reach an acceptable accommodation, does the employer's subsequent implementation of the proposed accommodation violate its § 8(d) duty to refrain from altering the contract without the consent of the union? *See generally* General Counsel's Memorandum, *supra* note 91, at 2337.

106. A memorandum of understanding is an agreement between an employer and a union that modifies or adds to an already existing collective bargaining agreement. Normally, a memorandum of understanding will cover only a small issue or a small number of people. It is binding on both the union and the employer. Rottenberg, *supra* note 105, at 187.

107. One commentator suggested that a possible solution to this problem is to consider union representatives "supervisors" under the ADA. Doty, *supra* note 44, at 1067-68; *see* 42 U.S.C. § 12112(d) (Supp. IV 1992). However, this definition creates inconsistencies with the established meaning of supervisor in labor law. Courts and Congress emphasize that supervisors must act in the interest of management. The NLRA specifically defines a supervisor as any person

having the authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1988) (emphasis added). Courts hold that a supervisor need not meet all of these criteria because the functions are listed disjunctively. *See* NLRB v. Security Guard Serv., 384 F.2d 143, 146-47 (5th Cir. 1967). However, the statute expressly insists that the supervisor "(1) have authority (2) to use independent judgment (3) in performing such supervisory functions (4) *in the interest of management* . . ." *Id.* at 147 (emphasis added). Because union representatives act in the interest of employees, they do not constitute supervisors under this established definition.

108. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). In *J.I. Case*, the Supreme Court held that an employer violated its duty to bargain collectively when it refused to negotiate portions of a collective bargaining agreement because individual employment contracts already covered particular employees. *Id.* Although the Court recognized that individual bargaining might yield greater benefits for some individuals, the Court found that "the mere possibility that such agreements might be made is no ground

Section 9(a) of the NLRA codifies this duty.<sup>109</sup> According to the terms of section 9(a), an employer and an employee may deal directly only if the agreement reached does not violate the terms of the collective bargaining agreement.<sup>110</sup> Additionally, as the exclusive bargaining representative, the union has the right to be consulted about any change that affects the terms and conditions of employment.<sup>111</sup>

Again, the NLRA's promotion of industrial pluralism through collective representation conflicts with the ADA's apparent contemplation of a system under which disabled employees bargain with their employers on an independent basis. According to the EEOC's regulations, an "appropriate reasonable accommodation" is best determined through consultation between the employer and the individual disabled person.<sup>112</sup> However, if the employer and the disabled employee independently agree on an accommodation, the employer may be guilty of direct dealing under section 9(a). As with the unilateral action problem discussed above, a possible solution to the employer's direct dealing dilemma is to bring the union into the reasonable accommodation process. Again, this solution would run afoul of the ADA's confidentiality requirement. Thus, the employer apparently must choose between accommodating the disabled employee and risking liability under section 9(a) for breach of the employer's duty to deal exclusively with the union or not accommodating the employee and violating the ADA.

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for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *Id.* at 338. The Court reasoned:

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay . . . collective bargaining . . . ; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement . . . . Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility.

*Id.* at 337 (citations omitted).

109. 29 U.S.C. § 159(a) (1988); *see supra* note 29; *see also* General Elec. Co., 150 N.L.R.B. 192, 194 (1964) (stating that the collective bargaining obligation requires "recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees").

110. 29 U.S.C. § 159(a) (1988).

111. *Id.*

112. 29 C.F.R. § 1630.2(o)(3) (1993); *see also* S. REP. No. 116, *supra* note 36, at 34-35. Additional comments within these regulations directly advise that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." 29 C.F.R. app. § 1630.9 (1993). This interactive process is intended to help the employer and the disabled individual "ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome." *Id.*

*D. Employer Defenses to Actions for Breach of Collective Bargaining Agreements and Confidentiality*

A more significant problem arises when the employer seeks to disclose the employee's medical information as an affirmative defense in an action for breach of an existing collective bargaining agreement.<sup>113</sup> As in the hypothetical described in Part I,<sup>114</sup> employers who provide a reasonable accommodation may breach the terms of a collective bargaining agreement. A strict reading of the confidentiality requirement prevents the employer from disclosing his reasons for the accommodation if the accommodation is challenged. Thus, while the ADA requires that the employer accommodate disabled employees, the employer may not be able to defend this action during a grievance procedure or arbitration hearing.<sup>115</sup> Once again, the effect of the ADA's confidentiality provision is to disable the employer.

IV. ACCOMMODATING EVERYONE—A PROPOSAL TO AMEND THE ADA'S CONFIDENTIALITY REQUIREMENT

The above discussion highlights the problems the confidentiality requirement of the ADA creates for employers who try to accommodate disabled employees in unionized workplaces. Employers who comply with the Act may risk liability for NLRA violations or breach of a collective bargaining agreement. Faced with these conflicting obligations, employers are caught in a quagmire: they must choose to either bargain collectively or accommodate disabled employees.

To resolve this conflict in a manner that promotes the statutory aims of both the ADA and the NLRA, Congress should amend the ADA to allow unions limited access to a disabled employee's medical records. Congress should insert the following amendment at the end of the existing confidentiality exceptions:

- (iv) union business representatives may be informed regarding necessary restrictions on the work or duties of the employee, necessary accommodations, and labor-management conflicts related to the reasonable accommodation procedure.<sup>116</sup>

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113. The EEOC first raised this question in its request for assistance in drafting the regulations implementing the ADA. 56 Fed. Reg. 8579 (1991).

114. See *supra* notes 17-20 and accompanying text.

115. See Frierson, *supra* note 13, at 310. Frierson notes that "this strict approach is unfortunate because the provision of reasonable accommodations is actually an employee benefit . . ." *Id.* In fact, union support was instrumental in passing the ADA. *Id.*

116. This proposal comports with the case law in Part III.A, which recognizes that the union's need to know confidential information outweighs the employer's interest in protecting workers' privacy.

This amendment assures that disclosure to the union is limited to only that information necessary to resolve an accommodation issue. In addition, union representatives would be under a duty to maintain the employee's records in a confidential manner.<sup>117</sup> Thus, the amendment furthers the aims of the NLRA while simultaneously protecting the privacy of disabled employees.

The proposed amendment finds support in ADA policy, federal case law, and EEOC policy. Reasonable accommodation is the touchstone of America's disability policy.<sup>118</sup> The amendment furthers ADA goals because it helps employers provide reasonable accommodations for disabled employees.<sup>119</sup> In addition, the amendment finds support in federal case law because it protects collective bargaining interests. Judicial interpretations of the Rehabilitation Act suggest that employment discrimination law was not intended to eliminate the special status of collective bargaining in American labor policy.<sup>120</sup> Finally, the amendment comports with EEOC policy because EEOC regulations reflect a willingness to alleviate an employer's conflicting statutory obligations by expanding the confidentiality exceptions.<sup>121</sup> Thus, the proposed amendment would reconcile the conflict between the ADA and the NLRA.

#### A. ADA Policy as Support for the Proposed Amendment

In enacting the ADA, Congress called reasonable accommodation the "crucial" element of Title I.<sup>122</sup> However, if disclosure to the union is prohibited, the employer may be unable to provide reasonable accommodation. An employer fearing potential liability under the NLRA or a collective bargaining agreement may refuse to make the accommodation and claim that such conflicting obligations constitute undue hardship.<sup>123</sup> The

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117. This result is safeguarded by § 12112(d)(3)(C), which requires that "the results of such examinations are used only in accordance with this title." 42 U.S.C. § 12112(d)(3)(C) (1988).

118. The House Committee on Education and Labor declared that the ADA imposes a higher standard of hardship on employers than does Title VII because "of the *crucial role* that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities." REPORT OF THE HOUSE COMM. ON EDUCATION AND LABOR, H.R. REP. NO. 485, *supra* note 19, at 63 (emphasis added).

119. See *infra* Part IV.A.

120. See *infra* Part IV.B.

121. See *infra* Part IV.C.

122. See *supra* note 119.

123. This happened under the Rehabilitation Act. Most employers simply refused to make the accommodations requested by disabled employers. See *infra* Part IV.B.



proposed amendment, by allowing limited disclosure, promotes open dialogue between the union and the employer about the effect of any proposed accommodations. It allows the two to come together at the negotiating table and draft a memorandum of understanding.<sup>124</sup> As a result, the employer leaves the table assured that it can accommodate a disabled employee without legal ramifications, and the disabled person receives accommodation. Limited disclosure serves the congressional aim of bringing disabled persons into the economic and social mainstream of American life, while at the same time strengthening collective rights.

Because the proposed amendment limits disclosure, it maintains the goals of the original confidentiality requirement.<sup>125</sup> The proposed amendment permits disclosure only to union representatives who will effectuate the accommodation. Consequently, the privacy invasion is minimal. In addition, the Act requires unions to regard the information as a confidential medical record. Therefore, the union may not disclose the information to a coworker, minimizing the potential threat of harassment, discrimination and ridicule.<sup>126</sup> Thus, the amendment preserves the goals of the ADA's confidentiality requirement.

### *B. Case Law Under the Rehabilitation Act as Support for the Proposed Amendment*

The legislative history of the ADA shows that Congress intended courts to adjudicate ADA disputes by adopting case law interpreting section 504

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124. Commentators suggest employer and union cooperation as a solution to the conflict between individual rights and industrial pluralism created by the ADA. However, most commentators overlook the issue of confidentiality. By allowing limited union access to confidential medical records, the proposed amendment facilitates the cooperative solutions previously suggested by other commentators. See *supra* note 107 and accompanying text.

125. See *supra* notes 13-15 and accompanying text. In many instances, employees voluntarily alert their employer to their disability. Thus, the proposed amendment would not pose a great threat to employee privacy interests because an employee can prevent union access to his or her medical history by withholding the information from his or her employer.

126. Additional problems with the confidentiality clause exist when accommodation requires cooperation from a disabled employee's coworkers. In such a scenario, should an employer be permitted to disclose confidential information to justify the accommodation? Discussion of this question is beyond the scope of this Note, but see Frierson, *supra* note 13.

of the Rehabilitation Act.<sup>127</sup> Section 504 case law<sup>128</sup> recognizes that collective bargaining has a special status in federal employment discrimination law.<sup>129</sup> These cases suggest that where industrial pluralism conflicts with individual liberty, the rights of the collective should prevail.<sup>130</sup> Accordingly, union disclosure is permissible even if such disclosure partially compromises individual privacy rights.

Federal courts consistently find that section 504 does not require an employer to breach its collective bargaining agreement in order to

127. The main proponents of the bill observed that:

In the compromise bill, the applicable Section 504 regulations, 42 C.F.R. 84.12, has been incorporated almost in full in the statute, to ensure the factors that have been used in these and other Section 504 cases continue to apply . . . .

[I]n the employment section, the ADA basically extends the provisions of section 504 of the Rehabilitation Act to private entities . . . . Section 504 is a very brief provision, which has been explicated by the regulations and case law over the past years. The sponsors of the ADA wished to draw upon those regulations and case law to create a clear and comprehensive statute that would set forth all of the relevant non-discrimination provisions in one place.

Jules L. Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 EMPLOYEE RELATIONS L.J. 273, 278 & nn.9-10 (1992) (quoting from the legislative history of the ADA).

128. To date there have been no judicial decisions addressing this issue under the ADA. However, the District Court for the Western District of Virginia recently ruled that a disabled employee alleging discrimination was estopped from bringing a discrimination suit against her employer because a provision of the collective bargaining agreement between the employer and the union required mandatory arbitration. *Austin v. Owens-Brockway Glass Container, Inc.*, 844 F. Supp. 1103, 1106 (W.D. Va. 1994). This ruling suggests that even under current disability law, the courts will show the same deference to collective bargaining aims. *But see In re City of Dearborn Heights*, 101 Lab. Arb. Rep. (BNA) 809 (1993). In *Dearborn Heights*, the arbitrator held that the police department properly accommodated an officer with brittle diabetes. *Id.* at 816. The department transferred the officer to the day shift despite the fact that such an accommodation required placing more senior officers on night duty. *Id.* at 809. This accommodation was in conflict with a binding past practice of assigning shifts according to seniority. *Id.* The arbitrator reasoned that the life-threatening nature of brittle diabetes outweighs any "discomfort" suffered by the damaged officers, and therefore "outweigh[s] the collective bargaining agreement 'factor.'" *Id.* at 816.

129. Smith, *supra* note 127, at 277. This Note does not attempt to argue that collective bargaining agreements should always trump an employer's affirmative obligation to reasonably accommodate disabled employees. It merely suggests that courts consistently show a deference to collective aims.

130. Other employment statutes reflect this policy as well. For instance, both Title VII and the Age Discrimination in Employment Act contain specific provisions safeguarding bona fide seniority systems. See 42 U.S.C. § 2000e-2(h) (1988); 29 U.S.C. § 623 (f)(2) (1988). Specifically, § 703(h) of Title VII establishes that, absent a discriminatory purpose, the operation of a seniority system is not an unlawful employment practice even if the system has some discriminatory consequences. *Transworld Airlines v. Hardison*, 432 U.S. 62, 82 (1977). Some commentators argue that the absence of an express provision in the ADA establishes a clear congressional intent against favoring seniority systems over the rights of disabled employees. See, e.g., *Stahlhut, supra* note 31, at 87. However, this argument is flawed because the Rehabilitation Act did not contain statutory protection for seniority systems either. Courts interpreting the Rehabilitation Act inferred such protection. See *supra* note 128 and accompanying text.

accommodate a disabled employee.<sup>131</sup> For example, in *Daubert v. United States Postal Service*,<sup>132</sup> the Tenth Circuit held that the Postal Service articulated a legitimate business reason for discharging a disabled employee where the seniority terms of the Postal Service's collective bargaining agreement foreclosed other available options.<sup>133</sup>

The Sixth Circuit followed *Daubert* in *Jasany v. United States Postal Service*.<sup>134</sup> The *Jasany* court refused a cross-eyed man's claim of discriminatory discharge where the collective bargaining agreement prohibited accommodation.<sup>135</sup> The court reasoned that requiring the employer to accommodate the disabled employee by restructuring his job would usurp the legitimate rights of other employees.<sup>136</sup> Numerous lower courts have

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131. *Ignacio v. United States Postal Service*, 30 M.S.P.B. 471 (1986) (Spec. Panel), sets forth the lone exception to the general rule. In *Ignacio*, the Postal Service dismissed the plaintiff letter carrier because he was unfit for duty. *Id.* at 474. The plaintiff had a deformity in his right leg, suffered from flat feet, and developed a heel spur. *Id.* The Merit Systems Protection Board (MSPB) held that the Postal Service need not reassign the plaintiff because reassignment would violate the provisions of a collective bargaining agreement. *Id.* at 475. The plaintiff appealed to the EEOC, which heard the action pursuant to 5 U.S.C. § 7702(b)(1) (1988). The EEOC found that the Rehabilitation Act overrides contrary terms in a collective bargaining agreement and remanded the case to the MSPB for further consideration. 30 M.S.P.B. at 475. On remand, the MSPB decided that, under civil service law, an employer does not have a duty to consider the reassignment of disabled employees. *Id.* The MSPB certified the case to the Special Panel of the MSPB. (The special panel resolves disputes between the MSPB and the EEOC over cases containing both civil service and discrimination issues. 5 U.S.C. § 7702 (1988)). The Special Panel held that the EEOC ruling prevailed because the EEOC interpreted its own guidelines and that interpretation was reasonable. 30 M.S.P.B. at 486. The Special Panel noted that case law undermining the EEOC's interpretation existed, but nonetheless refrained from disputing the EEOC's interpretation. *Id.* at 487 n.16; *see also* Ervin, *supra* note 31, at 949.

132. 733 F.2d 1367 (10th Cir. 1984).

133. *Id.* at 1370. In *Daubert*, the plaintiff suffered from back trouble and could not perform her duties as a multiposition letter-sorting-machine operator. The plaintiff could perform light duty work rewrapping parcels. *Id.* at 1368-69. However, the national collective bargaining agreement in effect at the time prohibited the Postal Service from permanently reassigning an employee in the plaintiff's position to light duty unless that employee had five years of postal service. *Id.* at 1369. The plaintiff had served only 92 days in the Postal Service. *Id.* at 1370.

134. 755 F.2d 1244 (6th Cir. 1985).

135. *Id.* at 1251-52. In *Jasany*, the employee suffered from a mild case of strabismus, commonly known as crossed eyes. *Id.* at 1247. The employee's position as a mail sorter required detailed visual work and exacerbated his condition. *Id.*

136. *Id.* at 1251-52 (citing *Daubert*, 733 F.2d at 1369-70 and *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (holding that under a national collective bargaining agreement that required the Post Office to grant light duty status to employees with less than five years seniority, requiring a grant of light duty status to an employee with less seniority is unreasonably burdensome)). The Fourth Circuit came to a similar conclusion in *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987). As in the cases discussed above, the plaintiff was a Postal Service employee who requested a transfer to light duty but did not meet the five-year seniority requirement. *Id.* at 466. The *Carter* court held that the Postal Service did not have to violate its collective bargaining agreement in order to accommodate an asthmatic custodian.

followed this precedent.<sup>137</sup> Thus, federal case law supports the legitimate rights and expectations of other employees under collective bargaining agreements.

The proposed amendment would also protect the rights of union members. First, the amendment ensures that accommodation will not interfere with other workers' rights because it allows the union to participate in the accommodation process. Second, the amendment maintains union strength because it does not force unions to rely solely on an employer's good faith.<sup>138</sup> Thus, the amendment preserves the special status of bargaining agreements in American labor policy.

### C. *The EEOC Regulations and Interpretations as a Source of Support for the Proposed Amendment*

The EEOC interpretive guidelines support the expansion of the confidentiality exceptions in order to reconcile an employers' conflicting

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*Id.* at 467. The court stated that a duty to accommodate can override a collective bargaining agreement only when the agreement reflects intentional discrimination. *Id.* at 469. In reaching this conclusion, the Fourth Circuit explicitly rejected the holding of *Ignacio* and noted that all other courts that have considered *Ignacio* have done the same. *Id.* at 468; *see supra* note 131. The *Carter* court found superior the rights of other employees who might be hurt by the disabled employee's preferential treatment. *Id.* at 467.

The First Circuit relied on *Carter* in *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989). The *Shea* court found that the Postal Service did not have to transfer a Vietnam veteran suffering from an anxiety disorder to a work site closer to his home. *Id.* at 786-87. The First Circuit reasoned that the accommodation would violate the rights of others under a collective bargaining agreement. *Id.* at 789. The bargaining agreement specified that employees had to bid on open jobs which would be awarded on the basis of seniority. *Id.* *Shea* did not possess the requisite seniority for the job that he was seeking. *Id.*

137. *See, e.g., Mackie v. Runyon*, 804 F. Supp 1508, 1511-12 (M.D. Fla. 1992); *Fowler v. Frank*, 702 F. Supp. 143 (E.D. Mich. 1988); *Davis v. United States Postal Service*, 675 F. Supp. 225, 233 (M.D. Pa. 1987); *Hurst v. United States Postal Service*, 653 F. Supp. 259, 263 (N.D. Ga. 1986); *Carty v. Carlin*, 623 F. Supp. 1181, 1189 (D. Md. 1985); *Alderson v. Postmaster Bolger*, 450 F. Supp. 49, 55 (W.D. Okla. 1984); *Bey*, 540 F. Supp at 928; *cf. Konieczko v. United Postal Service*, 47 M.S.P.B. 509, 511 (1991) (stating that "where an agency demonstrates that its nondiscriminatory collective bargaining agreement precludes it from reassigning an individual with a handicap to another position, such evidence is sufficient to establish that the reassignment would place an undue hardship on the agency").

The *Hurst* court stated: "The weight of authority is clearly that the rights afforded by the Rehabilitation Act cannot prevail over the rights created by a bona fide seniority system." This result is consistent with congressional intent. In adopting the ADA, Congress explicitly denounced paternalistic treatment of the disabled and adopted a policy of equality. Employers who ignore collective bargaining agreements and grant disabled employees special treatment undermine this congressional goal of equality. *See Rottenberg, supra* note 105, at 188.

138. *See infra* Part V.C.

statutory obligations. For example, the EEOC regulations allow employer disclosure relating to workers' compensation claims and "second injury" funds.<sup>139</sup> Many states require employers to provide the state with medical information to aid the administration of such funds.<sup>140</sup> In addition, an employer may need to disclose an employee's medical records in order to defend a workers' compensation claim. The confidentiality requirement made compliance impossible. In response to this conflict, the EEOC regulations broadened the ADA's confidentiality exceptions to permit employers to disclose medical records to state workers' compensation offices and second injury funds.<sup>141</sup> In addition, the EEOC Technical Assistance Manual notes that federal laws and regulations may require disclosure of relevant medical information.<sup>142</sup> Thus, the EEOC's own interpretation of employer obligations under the ADA supports an expansive interpretation of the confidentiality exceptions. The proposed amendment is consistent with this interpretation of the confidentiality requirement.

## V. PRACTICAL CONCERNS AND SUGGESTIONS

The following discussion presents temporary means by which employers can avoid the conflicting obligations created by the ADA's confidentiality requirement and the NLRA.<sup>143</sup> However, none of these suggestions is

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139. 29 C.F.R. § 1630.14(b) (1993). To encourage employers to hire disabled employees, many states have established "second-injury fund" programs. These programs seek to eliminate the financial disincentives associated with employing disabled people by limiting the amount that employers must expend when a worker suffers a work-related injury caused by a preexisting injury. Under a second-injury fund program, the balance is paid by the state through a common pool. As a prerequisite to recovery, however, many states require that the employer certify that it knew at the time of hire that the worker was disabled. TAM, *supra* note 6, § 1-9.5.

140. 29 C.F.R. app. § 1630 (1993).

141. *Id.* The EEOC stated that it intends to address this area in greater detail in the future. *Id.*

142. *See* TAM, *supra* note 6, § 1-6.6.

143. Employers should consider alternative means, because statutory change is a long and arduous process. The passage of the ADA is a prime example. Attempts to grant disabled people comprehensive freedom from discrimination began as early as 1972. In that year, Representative Vanik introduced a bill to amend Title VII of the Civil Rights Act of 1964. The bill prohibited discrimination on the basis of "physical or mental handicap" unless the employer could assert a bona fide occupational qualification. 118 CONG. REC. H9712 (daily ed. Mar. 22, 1972) (statement of Rep. Vanik). It took twenty years for Mr. Vanik's vision to become a reality.

Those who suffer from highly stigmatized diseases will probably resist union disclosure. Because of the threat of violence to and discrimination against AIDS and HIV-positive patients, AIDS activists will likely pose the most vocal opposition to union disclosure. *See supra* note 13. Such opposition makes it unlikely that Congress will amend the ADA in the near future.

entirely effective. The best solution is still an amendment allowing union access to a disabled employee's medical records.

#### A. *Educating Employees About the ADA*

Because other employees may contest accommodations for disabled employees, employers should educate employees concerning the right to reasonable accommodation under the ADA.<sup>144</sup> Employers should pursue this educational effort in cooperation with unions.<sup>145</sup> The joint effort should explain that the ADA may require the employer to make accommodations that appear to be preferential treatment.<sup>146</sup> In addition, the effort should emphasize the need for confidentiality and, most importantly, dispel misconceptions about the abilities of disabled workers.

Unfortunately, educational efforts provide the employer with few practical assurances. Employees may still argue that the employer breached the collective bargaining agreement, and the nondisabled employee may feel discriminated against.<sup>147</sup> If such problems persist and grievances are filed, the ADA's confidentiality requirement precludes an employer from asserting an adequate defense.

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144. Frierson, *supra* note 13, at 311; Levin, *supra* note 20, at 31.

145. Most national unions have already developed educational materials about disabled employees. Frierson, *supra* note 13, at 311.

146. Lawrence Levin, a senior partner at Levin & Funkhouser, Chicago, suggests that a memo be distributed to all company employees that states:

You may one day be working next to or near a fellow employee who has what you believe are the same job responsibilities as you but who is not performing all of the tasks you are. Your fellow employee might be performing some of the tasks in a different manner (e.g., sitting, while you are standing). You may also find that we need to reassign some duties and responsibilities between you and a person with a disability. If an employee's disability is obvious, it will be easy for you to understand why this is happening. Not all disabilities, however, are obvious. Because of the confidentiality obligations imposed on employers, we may not be able to share with you an employee's disability or the underlying reasons for an accommodation which is being made for the employee.

It may appear unfair that one employee is allowed to sit while others have to stand, or that duties and responsibilities are reassigned between employees. Please bear in mind, however, that one of the key purposes of the ADA is to allow individuals with disabilities to lead full and productive lives. The reasonable accommodation aspect of the ADA is designed to do just that. If you had a disability, you might well want your privacy protected. We must appreciate and respect the privacy of others who have disabilities. Numerous studies have shown that individuals with disabilities are as productive as other employees. Therefore, we ask for your understanding and cooperation. While various employees may do their work differently, each is endeavoring to contribute his or her fair share to the company's success.

Levin, *supra* note 20, at 31.

147. Frierson, *supra* note 13, at 312.

### B. *Voluntary Disclosure and Employee Waiver*

The ADA allows employees to voluntarily disclose their disabilities. Employers can encourage voluntary disclosure by convincing the employee that disclosure will facilitate the accommodation process.<sup>148</sup> In addition, the employer can explain that disclosure may lessen the appearance of favoritism, coworker jealousy, and tension in the workplace.<sup>149</sup>

In encouraging voluntary disclosure, the employer must ensure that disclosure does not appear coerced.<sup>150</sup> Voluntary disclosure must be in fact *voluntary*. As a solution, the employer could ask the employee to sign a legal release.<sup>151</sup> The release must state clearly that the employee is aware of the right to privacy and that the employee voluntarily chose to disclose the medical records to the union.<sup>152</sup> However, this solution may fail because courts generally refuse to enforce releases signed prior to legal action.<sup>153</sup> In the employment context, courts repeatedly invalidate such waivers as violative of public policy.<sup>154</sup> Therefore, use of employee

148. *Id.* at 311.

149. *Id.*

150. *Id.* Many employees may simply refuse to disclose their disability. This will happen most often when the disability is considered loathsome or contagious. *See supra* note 13 and accompanying text.

151. Frierson, *supra* note 13, at 311.

152. *Id.*

153. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 187, 499, 529 (1988); *see also* EEOC v. Calumet County, 686 F.2d 1249 (7th Cir. 1982) (holding that a prospective waiver of ADEA rights will violate public policy); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 853-62 (5th Cir. 1975) (holding that an employee may only release those Title VII claims arising from "discriminatory acts or practices which antedate the execution of the release," because public policy favors voluntary settlement of employment discrimination claims brought under Title VII), *cert. denied*, 425 U.S. 944 (1976); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) (holding that an employee may not waive in advance the rights granted by the Equal Pay Act).

154. PLAYER, *supra* note 153, at 499, 529. There is, however, no federal law that prevents an employee from waiving his or her right to sue. *Waivers of ADA Rights Should Follow Age Bias Rules, ACCOMMODATING DISABILITIES*, Oct. 1992, at 3 [hereinafter *Waivers*]. The EEOC Technical Assistance Division staff argues that the Older Workers Benefit Protection Act guidelines, which protect age discrimination claimants who waive their right to sue, ought to apply to ADA waivers. *Id.* The EEOC Technical Assistance Division staff suggests that employers should adhere to the following minimum criteria for voluntary waivers set by the Age Discrimination in Employment Act:

- 1) The waiver must be written in a manner that is understandable to the employee subject to it.
- 2) The waiver must specifically refer to the employee's rights or claims under the [ADA].
- 3) Rights or claims that may arise after the date the waiver is signed may not be waived.
- 4) In exchange for the waiver, the employee must receive something of value that is in addition to anything to which the employee would already be entitled.
- 5) The employee must be advised in writing to consult with an attorney prior to signing the waiver.
- 6) At least 21 days must be given to the employee within which to consider the waiver . . .

waivers is extremely risky.

### C. *Waiver of the Union's Rights*

An employer could also obtain a union waiver. While discussing the conflict between collective bargaining agreements and the ADA, Congress suggested that post-ADA<sup>155</sup> collective bargaining agreements should allow an employer the authority to take all actions necessary to ensure compliance with the ADA.<sup>156</sup> Generally, the NLRB will uphold such a waiver if its language is "clear and unmistakable."<sup>157</sup>

However, reliance on a union waiver is problematic.<sup>158</sup> If a union challenges an employer's action as a breach of a collective bargaining agreement, the employer must still prove that the offending conduct constituted a reasonable accommodation. The union might allege that a different accommodation would have a less damaging effect on the rights of other employees. Again, the employer would need to disclose information about the nature of the employee's disability to solve the dispute. Thus, a union waiver does not fully protect an employer from a union

7) The waiver must provide for a cooling-off period of at least seven days following its execution.

*Id*

However, even an ADA waiver that meets all of the above requirements does not absolutely protect the employer, because the EEOC is not officially bound by the requirements. Furthermore, the waiver requirements do not protect the employer from a suit by the EEOC, rather than the employee. *Id*.

155. The ADA became effective on July 26, 1992. 42 U.S.C. § 12111 (1988).

156. H.R. REP. No. 485, *supra* note 19, at 63. The House did not suggest exactly how to word such a waiver. One commentator suggested the following:

Neither the employer nor the union shall discriminate against any person on the basis of race, sex, creed, religion, color, national origin, age, veteran status, or physical or mental disability in violation of any applicable federal, state or local law or regulation. Discrimination on the basis of physical and mental disability shall be deemed to include the failure to make or agree to reasonable accommodation to the known physical or mental impairments of an otherwise qualified individual with a disability. The employer may take all actions necessary to comply with the Americans with Disabilities Act of 1990.

*Looking for Collective Bargaining Agreement in ADA Language?*, ACCOMMODATING DISABILITIES, Apr. 1993, at 12.

As another alternative, Willis Goldsmith of Jones, Day, Reavis & Pogue, Washington, D.C., suggested that each waiver contain a general "government requirements" clause, a management's rights provision, and meet-and-confer language. BUREAU OF NATIONAL AFFAIRS, AMERICANS WITH DISABILITIES ACT MANUAL ¶ 20:0017 (1993) [hereinafter BNA MANUAL].

157. Procter & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310, 1318 (8th Cir. 1979); J.I. Case Co. v. NLRB, 253 F.2d 149, 154 (7th Cir. 1958). The waiver must be contained in the actual text of the agreement. Mere omission from the contract or silence in the bargaining agreement is generally insufficient to constitute an enforceable waiver. Federal Compress & Warehouse Co. v. NLRB, 398 F.2d 631, 636 (6th Cir. 1968).

158. The congressional statement concerning future agreements ignores the reality of collective bargaining agreements currently in effect. Rottenberg, *supra* note 105, at 187.



grievance.

In addition, an employer may encounter difficulty in persuading a union to enter into such an agreement.<sup>159</sup> Unions have a clear interest in protecting their members from accommodations that interfere with workers' rights. Thus, the union may resist an agreement that relies solely on the good faith of the employer.<sup>160</sup>

None of the options described above have been sanctioned by courts or federal agencies. Furthermore, they may not be totally effective. Thus, employers should proceed with caution until Congress amends the ADA to allow limited disclosure of disabled employees' medical records.

## VI. CONCLUSION

The passage of the ADA signaled significant advances for the rights of disabled workers. However, employers who try to make reasonable accommodations face a conflict between the ADA's confidentiality requirement and the requirements imposed by the NLRA. Congress should adopt the amendment to the ADA confidentiality provision proposed in this Note and allow employers to disclose limited information about an employee's disability to union representatives. The amendment will enable employers to effectuate the congressional aim of bringing disabled people into the economic and social mainstream of American life, while simultaneously preserving the long-standing goals of collective bargaining embodied in the NLRA. Disabled employees, employers and unions are all accommodated.

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159. Strikes may result from a failure to reach an agreement, and the employer may suffer a loss of revenue and customers. Robert F. Prorok, *Union Contracts May Not Mesh with the ADA*, ACCOMMODATING DISABILITIES, May 1992, at 3. Gerald Maatman of Baker & McKenzie, Chicago, states that, as a negotiation strategy, clients often go the bargaining table claiming, "this isn't our request, this is the law." BNA MANUAL, *supra* note 156, ¶ 20:0017.

160. The union, for example, may have an interest in protecting the safety of other employees from a threat created by a disabled worker. The D.C. Circuit has stated that the "proposition that a union must rely on an employer's good intentions concerning the vital question of the health and safety of represented employees seems patently fallacious." *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 361 (D.C. Cir. 1983).