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Jerry M. Hunter

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# Potential Conflicts Between Obligations Imposed On Employers And Unions By The National Labor Relations Act And The Americans With Disabilities Act

JERRY M. HUNTER<sup>1</sup>

## INTRODUCTION

The Americans with Disabilities Act of 1990<sup>2</sup> ("ADA") has been called "the most significant civil rights legislation in more than 25 years."<sup>3</sup> At the signing ceremony on July 26, 1990, President George Bush stated that the Act "promises to open up all aspects of American life to individuals with disabilities — employment opportunities, government services, public accommodations, transportation, and telecommunications."<sup>4</sup> Extensive testimony before Congress showed that disabled persons experienced extremely high levels of unemployment and underemployment. The House Committee on Education and Labor reported that "[t]wo-thirds of all disabled Americans between the ages of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work."<sup>5</sup>

Title I of the Americans with Disabilities Act deals with discrimination in employment. The effective date was delayed for two years, followed by a two-stage implementation based upon the size of the employer. From July 26, 1992 until July 25, 1994 only employers with

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1. General Counsel, National Labor Relations Board. In 1974, Mr. Hunter received a B.A. in history and government from the University of Arkansas at Pine Bluff; in 1977 he received a J.D. from the Washington University School of Law. After nomination by President George Bush, he was confirmed by the Senate in November 1989 as General Counsel of the National Labor Relations Board.

Mr. Hunter wishes to express appreciation for the assistance of Assistant General Counsel Ellen A. Farrell and Acting Deputy General Counsel Yvonne T. Dixon in the preparation of this paper.

2. 42 U.S.C. § 12101 (Supp. 1991).

3. Julia Lawler, *Disabilities No Longer a Job Barrier*, USA TODAY, July 22, 1992, at 1A.

4. Statement by President George Bush upon signing S. 933, 26 WEEKLY COMP. PRES. DOCS. 1165 (July 30, 1990).

5. H.R. REP. No. 101-485, 101st Cong., 2d Sess., pt. 2, at 32 (1990).

twenty-five or more employees are covered; thereafter, employers with at least fifteen employees are covered.<sup>6</sup> As the effective date of Title I drew near, there was much concern expressed regarding its impact in the workplace. According to *USA Today*, the law would “forever change the way employers deal with the 33.8 million U.S. citizens who have physical or mental disabilities.”<sup>7</sup> The *New York Times* stated that there was “certainty among government officials and experts that the [ADA] requires vast changes in employment practices as extensive as those made for women and blacks.”<sup>8</sup> The *Wall Street Journal* agreed, saying that the ADA “will force businesses to alter a slew of employment practices — far more than many realize.”<sup>9</sup>

The *Wall Street Journal* predicted that, for employers with collective bargaining relationships, union contracts would have to be modified in order to permit compliance with the ADA. As part of its “road map” for employers, the *Journal* recommended that employers “[r]evis[e] all union contracts to reduce conflicts between the ADA and seniority rules.” The *Journal* went on to say:

Supervisors don't have to “bump” a staff member to accommodate a disabled employee. But what happens if a disabled individual fills a vacancy that a more-experienced worker deserves under union seniority rules? The new law is unclear.

So, at management's urging, the Transport Workers Union, among others, has modified some contracts to let employers make compliance moves. But the Service Employees

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6. Section 101(5) of Title I states:

The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title [July 26, 1992] an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

42 U.S.C. § 12111(5) (Supp. 1991); see also *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. § 1630.2(e) (1990).

7. Lawler, *supra* note 3, at 1A.

8. Alan R. Myerson, *Companies Prepare for New Law on Disabled*, N.Y. TIMES, July 25, 1992, § 1, at 35, col. 3.

9. Joann S. Lublin, *Disabilities Act Will Compel Businesses to Change Many Employment Practices*, WALL ST. J., July 7, 1992, at B1.

International Union opposes such changes as possibly harmful to seniority protections.<sup>10</sup>

There appear to be potential conflicts between the requirements of the ADA and the National Labor Relations Act (NLRA). This paper will outline some of them.

## I. POTENTIAL CONFLICTS BETWEEN THE DUTY TO BARGAIN UNDER THE NLRA AND THE DUTY TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT

### A. UNILATERAL CHANGES

When a labor organization has been recognized or certified as the bargaining representative of an employer's employees, sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act<sup>11</sup> obligate the employer and union, respectively, to "bargain collectively" over wages, hours and other terms and conditions of employment.<sup>12</sup> An

10. *Id.*

11. 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1988).

12. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(b)(3) (1988).

Section 8(b)(3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of 9(a)." *Id.*

Section 8(d) defines the duty to "bargain collectively":

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . [complies with the notice provisions of subsections (1)-(3)] . . . and (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract . . .

29 U.S.C. § 158(d) (1988).

employer violates that duty if it changes working conditions of employees represented by a union without first giving the union notice of the proposed change and an opportunity to bargain.<sup>13</sup> Where no collective bargaining agreement is in effect which contains a provision covering the affected issue, unilateral implementation of a bargaining proposal is permitted only if (1) the union waives its right to bargain about the issue;<sup>14</sup> or (2) the parties have bargained to a good faith impasse over the proposal without reaching agreement.<sup>15</sup>

If a collective bargaining agreement is in effect, both the language of section 8(d) and the case law obligate the parties to that agreement to refrain from altering terms and conditions of employment contained in the agreement without the consent of the other party.<sup>16</sup> Indeed, section 8(d) specifically authorizes parties to a labor agreement to refuse to "discuss or agree to any modification" during the term of the contract.

The ADA prohibits discrimination against qualified individuals with a disability because of that disability, "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."<sup>17</sup> Among the forms of discrimination prohibited are "not making reasonable accommodations to the known physical or mental limitations" of otherwise qualified disabled applicants or employees, unless the accommodation would impose an

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13. *NLRB v. Katz*, 369 U.S. 736, 738 (1962). A union also violates its duty to bargain by unilaterally changing working conditions. *Pattern Makers Ass'n of Detroit*, 233 N.L.R.B. 430, 435-36 (1977), *enforced in relevant part and remanded*, 622 F.2d 267 (6th Cir. 1980), *on remand*, 253 N.L.R.B. 643 (1980). As a practical matter, however, unions generally cannot affect changes in working conditions unilaterally. Consequently, the discussion herein focuses on the potential conflict between an employer's NLRA obligation to refrain from unilateral changes and its duty to comply with the ADA. Where, however, a union has the power to determine a term or condition of employment, such as its power to promulgate rules regarding the operation of a hiring hall, the same principles as govern an employer's bargaining obligation would govern the union's efforts to comply with the ADA with respect to that matter.

14. *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 751-52 (1968).

15. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968).

16. *See* 29 U.S.C. § 158(d) (1988); *see also, e.g., Oak Cliff-Golman Bakery Co.*, 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974); *Oak Cliff-Golman Bakery Co.*, 202 N.L.R.B. 614 (1973); *Automobile Workers Local 547 v. NLRB*, 765 F.2d 175, 179-83 (D.C. Cir. 1985), *enforcing Milwaukee Spring Div.*, 268 N.L.R.B. 601 (1984).

17. 42 U.S.C. § 12112(a) (1991).

“undue hardship” on the operation of the business of such covered entity.<sup>18</sup>

The NLRA obligation to bargain before unilaterally changing wages, hours or other terms and conditions of employment may affect how an employer complies with its ADA obligations — either to make a reasonable accommodation for disabled employees<sup>19</sup> or otherwise to alter its employment practices so as to achieve compliance with the ADA.

It must be noted, however, that unilateral action violates section 8(a)(5) or 8(b)(3) only if it effects a “material, substantial or significant” change in working conditions.<sup>20</sup> Accommodations such as putting a desk on blocks, providing a ramp, adding braille signage or providing an interpreter, which allow disabled employees to perform the same job in a fashion different than other employees generally would not be changes in terms and conditions of employment.<sup>21</sup> In that case, an employer would have no duty to bargain over the implementation of such accommodations. However, a change that is inconsistent with an established employment practice such as a seniority system, defined job classifications or a disability plan would more likely be a change in section 8(d) terms and conditions.<sup>22</sup>

The union’s status as *exclusive* bargaining representative under the NLRA<sup>23</sup> also presents the potential for conflict with the EEOC’s

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18. *Id.* § 12112(b)(5)(A).

19. As noted, the ADA prohibits employers and other covered entities from discriminating against applicants. Except in certain limited circumstances, however, an employer has no duty to bargain with a union over the application process or employee selection criteria. *Star Tribune*, 295 N.L.R.B. 543, 545-48 (1989). *Compare Houston Chapter, Associated Gen. Contractors*, 143 N.L.R.B. 409, 411-12 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965) (duty to bargain over standards for hiring hall). Consequently, outside the hiring hall context, an employer has no duty to bargain about “reasonable accommodations” for applicants with a disability, in the absence of an impact upon members of the bargaining unit.

20. *See, e.g., LaMousse*, 259 N.L.R.B. 37, 48-49 (1981), *enforced*, 223 L.R.R.M. (BNA) 3168 (9th Cir. 1983) (mem.) (five minutes increase in break time not material, substantial and significant); *Rangaire Acq. Corp.*, 309 N.L.R.B. No. 167 (Dec. 16, 1992) (elimination of 15-minute extended lunchbreak on Thanksgiving was a material, substantial and significant change).

21. *See, e.g., Rust Craft Broadcasting of N.Y., Inc.*, 225 N.L.R.B. 327 (1976) (change from manually completed timecards to timeclock).

22. *See, e.g., Southern Cal. Edison Co.*, 284 N.L.R.B. 1205, n.1, 1210-11 (1987) (unilateral change in temporary work assignment practices for disabled employees); *Jones Dairy Farm*, 295 N.L.R.B. 113, 113-16 (1989), *enforced*, 907 F.2d 1021 (7th Cir. 1990) (midterm implementation of rehabilitation program for temporarily disabled employees).

23. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988), provides:

suggestion that "the appropriate reasonable accommodation" is best determined through consultation between the employer and the disabled individual to "ascertain the precise job-related limitations" and how those limitations could be overcome.<sup>24</sup> The union's status as exclusive bargaining representative gives it the right to be consulted about a change affecting terms and conditions of employment. An employer violates its bargaining obligation by ignoring the union and attempting to deal directly with its employees.<sup>25</sup> To be sure, provisos to NLRA section 9(a) authorize an employer and employee to meet and adjust grievances, but they may do so only "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: [and p]rovided further, [t]hat the bargaining representative has been given opportunity to be present at such adjustment."<sup>26</sup> Absent a union's "clear and unmistakable" waiver of its right to bargain in such circumstances, an employer is obligated to deal with the union even if the employee initiated the contacts with the employer.<sup>27</sup> Thus, if a disabled employee who seeks an accommodation from the employer is part of a bargaining unit represented by a union, the employer's NLRA bargaining obligation suggests that the consultation process recommended by EEOC should include the union.

In some circumstances an employer's obligation to comply with the ADA may privilege it to act unilaterally with respect to actions

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Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

24. EEOC Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(o)(3) (1990).

25. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678-83, 684 (1944).

26. 29 U.S.C. § 159(a) (1988). An employer did not violate its bargaining obligation by participating in court-ordered settlement discussions regarding an employee's EEOC complaint where the employer directed the employee's lawyer to include the union in the settlement process and at no time during the settlement discussions sought to resolve the employee's parallel grievance in the union's absence. *Public Serv. Co. of Colo.*, 301 N.L.R.B. No. 33, n.2 (Jan. 18, 1991). Compare *United States Postal Serv.*, 281 N.L.R.B. 1015, 1015-18, *vacated and remanded*, 872 F.2d 1027 (6th Cir. 1989) (table) (Employer violated section 8(a)(5) by excluding union from settlement conference regarding EEOC complaints that were also the subject of grievances).

27. *Kansas Nat'l Educ. Ass'n*, 275 N.L.R.B. 638, 639 (1985) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)); see also *Bozzuto's, Inc.*, 275 N.L.R.B. 353, n.1, 357-358 (1985); *Carbonex Coal Co.*, 262 N.L.R.B. 1306, 1313 (1982).

necessary to bring it into compliance with the ADA. The National Labor Relations Board ("Board") has held that where changes in working conditions are mandated by changes in law, an employer does not violate section 8(a)(5) by making such changes. But, where the change in law leaves the employer with some discretion with regard to compliance, the employer violates section 8(a)(5) by unilaterally changing terms and conditions to bring itself into compliance.<sup>28</sup> For example, in a situation where there was no contract in effect, the Board held that an employer did not violate the Act by unilaterally prohibiting the consumption of food or drink in areas exposed to toxic materials, since such a rule was required by OSHA regulation and the employer had no discretion as to the implementation of the rule. However, the employer was found to have violated the Act by unilaterally banning certain reading materials, posters, charts and calendars from work areas. The Board rejected the employer's claim that it was required to prohibit such material under Title VII of the Civil Rights Act, which prohibited sexual harassment. The Board found that the employer's rule was overbroad and that discretion existed to determine whether specific items were sexually offensive.<sup>29</sup>

Generally speaking, an employer would appear to have sufficient discretion in determining what would be a "reasonable accommodation" under the ADA that it could not rely on the enactment of the ADA to justify failing to give a union any notice or opportunity to bargain about the proposed accommodation. First, the ADA does not mandate any particular accommodation. Consistent with the legislative history, EEOC has taken the position that the ADA does not require an employer to provide the "best" accommodation possible, so long as it is sufficient to meet the job related needs of the individual being accommodated.<sup>30</sup> Further, the ADA explicitly recognizes that "undue hardship" is a defense to a charge that an employer failed to make a reasonable accommodation.<sup>31</sup> Finally, the EEOC's implementing re-

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28. See, e.g., *Murphy Oil USA*, 286 N.L.R.B. 1039, 1042 (1987); *Standard Candy Co.*, 147 N.L.R.B. 1070, 1073 (1964).

29. *Murphy Oil USA*, 286 N.L.R.B. at 1042.

30. Appendix to Part 1630, Interpretative Guidance to Title I of the Americans with Disabilities Act, Section 1630.9. The House Judiciary Committee had stated: "In the event there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement, so long as the selected accommodation provides meaningful equal employment opportunity for the applicant or employee." H.R. REP. No. 101-485, 101st Cong. 2d Sess., pt. 3, at 40 (1990).

31. 42 U.S.C. § 12112(b)(5)(A) (Supp. 1991); Regulations to Implement the Equal Employment Provisions of Americans with Disabilities Act, 29 C.F.R. §§ 1630, 1630.9(a) (1990).



gulations regarding the ADA provide that it may be a defense to a charge of discrimination under the ADA that a challenged action is required or necessitated by another federal law or regulation or that another federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required.<sup>32</sup> Thus, it would appear that, 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.<sup>33</sup>

The most significant potential conflict between the NLRA duty to bargain and the ADA duty to make a reasonable accommodation is that posed by a proposed accommodation that is inconsistent with an existing collective bargaining agreement. As noted above, when no collective bargaining agreement is in effect the NLRA permits an employer unilaterally to implement a proposed change in working conditions if it first bargains to a good faith impasse about the proposal or if the union waives its right to bargain. When a collective bargaining agreement is in effect, however, section 8(d) forbids a party to modify the terms of the contract without the consent of the other party. And, it authorizes a party to refuse even to discuss proposed changes during the term of the contract. At the same time, the ADA makes it unlawful for an employer to participate in a contractual agreement, including a collective bargaining agreement with a union, that has the effect of subjecting the employer's own qualified applicant or employee with a disability to prohibited discrimination.<sup>34</sup> As previously noted, one type of prohibited discrimination is the failure to make reasonable accommodations for otherwise qualified disabled applicants or employees, unless the employer can show that the accommodation "would impose an undue hardship on the operation of its business."<sup>35</sup>

Thus, the question is raised: if a collective bargaining agreement contains a provision inconsistent with the proposed accommodation, may the employer or the union rely on that provision to demonstrate

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32. 29 C.F.R. § 1630.15(e) (1990).

33. Theoretically if a proposed accommodation is the only effective accommodation in the circumstances and is not an "undue hardship," the ADA might well mandate an employer to make that accommodation. In that case, the employer might have no duty to bargain. See cases cited *supra* notes 28-29. As a practical matter, the Board may never be confronted with this issue: if no employee is adversely affected by the accommodation it is unlikely that a charge would be filed.

34. 42 U.S.C. §§ 12112(a), 12112(b)(2) (Supp. 1991).

35. *Id.* §§ 12112(a), 12112(b)(5)(A).

that the proposed accommodation would be an undue hardship? The legislative history and EEOC guidance make clear that the terms of a collective bargaining agreement may be relevant, although not determinative, of whether a particular accommodation would cause undue hardship within the meaning of the ADA.<sup>36</sup> This history differentiates the ADA from the Rehabilitation Act of 1973 under which a disabled employee's right has been found not to prevail over other employees' rights under a collective bargaining agreement.<sup>37</sup>

Certainly, a party would have no right under the NLRA to insist on adherence to contract terms that are, on their face, violative of the ADA. For example, the Board has held that, when Congress raised the minimum wage, an employer did not violate its bargaining obligation by increasing the wages of several employees to the new statutory minimum without first bargaining with the union.<sup>38</sup> More difficult are contractual provisions that are neutral on their face. In the chapter on reasonable accommodation in its technical assistance manual, the EEOC discusses an example of a disabled worker who seeks reassignment to a light duty clerk position covered by a collective bargaining agreement. The agreement provides that such positions are filled based on seniority and the disabled worker lacks sufficient seniority to be eligible for the job under the contract. The manual comments:

If the collective bargaining agreement has specific seniority lists and requirements governing each craft, it might be an undue hardship to reassign this person if others had seniority for the clerk's job.

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36. The House Committee on Education and Labor stated: The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.

H.R. REP. No. 101-485, 101st Cong., 2d Sess., pt. 2, at 63; EEOC TECHNICAL ASSISTANT MANUAL § 7.11(a), 405 Fair Employment Practices Manual 7050.

37. See, e.g., *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1251-52 (6th Cir. 1985); *Mackie v. Runyon*, 804 F. Supp. 1508 (M.D. Fl. 1992).

38. *Standard Candy Co.*, 147 N.L.R.B. 1070, 1073 (1964). The Board further held, however, that the employer did violate its bargaining obligation by unilaterally raising the wages of other employees, whose wages already met the minimum wage, in an effort to maintain previously existing wage differentials. *Id.*

However, since both the employer and the union are covered by the ADA's requirements, including the duty to provide a reasonable accommodation, the employer should consult with the union and try to work out an acceptable accommodation.<sup>39</sup>

NLRA analysis shows that two questions are presented by this example. First, when a party to the contract (either an employer or a union) requests bargaining over such a proposed accommodation, may the other party rely on its right under section 8(d) to refuse to discuss any modification of the agreement during the term of the contract, or alternatively, does not creation of new legal duties under the ADA impose on both employers and unions a concomitant duty under the NLRA to, at least, bargain over the proposed accommodation?

Second, if the parties are unable to reach agreement on an accepted accommodation, does an employer violate its section 8(d) obligation to refrain from altering the contract without the consent of the union if it implements the proposed accommodation over the union's objection? It may be that a party is entitled to rely on its section 8(d) right to refuse to discuss or agree to a proposed accommodation, inconsistent with a contract provision, if an adequate alternative arrangement existed that would not conflict with the collective bargaining agreement. In this regard it should be remembered that the ADA does not require an employer to provide the "best" accommodation, but simply one that is sufficient to meet the job-related needs of the individual being accommodated.<sup>40</sup> If, however, a proposed accommodation is the only effective accommodation in a given circumstance, but that accommodation is inconsistent with a facially neutral contract provision, it would seem that the obligations imposed by the ADA and the NLRA are directly contradictory. The Board has not yet been presented with a case that would require it to address these issues.

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39. 405 Fair Employment Practices Manual 7007. The House Committee on Education and Labor suggested that "[c]onflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation." H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 63 (1990). EEOC issued similar guidance in its Technical Manual, 405 FEPC Binder 7007. Although such a provision would solve the problem identified here, and an employer would be free to make such a proposal, the EEOC does not suggest that a union would be required to agree to such a contract provision.

40. See *supra* note 30 and accompanying text.

## B. DUTY TO PROVIDE INFORMATION

Another area of potential conflict between the two statutes is the confidentiality requirement of the ADA and the duty to provide information under the NLRA. The ADA obliges an employer to treat as confidential information that it obtains from medical examinations and other inquiries regarding an applicant's or an employee's medical condition or history.<sup>41</sup> An employer's duty to bargain under the NLRA includes the obligation to provide to a union relevant information that is necessary to the union's performance of its duties as exclusive bargaining representative.<sup>42</sup> The Supreme Court has recognized that an employer has a legitimate interest in protecting against the improper disclosure of confidential information and held that in order to protect that interest the employer may place conditions on the disclosure.<sup>43</sup> The Board has refused to hold, however, that an employer is relieved of its duty to provide relevant information merely by asserting a legitimate claim that the requested information is confidential.<sup>44</sup> Rather, the Board requires the parties to bargain over means to accommodate both interests.<sup>45</sup> Whether the employer ultimately has a duty to disclose the information turns on a balancing of the union's need for the information against the confidentiality interests.<sup>46</sup> Where the union has a legitimate need for the information that is outweighed by limited intrusions on privacy concerns, the Board will require disclosure.<sup>47</sup> Where, however, the information requested is confidential and, though relevant, not necessary to the union's performance of its duties, the Board will not direct that it be disclosed.<sup>48</sup>

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41. 42 U.S.C. § 12112(d)(3)(4) (Supp. 1991); 29 C.F.R. § 1630.14 (1990).

42. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

43. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-20 (1979).

44. *Star Tribune*, 295 N.L.R.B. 543, 548-49, 565 (1989); *New Jersey Bell Tele. Co.*, 289 N.L.R.B. 318, 319-20 (1988); *Tritac Corp.*, 286 N.L.R.B. 522 (1987).

45. *Minnesota Mining & Mfg. Co.*, 261 N.L.R.B. 27, 32 (1982), *enforced sub nom.* *Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

46. *Johns-Manville Sales Corp.*, 252 N.L.R.B. 368 (1980); *LaGuardia Hosp.*, 260 N.L.R.B. 1455 (1982).

47. *LaGuardia Hosp.*, 260 N.L.R.B. at 1455 (directing disclosure of certain notations on patient charts and other medical records relevant to processing grievances of unit nurses).

48. The Board found an employer was not obligated to comply with a union request for the names of employees whose medical records had been "red-tagged" by company doctors as having been partially disabled by a lung disease. Even though the union had a reasonable basis for the information — namely, for use in developing a total health care program for employees and to prepare contract proposals to

## II. UNION'S DUTY OF FAIR REPRESENTATION UNDER THE NLRA AND ITS OBLIGATIONS UNDER THE ADA

Labor organizations as well as employers are covered by the obligations imposed by the ADA. Unions' actions or inactions regarding these obligations may give rise to allegations that they have violated their duty of fair representation under the NLRA.<sup>49</sup> First, a disabled employee may allege that a union violated that duty by discriminating in its operation of a hiring hall or apprenticeship program, by entering into facially discriminatory contract provisions or by discriminatorily responding to a request that an employer make a reasonable accommodation to the employee's disability.<sup>50</sup> Second, non-disabled employees who object to an agreement a union has entered into to accommodate a disabled employee might charge that the union's actions on behalf of the disabled employee violated its duty of fair representation to other employees.<sup>51</sup> The Board has long held that a union violates its duty of fair representation by discriminating against employees it represents based on "invidious" consid-

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protect red-tagged employees — and the identity of the affected employees was relevant to the union's needs, the identity was not essential to that program. A legitimate aura of confidentiality surrounded the identity of the employees and the employer asserted the privilege in good faith. On balance, the employer was entitled to condition disclosure of the identities on employee's consent to disclosure. *Johns-Manville Sales Corp.*, 252 N.L.R.B. at 368-69; *see also Hanlon & Wilson Co.*, 267 N.L.R.B. 1264 (1983) (Employer had no duty to furnish individually identified safety and medical records; records were confidential and union failed to give even general statement of purpose for which information was sought).

49. The doctrine of the duty of fair representation holds that a union's status under the NLRA as exclusive bargaining representative of unit employees obligates the union to deal fairly with unit employees in performing its representational functions. "The exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

50. In such cases the employee may also file a charge with the EEOC alleging that the union's conduct violated the ADA.

51. It does not appear that non-disabled employees would generally have standing as aggrieved persons under the ADA; thus EEOC would probably not entertain such a charge. *See, e.g.*, 24 U.S.C. § 12112(a) (Supp. 1991) (prohibition of discrimination against qualified individuals with a disability); *id.* § 12112(b)(4) ("Discrimination" includes discrimination against a qualified individual based upon that individual's relationship or association with a person with a known disability); *id.* § 1203(a) (prohibition of retaliation against any individual because he or she has opposed any act or practice made unlawful by the ADA).

erations such as disability.<sup>52</sup> Further, the Board recognizes that the union must be allowed a "wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."<sup>53</sup> Thus, it would appear that charges regarding a union's resolution of such grievances can be resolved under traditional principles developed in this area.

#### CONCLUSION

As of the date of the preparation of this paper, the EEOC has reported receiving thousands of charges alleging discrimination prohibited by Title I of the ADA. The charges which have been filed so far with the NLRB do not even begin to approach this number. It is our hope that large numbers of unfair labor practice charges will not be filed with the Board. In most cases, employers and unions will be able to resolve in an amicable manner problems which may arise as a result of compliance with the ADA. Unfair labor practice charges raising these issues may in fact be symptomatic of underlying relationship issues between the employer and the union which predated the ADA.

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52. See, e.g., *Bell & Howell Co.*, 230 N.L.R.B. 420, 420-23 (1977), *enforced*, 598 F.2d 136 (D.C. Cir. 1979) (sex discrimination); *Independent Metal Workers Union Local No. 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573, 1574-75, 1602-04 (1964) (race discrimination).

53. *Ford v. Huffman*, 345 U.S. 330, 338 (1953).

