



Unions and the ADA: Tips for Union Representatives

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What is the Americans with Disabilities Act (ADA)?

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

Under the ADA, an employer may not deny an individual with a disability the opportunity to apply for a job because of a request for a reasonable accommodation during the application process. Nor may an employer deny an employment opportunity to a qualified applicant or employee with a disability because of a request or need for a reasonable accommodation in order to perform the essential functions of the job. An employer is not required to provide an accommodation if so doing would subject its business to an undue hardship. Whether an accommodation creates an undue hardship is a factual issue based upon factors such as the type of accommodation, its cost, and the size and nature of the employer's business.

Since the passage of the ADA, unions and workers with disabilities have been incrementally learning how to navigate the sometimes conflicting responsibilities

for unions and employers, and the rights of workers with disabilities who require workplace accommodations. At times, an accommodation request by one member may prompt a grievance by another, especially around such areas as seniority and light duty jobs. Yet, union representatives are individuals to whom all members should feel they can directly bring their concerns and grievances. Informed union representatives can be a vital source of information about the ADA, workplace discrimination, and the reasonable accommodation process.

What Can Unions do to Assist Workers with Disabilities?

Labor unions have a profound influence upon the health and safety initiatives of a company and its legal compliance with laws such as the ADA.

Although many union initiatives have historically addressed health benefits and injury prevention, today's workforce includes more people with life-long disability and many older workers for whom some decrease in functioning is inevitable. Both the ADA and the National Labor Relations Act (NLRA) are relevant to a union's work with management, and the union is the exclusive representative of employees. The NLRA prohibits an employer from making any change in the terms and conditions of employment without giving the union an opportunity to bargain over proposed changes. Further, the ADA prohibits employers and unions from entering into collective bargaining agreements that discriminate against individuals protected under the ADA, and the NLRA requires that unions act reasonably, in a nondiscriminatory fashion, and in good faith toward all of their members, under their duty of fair representation. Consequently, when seeking to serve workers with disabilities, unions must consider the needs of

these individuals in the larger context of the collective bargaining unit as a whole. These are just a few of the reasons why it is imperative that union representatives understand issues related to disability and prepare themselves to assist workers who have both visible and non-obvious disabilities. Here are some specific ways unions can respond to the needs of members with disabilities:

1. Determine if the member's employment situation is being adversely affected by a disability.

To help your member determine if he or she is covered by the law ask:

- Does your member have a physical or mental disability or impairment? If so, does your member think the disability is affecting their work performance?
- Is your member worried about losing his or her job? If so, why? Keep in mind that the member's job performance issues may be due to an undisclosed physical or mental impairment that may meet the legal definition of disability under the ADA. While union representatives are not responsible for determining whether an individual has an ADA-covered disability, they can ask questions of the member that enable the individual to determine if the performance issues may be due to a known or possible medical condition that meets the legal definition. Has your member told his or her supervisor about the disability and requested accommodation for such disability? If so, what was the response? Did your member get the necessary accommodations?
- Has your member been disciplined or threatened with job loss solely because of a disability or possible disability?

2. Help your member understand his or her legal rights and responsibilities under the ADA.

- If your member has a physical or mental impairment that substantially limits performing at least one major life function (e.g., working, breathing, thinking, seeing, learning), or has a record of such an impairment, he or she meets the basic definition of “person with a disability” under the ADA.
- Such individuals are protected from employment discrimination and entitled to reasonable accommodation as long as they are “qualified”- that is, they can perform the essential job functions with or without reasonable accommodation.
- Make sure your member is aware of the company’s accommodation request process and that he or she cooperates in working with the employer to provide needed information, identify possible ways to address the performance issues presented by the disability, and uses the accommodation to meet performance expectations.
- Your member may request your help to decide whether to disclose their disability; or may just want a union representative to be present when disclosing to the employer. Ultimately, the decision to disclose or not, is up to the individual. Remember, while nondisclosure is a legally protected choice, your member must disclose if requesting reasonable accommodation because an employer is required to provide reasonable accommodation only for disabilities of which he or she has knowledge.
- Encourage your member to keep a record of what occurs once he or she has told the employer of the disability. What information was requested? How long did it take for the employer to act? What accommodations were offered? Were they effective? Ask that your member share this informa-

tion with you on a regular basis. This may allow you to intervene in a meaningful way on their behalf. For example, you may be able to suggest that the worker, or his or her medical professional, VR specialist, or other knowledgeable third party offer some possible job accommodations such as:

- Allowing the employee to work a modified work schedule in order to attend weekly counseling appointments;
- Providing technology to help a worker with hearing or visual impairments to perform essential job functions; or
- Modifying the job so that nonessential tasks are completed by other workers.

Help your member understand that the employer determines whether or not a specific accommodation request is reasonable. However, the employee’s participation in an interactive process is essential in making this determination. This may include allowing access to relevant medical information - pursuant to The Health Insurance Portability and Accountability Act (HIPAA), with the union member’s expressed, written permission- and working together to identify possible accommodations to help the member perform essential job functions. Often a suitable accommodation can be found.

3. Advise your member of the two conditions under which an employer may lawfully deny a specific accommodation request.

- An employer may deny an accommodation that presents an “**undue hardship**.” Undue hardship refers to significant difficulty or expense given the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing the accommodation. Undue hardship refers not only to financial difficulty, but to accommodations that are unduly exten-

sive, substantial, or disruptive, or those that would fundamentally change the nature or operation of the business. An employer must assess on a case-by-case basis whether an accommodation request would cause undue hardship. In cases of undue hardship based upon the financial cost, the employer must consider less costly alternatives and should consider tax credits that decrease the cost of implementing certain accommodations. If the cost of accommodation is still prohibitive, the employer should allow the member to contribute to that cost before denying the accommodation.

- The other condition under which an employer may deny accommodation is in situations in which it is felt that the individual poses a “**direct threat**.” In determining if an individual with a disability poses a direct threat, factors to be considered are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Even if the person is found to pose a significant risk of substantial harm, part of the reasonable accommodation determination is an analysis of whether the individual can be accommodated in a way that eliminates the direct threat or reduces it to an acceptable level. Decisions regarding direct threat must be based on objective evidence and not stereotypes about disability. In these situations, the employer must determine if there are ways to minimize or eliminate the potential risk before refusing accommodation.

What if Your Member has Already Been Terminated Because of a Disability?

As all union representatives know, most collective bargaining agreements have a just

cause proviso. This provides broader coverage or basis for just cause. Termination based on disability may be unjust even if the disability was not previously disclosed.

- If your member did not disclose his or her disability until the time of termination and was let go based on fair, equitable practices that the employer uses with all employees, the termination does not violate the ADA. If however, your member told the employer about the disability prior to termination, such as during the earlier stages of the disciplinary process, the employer has a legal obligation to offer reasonable accommodation unless doing so would present an undue hardship for the employer or would pose a direct threat to the health and safety of your member, co-workers or customers. In such instances, the employee may still be subjected to consequences for any conduct or performance issues once an accommodation is granted as long as these consequences are the same as those any worker would be given under the same circumstances.
- If it appears that your member’s termination violates the ADA, *promptly* consult your collective bargaining agreement and the employer’s policies for contesting termination or discriminatory action. Time is of the essence, as steps to contest such actions must be taken within a short time period.
- You and your member can learn more about rights under the ADA by calling the National ADA Network at 1-800-949-4232 or by visiting the EEOC website at <http://www.eeoc.gov/>

An Example

The example below provides suggestions about how to deal with some of the issues that may arise when working with union members with disabilities.

Gayle is an occupational health nurse who has sustained a spinal cord injury on the job and is on medical leave. She now uses a motorized wheelchair. She will meet with management prior to returning to work. As the steward and resident ADA “expert” for the union you are asked to lead the meeting with management and the legal department. Based on a quick assessment on your part, understanding the role and requirements of Gayle’s position, it appears to you that there are elements of her position that she will never be able to do, and there are some functions that may need to be shared with other workers or departments.

What issues should be on the agenda?

- Confirm the documented essential functions of the job.
- Review available medical information and discuss her ability to perform these functions with or without reasonable accommodation.
- Consider the duties that you are certain she can perform and whether she could perform these duties for coworkers who may then be able to complete tasks she is no longer able to do, so that the work share is still equitable.
- Determine what additional information you may need about her ability to do the essential functions of the job and how you will get this.

What counsel can you give them in light of your understanding of the ADA’s employment requirement?

- Do not assume what she can and cannot do. The decision as to whether she is still qualified for the position must be made on objective evidence, such as the medical information/advice provided by her physician, not assumption.

- Make sure that the essential functions are really essential; if they are simply preferences and/or are performed very infrequently, these may be able to be assigned to someone else.

Is Gayle still qualified for this position? If not, what are her options?

- She may still be able to do the training, report writing and consultation duties of the position. If the job requires that she visit multiple worksites, issues of transportation and wheelchair accessibility may need to be considered (if her injury is new she may not have explored ways she may be able to transport herself or if she is comfortable or able to travel independently. Also, some worksites may not be accessible to people who use wheelchairs).
- If she is not qualified (this decision may require more than one meeting), consider how the skills she has and the things she can do will benefit the company. She may be qualified for a lateral position. Perhaps there are subcontracted duties she could be assigned, such as editing reports. However, the employer is not obligated to create a new position for her.

What other information would you need to make a decision about this accommodation?

- If considering her returning for another position or to do work normally subcontracted out, you will need to think about the impact on the operation of the business (possible undue financial or operational hardship) and the impact on the other members of the collective bargaining unit.

Conclusion

Union efforts help ensure that the employer meets its obligations under the ADA and the NLRA. Union representatives can be effective facilitators of Alternative Dispute Resolution (ADR), which the courts have determined is a viable way to find individualized and non-confrontational ways to address accommodation needs while maintaining the employee/employer relationship. Most importantly, by encouraging the use of, and participating in the reasonable accommodation process, unions can be proactive in fostering positive, productive work environments and in furthering the ultimate goal of the ADA – inclusion and appreciation of people with disabilities in the workplace and in society.

References

Thomason, T., Burton, J. F., & Hyatt, D. E. (Eds.). (1998). *New approaches to disability in the workplace*. Madison, WI: Industrial Relations Research Association.

Keene, D.R. II (December 1997). Collective bargaining and compulsory arbitration of Americans with disabilities act claims. *Labor Law Journal*. 738-748.

Additional Resources

ADA National Network Technical Assistance Hotline

800-949-4232 (voice/TTY)
www.adata.org

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

815 16th Street, NW
Washington, DC 20006
(202) 637-5000 (voice)
(202) 637-5058 (fax)
http://www.aflcio.org/issues/jobseconomy/workersrights/disc_disability.cfm

Cornell University ILR School *Disability and HR Tips: The ADA and Collective Bargaining Issues*

http://www.ilr.cornell.edu/extension/files/download/Collective_Bargaining.pdf

Cornell University ILR School *Disability and HR Tips: Reasonable Accommodation under the ADA*

http://www.ilr.cornell.edu/edi/hr_tips/article_1.cfm?b_id=20&view_all=true

Job Accommodation Network (JAN)

(800)526-7234 (Voice)
(877)781-9403 (TTY)
<http://askjan.org>

US Business Leadership Network (USBLN®)

Phone: (202) 872-6739
www.usbln.org

U.S. Equal Employment Opportunity Commission

800-669-4000 (Voice)
800-800-3302 (TTY)
800-666-EEOC (publications)
<http://www.eeoc.gov>

Disclaimer

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Opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the authors. The Equal Employment Opportunity Commission's interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at: <http://www.eeoc.gov>

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

About this Brochure

This brochure is one of a series of three Informational brochures on unions and the Americans with Disabilities Act (ADA) edited by LaWanda H. Cook, Ph.D., CRC, Extension Associate with the Northeast ADA Center at Cornell University and Susanne M. Bruyère, Ph.D., CRC, Director, Employment and Disability Institute, ILR School, Cornell University in consultation with Lee H. Adler, J.D., Elizabeth A. Reiter, J.D, and the staff of Cornell University's Office of Workforce Policy and Labor Relations.

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

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

Contact Information

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