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HEALTH BENEFIT PLANS AND THE AMERICANS WITH DISABILITIES ACT

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ABSTRACT

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employers, employment agencies, and labor unions from discriminating against individuals in the terms and conditions of employment, including health benefits. Title I applies to covered entities with at least 25 employees (15 employees after July 25, 1994). Title II covers state and local government employers regardless of the number of employees. The ADA non-discrimination provisions extend to all "privileges of employment," and include prohibitions against participating in a contractual or other relationship that has discriminatory effect, with specific reference to arrangements with "an organization providing fringe benefits to an employee of the covered entity." However, provisions under ADA Title V allow insurers and employment-based health plans, in underwriting and classifying risks, to draw distinctions based on health status, provided that these practices are not used as a "subterfuge" to evade the purposes of the Act.

In regulations, public education materials, and guidance to field staff, the Equal Employment Opportunity Commission (EEOC) has reconciled the nondiscrimination mandates of ADA Title I with the insurance provisions under Title V. The EEOC has explained the application of the ADA to health benefit plans based on explanations in congressional committee reports. The legislative history indicates that the ADA (1) applies equally to insured and

self-funded plans; (2) does not subject self-funded plans to state regulation; and (3) federalizes state insurance law that prohibits "unfair discrimination," defined as differential treatment of people assigned, under generally accepted actuarial principles, to the same risk category.

Accordingly, the EEOC interprets the ADA to require that employees with disabilities be accorded equal access to whatever employment-based health benefits are provided to employees without disabilities, whether provided through third-party insurance or self-insurance, and to require that any differential treatment based on disability be justified by sound actuarial data or other legitimate business or insurance justification. The EEOC's interpretation may be summarized as follows:

(1) Employment decisions regarding an individual with a disability cannot take account of whether and to what extent an individual would be covered under a health benefit plan. Employers may not fire or refuse to hire an individual who has a disability (or a relationship with an individual with a disability) on the grounds that coverage of the individual may increase insurance costs.

(2) A plan may limit coverage based on actuarially valid risk classifications but generally may not completely deny coverage to an individual due to a diagnosis of disability.

(3) Plan sponsors may adopt generally applicable limitations and exclusions, even if they adversely affect individuals with disabilities. The following are examples of plan terms that are permissible as long as they are uniformly applied to individuals with and without disabilities:

   (a) denial of coverage for pre-existing conditions for the period specified in the policy;

(b) reduction of the amount of overall medical coverage or level of reimbursement for specific procedures and treatments (such as blood transfusions and x rays) that are not exclusively or nearly exclusively utilized for the treatment of a particular disability;

(c) limitations on the number of specific procedures and treatments for which the plan will provide reimbursement unless the limited procedures and treatments are exclusively or nearly exclusively utilized for the treatment of a particular disability;

(d) exclusions from coverage for experimental drugs or treatments or for elective surgery;

(e) exclusions or limitations applicable to broad categories of conditions (such as "mental health") or broad classifications of treatments (such as "eye care") that encompass individuals both with and without disabilities; and

(f) lower benefit levels for dependents of employees as a group than for employees.

(4) Limitations or exclusions that single out a disability, or a treatment used almost exclusively to treat a disability, must be justified by a legitimate business or insurance rationale. Examples of disability-based distinctions in health plans include exclusions from coverage for treatment of alcoholism or dollar limits on reimbursements for AZT.

(5) Disability-based distinctions must be proved justified by the risks or costs associated with the disability. For example, a plan sponsor must demonstrate that:

(a) disparate treatment of the expenses of a disability is due to cost projections based on legitimate actuarial data or experience, and all conditions with comparable actuarial data or experience are treated in the same way; or

(b) disparate treatment is necessary to prevent:

(i) plan insolvency;

(ii) a drastic increase in premiums, co-payments, or deductibles;

(iii) a drastic decline in the scope or level of coverage; or

(iv) other unacceptable effects on the health benefit plan;

and no alternative to a disability-based distinction is available.

In sum, plan sponsors should avoid disability-based distinctions and seek to contain health benefit costs in permissible ways.

I. INTRODUCTION

Health insurance is a major issue under the employment provisions of the Americans with Disabilities Act of 1990 (ADA)[1] because employment-based health benefit plans, the principal source of financing for medical treatment of people under age 65, often contain distinctions based on disability.[2] Financial protection against loss from illness, accident, and disability is variously provided through social insurance, individually purchased insurance, and employee benefit plans. Under current law, federally funded health insurance such as Medicare and Medicaid rarely extends to those who are employed. Individual health coverage has become unaffordable generally, and for people with disabilities in particular. Thus, access to health benefits through employment is a major consideration for people with disabilities in deciding whether and where to work.

People with disabilities vary greatly in their need for health care and have a wide range of utilization experiences. Despite this range, people with disabilities have been broadly excluded from employment-based group health

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[1] Pub. L. No. 101-336, 104 Stat. 329, codified at 42 U.S.C. § 12101 et seq. The ADA is modeled on the Civil Rights Act of 1964, the landmark legislation addressing discrimination based on race, color, religion, sex, and national origin, and the Rehabilitation Act of 1973, which addresses disability discrimination in the federal government and federally-financed programs and activities. ADA Title I blends concepts and terms from provisions of these laws on employment discrimination, specifically, Title VII of the Civil Rights Act, the regulations implementing section 504 of the Rehabilitation Act (34 C.F.R. Part 104), and the case law interpreting the Rehabilitation Act regulations.

[2] Employee Benefits Research Institute Issue Brief No. 133.

plans or provided inadequate benefits. Terms and conditions of employment-based health coverage increasingly have operated to limit benefits for people with disabilities as insurers and plan sponsors have pursued cost-saving strategies. Some of these practices have been addressed by the Equal Employment Opportunity Commission (EEOC), which enforces the ADA's employment provisions. Other issues of access to health care for people with disabilities remain to be addressed by national health care reform legislation.

II. HEALTH BENEFIT COST CONTAINMENT PRACTICES

Rising health care costs, depressed economic conditions and heightened competition have led plan sponsors to seek ways to reduce benefit costs, for example, by limiting coverage, otherwise shifting more of the cost to their employees, and/or through plan redesign. Except to the extent that they are bound by contract, employers may even decide to terminate health benefits altogether.

Some plans have pursued generally applicable cost-containment approaches: imposing a dollar limit on total coverage, for example, or changing from a traditional indemnity arrangement to a managed care arrangement, such as a health maintenance organization (HMO) or preferred provider organization (PPO). Other cost-containment strategies have been condition- or treatment-specific. One way used to limit exposure has been to exclude or limit coverage

for certain illnesses or treatments. Plan limitations and exclusions that target specific conditions, such as annual and lifetime caps for certain conditions, have particularly affected individuals with disabilities. However, even generally applicable cost-containment provisions have disproportionately affected people with disabilities.

For example, access to specialized medical supplies and services have been restricted under HMOs and PPOs. Under an indemnity arrangement the patient chooses the provider, and the plan simply pays (or reimburses the employee for) fees for medical services it promised to cover. HMOs provide comprehensive health care for a pre-paid fixed fee for each participant. Participants generally receive "first dollar" coverage (there are no deductibles) and are not required to make co-payments, but must receive care exclusively from providers in the network. PPOs establish networks of physicians and hospitals that have agreed to provide covered services at reduced rates. Participants in PPOs generally may obtain care from providers not in the network. However, individuals are eligible for a higher level of reimbursement if they obtain services from a provider in the network.

An HMO or PPO network may include no provider with the equipment or specialized training required to treat a condition. Some plans have chosen to fully reimburse participants who obtain out-of-network services in such circumstances, but if not, care needed by an individual with a disability sometimes has been unavailable as a practical matter. For example, out-of-

network services may not have been covered at all or have been subject to high deductibles (e.g., $2,000) and high out-of-pocket limits (e.g., $7,000). Under these circumstances, needed services sometimes have been prohibitively expensive.

Certain exclusions and limitations under indemnity plans have been even more likely to have a disproportionate effect on individuals with disabilities. Examples include:

> eligibility waiting periods during which no coverage is provided at all;
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> pre-existing condition exclusions, which deny coverage for care of a preexisting condition for a specified period;
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> annual and lifetime caps for certain treatments, such as restrictions on the number or cost of x rays or blood transfusions covered;
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> annual and lifetime maximum dollar limits on total coverage which preclude adequate catastrophic coverage;
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> exclusions from coverage for certain categories of health care and services, including prescription drugs, psychotherapy, assistive technology, durable medical equipment, and personal assistance services;
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> exclusions from coverage for drugs, treatments, and procedures that are designated "experimental";
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> exclusions for maintenance treatment such as ongoing physical therapy for an individual to prevent muscle deterioration;
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> denial of coverage for treatments not considered "medically necessary" by a third-party payor (although prescribed by the health care provider); denial of coverage for treatments unless successful "expected outcomes" are attainable within a determinable period of time.[3]

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[3] President's Committee 1993, pp. 7-8.

All insurance limits the type and quantity of services that are eligible for coverage. However, changes in the way group health plans spread risk have increased cost pressure to avoid people with (or perceived to have) above-average health risks. Over the years, insurance pricing has moved from community rating, which established the cost of group coverage by averaging cost and risks across an entire community, to experience rating. Experience rating allowed insurers to base premiums on the group's experience for the prior period and lower the cost of coverage for the employee group which would tend to pose a lower average risk than a community pool that included the unemployed. A logical next phase in the trend toward smaller risk pools was the establishment of "self-funded" or "self-insured" plans. Under traditional commercial insurance, the risk is shared by the insurer and the plan sponsor (and perhaps other customers of the insurer to some extent). Under self-funded plans, the plan sponsor bears all the risk, and the risk cannot be spread beyond the participant pool.[4]

Therefore, self-funded plans, which today constitute almost two-thirds of employment-based health plans,[5] have the greatest incentive to limit their medical claims exposure. Self-funded plans also may have the greatest opportunity to limit their claims exposure. State laws regulating insurance variously mandate provision of certain benefits and prohibit or restrict many

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[4] Padgug and Oppenheimer 1990, pp. 38-40.

[5] DiDonato and Johnsen 1993, p. B-10.

cost-containment practices under "unfair discrimination" standards that prohibit or restrict certain exclusionary practices by insured plans. However, self-funded plans are not governed by state insurance law. The Employee Retirement Income Security Act of 1974 (ERISA) exempts self-insured plans from state insurance regulation, without supplying corresponding federal regulation in its stead.[6] Further, self-funded plans are subject to certain federal income tax rules that insured plans are not. Highly compensated participants in a self-funded plan will be taxed on their benefits unless substantially equal benefits are available to those less highly compensated.[7] Thus, self-funded plans are discouraged from cutting costs by providing different levels of benefits at different compensation levels. Highly compensated employees who are in a position to influence plan design could be expected to favor approaches to cost-containment that they perceive will not adversely affect them.

For whatever reasons, some self-funded plans have sought to cut costs by excluding or limiting coverage for particular disabilities, notably AIDS. In the most well-known case, McGann v. H&H Music,[8] an insured plan with a $1,000,000 lifetime cap on plan benefits decided to self-insure after an

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[6] 29 U.S.C. §§ 1003(b), 1144(b)(2)(B). See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

[7] Internal Revenue Code of 1986, as amended, § 105(h).

[8] 946 F.2d 401 (5th Cir. 1991), cert. denied sub nom Greenberg v. H&H Music, 61 U.S.L.W. 3355 (Nov. 9, 1992).

employee began to make AIDS treatment claims and it became apparent to the insurer and the employer that the employee would have continuing health care needs. The plan reduced the amount of health coverage for AIDS-related illness to $5,000 (the amount that the participant already had spent). State law prohibited AIDS caps, but once the plan became self-insured, state law no longer applied, and the Fifth Circuit held that the plan's action was permissible under ERISA. The court observed that the employer had retained the right to amend or terminate the plan (as most employers routinely do), and that federal law (before enactment of the Americans with Disabilities Act) did not prohibit amending the plan to limit AIDS-related benefits to $5,000. The Supreme Court's November 1992 decision to deny review does not constitute confirmation of the correctness of the Fifth Circuit's opinion, and the McGann interpretation of ERISA ultimately may be determined to be wrong.[9] However, in the interim, the Eleventh Circuit has adopted a similar view in Owens v. Storehouse.[10]

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[9] See, e.g., Letter from Representatives William J. Hughes & Sherwood L. Boehert to Secretary of Labor Lynn Martin (Nov. 30, 1992) (copy on file with the author).

[10] 984 F.2d 394 (11th Cir. 1993).

Similar cases now are arising under the ADA.[11] In one case, the Mason Tenders District Council Welfare Fund, a self-funded union-management plan, sued the EEOC District Director in New York who had made an administrative determination that the plan violates the ADA by excluding coverage of AIDS-related conditions.[12] The EEOC subsequently filed suit against the plan for violating the ADA by excluding from its benefit coverage individuals with HIV.[13] The plan similarly excludes from coverage treatment of alcoholism, which is also a disability; but this term of the plan is not at issue in the current litigation. Another common target of restrictions is psychotherapy, which, like the other excluded conditions, tends to carry a social stigma.

How broadly courts will define the ADA's nondiscrimination requirements will depend largely on how much credence they give to the legislative history (as opposed to adhering strictly to the words of the statute or to prior judicial interpretations of similar terminology in other statutes) and the

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[11] Peggy Mastroianni, director of the EEOC's ADA policy division, reported at a District of Columbia Bar seminar that charges of disability-based discrimination in benefits filed with the EEOC had risen to 570 as of December 1993, 59 of which involve people with HIV or AIDS. 'Big Damages' for Health Benefits Bias Predicted Under ADA, 2 ADA Manual Newsletter (BNA) No. 12, at 78 (Dec. 1993).

[12] The EEOC's Philadelphia District Office has since issued a similar determination. AIDS Law Project of Pa. v. Laborers' Dist. Council, Charge No. 170930899 (Sept. 9, 1993).

[13] EEOC v. Mason Tenders District Council Welfare Fund, No. 93 CIV. 3865 (filed June 9, 1993 S.D.N.Y.). A similar EEOC suit against a California plan has been settled. EEOC v. Allied Services Division Welfare Fund, No. CIV-93-5076 (D.C.C. Cal. Sept. 28, 1993).

extent to which courts defer to the EEOC's position on the application of the ADA to health benefit plans. The ADA grants the EEOC authority to engage in substantive rulemaking, and EEOC regulations implementing Title I therefore have the force and effect of law.[14] A court's degree of deference may vary with the form of the EEOC interpretations, with more weight given to regulations[15] than to less formal guidance such as the Interpretive Guidance issued as an appendix to the final regulations,[16] the EEOC's Technical Assistance Manual, and Interim Enforcement Guidance issued to agency investigators. At present, the EEOC's interpretation of the ADA's insurance provisions is mainly contained in the Interim Enforcement Guidance.

III. HEALTH BENEFIT ISSUES UNDER THE ADA

ADA Title I prohibits employers, employment agencies, and labor unions from discriminating against qualified individuals with disabilities. Title I applies to covered entities with at least 25 employees (15 employees after July 25, 1994). Title II covers state and local government employers regardless of the number of employees. The ADA nondiscrimination provisions extend to discrimination in hiring, promotion, discharge, compensation, and other "terms,

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[14] ADA § 107(a).

[15] 29 C.F.R. Part 1630 (1991).

[16] 29 C.F.R. Part 1630 Appendix (1991).

conditions and privileges" of employment.[17] "Discrimination" under the Act includes basing employment decisions on criteria that screen out individuals with disabilities unless the criteria are shown to be job-related and consistent with business necessity. Discrimination also includes refusing to employ a qualified individual with a disability because of the need to accommodate the individual's physical or mental limitations, and failing to accommodate an individual with a disability unless providing a reasonable accommodation would pose an undue hardship.[18]

The legislative reports specifically contemplate that the ADA's protections extend to employee benefits. The reports signify that employers may not fire or refuse to hire an individual who has a disability (or a relationship with an individual with a disability[19]) on the grounds that the existing health plan does not cover the disability or because employment of the individual may increase insurance costs.[20] Public education material prepared by EEOC staff advises that employment decisions must be made independently of decisions about coverage under any benefit plan.[21]

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[17] ADA § 102(a).

[18] ADA § 102(b)(3), (5), (6) & (7).

[19] ADA § 102(b)(4).

[20] House of Representatives Report No. 485, Part 2, p. 136. House of Representatives Report No. 485, Part 3, p. 71.

[21] EEOC Technical Assistance Manual, § 7.9.

Pre-employment medical examination or inquiry into disability also constitutes prohibited discrimination.[22] However, an offer of employment may be conditioned on the results of a medical examination if (1) medical examination is required of all entering employees in the same job category, (2) the medical information obtained is kept confidential, and (3) any exclusionary use of the results of the examination are justified as job-related and consistent with business necessity.[23] Information obtained from a permitted employment entrance examination may be used for insurance underwriting purposes.

The definition of discrimination under ADA Title I also includes "limiting, segregating or classifying" an individual in a way that adversely affects the individual's employment status or opportunities on the basis of disability[24] as well as "participating in a contractual or other arrangement" that has the effect of discriminating on the basis of disability.[25] Thus, committee reports explain that employees with disabilities must have "equal access" to "fringe benefits available by virtue of employment" administered either by the

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[22] ADA § 102(c)(2).

[23] 29 C.F.R. § 1630.14(b) (1991). Employers may require post-employment medical examinations only if job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c). However, voluntary examination as part of a wellness program is permitted if the medical information obtained is kept confidential and not used for any purpose inconsistent with the ADA. 29 C.F.R. § 1630.14(d) (1991).

[24] ADA § 102(b)(1).

[25] ADA § 102(b)(2).

employer or by a third party on behalf of the employer.[26] Accordingly, EEOC regulations require that employees with disabilities must be afforded equal access to whatever health insurance is provided to other employees.[27]

At the same time, section 501(c) under ADA Title V states that the Act is not to be construed to prohibit or restrict state-regulated insurers, health care providers, or employee benefit plans from classifying or administering risks in accordance "with state law." Nor is the Act to restrict or prohibit the operation of "bona fide" plans that are not subject to state law, that is, "self-insured" or "self-funded" plans which are exempt from state regulation under federal law. However, section 501(c) concludes with the proviso that its terms may not be used as a "subterfuge to evade the purposes" of the Act.

Because health insurance risk assessment and classification make distinctions based on health status, it is not obvious how to reconcile the mandates of Title I with the rule of construction provided under Title V. The legislative history provides only limited specifics. Citing the Supreme Court's application of the Rehabilitation Act in Alexander v. Choate,[28] which held that the requirement of "meaningful access" to state Medicaid services would not be violated by a 14-day limitation on impatient coverage, House and Senate

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[26] House of Representatives Report No. 485, Part 2, pp. 55, 59. House of Representatives Report No. 485, Part 3, p. 34.

[27] 29 C.F.R. § 1630.5 & app. § 1630.5.

[28] 469 U.S. 287 (1985).

reports indicate that the disparate impact test of discrimination does not require health plans to "address the special needs of every person with a disability." Thus, a plan may limit certain kinds of coverage based on actuarially valid risk classifications and may deny to an individual with a pre-existing condition coverage "for that condition for the period specified in the policy." However, a plan may not deny coverage "completely" to an individual based on diagnosis of a disability. For example, a plan may not deny coverage for treatments and procedures unrelated to the pre-existing condition,[29] although there may be instances where increased insurance risks might effectively make an individual with a disability uninsurable and thus entirely excluded from coverage under a small employer's plan required to underwrite each employee on an individual basis.

EEOC staff takes the position that the ADA's reasonable accommodation obligation does not apply to health benefit plans. I would argue that the citation to Alexander v. Choate suggests that the ADA provides no such categorical exemption for health benefit plans, because Choate includes the following language:

> [A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [covered entity] offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access,

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[29] House of Representatives Report No. 485, Part 2, pp. 59, 137. Senate Report No. 116, pp. 29, 85. See House of Representatives Report No. 485, Part 3, p. 71.

> reasonable accommodations in the grantee's program or benefit may have to be made.[30]

However, the EEOC has stated informally that it does not interpret Choate to require any type of reasonable accommodation in the context of health insurance plans.

Many other issues remain unaddressed either by the statutory language or explanatory legislative reports. The application of the ADA to health benefits ultimately will be determined by voluntary agreement between plan sponsors and individuals with disabilities and, via litigation, by judges. Several court cases addressing the ADA's application to health benefits have been docketed already.[31] One litigant argues that the ADA does not apply to self-funded plans at all. Other issues raised include: To what extent is it permissible for plan sponsors to cut costs by reducing or eliminating benefits, without reference to a specific health condition? Are cost-cutting limitations and exclusions, even if disability-specific, permitted under the ADA if permitted by state law? Under what circumstances is reducing benefits to

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[30] 469 U.S. at 301.

[31] See e.g., Mason Tenders District Council Welfare Fund v. Donaghey, No. 93-CIV-1154 (filed March 1, 1993 S.D.N.Y.); Estate of Kandinger v. Int'l Broth'd of Electrical Workers, Local 110, No. 3-93-159 (filed March 17, 1993 D. Minn.) (settled Dec. 21, 1993); EEOC v. Mason Tenders District Council Welfare Fund, No. 93 CIV. 3865 (filed June 9, 1993 S.D.N.Y.). A New Hampshire United States district court has already addressed the application of the ADA to a health plan with an AIDS cap, but dismissed the ADA claim on the ground that the trade association that sponsored the health plan was not the employer of the self-employed participant/plaintiff or otherwise a "covered entity." Carparts Distribution Center v. Automotive Wholesalers Association of New England, No. C-92-592-L, 1993 U.S. Dist. LEXIS 9895 (D.N.H. July 19, 1993). The EEOC is seeking review by the First Circuit.

avoid anticipated claims a subterfuge? The answers depend on how one reads ADA section 501(c).

The EEOC's interpretations are drawn from expressions of congressional intent in committee reports. The legislative history indicates that the insurance provisions of Title V were intended to clarify that the ADA (1) applies equally to insured and self-funded plans[32]; (2) does not subject self-funded plans to state regulation[33]; and (3) federalizes state law "unfair discrimination" prohibitions against differential treatment of people assigned to the same risk category under generally accepted actuarial principles.[34] Accordingly, the EEOC interprets the ADA to require equal access to employment-based health benefits, whether provided through third-party insurance or self-insurance, and to bar only practices that constitute differential treatment without sound actuarial or other limited business or insurance justification.

IV. WHAT SECTION 501(c) ACCOMPLISHES

The legislative history indicates that the insurance provisions of Title V were intended to clarify that the ADA's requirements will not disrupt the way

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[32] House of Representatives Report No. 485, Part 2, p. 138. Senate Report No. 116, p. 86.

[33] House of Representatives Report No. 485, Part 2, p. 136. House of Representatives Report No. 485, Part 3, pp. 70-71. Senate Report No. 116, p. 86.

[34] House of Representatives Report No. 485, Part 2, pp. 136-137. Senate Report No. 116, p. 84.

the insurance business or benefit plans are conducted nor subject self-insured plans to state regulation. Neither the nature of insurance underwriting nor the "regulatory structure" is to be disrupted as long as insurers, health care providers, and employee benefit plans carry out their functions in accordance with accepted principles of insurance risk classification.[35]

It is thus clear from both the history and the statutory language that Title I is not to be construed to apply to insurance as Title VII of the Civil Rights Act of 1964[36] has been interpreted. Two Supreme Court opinions have read Title VII to prohibit employee benefit plans from using risk classifications based on race, color, religion, sex, and national origin, even if actuarially justified. Taken together, the Supreme Court cases City of Los Angeles Department of Water & Power v. Manhart[37] and Arizona Governing Committee v. Norris[38] hold that a defined benefit retirement plan must not require different levels of employee contributions nor provide different benefit amounts on the basis of any classification forbidden by Title VII, even to accurately reflect group differences in life expectancy. The retirement plans in both cases were found to be "compensation," "terms," "conditions," or "privileges" of employment as to which there could be no discrimination on

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[35] House of Representatives Report No. 485, Part 2, pp. 136-138.

[36] 42 U.S.C. § 2000a et seq.

[37] 435 U.S. 702 (1978).

[38] 463 U.S. 1073 (1983).

specified grounds: "Even a true generalization" about a racial, sexual, or ethnic class cannot be assumed true about any particular individual.[39]

In these cases, the plans had argued that they should be permitted to follow principles set forth in state insurance law which prohibit only "unfair discrimination," that is, classifications that are not actuarially justified.[40] ADA section 501(c) appears to allow this approach. Sections 501(c)(1) and (2) provide that the Act is not to be construed to prohibit or restrict underwriting, classifying, or administering risks "based on or not inconsistent with state law" or administering a "bona fide" plan based on such risks. Section 501(c)(3) provides that the ADA does not prohibit or restrict any organization from operating a "bona fide" self-insured employee benefit plan that is not subject to state law. Section 501(c) concludes by providing that the three outlined insurance exceptions may not be used as a "subterfuge to evade the purposes" of the Act. The Supreme Court has defined as "bona fide" under an analogous provision of the Age Discrimination in Employment Act (ADEA), any plan that actually exists and provides benefits and has been accurately communicated to employees.[41] The EEOC has adopted this interpretation, so virtually any plan at issue will be "bona fide."

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[39] 463 U.S. p. 1084-85 (quoting Manhart, 435 U.S. p. 708).

[40] Norris, 463 U.S. p. 1100 n.6.

[41] United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 (1977); Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 166 (1989).

The key ambiguities in the provisions of 501(c) are (1) whether the language of section 501(c)(3) entirely exempts self-funded plans from the ADA's prohibitions against disability discrimination; (2) what is meant by "state law"; and what conduct constitutes "subterfuge." Section 501(c)(3) could be read literally to remove self-funded plans entirely from the ADA nondiscrimination mandates and allow any limitations or exclusions not prohibited by ERISA, such as the AIDS caps upheld by the Fifth and Eleventh United States Courts of Appeals in McGann v. H&H Music and Owens v. Storehouse. However, the legislative history contradicts such an interpretation in two respects: First, by explaining that section 501(c)(3) was added only to clarify that sections 501(c)(1) and (2) were not to be construed to override ERISA preemption; second, by stating that the mandates of the ADA are to apply equally to insured and self-funded plans. For example, The House Education and Labor Committee Report states that section 501(c) recognizes "that benefit plans (whether insured or not) need to be able to continue business practices in the way they underwrite, classify, and administer risks, so long as they carry out those functions in accordance with accepted principles of risk classification."[42]

So it seems that section 501(c)(2), as its "plain language" indicates, is intended to cover self-funded as well as insured plans, and section 501(c)(3)

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[42] House of Representatives Report No. 485, Part 2, p. 138 (emphasis added).

intended to make the point that states are not thereby given authority to regulate self-funded plans. Thus, section 501(c)(3) does not liberate self-funded plans from all nondiscrimination requirements. Consistent with the legislative history, the EEOC interprets the ADA to apply equally to both insured and self-funded plans. Ruling in open court, the Judge hearing Mason Tenders District Council Welfare Fund v. Donaghey also has rejected the argument that the ADA does not apply to self-funded plans.[43]

Construing the intended meaning of "state law" in sections 501(c)(1) and (2) is more complex. I read the legislative history to equate the unfair discrimination principles articulated by the National Association of Insurance Commissioners (NAIC) with "state law." Sections 501(c)(1) and (2) could be read to allow any limitations or exclusions not prohibited by the law of the particular state with jurisdiction over a plan. Because state law provisions vary considerably, this reading would allow for differential application of the ADA from state-to-state. However, committee reports appear to contemplate a uniform minimum standard based on NAIC guidelines. Both House and Senate reports[44] track the language of NAIC model regulations, without specifically identifying them.[45]

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[43] See Court Rules Against Benefit Fund, 2 ADA Manual Newsletter (BNA) No. 12, at 75 (Dec. 1993).

[44] House of Representatives Report No. 485, Part 2, p. 137. Senate Report No. 116, p. 84.

[45] NAIC, Model Regulation on Unfair Discrimination in Life and Health Insurance on the Bases of Physical and Mental Impairment, Section 3, Model Regulation Service, p. 887-1 (July 1990).

The NAIC model regulations define "unfair discrimination" under the model Unfair Trade Practices Act,[46] and both House and Senate committee reports note that the model act has been enacted in some form in all states and the District of Columbia.[47] These acts generally prohibit "unfair discrimination" between similarly situated individuals who constitute members of the same class with respect to rates charged or benefits payable. Distinctions must be based on "sound actuarial principles" rather than on assumptions or prejudices. The Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment provides:

> It is unfair discrimination, between individuals of the same class, to refuse to insure, to refuse to continue to insure, limit the charge or charge a different rate except where based on sound actuarial principles or where related to actual or reasonably anticipated experience.

The House Education and Labor Committee Report explains section 501(c) in virtually identical language as follows:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure or refuse to continue to insure, or limit the amount, extent or kind of coverage available to an individual or charge a different rate for the same coverage solely because of a physical or mental limitation, except where the refusal, limitation, or rate

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[46] NAIC, Model Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance, Section 2(G), Model Regulation Service (1989).

[47] House of Representatives Report No. 485, Part 2, p. 136. Senate Report No. 116, p. 84.

> differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience.[48]

While the NAIC regulation is not binding and the organization has no enforcement power, the repetition of its language suggests that its definition of the nondiscrimination principle embodied in Unfair Trade Practices Acts is what "state law" means under section 501(c). Both Senate and House committee reports state explicitly that the ADA adopts the prohibition against unfair discrimination recognized by virtually all states.[49] Thus, the legislative history suggests that regardless of variations in state law, both insured and self-insured plans must justify any disability-based limitations and exclusions under NAIC "unfair discrimination" standards. Insured plans, of course, also must comply with applicable state law.

The EEOC's guidance is consistent with the legislative history. EEOC regulations generally allow uniformly applied limitations and exclusions even if they adversely affect individuals with disabilities or fail to address the special needs of every individual with a disability. The EEOC states in the Interim Guidance that disparate impact theory does not apply in the context of health

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[48] Ibid., pp. 136-137.

[49] Ibid., p. 136. Senate Report No. 116, p. 84.

benefit plans.[50] The Interim Guidance interprets the ADA to permit broad classifications such as "mental/nervous" conditions or "eye care" which are not considered disability-based distinctions because they apply to the treatment of a multitude of dissimilar conditions and affect individuals both with and without disabilities. This conclusion comports with a statement in the Senate Labor and Human Resources Committee Report that contemplates that the ADA would permit limitations on mental health coverage.[51]

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[50] 29 C.F.R. § 1630.5 (1991). A footnote in the Interim Guidance suggests that the citation of Alexander v. Choate in the legislative history on the ADA's application to health plans indicates that "disparate impact" is unavailable as a theory of discrimination in ADA cases involving health benefit plans. I suggest that, in fact, the citation to Alexander v. Choate in the legislative reports more likely suggests just the opposite, i.e., that the disparate impact of plan provisions may constitute discrimination under the ADA even if there is no discriminatory intent.

Alexander v. Choate addressed the legality under the Rehabilitation Act of state Medicaid limits on covered days of hospitalization. The Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped," but concluded that "the effect of Tennessee's reduction in annual inpatient coverage" was not such an instance. 469 U.S. at 299. The Court reasoned as follows:

> The 14-day rule challenged in this case is neutral on its face, is not alleged to rest on discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The state has made the same benefit--14 days of coverage--equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped.

The EEOC staff apparently concludes from this that any limitation on coverage is permissible if the limitation is neutral on its face and not motivated by a discriminatory intent no matter how disproportionate the effect on people with disabilities. However, the Choate opinion explains at length that the purpose of the Rehabilitation Act was to redress discrimination that was largely the product of "benign neglect," and that purpose would be thwarted if the Act "could not rectify the harms resulting from action that discriminated by effect as well as by design." 469 U.S. at 297. See 469 U.S. at 292-302. The holding of Alexander v. Choate is that disparate impact analysis does not require health plans to "address the special needs of every person with a disability," which is the proposition for which it is cited in the ADA legislative history. In this context, I do not think the citation indicates congressional intent that disparate impact theory be entirely inapplicable to health plans under the ADA.

[51] Senate Report No. 116, p. 29.

Coverage limits on medical procedures that are not exclusively, or nearly exclusively, utilized for treatment of a particular disability are permitted also. Plans may exclude coverage for certain treatments such as "experimental" drugs or procedures or limit coverage of certain procedures, such as x rays or blood transfusions, to a certain number per year, even though an employee with hemophilia, for example, may require more. Plans likewise may reduce the number of days of paid sick leave or amount of medical coverage provided to employees generally even if the reductions have a disproportionate impact on employees with disabilities in need of more sick leave and medical coverage.

Of course, selective application of "neutral" plan terms intentionally to discriminate against individuals with disabilities is in violation of the ADA. The EEOC Interim Guidance states that such charges should be resolved under Title VII disparate treatment theory and analysis.

Disability-based distinctions are not prohibited absolutely, but a sponsor bears the burden of proving that a disability-based distinction is not a "subterfuge" by showing justification. A term or provision is disability-based if it singles out a particular disability such as deafness, AIDS, or schizophrenia; a discrete group of disabilities such as cancers, muscular dystrophies, or kidney diseases; disability in general, such as non-coverage of all conditions that substantially limit a major life activity; or a treatment or procedure used exclusively, or nearly exclusively, for the treatment of disability. Exclusions of coverage for any organ transplants may fall within the last category.

The Interim Guidance interprets the ADA to permit plan classifications based on disabilities if the plan sponsor establishes that the plan (1) is a "bona fide plan"; (2) in the case of an insured plan, complies with applicable state law; and (3) has adequate justification. The plan sponsor bears the burden of proof of all three. A "bona fide" plan is any plan that actually exists and provides benefits and has been accurately communicated to employees. Proof of compliance with "applicable law" involves a more demanding determination of which state or states have legal authority over the plan, which laws of the appropriate state are implicated, and what the laws require of the plan.

The EEOC has provided a "non-exclusive list" of justifications, including that the distinction is based on "legitimate actuarial data." The actuarial data relied on must be shown not to be seriously outdated, inaccurate, or based on myths or stereotypes about a disability. Other justifications include that all similarly catastrophic conditions are treated in the same way; or that disparate treatment is necessary to prevent a drastic increase in premiums, co-payments, deductibles, or scope or level of coverage due to anticipated cost increases, and that other nondisability based health insurance plan changes were not available.

A plan that provides coverage to employees' dependents must justify in the same way any reduction in the level of dependent benefits to an employee because the employee has a dependent with a disability. However, a plan may

provide differential levels of benefits for employees and dependents as long as dependent benefit caps are uniformly applied.

Finally, the regulations prohibit discrimination based on disability in regard to fringe benefits available by virtue of employment, whether or not administered by the covered entity. Under the Interim Guidance, the EEOC would find a plan sponsor liable for any discrimination resulting from a contract with an insurer, provider, or third party administrator.

Because of Supreme Court precedent interpreting the term "subterfuge" in the context of the ADEA, the subterfuge provision could be read to have no application to discriminatory health benefit plans unless the disparate treatments were intended to adversely affect the employment status, not just the fringe benefits, of an employee with a disability, such as forcing the employee to terminate employment. In Ohio Public Employees Retirement Fund v. Betts,[52] the Supreme Court defined "subterfuge" narrowly under a similarly phrased provision of the ADEA, subsequently repealed. The Court defined "subterfuge" as an action (1) taken after enactment, (2) with the specific, subjective intent to discriminate against an employee, (3) with respect to a non-fringe aspect of employment. Further, the Court imposed the burden of proof on the employee. However, the ADA legislative history, echoed in the EEOC Interpretive Guidance, explicitly rejects the first prong of the Betts interpretation of subterfuge by explaining that pre-enactment conduct can

[52] 492 U.S. 158 (1989).

constitute subterfuge under the ADA. Whether or not practices are used as a subterfuge is to be determined without regard to whether the insurance or employee benefit plan was issued before enactment of the ADA.[53]

Given no specific legislative history rejecting the other elements of the Supreme Court's definition, some commentators have argued that subterfuge under the ADA should be understood as defined in Betts because the members of Congress were well aware of the Betts definition. Indeed they were. They were busily trying to (and ultimately did) legislatively override Betts at the time the ADA was being considered. There is an inherent illogic in the proposition that legislators would adopt in the ADA the judicial gloss to which they were simultaneously so energetically directing their opposition.

The ADA more likely employed the term subterfuge as it had previously long been understood. A far broader view of subterfuge had prevailed for years in benefits practice, and there was a widespread and perhaps stubbornly held view that the Court was just plain wrong. For example, the Senate Report accompanying the Older Workers Benefit Protection Act (OWBPA), which legislatively reversed Betts, states:

> In Betts, the Supreme Court incorrectly held that the ADEA permitted arbitrary age discrimination in employee benefit plans. The bill is necessary to correct that erroneous holding. . . . The bill tracks the requirements set forth in ADEA regulations for over twenty years, requirements that had been approved by every federal court of appeals

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[53] House of Representatives Report No. 485, Part 2, pp. 136-138; House of Representatives Report No. 485, Part 3, pp. 70-71; Senate Report No. 116, p. 85.

to consider the defense in the 12 years preceding the decision in Betts.[54]

Additionally, in the debate on the ADA, two members of the House of Representatives are recorded as denying that subterfuge under the ADA has the same meaning as in Betts.[55]

V. CONCLUSIONS AND RECOMMENDATIONS

To summarize the EEOC's position, plans must comply with applicable federal laws, such as ERISA; and insured plans must comply with state insurance law as well. Within these constraints, a plan may underwrite, classify or administer risks, and in doing so limit certain kinds of coverage based on actuarial risk, provided risk classification is not used as a subterfuge for discrimination that is prohibited by Title I. Specifically:

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[54] Senate Committee on Labor and Human Resources, S. Rep. No. 263, 101st Cong., 2d Sess. pp. 5 (1990).

[55] 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (quoting Rep. Owens); 136 Cong. Rec. H4624 (daily ed. July 12, 1990) (quoting Rep. Edwards).

However, if courts give "subterfuge" the narrow meaning defined in Betts, prohibition of disability-based distinctions that provide differential treatment to people in the same risk category might alternatively be premised on the language of section 501(c) other than the concluding proviso regarding subterfuge. In my view, section 501(c)(1) and (2) apply unfair discrimination principles to health plans.

As explained above, the legislative history indicates that ADA sections 501(c)(1) and (2) incorporate unfair discrimination principles which prohibit disability-based limitations or exclusions that are not actuarially justified. Thus, any plan that engages in unfair discrimination would not be entitled to the exemption provided under section 501(c) ("Title[] I. . . shall not be construed to prohibit or restrict . . . .). Title I would prohibit discriminatory limitations and exclusions. For example, section 102(b)(1) prohibits classifying an individual in a way that adversely affects employment opportunities on the basis of disability; and section 102(b)(6) prohibits using, absent a showing of "business necessity," criteria that tend to screen out an individual with a disability. "Subterfuge" would be irrelevant (because section 501(c) would be entirely inapplicable).

(1) Plans must afford individuals with disabilities equal access to whatever health coverage the plan provides to participants without disabilities.

(2) Disparate treatment, rather than disparate impact, is the test of discrimination in health plans. Plans may continue to apply insurance distinctions that are not based on disability and are uniformly applied.

(3) A plan may limit certain kinds of coverage based on actuarially valid risk classifications but generally may not completely deny coverage to an individual on account of a diagnosis of disability. The plan may not deny coverage for treatments and procedures unrelated to the disability nor deny coverage for other treatments and procedures not connected with any permissibly limited treatment and procedures.

(4) Disability-based limitations or exclusions must be justifiable. A term or provision is disability-based if it singles out a particular disability, a discrete group of disabilities, disability in general (all conditions that substantially limit a major life activity), or a treatment or procedure used exclusively, or nearly exclusively, for the treatment of disability. A "non-exclusive list" of justifications includes:

(a) that disparate treatment is based on legitimate actuarial data or actual or reasonably anticipated experience, and all conditions with comparable actuarial data and/or experience are treated in the same way; or

(b) (1) that disparate treatment is necessary to prevent plan insolvency, a drastic increase in premiums or employee co-payments or deductibles, a drastic decline in scope or level of coverage, or other unacceptable change; and (2) no alternative to a disability-based distinction is available.

It remains to be seen whether plan sponsors and people with disabilities generally will agree to the EEOC's reconciliation of the affected interests. Moreover, when conflict arises, it is uncertain whether the courts will uphold

the EEOC's interpretation of the ADA. It will be some time before definitive decisions are forthcoming. In the interim, it is in a plan sponsor's interest to find not only alternatives to costly coverage, but also alternatives to costly litigation. Reviewing plan documents is the way to start identifying both.

Pursuing health cost containment strategies within the confines of the EEOC's framework is both possible and prudent. For example, plan sponsors and insurance companies may employ blanket pre-existing condition clauses and other generally applicable limitations and exclusions in their health plans. Further, it appears that a company may permissibly deny coverage completely or impose a dollar cap on all disabilities posing equal financial risks. However, even if implementing provisions permitted by ERISA and the ADA, plan sponsors might be well advised to grandfather in those who already are on a particular course of treatment. By doing this, plan sponsors may prevent litigation premised on contractual theories of oral promise or reliance.

HIV disease has been a popular candidate for unique treatment. However, a 1991 study reported that AIDS claims accounted for less than 1.5% of accident and health insurance claims, remaining at the same level since 1989.[56] Further, AIDS expenses often are lower than other catastrophic medical conditions: current estimates of lifetime costs for AIDS range from $50,000 to $102,000. The estimated costs of a kidney transplant are $51,000; heart transplant estimates range from $83,000 to $148,000; liver transplants

[56] DiDonato and Johnsen 1993, p. B-18.

from $175,000 to $235,000. The cost of end-stage renal disease is estimated at $158,000; myocardial infraction in men of middle age $66,800; acute heart attack, over $100,000; and premature, low-birthweight babies as much as $500,000.[57] "The last year of life for cancer patients generates an average cost of $30,300, compared to final year hospital costs for AIDS patients of roughly $20,000 to $25,000."[58]

In addition, AIDS-specific limitations and exclusions may not be justified as "necessary" because cost-effective alternatives exist. Case management techniques can dramatically reduce the cost of care. Case management typically involves monitoring the course of an illness, supervising and authorizing medical service, and providing out-patient home and hospice care where needed. Chevron USA brought AIDS care management down from the $100,000 lifetime average cost to $35,000. Bank of America has been able to maintain costs at about $25,000.[59]

Some commentators opine that the ADA allows a plan to test all applicants for plan participation for HIV, provided the testing method is reliable and objective like the ELISA and Western Blot tests, and to use test results as a basis for classifying risks. However, it does not seem worthwhile

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[57] Ibid., pp. B-18-B-19. Woods 1992, p. 286 n.96.

[58] Ibid.

[59] Ibid., pp. 285-86.

for a plan to spend funds on HIV tests because the typical pre-existing condition clause covers a period no longer than two years.[60] Moreover, the plan might be required to provide coverage for non-HIV related medical conditions during that period because the employee generally cannot be denied coverage "completely" on the basis of a diagnosis of disability. In addition, the EEOC views the ADA as allowing higher premiums to be charged or denial of coverage only if diseases that have similar actuarial and financial risks are treated the same.

A positive means of decreasing costs associated with many catastrophic illnesses is to cover home health care.[61] Many health plans do not reimburse for home health care, but such a provision can save money by saving unnecessary hospital costs. If home care is not covered, doctors may hospitalize a patient to ensure insurance reimbursement. Similarly, the ADA might prompt a look at other innovative approaches to treatment. Recently, for example, CBS News reported that Mutual of Omaha would begin covering certain nontraditional treatments of heart disease because they were less costly

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[60] A permanent pre-existing condition exclusion may be unappealing to employers. As a practical matter, its broad sweep might exclude coverage of corporate officers and executives. Additionally, a permanent preexisting condition exclusion might trigger litigation. I would think at least a plausible argument can be made that a permanent exclusion is a distinction based on disability in general because the permanency of a condition necessarily causes it to be a substantially limiting impairment even if the condition is not severe, such as certain skin conditions or mild asthma.

[61] Ibid., pp. 285-287.

than conventional treatments and were demonstrably effective. It is such "win-win" solutions that will simultaneously advance the interests of all involved.

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Susanne Civil Rights Dept. provide info. & research on these rights Brenda

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Brenda Moon.
24 Jan 94
Project Director
Aids in the workplace
AFL-CIO

Dear Brenda.

I just had to show a little gratitude and let you and your associates know how much your time. effort. and assistance has meant to me. I would like to let you know a little bit about the person whom you have helped to make quite happy on this certain day. I am 28 years old. I have been employed by Shawnee Milling Company for approximately six years now. Oklahoma is still holding on to the (closed shop) status. and to be honest. I didn't much care for the union or there ways when I began work at the mill. After about a year of frustration. I decided to get myself a copy of the labor/management Agreement booklet. learn it. and then apply the knowledge gained. I then served eight months as a department steward. one year as an executive board committeeman. and I am presently just starting my third year as the local Union president. I represent a small local Union. and on a national scale. a small private employer. Most of what I learn. I learn on my own. but not without the help of generous people like you. I was the only one of six. to include my International representative who stuck with my guns on this Aids cap from the start. My negotiating committee was getting quite frustrated with me because pushing this issue could mean losing things gained in now open negotiations. As your fax was being sent today. my board was returning to my home after a lunch break. I turned on the micro cassette recorder and made them all listen to our four-way telephone conversation from start to finish. By the way. Gwen. the law professor made my case. Listening to that tape finally convinced my board that I had been right from the start. Within two hours. I was in a meeting with the company president. his plant superintendent. and my negotiating team. and I was explaining that under no circumstances could I. nor would I enter into a contract with an Aids cap different from other illnesses. At this time I handed them a 24 page copy of the fax you had just sent. I have to say. a great weight was lifted from me when the president of Shawnee Milling Company agreed to lift the Aids cap to now be unlimited! I could not have succeeded with convincing my board. let alone the employer of this need. without the help of you and those you put me in personal contact with. I applaud your efforts to assist me. A most sincere thank you is in order.

If there is ever. anything at all. that I might possibly be able to help or assist you. or your colleagues with. please ask. If it is within my means. I will make it happen.

Sincerely.
Dan Reinhardt

The Lifetime Cost of Treating a Person With HIV

Fred J. Hellinger, PhD

Objective.—To estimate the cost (total charges for services) of medical care for persons with human immunodeficiency virus (HIV) from the time of infection until death.

Design and Setting.—Data from the AIDS (acquired immunodeficiency syndrome) Cost and Service Utilization Survey were used.

Patients.—Data from interviews conducted during the spring and early summer of 1992 with 1164 respondents with HIV were analyzed. The respondents were recruited at 26 sites (hospitals, clinics, and physicians' offices) in 10 cities. Billing data from a survey of providers also were used.

Outcome Measures.—Estimates of the mean occupancy time in each of four disease stages were obtained from the San Francisco Men's Health Study. These estimates were multiplied by the monthly cost in each stage and summed to derive a synthetic estimate of the lifetime medical care costs of treating a person with HIV.

Results.—It is estimated herein that the lifetime cost of treating a person with HIV from the time of infection until death is approximately $119 000. The estimated cost of care from HIV infection until the development of AIDS is $50 000, while the estimated cost from AIDS development until death is approximately $69 000. These estimates define upper bounds because they assume persons receive treatment continuously from the moment of infection until death.

Conclusions.—This study found that the cost of treating a person with AIDS, which has risen rapidly in the past, has fallen as a result of a reduction in the use of inpatient hospital services.

(*JAMA*. 1993;270:474-478)

ESTIMATES of the lifetime cost (defined herein as total charges for services) of treating PWAs (persons with AIDS [the acquired immunodeficiency syndrome]) have climbed steadily over the past several years and now exceed $100 000.[1-5] To some extent this reflects enhanced survival times (between 1985 and 1990 the average survival time for PWAs climbed from 1 to almost 2 years[4,6]), and to some extent this reflects the provision of more outpatient care without a commensurate decrease in inpatient care. For example, in New York State the amount of money spent for outpatient care for PWAs more than doubled between 1988 and 1989, while hospitalization rates for PWAs remained the same.[7]

Almost all studies of the cost of treating a PWA provide data about services covered by one insurer or about services received at one hospital.[3-5,8,9] Such studies exclude services covered by other insurers or provided at other hospitals. They also exclude services paid out-of-pocket by the patient and services provided by volunteers. In addition, these studies rely on retrospective analyses of provider data that are now several years old. It is important to use timely data to estimate the cost of care because of rapid changes in treatment regimens for persons with human immunodeficiency virus (HIV) infection.

The only means of acquiring information about all services received by a person with HIV is to survey or interview the person. This study presents data from a large multisite survey (the AIDS Cost and Service Utilization Survey [ACSUS]) that collected data directly from persons with HIV about care received from March 1991 through August 1992. Results from two earlier studies (each fewer than 40 patients) that collected economic data directly from patients have been reported in the literature.[10,11]

Estimates of the monthly cost of treatment for persons in each of the following four stages of HIV illness were derived: (1) symptomatic AIDS (the 1987 definition of AIDS is used in this study); (2) HIV infection without AIDS with a T-cell count lower than 0.20×10^9/L (200/μL); (3) HIV infection without AIDS with a T-cell count of 0.20×10^9/L or higher and lower than 0.50×10^9/L; and (4) HIV infection without AIDS with a T-cell count of 0.50×10^9/L or higher.

The monthly cost of treatment in each stage is multiplied by the mean occupancy time in that stage to estimate the average cost of care for a given stage. The cost of care for each of the four stages is summed to obtain a synthetic estimate of the lifetime cost of treating a person with HIV.

Estimates of the mean occupancy time in each stage were obtained from the San Francisco Men's Health Study (SFMHS).[12] The SFMHS is a prospective cohort begun in 1984 with an enrollment of a random sample of 1084 homosexual/bisexual men aged 25 through 54 years.

The ACSUS is the source of utilization and cost data for this study. Respondents in the ACSUS were interviewed every 3 months during an 18-month period. The 3-month time period between interviews mitigates errors caused by poor recall. Because persons with HIV may experience problems that affect memory, it is important for longitudinal surveys of HIV-infected persons to interview patients as frequently as possible.

The estimate of the lifetime cost of treating a person with HIV presented in this study assumes that an individual is identified and treated for HIV immediately following infection. This presumes that a person is tested, found to

From the Division of Cost and Financing, Center for General Health Services Extramural Research, Agency for Health Care Policy and Research, US Public Health Service, Rockville, Md.

Reprint requests to Division of Cost and Financing, Center for General Health Services Extramural Research, Agency for Health Care Policy and Research, US Public Health Service, 2101 E Jefferson St, Suite 502, Rockville, MD 20852 (Dr Hellinger).

FOR IMMEDIATE RELEASE
April 11, 1994

INQUIRY Highlights: Spring 1994

The article highlighted here appears in the Spring 1994 issue of INQUIRY, the journal of health care organization, provision, and financing.

Citation:

("Costs to Business for an HIV-Infected Worker." Farnham, Paul G. and Gorsky, Robin D., Inquiry. 1994: 31(1), 76-88.)

"HIV-Infected Employee Costs Business Less Than $32,000"

Researchers who studied the economic impact of HIV on business estimate that firms can expect to pay a maximum of $32,000 over five years for an HIV-infected worker, with an average cost of $17,000. The research indicates that HIV/AIDS costs to business are substantially less than the lifetime medical HIV/AIDS costs to society, which have been estimated at more than $100,000.

Additional Press Release on article mentioned above:

HIV-INFECTED WORKER COSTS BUSINESS LESS THAN $32,000, STUDY SAYS

ROCHESTER, N.Y. – Business firms can expect to spend a maximum of $32,000 over five years for and HIV-infected employee, with an average cost of $17,000, according to a new study in the Spring issue of INQUIRY.

This is the first major study to examine the economic impact of the human immunodeficiency virus (HIV) on business. Previous cost analyses have focused on the societal effect of acquired immunodeficiency syndrome (AIDS). This research shows that HIV/AIDS costs to business are considerably less than the lifetime medical HIV/AIDS costs to society, which have been estimated at more than $100,000.

"This relatively low expected business cost, combined with the intangible aspects of an employee's knowledge and experience, suggests that there are significant benefits for an employer to retain HIV-infected workers on the job as long as their health permits," write the authors, Paul G. Farnham, associate professor of economics in Georgia State University's College of Business Administration, and Robin D. Gorsky, associate professor of health management and policy, in the University of New Hampshire's School of Health and Human Services. The research was done in conjunction with the Centers for Disease Control and Prevention in Atlanta.

The study estimates the additional costs that businesses can expect from and HIV-infected employee. These expenses include health insurance, short- and long-term disability benefits, recruiting, hiring and training costs, employee life insurance and pension costs.

The authors examined the costs over a five-year period, a typical time frame for business decision making. The estimates apply to firms with more than 100 workers, that employ about 65 percent of the private sector labor force.

The lifetime societal AIDS cost estimates include the last and most expensive stage of HIV infection. The maximum expected costs to business are lower, because the typical HIV-infected worker, whose illnesses tend to be chronic rather than acute, is unlikely to move into this late stage within a five-year period. The median time from infection to diagnosed AIDS is 10 years.

"The model indicates that firms do not have a large economic incentive to try to dismiss ill employees or force them to resign," according to the authors.

Farnham and Gorsky point out that firms which still see a disincentive in employing HIV-infected individuals faces constraints by federal and state legislation, including the Americans with Disabilities Act of 1990, and by possible discrimination or privacy violation suits that could lead to other economic losses.

INQUIRY, the journal of health care organization, provision, and financing, is a refereed, scholarly publication. It is published quarterly by Blue Cross and Blue Shield of the Rochester Area and the Blue Cross and Blue Shield Association.*

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* An additional press release from Georgia State University is forthcoming, which discusses BRTA's involvement with this study.

DRAFT

Health Benefit Plans and the Americans with Disabilities Act

DRAFT

This was written by Gwen Thayer Handelman, Associate Professor of Law, Washington and Lee University, School of Law, Lexington, Virginia.

This publication is taken from a more extensive review of the topic entitled "Health Benefit Plans and the ADA", which is currently available for purchase from your Regional Disability and Business Technical Assistance Center at 1-800-949-4232 (Voice/TTY), or from LRP Publications (specify Product #31015 HEALTH, 39 pp. $16) at Dept. NIDRR, PO Box 980, Horsham, Pennsylvania, 19044-0980, phone (800) 341-7874, Fax 1-215-784-9639.

DRAFT

Program on Employment and Disability
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What is the Americans With Disabilities Act?

The Americans With Disabilities Act of 1990 (ADA) is a civil rights law for individuals who have a current disability or a record of disability, or are perceived as having a disability. The ADA protects against disability-based discrimination in employment, access to government and commercial services, transportation and telecommunications. For purposes of the ADA, a disability is a physical or mental impairment — such as a visual, hearing or mobility impairment, HIV disease, mental retardation, etc. — that substantially limits a major life activity.

How does the ADA Apply to Employment?

ADA Title I prohibits limiting, segregating or classifying an individual in a way that adversely affects employment opportunities on the basis of an individual's disability. Title I also forbids denying equal jobs or benefits based on an individual's relationship to someone else with a disability.

Title I applies to both public and private employers with at least twenty-five employees (fifteen employees after July 25, 1994). Title II applies the same standards to state and local government employers regardless of the number of employees. Title I also covers employment agencies, labor unions, and joint labor-management committees.

Title I reaches purposeful discrimination and employment practices with discriminatory impact. Criteria that have the effect of excluding individuals with disabilities from employment opportunities may not be used unless justified by business necessity. Further, Title I establishes the obligation, except if it is an undue hardship for the covered entity, to reasonably accommodate "a qualified individual with a disability," that is, an individual with a disability who meets the necessary prerequisites for a job and can perform the essential job functions with (or without) reasonable accommodation.

Does the ADA Apply to the Terms of Health Benefit Plans?

Yes. ADA Title I prohibits discriminating against a qualified individual with a disability in all terms, conditions and privileges of employment, including health benefits. The ADA specifically prohibits participating in a discriminatory contractual or other arrangement with organizations that provide fringe benefits to employees.

The Equal Employment Opportunity Commission (EEOC) has addressed health benefits issues in regulations and various informational materials. In addition, the EEOC has issued specific guidance to its enforcement staff on the application of the ADA to health benefit plans. All are based on explanations in congressional committee reports. The application of the ADA to health benefit plans also

currently is being considered by federal courts. What follows is based on the EEOC's interpretations.

Does the ADA Apply to Health Benefit Plans Adopted Before the ADA?

Yes. The ADA does not provide a "safe harbor" for plans that were adopted prior to the ADA's July 26, 1990 enactment date.

Does the ADA Apply to Self-Funded Plans?

Yes. The EEOC enforcement guidance applies to the terms both of plans insured by a third party and self-insured health plans.

How Does the ADA Affect Health Benefit Plans?

First, personnel decisions regarding an individual with a disability may not take account of whether, or to what extent, an individual is or would be covered under a health benefit plan. For example, an employer may not refuse to hire a qualified applicant who has a disability or has a dependent with a disability because of concern about the potential impact on health insurance costs.

Further, the ADA regulations require that employees be accorded equal access to whatever health benefits are provided to other employees. If an employer provides health insurance to employees in general, the employer must provide equal access to employees with disabilities. However, ADA Title V allows insurers and health benefit plans to make health-related distinctions, provided that these practices are not used as a subterfuge to evade the purposes of the ADA. This means that any coverage limits or exclusions based on disability must be justified by sound actuarial data or other legitimate business or insurance justification.

For example, it is probably illegal for a health plan to cap benefits for the treatment of AIDS at a lower level than the cap applicable to the treatment of all other physical conditions. The lower AIDS cap presumptively violates the ADA, and there is probably no justification for disparate treatment because many studies show AIDS costs comparable to costs of numerous other commonly covered conditions.

Finally, even if a disability-based distinction is justified, a plan is rarely justified in completely denying coverage to an individual based on a diagnosis of disability. For example, a group plan generally could not deny coverage for treatments or procedures unrelated to the disability.

Must All Limitations and Exclusions Be Justified?

No. Justification is required only for disability-based distinctions. Not all health-related plan distinctions discriminate on the basis of disability. The EEOC does not require justification of generally applicable limitations and exclusions, even if they adversely affect individuals with disabilities. Nor does the EEOC interpret the ADA to require that health plans make reasonable accommodation for individuals with disabilities.

Employers, insurers and unions may continue to apply insurance distinctions that are not based on disability and are uniformly applied to all employees. For example, employers may still offer health insurance that does not cover pre-existing conditions for a certain period of time specified in the plan, even if such a pre-existing condition exclusion adversely affects employees with disabilities. The guidelines also permit facially neutral limitations such as lifetime coverage caps applied to all employees.

Further, a health plan may exclude or limit coverage for specific procedures or treatments if they are not exclusively or nearly exclusively applicable to a particular disability. For example, a plan may limit the number of blood transfusions or x-rays that the plan will pay for, even though this may have an adverse effect on individuals with certain disabilities such as hemophilia. Likewise, a plan may limit or deny coverage for all "experimental" drugs and/or treatments or all "elective surgery."

Finally, a plan may exclude or provide lower levels of coverage for broad categories of conditions that are not drawn along lines of disability. For example, a plan may have lower reimbursement rates for treatment of "mental or nervous conditions" or for "eye care." The EEOC does not consider these disability-

based distinctions because these conditions are not always "disabilities" as defined in the ADA. That is, they are not always impairments that substantially limit a major life activity.

How Does the ADA Apply to Disability-Based Distinctions?

A plan term or provision is disability-based if it singles out a particular disability, a discrete group of disabilities, disability in general (all conditions that substantially limit a major life activity), or a treatment or procedure used exclusively or nearly exclusively to treat a particular disability. Exclusions that are based on a disability like deafness, AIDS, cancer or alcoholism, may violate the ADA.

The best way to avoid possible violations of the ADA is to avoid singling out diseases or conditions considered disabilities under the ADA. However, differential treatment may be justified by the risks or costs associated with the disability. Justification will be determined on a case-by-case basis. The plan sponsor bears the burden of proof that a disability-based distinction is permitted by first showing that the health plan either is a bona fide plan that is consistent with state law or is a bona fide self-funded plan, and then proving that the disability-based risk classification is not being used as a subterfuge to evade the purposes of the law.

Plan sponsors may use accepted principles of insurance risk classification and current and accurate actuarial data, but not data based on myths, fears, stereotypes or false or outdated assumptions about a disability. Disability-based limitations or exclusions will not be considered to violate the ADA if:

1. they are based on legitimate actuarial data, or actual or reasonably anticipated experience, and apply equally to conditions with comparable actuarial data and/or experience; or
2. they are necessary because no alternative to a disability-based distinction is available to prevent an "unacceptable" change such as:

- a drastic increase in premiums, co-payments or deductibles;
- a drastic alteration in the scope of coverage or level benefits; or
- other changes that would make the plan unavailable to a significant number of other employees, or so unattractive that the employer could not compete in recruiting and maintaining qualified workers due to the superiority of health insurance plans offered by other employers in the community, or so unattractive as to result in significant adverse selection.

How Does The ADA Apply to Dependent Coverage?

If coverage is provided to employees for their dependents, a plan must justify in the same way any reduction of the level of those benefits to an employee because that employee has a dependent with a disability. The ADA, however, does not require that the coverage accorded dependents be the same in scope as the coverage accorded employees. For example, a $100,000 benefit cap for employees but only a $50,000 for dependents, would be permitted.

Will There Be Future EEOC Guidance?

Yes. The EEOC plans to publish further guidance with an opportunity for public comment. Future guidance also will address issues arising from wellness plans, such as whether premiums for non-smokers are permissible and the extent to which risk-group classifications under wellness plans will be treated as disability-based. The final guidance also will clarify plan coverage of workers with substance abuse problems and treatments not usually covered by plans, such as fertility treatment.

EEOC materials are available from the U.S. Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507, (800) 669-4000 (Voice), (800) 800-3302 (TTY), or (800) 669-EEOC (Publications-voice).

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In addition to serving as a National Materials Development Project on the Employment Provisions of the Americans with Disabilities Act of 1990, the *Program on Employment and Disability* also serves as the training division of the Northeast Disability and Business Technical Assistance Center. This publication is one of a series edited by Susanne M. Bruyère, Ph.D., C.R.C., Director of the ILR Program on Employment and Disability at Cornell University.

OTHER TITLES IN THIS *IMPLEMENTING THE ADA* SERIES ARE:

- Pre-Employment Screening and the ADA
- A Human Resource Perspective on Implementing the ADA
- Attitudes Toward the Employment of Persons with Disabilities
- The Implications of the ADA for Personnel Training
- The ADA and Workers' Compensation
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- Reasonable Accommodation Under the ADA
- The Reasonable Accommodation Process in Unionized Environments
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clause in contract doesn't pre-empt ADA

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ARTICLES

NOTES

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The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?

BY MARY K. O'MELVENY*

INTRODUCTION

Title I of the Americans with Disabilities Act ("ADA"),[1] which took effect on July 26, 1992,[2] promises to significantly enhance employment opportunities for people with disabilities. The ADA has received broad support from both individuals[3] and organizations[4] working to remove barriers to the full employment of the disabled and includes many of the statutory protections for disabled workers contained in the Rehabilitation Act of 1973.[5] The ADA, however, is intended to reach more broadly than the

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* Headquarters Counsel, Communication Workers of America, AFL-CIO. Some of the textual material in this paper is based upon earlier drafts prepared by the author for a Report in progress to be issued by the President's Committee on Employment of People with Disabilities ("PCEPD"). An earlier version of this paper was presented at the 1993 Mid-Winter Meeting of the ABA Labor and Employment Law Section, EEO Committee. The author is a member of the Working Group on Seniority and Collective Bargaining Rights, a subcommittee of PCEPD.

[1] Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991) (commonly known as the Americans with Disabilities Act) [hereinafter ADA].

[2] *Id.* at § 12111(5) (Employers with twenty-five or more employees are covered by the ADA as of July 26, 1992. Employers with fifteen to twenty-four employees have until July 26, 1994, to comply with the ADA.).

[3] Individuals who testified in support of the ADA include Sandra Parrino, Chairperson, National Council on the Handicapped and Justin W. Dart, Jr., Chairperson, Task Force on the Rights and Empowerment of Americans with Disabilities. *See* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 25-27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 [hereinafter H.R. REP. NO. 485].

[4] Among those organizations expressing support for the ADA were the American Federation of Labor and Congress of Industrial Organizations [hereinafter AFL-CIO] and the National Institute on Disability and Rehabilitation Research. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE 1) OF THE AMERICANS WITH DISABILITIES ACT, RESOURCE DIRECTORY (1992) [hereinafter ADA TECHNICAL ASSISTANCE MANUAL].

[5] 29 U.S.C. §§ 701-797(b) (1988). The Rehabilitation Act of 1973 prohibits recipients of federal funding, 29 U.S.C. § 794, federal government agencies, 29 U.S.C. § 791, and federal contractors, 29 U.S.C. § 793, from discriminating against qualified individuals with disabilities. Congress used 29 U.S.C. § 794 as its primary model for the

Rehabilitation Act by providing a "clear and comprehensive national mandate"[6] to eliminate discrimination against disabled workers and by setting forth "clear, strong, consistent and enforceable standards"[7] for equal treatment. In order for these standards to be met, the federal government must play a "central role"[8] in the enforcement of the ADA.[9]

Labor unions[10] have been among the most vocal supporters of the ADA and the added benefits that the Act brings to their members. Unions recognize that the sweeping benefits contained in the ADA are consistent with the interests of all of the employees that they represent. Prior to the ADA's enactment, unions often sought improved health and safety protections in the workplace through the well-established collective bargaining process. Traditionally, unions used prohibitions against discrimination contained in their collective bargaining agreements and their contractual grievance procedures to protect the rights of employees with disabilities. The ADA provides an enhanced opportunity to continue these efforts by adding new statutory requirements designed to compel reluctant employers to provide equally safe and healthy working conditions for the disabled. As the number of workers with disabilities continues to grow,[11] these added requirements have become increasingly significant.

ADA. ADA specifically provides that, *at a minimum*, its protections shall be as substantial as those required by the Rehabilitation Act. Thus, the ADA does not preempt any federal, state or local law which provides equal or greater rights for individuals with disabilities than those established by the ADA. 42 U.S.C. § 12201(b).

[6] H.R. REP. NO. 485, pt. 2, *supra* note 3, at 22; *see also* 42 U.S.C. § 12101(b)(1) (explaining the purpose behind the ADA).

[7] 42 U.S.C. § 12101(b)(2).

[8] *Id.*

[9] *Id.* § 12101(b)(3).

[10] The AFL-CIO, for example, has been a major labor union proponent of the ADA. *See* AFL-CIO & GEORGE MEANY CENTER FOR LABOR STUDIES, INSTRUCTOR'S GUIDE FOR TRAINING REPRESENTATIVES ON APPLICATION OF THE ADA 1 (1992).

[11] During Congressional hearings on the ADA, it was recognized that the number of people with disabilities is steadily growing, and that many of these individuals suffer frequent job discrimination. *See* H.R. REP. NO. 485, pt. 2, *supra* note 3, at 30-34. The statute recognizes that 43 million people suffer from disabilities. 42 U.S.C. § 12101(a)(1). The ADA protects not only those who are *actually* disabled, but also those who are "regarded" as having a disability, thus substantially increasing the number of individuals protected. 42 U.S.C. § 12102(2). The number of workplace injuries is also dramatically increasing, causing many employees to join the ranks of the disabled. Each day 11,000 workers lose work time or must restrict their work activity due to serious injuries on the job. Charles Noble, *Keeping OSHA's Feet to the Fire*, TECHNOLOGY REV. 43, 44 (Feb-Mar. 1992). A recently released Public Health Service study documented job-related injuries in 1988 affecting one of every 15 U.S. workers. *PHS Releases Report on Job-Related Injuries*, 145 Daily Lab. Rep. (BNA) D23 (DLR 1993), *available in* Westlaw, BNA-DLR databases (citing conclusions set forth in National Center for Health Statistics, HEALTH CONDITIONS AMONG THE CURRENTLY EMPLOYED, UNITED STATES 1988 (1993)).

Unfortunately, neither the language of the ADA itself nor the Equal Employment Opportunity Commission's guidance on the ADA's enforcement explicitly acknowledges the existence, or the possible importance, of the collective bargaining process as a way of maximizing the effectiveness of the Act. As a result, there has been a tendency on the part of some labor organizations, disability rights lobbyists and employers to assume that the interests of nondisabled and disabled union members are in conflict.[12] Indeed, several areas of tension appear to exist between the obligations imposed by the ADA and the union's role as a collective bargaining representative.

Congress gave virtually no guidance concerning how potential conflicts between the ADA and other labor relations statutes, such as the National Labor Relations Act ("NLRA"),[13] should be resolved. Furthermore, the regulations and technical assistance materials issued by the Equal Employment Opportunity Commission ("EEOC") since the ADA's enactment have shed little light on the appropriate resolution of such conflicts.[14] Following the passage of the ADA, the EEOC issued notice of proposed rulemaking on the relationship between the requirements of Title I of the ADA and the NLRA.[15] In response, comments were received from the labor, employer and disability communities.[16] When the EEOC issued its first set of regulations and interpretive guidance on the ADA, however, it deferred taking a position on this issue. In the preamble to its final rule, the Commission stated:

> The comments that we received reflected a wide variety of views. For example, some commentators argued that it would always be an undue

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[12] Such assumptions are based upon a lack of understanding of the ADA or on a lack of understanding of the historical efforts by organized labor to expand protections for disabled workers, as discussed above. Commentators from the differing perspectives have suggested varying means of resolving this debate. *See, e.g.*, Eric H. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate under the ADA by Claiming a Collective Bargaining Obligation?*, 9 THE LABOR LAWYER 71, 93-96 (Winter 1993); Joanne J. Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, DET. C. L. REV. 925, 954-71 (1991).

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

[14] *See* ADA TECHNICAL ASSISTANCE MANUAL, *supra* note 4, at III-16 (discussing the possibility of union and employer conflict but suggesting only that the union allow the employer to do whatever is required).

[15] 29 C.F.R. § 1630 (1992).

[16] *Id.*

> hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commentators, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship.

Subsequently, the EEOC and the General Counsel of the National Labor Relations Board ("NLRB") attempted to address these issues by working to draft and adopt a substantive "Memorandum of Understanding" that would provide the needed guidance. These efforts failed, however, and the NLRB General Counsel issued its own Memorandum to its field personnel on August 7, 1992.[17] This Memorandum detailed some of the potential conflicts between the ADA and the NLRA and directed that any unfair labor practice charges raising ADA-related issues should be referred to its Division of Advice for review.[18] The EEOC, while continuing to study the problem, has not yet issued any policy statements or other documents that would assist in resolving the identified areas of potential conflict.[19]

The premise of this Article is that it is both possible and desirable to reconcile the tensions which exist between the ADA and the National Labor Relations Act, and its various state and local counterparts. Indeed, this Article will argue that the best, most readily available vehicle for doing so already exists–the labor-management relations dialogue known as the collective bargaining process.

I. THE RELATIONSHIP BETWEEN THE ADA AND EXISTING LABOR LAWS

The existence of potential conflicts between state and federal labor laws and the ADA stems from the failure of the drafters of the ADA to give adequate recognition to the unique role that unions play in the

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[17] *See Memorandum from the Office of the General Counsel of the NLRB on Potential Conflicts Raised by Americans with Disabilities Act*, 158 Daily Lab. Rep. (BNA) E-1 (DLR 1992), *available in* Westlaw, BNA-DLR databases [hereinafter *NLRB General Counsel's Memorandum*].

[18] *Id.*

[19] A draft of an enforcement guide was prepared by the EEOC staff at the end of 1992, however, and has been circulating as part of the EEOC's internal review process. Letter from Evan Kemp, Chairman of the U.S. Equal Employment Opportunity Commission, to Justin W. Dart, Jr., Chairman of the President's Committee on Employment of People with Disabilities (Nov. 25, 1992) (on file with author).

workplace. This role requires that each union take actions that advance the interests of all members of the bargaining unit while, at the same time, ensuring that the rights of individual employees are adequately protected.

Much state and federal legislation governing labor-management relations has recognized and defined this role of unions, as well as the employer's corresponding duties and obligations.[20] The principal federal statute on collective bargaining is the NLRA,[21] although other federal legislation, such as the Railway Labor Act[22] and the Federal Labor Management and Employee Relations Act,[23] also regulates labor-management relationships and the rights of represented employees. Additionally, many states have enacted legislation patterned after the NLRA in order to include state or local government workers whom the NLRA does not cover.[24]

This Article will examine several ADA provisions which arguably conflict with the statutory requirements of the NLRA and with parallel state and local labor relations enactments. Although limited guidance exists to resolve these potential points of conflict, it should be obvious that Congress did not intend to silently overrule large segments of long-standing and crucial labor legislation in its efforts to accommodate disabled individuals in the workplace.

EEOC Regulations issued early in 1992 provide that one defense against a charge of ADA-prohibited discrimination will be to assert that the action was required by "another Federal law or regulation [that] prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required."[25] Since Congress

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[20] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 150A, §§ 1-10 (West 1982); WIS. STAT. ANN. §§ 111.01-111.19 (West 1988); MINN. STAT. ANN. §§ 179.01-.17 (West 1993).

[21] 29 U.S.C. §§ 151-168 (1988) (encouraging the use of collective bargaining and the designation of representatives).

[22] 45 U.S.C. §§ 151-164 (1988). "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." *Id.* § 152.

[23] 5 U.S.C. §§ 7101-7135 (1988). "Each employee shall have the right to form, join, or assist any labor organization, or to refrain . . . without fear of penalty or reprisal . . . and each employee shall be protected in the exercise of such right." *Id.* § 7102.

[24] Some state employees are also covered by executive orders. Furthermore, many county and local government employees are covered by local ordinances. *See, e.g.*, KY. REV. STAT. ANN. § 030(1) (Michie/Bobbs-Merrill 1993) (Kentucky Fire Fighters Collective Bargaining Act permitting fire fighters in cities with population over 300,000 to engage in collective bargaining and those in cities with lesser populations to petition for collective bargaining authority).

[25] 29 C.F.R. § 1630.15(e) (1992).

was aware of the existence of statutes such as the NLRA when it enacted the ADA, the NLRA should arguably be included in the "federal laws" defense category.[26] Such a "federal laws" defense would recognize those limited situations where employers and union representatives will have to violate either the NLRA or the ADA because it will be impossible to comply with both.

Recognition of the NLRA's important protections in evaluating ADA rights and obligations is particularly important because of the unique role played by unions as the employees' agent on matters affecting terms and conditions of employment. This role leads to a corresponding duty of fair representation. Collective bargaining representatives owe a duty to each member of the bargaining unit to "serve the interests of all members without hostility or discrimination toward any, to exercise their discretion with complete good faith and honesty, and to avoid arbitrary conduct."[27] This duty exists at all stages of the collective bargaining process–negotiation, administration and enforcement of collective bargaining agreements.[28]

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[26] The Union comments presented to the EEOC on this topic specifically recommended that § 1630.15(e) "make clear that an obligation to comply with, among other laws, the national labor relations act, would also be a defense to a charge of discrimination [under] the ADA. The national labor relations act [sic], of course, requires employers and bargaining agents to negotiate over the terms and conditions of employment." *See* Report of the Labor and Employment Law Section of the American Bar Association on the Proposed EEOC Rules on the Americans With Disabilities Act, April 12, 1991, pp. 70-71 [hereinafter Labor and Employment Law Section Report]. This position, in fact, has been advanced by the NLRB General Counsel. *NRLB General Counsel's Memorandum*, *supra* note 17, at *2 (explaining that actions required by other federal laws would be a defense to an ADA challenge).

[27] Vaca v. Sipes, 386 U.S. 171, 177 (1967) (citations omitted).

[28] *See* Electrical Workers (IBEW) v. Foust, 442 U.S. 42, 47 (1979) ("A union must represent fairly the interests of all bargaining-unit members during the negotiations, administration, and enforcement of collective-bargaining agreements."); *see also* Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1135 (1991) ("Indeed, we have repeatedly noted that the *Vaca v. Sipes* standard applies to 'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well.'" (quoting Communications Workers v. Beck, 487 U.S. 735, 743 (1988)); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-69 (1976).

> In *Vaca* "we accept[ed] the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion," . . . and our ruling that the union had not breached its duty of fair representation in not pressing the employee's case to the last step of the grievance process stemmed from our evaluation of the manner in which the union had handled the grievance in its earlier stages.

(quoting Vaca v. Sipes, 386 U.S. at 191).

In the context of the ADA, this judicially imposed obligation[29] means that a union may not arbitrarily pursue the rights of a disabled member in a manner that ignores the interests of nondisabled members. Likewise, the union may not discriminate against a member with a disability merely because other members are antagonistic to that individual. Presumably, if a union's actions are fair, impartial and taken in good faith, relatively wide discretion will be given to its ADA-related efforts.[30]

The NLRB General Counsel's Memorandum asserts that the NLRB plans to analyze employees' unfair labor practice charges that implicate the ADA by using "traditional principles" governing the duty of fair representation.[31] Any union faced with a member's demand for an

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[29] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 198 (1944). The *Steele* Court held that the Railway Labor Act "expresses the aim of Congress to impose on the bargaining representative of a craft or a class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 202-03. Subsequent cases have defined the duty as a federal right and have treated a breach of the duty as an unfair labor practice over which federal courts have jurisdiction. *See* Humphrey v. Moore, 375 U.S. 335, 343 (1964) ("[T]his action is one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law. . . ."); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) ("That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N.R. Co.* . . . in connection with comparable provisions of the Railway Act."); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944) ("[T]he right asserted by Petitioner which is derived from the duty imposed by the Railway Labor Act . . . as a bargaining representative, is a federal right . . . . The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction. . . ."); *cf.* Syres v. Oil Workers Int'l Union, Local No. 23, 350 U.S. 892 (1955) (ruling that employees' challenge of collective-bargaining agreement provisions concerning seniority that had been agreed to by union representatives was based upon breach of contract and did not involve the NLRA or any federal law).

[30] *Air Line Pilots Ass'n, Int'l*, 111 S. Ct. at 1130 ("[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational."). Thus, mere negligence is not sufficient to charge a union with breach of its duty of fair representation. *See* United Steelworkers of America, AFL-CIO-CLC v. Rawson, 495 U.S. 362, 372-73 (1990) (stating that "mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation.").

[31] *NLRB General Counsel's Memorandum*, *supra* note 17, at *4. The NLRB has issued two rulings on requests for advice in unfair labor practice charges involving a union's opposition to a proposed accommodation under ADA since issuance of the General Counsel's Memorandum. The first, *Local 876, United Food and Commercial Workers (The Kroger Company)*, Case 7-CB-9518 (June 23, 1993) (on file with the

accommodation under the ADA that would impair the rights of other members in the unit is placed in a difficult, though not an impossible, position. The best way to "accommodate" the competing and conflicting interests involved is to insure that full communication exists at all points in the ADA dialogue process, so that the union can play a constructive role in suggesting alternative accommodations while limiting adverse effects on the interests of the other workers. Resolving ADA issues in ways that are in harmony with collective bargaining rights and that result in solutions that will have the support of all members of the collective bargaining unit enables all employees to receive the maximum protection of both the ADA and the NLRA collective bargaining process.

In order for a union to carry out its fair representation duties, the NLRA ensures that the union will be able to elicit information from, and insist on dialogue with, the employer whenever terms and conditions of employment are at issue.[32] Without these crucial communications, the union cannot fulfill its obligations to the workers it represents, including those workers with disabilities.

II. THE AREAS OF POTENTIAL CONFLICT BETWEEN THE ADA AND LABOR-MANAGEMENT RELATIONS STATUTES

Hiring and personnel practices which discriminate against qualified individuals with mental or physical disabilities are unlawful.[33] Employ-

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author) involved a union's refusal to agree to the transfer of an employee suffering from a panic disorder condition because it would violate contractual seniority provisions. The Board concluded that there was no evidence that the union's action was motivated by discrimination, or that it had taken a different position in the case of non-disabled employees seeking transfers, or that it had acted arbitrarily. There was evidence that the union had agreed to earlier accommodations proposals which would not have violated the contract, but the employee had rejected those approaches. Therefore, the Board concluded that "the Union had a reasonable basis to decide that subordinating [the disabled employee's] interests to the interests of other unit members, as required by the contract seniority, was preferable." *Id.* at 5.

The second ruling, *Local 125, United Auto Workers (John Deere Co.)*, Case 18-CB-3323, 1993 WL 321785 (N.L.R.B.G.C.) (July 29, 1993), also dismissed a charge alleging that the Union's failure to pursue a grievance challenging a contractually negotiated smoking policy. The Board found no evidence that the Union's action was arbitrary or motivated by discrimination against the employee's asthma condition, relying upon traditional precedent protecting conduct within a "wide range of reasonableness," *Id.* at *3 (citing Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953) and Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991).

[32] Detroit Edison Co. v. NLRB, 440 U.S. 301, 302 (1978) (declaring that the duty to bargain collectively includes a duty to provide relevant information needed by the union to enable it to negotiate); 29 U.S.C. § 158(d).

[33] 42 U.S.C. § 12112(a); *see also id.* § 12102(2) (defining the term "disability").

ers must make "reasonable" efforts to accommodate such disabled workers so that they can perform the "essential functions" of a position unless doing so would constitute an "undue hardship."[34] Required accommodations may involve changes in job structure, work procedures, or workplace environment that will enable disabled employees to enjoy the same work opportunities that are available to nondisabled employees.[35] While each potentially "reasonable" accommodation will vary according to the employee's individual circumstances and the nature of the work, virtually every proposed accommodation will effect some change in the working conditions for the disabled employee and often for other employees as well.

A. *Proposed Accommodations Affecting Terms and Conditions of Employment Within the Bargaining Unit*

The NLRA imposes upon employers a duty to bargain with the union over "wages, hours and other terms and conditions of employment."[36] This duty is the crucial component of the collective bargaining relationship. Collective bargaining assumes an ongoing, cooperative relationship and is premised upon a good faith willingness to reach agreement on employment matters.[37] Section 8(a)(5) of the NLRA requires an employer to notify the union of any proposed "material, substantial or significant" changes in working conditions and to bargain with the union over such proposals.[38] Failure to do so constitutes a refusal to bargain and a

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[34] 42 U.S.C. § 12112(b)(5)(A).

[35] *Id.* § 12111(9).

[36] This language is set forth in § 8(d) of the NLRA. 29 U.S.C. § 158(d) (1988). Section 9(a) also delineates "rates of pay, wages, hours of employment, or other conditions of employment" as mandatory bargaining subjects. 29 U.S.C. § 159(a) (1988). In NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958), the Court concluded that § 8(d) and § 8(a)(5), 29 U.S.C. § 158(a)(5), were to be read together to establish a mandatory bargaining obligation whenever wages, hours, or conditions of employment were at issue. The Court also recognized an area of "permissive" bargaining subjects, about which the parties were "free to bargain or not bargain, and to agree or not to agree." *Wooster*, 356 U.S. at 349.

[37] [The NLRA] does not require that the parties agree; but it does require that they negotiate in good faith *with the view of reaching an agreement if possible*; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions.

NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 637 (4th Cir. 1940) (emphasis added).

[38] *NLRB General Counsel's Memorandum*, *supra* note 17, at *2 (citing Lamoureux, 259 N.L.R.B. 37, 48-49 (1981)).

violation of the NLRA, regardless of the employer's good faith.[39] Whenever proposed changes will "vitally affect" the terms and conditions of the employee's employment within the bargaining unit, these changes must be presented to the union for negotiation.[40] Normally, the courts will defer to the judgment of the National Labor Relations Board in determining if a statutory duty to bargain exists.[41] Bargaining history and current industrial practices are among the areas scrutinized in determining this duty.[42]

When a statutory duty to bargain exists, an employer cannot make any changes in the terms and conditions of employment that would constitute labor contract "modifications" without the consent of the union.[43] Failure to obtain the union's consent to such changes violates section 8(d) of the NLRA.[44] The NLRB General Counsel's Memorandum soundly reaffirms the employer's duty to bargain with the union when proposing ADA accommodations that would effect any significant change in working conditions:

> [I]f an employer unilaterally implements a "reasonable accommodation" for a disabled employee or otherwise alters its employment practices so as to change wages, hours or other working conditions, its action may give rise to a Section 8(a)(5) charge.[45]

Thus, any "change that is inconsistent with an established employment practice such as a seniority system, defined job classifications or a disability

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[39] *See* NLRB v. Katz, 369 U.S. 736, 743 (1962). "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.*

[40] *See* Allied Chem. & Alkali Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971) (affirming the Sixth Circuit's reversal of the NLRB's holding that changes in an employer's unilateral modification of retired employees' retirement benefits, which are embraced by the bargaining obligation, constitutes an unfair labor practice).

[41] *See* Ford Motor Co. v. NLRB, 441 U.S. 488, 501 (1979) ("[A]s for the argument that in-plant food prices and services are too trivial to qualify as mandatory subjects, the Board has a contrary view, and we have no basis for rejecting it.").

[42] *Id.* at 499-500 (1979).

[43] *Katz*, 369 U.S. at 743; *Allied Chem.*, 404 U.S. at 179.

[44] *NLRB General Counsel's Memorandum*, *supra* note 17, at *1 ("[N]either party may alter terms and conditions . . . in the agreement without the consent of the other party. Moreover, section 8(d) specifically authorizes parties to . . . refuse to 'discuss or agree to any modification' during the term of the contract.").

[45] *Id.*

plan would more likely be a change in Section 8(d) terms and conditions" of employment.[46]

There are a few accommodations which are not generally thought to constitute a substantial change in working conditions. These "non-substantial" changes involve an employer's expenditure of funds to make minor additions to, or alterations of, work space or equipment in order to enable the disabled individual to perform the essential functions of the position.[47] Specific examples provided by the NLRB General Counsel include posting notices in braille and putting a desk on blocks.[48]

Although such purely physical, individual accommodations may have little to no effect upon the rights of the other workers or upon general working conditions within the bargaining unit, they do affect the terms and conditions of employment of the worker with a disability. Thus, the union should still be included in discussions about such proposed accommodations in order to ensure that the employee's rights are protected and to reduce the chance for conflict. Such ongoing dialogue best serves the purposes of both the NLRA and the ADA.

Moreover, individualized negotiations between the employer and an individual employee over even minor changes that involve a mandatory bargaining subject require negotiation with the union and are precluded by section 9(a) of the NLRA.[49] Thus, even if the proposed accommodation does not affect other members' interests, the union should be allowed the opportunity to participate in the discussion in order to reduce any possible conflicts which may otherwise arise.[50] In particular, participa-

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[46] *Id.* at *2.

[47] *Id.*

[48] A unilateral "reasonable accommodation" would violate Section 8(a)(5) only if it affects a "material, substantial or significant" change in working conditions. 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. In that case an employer would have no duty to bargain over the implementation of such accommodations.

Id.

[49] *Id.* at *3 (An employer and employee are authorized to adjust grievances "but only 'as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract . . . [and] the bargaining representative has been given opportunity to be present to such adjustment.'") (quoting § 9(a) of the NLRA).

[50] The benefits of this cautious approach are evidenced when considering the pre-employment selection process. The ADA, of course, protects applicants for employment as well as existing employees. 42 U.S.C. § 12112(a) (Supp. III 1991). With the exception of the hiring hall arena, where the pool of prospective employees are already in the union,

tion by the union may help to ensure that the accommodation is adequate while not placing an undue burden on other workers.

B. "Direct Dealing" Between the Employer and the Disabled Employee

The EEOC Regulations interpreting the ADA describe the accommodations process as an ongoing "interactive" dialogue between the employer and a disabled worker that is aimed at developing alternative ways ("reasonable accommodations") for that employee to perform the essential functions of a particular job without causing undue hardship for the employer.[51] In a unionized workplace, such a worker-employer dialogue is not permitted unless the collective bargaining representative has declined the opportunity to participate in the process. The rationale is simple–if an employer were free to make "special deals" with individual employees, the collective bargaining process would quickly be undermined.

Direct dealings between an employer and a represented employee are subject to both the NLRA and the applicable collective bargaining agreement. Thus, an employer who deals directly with a represented employee about terms and conditions of employment violates sections 8(a)(5) and 9(a) of the NLRA.[52] Moreover, an employer cannot reach an agreement with an individual employee that would result in a violation of the terms of an existing collective bargaining agreement. There is no reason to treat the ADA's passage as requiring a different rule, and there are many reasons not to do so.[53] Thus, the employer needs to deal with

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an employer's duty to bargain with the union over terms and conditions of employment is far more limited when would-be employees are involved. However, if the selection process includes a proposed accommodation which would "impact on members of the bargaining unit," failure to bargain with the union about it may lead to a § 8(a)(5) violation. *See id.* at *4 n.5.

[51] EEOC regulations encourage the employer to "initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(c)(3) (1992).

[52] *NLRB General Counsel's Memorandum*, *supra* note 17, at *3; *see, e.g.*, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (agreeing with the NLRB that Medo Photo violated the essential principles of collective bargaining and engaged in unfair labor practices by negotiating directly with the employees and disregarding the bargaining representative); Standard Fittings Co. v. NLRB, 845 F.2d 1311, 1319 (5th Cir. 1988) ("Standard Fittings has committed unfair labor practices in refusing to bargain with the union and in appealing directly to its workers.").

[53] An individual employee negotiating on her own may not possess the familiarity

the employee through his union when searching for a reasonable accommodation that might impact on the terms and the conditions of employment. Otherwise, any "dialogue" about matters covered by the ADA that excludes the employee's collective bargaining representative will run afoul of the NLRA.[54] The NLRB General Counsel's Memorandum acknowledges the importance of union involvement: "[A]n employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with the affected union may be liable for 'direct dealing' with the employee" in violation of the NLRA.[55]

Involving the union in the accommodations discussion can significantly increase the likelihood that the selected accommodation will be the most reasonable under the circumstances. Union involvement neither prevents nor discourages the employee from active participation in the dialogue. Indeed, the employee seeking an accommodation should be involved as well. However, the assistance and involvement of a collective bargaining agent empowered to act on the employee's behalf will likely increase the significance of the accommodations request in the eyes of the employer and place additional pressure on the employer to find the most reasonable solution.[56] To facilitate the union's participation in the accommodations discussion, unions and employers might establish joint task forces or committees that focus specifically on ADA issues and routinely discuss facts and likely solutions whenever an employee requests an accommodation. Such committees would quickly develop

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with the bargaining unit or the knowledge of past grievances or settlements which might apply to the accommodation being requested. The individual does not have the same authority to request relevant information from the employer to aid in reaching agreement and lacks the standing to seek NLRB enforcement of such requests. *NLRB General Counsel's Memorandum*, *supra* note 17, at *3.

[54] There is a substantial body of precedent establishing that an employer cannot exclude the union from conferences regarding employee grievances and complaints. *See, e.g.*, Carbonex Coal Co., 262 N.L.R.B. 1306, 1313 (1982) (holding that changing hours pursuant to an employee request without giving the union notice or an invitation to bargain violates the NLRA).

[55] *Id.* at *3; *cf.* NLRB v. American Mfg. Co. of Tex., 351 F.2d 74 (5th Cir. 1965) (affirming the NLRB's ruling that the employer violated the NLRA by failing to bargain and by making unilateral changes.).

[56] As noted in the General Counsel's Memorandum and the EEOC Regulations, the ADA does not require selection of the "best" accommodation, only one which is reasonable. *NLRB General Counsel's Memorandum*, *supra* note 17, at *5 n.17; *see also* 29 C.F.R. § 1630.9 (1992) (an employer must make a reasonable accommodation unless the accommodation creates undue hardship); 29 C.F.R. § 1630(o) (1992) (defining the term "reasonable accommodation" and providing examples).

"expertise" in evaluating and recommending particular accommodations and in searching for the solution that would have the least disruptive impact on other contractual rights or existing workplace practices. Furthermore, the establishment of such committees would demonstrate to all workers a firm commitment by management and the union to make the needs of workers with disabilities a paramount concern in the workplace.

C. *Proposed Accommodations Adversely Affecting the Rights of Other Bargaining Unit Members*

The most difficult conflict between obligations and rights established by the ADA and the NLRA will occur where a proposed accommodation has consequences for the rights of the other bargaining unit members. Proposed accommodations which may affect rights guaranteed by an existing collective bargaining agreement can take several forms.[57] There is no question that the NLRA requires that such accommodations be the subject of discussions with the union.[58] If the rights of the other bargaining-unit employees will be adversely affected, the union cannot agree to such a proposal without violating its duty of fair representation to those workers under the NLRA.

1. *The Role of Seniority*

Traditional collective bargaining agreements provide that seniority rights may determine, or play a significant role in determining, an employee's eligibility for particular jobs, assignments, schedules, transfers and promotions. Any proposal to accommodate a disabled employee by providing a job or benefit that would normally go to the most senior employee will likely infringe upon rights guaranteed by the collective bargaining contract to another member of the bargaining unit.

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[57] Present EEOC Regulations state that reasonable accommodations under the ADA may include, but are not limited to, "job restructuring, part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities." 29 C.F.R. § 1630.3(o)(2)(ii).

[58] 29 U.S.C. § 158(d) ("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. . . .").

Seniority rights are some of the most historically significant rights enjoyed by union-represented employees because they often guarantee job security. Seniority rights provide a crucial protection in the face of "downsizing" or plant closings by ensuring that an employee is protected against layoffs or is permitted to transfer to another position or location rather than face unemployment. In addition, seniority rights offer a neutral, predictable vehicle for making employment decisions when competing needs or interests are involved. A seniority system provides all employees, including employees with disabilities, with important protections from management's favoritism, bias or arbitrariness on matters such as promotions, assignments, or other opportunities. Because seniority protections play such a central role, accommodations that threaten or impair seniority rights could disrupt the entire collective bargaining relationship. Additionally, pitting worker against worker fails to promote the goals of the ADA or serve the needs of the employees that the ADA was intended to protect.

2. *Areas of Friction*

The most likely areas of conflict between ADA compliance obligations and the rights established by the collective bargaining process concern the following ADA-endorsed accommodations. First, the employer could assign the disabled worker to a "vacant" position to which more senior employees would have bidding rights or to which employees on layoff status would have recall rights.[39] Second, the employer could create a "new" or "restructured" position without bargaining with the union about duties, performance standards, benefits, or similar matters.[40] Third, the employer could offer the disabled worker

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[39] This accommodation is discussed in the House Report on the ADA, which notes that an employer can accommodate a disabled employee through reassignment to a vacant position but need not "bump" another employee from the job to create a vacancy. H.R. REP. NO. 485, pt. 1, *supra* note 3, at 63.

[40] Job restructuring was discussed extensively by Congress as a means of providing a reasonable accommodation. *See* S. REP. NO. 116, 101st Cong., 1st Sess. 31 (1989) (Senate Committee on Labor and Human Resources) (defining job restructuring as "modifying a job so that a person with a disability can perform the essential functions of the position"); H.R. REP. NO. 485, pt. 2, *supra* note 3, at 62 (means of job restructuring include "eliminating nonessential elements of the job; redelegating assignments; changing assignments with another employee; and redesigning procedures for task accomplishment"). Previously, employers had *not* been required to create "new" positions as an accommodation under the Rehabilitation Act of 1973, 29 C.F.R. § 1613.701-709 (1992), which applies to federal agencies and defines a "qualified handicapped person" as one

a different position with, for example, more favorable hours, schedules, or "light" duty assignments that would normally be open to bidding based upon seniority status.[61] Finally, the employer could reassign job duties to other bargaining-unit employees in a way that would increase their workload or otherwise effect a substantial change in their working conditions.[62]

In addressing potential conflicts between proposed accommodations and existing collective bargaining agreement provisions under the Rehabilitation Act of 1973, the courts generally ruled that modification of contract provisions was not required if the provisions were the result of a *bona fide* seniority system.[63] It is unclear, however, whether the ADA contemplates similar deference, particularly since the ADA provides as examples of accommodations types of accommodations governed by traditional seniority criteria.[64]

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who can, with or without reasonable accommodation, perform the essential functions of the job. 29 C.F.R. § 1613.702(f). Thus, this area of the debate will focus on when a restructured job becomes a "new" position.

[61] An employer is *not* required to promote an employee into a vacant position. *See* S. REP. NO. 116, *supra* note 60, at 31-32 ("[B]umping another employee out of a position to create a vacancy is not required."); H.R. REP. NO. 485, pt. 2, *supra* note 3, at 63.

[62] *See* H.R. REP. NO. 485, pt. 2, *supra* note 3, at 62 (discussing various approaches to job modification, including eliminating nonessential assignments, redelegating tasks, exchanging assignments with other employees and redesigning job procedures); *see also* Carty v. Carlin, 623 F. Supp. 1181, 1185 (D. Md. 1985) (holding that the Rehabilitation Act of 1973 does not require job reassignment). An argument that the ADA does not require job reassignment will not succeed because the statute specifically suggests reassignment as an example of a reasonable accommodation.

[63] These decisions involved proposed assignments to light duty jobs or other positions that the collective bargaining agreement required to be given to employees with more seniority. *See, e.g.*, Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) (recognizing that a light duty assignment would conflict with *bona fide* seniority provision reserving jobs for employees with five years of seniority); Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984) (holding that an employee who did not qualify under § 504 of the Rehabilitation Act could be discharged pursuant to the terms of a collective bargaining agreement); Jasany v. United States Postal Service, 755 F.2d 1244, 1250-51 (6th Cir. 1985) (job restructuring); Shea v. Tisch, 870 F.2d 786, 789-80 (1st Cir. 1989) (reassignment to vacant position).

[64] Congress used the term "undue hardship," taken from the Rehabilitation Act, 29 U.S.C. § 794 (1988), to define a defense to the ADA's reasonable accommodation duty. 42 U.S.C. § 12112(b)(5)(A). The concept of "undue hardship" in section 504 of the Rehabilitation Act has been given a significantly broader interpretation than, for example, its use in Title VII, 42 U.S.C. § 2000e-2 (1988), to describe a "de minimis" defense as failure to make an accommodation on religious grounds. *See, e.g.*, Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977) (holding that an employer was not required to accommodate a Jewish employee by giving him Saturday off, because it was more than

Although the House and Senate committee reports suggest that the terms of collective bargaining agreements are "relevant" to the determination of whether an accommodation is "reasonable,"[65] Congress did not address this issue directly. Instead, the reports suggest that employers and unions agree to the ADA "override" language, which would vest the employer with the discretion to "take all actions necessary" to comply with the ADA.[66] This simplistic proposal, however, would be a poor and problem-ridden substitute for an ongoing dialogue between all of the parties affected by an ADA accommodation request.

D. The Duty to Provide Information versus the ADA's "Confidentiality" Provisions

The ADA has various confidentiality provisions that could create potential conflicts with the rights guaranteed by the NLRA. For example, as the bargaining representative, a union is entitled to all "relevant" information that impacts on its bargaining duties.[67] Such information is deemed to be an essential part of the collective bargaining process.[68] The ADA, however, prohibits an employer from releasing medical information concerning an employee's disability to anyone outside a very

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a "de minimis cost"). Congress specifically stated that "undue hardship in the ADA is intended to convey a significant, as opposed to a de minimis or insignificant, obligation on the part of employers." H.R. REP. NO. 485, pt. 3, *supra* note 3, at 40.

[65] *See* H.R. REP. NO. 485, pt. 2, *supra* note 3, at 63.

[66] *Id.*

[67] Failure to furnish such information to the union is an unfair labor practice within the meaning of the National Labor Relations Act § 8(a), 29 U.S.C. § 158(a)(5) (1947) ("It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ."). *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956) (stating that employers have an obligation to furnish relevant information to a union during contract negotiations); NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967) (noting obligation to furnish information extends past contract negotiations to all "labor-management relations during the term of an agreement").

[68] *See* NLRB v. Whitin Machine Works, 217 F.2d 593, 594 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955) (noting unions cannot represent employees effectively without information that is "necessary to the proper discharge of the duties of the bargaining agent"). If the employer's refusal to provide information prevents the union from being able to represent its members, the employer is preventing the operation of the collective bargaining process. *See* NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967) (holding that an employer has a general obligation to provide relevant information that is needed by a bargaining representative). *But see* Detroit Edison Co. v. NLRB, 440 U.S. 301, 317-20 (1979) (stating that a union's request for relevant information does not always predominate over other legitimate interests).

limited "need to know" group.[69] Such information must be maintained in segregated files.[70] A literal interpretation of these provisions will not allow a union to effectively carry out its function of processing grievances on behalf of represented employees, including the disabled worker. Absent such information, the union might be unable to determine whether, or how, a proposed accommodation might affect other employees in the unit, or whether an employer's refusal to provide an accommodation was based on justified, ADA criteria. This information will clearly be important if the union intends to assert that a failure to accommodate is a violation of a contractual nondiscrimination clause.

An employer's refusal to provide the information to the union hampers the union's ability to pursue the grievance process and arguably violates the NLRA. In considering this issue, the NLRB General Counsel concluded that the NLRB would balance a union's request for "relevant" information against an employer's "legitimate claim" of confidentiality.[71] The NLRB "will direct the parties to bargain over means to accommodate both interests."[72]

Absent the ADA's restriction on the release of medical or other disability-related information, several factors would operate to determine the balance between the competing demands of statutory entitlement and privacy rights: (1) an employee may affirmatively "waive" her privacy rights and consent to the release of confidential data; (2) such a waiver may be implied whenever an employee has placed her medical condition

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[69] 42 U.S.C. § 12112(d)(3)(B) (Supp. III 1991); 29 C.F.R. § 1630.14 (1992).

[70] 29 C.F.R. § 1630.14.

[71] *NLRB General Counsel's Memorandum*, *supra* note 17, at *3.

[72] *Id.* The Board already engages in such balancing when considering unfair labor practice charges involving information requests that allegedly involve confidential matters. *See* Detroit Edison Co. v. NLRB, 440 U.S. 301, 314-20 (1979) (holding that a company does not always have to disclose relevant, requested information when bargaining in good faith with a union). The burden is on the employer to demonstrate that specific harm will result from disclosure of otherwise relevant records. An employer may not simply refuse to disclose records because it prefers to keep them confidential, or because it sets forth a blanket assertion of privilege. *See* WCC Radio, Inc. v. NLRB, 844 F.2d 511, 515 (8th Cir.), *cert. denied*, 488 U.S. 824 (1988) (enforcing 282 N.L.R.B. 1199 (1987) and holding that a court must "weigh the competing interests of the employer and union in the requested information"); Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB (Minnesota Mining & Mfg. Co.), 711 F.2d 348, 358-63 (D.C. Cir. 1983) (noting that an appropriate balance must be struck between the interests of employers and unions); Southwestern Bell Tel. Co. v. NLRB, 667 F.2d 470, 474-76 (5th Cir. 1982) (stating that a union can waive its right to relevant information during settlement negotiations and thus be estopped from prosecuting an alleged violation when the company refuses a later request).

at issue in challenging some action or omission by the employer; and (3) the union representative may agree to limited confidentiality restrictions on the use of the information released in order to assure that it can pursue its statutory obligations, while at the same time avoiding unnecessary disclosure.[73]

The EEOC's Technical Assistance Manual has specifically noted that the ADA's limitations on the release of confidential information do not apply in circumstances where "other" federal laws "require disclosure of relevant medical information."[74] Including the NLRA and related labor statutes within this category of "other" federal laws would result in the harmonious interpretation of both statutory schemes. By allowing union representatives to actively participate in the accommodation decision, the employer and the disabled worker will receive the advantage of additional input and guidance in selecting the most reasonable accommodation. This participation should also significantly reduce the number of grievances, legal disputes and unfair labor practice charges.

E. Determinations of "Essential" Job Functions

Collective bargaining agreements sometimes contain negotiated job descriptions. To be "qualified" under the ADA, however, an employee with a disability need only be able to perform the "essential functions" of a position, not every function.[75] The requisite reasonable accommodation which must be provided is only directed to the key functions, as defined in the ADA, not to the ancillary duties of the position, regardless of whether or not the job has traditionally involved additional duties.[76]

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[73] The NLRB has held, for example, that medical information must be released when it is to be used in processing grievances. *See* Howard Univ., 290 N.L.R.B. 1006 (1988); LaGuardia Hosp., 260 N.L.R.B. 1455 (1982). The Board has also upheld the release of redacted files and files that have been the subject of a specific employee waiver of any privacy interests. *See* Johns-Manville Sales Corp., 252 N.L.R.B. 368, 378 (1980).

[74] ADA TECHNICAL ASSISTANCE MANUAL, *supra* note 4, § 6.5, at VI-12. EEOC Regulations provide that confidential medical information may not be used for any purpose "inconsistent" with the ADA. 29 C.F.R. § 1630.14(c)(2) (1992). Several unions submitted comments on the EEOC's proposed Regulations and specifically recommended the addition of specific language recognizing the right of collective bargaining representatives to gain access to such data "where it is necessary . . . for purposes of representing members of the collective bargaining unit, including any disabled employee hired by the employer." Labor and Employment Law Section Report, *supra* note 26, at 66-67.

[75] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m), (n).

[76] Essential functions are "fundamental job duties," excluding "the marginal functions of the position." 29 C.F.R. § 1630.2(n).

Congress cautioned that the terms of applicable collective bargaining agreements may be "relevant" to the determination of a job's "essential functions."[77] Thus, any process to change job descriptions contained in collective bargaining agreements or job functions traditionally subject to negotiations between the union and the employer must result from discussion and agreement between the union and employer.

Presumably, if an employer planned to evaluate or reassess its collectively bargained job descriptions in order to determine "essential functions" for purposes of ADA compliance, the new evaluation would not be binding on the union unless the union agreed to any change.[78] Moreover, to the extent that negotiated job descriptions have been used to establish wages, benefits, or other terms and conditions of employment, potential difficulties arise in accounting for duties or responsibilities that have been added to the load of the nondisabled workers in order to accommodate the disabled employee.[79] As noted earlier, any significant alteration of such duties would constitute a change in employment terms and conditions, which must be bargained for with the union.

III. THE "UNDUE HARDSHIP" DEFENSE

An employer is not required to accommodate an employee if doing so would create an "undue hardship."[80] An undue hardship is defined as "an action requiring significant difficulty or expense" when considered in light of its overall cost, the financial resources of the employer, and the nature of the business.[81] Citing House and Senate reports, EEOC Regulations define an undue hardship as any action that would be

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[77] *See* H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 567 (stating that an employer's written job description, prepared prior to advertising or interviewing for the job, is evidence of the essential functions of the job). The EEOC Regulations contain the same suggestion–that the job description be evidence of the essential functions. 29 C.F.R. § 1630.2(n)(3)(v) (1992). Congress rejected a proposed amendment that would have created a presumption in favor of the employer's determination of essential job functions. H.R. REP. NO. 485, pt. 3, *supra* note 3, at 33.

[78] The *NLRB General Counsel's Memorandum*, *supra* note 19, at *3 cites an employer's change in "defined job classifications" as an example of a change which must be the subject of bargaining under Section 8(d) of the NLRA.

[79] Problems may also arise if an evaluation is conducted by interviewing individual employees without informing the union of the discussion, particularly if the employer plans to use the results of the survey to change terms and conditions of employment. *See, e.g.*, Marriott Corp., Bob's Big Boy Family Restaurant Div., 264 N.L.R.B. 432 (1982).

[80] 42 U.S.C. § 12112(b)(5)(A).

[81] 42 U.S.C. § 12111(10)(A), (B) (Supp. III 1991).

"unduly costly, extensive, substantial or disruptive or that would fundamentally alter the nature or operation of the business."[82] The burden of proof clearly lies with the employer to show undue hardship.

Arguably, an undue hardship exists when the provisions of a collective bargaining agreement clash with a proposed accommodation. Congress explicitly recognized that collectively bargained rights may help in determining whether an accommodation is reasonable or poses an "undue hardship."[83] Thus, the Senate Committee on Labor and Human Resources Report on the ADA states:

> The collective bargaining agreement could be relevant . . . 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 that job.[84]

Additionally, EEOC Regulations recognize that "an employer could demonstrate that a particular accommodation would be unduly disruptive of its other employees or the functions of its business [and that] [t]he terms of a collective bargaining agreement may be relevant to this determination."[85] The EEOC's Technical Assistance Manual, for example, gives an illustrative scenario involving a worker with a deteriorated spinal disc condition who seeks reassignment to a vacant clerical job. "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."[86] This illustration continues with the recommendation that "the employer should

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[82] 29 C.F.R. app. § 1630.2(p). Obviously, such matters may be substantially interrelated.

[83] S. REP. NO. 116, *supra* note 60, at 32.

[84] *See id.*; *see also* H.R. REP. NO. 485, pt. 1, *supra* note 3, at 63 (containing identical language, but adding that "the [collective bargaining] agreement would not be determinative on the issue").

[85] 29 C.F.R. app. § 1630.15(d). Congress endorsed the "flexible approach" to cost arguments discussed in Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (comparing the cost of the proposed accommodation in time of severe budget crisis with the "social cost" of discrimination); H.R. REP. NO. 485, pt. 3, *supra* note 3, at 41 (discussing the flexible approach).

[86] ADA TECHNICAL ASSISTANCE MANUAL, *supra* note 4, § 3.9, at III-16.

consult with the union and try to work out an acceptable accommodation."[87]

Congress also noted that any terms of a collective bargaining agreement that are "inconsistent" with the obligations of the ADA should neither affect the employer's duty to comply with the ADA, nor be used to accomplish what the ADA would otherwise prohibit the employer from doing.[88] The NLRA does not protect contract terms that violate the ADA on their face.[89] Few collective bargaining agreements, however, contain provisions that would directly discriminate against employees protected by the ADA. Thus, the ADA-NLRA tension will likely arise where the proposed accommodation conflicts with "neutral" contractual rights.[90]

It is not likely that Congress intended to ignore or override long-established, facially neutral worker protections, such as seniority rights, by including the language concerning discriminatory contract provisions in the ADA. Such a conclusion is at odds with Congress' explicit recognition that such rights must be factored into the "undue hardship" determination.[91] Neither seniority rights nor other collectively bargained rights can fairly be said to be the "cause" of any act which violates the ADA. At most, the existence of such rights requires that the parties return to the "drawing board" to consider accommodations that will be less disruptive of existing labor and employee relations.

An accommodation that alters or impairs seniority-based decisions such as shift assignments, transfers, or promotional progression can potentially impact on every employee at a work site or in a job group. While the ADA does not contain any specific protection for *bona fide*

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[87] *Id.* This suggestion is offered "since both the employer and the union are covered by the ADA's requirements." *Id.* However, it is followed by the note that "employers may find it helpful" to negotiate ADA override provisions in collective bargaining agreements. *Id.*

[88] S. REP. No. 116, *supra* note 60, at 32. EEOC Regulations explain that "contractual or other arrangement[s]," including collective bargaining agreements, may not be used to subject a "qualified applicant or employee with a disability to the discrimination" that the ADA prohibits. 29 C.F.R. § 1630.6(a) (1992).

[89] *NLRB General Counsel's Memorandum*, *supra* note 17, at *3.

[90] 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. On the other hand, if the contract provision relied on is neutral on its face, a party may argue that it should be entitled to rely on its Section 8(d) right to refuse to discuss or agree to a proposed accommodation, inconsistent with that provision, if an adequate alternative arrangement existed that would not conflict with the collective bargaining agreement.

Id.

[91] *See supra* notes 65-66 and accompanying text.

seniority systems, the ADA also does not provide for any "affirmative action" obligations on the employer, such as hiring preferences or goals. An employer is *not* required to "prefer applicants [or employees] with disabilities over other applicants [and employees] on the basis of disability."[82] Instead, the employer simply must ensure that a disabled employee does not suffer job discrimination because of the disability. Thus, to the extent that a proposed accommodation results in preferential treatment for the disabled employee over the long-established rights of other, nondisabled employees, such an accommodation poses an "undue hardship" and is not required by the ADA.

Congress was clear that an employer could continue to establish job and performance standards, impose discipline, and take any other employment-related actions as long as the result of those actions did not disadvantage the disabled worker *because* of her disability.[83] Contractually and statutorily mandated collective bargaining rights should be considered to be of equal importance. In the absence of any statutory obligation to "prefer" disabled employees or applicants over other employees, seniority rights can frequently be demonstrated to be directly related to job qualifications. As noted by the EEOC in its Interpretive Guidance to its implementing regulations: "[The regulations are] not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job."[84]

Longevity is a common, legitimate qualification for a position and may, at least, bear a significant relationship to an employee's ability to perform a job. A proposed accommodation that will potentially place an employee with a disability in a position normally held by the most senior employees may, in fact, indicate that the employee is not "qualified" for that job due to an insufficient level of skill or experience to perform it. Even if seniority were not deemed to be an "essential" or job-related criterion, there is no doubt that reaching an accommodation with a disabled employee by ignoring seniority rights will cause a deterioration in co-worker relationships with possible, corresponding, adverse effects on morale, productivity, and efficiency.[85] There is no reason to risk such

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[82] H.R. REP. No. 485, pt. 2, *supra* note 3, at 56.

[83] *Id.* at 55-56.

[84] 29 C.F.R. app. § 1630.4 ("Interpretative Guidance on Title I of the Americans With Disabilities Act").

[85] EEOC Regulations reject the defense of undue hardship where "disruption" to employees results from "fear or prejudice" rather than the result of the accommodation,

results when it is possible, through use of the established collective bargaining process, to negotiate an accommodation that will have the full support of co-workers and will serve the needs of the disabled employee.

That the ADA is not an "affirmative action" statute in the traditional sense[56] is significant when evaluating the potential conflicts between collective bargaining rights and the employer's accommodation duty. While employers should certainly evaluate their workplaces and job definitions with a view toward ADA compliance issues, no particular actions need be taken in advance of the time that a disabled employee makes known her need for a reasonable accommodation. For example, there is no requirement that the employer "set aside" certain jobs or groups of jobs for occupancy by workers with disabilities. In fact, such an action might itself violate the ADA by resulting in the "classification" of jobs based upon disabilities or the "segregation" of disabled workers into particular work areas or lines of progression.[57]

Reasonable accommodation, however, is an affirmative obligation under the ADA. This obligation is situation-specific, though, in that the accommodations should be made on an individual basis. Providing an accommodation that is reasonable under the particular circumstances will involve time, attention and probably the expenditure of funds, yet the result of these efforts will not necessarily be applicable to any other situation. This individualized process underscores the need to carefully consider every aspect of the proposed accommodation, including its impact on the rights of other workers in the facility. Such careful consideration will ensure that the final decision achieves the purposes of the ADA, including the avoidance of "undue hardship."

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or where a "negative impact" on co-worker morale is not related to the co-workers' ability to perform their jobs. 29 C.F.R. app. § 1630.15(d). *See also* ADA TECHNICAL ASSISTANCE MANUAL, *supra* note 4, § 3.9.5, at III-15 (stating that restructuring of a job which results in a "heavier workload" for co-workers may constitute an undue hardship, but that objections based on "feel[ing] uncomfortable" around the worker with a disability would not).

[56] *Compare* 29 U.S.C. § 793(a) (1988) (stating that contracts "shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities") *with* 29 U.S.C. § 794 (1988) (containing no affirmative action requirement). *See* Alexander v. Choate, 469 U.S. 287 (1985) (holding that § 504 of the Rehabilitation Act does not require a state to guarantee the handicapped equal results under state Medicaid benefits).

[57] The ADA prohibits "limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities, or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1).

IV. COLLECTIVE BARGAINING AGREEMENT LANGUAGE

The legislative history of the ADA suggests that Congress believed that conflicts between ADA obligations and other statutory obligations, such as those imposed by the NLRA, could be resolved simply by adding language to the contract granting the employer the right "to take all actions necessary to comply with [the ADA]."[98] Unfortunately, such an ADA "override" proposal fails to offer a solution to the conflicts which have been discussed above. Such a proposal could significantly hinder the collective bargaining process by exacerbating, rather than resolving, tensions in the workplace.

The NLRB General Counsel discussed this issue in the context of obligations that intervening law imposes on the parties to a collective bargaining agreement and that the employer then asserts as a defense to charges that the employer has changed the terms of the collective bargaining agreement. Noting that an employer "may argue that its obligation to comply with the ADA privileges it to act unilaterally,"[99] the General Counsel emphasized the discretionary nature of ADA compliance.[100] "[W]here the change in law leaves the employer with some discretion with regard to compliance," an employer would violate section 8(a)(5) "by unilaterally changing terms and conditions to bring itself into compliance" with the law.[101] An examination of the case-by-case nature of the ADA's reasonable accommodation burden and the existence of the "undue hardship" defense clearly demonstrates that "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."[102] Each NLRB Region has been advised that, before submitting any case raising an undue hardship defense to the Division for Advice,

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[98] *See* S. REP. NO. 116, *supra* note 61, at 32: "Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after [July 26, 1992] contain a provision permitting the employer to take all actions necessary to comply with this legislation."

[99] *NLRB General Counsel's Memorandum*, *supra* note 17, at *2.

[100] *Id.*

[101] *Id.*

[102] *Id.* at *2; The EEOC's Regulations also make clear the highly discretionary nature of the accommodations process. *See* 29 C.F.R. app. § 1630.15(d) ("Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.").

> it should investigate whether each element of the defense is present. That is, it should attempt to ascertain all parties' positions as to whether the proposed accommodation was the only one that would be effective in the circumstances and whether that accommodation posed no undue hardship.[103]

Most collective bargaining agreements already contain prohibitions against discrimination, including specific references to "disability" as a category of protection. Even if the contract is silent on this point, anti-discrimination laws apply to employers and unions regardless of whether reference is made to them in a particular contract. Thus, such language is not required in order to impose an obligation on the employer to comply with the ADA. A union which agrees to vest such power in the employer through the addition of unilateral action language runs the risk of "endorsing" that employer's actions, or failure to act, and potentially could be seen as jointly liable for the employer's decisions.[104]

In addition, such override language is contrary to the usual rules of labor-management relations, which encourage ongoing discussion and agreement by the parties on issues impacting the rights of employees, not unilateral action by one party. Yet, the ADA places the burden of finding a reasonable accommodation that does not pose an undue hardship only on the employer, *not* on the union or on the two jointly. Still, unions must be prepared to cooperate with the employer to help come up with accommodations that satisfy the statutory requirements. Simply relying upon override language is an abandonment of the entire process.

It is a regrettable fact that greater numbers of the workforce are becoming disabled each year.[105] Collective bargaining agreement protections such as seniority rights are thus *more* important than ever as a potential vehicle for protecting this expanding group of employees. In addition, as greater numbers of employers are forced to reduce their workforces, or shift their operations to non-union contractors, seniority rights become more crucial in protecting existing union employees from the loss of their jobs. An assumption that the ADA should "override"

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[103] *NLRB General Counsel's Memorandum*, *supra* note 17, at *2 n.16.

[104] *See, e.g.*, Macklin v. Spector Freight Sys., 478 F.2d 979, 989 (D.C. Cir. 1973); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982) (finding union can be held jointly liable for promotion system contained in collective bargaining agreement which had a racially discriminatory effect even though union had no responsibility for promotional decisions). *See* Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980).

[105] 42 U.S.C. § 12101(a).

such rights contained in existing collective bargaining agreements could significantly undercut important worker protections at a time when they are increasingly necessary. Effectuating the purposes of the ADA should involve all interested and knowledgeable parties. There is no sound reason to reduce the input and problem-solving ability of one of the key players through such override language.

V. ALTERNATIVE DISPUTE RESOLUTION

The ADA[106] provides that alternative means of dispute resolution should be utilized to resolve disputes arising under the Act "where appropriate and to the extent authorized by law."[107] The statute lists various Alternative Dispute Resolution ("ADR") methods, including mediation, conciliation, facilitation, fact-finding, mini-trials and settlement negotiations.[108] Elevating ADR as a statutorily endorsed alternative to litigation undoubtedly reflects a growing Congressional concern over expensive and lengthy court proceedings.[109] Congressional encouragement of such nonlitigation measures, however, should not be viewed either as a requirement that such measures be used, or as a "green light" for bypassing traditional grievance and arbitration procedures contained in collective bargaining agreements.

Since the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[110] employers have increasingly sought agreements from workers to arbitrate, rather than litigate, employment discrimination claims. In workplaces governed by collective bargaining agreements, grievance and arbitration clauses have traditionally paralleled litigation remedies. ADR methods have not been held to be the exclusive forum for redress of discrimination complaints, however, since the Supreme Court's ruling nearly twenty years ago in *Alexander v. Gardner-Denver Co.*[111]

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[106] 42 U.S.C. § 12212.

[107] *Id.*

[108] *Id.*

[109] For example, the author of the amendment which eventually became 42 U.S.C. § 12212 argued that "rights and litigation are not one and the same. There are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation." 136 CONG. REC. H2431 (daily ed. May 17, 1990) (statement of Rep. Glickman).

[110] 111 S. Ct. 1647 (1991) (holding that a claim brought under the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration).

[111] 415 U.S. 36 (1974) (holding that federal civil rights plaintiffs could not be precluded from pursuing Title VII claims even though those claims had previously been arbitrated under the terms of a collective bargaining agreement).

Congress was not mandating ADR as a means of resolving ADA claims.[112] Joint conferees agreed that ADR was "intended to supplement, not supplant, the remedies provided by this Act."[113] Thus,

> any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement, or in an employment contract, does not prevent the complainant from seeking relief under other enforcement provisions of this Act. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.*[114] applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.[115]

While Congress was preventing employers from making ADR the exclusive remedy for ADA violations, it did not address what might happen if an employer decided to bypass existing collective bargaining agreement grievance mechanisms and directly resolve an accommodation dispute with the employee. Such an effort would certainly run contrary to sections 8(a)(1),[116] 8(a)(5)[117] and 9(a)[118] of the NLRA if it permitted "direct dealing" with the represented worker on terms and conditions of employment. Thus, it would be neither "appropriate" nor "authorized by law" for ADR to supplant the grievance process available to a worker under a collective bargaining agreement. Should an employer decide to set up a "special" ADA claims resolution process, it must obtain the union's agreement and permit it to be a participant in that process.

CONCLUSION

We need not assume that there cannot be a "reasonable accommodation" between the ADA and collectively bargained employment contracts.

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[112] *See Report of Conference Committee on ADA: Joint Explanatory Statements*, 136 CONG. REC. H4582, H4606 (daily ed. July 12, 1990).

[113] H.R. REP. No. 485, pt. 3, *supra* note 3, at 76.

[114] 415 U.S. 36 (1974).

[115] H.R. REP. No. 485, pt. 3, *supra* note 3, at 76-77.

[116] 29 U.S.C. § 158(a)(1) (employer may not interfere with employee exercising rights under the NLRA).

[117] 29 U.S.C. § 158(a)(5) (employer may not refuse to bargain collectively with the representatives of employees).

[118] 29 U.S.C. § 159(a) (union representatives are exclusive representatives of all employees).

There is every reason to expect unions to support ADA-mandated accommodations and its protections of their disabled members. The reality of most labor settings is that workers try to help each other on the job. Therefore, it is unlikely that unions will oppose the providing of full opportunities for qualified disabled workers. Instead, they will most likely cooperate fully in the effort to help such workers function effectively in the job.

In fact, union demands for significant health and safety changes in the workplace have often met resistance from employers reluctant to expend funds in a shrinking economy.[119] The ADA provides an avenue for the union to renew those demands on behalf of disabled individuals, while actually improving the worksite conditions for all its members. Many unions already have committees in place that are knowledgeable about medical and other health problems affecting represented workers.[120] Thus, the unions are in a position to press the needs of disabled workers and to maximize the benefit to all of their members, using the ADA to give added support to these efforts.

Unions have also been involved in the process of developing accommodations under the Rehabilitation Act of 1973 since its passage over twenty years ago. The negotiations and grievance processes have been utilized to resolve issues for temporarily disabled workers in need of "light duty" assignments or similar assistance in protecting their jobs. In particular cases, union representatives might be willing to endorse, on a non-precedential basis, specific contract modifications to protect or enhance opportunities for a disabled individual. In other cases, alternative means can be developed, such as the purchase of equipment to assist with heavy lifting tasks, which achieve that result in a less burdensome manner. Such problem-solving approaches will enhance the ADA's new protections for disabled workers, not impede them.[121]

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[119] *Statement of USW Wage Policy Committee's Bargaining Goals*, 243 Daily Lab. Rep. (BNA) D-1 (DLR 1992), *available in* Westlaw, BNA-LB database.

[120] Some unions have established separate entities which focus exclusively on providing retraining and related assistance to workers with disabilities. One example of this approach is "IAM Cares," sponsored by the International Association of Machinists and Aerospace Workers ("IAM"), in conjunction with employers with whom IAM has a collective bargaining relationship. Another variation on this theme is a joint effort between IAM and Boeing Aircraft known as the IAM/Boeing Health and Safety Institute which develops programs to bring occupationally injured and ill employees back to work.

[121] Unions can also conduct ADA education and training programs or negotiate with the employer for such employee training opportunities. The enhanced dialogue and understanding which can result from such efforts will encourage flexibility when individual accommodation issues arise.

The fundamental principle of negotiation can enable employers to effectively achieve ADA compliance in a workplace governed by a collective bargaining agreement. Only through an ongoing dialogue between *all* affected parties–the disabled individual, the union, and the employer who has the burden to provide a reasonable accommodation–can the objectives of the ADA be effectively realized.

Thus, even if crafting an accommodation which impairs seniority rights of co-workers appears to be the quickest or cheapest solution, it is also the most disruptive and least desirable. For this reason, both Congress and the EEOC recognized that solutions such as "reassignment" should only be measures of last resort. By looking carefully at the impact which a proposed accommodation will have on the entire work environment, as contemplated by the "undue hardship" defense built into the ADA, the solution reached will most likely be accepted by everyone affected.

The ADA's affirmative obligations require thought, time, and funds to enhance opportunities for workers with disabilities. The most "reasonable" accommodation in each unique case will require an evolutionary process which carefully evaluates, balances, and refines proposals. Effective achievement of ADA objectives requires harmonizing two statutory schemes, both of which have the needs and benefits of workers at their core. Potential conflicts can be "reasonably accommodated" if the time-tested collective bargaining process becomes part of the day-to-day experience of the ADA's protections.

The collective bargaining process involves an ongoing dialogue and commitment to problem solving. It is a natural vehicle for working through existing tensions or potential conflicts in the employment arena, or at least greatly lessening them. By including the union as an active member of the "team" which makes the ADA decision, the potential for conflict, including litigation, is reduced. Open and ongoing communication and dialogue between the employer and the union on all issues relating to ADA compliance will most effectively serve the goals of the ADA.