A PROSPECTIVE AND RETROSPECTIVE WITH THE NLRB FORMER GENERAL COUNSELS – THE CONFLICTS BETWEEN THE AMERICANS WITH DISABILITIES ACT AND THE NATIONAL LABOR RELATIONS ACT

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As I was reading the National Labor Relations Board's (hereinafter "Board" or "NLRB") recent decision in Industria Lechera de Puerto Rico, Inc. (Indulac, Inc.), 344 NLRB No. 133 (2005), I reflected on the concerns which arose and the uncertainty which existed in the labor-management community concerning the potential conflicts between the Americans with Disabilities Act of 19901 ("ADA") and the National Labor Relations Act ("NLRA") as the effective date of the ADA drew closer during the summer of 1992. The Board, in reviewing a decision issued by an Administrative Law Judge, had to determine whether the Respondent Employer violated Sections 8(a)(5) and (1) by unilaterally transferring an employee from the second shift to the first shift without notifying the union or providing it an opportunity to bargain based upon a letter which it received from the employee's physician requesting the transfer in view of medication which the employee was required to take at night and which might cause him to endanger his co-workers. The Respondent Employer in Industria Lechera de Puerto Rico argued that its unilateral transfer of the employee was required under the ADA. In this case, the Board was confronted with resolving what appeared to be a conflict between the Respondent Employer's duty to notify the union and/or provide it with an opportunity to bargain concerning the proposed unilateral transfer as required by the NLRA and the Respondent Employer's obligation to accommodate the employee under the ADA.

Around the time of its effective date, the ADA was called "the most significant civil rights legislation in more than 25 years."2 At the signing ceremony on July 26, 1990, President George H.W. Bush stated that the Act "promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation,

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2/ Julia Lawler, Disabilities No Longer a Job Barrier, USA Today, July 23, 1992, at 1A.
and telecommunications." Extensive testimony before Congress showed that disabled persons experience extremely high levels of unemployment and underemployment. The House Committee on Education and Labor reported that "two-thirds of all disabled Americans between the ages of 16 and 64 were not working at all; yet, a large majority of those not working said they wanted to work." Title I of the Americans with Disabilities Act deals with discrimination in employment. The effective date was delayed for two years, followed by a two-stage implementation based upon the size of the employer. From July 26, 1992 until July 25, 1994 only employers with twenty-five or more employees were covered; thereafter, employers with at least fifteen employees were covered. As the effective date of Title I drew near, there was much concern expressed regarding its impact in the work place. According to USA Today, the law would "forever change the way employers deal with the 33.8 million U.S. citizens who have physical or mental disabilities." The New York Times stated there was "certainty among government officials and experts that the ADA requires vast changes in employment practices as extensive as those made for women and blacks." The Wall Street Journal agreed, saying that the ADA "will force businesses to alter a slew of employment practices - far more than many realize."
The Wall Street Journal predicted that, for employers with collective bargaining relationships, union contracts would have to be modified in order to permit compliance with the ADA. As part of its "roadmap" for employers, the Journal recommended that employers "[r]evise all union contracts to reduce conflicts between the ADA and seniority rules." The Journal went on to state:

"Supervisors don’t have to ‘bump’ a staff member to accommodate a disabled employee. But what happens if a disabled individual fills a vacancy that a more-experienced worker deserves under union seniority rules? The new law is unclear. So, at management’s urging, the Transport Workers Union, among others, has modified some contracts to let employers make compliance moves. But the Service Employees International Union opposes such changes as possibly harmful to seniority protections."

At the time that the NLRB Office of the General Counsel initially considered these issues during the summer, 1992, there appeared to be potential conflicts between the requirements of the ADA and the NLRA. This paper will outline some of the potential conflicts which we believed existed as of the effective date of the ADA.

Americans with Disabilities Act

A. Introduction

1. Potential conflicts between the NLRA and the ADA:
   a. Duty to bargain regarding the adoption of an accommodation.
   b. Process of identifying reasonable accommodations.
   c. Accommodations which conflict with existing collective bargaining agreements.
   d. Disclosure of confidential medical information to the union.
   e. Duty of fair representation.

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9/ Id.
2. The General Counsel issued a guideline memorandum to the regional offices which discussed these issues.\(^{11}\)

B. Duty to bargain, in general:

1. An employer must bargain with the union which represents its employees regarding wages, hours, and other terms and conditions of employment.

2. Employer would be required to bargain with the union before providing a “reasonable accommodation” only if the accommodation would constitute a “material, substantial or significant” change in working conditions.\(^{12}\)

3. Changes such as putting a desk on blocks, providing a ramp, adding braille signage, and the like, that allow disabled employees to perform the same job in a fashion different than other employees may not be changes in terms and conditions of employment which would give rise to a duty to bargain.

4. A change that is inconsistent with an established employment practice such as a seniority system, defined job classifications, or a disability plan would more likely be a change in terms and conditions of employment which would require bargaining.\(^{13}\)

C. The process of identifying reasonable accommodations:

1. EEOC approach:

   a. The appropriate reasonable accommodation is best determined through an interactive process that involves both the employer and the qualified individual with a disability.

   b. There should be consultation with the disabled individual to ascertain the precise job-related limitations; how those limitations could be overcome; and to identify and assess potential accommodations.\(^{14}\)

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\(^{12}\) See, e.g., LaMousse, 259 NLRB 37, 48-49 (1981), enf’d. (mem) 112 LRRM 3168 (9th Cir. 1983) (five minute increase in break time not material, substantial, and significant.)

\(^{13}\) See, e.g., Southern California Edison Co., 284 NLRB 1205, n.1, 1201-1211 (1987) (unilateral change in temporary work assignment practices for disabled employees)

\(^{14}\) EEOC Regulations to Implement the Equal Employment Provisions of the ADA, 29 CFR 1630.2(o)(3).
2. NLRA law:
   a. A union which has become the representative of employees is the exclusive representative of all the employees in the bargaining unit for purposes of collective bargaining.\(^{15}\)
   b. Because of the union's status as collective bargaining representative, an employer may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with represented employees. An employer must bargain with the statutory representative and cannot bargain directly or indirectly with unit employees.\(^{16}\)
   c. A union has a statutory right to be consulted about a change affecting the terms and conditions of employment. The union may waive this right, but such a waiver may not be lightly inferred but must be clear and unmistakable.\(^{17}\)
   d. An employer is obligated to bargain solely with the designated bargaining representative even if the employees themselves initiate the contacts.\(^{18}\)

D. Accommodations which conflict with existing collective bargaining agreements:

1. EEOC regulations:
   a. It is unlawful for an employer to participate in a contractual arrangement, including a collective bargaining agreement with a union, that has the effect of subjecting the employer's own qualified applicant or employee with a disability to prohibited discrimination.\(^{19}\)
   b. An employer must make reasonable accommodations for otherwise qualified disabled applicants or employees, unless the employer can show that the accommodation "would impose an undue hardship on the operation of its business."\(^{20}\)
   c. Legislative history and EEOC guidance indicate that the terms of a collective bargaining agreement may be relevant, although

\(^{15}\) 29 U.S.C. 159(a).
\(^{19}\) Ibid, citing Spectra Freight System, 260 NLRB 86, 94 (1982).
\(^{20}\) 29 CFR Section 1630.9(a).
not determinative, of whether a particular accommodation would cause undue hardship.\textsuperscript{21}

d. EEOC's technical assistance manual states that if, for example, a disabled worker seeks a reassignment to a light duty position covered by a collective bargaining agreement, and 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. However, since both the employer and the union are covered by the ADA's requirements, including the duty to provide a reasonable accommodation, the employer should consult with the union and try to work out an acceptable accommodation.\textsuperscript{22}

e. The manual also suggests that, "to avoid continuing conflicts between a collective bargaining agreement and the duty to provide reasonable accommodation, employers may find it helpful to seek a provision in agreements negotiated after the effective date of the ADA permitting the employer to take all actions necessary to comply with this law."\textsuperscript{23}

f. Another section of the EEOC regulation states that it may be a defense to a charge of discrimination that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required.\textsuperscript{24}

2. NLRA law:

a. Where bargaining has resulted in a collective bargaining agreement, neither party can unilaterally terminate or modify the agreement during its effective term.\textsuperscript{25}

b. 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.

c. If the contract provision relied on is neutral on its face, a party may 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

\textsuperscript{22} Id
\textsuperscript{23} FEPC Binder, 405:7007. 411d.
\textsuperscript{24} Id
\textsuperscript{25} 29 CFR Section 1630.15(e).
\textsuperscript{26} 29 U.S.C. 158(d).
existed that would not conflict with the collective bargaining agreement.

d. EEOC has taken the position that the ADA does not require an employer to provide the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated.26

e. Where the employer has discretion, the Board has required bargaining. For example, the Board has held that unilateral implementation of FLSA mandated wage increases did not violate the NLRA. Discretionary wage increases require bargaining.27

f. In another case, the Board held that an employer did not violate the Act by unilaterally prohibiting the consumption of food or drink in areas exposed to toxic materials, since such a rule was required by OSHA regulation and the employer had no discretion as to the implementation of the rule. However, the employer was found to have violated the Act by unilaterally banning reading materials, posters, charts and calendars from work areas. The Board rejected the employer’s claim that it was required to prohibit such material under Title VII of the Civil Rights Act, which prohibited sexual harassment. The Board found that the employer’s rule was overbroad and that discretion existed to determine whether specific items were sexually offensive.28

g. The most difficult issue is whether parties can be compelled to bargain midterm over proposed accommodations that would violate facially neutral contractual provisions or whether an employer violates Section 8(a)(5) by implementing, over the union’s objection, an accommodation that would violate such a contract provision but is also the only effective accommodation in a given circumstance. Here, the requirements of the ADA and the NLRA are directly opposed. Hopefully, parties will be able to work out these problems.

E. Disclosure of confidential medical information to the Union:

1. The ADA requires an employer to treat as confidential, information that it obtains from medical examinations and other inquiries regarding an applicant’s or an employee’s medical condition or history.

26 Appendix to Part 1630, Interpretative Guidance to Title I of the Americans with Disabilities Act, Section 1630.9.
28 Murphy Oil USA, 286 NLRB 1039 (1987).
2. The employer has a duty under the NLRA to provide relevant information requested by the union.

3. In certain circumstances employers can legitimately assert confidentiality as a defense to a refusal to provide the union with otherwise relevant information.29

4. Where an employer asserts a legitimate claim of confidentiality in response to a request for relevant information, the Board balances the union's need for the information against the assertion of confidentiality.30

5. The Board looks with disfavor upon blanket denials of information based upon confidentiality. The Board expects the parties to bargain over means to accommodate both interests.31

F. Duty of fair representation issues:

1. A union violates its duty of fair representation by discriminating against employees it represents based upon invidious considerations.32

2. The union is allowed a wide range of reasonableness in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.33

3. These principles have been applied in ADA cases.

Sometime after the issuance of General Counsel Memorandum 92-9 on August 7, 1992 which dealt with the potential conflicts between the duty to bargain under the NLRA and the duty to comply with the Americans With Disabilities Act, I initiated a meeting with the then chairman of the EEOC, Evan Kemp, to discuss the potential conflict between the NLRA and the ADA and steps that both agencies could take to establish a procedure to avoid these conflicts in the processing of charges filed with the EEOC under the ADA and the NLRB under the NLRA. Following my meetings with the Chairman of the EEOC, various staff members from the NLRB Office of the General Counsel and the Office of the Chairman of the EEOC participated in a series of meetings to resolve any procedural

29 Detroit Edison v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979).
32 See, e.g., Independent Metal Workers Union Local No. 1 (Hughes Tool Co.), 147 NLRB 1573, 1574-1575, 1602-1604 (race discrimination); Bell & Howell Co., 230 NLRB 420, 420-423 (1977), enf'd. 598 F.2d 136 (D.C. Cir. 1979) (sex discrimination).
hurdles to the two agencies coordinating the enforcement of Title I of the ADA and Section 8 of the NLRA. The series of meetings which I initiated with the Chairman of the EEOC resulted in a Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission which was executed by the NLRB General Counsel and Tony E. Gallegos, Chairman of the EEOC, on November 16, 1993. (see Exhibit 2 attached hereto).

With respect to my initial reference to Industria Lechera de Puerto Rico at the beginning of this paper, the Board’s decision in the case was not only not surprising, but was also consistent with the principles outlined above. In adopting the Administrative Law Judge’s decision finding that the Respondent Employer violated Sections 8(a)(5) and (1) by unilaterally transferring employee del Valle from the second shift to the first shift, the Board stated that it was also relying on US Airways, Inc. v. Barnett, 535 U.S. 391 (2002). The Board stated that the Supreme Court’s Barnett decision undercuts the Respondent’s argument that it was privileged to act unilaterally because it was required to provide the employee a “reasonable accommodation” under the ADA. The Board went on to state as follows:

In Barnett, the Supreme Court concluded that, absent special circumstances, the ADA does not require an employer to assign a disabled employee to a particular position when the assignment will violate the employer’s “established seniority system.” 535 U.S. at 406. Here, the Respondent transferred del Valle to the first shift – the shift most desired by the Respondent’s employees – after receiving a letter from del Valle’s physician stating that he should be transferred to that shift because he was taking medication at night that might cause him to endanger his coworkers. Without notifying the Union or providing it an opportunity to bargain, the Respondent implemented the transfer, even though it maintained a seniority system governing shift assignments, and there was another second shift employee who was more senior than del Valle.

344 NLRB No. 133, p. 1. The Board went on to state that in light of Barnett, it found no merit in the Respondent’s argument that its unilateral transfer of del Valle was required under the ADA.
EXHIBIT 1
Title I of the Americans With Disabilities Act (ADA), which deals with discrimination in employment, became effective on July 26, 1992. There are potential conflicts between the requirements of the ADA and the National Labor Relations Act (NLRA). The following discussion will acquaint you with some of the issues which may arise. Due to the novel and complex issues involved, any unfair labor practice charge raising issues under the Americans with Disabilities Act must be referred to the Division of Advice for review.

I. Potential Conflicts between the Duty to Bargain under the NLRA and the Duty to Comply with the Americans with Disabilities Act

An employer’s duty to bargain in good faith as defined by Section 8(a)(5) and 8(d) of the NLRA forbids an employer to change working conditions of employees represented by a union without first giving the union notice of the proposed change and an opportunity to bargain.\(^1\) Further, during the term of a collective bargaining agreement, neither party may alter terms and conditions of employment contained in the agreement without the consent of the other party.\(^2\) Moreover, Section 8(d) specifically authorizes parties to a labor agreement to refuse to “discuss or agree to any modification” during the term of the contract.

The ADA prohibits covered entities, which include employers and labor organizations, from discriminating against qualified individuals with a disability because of that disability.\(^3\) Among the forms of discrimination prohibited

\(^1\) NLRB \text{v.} Katz, 369 U.S. 736 (1962).

\(^2\) See, e.g., Oak Cliff-Golman Bakery Co., 202 NLRB 614, 207 NLRB 1063 (1973), enf'd. 505 F.2d 1302 (5th Cir. 1974).

\(^3\) ADA Section 102(a), 42 U.S.C. 12112(a).
are "not making reasonable accommodations to the known physical or mental limitations" of otherwise qualified disabled applicants or employees, unless the accommodation would impose an "undue hardship" on the operation of the business of such covered entity. However, if 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. Discussed below are several of the types of violations that may be alleged and the factors that may affect the consideration of whether such a charge would be found meritorious.

A. Accommodation as a Section 8(d) Term or Condition of Employment

A unilateral "reasonable accommodation" would violate Section 8(a)(5) only if it effects 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

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4 ADA Section 102(b)(5)(A), 42 U.S.C. 12112(b)(5)(A).
5 As noted, the ADA prohibits employers and other covered entities from discriminating against applicants. Except in certain limited circumstances, however, an employer has no duty to bargain with a union over the application process or employee selection criteria. Star Tribune, 295 NLRA 543, 545-548 (1989). Compare Houston Chapter, Associated General Contractors, 143 NLRA 409, 411-412 (1963), enf'd 349 F.2d 449 (5th Cir. 1965) (duty to bargain over standards for hiring hall). Consequently, outside of the hiring hall context, an employer has no duty to bargain about "reasonable accommodations" for applicants with a disability, in the absence of an impact upon members of the bargaining unit.
6 These issues might also arise in the context of a Section 8(b)(3) charge filed by an employer that sought to bargain over a proposed accommodation and was met with a refusal to bargain. The merits of such charges are discussed in Section B, below.
7 See, e.g., LaMousse, 259 NLRA 37, 48-49 (1981), enf'd. (mem) 112 LRRM 3168 (9th Cir. 1983) (five minute increase in break time not material substantial and significant).
changes in terms and conditions of employment. In that case, an employer would have no duty to bargain over the implementation of such accommodations. A change that is inconsistent with an established employment practice such as a seniority system, defined job classifications or a disability plan would more likely be a change in Section 9(d) terms and conditions.

B. Intervening Enactment of ADA as a Defense

The employer may argue that its obligation to comply with the ADA privileges it to act unilaterally. The Board has held that where changes in working conditions are mandated by changes in law, an employer does not violate Section 8(a)(5) by making such changes. But, where the change in law leaves the employer with some discretion with regard to compliance, the employer violates Section 8(a)(5) by unilaterally changing terms and conditions to bring itself into compliance.

It seems unlikely that an employer would be privileged to unilaterally change working conditions to achieve compliance with the ADA without giving a union any notice or opportunity to bargain. First, the ADA explicitly recognizes that "undue hardship" is a defense to a charge that an

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8 See, e.g., Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976) (change from manually completed timecards to timeclock).
9 See, e.g., Southern California Edison Co., 284 NLRB 1205, n.1, 1210-1211 (1987) (unilateral change in temporary work assignment practices for disabled employees); Jones Dairy Farm, 295 NLRB 113, 113-116 (1989), enf'd. 907 F.2d 1021 (7th Cir. 1990) (midterm implementation of rehabilitation program for temporarily disabled employees).
10 See, e.g., Murphy Oil USA, 286 NLRB 1039, 1042 (1987); Standard Candy Co., 147 NLRB 1070, 1073 (1964).
11 Ibid.
12 As long as the proposed modification would not constitute a mid-term modification, if an employer gives adequate notice and opportunity to bargain and the union fails to respond, the union will be deemed to have waived its right to bargain and the employer may lawfully implement. As to mid-term modifications, see discussion below.
employer has failed to make a reasonable accommodation. The legislative history makes clear that the terms of a collective bargaining agreement may be relevant, albeit not determinative, of whether a particular accommodation would cause undue hardship. Further, the EEOC's implementing Regulations regarding the ADA provide that it may be a defense to a charge of discrimination under the ADA that a challenged action is required or necessitated by another Federal law or regulation or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required. Thus, it would appear that, in most cases, an employer has sufficient discretion under the ADA to warrant requiring it to afford a union notice and an opportunity to bargain about a proposed accommodation.

A more difficult issue is the scope of the duty to bargain, during the term of a collective bargaining agreement, over a proposed accommodation that is inconsistent with

13 ADA Section 102(b)(5)(A), 42 U.S.C. 12112(b)(5)(A); Regulations to Implement the Equal Employment Provisions of Americans with Disabilities Act, 29 C.F.R. 1630, 1630.9(a).

14 "The collective bargaining agreement could be relevant, however, in determining whether a particular accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue." House Report 101-485, Part 2 (May 15, 1990), p. 63.

15 29 C.F.R. 1630.15(e).

16 It might be argued that if a proposed accommodation is the only effective accommodation in the circumstances and is not an "undue hardship," an employer is mandated by the ADA to make that accommodation and would have no duty to bargain under the principles discussed in cases cited in n. 10, above. Before a Region submits a case that raises this defense to the Division of Advice, 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.
the provisions of that agreement. Two questions are presented:

(1) When a party to the contract (either an employer or a union) requests bargaining over such a proposed accommodation, may the other party rely on its right under Section 8(d) to refuse to discuss any modification of the agreement during the term of the contract or, alternatively, does the creation of new legal duties under the ADA impose on both employers and unions a concomitant duty under the NLRA, at least, to bargain over the proposed accommodation?

(2) If the parties are unable to reach agreement on an acceptable accommodation, does an employer violate its Section 8(d) obligation to refrain from altering the contract without the consent of the union if it implements the proposed accommodation over the union’s objection?

It is beyond the scope of this Memorandum to address all the competing policy considerations presented by these questions and to state definitively how to resolve charges raising them. Certain points can be made. 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. As to whether parties can be compelled to bargain mid-term over proposed accommodations that would violate a facially neutral contractual provision or whether an employer violates Section 8(a)(5) by implementing, over a union’s objection, an accommodation that would violate such a contract provision but is also the only effective accommodation in a given

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17 In an appendix to the ADA implementing Regulations, the EEOC has explained that the ADA does not require an employer to provide the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated." 29 C.F.R. Appendix Section 1630.9.
circumstance, further guidance will be forthcoming as charges raising these issues are resolved.\textsuperscript{18}

C. Direct Dealing

The ADA requires that the employer consult with the disabled employee about the accommodation.\textsuperscript{19} With respect to accommodations that would change terms and conditions of employment, provisos to Section 9(a) of the NLRA authorize an employer and employee to meet and adjust grievances but only "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: [and] further, [t]hat the bargaining representative has been given opportunity to be present at such adjustment." Thus, an employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with an affected union may be liable for "direct dealing" with the employee.\textsuperscript{20}

\textsuperscript{18} Charges that turn on the interpretation of a contract will be deferred to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971). Where, however, there is no claim that the accommodation is even arguably consistent with the contract, whether the implementation of the accommodation violates an employer's duty to bargain does not turn on any underlying dispute over the terms of the contract and Collyer deferral is unwarranted. See, Oak Cliff-Golman Baking Co., 207 NLRB at 1063.

\textsuperscript{19} 29 C.F.R. 1630.2(c)(3).

\textsuperscript{20} See, generally, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-684 (1944). Compare e.g., United States Postal Service, 281 NLRB 1015, 1015-1018; United States Postal Service, 281 NLRB 1031, 1032 (1986), vacated and remanded 872 F.2d 1027 (6th Cir. 1989) (unpublished) (employer violated 8(a)(5) by excluding union from settlement conference regarding EEO complaints that were also the subject of grievances) and Carbonex Coal Co., 262 NLRB 1306, 1313 (1982) (employer violated 8(a)(5) by implementing change in shift hours at request of employees without giving union notice or opportunity to bargain) with Public Service Co. of Colorado, 301 NLRB No. 33, slip op. at 1, n.2 (participation in court-ordered EEO settlement discussions without affording union opportunity to be present not unlawful where employer directed employee's attorney to include union in settlement process and did not seek to settle griev-ance in union's absence).
D. Duty to Provide Information

The ADA obliges an employer to treat as confidential, information that it obtains regarding an applicant’s or an employee’s medical condition or history. This obligation may pose a conflict with an employer’s duty under the NLRA to provide relevant information requested by the union. Where an employer asserts a legitimate claim of confidentiality in response to a request for relevant information, the Board balances the union’s need for the information against the assertion of confidentiality. Before the Board engages in a full balancing of the countervailing interests, the Board will direct the parties to bargain over means to accommodate both interests.

II. A Union’s Duty of Fair Representation under the NLRA and Its Obligations under the ADA

A union’s action or inaction regarding disabled employees may give rise to two types of allegations that the union violated its duty of fair representation. First, a disabled employee may allege that a union violated that duty by, for example, discriminating in its operation of a hiring hall or apprenticeship program, by entering into facially discriminatory contract provisions or by discriminatorily responding to a request that an employer make a reasonable accommodation to the employee’s disability.

Second, non-disabled employees who object to an agreement a union has entered into to accommodate a disabled

21 Section 102(c)(3) and (4), 42 U.S.C. 12112(d)(3)(4); 29 C.F.R. 1630.14.
24 The Board has held that a union violates its duty of fair representation by discriminating against employees it represents based on “invidious” considerations such as disability. See, e.g., Independent Metal Workers Union Local No. 1 (Hughes Tool Co.), 147 NLRB 1573, 1574-1575, 1602-1604 (1964) (race discrimination); Bell & Howell Co., 230 NLRB 420, 420-423 (1977), enf’d 598 F.2d 136 (D.C. Cir. 1979) (sex discrimination).
employee might charge that the union’s actions on behalf of the disabled employee violated its duty of fair representation to other employees. Regions should analyze such charges under traditional principles regarding a union’s duty of fair representation in resolving potential conflicts within the bargaining unit.25

III. Concerted Activities

Employees’ concerted activities regarding disability issues that affect wages, hours and working conditions are protected by Section 7.26 Accordingly, an employer vio-

25 A union’s obligation to refrain from arbitrary conduct toward the employees it represents subjects its actions to some review for rationality. Air Line Pilots Assn. v. O’Neill, U.S. 111 S. Ct. 1127, 1133-1134, 136 LRRM 2721, 2725 (1991). Nevertheless, “[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.” Ford v. Huffman, 345 U.S. 330, 338 (1953). A union is held to the same standard of conduct in the negotiation of contracts as it is in the administration and enforcement of contracts. Air Line Pilots, 111 S. Ct. at 1135, 136 LRRM 2725-2726.

26 Cf. Cristy Janitorial Service, 271 NLRB 857 (1984) (concerted complaints to Department of Labor protected activity). Inasmuch as Section 7 protects only concerted activities, however, the action of a single employee is not protected unless the employee acts with the authorization of other employees or with the intent to induce group action. Meyers Industries, 281 NLRB 882, 885-887 (1986), enf’d. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987). Furthermore, the protected nature of employee activities that are in derogation of their collective bargaining representative must be determined under the principles of Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) and its progeny.
lates Section 8(a)(1) by retaliating against employees for engaging in such activity or by threatening to retaliate against such activity.

Jerry M. Hunter
General Counsel

EXHIBIT 2
Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission (November 16, 1993)

The General Counsel of the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) enter into this agreement in order to establish a procedure for coordinating the enforcement of Title I of the Americans with Disabilities Act (ADA) and Section 8 of the National Labor Relations Act (NLRA).

1. When a charge is filed with a Regional Office of the NLRB alleging that the duty to bargain under Section 8(a)(5), Section 8(b)(3) and/or Section 8(d) of the NLRA was breached by either an employer or a union, and the resolution of that charge would require an interpretation of the charged party's duties under the ADA, the General Counsel will, upon completion of investigation, consult with the EEOC's Office of Legal Counsel regarding the applicability of the ADA.

2. When a charge is filed with a field office of the EEOC alleging discrimination by either an employer or a union in violation of the ADA, and the resolution of that charge would require an interpretation of the charged party's duties under the NLRA, the EEOC will, upon completion of the investigation, consult with the NLRB's Associate General Counsel, Division of Advice regarding the applicability of the NLRA.

3. EEOC and the NLRB shall share any information relating to the employment policies and practices of a respondent, employer or union that may assist each agency in carrying out its responsibilities under this agreement. Such information shall include, but is not limited to, complaints, charges, and investigative files.

4. (a) When the NLRB receives information obtained by EEOC, it shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended, (42 USC 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, as would EEOC, except in cases where the Board receives the same information from a source independent of the EEOC. Questions concerning the confidentiality requirements of Title I shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel, EEOC.

(b) NLRB documents which are shared during this process constitute part of the Agency's investigative files compiled for law enforcement purposes. In the event that any of the parties to the EEOC proceeding, or any other persons, request permission to inspect or copy any of these documents, apart from documents that are already in the public domain (such as pleadings), EEOC will resist the demand for their production. Consistent with the Freedom of Information Act, the NLRB would not produce affidavits or other non-public evidentiary materials while a case is pending. However, after a case is closed, the NLRB is willing to release some case file documents pursuant to a request under limited circumstances. Accordingly, before releasing or disclosing information from any of the materials...
disclosed to it, EEOC will obtain the permission of the General Counsel of the NLRB pursuant to 29 CFR Section 102.118.

5. When an unfair labor practice charge is filed by an individual with a disability alleging that his/her collective bargaining representative has failed to fairly represent him/her, and that individual has also filed a charge with the EEOC alleging that, by the same conduct, the collective bargaining representative has violated the ADA, the NLRB will conduct a preliminary investigation. If the charge is clearly nonmeritorious, the NLRB, absent withdrawal, will dismiss it. In all other cases, the NLRB will defer the case for a reasonable period, pending the completion of the investigation by EEOC. If EEOC finds cause to believe that the ADA has been violated and successfully conciliates the charge, and further proceedings are not necessary to effectuate the purposes of the NLRA, the NLRB will seek a withdrawal of the charge before it. Absent such withdrawal, the NLRB will dismiss. If conciliation fails, the NLRB will consult with the EEOC and will determine whether to defer the case for a further period or to resume its processing of the case. If the EEOC finds no cause to believe that discrimination has occurred, the NLRB will resume processing of the unfair labor practice charge.

6. Where the NLRB has deferred an unfair labor practice charge under paragraph 5. above, EEOC will not defer such charges to the State FEP agency.

7. When an unfair labor practice charge is filed by an individual with a disability alleging that his/her collective bargaining representative has failed to fairly represent him/her regarding accommodating his/her disability in the workplace, and that disabled individual has not filed a charge with the EEOC alleging that the collective bargaining representative has violated the ADA, the NLRB will notify the charging party in writing of the right to file such a charge under the ADA. The NLRB will then process the charge in the normal course. However, if the charging party or the EEOC notifies the NLRB of the filing of a charge with the EEOC, then the NLRB will process the charge in accordance with paragraph 5. above.

8. If a charge is filed by an individual without a disability, alleging that an accommodation provided to an individual with a disability has violated the NLRA, the procedure in paragraph 1. above will be followed.

9. The parties to this agreement will engage in periodic consultations in order to review its implementation.

10. (a) This agreement may be modified at any time, provided that such modification is by mutual consent and in writing.

(b) This agreement may be terminated by either party under 30 days’ written notice of the other party.

Jerry M. Hunter  
General Counsel  
National Labor Relations Board

Tony E. Gallegos  
Chairman  
Equal Employment Opportunity Commission

November 16, 1993