A LITTLER PRESENTATION

Tackling the Intersection Among the ADA, the FMLA, and Collective Bargaining Agreements

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Littler®

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Why Are We Here?

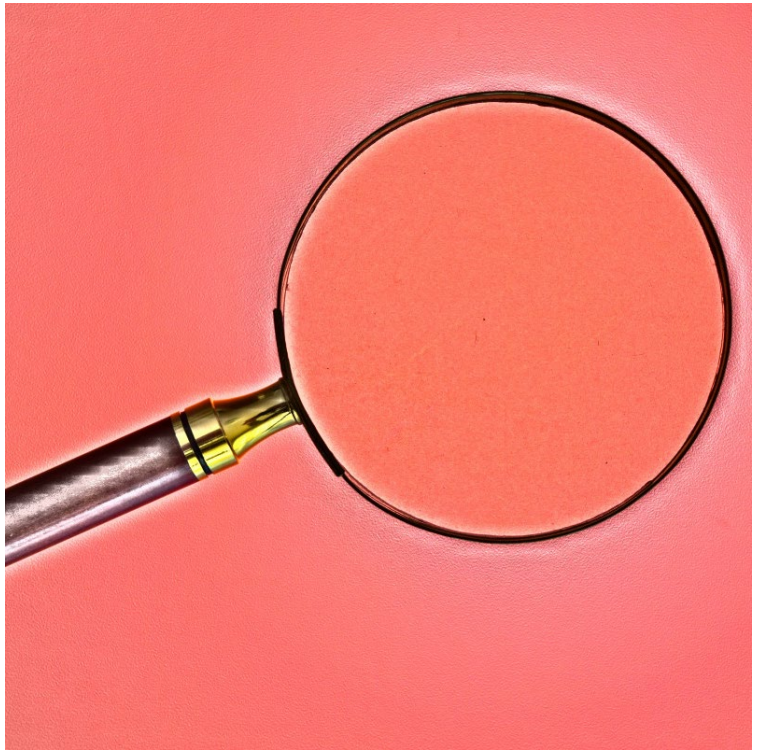
- Accommodation requests often trigger a variety of different legal obligations for employers.
- While these legal obligations often interact harmoniously, there are also situations in which the overlap amongst them creates conflict or confusion.
- It is important to have a game plan in place to ensure these varying legal obligations are being identified and considered when responding to accommodation requests.

Today's Agenda

- Issue spotting
- Evaluating your legal obligations
- Avoiding and addressing conflicting legal obligations
- Review of case studies
- Takeaways

Issue Spotting

- It is usually the employer's ultimate burden to "catch" the need for accommodation
- No magic words required
- Requests can come from:
  - The applicant/employee;
  - A family member of the applicant/employee;
  - The union; or
  - The applicant's/employee's healthcare professional
- Listen for cues
  - And ensure managers and supervisors are trained on recognizing accommodation requests



Issue Spotting: Common Scenarios

Scenario 1	Scenario 2	Scenario 3	Scenario 4
• An employee submits a doctor's note stating that he has restrictions or is otherwise unable to do some aspect of his job.	• An employee requests a leave of absence for a pregnancy-related condition.	• An employee explains during the course of a counseling or disciplinary meeting that he has a medical problem causing his performance deficiencies.	• A manager notices a significant change in an employee's behavior, work patterns or conduct and has reason to believe they may be related to a medical condition.

Issue Spotting: Common Scenarios

Scenario 5	Scenario 6	Scenario 7	Scenario 8
• An employee suffers an on-the-job injury that renders him unable to work for a period of time or that requires some modification to his job or work environment.	• An employee provides information—in person, via telephone, from a family member, etc.—about a medical problem that may require time off of work, either on occasion, or all at once.	• An employee raises an issue about her work schedule as it relates to a medical condition.	• An employee is unable to return to work after a leave because she continues to seek medical treatment.

What's In Your Leave and Accommodations Toolbox?

- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Workers' Compensation Laws
- Collective Bargaining Agreements
- Short-Term or Long-Term Disability Insurance Plans
- Pregnancy Disability/Maternity Leave Laws
- Handbook Provisions
- State and Local Discrimination Statutes
- State and Local Sick Leave Laws

Evaluating Your Legal Obligations: The ADA

The ADA's Reasonable Accommodation Obligation

- Reasonable accommodations…
- For qualified individuals…
- With known disabilities…
- To enable them to perform the essential functions of the job…
- Unless it poses an undue hardship.

What is a “Reasonable Accommodation”?

- Any change or adjustment to a job, work environment, or the way things are customarily done that enables an individual to perform essential job functions, apply for a job, or enjoy equal access to benefits and privileges of employment.
  - May include modifications to the work environment, job duties, or application process to ensure equal opportunities for individuals with disabilities or other protected conditions
- There are generally three categories of ADA accommodations:
  - Ergonomic (equipment, devices, workspace)
  - Job changes (such as schedule changes or task modifications)
  - Leaves of absence (intermittent or block)

Evaluating Your Legal Obligations: The FMLA

Leaves of Absence

- As mentioned, one category of ADA accommodations may be a leave of absence
  - Leaves of absence may involve other legal obligations, such as state and federal FMLA
- The ADA and FMLA work hand in hand when:
  - An employee qualifies for state or federal FMLA AND such time off constitutes a reasonable accommodation;
  - An employee is ineligible for state or federal FMLA but is eligible for leave as an accommodation; ***OR***
  - An employee has exhausted his/her leave entitled under the FMLA but his eligible for additional leave as an accommodation.

When Does the FMLA Apply?

- Does the employee work for a covered employer (50+ employees total)?
- Has the employee accumulated 12 months of service?
- Has the employee worked 1,250 hours in last 12 months?
- Does the employee have a qualifying reason for leave?
  - Birth or placement of a child (12 weeks in a single 12-month period)
  - To care for a spouse, parent or child with a serious health condition (12 weeks)
  - The employee's own serious health condition (12 weeks)
  - A qualifying exigency (12 weeks)
  - To care for a covered servicemember (26 weeks)
- *Always check for state FMLA-equivalent laws as well and be aware of potential differences*

Key Differences Between the ADA and FMLA

- The ADA takes effect day 1 (and before!)
- We are out of the medical diagnosis business
  - Much less emphasis on the specific condition the employee has
- All about the interactive process and ***accommodation***
  - Extremely individualized analysis
- BUT: Negotiation and pushback may be an option (unlike the FMLA)
  - Employee is entitled to reasonable accommodation, not employee's preferred accommodation.

Evaluate Your Legal Obligations: Collective Bargaining and the NLRA

Evaluate Your Obligations: The NLRA

- For unionized employers, there are additional pieces of the puzzle…
  - Under the NLRA, the union is the exclusive representative of the employees, and an employer is prohibited from dealing directly with employees concerning the terms and conditions of employment.
  - The NLRA also prohibits an employer from changing the terms and conditions of employment without offering the union an opportunity to bargain over the proposed changes, or the effects of those changes, as the case may be.

Evaluating Your Obligations: Collective Bargaining

Does the CBA contain any provisions on leaves and accommodations?

- Does it mandate and/or limit certain accommodations (e.g., light duty, leaves of absence, etc.)?
- Does it mandate and/or permit leave for a set term?
- Does it require certain wage replacement or other benefits during leave?
- Does it have certain reinstatement requirements?

If the CBA is silent on these issues, what are your obligations?

- Can you deal with the employee directly?
- Do you need to bargain with the union over potential accommodations?

Evaluating Your Obligations: Other Considerations

Evaluate Your Obligations: Other Issues

Workers' Compensation*	State Laws	Short-Term or Long-Term Disability Insurance Plans*	Handbook
• Is an "on the job" injury involved? • Could the employee be eligible to collect workers' compensation benefits?	• Does the employee qualify for state or local sick leave? • Does the employee qualify for state or local pregnancy or maternity leave or accommodations? • Do state anti-discrimination laws mandate other accommodations?	• Is the employee enrolled in and/or otherwise eligible for disability benefits either under a private plan or under state law?	• Does your handbook provide leave and/or benefits beyond what the law requires?

*Remember that workers' compensation and STD/LTD are wage replacement benefits, not types of leave.

- If an employee is receiving workers' compensation (or STD/LTD benefits) you should assess what kind of leave they are eligible for.
- FMLA leave (and/or ADA leave) often is the leave type an employee is on when they are receiving WC (or STD/LTD) benefits.

Finding a Balanced Approach

Finding a Balanced Approach

- How do you balance your legal obligations under the ADA, FMLA, and relevant state laws with your NLRA obligations related to the union and the CBA?

- Critical to review the terms of any applicable CBA and administer leave policies in accordance with the CBA, FMLA, ADA, and any other relevant federal, state, or local laws.

Real World Examples

Darvin Furniture, 124 BNA LA 821 (Van Kalker, 2007)

- The CBA stated:

  "The Employer will provide medical leaves of absence in accordance with the provisions of the Family and Medical Leave Act (FMLA). The provisions of the FMLA shall be considered part of the Agreement."

- The Union alleged the employer violated the CBA when it terminated the employee after the employee was unable to return to work following a leave of absence and the employer claimed it was not able to extend the leave without posing an undue hardship on its operations.
- The arbitrator held that the CBA did not mandate leave beyond that required under the FMLA, and because the employer provided leave in compliance with the FMLA, there was no violation of the CBA.

Real World Examples

Bi-State Dev. Agency, 138 BNA LA 1141 (Finkin, 2018)

- The Arbitrator held that "an arbitrator is a creature of the parties' collective agreement and is not licensed by them to consider external law unless the collective bargaining agreement directs him or her to do so."
- However, because the CBA detailed employee entitlements to "medical leave," including FMLA, and also contained provisions on how the employer would treat disability claims under the ADA, the arbitrator agreed to interpret the CBA based on those laws.
- The Arbitrator held that because the employer failed to abide by its medical leave policy, which allowed for an "additional short leave," the employer violated the CBA in terminating the employee.

Real World Examples

Twinsburg Board of Education, 119 BNA LA 54 (Chattman, 2003)

- The issue was whether the Board of Education violated the collective bargaining agreement when it failed to reassign an employee to "light duty" when the employee injured her back and could no longer lift and toilet older students.
- Though not explicitly referenced in the CBA, the Arbitrator held the Board of Education had a legal obligation to reasonably accommodate an individual deemed "disabled" under the ADA, holding "[t]here is no question that the School Board must adhere to the provisions of the ADA under both state and federal law-that concept is incorporated into the collective bargaining agreement as well as in 'Employee Rights' section."
- The Arbitrator held that because the employee could not meet the standard of being categorized as disabled under the ADA, the Board of Education was not obligated to accommodate the employee by assigning her to a non-lifting position.

Handling Conflicting Obligations

- The ADA prohibits employers and unions from entering into collective bargaining agreements that discriminate against individuals protected by the ADA.
- Employees cannot waive their prospective rights under the FMLA.
  - For example, employees or their collective bargaining representatives "cannot trade off the right to take FMLA leave against some other benefit offered by the employer." 29 CFR § 825.220
  - For example, CBA provisions that provide for reinstatement to a position that is not equivalent to the employee's prior position are superseded by the FMLA.
- An employer may be obligated to observe any employment benefit program or plan that provides *greater* family or medical leave rights to employees than the rights established by the FMLA.

ADA vs. Collective Bargaining

- While the ADA encourages one-on-one negotiations with employees regarding potential accommodations for the employee vs. undue burdens for the employer, the NLRA prohibits direct dealing with represented employees.
- Hence the troubling intersection of these laws.
- So, what should employers do?

General Counsel Memo 92-9

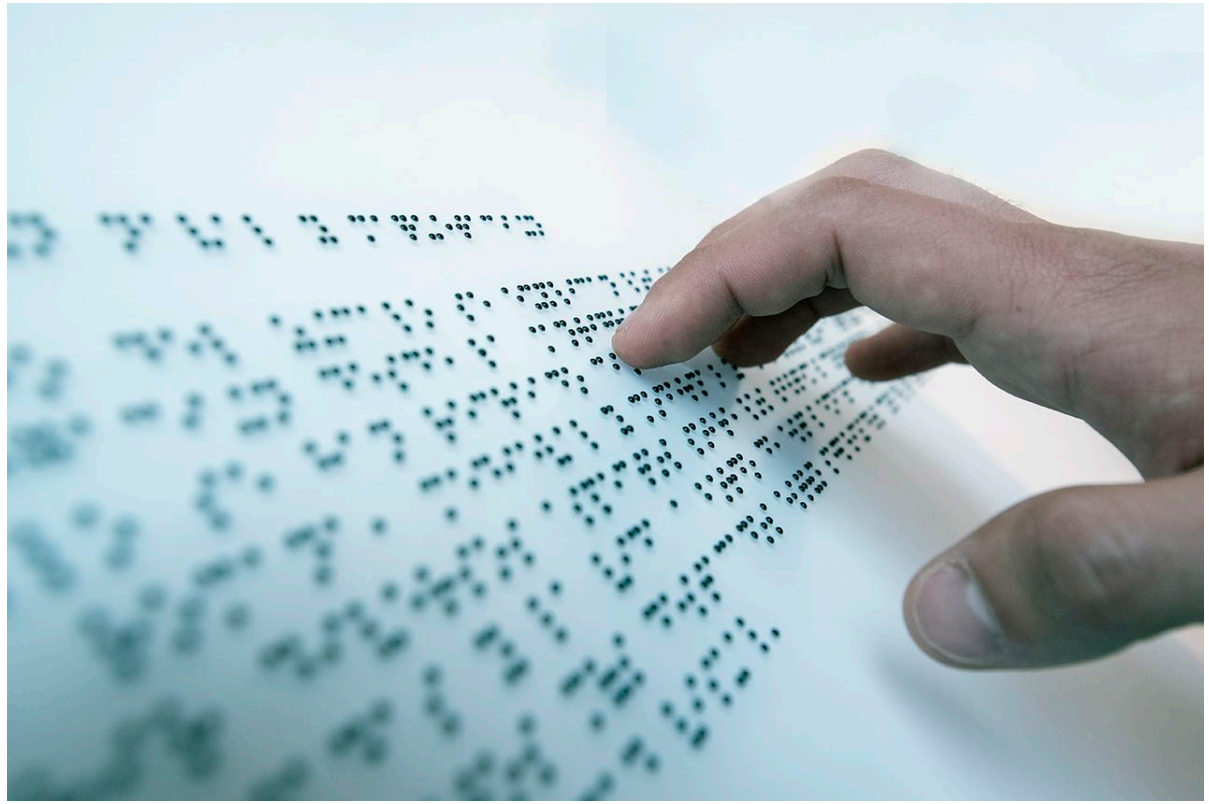
- In 1992, the General Counsel of the NLRB issued GC Memo 92-9 in response to the enactment of the ADA (1990).
- This memo set forth that employers should not directly deal with employees over ADA matters.
  - This premise is bolstered by the ADA Technical Assistance Manual on Employment Provisions, which encourages employers to consult with the union regarding acceptable accommodations.
  - Application of Section 9(a) of the NLRA.
- The Guidance Memo provides that, in most instances, an employer must bargain with a union over a reasonable accommodation request from an employee.
  - **2 exceptions to this requirement:**
    - If the change in working conditions is mandatory under the ADA.
    - If the proposed change is "relatively minor."

What is a “Mandatory” Change Under the ADA?

- If the accommodation is mandatory under the ADA, an employer is permitted to make a unilateral change without bargaining with the Union.
  - It is advisable to provide the Union with notice of the accommodation and change prior to implementing it, though.
  - For example, if a leave of absence is the one and only accommodation that would enable the employee to perform the essential functions of the job.
- If an employer has “discretion” to choose from multiple accommodations, then the accommodation is not “mandatory,” and the employer must bargain with the union before implementing the accommodation.
  - For example, if various accommodation options are available such as job restructuring, leave of absence, schedule modifications, equipment modifications, etc.

What are “Minor changes” under the ADA?

- Some examples include:
  - Increasing an employees’ break time by 5 minutes.
  - Adding blocks to a desk (think standing desks today)
  - Providing an accessible ramp
  - Adding Braille signs



What Constitutes a Conflict with the CBA?

- Seniority is the most likely CBA provision to conflict with requests for ADA accommodations.
- U.S. Circuit Courts have held that if a proposed ADA accommodation violates a seniority provision, then the accommodation is ***not*** required.
- However, there must be a ***true conflict*** between the ADA accommodation and the seniority provision
  - *Laurin v. Providence Hosp.*, 150 F.3d 52 (1st Cir. 1998) (employer not required to exempt nurse with fatigue-induced seizures from shift rotation requirement because such accommodation would require more senior nurses to cover plaintiff's evening and night shifts, in violation of CBA).
  - *Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 677 (9th Cir. 2001), *as amended* (Mar. 27, 2001)(employee's proposed accommodation was per se unreasonable because it directly conflicted with bona fide seniority system established under CBA).

Take A Proactive Approach: Bargain To Your Advantage

- Get ahead of potential conflicts between and among the ADA, FMLA, and NLRA through collective bargaining.
  - Consider including standardized procedures and criteria that are equal to or greater than protections afforded to employees under the ADA and FMLA (and any state equivalents)
    - Outline the process for requesting accommodations, the types of accommodations available, etc.
    - Consult relevant laws accordingly
- Where appropriate, involve the Union in discussions surrounding leaves and accommodations.

One Example of a Potential CBA Provision to Consider

"The Employer has full authority to implement any measures which, in its discretion, it deems necessary for legal compliance with the Americans With Disabilities Act ("ADA") or any applicable Federal, State, or Local law, ordinance or regulation relating to discrimination on the basis of disability, or to accommodate a disability pursuant to such law, ordinance or regulation. The Employer shall have no obligation to disclose to the Union or its representatives any confidential medical records or the confidential medical information in those records, of any employee of the Employer, whether or not a member of the bargaining unit, absent the express written consent and release signed by the employee to whom such confidential records or information pertains."

Another Example of a Potential CBA Provision to Consider

Sample Non-Discrimination Provision

The Employer and the Union agree the provisions of this Agreement shall be applied fairly to all employees, in a manner that does not discriminate because of their race, creed, color, sex, national origin, religion, age, gender identity or expression, veteran status, marital status, citizenship, physical or mental disability, union membership, sexual orientation, or any other status protected by applicable law.

Any dispute regarding the interpretation and compliance with this Article may be subject to the grievance procedure, but absent resolution through the grievance procedure, it shall not be submitted to arbitration, and shall instead be resolved through the appropriate federal or state EEO agencies and/or court, unless asserted in the context of other alleged violations of this Agreement (for example, a grievance over a termination).

Handling Union Requests for Information

Under the ADA, employers are required to treat all medical information regarding bargaining unit employees as confidential.

The confidentiality requirement can create issues when a union requests information that is protected under the ADA.

Under the 1992 GC Memo 92-9, the NLRB requires an employer and the union to bargain over this information before considering whether an employer has a legitimate confidentiality claim.

Handling Union Requests for Information

- EEOC's 1996 Opinion Letter:
  - *"The Commission believes that the requirements of the ADA and the NLRA can be harmoniously construed and concludes that, as delineated herein, Title I of the ADA permits an employer to give a union, in its role as bargaining unit representative, medical information necessary to the ADA reasonable accommodation process to enable the employer and union to make reasonable accommodation determinations consistent with the ADA."*
- *Roseburg Forest Prods. Co.*, 331 NLRB 999 (2000):
  - In relying, in part, on the EEOC's 1996 Opinion Letter, the NLRB held that the ADA permitted the Employer to give the union only the medical information about an employee that was *strictly necessary* for the union to meet its collective bargaining obligations during the accommodation process.
  - The Board directed the parties to bargain in good faith to reach an agreement balancing the union's right of access to relevant information against the employer's legitimate confidentiality concerns.

Case Studies

Case Study #1

- A union employee suffers an on-the-job injury and goes out on a three-month leave of absence. When it comes time for the employee to return to work, she reports that her injury is not fully healed and she is unable to return to her original role. She requests light duty, but you do not have any light duty roles available for her.

- What legal obligations are at play?
- How should you proceed?

Case Study #2

- An employee has been out on leave for an extended period of time. Although she exhausted her 12 weeks of FMLA leave, her employer provided her with an additional three months of leave as a reasonable accommodation. She is now requesting to come back to work, but her restrictions have not been fully lifted. Instead of returning to her original role, she is asking for a part-time role. The employer does not have any part-time roles available but is willing to split a full-time role into two separate part-time roles in order to accommodate the employee. The Union rejects the employer's offer to do so, claiming that the CBA explicitly prohibits splitting the full-time role into two part-time roles.
- What legal obligations are at play?
- How should the employer proceed?

Case Study #3

- During CBA negotiations, the union proposes language stating that, at the end of any leave of absence lasting six months or less, the employee will be entitled to return to the same position held immediately prior to the leave of absence. The employer counter-proposes language stating that the employee will only be entitled to return to the same position at the end of a leave of absence lasting three months or less.
  - What legal obligations are at play?
  - Any issue with the employer's proposal?

Case Study #4

- During contract negotiations, the parties agree to a provision that limits work-from-home arrangements by putting a radius rule in effect for in-person attendance (i.e. if you live 30 miles or less away from the facility, you have to come in three days/week. If you don't, then you can work 100% remote).
  - An employee that lives 30 miles or less away from the facility has requested to work 100% remote as an accommodation for a medical condition.
    - Does the employer need to accommodate this request?
    - Can the radius restriction otherwise be justified from an ADA perspective?

Case Study #5

- A union employee requests an accommodation that would eliminate her from working any overnight shifts. The CBA has a bidding system for creating schedules. The employee's accommodation request would require that the employer excuse her from the bidding system to allow her to pick her shifts without the bidding system's limitations. In other words, the requested accommodation would violate the CBA.
  - What legal obligations are at play?
  - Does the employer need to provide the accommodation?

Questions