



Employment, Benefits & Labor Relations Quarterly is a newsletter addressing current issues written by attorneys who regularly provide counsel in these changing areas of law.

### How Can We Help You?: Understanding Reasonable Accommodation Under the Americans with Disabilities Act and its Recent Amendment

By: Sara Ackermann

**B**y now all employers should know about the Americans with Disabilities Act Amendments Act (ADAAA). The ADAAA overturned several U.S. Supreme Court decisions that Congress believed had interpreted the definition of “disability” too narrowly. Though the ADAAA went into effect on January 1, 2009, the EEOC did not issue its new regulations until May 20, 2011. Now, employers are struggling to understand whether the ADAAA has changed their obligation to provide “reasonable accommodation” under federal law.

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### Concealed Carry Law: Are Your Employees Armed or Not?

By: Dean Dietrich

**T**he new Concealed Carry Law (Section 176.60 of the Wisconsin Statutes) is a substitute amendment to the current law governing the carrying of concealed weapons. Under the new law, a “licensee” may carry a concealed weapon anywhere in Wisconsin except as provided in the limited prohibited areas.

#### LICENSE REQUIREMENTS

A “weapon” is defined as a “handgun, an electric weapon, a knife other than a switchblade, or a billy club.”

Applications for a license, or permit, are submitted to the Department of Justice (DOJ) who then reviews the applications, and issues licenses to those “qualified individuals.” Qualified individuals must be 21 years or older, Wisconsin residents, and provide proof of firearm training.



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Calendars

November 4, 2011 | Annual Employment, Benefits & Labor Relations Conference |  
Westwood Conference Center, Wausau, WI | Additional details online at [www.ruderware.com](http://www.ruderware.com)

Permits will not be issued to individuals who have been charged with a misdemeanor or a felony and the court has prohibited the individual from possessing a dangerous weapon as a condition of bail or a condition of release. Further, those individuals prohibited under federal or state law from possessing a firearm will not be able to obtain a license.

## RESTRICTIONS

The law permits certain owners and occupants of property to prohibit persons from carrying a concealed firearm in or on the property. A person may be subject to a Class B forfeiture if he or she carries a firearm on the property after being notified not to enter or remain on the property with a specific type of firearm. In the latter case, a property owner can prohibit a person from possessing a specific type of firearm on their property or any firearm. Wis. Stat. § 943.13(1m)(b).

In addition, property owners generally possess the right to exclude others from their property. While the specific provisions below only reference prohibiting the possession of firearms, property owners may also prohibit or restrict the possession of other weapons on their property. Violations of such restrictions may also constitute a Class B forfeiture under Wis. Stat. § 943.13(1m)(b).

It is unlawful for anyone to enter or remain at a residence that the person does not own or occupy after the owner of the residence, if he or she has not leased it to another person, or the occupant of the residence, has notified the person not to enter or remain at the residence while carrying a firearm or with that type of firearm. "Residence," with respect to a single-family residence, includes the residence building and the parcel of land upon which the residence building is located. If a residence is not a single-family residence, "residence" does not include any common area of the building in which the residence is located or any common areas on the rest of the parcel of land upon which the residence building is located. Wis. Stat. § 943.13(1m)(c)1.

It is unlawful for anyone to enter or remain in the common area in a building, or on the grounds of a building, that is a residence that is not a single-family residence if the actor does not own the residence or does not occupy any part of the residence and if the owner of the residence has notified the actor not to remain in the common area or on the grounds while carrying a firearm or with that type of firearm. This provision does not apply to a part of the grounds that is used for parking if the firearm is in a vehicle driven or parked in that part. Wis. Stat. § 943.13(1m)(c)1m.

It is unlawful for any person to enter or remain in any part of a nonresidential building, grounds of a nonresidential building, or land that the person does not own or occupy after the owner of the building, grounds, or land, if that part of the building, grounds, or land has not been leased to another person, or the occupant of that part of the building, grounds, or land has notified the person not to enter or remain in that part of the building, grounds, or land while carrying a firearm. This provision does not apply to a part of a building, grounds, or land occupied by the state or by a local unit of government; to a privately or publicly owned building on the grounds of a university or college; or to the grounds of or land owned or occupied by a university or college. In addition, if the firearm is in a vehicle driven or parked in a parking facility, this provision does not apply to any part of a building, grounds, or land used as a parking facility. The law specifies that "nonresidential building" includes a nursing home, a community-based residential facility, a residential care apartment complex, an adult family home, and a hospice. Wis. Stat. § 943.13(1m)(c)2 and § 943.13(1e)(cm).

It is unlawful for any person to enter or remain in any part of land that the person does not own or occupy after the owner of the land, if that part of the land has not been leased to another person, or the occupant of that part of the land has notified the person not to enter or remain in that part of the land while carrying a firearm. This provision does not apply to a part of land occupied by the state or by a local unit of government; to a privately or publicly owned building on the grounds of a university or college; or to the grounds of or land owned or occupied by a university or college. In addition, if the firearm is in a vehicle driven or parked in a parking facility, this provision does not apply to any part of land used as a parking facility. Wis. Stat. § 943.13(1m)(c)2 and § 943.13(1e)(cm).

## EMPLOYER RESTRICTIONS

An employer may restrict the carrying of a concealed weapon by an employee during work time regardless of the location of the employee. In other words, the employer may restrict an employee from carrying a concealed weapon on the property of the employer or on any other property where the employee is engaged in business on behalf of the employer. The employer may also prohibit an employee from carrying a concealed weapon

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## How has the ADAAA impacted the concept of “reasonable accommodation?”

Under the old ADA, employers frequently litigated the issue of whether or not an employee was disabled. Under the new ADAAA, it is much easier for an employee to prove he/she is disabled because the definition of disability is greatly expanded. As a result, the critical issue in ADAAA litigation will not be, “Is this employee disabled?” but rather “Did this employer offer a reasonable accommodation?”

## What does the law say about reasonable accommodation?

The ADAAA did not modify this part of the ADA. It is still unlawful to fail to make “a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless...the accommodation would impose an undue hardship on the operator of the business...” 42 U.S.C. § 12112(b)(5)(A), (B); 29 C.F.R. §§ 1630.9, 1630.15(d).

## How should employers assess a request for reasonable accommodation?

The EEOC suggests that employers consider three questions when presented with a request for accommodation:

- Is a reasonable accommodation needed?
- If needed, will the reasonable accommodation be effective, i.e., will it allow the employee to perform his/her job?
- If effective, will providing the reasonable accommodation impose an undue hardship on the employer?

## What is an “undue hardship?”

To establish undue hardship, the employer must show that it will suffer significant difficulty or expense. This can be in the form of financial expense or administrative difficulty. Whether an undue hardship exists will be based upon a review of all resources of the employer, and the cost and difficulty of providing the accommodation based on those resources.

## Does employee morale justify a finding of “undue hardship?”

No—low morale is not enough. (For example, if other employees are complaining about the fact that a co-worker gets to start work at 9:00 a.m. when they need to arrive by 8:00.) However, if other employees are unable to perform job duties, or if business operations are disrupted, then undue hardship can be established.

## What are some examples of reasonable accommodations?

Some examples of reasonable accommodations include: job restructuring; breaks during the workday; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; and unpaid leave.

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# Are Your Workers Misclassified For Federal Tax Purposes?

By: Mary Ellen Schill & Megan Heinzelman

On September 21, 2011, the Internal Revenue Service announced that it will allow employers who have improperly classified individuals as independent contractors to reclassify them as employees and make a minimal payment for past due unpaid taxes. The program will help taxpayers achieve compliance with the tax law at a minimal cost. The program is related to the initiative at the IRS to allow taxpayers a “fresh start” and help taxpayers address their tax responsibilities.

The Voluntary Classification Settlement Program (VCSP) allows eligible taxpayers to voluntarily reclassify their workers for federal employment tax purposes and obtain partial relief. VCSP is optional, and in order to participate in the program, the taxpayer must meet certain eligibility requirements. To be eligible, the employer must:

- Have consistently treated the workers in the past as nonemployees;
- Have filed all required Forms 1099 for the misclassified individuals for the previous three years; and
- Not currently be under audit by the IRS or any other agency concerning the classification of these workers.

Interested taxpayers can apply for the program by filing Form 8952, Application for Voluntary Classification Settlement Program, at least sixty days before they want to begin treating workers as employees.

In exchange, the taxpayer will pay ten percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year. Furthermore, the taxpayer will not be liable for any interest and penalties on the liability, and will not be subject to an employment tax audit with respect to the workers’ classification for prior years. Taxpayers accepted into the program will be subject to an extended six year statute of limitations, rather than the usual three years that applies to payroll taxes.

Ruder Ware is available to assist eligible taxpayers interested in filing Form 8952, and representing the taxpayer before the IRS. Any taxpayers whose application has been accepted will need to enter into a closing agreement with the IRS to finalize the terms of the VCSP and simultaneously make full and complete payment of any amount due under the closing agreement. Ruder Ware is also available to assist in finalizing such agreements. ♦

if the employee is using a company vehicle for the conduct of business on behalf of the company. Employers normally will adopt a policy regarding the carrying of concealed weapons and incorporate such a policy into the employee handbook or company personnel policies. The restrictions can apply to anything defined as a weapon, including a handgun, electric weapon, knife, or billy club.

An employer may not prohibit an employee from carrying a concealed weapon in the employee's vehicle as a condition of employment. This holds true when the employee's vehicle is used during the course of employment, and when the vehicle is driven and parked on property used by the employer.

## IMMUNITY

The law specifically grants immunity to "an employer who does not prohibit one or more employees from carrying a concealed weapon" from any liability arising from that decision.

Employers who prohibit the carrying of concealed weapons will not receive statutory immunity. This lack of blanket immunity does not mean that employers who prohibit concealed weapons on their property will automatically be liable for damages sustained on their premise—liability will still be analyzed based upon the facts surrounding the incident.

For public and private employers alike, a sign must be posted that states weapons are not permitted. The sign must:

- Be located in a prominent place near all entrances of the building/site; and
- Be at least five inches by seven inches.

Employers must make a deliberate choice whether or not to allow employees to carry a concealed weapon during normal work hours. Most employers are inclined to prohibit the carrying of concealed weapons but each employer must make that decision recognizing that there are legal effects of such a decision. It is clear, however, that an employer may not prohibit an employee from carrying a concealed weapon when driving to work or driving onto the company parking lot, although the weapon must remain in the employee's personal vehicle at all times if a prohibition against carrying of concealed weapons is adopted. ❖

## *How Can We Help You..., Continued from Page 3*

**What if the employee can perform part of the job, but not every job duty—must the employer modify the job duties as a reasonable accommodation?**

Yes, depending upon the significance of the job duties in question, it is possible that the employer will need to modify the job. Recently the Seventh Circuit Court of Appeals addressed this issue in *Miller v. Illinois Dept. Transp.* (7th Cir. 2011.) The case involved an employee, Darrell Miller, who worked as part of a bridge repair crew for the IDOT. Miller had a fear of heights which was known by the IDOT and the employee's co-workers. However, even with this fear, Miller successfully performed his job on the crew. The court noted that although there were certain tasks that Miller was unable or unwilling to perform, the IDOT, "informally accommodated Miller by allowing other members of his team to handle those tasks for him." After four years of successful performance, Miller had a panic attack when attempting to perform a task that required him to walk on a bridge beam. After later being formally diagnosed with acrophobia, he was terminated.

Miller sued the IDOT alleging that he should have been accommodated because there were other employees who could have performed the task for him. The Seventh Circuit acknowledged that the IDOT had created a precedent by allowing individual members of the crew to substitute and reassign tasks among themselves according to individual abilities and limitations. Accordingly, the court concluded that a reasonable jury could find that Miller's request for accommodation—that other members of his team substitute for him for certain tasks—was reasonable.

**What do Wisconsin employers need to know?**

Clearly, under both federal and state disability law, Wisconsin employers have a duty to offer disabled workers a reasonable accommodation. The recent expansion of the ADA has placed a greater burden on employers under federal law. Employers should carefully consider all accommodation options, and make sure to document every step of the process when working with employees to determine the appropriate accommodation. Further, employers want to consult the Job Accommodation Network (JAN) when exploring accommodation options for employees: <http://askjan.org>. Before terminating a disabled employee who has requested an accommodation, legal counsel should be consulted to assess the risk of litigation surrounding the decision. ❖



## News From the National Labor Relations Board

### NLRB Continues to Advance Pro-Union Agenda Through Three Recent Union-Friendly Decisions

By: Bryan Symes

In a fusillade of recent activity, the National Labor Relations Board ("Board") continues to advance its pro-union agenda, further eroding many of "Bush era" employer-friendly advances. As explained below, through three recent decisions, the Board has created new pro-union standards and revived previously discarded pro-union standards.

#### 1. Specialty Healthcare and Rehabilitation Center of Mobile

At first blush, Specialty Healthcare and Rehabilitation Center of Mobile appears to be a narrow decision impacting nursing home employees. However, a closer reading of the Specialty Healthcare decision reveals that it is intended to reshape the way employee "bargaining units" are created in private-sector companies throughout the country—not surprisingly, to the advantage of labor organizations. There is no question that through Specialty Healthcare, the Board overturned long-standing Board precedent that made union organizing more cumbersome in the nonacute health care sector, which includes nursing homes. However, according to Member Brian E. Hayes (the sole dissenter in the 3-to-1 decision)("Hayes") the universally applicable (applicable beyond the health care industry) and most ominous aspect of Specialty Healthcare involves the Board's imposition of a new, heightened standard to evaluate the appropriateness of proposed bargaining units. In other words, according to Hayes, Specialty Healthcare paves the way for "an extraordinary fragmentation of the work force for collective-bargaining purposes, a situation that cannot lend itself to...labor relations stability..."

Through Specialty Healthcare, the Board endorsed the so-called "overwhelming community of interest" test for evaluating the appropriateness of proposed bargaining units where employers contest the adequacy of such proposed units as being underinclusive. In other words, employers often take the position that proposed bargaining units must be expanded to create increasingly fair, representative groups of workers for purposes of authorizing or rejecting union representation—workers who share a so-called "community of interest" (e.g., mutuality of interest in terms of wages, hours, working conditions, degree of skill and common functions).

Through Specialty Healthcare, the Board first reiterated the well settled legal principle that a proposed bargaining unit is not inappropriate simply because it is small or could conceivably include other employees with common interests. This statement is not novel. However, according to Hayes, the Board sharply departed from established precedent through adopting the "overwhelming community of interest" test to determine if proposed bargaining units should be expanded to include additional workers or job classifications. According to the majority in Specialty Healthcare:

[T]he proponent of the larger unit must demonstrate that employees in the more encompassing unit share an overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it. [emphasis added].

To illustrate the above test, the majority in Specialty Healthcare referenced a Venn diagram comparison, endorsing the position that "two groups have an overwhelming community of interest when the factors overlap almost completely." In other words—additional employees will not be added to the proposed bargaining unit absent a nearly perfect match with respect to considerations like wages, hours and working conditions. Thus, the "overwhelming community of interest" standard creates an extremely difficult threshold, one that undeniably tilts in favor of labor organizations.

According to Hayes, the majority's "overwhelming community of interest" standard is employed out of context and asks the wrong question—in Hayes's view, the Board has long asked the appropriate question, which is "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."

Venn Diagram, example

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## 2. Lamons Gasket Company – Board Turns Back the Clock on Voluntary Recognition Bar

In Lamons Gasket Company, the Board restored the pre-Bush era “recognition bar” that prevailed for over forty years prior to the Board’s 2007 Dana Corp. decision. In Lamons Gasket Company, the Board succinctly summarized the history of the so-called “recognition bar,” as follows:

“A bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period (six months to one year) in which it can be given a fair chance to succeed.” Consistent with that principle, it was settled Board law from 1966 to 2007 that an employer’s voluntary recognition of a union, based on a showing of uncoerced majority support for representation, barred the processing of an election petition for a reasonable period of time, in order to permit the employees’ chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer.”

Four years ago [2007—Dana Corp.], a sharply divided Board rejected this longstanding principle in favor of a modified recognition bar, under which a minority of employees are permitted immediately to challenge the freely expressed will of the majority...[during]...a 45-day window period after voluntary recognition...[through the filing of]...a decertification petition supported by a 30-percent showing of interest.

The Board majority did away with the Bush era “modified recognition bar” because, among other reasons, “[i]n no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights,” and the 2007 Dana Corp. decision was based on “unwarranted” “suspicion of voluntary recognition.”

According to Hayes, the majority “restore[d] an immediate bar to a secret ballot election in all voluntary recognition...situations...[s]uch a bar will preclude employees or rival unions from filing Board election petitions for a minimum of 6 months and for a maximum of 4 years. Theirs [the majority] is a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise.”



## 3. UGL-UNICCO Service Company – Board Restores Successor Bar

In UGL-UNICO Service Company, the Board restored the once discarded “successor bar” (discarded by the Board in 2002). According to the Board majority, the so-called “successor bar” operates such that:

“[W]hen a successor employer (e.g., new employer by operation of a merger or a sale of a business) acts in accordance with its legal obligation to recognize an incumbent representative of its employees [the incumbent union], the previously chosen [union] is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status.”

Through UGL-UNICO Service Company, the Board—for the first time—precisely articulated how it would interpret “reasonable period of time” for purposes of applying the “successor bar”. Specifically, the Board articulated the following three scenarios:

1. Where a new/successor employer adopts existing terms and conditions of employment [as established by predecessor employer with the incumbent union] as starting point for labor negotiations = six months, measured from the date of the first bargaining meeting.
2. Where the new/successor employer unilaterally sets initial terms and conditions of employment (assuming new/successor employer is not a so-called “perfectly clear successor,” in situations where it is clear that the new employer intends to retain all of the employees in the bargaining unit) =
  - a. Minimum of six months, measured from the date of the first bargaining meeting; or
  - b. Maximum of one-year, measured from the date of the first bargaining meeting (depending on application of several factors).
3. Where the new/successor employer and incumbent union reach an agreement during a reasonable period during which a successor bar applied AND there was no open period permitting the filing of a petition during the final year of the predecessor/old employer’s bargaining relationship with the union, the contract bar period applicable to election petitions filed by employees or rival unions will be a maximum of two years instead of three.

It is clear that through the above-referenced decisions (and the Board’s recent rule mandating employer posting of employee rights under the National Labor Relations Act), the Board continues to make life more challenging for employers who seek to avoid or disentangle from unions. Rest assured that more union-friendly changes are on the horizon. ❖

# Will Public Sector Unions File Petitions for Recertification Under the Revised Election Rules?

By: Kevin Terry

Earlier this month the Wisconsin Employment Relations Commission (WERC) issued a new set of Emergency Administrative Rules which govern the initial election process to determine whether a collective bargaining representative will continue to represent a public sector bargaining unit. The purpose of these rules is to establish a procedure for unions to determine if they have the necessary votes to enable the union to continue to represent municipal employees in the bargaining unit. The election process has been outlined by Dean Dietrich in his article from September 20, 2011. The new election process raises a number of questions about how bargaining units and employers alike will respond to the changes mandated by the new legislation.

If the strategy selected by the over twenty-three thousand (23,000) member Wisconsin State Employees Union (WSEU) is any indicator of how other public sector unions will respond to the new law, some bargaining units may take the position that filing for recertification may not be worth the risk. In explaining its decision not to file for recertification, WSEU Executive Director Marty Beil has contended that union resources could be better used in other efforts stating "We looked at the law and we find the law at best an exercise in wasted resources. We've chosen to use our resources to organize our members and advocate for our members." The reality is that many public sector unions may not want to take the chance that they will suffer the embarrassment of losing the right to represent a bargaining unit under the new rules.

With the changes to the election process, unions have to now ask the tough question of whether filing for recertification is the appropriate strategy going forward. The reason is that the risk of not receiving enough votes has been heightened with the new election laws. Remember, the bargaining representative must achieve a positive vote from at least 51% of all *eligible voters* in order to be certified. This is a big change from the former election procedures where if the bargaining representative received 51% of the bargaining unit employees *who actually voted*, they would be certified. Under the former rules, employees who chose not to vote let those who voted determine the outcome of the election. Now, if an employee does not vote, he or she is essentially voting "no" to union representation. Moreover, should a union fail to receive enough votes to be recertified, the union may not file another petition for certification for a period of one year from the date the results are certified by the Wisconsin Employment Relations Commission. Finally, under the new bargaining law, the issues that unions have a right to bargain on are limited to "base wages" which are capped based on the increase or decrease in the Consumer Price Index (CPI). Therefore, public sector unions may decide that the risks are not outweighed by the advantages of recertification.

The Wisconsin State Employees Union's decision not to file had much to do with the fact that the only thing that the union is now able to bargain over is the base wages of its members. Additionally, the WSEU had to consider that with the new election process created a stronger likelihood that if the vote was taken they would lose. Many unions may not want to take the chance that a majority of employees may not believe union representation is necessary. Other bargaining representatives across the state have not yet made public announcements of their intentions for the coming elections. Only time will tell if certification petitions will be filed.

## How should employers handle the election process?

For employers with unions choosing to file a petition for recertification, much thought should be given to how to deal with the situation. Employers cannot predict the actions of the unions. However, they should think about what actions can be taken if a union chooses to file for recertification. How will the employees be informed of the election process? Employers may want to think about the best way for its employees to be informed of the new election process. The unions seeking recertification will certainly provide information to its members regarding the process, but that does not mean that employers are not able to provide this information as well. Employees will no doubt have questions about the process and the consequences of the outcome of the process. Employers should give thought to what its role in that inquiry will be.

How will employers handle solicitation of its employees during the election process? If a union chooses to file a petition for recertification, there is a chance that some of the employees could attempt to solicit votes in the workplace. An employer must know what it can legally do to handle these situations. The place to start is by first looking at the employer's current solicitation policy. Straying from a stated policy or treating those individuals soliciting support for the union election different than other employees who solicit in the workplace

for non-union organizations could make the employer susceptible to legal challenges if they discipline union advocates for solicitation during working time or for distribution of pro-union literature in the workplace. Further, the mode for the solicitation is something that the employer should think about. Are the employees going to be able to use their personal work email accounts to solicit votes from other employees while at work? Again, employers need to be aware of current rules and policies regarding the use of work email accounts. Prohibition of solicitation for union activity, but allowing other types of solicitation via work email, could subject an employer to litigation. A properly drafted and administered solicitation and distribution of literature policy can avoid these issues.

Finally, employers should think generally about how information regarding the changes to the employment relationship are presented to its employees. Without question, unions will be informing their members of the changes to Wisconsin law. Doubt may be cast by some pro-union advocates to their fellow employees about what sort of treatment employees could expect at the workplace without union representation. Employers are not powerless in this exchange. Employers have the right to correct any factually erroneous information provided to its employees about the effects of the legal changes. Additionally, employers may be helping themselves by taking a proactive, rather than reactive, approach in the dissemination of this information.

If employers choose to be proactive, and provide information to their employees either about the new election process or about the changes to the state bargaining laws, they must be mindful of who distributes the information, how the information is distributed, and what information is being provided. Employers must be mindful that this communication could ultimately be used against them should unions feel that the actions of the employer constitute an unfair labor practice. Legal consultation should be sought prior to providing information to employees to ensure that it is being properly and accurately disseminated. Ultimately the new election process should spark conversations for employers. Conversations amongst management as well as conversations with legal counsel will help prepare employers for these labor relations changes. ♦

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