

Medical accommodation

Representation and Legal Services Branch

Union of National Employees

2022 Local Presidents' Conference



Public Service Alliance of Canada
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Objective

Provide some guidelines related to the duty to accommodate in the context of medical accommodation.



Overview

Medical accommodation and the duty to accommodate



Legal basis



General Accommodation Process



Roles and responsibilities of the parties



Medical accommodation and the duty to accommodate



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What does medical accommodation entail?

An employees in need of temporary and/or permanent medical accommodation in an employment context.

When an employees requires medical accommodation, it triggers the employer duty to accommodate that employee.



What is the duty to accommodate ?

Duty of employers to make sure that their workplaces are inclusive and allow all workers to participate fully.

Employers have a legal duty to offer reasonable accommodation to employees who are in need unless doing so creates an undue hardship on the employer.



What does this mean?

The employer **must adapt** the workplace (physical workspace or equipment, or workplace rules, practices etc) to ensure that individual workers can fully participate.

Examples:

- Designing physical spaces with accessibility in mind for people with different physical abilities and limitations
- Providing an adapted workstation if a worker has disability-related ergonomic needs



Scope of medical accommodation

Disability, which include visible and non-visible disabilities including physical, cognitive, psychological, sensory and learning, episodic and substance use disorders.



Legal Basis



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Legal basis to accommodation

- Human right acts and codes
- Other laws that provide accommodation rights
- Accessibility legislation
- Collective agreements
- Other laws covering the workplace



Human rights acts and codes

- Employers in the federal jurisdiction fall under Canadian Human Rights Act.
- Specific requirement of employers to accommodate individual workers up to the point of undue hardship (section 15(2))
- Case law: Meiorin Supreme Court of Canada decision in 1999;
- Provincial and territorial human rights acts or code vary in their accommodation provisions.



Other laws that provide accommodation rights

- Provincial or territorial workers' compensation acts
- Labour legislation
- *Public Service Employment Act* (federal)

Supreme Court of Canada has held that human rights legislation is **quasi-constitutional** (i.e. nearly constitutional)



Accessibility legislation

Accessible Canada Act

the federal government and federally-regulated industries must remove and prevent barriers to people with disabilities in [...] employment, [...].

Organizations must develop accessibility plans to outline how they will become accessible, including making the workplace fully accessible and removing barriers to employment and participation at work.



Collective agreements

Collective Agreements must be interpreted and applied consistently with human rights legislation and case law

Provisions in human rights laws that relate to the workplace are considered part of the collective agreement.



Other laws covering the workplace

Employment Equity Act

Employment equity plans must include positive policies and practices for the accommodation of those belonging to the designated groups

Public Service Employment Regulations (PSER)

Section 7 of the Regulations sets out a time-limited priority for workers who develop disabilities in order to facilitate their reintegration and return to work. This is not limited workplace injuries.

Canada Labour Code

Provides wage protection, workplace hazards, and return-to-work provisions for workers injured on the job



General Accommodation Process



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When does the duty to accommodate a worker arise?

- Employers must design workplaces so that equality and accommodation are built into all policies and practices. (Meiorin case)
- Worker must advise the employer of any accommodations they need to participate fully at work or at the time of returning to work.

Once a worker identifies a need for medical accommodation then the duty is on the employer to make every reasonable effort to accommodate the worker.



Steps in the accommodation process

1. Need for accommodation arises
2. Information gathering
3. Meeting of the parties to discuss possible accommodations
4. Implementation of accommodation
5. Follow-up and re-assessment of accommodation needs



Limitation to the duty to accommodate

An employer **must** accommodate **unless** they can establish that the job requirement is a **bona fide occupational requirement** (BFOR)

A BFOR refers to the **essential tasks** required to perform a job.

The employer is obligated to accommodate to the point of **undue hardship** before a BFOR defence can be established.



Limitation to the duty to accommodate (continue)

The Meiorin decision sets out three steps that help determine whether a discriminatory standard is a BFOR:

1. Did the employer adopt the standard for a purpose rationally connected to the performance of the job?
2. Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? To show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship upon the employer



What is undue hardship?

Case law teach us that it means that excessive and substantial disruption or interference with the employer's operation such that they would alter the essential nature of the organization or significantly affect its viability.

Undue hardship **does not** mean minor inconvenience or interference.

The undue hardship threshold is **high**.



What is undue hardship? (continue)

Two major issues have been identified as important in defining undue hardship:

- If the **financial costs** associated with the accommodation would be so high that they would change the essential nature of the organization or threaten its ability to operate.
- If **health and safety considerations** are not met. Public safety and the health and safety of co-workers must be considered.



Burden of proving undue hardship

Once the worker has shown that they have accommodation needs related to medical needs (i.e. disability, etc.), the employer must prove that it is unable to accommodate due to undue hardship.



Guideline

- Can the worker perform their existing job as it is (i.e. same classification, location and wages)?
- If not, can they perform their job with modifications, physical changes or “re-bundled” duties?
- If not, can they perform another job in its existing form (i.e. same classification, location and wages)?
- If not, can they perform another job with modifications, physical changes or “re-bundled” duties? (This may involve re-training)



Medical information requirement

Medical information that must be provided should **only** consist of what is necessary to assess accommodation in the workplace, i.e. limitations and restrictions.

The worker only has to disclose medical information that is relevant to the disability being accommodated and does not have to provide access to their entire medical file.

Diagnosis is not required in virtually all cases.



Medical information requirement (continue)

An employer **may** request more information if there is some issue or problem with the medical information.

If a specialist is needed, the employee can go to a specialist of their choosing.

In some cases, an independent medical exam may be reasonable.



Medical information requirement (continue)

Where an independent assessment may be required, an employer **cannot** insist or automatically require that a worker go to the employer's own medical assessor (e.g. Health Canada) for a medical assessment, **unless** there is specific language in the collective agreement.

Human rights case law is clear that an employer **cannot discipline** a worker who refuses to submit to an employer's own medical assessor.

Refusal to provide medical information or to go for a medical assessment **may result** in some negative consequences, so it may be necessary to comply while filing a grievance.



The role and responsibilities



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Who are the parties involved in the accommodation process ?

- Employer
- Employees
- Union - Health and Safety representative
- Medical and other professionals



What are the role and responsibilities of the parties?

Employer

- to design workplace requirements and standards so that they do not discriminate
- to inform employees of their right to accommodation and its duty to accommodate policy and procedures
- to ensure all managers and supervisors are aware, understand and abide by their obligations to accommodate
- to maintain confidentiality and respect privacy and dignity of the workers who are being accommodated



What are the role and responsibilities of the parties?

Employer

- to review, follow-up and assess accommodation of workers on an on-going basis
- to consult and seek information concerning their workers' disability-related employment needs from workers, union representatives and medical and accommodation specialists
- to identify the need for medical information, assessment and accommodation if not possible by the worker themselves



What are the role and responsibilities of the parties?

Employee

- to identify and communicate the need for accommodation, if possible
- to inform the employer of any changes to the accommodation needs
- to **collaborate** with the employer to find the most appropriate accommodation, if possible.
- to accept reasonable offers of accommodation.



What are the role and responsibilities of the parties?

Employee

- to supply job-relevant medical information in cases relating to disability
- to supply other information that may be necessary to demonstrate the need for accommodation (e.g. in cases of family status)



What are the role and responsibilities of the parties?

Union

- to assist and represent a member requiring accommodation throughout the accommodation process
- to collaborate with the member and the employer in accommodating the worker
- to respond to employer accommodation proposals
- to follow-up after the accommodation is implemented to assess whether it is working and to help address any associated issues that may surface



What are the role and responsibilities of the parties?

Union

- to inquire with a member who is having difficulty at work or has been disciplined as to whether any accommodations are needed (where a disability appears to be a factor)
- to educate other employees in the workplace about the duty to accommodate, especially if there is a lack of understanding on this issue



Recourse



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Grievance

Sample grievance wording:

I grieve that the employer has failed to accommodate me in the workplace and therefore has discriminated against me on the basis of ____ (applicable ground such as disability, family status, etc.), contrary to Article __ No Discrimination, _____ (other relevant articles of the collective agreement) and contrary to the _____ (Canadian Human Rights Act or applicable provincial/territorial human rights legislation).

Remedy requested: For the employer to provide me with the needed accommodation immediately, in accordance with _____ (“my physician’s recommendations” or other relevant information of the grievor), and full redress for any losses, including ____ (e.g. reimbursement for lost salary and benefits, restoration of sick leave credits, etc.), pain and suffering, and any other appropriate remedy in order to make me whole.



Human rights Complaint

A human rights complaint is to the human rights commission under the human rights legislation that covers your workplace, on the basis of discrimination on a prohibited ground.

If in doubt about whether there is a valid human rights grievance, then member should still file it to protect time limits and ensure that you cover appropriate remedies. (“if you feel it, file it”)

It is often beneficial to file both grievances and human rights complaints at the same time. There are also time limits to file human rights complaints, so member should contact the human rights commission at the same time a grievance is filled, in order to ensure that you meet both time limits



Duty of fair representation



Duty of fair representation standards

- Members are not entitled to be automatically represented by the union.
- We need to listen to our members, consider the facts of their situation and the caselaw, and make an objective, rational judgement.
- Document conversations in writing (dates, detail of what was said), and provide responses to members in writing.



Contacting Representation & Legal Services

RLSB can only provide guidance or information if we have all the facts; when submitting a question, please include the following:

- ✓ A clear legal question for RSLB to answer
- ✓ Copies of exchanges between member and employer

As a note: RLSB cannot answer hypothetical questions.





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