



Human Rights and Equity: Frequently Asked Questions

Accommodating Employees with Disabilities in the Workplace

This document provides members of the Ontario Nurses' Association (ONA) with general answers to commonly asked questions about the employer's duty to employees with disabilities in the workplace. Specific advice should be sought from your Bargaining Unit Return to Work Representative, Bargaining Unit President or Labour Relations Officer.

What is a "disability?"

The Ontario *Human Rights Code* protects employees from discrimination in employment on the basis of disability. These protections are incorporated into ONA's collective agreements.

The *Code* defines "disability" as:

- any degree of physical disability, developmental disability, learning disability;
- dysfunction in understanding or using symbols or spoken language;
- a mental disorder; or
- an injury or disability for which WSIB benefits were claimed or received.

Disability has been interpreted broadly to include many disabilities that are not always recognizable. For example, the definition includes alcohol or substance dependence, HIV status, depression, latex allergy, visual or hearing impairments, and obesity.

A disability may be temporary, chronic or permanent.

The employer's duty to accommodate is triggered once it becomes aware or ought reasonably to have been aware that an employee has a disability requiring accommodation.

What is the employer's duty to accommodate?

The duty to accommodate is a fundamental legal obligation that comes from human rights legislation and rulings from the Supreme Court of Canada.

This duty is a multi-party legal obligation with roles and responsibilities for the employer, the union and the employee seeking accommodation. All three parties have a duty to cooperate and facilitate the accommodation.

The employer, however, bears the primary responsibility to accommodate an employee's disability up to the point of undue hardship. The employer's duty to accommodate applies to temporary, probationary and permanent employees.

The employer has an obligation to take all the necessary steps to determine what accommodation measures may be required in order to allow the employee to participate fully in the workplace.

This obligation is ongoing as long as there is still a disability requiring accommodation and that the accommodation, over time, does not amount to undue hardship.

The employer is required to conduct its own independent assessment of the employee's needs based on the individual facts and medical documentation underlying the request to accommodate. It cannot rely, for example, on findings made by a Long-Term Disability (LTD) carrier or the Workplace Safety and Insurance Board. The employer must also conduct its own investigation of the accommodation measures that are available.

Are there limits on the employer's duty to accommodate?

Yes. The duty to accommodate is limited to the extent that it does not cause undue hardship to the employer. As with other types of accommodations, the test for undue hardship is based on a number of factors including cost, health and safety requirements, the size of the employer's operation, interchangeability of the workforce, collective agreement provisions and impact on the rights of other employees.

The employer is not obliged to create a job for the employee where no meaningful work exists.

Ultimately, accommodation requires a balancing act between two underlying issues: the right of an employee with a disability to equal treatment and the ability of an employer to operate a productive workplace.

What if there are several options for accommodation?

The employer's duty is to provide *reasonable* accommodation. While an employee can identify a suitable accommodation, the employee cannot choose their accommodation or insist on their preference.

What is the process for the employee to request accommodation?

- Contact your ONA representative as soon as possible for assistance and representation.
- Check whether the employer has a policy containing a process for accommodation requests.
- Formally request the accommodation and provide supporting medical documentation. In most cases, an employee need not provide a diagnosis. Your ONA representative will assist in identifying the necessary information and documentation.
- The employer must work with the union and the employee to find a reasonable accommodation. Any changes in how the collective agreement is applied must be agreed to by the union.
- The Union and employer representatives must ensure the privacy of any personal and medical information.
- Grievances may be filed on behalf of an ONA member where necessary.

It is the obligation of the Union and the employee to establish the existence of a disability and that the employee is unable to perform some aspect of their job because of the disability. Once this is done, the employer's duty to accommodate is triggered and the employer must work with the Union and the employee to find a reasonable accommodation.

The employee must actively participate and co-operate in the process for accommodation. The employee must provide appropriate medical documentation and comply with reasonable requests for additional medical information. If the employer offers an accommodation that is reasonable and, if implemented, would satisfy their duty to accommodate, the employee has a duty to accept the accommodation.

What are some examples of accommodation?

Accommodation in the pre-disability job is always preferable; however, it may not always be possible.

The employer should engage in a four-step process:

- can the employee perform her existing job as it is;
- if not, can she perform existing job, modified or "re-bundled;"
- if not, can she perform another job in its existing form;
- if not, can she perform another job in a modified or "re-bundled" form?

The most common example of accommodation is a reduction or modification of hours or work duties with respect to the employee's pre-disability position. Other examples include providing adaptive technologies or equipment, modification of the physical layout of a workspace, transfer to a vacant position, retraining for alternative positions or job bundling.

An employer's obligation to accommodate includes training. For example, a nurse may require training in order to be certified to perform specific medical procedures on the unit where she will be accommodated.

Bundling of duties refers to the fact that duties performed by a number of employees can be combined to create a part-time or full-time job. For example, scheduled and PRN medications on a busy medical surgical unit that are the responsibility of each nurse could be combined to create a position for the employee seeking accommodation.

Where can I get more information and resources that can help?

- ONA presentation "The Duty to Accommodate Disability" (found on ONA's website at www.ona.org under the "Human Rights and Equity/Teleconnects");
- ONA's *Human Rights and Equity Guide* (found in the member's section of ONA's website under "Human Rights and Equity");
- Employer policies dealing with discrimination and workplace accommodation;
- ONA's collective agreement (found in the member's section of ONA's website under "Publications");
- *Ontario Human Rights Code*;
- ONA offers its representatives and front-line members a workshop called "Return to Work/Accommodation and an eLearning module called "Duty to Accommodate" (video lecturette)

Contact your Bargaining Unit Return to Work Representative, Bargaining Unit President or Labour Relations Officer for more information, advice and support.