



Pocket Guide on the **Duty to Accommodate**



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Other useful documents

Guide for Members

Membership Benefits pamphlet

Professional Institute By-Laws and Regulations

Professional Institute Policy Manual

Steward Manual

Manual for Elected Officials

Pocket Guide for Elected Officials

Pocket Guide for Stewards

Pocket Guide on Whistleblowing

Pocket Guide on How to Write a Resolution

Pocket Guide on Leadership

Pocket Guide on Mentoring

Pocket Guide on Occupational Safety and Health

Pocket Guide on Consultation

Pocket Guide on Harassment

Pocket Guide on Employment Equity



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Introduction

This document provides a general overview of the duty to accommodate. Canadian law prohibits discrimination based on any of the 11 grounds identified in human rights legislation. Employers have a duty to accommodate employees to avoid such discrimination.

Employers must reasonably accommodate employees who fall into the groups protected by human rights legislation up to the point of undue hardship.

Accommodation is generally determined on a case-by-case basis although the employer should do as much as it can up front to prevent barriers from occurring in the first place.

What is Discrimination?

Discrimination is an action or a decision that results in the unfair or negative treatment of person or group because of their race, age, religion, sex, etc. Employers who are subject to human rights legislation cannot discriminate against individuals.


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For example, the 11 grounds protected under the *Canadian Human Rights Act* are:

- Race;
- National or ethnic origin;
- Colour;
- Religion;
- Age;
- Sex;
- Sexual orientation;
- Marital status;
- Family status;
- Disability;
- A conviction for which a pardon has been granted or a record suspended.

There are several ways that a person could be discriminated against. *The Canadian Human Rights Act* calls these discriminatory practices. Under this Act the following seven **discriminatory practices** are prohibited when they are based on one or more grounds:

- Denying goods, services, facilities or accommodation customarily available to the general public;
- Refusing to employ, continue to employ someone, or unfair treatment ;
- Following policies or practices that deprive people of employment opportunities;

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- Unequal wages based on a prohibited ground;
 - Retaliating against the filing of a complaint with the Commission;
 - Harassment based on a prohibited ground;
 - Communication of hate messages.

Employers subject to human rights legislation are obligated to make every reasonable effort to accommodate employees who request accommodation.

What is the Duty to Accommodate?

Sometimes treating people equally and fairly means treating them differently from others. The **Duty to Accommodate** applies only to needs that are based on one of the 11 grounds of discrimination protected under the human rights legislation. Typically, accommodation arises most under disability, family status or sex (pregnancy), but it can also arise with other protected grounds. It can also include a perceived disability (e.g. an individual may not be functionally disabled because of a back injury, but her employer believes she is and denies her work as a result).

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What is a Disability?

Under the *Canadian Human Rights Act*, disability is defined as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”.

Examples of disabilities include:

- Visual impairments;
- Hearing impairments;
- Mobility restrictions;
- Chronic pain;
- Environmental sensitivities;
- Addictions;
- Learning disabilities;
- Psychiatric disabilities such as depression, anxiety, bipolar disorder;
- Chronic conditions such as diabetes.

What is Family Status?

Family status has several aspects. Family status refers to:

- the fact of being in a family or not (e.g. an employer refuses to hire someone with a family believing family responsibilities will affect the individual’s performance),

- the obligations and responsibilities arising from family care (e.g. childcare or eldercare obligations or care for a relative with a disability), and
- the identity of an individual's family member (e.g. e.g. an employer fires an employee because she is related to "Sue").

Human rights legislation protects against discrimination on the basis of family status and requires employers to accommodate an employee's family status in certain situations.

In order to establish a duty to accommodate for family responsibilities, an employee must show:

- That the child or elderly person is under the employee's care and supervision;
- That the care obligation engages the employee's legal responsibility for that child or elderly person, as opposed to being a personal choice;
- That the employee has made reasonable efforts to meet those care obligations through reasonable alternative solutions, and that no such solution is reasonably accessible;
- That the workplace rule or policy interferes in a manner that is more than trivial or insubstantial with the fulfillment of the care obligation.

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For instance, an employer may have to accommodate an employee's inability to work varying shifts because of childcare obligations (where alternative care is not available at varying times) but an employer would not likely have to accommodate an employee's desire to work an earlier shift in order to attend her/his child's soccer practice.

Bona Fide Occupational Requirements (BFOR)

The law recognizes that, in certain situations, a limitation on individual rights may be reasonable and justifiable. Discrimination or exclusion may be allowed if an employer can show that a discriminatory requirement of a job is essential for performing that job. For instance, a correctional institution with female inmates may put in place gender protocols to protect the dignity and privacy of the women in custody. This means that male applicants could be excluded from being hired in positions where male presence would violate an inmate's privacy and dignity. The onus is on the employer to prove a BFOR if the complainant shows a prima facie case of discrimination.

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Employee's Responsibility under the Duty to Accommodate

If an employee requires an accommodation, it is their responsibility to:

- Tell the employer and/or union representative about their individual circumstances/limitations that relate to one or more protected grounds of discrimination;
- Discuss with the employer changes they can make to accommodate their needs;
- Give enough information about their individual circumstances to justify the change(s) (e.g. medical information verifying a disability and setting out limitations);
- Inform the immediate manager of the nature of the requirements/request and cooperate in good faith in finding a workable solution;
- Fully participate in both the identification of requirements and, where possible, alternatives and solutions;
- Be open to alternative suggestions that meet their needs and be flexible when considering proposals that effectively address limitations;
- Inform the immediate manager when changes are required to an accommodation plan or when the accommodation is no longer necessary.

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Accommodation can be a challenging area and needs may change over time.

An employee's right to privacy is to be a primary consideration at all times. Employees requiring accommodation for medical reasons are not required to provide management with the diagnosis or intimate details of their disability but only documentation of the limitations (if any) and whether such limitations are permanent or temporary.

An employee is only entitled to a reasonable accommodation, not a perfect one. Every person's accommodation is unique. Having a detailed conversation as to the full list of limitations is a good conversation to have and to document with the employer.

It is recommended to consult with an Employment Relations Officer in these cases as they will be able to support the employee in this conversation. Having dealt with the employer on other cases, the Employment Relations Officer will have a good idea of what information pertaining to limitations the employer will be seeking in each case.

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Employer's Responsibility under the Duty to Accommodate

The employer is required to:

- Consider the employee's request for accommodation in good faith;
- Work with the employee to canvass and consider alternative approaches and possible accommodations
- Maintain confidentiality;
- Request only the information needed to respond to the accommodation request (I.e. information related to the nature of the limitation or restriction);
- Recognize that an employee requesting accommodation, who has yet to obtain a diagnosis and/or a physician's letter outlining functional limitations and restrictions, is still entitled to interim/informal/temporary accommodation.
- Grant accommodation requests in a timely manner, to the point of undue hardship.
- Recognizing and respectfully approaching employees who may need accommodation but who have not asked (e.g. someone suffering from alcohol dependency whose performance is affected)

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Undue hardship means that accommodating the special needs of protected individuals or groups imposes an unreasonable cost or health and safety concern on employers, service providers, property owners, etc. What constitutes undue hardship will vary in each case, as will the factors taken into consideration.


Managers are not obligated to:

- Create an unnecessary job,
- Remove an aspect of a position which is absolutely essential (Bona Fide Occupational Requirement)
- Retain an employee if reasonable accommodations do not result in employee being able to meet their responsibilities;
- Hire someone who would not be able to successfully do the job even with accommodation.

The Role of the Union

The union has a role to play in the accommodation process:

- Review policies, procedures, practices and activities to identify and remove discriminatory barriers.
- Ensure the collective agreement does not discriminate against employees.

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- Foster an environment in which accommodation needs may be communicated and respected.
 - Support employees in requesting accommodation when approached.

The Role of the Steward

As a Union Representative, the Steward has a role to play in the accommodation process. The steward may:

- Serve as the first contact for a member.
- Provide advice and guidance to a member seeking accommodation.
- Facilitate, advise or advocate for the member with an accommodation issue at the employee's request.
- Represent members in the initial steps of formal accommodation processes in consultation with Institute staff.

An employee has a right to request the involvement of a Union representative for advice or assistance regarding their request for accommodation. Union representatives have an obligation to participate and support members. A member's right to confidentiality must always be respected.

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Examples of the Duty to Accommodate

- A female employee with an excellent performance record announces that she is pregnant but can no longer work with the dangerous chemicals she often uses in her position. The employer refuses to provide alternative duties which will be required for the duration of the pregnancy. This may be a case of discrimination based on the prohibited ground of **sex**.
- An employee requires a quiet space to pray three times a work day, according to the tenets of his religion. The employer refuses to provide the space. This may be a case of discrimination on the basis of **religion**.
- An employee requires part-time work, telework and a specially designed work station to accommodate her disability. The employer will only provide part-time work if she takes a demotion. This may be a case of discrimination on the basis of **disability**.