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Overview

Human rights laws are in place to create a work environment that promotes respect for the dignity and worth of all Canadians, mutual respect and understanding, and equal opportunity to participate in and contribute to the community. Human rights law requires an employer, short of undue hardship, to accommodate the needs of an employee who has a disability. Under human rights law, disability is a protected ground and it would be unfair as well as illegal to exclude someone from the workplace or activities in the workplace because their lawfully protected needs are different from the majority.

Just like other illnesses including, but not limited to, cancer, epilepsy and/or addictions, HIV/AIDS is defined under human rights law as a disability. As such it is a protected ground. In general, human rights law provides a basic definition of disability to include the following:

- Conditions that have developed over time
- Conditions that result from an accident, or
- Conditions that have been present from birth

The Ontario Human Rights Code, section 10, defines disability to include:

- Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness
- A condition of mental impairment or developmental disability
- Learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language
- A mental disorder, or
- An injury or disability for which benefits were claimed or received under the Workplace Safety and Insurance Act

Comparable provincial human rights laws are in place across Canada and all define disability as a protected ground.

The principle of accommodation applies to all grounds of human rights law but certain grounds and issues arise frequently in the area of employment. This Information Sheet will concentrate on employees with disabilities and will provide basic information about:

- The principles of accommodation
- Accommodation in the workplace
- Duties and responsibilities, and
- Undue hardship

Respect for the dignity of persons with disabilities is the key to preventing and removing barriers. This includes respect for the self-worth, individuality, privacy, confidentiality and autonomy of persons with disabilities.
Human rights law states that persons with disabilities have the right to full integration and participation in society. It guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job or service. No one can be judged incapable of performing those duties until efforts have been made to accommodate the individual, up to the point of undue hardship to the employer.

Human rights law acknowledges the duty of the employer to provide individual accommodation, up to the point of undue hardship, and the responsibility to minimize the need for individual accommodation by ensuring that any rules, policies, standards or practices are not discriminatory. Discrimination based on disability or perceived disability is prohibited in employment. Human rights law guarantees equal treatment to a person with a disability who is able to perform the essential duties of a job with accommodation to the point of undue hardship. Where a person is unable to perform the essential duties of the job, even with accommodation, or where accommodation would amount to undue hardship a decision not to employ the person would not be discriminatory.

The Principle of Accommodation

When we talk about the principle of accommodation, the generally accepted values are: dignity, individualization and inclusion.

Dignity:

Persons must be accommodated in a manner that most respects their dignity, including their privacy, confidentiality, comfort and autonomy.

Individualization:

There is no set formula for accommodation. Each person's needs are unique and must be considered afresh when an accommodation request is made. A solution may meet one person's requirements but not another's.

Inclusion:

Achieving integration and full participation requires barrier-free and inclusive designs and removal of existing barriers. Barriers can be physical, attitudinal and/or systemic. The Ontario Human Rights Commission states: "a systemic barrier is not just a single rule or policy but a combination of policies and/or guidelines that result in the exclusion of people".

Preventing and removing barriers means all persons should be able to access their environment and face the same duties and requirements with dignity and without impediment.

As we strive to remove physical barriers in the workplace, it is also important to provide education and awareness in order to challenge commonly held mistaken and/or inaccurate beliefs and attitudes about persons with HIV or AIDS in the workplace.

Accommodation in the Workplace

Disability is a protected ground under human rights law. Keeping the principles described above in mind, it is important to have a workplace policy that provides specific information about the duties and responsibilities with respect to the duty to accommodate in the workplace.

Because accommodation will vary according to a person's unique needs, these needs must be considered, assessed, and accommodated individually. Accommodation may include, but is not limited to:

- Physical modification of a work site
- Purchase of assistive devices (for example anti-glare screen saver, lumbar support for chair)
- Modifying performance standards or productivity targets
- Flexible work schedules
- Extra breaks during the day
• Transfer to a different job to reduce stress, and/or
• Leaves of absence as defined within existing leave policies or as required to accommodate the employee with a disability

Example:

If an employee is sensitive to light as a result of a medication(s) they are taking, the following are examples of modifications that may be provided:

• Lower wattage overhead lights
• Task lighting
• Broad spectrum lighting
• Install flicker free lighting
• Move work station to another area
• Place blinds on windows that create glare

To access a full range of information on accommodation possibilities for persons with HIV or AIDS, please refer to The Job Accommodation Network at http://www.jan.wvu.edu.

A clearly stated accommodation workplace policy will support people living with HIV or AIDS to make appropriate work-related decisions. These provisions will vary according to a person's unique needs.

Duties and Responsibilities

Once the employer is aware of the employee's needs, they must take steps to meet the duty to accommodate, up to the point of undue hardship.

There are a number of considerations in the accommodation process including, but not limited to:

• The nature of employment and the essential job duties
• The details about the limitations and/or requirements
• The availability of policies and procedures
• Privacy and confidentiality

• The overall level of trust that the employer has established with its employees to discuss accommodation requirements

Employers and persons with disabilities have a shared responsibility in making the accommodation process a success. When an accommodation is requested, everyone involved should cooperatively share information and actively seek solutions. This may include, but is not limited to:

• The employee
• The employer (human resources or senior management member)
• The union representative
• The supervisor
• Possibly co-workers
• Medical professionals
• Insurance providers
• Alternative practitioners (example: para-medicals)
• Supportive interventions such as wellness programs, education and awareness, support, care and treatment programs and;
• Other social networks such as peer support and referral services if available

A person with HIV or AIDS is not required to disclose their medical status. The information required relates specifically to any limitations that the employee may have in the performance of the essential duties of the job. Conclusions about the inability to perform essential duties should not be reached without actually testing the ability of the person. It is not enough for the employer or person to assume that the person cannot perform an essential requirement of the job. Rather, there must be an objective determination of that fact.
Responsibility of persons with a disability requesting accommodation:

- Make any request communicating the need for accommodation to the employer in writing
- Inform the employer of the needs and relevant restrictions or limitations
- Cooperate in obtaining necessary information, including medical and/or other expert opinions
- Actively participate in discussions about solutions
- The duty of "reasonable conduct" - to act reasonably and try to minimize any disruptive effect on the workplace
- As applicable and/or appropriate, assist with workload planning and/or redistribution
- Meet agreed upon performance objectives and measurements once accommodation is provided
- Develop an accommodation plan and agreement; and
- Work with the employer on an ongoing basis to manage and monitor the accommodation process to ensure the policy and procedure is being applied correctly

Responsibility of an employer receiving a request for accommodation:

- Maintain the confidentiality of a person with a disability
- Accept requests for accommodation in good faith and deal with accommodation requests in a timely manner
- Discuss with the employee the purpose and essential functions of the employee's job, the accommodation required, whether or not there are alternatives and take an active role in ensuring that possible solutions are examined
- Request only information that is required to make the accommodation
- Following discussion with and agreement by the employee, obtain expert advice or opinion where necessary
- Ensure that any medical opinion(s) required will be restricted to: the employee's capability to continue working, special workplace facilities or needs necessary to accommodate the employee's medical condition or protect the health of the employee, co-workers or other individuals with whom the employee has contact
- Identify potential accommodation options and assess the effectiveness each would have in allowing an individual to perform the job optimally
- Identify any costs, benefits or detriments
- Bear the cost of any required medical information or documentation
- Develop an accommodation plan and agreement, manage and monitor to ensure the policy and procedure is being applied correctly

When reviewing a request for accommodation the essential duties of the job and the non-essential duties of the job must be separated. The person with the disability should be assessed in terms of their ability to perform the essential duties and, on that basis, accommodation should be considered up to the point of undue hardship.

The employer's duty to accommodate exists short of undue hardship, the point at which the cost of the accommodation would jeopardize the survival of an organization. In order to claim undue hardship, the employer has the onus of proof. It is not up to the person requesting accommodation to prove that the accommodation can be accomplished without undue hardship. The nature of the evidence required to prove undue hardship must be objective, real, direct, and in the case of cost, quantifiable. The employer must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement to the employee or the Human Rights Commission without supporting evidence, that the cost or risk is "too high"
based on impressionistic views or stereotypes will not be sufficient. The employer must be prepared to provide any supporting evidence to the Human Rights Commission.

The criteria for undue hardship can vary across Canada. Generally, there are three items that may be considered in assessing whether an accommodation would cause undue hardship to the employer. These are:

- Cost (Note: The majority of accommodation involves little or no cost to the organization)
- Outside sources of funding, if any, and
- Health and safety requirements, if any

This means that the employer must provide evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship for the employer.

In many cases, the Commission will not accept the following as reasons for denying accommodation:

- Business inconvenience
- Employee morale
- Customer preference
- Client and/or colleague preference

It is important to note that there are some differences for assessing undue hardship at the federal and provincial levels and between provinces and territories. As such, please be sure to consult with the appropriate federal or provincial human rights office in your location to determine the correct interpretation for your jurisdiction.