

# Accommodating disabled employees:

## What you don't know about the law *can* hurt you

Sooner or later, every manager will be asked to accommodate an employee who has suffered a workplace injury or illness. The request may be for a *temporary* change in work schedule, or *permanent* change in an employee's duties. It may require changes in schedule, modifications to equipment, or the reassignment of job duties. In short, meeting the legal obligation to accommodate disability, while at the same time managing the workplace, can be a manager's greatest challenge. So what's a manager to do?

Here are some practical tips to help you navigate the duty to accommodate:

### What is a "disability"? Don't assume you know what it "looks like"

Many jurisdictions define disability very broadly. The *Ontario Human Rights Code* for example, lists the conditions that are considered to be disabilities as:

- any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness;
- lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment;
- a condition of mental impairment or a developmental disability;
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language; and/or a mental disorder.

A disability is not always obvious or easy to spot. It may be visible, invisible, mental or physical. As well, the same disability can affect two employees in vastly different ways.

Managers should never *guess* whether or not an employee has a disability. Only

suitable medical information can confirm or deny the existence of one. This same medical information can help establish what type of accommodations the employee requires.

### What is "discrimination" on the basis of a disability?

Discrimination in the workplace on the basis of disability can take two basic forms:

*Treating someone differently because of their disability.* For example, it's discrimination to not hire someone because of their disability or because they would need special equipment to work alongside other employees; or

*Treating two employees identically, despite the fact that one has a disability.* For example, two employees install air bags on a production line. One employee has a shoulder injury that prevents him from working as quickly as his colleague. Requiring both employees to work at the same pace, without regard to the fact that one employee is unable to do so because of his disability, is discrimination.

### What is the "duty to accommodate"?

It's illegal for employers or managers to discriminate against an employee who has a disability. If an employee cannot perform the essential duties of his or her job because of a disability, the employee must be accommodated to the "point of undue hardship".

This means employer must take all reasonable steps to modify the employee's work to allow the employee to work within the restrictions of his illness or disability. This could include purchasing equipment or modifying machinery to allow the employee to continue to work



alongside their colleagues; creating a new or different work schedule; taking away tasks that the employee cannot perform; or providing time off of work.

If the employee's job cannot be modified, the employee is entitled to the offer of alternative work during the period of their disability. This alternative work must be provided even if the type of work being offered does not fit within the employee's "job description".

It's important to note that, although the duty to accommodate requires a manager to consider offering new or varied job duties to an employee, it does not require a manager to "create" a new job for the employee. Furthermore, if the only work available is in a lower pay scale or is part time, it is acceptable to reduce the employee's wages accordingly. However, prior to reducing an employee's wages or declaring that there is no alternate work that can be offered, a manager is expected to take a serious and creative look at the type of work that is available that the employee can perform.

Only if the employee cannot perform the essential elements of their employment (or reasonable alternate employment) is the manager allowed to deny work to an employee with a disability.

### Create an accommodation plan, but do not assume that one plan will accommodate all workers

The key to accommodating a disability is to create a plan that will meet each employee's individual and personalized needs. Not only is this the law, but it's also logical.

Every employee is unique. This makes it impossible to create a set list of standard workplace accommodations that can be applied each time an employee asks for modified work.

The plan should therefore set out what duties the employee's disability prevents him or her from performing, and what type of work meets the employee's restrictions. The accommodations that are offered to the employee should take into account the employee's restrictions and the available work.

### Talk to the employee about his or her needs

Because every disability and every employee is different, an open and frank initial discussion about the employee's abilities and needs will assist the manager to tailor the accommodation plan to the individual situation. The following issues should be discussed:

- what job duties the employee is prevented from performing;
- how long the employee is expected to be unable to perform those job duties; and
- how the employee's work can be modified to allow the job duties to be performed.

*A word of caution:* a manager is allowed to ask for information related to the employee's ability to perform work and the type of accommodations the employee requires. A manager is *not* allowed to ask the employee for a diagnosis of their medical condition. For example, a manager may not ask: "What is wrong with you?" but can ask: "How will your illness affect your ability to work at your regular duties?"

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### Obtain medical information that supports the employee's claims

It is neither illegal nor contrary to human right codes (such as Ontario's for example) to ask for medical information that supports the employee's claim of illness or disability.

Managers have a duty to accommodate, and are entitled to sufficient medical information to enable an appropriate offer of modified work. Timely, accurate and relevant medical information allows a manager to evaluate what work can be safely performed by the employee. It will also ensure the accuracy of the statements being made by the employee about his or her limitations.

An employee has an obligation to cooperate in the accommodation process, but does not have an obligation to provide access to his or her medical information. Therefore, all requests for information should be in writing and should specify that the information is being sought to accommodate the employee's illness or disability. In this way, the manager will have a record of the steps that were taken to accommodate the employee, even if the employee will not cooperate in the process. Further, if the steps taken are not set out in writing, it will be difficult to prove that any steps were taken if the accommodation process is later called into question. Similarly, it is necessary to obtain an employee's *written* consent to receive medical information from a physician. Verbal consent is not sufficient.

In terms of the information itself, a manager *cannot* ask a physician for a diagnosis of the employee's medical condition. However, the following information can be sought:

- Whether the employee can perform the essential duties of the job;
- if the employee cannot perform the essential duties of the job, what components of the work can be performed safely;
- what modifications to the employee's job can be made to allow the employee to work safely;

- how long the employee will require modified work; and
- whether any treatment plan will affect the employee's ability to be at work, or whether any medications will affect the employee's ability to operate machinery.

All medical information should be disclosed directly to a company physician – not to the employer or the manager. This practice prevents the accidental disclosure of information that the manager is not entitled to receive, and helps to preclude a complaint from the employee that the manager asked for or obtained information that was not covered by the consent the employee provided.

### If you have a union, involve the union

Should you manage in a unionized workplace, the union also has an obligation to co-operate in the accommodation process. This includes offering constructive suggestions where it believes an accommodation plan is deficient.

Furthermore, while collective agreement rights should be maintained to the extent possible, a union cannot refuse to waive provisions of the collective agreement if that is the only way an employee can receive workplace accommodation.

The duty to accommodate, while sometimes daunting and frustrating, does not have to be an insurmountable task. Properly executed, it can be a straightforward exercise of a manager's role in the workplace. The steps set out above are designed to provide the tools by which managers can implement accommodation in the workplace. ○

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