

Accommodation is 2-way street

Employees must participate meaningfully in accommodation process



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“John cannot attend work for medical reasons.”

Many employers have received a doctor’s note like this. The question we often receive from employers is, “Can we ask for more information?” The answer, most of the time, is yes.

Under human rights legislation across Canada, an employer must accommodate an employee with a disability to the point of undue hardship. However, accommodation is a two-way street, and the employee must participate meaningfully in the accommodation process. As the Supreme Court of Canada stated in [Central Okanagan School District No. 23 v. Renaud, 1992 CanLII 81](#):

“The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation.... To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.”

Practically, this means if an employee requests accommodation (including time off), they must provide sufficient medical and other relevant information to demonstrate they have a disability and require the [accommodation requested](#).

Privacy considerations in accommodation

How does an employee's right to privacy factor in? Recently, in *Fernie (City) v. CUPE, Local 2093 (Ubell), Re*, a British Columbia arbitrator upheld an employer's decision to dismiss an employee because she did not provide sufficient medical information to support a two-month absence from work. Despite repeated requests for more, the medical documents only indicated she was "unable to work" and "unfit for duty."

The arbitrator found the employee obstructed the accommodation process and held: "Of course, an employee may rely on their privacy rights to refuse to provide adequate information to their employer. However, they do so at their peril."

Similarly, the Human Rights Tribunal of Ontario has held, "It was not sufficient, however, for the [employee] to have communicated to the [employer] merely that she had a disability. Rather, the [employee] had to inform the [employer] of her disability-related needs and how those needs interacted with her workplace duties." See [Baber v. York Region District School Board, 2011 HRTO 213](#).

The Ontario Human Rights Commission (OHRC) has also outlined [the type of information](#) an accommodation seeker is expected to provide, including:

- That they have a disability
- Limitations or needs associated with the disability
- Whether they can perform the essential duties of the job, with or without accommodation
- The type of accommodation(s) needed to allow them to fulfill the essential duties of the job
- Regular updates about when they expect to return to work, if on leave.

Finally, the OHRC noted that in some circumstances, an employer may need [additional information](#), including the nature of the disability and, in rare situations, a diagnosis.

Medical information in the unionized context

In a leading decision - [Complex Services Inc v. Ontario Public Service Employees Union, Local 278, 2012 CanLII 8645](#) - Arbitrator Surdykowski identified information an employer may require in a unionized context:

- Nature of the illness and how it manifests as a disability (may include diagnosis in the case of mental illness).
- Whether the disability (if not the illness) is permanent or temporary, and the prognosis (i.e., anticipated improvement and time frame).
- Restrictions or limitations (i.e., a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of their normal job duties, and possible alternative duties).
- Basis for the medical conclusions (i.e., nature of illness and disability, prognosis, restrictions), including examinations or tests performed (but not necessarily test results or clinical notes).
- Treatment, including medication (and possible side effects) which may impact the employee's ability to perform their job, or interact with management, other employees, or "customers."

Employment standards and sick leave

Additional considerations arise if an employee is using their sick leave under employment standards legislation.

Ontario: Under the Employment Standards Act, 2000 (ESA), an employer is entitled to ask for “evidence reasonable in the circumstances” which includes: expected duration of absence (or, if the absence is completed, the date(s) of the absence addressed by the [medical] certificate); date the employee was seen by a health care professional; and whether the employee was examined in person by the health care professional issuing the certificate. Note: legislation is under consideration that would prohibit an employer from requesting evidence from a qualified health practitioner in support of ESA sick leave. However, this would only apply to the three days of unpaid sick leave under the ESA. Quebec: There is legislation before the National Assembly that would prohibit an employer from requiring a sick note for a leave of absence of three days or fewer.

Nova Scotia: An employer may not [require a medical note](#) unless: the employee has missed more than five consecutive working days due to sickness or injury; or the employee has already had at least two non-consecutive absences of five or fewer days due to sickness or injury in the preceding 12-month period (Medical Certificates for Employee Absence Act, s. 5).

Prince Edward Island: An employer may only request a medical certificate for paid sick leave of three or more consecutive days of absence (Employment Standards Act, s. 22.2(9)).

Newfoundland and Labrador, New Brunswick and Northwest Territories: – an employer may request a medical certificate if the leave is more than three or four consecutive days (NL Labour Standards Act, s. 43.11(2); NB Employment Standards Act, s. 44.021(2); NWT Employment Standards Act, s. 29(3)).

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