



DUTY TO ACCOMMODATE FREQUENTLY ASKED QUESTIONS & ANSWERS

This document provides employers, employees and unions with general answers to frequently asked questions about the “duty to accommodate.”

Produced for education and information purposes only, it is not intended as legal advice.

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For additional information on the duty to accommodate, please consult the Canadian Human Rights Commission’s *A Place for All – A Guide to Creating an Inclusive Workplace* through the Commission’s website: <http://www.chrc-ccdp.ca/>

Accommodation

Questions in this section:

- 1. What is the duty to accommodate?**
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1. What is the duty to accommodate?

The duty to accommodate is the obligation to meaningfully incorporate diversity into the workplace. The duty to accommodate involves eliminating or changing rules, policies, practices and behaviours that discriminate against persons based on a group characteristic, such as race, national or ethnic origin, colour, religion, age, sex (including pregnancy), sexual orientation, marital status, family status and disability.

Sometimes, workplaces have rules, policies, practices and behaviours that apply equally to everyone, but which can create barriers based on an irrelevant group characteristic. For example, if you require that employees wear a certain uniform, you may create a barrier to someone whose religious practice requires a certain manner of dress.

The duty to accommodate requires employers to identify and eliminate rules that have a discriminatory impact. Accommodation means changing the rule or practice to incorporate alternative arrangements that eliminate the discriminatory barriers.

2. Does the duty to accommodate apply to all grounds of discrimination?

The duty to accommodate is most often applied in situations involving persons with disabilities. In these situations, accommodation often means removing physical barriers, perhaps by building a wheelchair ramp. It often also means accommodating individual needs, such as by providing a computer screen reader for a blind employee.

The duty to accommodate also applies to grounds other than physical disability. Specifically, it applies to all grounds covered by the *Canadian Human Rights Act*: race, national or ethnic origin, colour, religion, age, sex (including pregnancy), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3. Is there a legal requirement to accommodate?

The duty to accommodate is a legal requirement, per sections 2 and 15 of the *Canadian Human Rights Act*.

Section 2 reads as follows:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity



equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The Act says that accommodation is required, short of undue hardship. The Supreme Court of Canada has also defined the duty to accommodate. (For a summary of these court decisions see Appendix A of *A Place for All – A Guide to Creating an Inclusive Workplace*.)

4. What is the process of accommodation?

When approached with a request for accommodation, an employer or service provider is expected to do the following:

- determine what barriers might affect the person requesting accommodation,
- explore options for removing those barriers, and
- accommodate to the point of undue hardship.

If the employer finds that removing the barrier or changing the workplace rule creates an undue hardship on the business, then that rule or practice is a Bona Fide Occupational Requirement (BFOR), in which case the employer does not have to accommodate.

If you fail to follow this process, you can be found to have discriminated, per the *Canadian Human Rights Act*.

5. Should employers and service providers have an accommodation policy?

While the law does not require you to have an accommodation policy, it is a good idea for employers and service providers to develop one. Doing so states a commitment to incorporating diversity into the workplace or in the delivery of services. Such a policy sets out a process by which the employer will consider all requests for accommodation.



In *Meiorin*,¹ the Supreme Court of Canada ruled that employers who do not start an accommodation process could be liable under human rights law. Developing a policy before somebody asks for an accommodation would make the process of accommodation much simpler.

Employers can reduce confusion by providing clear information and training on accommodation and their own accommodation policy. Employees who clearly understand accommodation are much less likely to have unrealistic expectations. In fact, employees who are familiar with the accommodation process are more likely to provide helpful, timely information.

For information on creating an accommodation policy, please consult the Commission's *A Place for All – A Guide to Creating an Inclusive Workplace*.

6. What are some examples of accommodation?

The ability to accommodate should be considered case by case. The following examples of accommodation are not comprehensive. Remember, one only has a duty to accommodate insofar as it does not impose an undue hardship. Undue Hardship on the operation of the business.

i) Modified physical and ergonomic conditions of the workplace

To perform their duties, employees with disabilities sometimes require changes such as these to their physical environment:

- increased space between cubicles, and space within a cubicle, to allow wheelchair access;
- specialized computer equipment, such as an ergonomic keyboard or mouse, to accommodate repetitive strain injury;
- modified monitor settings for large-print reading;
- desk chairs with specialized back and arm supports; and
- software for blind or visually impaired people that reads computerized text.

¹ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, unreported, S.C.C. December 16, 1999, also known by the name *Grismer*.



ii) Modified terms and conditions of employment

The duty to accommodate may require modifications in job duties if, for example, a person's disability or religion prevents them from carrying out certain aspects of the job.

First, identify and list the essential tasks of the position. Some tasks may be incidental and rarely required. Other tasks can be delegated to other employees, perhaps in exchange for duties or tasks that the person requesting accommodation can perform. Alternatively, the employee could be excused from those tasks.

An employer is not expected to create a permanent or new position for an employee who requires accommodation. However, employers are expected to accommodate employees with short-term light duty or rehabilitation assignments as part of a return-to-work program. (See the next section, *Temporary assignments*.)

iii) Temporary assignments

Temporary reassignment can be a form of accommodation. This may involve temporary light duties. For example, an employee returning to work after back surgery may require a six-month period of modified or light duties until their back is strong enough to carry out the full functions of the job.

In other cases, accommodation may require a temporary transfer to a different position. For example, a pregnant employee who works a printing press may not be able to deal with the fumes from the ink and toner. A possible accommodation would be to move her to a customer service position until her baby is born.

With respect to pay and benefits, an employee who stays in the same job should get the same pay and benefits, no matter how that employee has been accommodated. If the employee is accommodated through a temporary assignment, the new position should have the same or comparable pay and benefits. If it is not possible to accommodate the person in their own job category or in a comparable job, the employee is expected to accept the compensation scheme of the new position.

iv) Leaves of absence

Sometimes an employee requires a temporary leave of absence to accommodate a disability-related illness or family emergencies. Generally, an employer is expected to accommodate such requests and to hold the position until the employee returns.



However, there are costs to filling a position temporarily. The employer may be unable to attract or retain qualified replacements because the position is not permanent. The employee's team may not be able to work effectively. At some point, therefore, the absence may create an undue hardship for the employer. Paying the employee's benefits over an extended leave of absence may itself be an undue hardship.

Of course, if the employee has an absenteeism problem unrelated to disability or to another protected ground under the Canadian Human Rights Act, the employer does not have a duty to accommodate that employee.

See also Question #36 (How long does an employer have to accommodate an employee who is absent from work due to a disability?).

7. What if there are several options for accommodation?

When different options for accommodation are available, the preferred alternative is the one which achieves the following:

- maximizes the individual's dignity, autonomy, privacy and integration into the workplace and the larger society;
- minimizes discomfort or inconvenience; and
- addresses the individual's needs most rapidly.

For detailed procedures on how to accommodate an individual, please consult the Individual Accommodation Procedures Guide in the *Commission's A Place for All – A Guide to Creating an Inclusive Workplace*. For example of the case law, read about this case in British Columbia.

Undue Hardship

Questions in this section:

8. What is undue hardship?

9. What are some factors to consider in determining undue hardship?

10. Do financial costs count as undue hardship?

11. What if accommodation involves workplace health and safety risk?

12. What are some factors not to consider in determining undue hardship?



8. What is undue hardship?

Undue hardship describes the limit, beyond which employers and service providers are not expected to accommodate. Undue hardship usually occurs when an employer or service provider cannot sustain the economic or efficiency costs of the accommodation.

There is no formula for deciding what costs represent undue hardship and there is no precise judicial definition of “undue hardship.” However, remember that “undue hardship” implies that some hardship may be involved in the duty to accommodate. Employers and service providers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship.

9. What are some factors to consider in determining undue hardship?

Section 15 (2) of the *Canadian Human Rights Act* says undue hardship exists when “accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.” (Emphasis added.)

All three of these factors—health, safety and cost—should be considered when determining if an accommodation creates an undue hardship.

It is not enough to offer subjective assumptions or impressionistic evidence about what is or is not possible, nor can one simply say, “It costs too much to accommodate” or “Accommodation would present health and safety concerns.” To prove undue hardship, you have to provide evidence.

The Supreme Court has listed other factors that may also be considered:

- the type of work performed,
- the size of the workforce,
- the interchangeability of job duties,
- financial ability to accommodate,
- the impact on a collective agreement, and
- impact on employee morale.

These factors will vary from case to case, as will the importance of each factor.



10. Do financial costs count as undue hardship?

In some cases, financial costs make accommodation impossible. The impact of financial costs of accommodation will vary widely depending on the size of the employer.

Large corporations, for example, would find it hard to prove undue hardship on the basis of cost alone, as would federal departments and agencies. Such organizations usually have the budgetary and organizational scale and flexibility to accommodate special needs at relatively little cost.

Consider these factors when determining if financial costs pose an undue hardship:

- the employer's size and financial situation,
- the ability to amortize the costs or to mitigate the hardship in some other way,
- the number of people the accommodation may benefit,
- the possibility of phasing-in major accommodations, and
- the availability of special budgets, reserve funds or external sources of funding, such as government funding or tax incentives.

11. What if accommodation involves workplace health and safety risks?

An employer might find that accommodating an employee creates an undue hardship based on health, safety or both.

When considering the impact of an accommodation on health and safety, look at the extent of the risk and identify anyone who would bear that risk.¹ However, balance this risk against the right of employees to participate fully in the workplace. The goal is not absolute safety, but reasonable safety.²

¹ *Woolverton v. BC Transit operating HandyDART*, 1992, 19 C.H.R.R. D/200

² *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, unreported, S.C.C. December 16, 1999, also known by the name *Grismer*.



If the risk is borne entirely by the employee asking for the accommodation, then a higher degree of risk is acceptable. However, the employer must fully inform the employee of the nature of the risk, so that the employee can decide whether to accept that risk.

For example, an employee who wears a turban may be excused from wearing a hard hat in the workplace. In this case, the employee has a higher risk of injury, but the risk is the employee's alone.

Where the risk affects other employees or customers, much less risk is acceptable. The employer must assess the risk to others caused by accommodation and may then decide that this risk would cause undue hardship. If so, the employer should be prepared to provide objective evidence that it honestly believed that an unreasonable risk existed.

Employers considering the health and safety impacts of accommodation must still remember their responsibilities for health and safety and to the workers compensation board. They should consult appropriate representatives before settling on an accommodation. Nevertheless, the existence of a health and safety rule (such as a hard hat requirement) does not automatically constitute a bona fide occupational requirement.

12. What are some factors not to consider in determining undue hardship?

Employers cannot claim that there is an undue hardship if that claim contradicts the purpose of, and values inherent in, human rights legislation. For example, an employer cannot claim that any of the following factors will cause undue hardship:

- customer or public preference that is based on prejudice or stereotyping;
- discriminatory objections, such as other employees' objections to accommodations based on prejudice or attitudes inconsistent with human rights values; or
- threatened grievances by other employees.

Bona Fide Occupational Requirement

Questions in this section :

13: What is a bona fide occupational requirement?

14. What is the process for determining if a rule or a standard is a BFOR?



13. What is a bona fide occupational requirement?

A bona fide occupational requirement (or BFOR, for short) is a standard or rule that is integral to carrying out the functions of a specific position. For a standard to be considered a BFOR, an employer has to establish that any accommodation or changes to the standard would create an undue hardship.

For example, an airline pilot must have very good eyesight. This standard is integral to carrying out the duties of a pilot's job.

When a standard is a BFOR, an employer is not expected to change it to accommodate an employee. However, to be as inclusive as possible, an employer should still explore whether some form of accommodation is possible anyhow.

14. What is the process for determining if a rule or standard is a BFOR?

The Supreme Court of Canada established a three-step process to determine if a specific accommodation is a BFOR because it creates an undue hardship.¹ The three-step process encourages the development of standards that are free from discriminatory barriers and that accommodate the potential contributions of all employees.

a) Step one: Establish a rational connection

Was the rule adopted for a purpose rationally connected to the performance of the job?

In the first step, the employer identifies the general purpose of the standard and determines whether it is rationally connected to the performance of the job. For example, in the case of the airline pilot, good eyesight is rationally connected to flying aircraft in all weather conditions.

However, if there is no rational relationship, the employer is expected to accommodate and the rule cannot be a BFOR. For example, the employer believes that good customer service requires that all its employees stand when greeting customers. While the rule of standing to greet customers may have been adopted in good faith and with no intention to discriminate, it has a discriminatory impact on those who use wheelchairs. Is the standard reasonably necessary? No. One might legitimately argue that good customer service does not solely rely on standing to greet customers.

¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (1999 35 C.H.R.R. D/257 (S.C.C.) also known by the name of Meiorin



b) Step two: Establish good faith

Did the employer adopt the rule in an honest and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose?

This step looks at the subjective element of the standard. The employer considers whether the standard was adopted with no intention of discriminating against an employee or group of employees.

The following considerations are helpful in determining whether the rule or standard was adopted in good faith:

- Why was the standard developed?
- When and by whom was the standard developed?
- What process was used to develop the standard?

If the standard is not thought to be reasonably necessary or motivated by discriminatory considerations, then the standard must be changed, as it cannot be a BFOR.

c) Step three: Establish reasonable necessity

Is the rule reasonably necessary to the accomplishment of that legitimate work-related purpose?

In this step the employer examines whether the standard is reasonably necessary. The employer must carefully consider all reasonable options for accommodation, short of undue hardship. If the employer, after exploring all options for accommodation, finds that it cannot accommodate, then the rule can be considered a BFOR.

On the other hand, if the employer finds that it can accommodate the employee, then the employer must change the rule or standard to incorporate the accommodation.



Here are some questions to ask in considering whether the standard is reasonably necessary.

- Were alternatives to the standard or rule considered?
- If so, why weren't they adopted?
- Must all employees meet a single standard, or could different standards be adopted?
- Does the standard treat some more harshly than others?
- If so, was the standard designed to minimize this differential treatment?
- What steps were taken to find accommodations?
- Is there evidence of undue hardship if accommodations were provided?

Conflicting Rights

Questions in this section:

- 15. What if an accommodation conflicts with other regulations or other requests for accommodation?**
- 16. What if the accommodation conflicts with a collective agreement?**
- 17. Some people perceive accommodation as “special treatment.” Is it fair that one person gets “special treatment” over others?**

15. What if accommodation conflicts with other regulations or other requests for accommodation?

From time to time, an employer or service provider will have to reconcile “conflicting rights.” For example, someone with an allergy to animals may object to working with someone who has an assistance animal. One possible accommodation would be to physically separate the workers. Another would be to arrange schedules that prevent or reduce contact.

There is no hierarchy of grounds. For example, someone's need to be accommodated on the basis of family status is as important as somebody else's need to be accommodated on the basis of religion. You can't claim discrimination on the grounds of religion as a way to give your accommodation precedence.

There may be cases where an accommodation that is reasonable for one person may not be reasonable when somebody else asks for it. For example, in a case involving INCO, the employer was accommodating two employees' religious needs to change shifts. When a third employee asked for a similar change of



shift, INCO provided evidence that it would amount to undue hardship to accommodate him as well. The tribunal agreed with INCO.¹

16. What if the accommodation conflicts with a collective agreement?

The duty to accommodate prevails over private arrangements such as collective agreements. However, a substantial departure from the normal operation of the collective agreement may amount to undue interference and may accordingly constitute Undue Hardship.²

Union members have a legitimate interest in ensuring that the employer implements the terms of the collective agreement. If this interest is threatened by a proposed accommodation, the union need not agree to it, but maintaining the integrity of a collective agreement is not to be considered, if doing so has discriminatory impact. Some employers and unions have developed joint “accommodation committees” to maximize opportunities to accommodate and minimize the impact of accommodation on the collective agreement.

It is legitimate to be concerned about the impact that an accommodation will have on others. However, you have to show more than minor inconvenience to defeat the employee’s right to be accommodated. The courts have said, “The employer must establish actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures.”³

When it comes to collective agreements, unions should follow the same process of identifying and eliminating barriers to full participation in the workplace as does the employer.

See also Question #26 (What is a union’s responsibility in the search for accommodation?)

17. Some people perceive accommodation as “special treatment.” Is it fair that one person gets “special treatment” over others?

Equal treatment does not mean identical treatment. Sometimes, some employees have to be treated differently so that everyone has equal access to

¹ *Osborne v. Inco Ltd.* (1984), 6 CHRR D/2591 (Man. C.A.)

² *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, unreported, S.C.C. December 16, 1999, also known by the name *Grismer*.

³ (see *Renaud*, above)



employment. For example, a rule that all employees must stand when greeting customers will deny employment to employees in wheelchairs. Excusing an employee in a wheelchair from this rule lets her or him stay on the job.

This does not mean that these employees have “special treatment.” Rather, the duty to accommodate recognizes that equal treatment excludes some people, who suffer discrimination because of their personal characteristics, such as race, religion or disability. Accommodation removes barriers to full participation in the workplace. When an employer refuses to accommodate, it denies some employees the opportunity to work.

Employees concerned about “special treatment” should be provided the employer’s accommodation policy and procedure, if applicable. Otherwise, the employer or supervisor or union representative should discuss the employer’s legal responsibility to accommodate its employees to the point of undue hardship. It should be explained to the employee that accommodation is a fundamental responsibility that furthers equality and reduces discrimination in the workplace.

It may feel like “special treatment” for a co-worker today. However, that employee may well require accommodation someday.

Employees’ Rights and Responsibilities

Questions in this section:

- 18. What is the employee’s duty to ask for accommodation?**
- 19. What if the employee refuses to cooperate in the accommodation process?**
- 20. Do employees have to tell their employers why they need to be accommodated?**

18. What is the employee’s duty to ask for accommodation?

Employees must communicate their need for accommodation to their employer. They cannot assume that their employer knows about this need, or that the employer even suspects the need. In fact, if an employee does not communicate a need, the employer may be absolved of its legal duty to accommodate.¹ Employers cannot be held liable for not accommodating needs they do not know about or could not have reasonably known about. What is “reasonable” depends on the facts of each case.²

¹ *Williams v. Elty Publications Ltd.*, (1992), 20 CHRR D/52 (BCCHR)

² *Westmin Resources Ltd.*, (1997) 63 LAC (4th) 134



This being said, there may be an exception if a particular disability makes it difficult or impossible for the employee to express the need for accommodation. For example, in the case of some mental illnesses, the disability itself prevents the person from identifying the need for an accommodation.

If the need for accommodation is obvious—for example, if an employer notices a drastic change in an employee's behaviour or attitude—the employer has a responsibility to engage the employee in a confidential discussion about accommodation.¹

Another exception may arise if the employee does not become aware that a disability is affecting his or her work until after being dismissed for incompetence or incapacity. In this case, the employer may have a duty to reconsider its decision to dismiss the employee, after reviewing medical information.² For example, an employee who develops a mental illness may not be aware that behavioural changes are due to a mental illness.

See also Question # 23 (An employer suspects an employee needs accommodation, although the employee has not requested it. What is the employer's responsibility to address this?)

19. What if the employee refuses to cooperate in the accommodation process?

Employees are expected to be cooperative and reasonable when considering proposals that effectively respond to their needs. Employees should not make impractical accommodation demands.

Often, an employer will take reasonable steps to accommodate, but those steps might not meet the employee's idealized expectations. If the employee rejects a reasonable accommodation, she or he may be absolving the employer from liability.³

For example, an employee returning to work after surgery may ask for another employee's position as part of a return-to-work program. The employer may instead suggest modifying the returning employee's duties. In this case, the employer has met its duty to accommodate.

¹ *Mager v. Louisiana-Pacific Canada Ltd.*, unreported, BCHRC, June 29, 1998.

² *Zaryski v. Loftsguard and Percival Mercury Sales*, (1995), 22 CHRR D/256 (Sask. Bd. Inq.)

³ O'Malley and Renaud, *op cit.*



20. Do employees have to tell their employers why they need to be accommodated?

Often, we have to balance the privacy interests of the employee and the information needs of the employer.

Employees are often reluctant to share medical or personal information with their employer. For some employees, this information is private and they do not want it shared with anyone. Some employees are also concerned that their employer will not keep their information confidential, leaving them vulnerable to workplace harassment. They even fear that the employer will use the information against them to fire or demote them.

The employee needs to provide information to support a request for accommodation. The employer is entitled to sufficient information about the need to be accommodated, about suitable accommodations and about the employee's prognosis.

The employer may require a report from the employee's doctor. The report should concentrate on the functional or other limitations that require accommodation. It should not recite the medical condition. If the employer has concerns or doubts about the information, it may ask for another opinion or for an outside expert's assessment. Even so, the focus is on how best to accommodate limitations, rather than the condition itself.

Only the information necessary to determine what accommodation is required should be released, and this only to those who need to know. For example, a doctor's note may say that the employee is required to attend treatment sessions two hours, once a week, during working hours. But the employer is not entitled to know that the treatment sessions are for cancer.

If the employee declines to provide, or does not allow the employer to obtain, the necessary information, this may become a factor when deciding if the employer has met its legal duty to co-operate in the search for a reasonable accommodation.

Employer's Rights and Responsibilities

Questions in this section:

- 21. What is an employer's obligation to accommodate someone who is applying for a position?**
- 22. What is an employer's obligation to accommodate a new hire?**
- 23. An employer suspects an employee needs accommodation, although the employee has not requested it. What is the employer's responsibility to address this need?**



24. Is the employer entitled to know everything about an employee's medical condition?

25. Can an employer go to an outside source to assist in determining accommodation?

21. What is an employer's obligation to accommodate someone who is applying for a position?

Employers must ensure that the hiring process does not discriminate on the grounds protected under the *Canadian Human Rights Act*. This means that employers must accommodate job applicants who, because of a personal characteristic protected by the *Act*, are unable to participate in the hiring process in the same manner as other applicants.

For example, an employer should provide a wheelchair-accessible interview location, or it should provide additional time for an applicant with a learning disability to write an exam. Employers do not have to accommodate applicants during the hiring process, however, if they can show that doing so would be an undue hardship.

Employers can exclude applicants having personal characteristics protected by the *Act* if the exclusion is based on a bona fide occupational requirement (BFOR). A BFOR is a standard or rule that is integral to carrying out the functions of a specific position, such as a vision requirement for air traffic controllers. See Question #13 (What is a bona fide occupational requirement?) and Question #14 (What is the process for determining if a rule or standard is a BFOR?)

22. What is an employer's obligation to accommodate a new hire?

An employer must hire a successful applicant even if the candidate requires accommodation, unless doing so would amount to an undue hardship.

For example, a mother who requires a flexible start time to care for her special needs child will have to be accommodated, unless the employer can demonstrate that doing so would be an undue hardship.

23. An employer suspects an employee needs accommodation, although the employee has not requested it. What is the employer's responsibility to address this need?

Employers must accommodate employees who show signs of needing accommodation, even if they haven't asked for it,¹ based on the "ordinary person test." If an ordinary person had the same information that the employer has about

¹ See, *Conte v. Rogers Cablesystems Ltd.*, (1999), 36 C.H.R.R. D/403 (C.H.R.T.)



the employee, would that person have known that the employee required accommodation?

Some signs that an employee may require accommodation include a sudden drop in attendance, a rise in lateness, sudden changes in behaviour or unusually poor work performance. The employee may also start exhibiting unsafe work practices.

Employees are often reluctant to inform an employer that they require accommodation, because they do not feel comfortable asking the employer for help. In some situations, employees fear that telling the employer about a problem or asking for accommodation will have negative consequences, such as losing their position, being refused future promotions, being demoted, receiving fewer hours or being humiliated by their supervisor or peers.

In other situations, employees may be embarrassed to admit that they require accommodation because of the stigma and indignity associated with disabilities concerning mental illness or substance addictions. Sometimes, the very nature of these disabilities means that employees are unable to ask for accommodation.

In this situation, an employer should first approach the employee in a non-confrontational and discrete manner to discuss the potential need for accommodation. If applicable, a union representative or support person should be present at the meeting.

These are key points that should be communicated to the employee:

- the discussion is confidential,
- the discussion is to determine if there is a problem or issue that needs accommodation and to arrange that accommodation,
- the employee will not be negatively affected by the accommodation or by any information provided,
- there will, if applicable, be a review of the employers' accommodation policy and procedure, or otherwise there will be a review of the steps to follow to work out an accommodation,
- if applicable, the employee will be referred to resources funded by the employer, such as an employee assistance plan, short- or long-term disability plans, or other available financial and personal supports,
- if applicable, there may be a request for diagnostic, specialist or third-party information needed to develop the accommodation plan.



Rarely, the employer may find that the employee is not capable of participating in the accommodation process. If so, the employer should have someone who represents the employee (such as a union representative, advocate, spouse or holder of power of attorney) to help design the accommodation process.

See also Question #18 (What is the employee's duty to ask for accommodation?) and Question #11 (What if accommodation involves health and safety risks?)

24. Is the employer entitled to know everything about an employee's medical condition?

Some employers believe that if they have a duty to accommodate, they also have the right to know the precise diagnosis of the employee's disability. This is not the case. An employer is only entitled to receive the information necessary to enable it to accommodate the employee. This will include expert or professional verification that the employee has a legitimate functional limitation, a description of the limitation to help the employer accommodate that limitation, and a professional estimate of how long the employee will need to be accommodated.

See also Question # 20 (Do employees have to tell their employer why they need accommodation?)

Employers can overcome many of the difficulties associated with disclosure of sensitive medical information by having an accommodation policy that includes clear procedures for gathering medical information, for using the information strictly to accommodate an employee, and for maintaining the highest possible level of confidentiality. By developing a clear set of standards on using and maintaining this information, the employer will create a culture of trust, which will encourage employees who require accommodation to make this information more readily available.

See also Question #5 (Should employers and service providers have an accommodation policy?)



25. Can an employer go to an outside source to assist in determining accommodation?

Where either an employer or employee (or both) feel it is necessary, the employer can go to an outside expert to help develop the accommodation plan. Such an expert can provide these benefits:

- experience gathered from other workplaces and accommodations,
- a level of assurance for ideas the employer and employee have been considering but haven't yet accepted, because of a lack of knowledge or trust,
- innovative suggestions or ideas on the accommodation process, and
- a demonstration that the employer is highly committed to accommodating the employee.

Rights and Responsibilities of Unions and Professional Associations

Questions in this section:

26. What is a union's responsibility in the search for accommodation?

27. Does accommodation supercede seniority rights?

26. What is a union's responsibility in the search for accommodation?

Unions play a pivotal role in the accommodation process. While the employer has the primary duty to provide reasonable accommodation, in some circumstances the union shares that responsibility.

The union's responsibility depends on the source of the discrimination. The union will share responsibility where the union has participated in forming a discriminatory work rule, including a provision of the collective agreement. A union will also be responsible if it impedes the reasonable efforts of an employer to accommodate an employee. For example, the collective agreement may contain provisions on shift work and hours of work that exclude employees that refrain from work on their Sabbath.

The union's duty to accommodate only arises when its participation is required to make accommodation possible and no other reasonable alternative solution has been found or could reasonably be found. In the case of the employee who observes a Sabbath day, a union could make an exception to its collective agreement, so that the employee can take an alternate shift arrangement. And



the rule itself can be changed when the collective agreement is next re-negotiated.

The relationship between the employer's and the union's responsibilities must take into account the union's duty to represent the best interests of all its members. This means that the union may not agree to accommodations that hurt the rights of other members of the union. If the union does not agree to an accommodation proposed by the employer, it must put forward alternative measures that it believes are less onerous for its members.

In some situations, the best accommodation conflicts with the collective agreement or with the rights of other union members. In these situations, the union will have to work with the employer to amend the collective agreement.

27. Does accommodation supercede seniority rights?

As indicated in Question #16 (What if the accommodation conflicts with a collective agreement?), the duty to accommodate prevails over private arrangements such as collective agreements. However, if doing so substantially changes the operation of the collective agreement, then the accommodation may amount to undue interference and may thus be undue hardship.¹

Sometimes, the rules of seniority can prevent an accommodation. For example, if an employee with a sleep disorder is unable to work night shifts, the request to exclude night shifts from his schedule might conflict with the seniority rights of a long-term employee who has earned the exclusion from night shifts. In this case, the union will have to consider whether accommodating the employee will pose an undue hardship. This would depend on the size of the workplace, the impact on the collective agreement and employee morale.

Union members have a legitimate interest in ensuring the employer implements the terms of the collective agreement. Where those interests are so threatened by a proposed accommodation that it would cause undue hardship, the union may reject the accommodation. However, maintaining the integrity of a collective agreement is not enough to justify its discriminatory impact. Some employers and unions have developed joint "accommodation committees" to maximize opportunities to accommodate and minimize the impact of accommodation on the collective agreement.

¹ *Renaud, v. Central Okanagan School Board and C.U.P.E.*, 16 CHRR D/425 (S.C.C.)



Confidentiality and Privacy

Questions in this section:

28. What can an employer or union tell other employees about someone's accommodation?

29. How does an employer accommodate invisible disabilities and not breach privacy or confidentiality?

30. How does the federal privacy legislation affect an employer's right to disclose information to third parties about the accommodation?

28. What can an employer or union tell other employees about someone's accommodation?

Employers and unions must respect an employee's right to confidentiality.

Employers or unions can only provide other employees with the information they need to work safely and efficiently as the employee is accommodated.

Employees may need details about the accommodation if their duties, role or responsibility change as a result of the accommodation. Often, though, other employees will have no information other than what is involved in setting up the accommodation.

During the accommodation planning process, employers and employees should discuss how much information they will disclose to other employees and customers. Doing so will help the parties to determine the minimum necessary disclosure.

29. How does an employer accommodate invisible disabilities and not breach privacy or confidentiality?

Invisible disabilities are difficult for both the employer and employee. Without disclosing why the employee is being accommodated, it might appear that the employee is receiving special treatment.

The employee may not want to disclose their disability to colleagues, supervisors or customers because of the stigma attached to the disability. The accommodation planning process provides an opportunity for both parties to discuss disclosure. It also allows them to design an accommodation that raises the fewest questions or concerns in the workplace. Sometimes, however there does need to be some disclosure for reasons of health and safety.



30. How does the federal privacy legislation affect an employer right to disclose information to third parties about the accommodation?

The Privacy Commissioner of Canada administers privacy in the federally regulated sector. The *Privacy Act* applies to employee information in federal government institutions. The *Personal Information Protection and Electronic Documents Act* applies to employee information in the rest of the federally regulated sector.

To comply with the legislation, employers need to respect the 10 principles set out in Schedule 1 of the *Privacy Act*: accountability, identifying purposes, consent, limiting collection, limiting use, disclosure and retention, accuracy, safeguards, openness, individual access and challenging compliance. Employees who think that their employer has not respected the provisions of the *Act* can file a complaint with the Privacy Commissioner.

The Privacy Commissioner has issued findings on many cases under the *Personal Information Protection and Electronic Documents Act*. Cases 119 and 135 deal specifically with personal information needed for accommodation. In general, the Privacy Commissioner appears to provide employers with room to meet their business purposes as long as they respect the 10 principles. For more information, see the fact sheets and findings at <http://www.privcom.gc.ca/>

Ground-specific Issues: Religion

Questions in this section:

- 31. For the purpose of accommodation, what defines a religion?**
- 32. How do you know that a practice is a requirement of a religion?**
- 33. How far can an employer go to find out?**
- 34. What is an employer's responsibility to accommodate non-Christian religious observances and practices?**

31. For the purposes of accommodation, what defines a religion?

A religious belief is a belief characterized by a reference to either a spiritual relationship between humans and the environment, or to some aspect of existence beyond physical life, or to both.

Usually, religious beliefs are closely connected with a person's religion. But these beliefs can vary from the religion's established doctrine or they can be entirely personal. Religious belief also includes agnosticism and atheism.¹

¹ *Kurvits v. Canada (Treasury Board)* (1991) 14 CHRR D/469 (C.H.R.T).



32. How do you know that a practice is a requirement of a religion?

Most requests for religious accommodation can be accepted without question as they involve employees who demonstrate a sincere belief in an established religion and involve well known religious requirements, such as not working on their Sabbath, needing time to pray or not wearing head gear.

Where an employee's religious belief is less clear the employer can consider the following:

- the spiritual or moral nature of the belief, or both,
- previous religious experience,
- the relationship between those previous religious beliefs and current beliefs,
- the connection between the religious belief and the requested accommodation, and
- the extent to which the religious beliefs are applied in the employee's daily life.

33. How far can an employer go to find out?

Where the information provided is not enough for the employer to decide how to accommodate the employee, it may request additional information, either from the employee or from a designated official within the employee's religious community. This inquiry should be restricted to information for accommodation.

To help this process, employers should accommodate religious beliefs when they adopt workplace policies governing break times, leave days and work schedules. Under this policy, employees requiring accommodation would write out their request, identifying the belief that needs to be accommodated and the accommodation they require.

34. What is an employer's responsibility to accommodate non-Christian religious observances and practices?

Under the *Act*, an employer should accommodate religious belief when an employee's religious beliefs or practices conflict with a workplace requirement, qualification or practice. The accommodation may modify a rule or exempt an employee from it. Dress codes, break policies, scheduling and recruitment procedures may affect some employees because of their religious beliefs, unless these employees are accommodated.



Dress codes

Workplaces frequently have rules about dress. Employees may have to wear protective equipment or a uniform, or there may be rules about head coverings. These rules may come into direct conflict with religious dress requirements creating a duty to accommodate the employee to the point of undue hardship.

In most situations, the uniform can be modified to accommodate the employee's religious observances. If the uniform is used for health or safety reasons, however, employers must look for ways to alter the requirement or the protective clothing to maintain a reasonable level of safety while meeting the employee's religious requirements. See Question #11 (What if accommodation involves workplace health and safety risks?)

Break policies

Sometimes, an employee's regular work hours or specific duties conflict with their religious requirement to pray at particular times of the day. Employers have a duty to accommodate the employee's religious requirements. Possible accommodations include a modified break policy, flexible hours, a private area for devotions or both.

Non-Christian religious holidays

The employer has a duty to grant requests for religious leave unless doing so would cause undue hardship for the employer. Employees can do this by switching shifts, banking time, taking holiday leave or making other scheduling changes.

The law is not clear as to whether an employer must give paid leave for religious holidays. In one case, involving teachers, the Supreme Court required that a school board give paid leave to Jewish teachers who required leave for their high holidays, but this may not apply in all employment situations.¹

Some employers provide non-Christian employees with at least the same number of paid religious days as are provided for Christians. The *Canada Labour Code, Part III* requires employers to provide a paid day off to all employees for the Christian holidays of Christmas Day and Good Friday. Many collective agreements require employers to provide Easter Monday as a paid holiday. Requests for paid leave days for other religious holidays may be accommodated by providing floating leave days or unpaid leave.

¹ *Commission Scolaire de Chambly v Bergevin*, (1994) 3 S.C.R. 525, 94 CLLC 17,203



Flexible scheduling

An employer can accommodate employees whose religious beliefs do not permit them to work certain hours or days of the week. For example, Seventh Day Adventists and Jews observe a Sabbath from sundown Friday to sundown Saturday. Flexible scheduling may include alternative arrival and departure times on the days when the person cannot work the entire period, or the employee can trade lunch times for early departure or staggered work hours. If the employee has no time off left, the employer should consider letting the employee make up time lost or use floating days off.

Ground-specific Issues: Disability

Questions in this section:

35. What constitutes a disability for the purposes of accommodation?

36. How long does an employer have to accommodate an employee who is absent from work due to a disability?

35. What constitutes a disability for the purposes of accommodation?

A disability is a physical or mental condition that is both:

- permanent, ongoing, episodic or of some persistence, and;
- a substantial or significant limit on that person's ability to carry out some of life's important functions or activities, such as employment.

Disabilities include both visible disabilities, such as the need for wheelchairs, and invisible disabilities, such as cognitive, behavioural or learning disabilities.

36. How long does an employer have to accommodate an employee who is absent from work due to a disability?

An employee's disability can lead to extended absences from work, which may be an undue hardship for the employer. Each case needs to be considered individually.¹ Case law has not established a time limit or time formula for determining when a disability-related absence becomes an undue hardship. Here are some ways in which an extended absence can create an undue hardship.

¹ See, *AirBC Ltd and Canadian Airline Dispatchers Association*, (1995) 50 L.A.C. (4th) 93 (McPhillips).



- The employer may be unable to attract or retain persons qualified for the position because it is not being offered permanently.
- The cost of paying an employee's benefits while that person is not working may become an undue hardship.
- The employee's skills may become outdated.
- A new business focus or approach may no longer require the employee's skill.

Undue hardship due to absence is determined case by case. At some point, absenteeism will breach the employment contract, as the employer is unable to benefit from the contract.¹

The employer does not have to accommodate the absence of an employee with a disability if the absence is unrelated to the disability or to any other ground protected by the *Canadian Human Rights Act*. That situation would be a disciplinary matter that needs to be handled under the applicable collective agreement and the terms and conditions of employment or the *Canada Labour Code*.

Ground-specific Issues: Race, Colour, Ancestry and National or Ethnic origin
Race, colour, ancestry, national or ethnic origin

37. Does an employer have to accommodate applicants and employees who do not meet language proficiency standards?

Employers are not required to accommodate applicants and employees who cannot meet language proficiency standards.

These standards should meet the requirements for a bona fide occupational requirement.

In situations where language proficiency standards are not closely related to job requirements, however, such standards may be a pretext for not recruiting or promoting persons based on their race, ancestry or place of origin. Similarly non-specific references to "an insufficient command of a language" or "speaking with an accent" can lead unsuccessful applicants to conclude that the decision was based on race, colour, ancestry or place of origin.²

¹ See, *AirBC Ltd and Canadian Airline Dispatchers Association*, (1995) 50 L.A.C. (4th) 93 McPhillips).

² *Fletcher Challenge Canada Ltd. v. B.C. (Council of Human Rights) and Grewal*, (1992) 18 CHRR D/422 B.C.S.C.) and *Clau v. Uniglobe Pacific Travel Ltd*, (1995) 23 CHRR D/515 (B.C.C.H.R.)



Ground-specific Issues: Family Status

38. How far does an employer have to go to accommodate childcare and eldercare?

Employers have the same responsibility to accommodate an employee's family status as they do for other protected characteristics, such as disability or religion. This means that employers must accommodate employees who are differentially affected by workplace standards, policies or practices because of their family status. Responsibilities that flow from same-sex relationships are protected as "family status" in the *Act*.

Examples of accommodation based on family status include:

- allowing for an extension of a maternity or parental leave;
- allowing for leave to care for sick family members;
- allowing for alternative work arrangements, such as compressed hours, job sharing, part-time work, flexible hours and flexible place of work arrangements;
- not penalizing employees who cannot accept overtime work because of special needs relating to family status;
- adapting work and service procedures to reflect the diversity of family configurations; and
- providing suitable options to allow for breast feeding as required.

The employer must accommodate an employee's family status requests up to the point of undue hardship.

The employer's responsibility to accommodate an employee based on family status will be affected by how the employee shoulders the family responsibility. For example, a single mother is probably the only person who can care for a child too sick to go to school.¹

Employers do not have to provide paid leave to employees who need to be away from the workplace during regular working hours, unless paid leave is provided for similar matters unrelated to family status.

¹ Brown v. M.N.R., Customs and Excise, (1993), 19 CHRR D/39 (C.H.R.T.)