

PRACTICE TIPS

Workplace Accommodation Checklist: Responding to an Employee's Request for Accommodation

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Introduction

Under the *Human Rights Code* (Ontario), the duty to accommodate consists of two discrete components:

1. The ***substantive*** **or** ***practical*** component requires an employer to provide an employee an appropriate form of accommodation, where required.
2. The ***procedural*** component focuses on the steps an employer takes to consider and assess an employee's accommodation request.

Each request for accommodation must be addressed on an individualized, case-by-case, basis recognizing the employee's unique issues and needs.

This checklist offers general tips and steps that can be followed in an effort to ensure both the *substantive* and *procedural* components of the duty to accommodate are met.

The Checklist

1. An employee makes a request for accommodation OR the employer reasonably suspects the employee requires accommodation:

• Note: It is not necessary that an employee actively *request* accommodation. Where an employer knows or reasonably ought to know an employee requires accommodation, the employer has an obligation to make appropriate inquiries.

2. Determine whether there is a link between the request/need for accommodation and a prohibited ground under the *Human Rights Code* (*i.e.*, does the request for accommodation relate to: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability). Where no link exists, the duty to accommodate will not be triggered.

• Consult with the employee to understand the nature and basis of the request, as well as any suggestions or recommendations he/she may have regarding accommodation.

• Note: Human rights jurisprudence requires the accommodation process to be collaborative; employer and employee (as well as the union, where one exists) all participate.

• Request and review supporting information and/or documentation to substantiate the request for accommodation (*e.g.*, doctor's note, hospital records, treatment plan, *etc.*). Wherever possible, a request for information and documentation should be in writing so they are documented and the employee cannot later claim he/she was never asked to provide additional information.

• Note: An employer is typically not entitled to ask for an employee's medical *diagnosis*. However, in most circumstances, it is reasonable to request the provision of information about: (i) the general nature of the illness or disability; (ii) the prognosis; (iii) limitations or medical restrictions; (iv) whether limitations prevent the employee from performing his/her regular job duties and responsibilities; (v) what, if any, modifications and/or accommodations can be implemented in order to return the employee to work; and (vi) when it is anticipated the employee will be capable of returning to work, either with or without accommodation.

• Where inappropriate, insufficient, or contradictory information is provided, an employer has the right, and should exercise the right, to require further information and/or clarification.

• Note: Ordinarily, an employer will ***not*** be permitted to contact an employee's physician or health care provider directly without the employee's consent. As such, the best practice when seeking additional medical information or documentation is to provide an employee with a letter to bring to his/her physician, outlining the request.

3. Once it has been determined the employee's request for accommodation: (i) relates to a prohibited ground; and (ii) legitimately requires accommodation in the workplace, assess available accommodation. This includes reviewing the following factors, and recording and documenting steps taken, factors considered and reasons why a conclusion was reached:

The Employee's Regular Position:

• Can the employee perform his/her existing job?

• If the answer is 'no', can the employee perform the job in a modified form (*e.g.*, modified scheduling, use of supportive devices, *etc.*)?

• If the answer is 'no', the employer must proceed to the second stage of the assessment process - looking at other available positions in the workplace.

Other Positions in the Workplace:

• A thorough review of the workplace should be undertaken to determine whether there is an existing, available position the employee is able to perform. The duty to accommodate will generally not require an employer to "bump" an incumbent employee from a position in order to accommodate an employee who requires accommodation.

• In a unionized workplace, the union's obligation to participate in the accommodation process may include permitting the employee to post into a position into which he or she may not otherwise have been entitled on a seniority basis under the collective agreement.

• If the employee is a member of a bargaining unit, the employer should first review positions within the bargaining unit. If there are no positions in the bargaining unit suitable for the employee, only then should the employer consider positions outside of the unit.

• If the employee cannot perform any other existing position in the workplace, the employer must considered "bundling" of duties.

"Bundling" of Duties:

• Can the employee perform tasks and responsibilities from various positions across the organization which can be "bundled" together to provide an opportunity to perform a productive and useful job?

• It may be prudent to consider whether it is possible, absent undue hardship, to "create" a position by re-bundling duties and responsibilities.

4. Where required, consult with the employee (and union, if any), as well as with the employee's healthcare provider, to ascertain the suitability of accommodation options.

5. **Communicate the decision in writing and in a timely manner.**

• Note: An employee is not entitled to his/her *preferred* accommodation. Rather, the duty to accommodate requires the employer provide *reasonable* accommodation, up to the point of undue hardship. While an employee (and union, if any) and the employee's healthcare provider may have input into the accommodation process, **the ultimate decision rests with the employer**.

• Where an employee cannot be accommodated because no suitable work is available, or because to do so would cause the employer undue hardship, objective evidence should be gathered and recorded in support of such a conclusion.

• If the employer employs 50 or more employees, it should ensure a written individualized accommodation plan is developed for the employee, in accordance with the requirements of the *Accessibility for Ontarians with Disabilities Act.*

6. Where appropriate accommodation has been identified, implement as soon as practicable in a matter that respects the employee's privacy. This usually means the accommodation plan should only be discussed with those in the organization who *need to know* to facilitate the accommodation.

7. Once implemented, accommodation should be monitored regularly to ensure it continues to meet the needs of the employee.

• Remember: **The duty to accommodate is an ongoing duty** which requires the employer to periodically revisit whether accommodation is possible and/or should be changed, either because of changes in the workplace or the employee's restrictions. This includes discontinuing accommodation where it is no longer required.

• Throughout the accommodation process, the **lines of communication** between employer and employee (and union, if any) should be kept open. This free-flowing dialogue facilitates the accommodation process and assists in ensuring all parties meet their obligations.

