

Frequently Asked Questions with regard to Employment

Employment Section of the Act

1) **What is undue hardship?**

Undue hardship is not easily defined and is fact-specific. Things that are considered when determining undue hardship are: costs, occupation, size of organization, impact on the organization and employees, health and safety, etc.

2) **Does an employer have to accommodate an employee?**

Yes, an employer has to accommodate employees based on any of the protected grounds under the *Act*, when an employee advises the employer of the need for accommodation and/or provides the employer with documentation supporting the need for accommodation. The employer's duty to accommodate is up to the point of undue hardship, and the employee is entitled to timely, reasonable accommodation. If the accommodation is related to a physical or mental disability, the employer is entitled to know the restrictions, limitations and prognosis, but not the diagnosis. The accommodation process is a collaborative process.

3) **I have an employee who is out on sick leave, and has a medical note putting them out for 4 months. However, our Short Term Disability (STD) carrier has denied their claim for benefits. Can I force the employee to return to work prior to the expiry of the 4-month period?**

No. If the employee is on a physician authorized medical leave of absence, whether or not a STD carrier approves the leave with payment is irrelevant to the employer's duty to accommodate the absence. The standards used by the STD insurer are different than what the medical professional would use and may not accurately reflect the individual's actual ability to be at work.

4) **Do I have to create a new position for the employee who needs accommodation?**

No. Employers are under no obligation to create a new position. They do, however, have an obligation to review accommodations options (including bundling tasks), whether an employee can work their regular position with some accommodation, etc.

5) **When can I ask for further medical information? Who has to pay for that?**

When an employee requests accommodation and provides medical documentation supporting the request, an employer may request additional medical information if the employer determines that they need additional medical documentation supporting the request for accommodation, such as accommodation needs, prognosis, side effects from medications, etc. It would be the employer's responsibility to pay for the medical professional to assess and provide this information.



6) How often can I communicate with an employee who is out on sick leave?

It depends on the nature of the leave, the reason for your communication, the period of the leave, and whether or not there is medical documentation indicating that such contact would be detrimental to the recovery of the employee. If there is no medical documentation indicating that such contact would be a problem, then communication should be reasonable and necessary to facilitate the employee's return to work. Keep in mind that you don't want to be perceived as badgering the employee back into the workplace.

7) What do I do if I think I was discriminated against in a job application process?

Contact the Commission. During that contact, you would need to provide specific information as to how you believe you were discriminated against during the application process. This would include information regarding the type of the questions you were asked during the interview or the application form, and their impact on your application. You would have to establish that you have a protected characteristic under the *Act* (such as race, colour, physical disability, etc.) and that this characteristic was the basis for the alleged discriminatory actions.

You may want to take notes of what happened, what was asked, who was present during the interview process, you may want to keep a copy of the application form, etc.

8) As an employer, can I insist that employee(s) have a Grade 12 education?

No, unless it is a *bona fide* occupational qualification (BFOQ). However, to determine a BFOQ, you would have to identify what the grade 12 education would establish with regard to the job function. As an employer, you have to identify why the person needs a grade 12 education (such as literacy levels) and what are you trying to measure. Individual testing is required.

9) What happens when potentially discriminatory comments are made in the environment, but not directly at the employee?

An employer has an obligation to provide a discrimination-free environment and must investigate and remediate the situation.

10) How do you accommodate someone if that accommodation may/will affect the job tasks of other employee(s)?

Co-workers have a duty in the accommodation process to assist an employer in accommodating another employee who requires accommodation. The employer has a duty to re-bundle job tasks to meet the accommodation needs of an employee, which is a direct result of one of the protected grounds under the *Act*.

Undue hardship may be met if the accommodation would cause a health and safety concern for the other employee, e.g. repetitive strain injuries, etc.



a. What do we do about conflicting accommodations?

The employer's duty to accommodate is to the point of undue hardship. Depending upon the size and the nature of the workplace, and the number of employees needing accommodation, an employer may meet the threshold of undue hardship at some point. Typically, accommodation is on a "first come first serve" basis, however, if there are long standing accommodations required and new employee requests are submitted, an employer may request updated medical information supporting the need for the continuing of the longstanding accommodation as accommodation needs may change over time.

11) If the disability happened outside of the workplace, do I still have to accommodate? Is the level of accommodation required still the same?

Yes and yes.

12) What do I do with an employee who is not respecting their own accommodation request?

The employee has a responsibility to participate and cooperate, and not undermine or frustrate the accommodation process, but the employer has the responsibility to accommodate to the point of undue hardship. Keep in mind that undue hardship might be the employee's frustration of the accommodation process.

13) Does the Duty to Accommodate include moving someone to another bargaining unit?

Under some circumstances, yes.

For example: an employee is an Educational Assistant (EA) with 5 years of full-time experience, but is unable to do the work due to disability. The only position available is a new position as an administrative support person in a different bargaining unit, and seniority and bumping rights come into play. The union wants this new position to be posted, but this is a reasonable accommodation for the employee. Can the employer do this and what seniority will the employee have in the new position?

- a. When it is ascertained that the employee cannot do the functions as an EA even in a modified form, the employer should look into a new position in the same bargaining unit. If no position exists, the employer would look into other bargaining units for a position. If an employer is able to show that the only way that this person can be accommodated is to put him or her in an unfilled position, then the union has a duty to assist in the accommodation process, which would include putting the person in that position regardless of seniority in the collective agreement.
- b. With regard to the person's seniority, it may be required that the person carries his or her seniority into the new bargaining unit.
- c. The duty to accommodate trumps the collective agreement as long as the employer can show that there was no other possible accommodation for the employee. The law requires as little impact on a collective agreement as possible. However, when there is no alternative, the duty to accommodate supersedes the collective agreement.



- d. An employer should ensure it has documented all the possible solutions/positions that the employee could do in light of their education, training and physical capabilities, and why these positions were not reasonable for the employee.

14) Does the duty to accommodate require me to keep the employee at the same rate of pay when the position is lower?

It depends. The case law is in flux and depends on a variety of things: whether or not it would cause undue hardship on the employer, the difference in the pay, the collective agreement, etc. Employers should be cautious of reducing an employee's rate of pay as that employee may file a civil action for constructive dismissal.

15) What happens with the equipment that the employer bought for accommodation? Does the employee keep it?

It depends on the type of equipment and the level of personalisation (for example, personalized hearing aids vs. ergonomic work station, chairs) and also who paid for it and if it can be interchangeable in the workplace.

16) A person has used all of their paid sick time but still needs to take sick leave. Do I still have to continue to pay them?

No. However, the employer still needs to grant the employee the sick leave when provided with a valid medical note, provided the employer would not experience undue hardship by granting the sick leave.

17) I have many employees. We do 24-hour shifts. I need to have 10 employees on at all times. I have several requests from employees requesting not to work nights. 10 employees are already being accommodated based on a protected ground. What do I do with the 11th person requesting the accommodation? Do I need to accommodate? Do I need to remove one employee?

You can't remove accommodation from one employee to accommodate another. The employer should consider, among other things, the following: Is there any way to accommodate employee 11 within their limitations and while respecting others limitations? Could the work be 11 and 9? Could you change the shift structure? Could you create more shift options (three eight hour shifts)?

If you could not do any of the above, then accommodation is on "first come first serve" basis and you may meet the undue hardship threshold.

You may also want to obtain updated documentation supporting the other employees continued need for accommodation as that may result in confirmation that the employee no longer needs the accommodation.



18) What do I do with an employee who is stealing from me?

It is possible that theft is a symptom of a mental disability or physical disability. You would need to meet with the employee to inquire as to the reason for the theft, and if the employee raises a disability, you have the right to obtain medical documentation from a treating professional that supports the employee's claim that the action (theft) was directly due to the disability. Absent that, you would want to seek legal advice with regard to your right to discipline the employee and what this discipline could look like.

19) Can I ask an employee to have an independent medical evaluation and who has to pay for that?

Yes, but only in situations where the employer has conflicting medical information (e.g.: the employee's family doctor and a WorkSafeNB doctor have different views on issue) or where an employee's medical professional refuses to provide the information to facilitate the accommodation. It would be the employer's responsibility to pay for the medical professional to assess and provide this information if the employer is seeking clarification or additional information provided by the employee's physician.

20) I have a pregnant employee who is not currently able to do some aspects of the job due to the pregnancy. Can I lay them off?

Employers must accommodate pregnant employees up to the point of undue hardship. Before laying off a pregnant employee, the employer would need to consider possible accommodations, including re-bundling duties or other adjustments to the workplace or employee's position. If the pregnant employee cannot be accommodated without the employer experiencing undue hardship, then lay off may be permissible.

21) When can I decide that an employee on sick leave is not coming back?

It is not your decision. This determination would require a discussion with the employee and/or being provided with medical documentation indicating they are unable to return to work permanently.

22) How do I deal with an employee who I suspect is drinking on the job?

Determine whether it is a symptom of a disability by approaching the employee and stating that certain observed behaviors are of concern. Inquire of the employee if there is anything that the employer should know with regard to this observed behavior. If the employee admits of consuming alcohol on the job, then the duty to accommodate may be triggered if the employee indicates that it is due to a disability. The duty to accommodate is to the point of undue hardship, and depending upon the nature of the job, an employer may be able to argue that a *bona fide* occupational qualification (BFOQ) exists (an employer should seek legal advice with regard to the establishment of a BFOQ). The employer should seek legal advice with regard to the right to discipline the employee and what this discipline could look like.



23) I have an employee who says they have to smoke medical marijuana on the job. Do I have to accommodate that?

The employer has the right to seek further medical information/documentation regarding the employee's claim about needing to smoke medical marijuana on the job. An employer should provide the prescribing physician with a detailed description of the employee's job so that the treating physician can comment about the possible impairment implications on the employee's ability to safely complete the employment duties. If an employer is concerned about the impairment implications on the employee's ability to safely complete the employment duties, the employer may seek legal advice with regard to the possible options including a BFOQ defence. It would be treated like any other medication that may have impairment implications.

24) What do I do with an employee who cries at the workplace all the time?

The employer can meet with the employee stating their observations (e.g.: saying "I noticed you have been crying frequently at work") and asking what the employer can do to assist that employee. If it relates to one of the protected grounds, the employer has a duty to accommodate that employee.

25) I have an employee who is late every day. Can I talk to them about that?

Yes you can speak to them about it; make sure they know the work schedule. Ask if there is a reason for them being late. If the reason for being late is for one (or more) of the protected grounds, then you may request documentation supporting that claim. If this is provided, then the duty to accommodate is triggered.

26) I have a transgender woman in my workplace. Can she use the female designated washroom even though she has not had surgery? Do I have to make all my washrooms unisex?

The transgender employee can use the bathroom of their choice and the employer is not required to provide unisex washrooms as of this date. Surgery is not required to trigger the duty to accommodate

27) If an employee doesn't ask for accommodation but I believe they need it, do I have to provide it?

The employer first has to ascertain why he thinks the employee needs an accommodation (such as performance issues, including not completing work, arriving to work late, excessive absenteeism, etc.) The employer should discuss with the employee their observations regarding performance and inquire of the employee if they need accommodation. If the employee states that they don't believe they need accommodation, then the employer should document such refusal(s). The employer should also advise the employee that they may be held accountable for these identified performance issues.

However, if the employer suspects that the employee may have a mental disability but is refusing to acknowledge that they have one, the employer should approach the employee on more than one occasion to discuss the employer's observations regarding performance



and the possible impact that they could have on a continuing employment relationship. There may be a duty to accommodate if an employer knows or reasonably ought to have known that an employee requires accommodation. If the employee refuses accommodation(s), then the employer has done their due diligence. A good practice would be for the employer to document all actions taken. The employer may want to contact the Commission for further information regarding their duty to accommodate in situation like this.

28) Do I have a duty to ensure that employees are not mimicking cultural backgrounds? e.g. making fun of accents.

Yes, you have a duty to ensure that employees are working in a safe and comfortable work environment and to address concerns and/or discipline with the possible offending employee.

29) Do I have a duty to investigate all rumours?

It depends on the nature of the rumour(s). Under the *Act*, an employer has an obligation to provide a discrimination free workplace. If the rumour(s) touch upon any of the protected grounds, the employer should investigate the rumour(s).

Outside of the obligations under the *Act*, employers also have a common law duty to provide a safe and harassment free workplace. Therefore, the employer may want to determine the impact of the rumour(s) on the workplace and/or individuals before deciding what actions they may or may not take regarding them.

30) Does the employer have a duty to investigate when internal complaints are filed?

It would be a best practice for an employer to investigate internal complaints. If the allegations include one of the protected grounds, the employer has a duty under the *Act* to investigate and remediate the situation. It is recommended that all steps taken for this internal investigation be documented. Also, an employer may want to contact the Commission if the allegations touch on any of the protected grounds.

31) Can I ask, at the interview process, questions about disability, age, marital status?

Typically, an employer is not permitted to ask questions either directly or indirectly about one of the protected grounds. However, if an employer believes and can prove that they need this information due to the nature of the job, the employer may ask these questions. The onus is on the employer to establish that such information was/is required for a BFOQ/BFOR for the fulfillment of the employment's duties.



32) Can I, in my posting, set out the physical requirements of the job?

Yes. It may be helpful for potential applicants to know the true nature of the job requirements.

33) Can I ask for a physical evaluation before I hire the employee?

No, unless you can establish that the essential nature of the job requires a specific physical capability. The onus is on the employer to establish that such information was/is required (BFOQ/ BFOR) for the fulfillment of the employee's duties.

34) Can I do pre and during employment drug testing?

No. Pre-employment drug testing is never permitted under the *Act*. With regard to during employment drug testing, at this time, testing has not been developed to measure current state of intoxication. Therefore, is not permitted.

a. What about alcohol testing?

No, alcohol testing during pre-employment is not permitted. However, during the course of employment, if there is a workplace accident and is suspected that alcohol was a factor, the employer may require the employee to undergo alcohol testing only if that employee is in a safety sensitive position.

35) We have a kitchenette but I have an employee who is Orthodox Jew, do I have to provide a new fridge?

It depends on the need for accommodation and why the employee may or may not need a separate fridge. If it is determined that the employee is not able to use the same fridge as the other employees, then an employer has to investigate whether or not they are able to provide an individual fridge. It could be a mini fridge for the employee. An employer would have to show that it was unduly hard for them to provide the fridge (cost of the fridge, available space in the workplace, etc.)

The employee also has a responsibility to participate in the accommodation process and has an obligation to accept reasonable accommodation. If it is determined that the employee does not require an individual fridge as a result of the fridge's use by other employees, then that employee has an obligation to accept the accommodation being offered.

36) We have a multicultural base with various religions, so we have provided a room for prayers. However, the religions that use that room are opposing religions. What do I do?

If the employer does not have the ability to provide separate rooms, then the employer should provide a schedule for the different groups and work with the groups to ensure they have access to the room. An employer may need regulations and have them posted so that they are known to everyone, depending on the situation.



37) Is it discrimination if my employer refuses to grant me time off from work to write exams for school?

No. However, if you have a physical or mental disability that requires additional time to study or write the exam, your employer may have a duty to accommodate this request for time off. You would need to provide documentation to your employer from a treating medical professional indicating that you have a disability (not the diagnosis) that results in you needing extra time to either prepare for or write the exam/test.

The employer's duty to accommodate is to the point of under hardship and you may be entitled to reasonable accommodation, but not necessarily a perfect solution.

38) Can I be fired for requesting time off to attend medical appointments?

The employer should not base their decision to dismiss an employee for absences related to a physical or mental disability, and this includes absences to attend medical appointments. However, there is a duty on the employee to attempt to arrange their medical appointments that has the least impact on the workplace, such as prior to a shift, after a shift or during the beginning or end of a shift depending upon the workplace.

39) Do I have to accommodate smokers smoking at work?

It all depends on whether medical documentation has been provided indicating that the person needs accommodation to take "smoke breaks". However, an employee is entitled to reasonable accommodation and not the perfect solution. Therefore, the employer may not be required to pay the employee during their "smoke breaks". The employee has a duty to mitigate the effects of the disability on the workplace, which may include seeking treatment.

40) How do you deal with an employee who has excessive body odour that is causing issues in the workplace?

It all depends on the reason causing the excessive body odour. To fall under the Commission's jurisdiction, the reason must be due to one (or more) of the protected grounds.

Typically, the employer should approach the employee who has excessive body odour delicately and advise the employee of the concern and/or impact of the employee's body odour in the workplace. The employer may want to inquire of the employee if they have a medical condition that is causing the issue and whether or not the employee is attempting to take steps to address the odour.

41) Can you discriminate based on sex when it comes to personal care?

The courts have indicated that a BFOQ exists on the basis of sex in relation to providing personal care and that it would be the decision of the person receiving the care. As an employer, you are not able to make this decision on behalf of your client unless the client is incapacitated. When hiring staff to complete the personal care services, you would first have to ascertain from your clients their position with regard to the sex (gender) of the employee who will be providing the personal care services. The employer should document it and from this, an employer would be entitled to make its employment hiring decision.

42) What happens when there are conflicting human rights?

The employer/service provider must take into consideration, among other things: the interests and needs on each side; if there is a way to accommodate everyone; if there is a situation where one person is just mildly inconvenienced versus another's dignity suffering; if there is an undue hardship; reasonable accommodations; etc.

43) What do I do when I have an employee who has an extreme phobia to animals while at the same time, I have patrons who need to use service animals?

This is a case of competing human rights. As an employer, you have a duty to accommodate your employee up to the point of undue hardship. Phobias have been found to constitute a disability under the *Act*. Further, as a service provider, you have a duty to accommodate your patron so that they can access your services with the assistance of their service animal.

Depending upon the size of your organization, you may easily be able to ensure that these two individuals (employee and patron) do not have interaction(s) with one another. However, if you have very few employees, you may want to discuss with the employee who has the phobia whether or not they are comfortable with you disclosing this information to the patron so that you can facilitate accommodation of both individuals. You may want to advise the patron that you intend to provide a barrier free service to the patron but that you may need advance notice of when the patron intends to use the service in order to accommodate the employee.

Disclosure – The answers to these questions are not to be considered as legal advice or a substitute for legal advice and if there is any conflict between the answers to these questions and the *Act* and/or case law interpreting the *Act*, the *Act* and case law prevail. Direct any questions regarding this guideline to the Commission's staff.

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