

Prescription and Non-Prescription Drugs in the Workplace

Employers have a duty to accommodate an employee up to the point of undue hardship in cases where an employee is covered by a prohibited ground of discrimination in human rights legislation, such as a disability. This document will be focused on the accommodation of non-occupational injuries/illnesses.

What is the duty to accommodate?

The duty to accommodate is the legal requirement to take steps to remove discriminatory barriers to employment (up to the point of undue hardship). Accommodating these barriers may include altering an employee's daily job duties, the scope of the work, the employee's physical workplace or amending the employee's schedule. The duty to accommodate requires both the employee and the employer to facilitate accommodation efforts to try and to balance the employee's right to reasonable accommodation with the employer's right to a safe and productive workplace.

What is undue hardship?

Undue hardship is the point at which the employer cannot reasonably provide an accommodation to an employee. To establish that this point has been reached, an employer must demonstrate there would be significant consequences that would result if it had to accommodate the employee further. Those consequences must be more than a modest expense, inconvenience, or apathy on the employer's part. What constitutes 'undue hardship' varies from case to case and from employer to employer. Considerations speaking to the viability of an accommodation include:

- **Safety:** undue hardship may exist where accommodation would create an intolerable safety risk either to the employee or to others.
- **Size of employer:** employers with larger operations may be considered more likely to be able to facilitate an acceptable accommodation.
- **Interchangeability:** a workplace or worksite that is easily able to adapt to a change in process or re-bundling of work duties will be considered more able to accommodate an employee.
- **Cost:** where the cost of accommodation would significantly impact the financial viability of the enterprise, undue hardship may exist.

Who is responsible for accommodation?

There are three parties responsible in the accommodation process: the employer, the employee, and the union. All three must make reasonable efforts to facilitate an accommodation. Employees are not entitled to an ideal or perfect accommodation, but rather an adequate one, and must actively cooperate in seeking to be accommodated.

When do employees need to be accommodated or bring an issue to the employer?

An employee who has a disability, or takes medication for a disability, which may cause him or her to be unable to perform the functions of their job safely or effectively should immediately bring it to the attention of their employer. Accommodating a disability includes accommodation of the effects of the prescription(s) necessary to treat that disability. An employer cannot accommodate what they do not know about; however, the employer should be vigilant in observing where a disability might be suspected (particularly with issues of drug and/or alcohol addiction).

Employees may choose not to share information or ask for accommodation for reasons such as: concerns over confidentiality, embarrassment over the stigma associated with the disability, fear that revealing a problem or requesting an accommodation will have negative consequences, etc. However, employers are entitled to request and receive sufficient information to provide effective accommodation. If that is not provided, employers are not expected to accommodate.

Employer policies should require any employee in a safety-sensitive position to report to the employer the use of any prescription or non-prescription (whether over-the-counter or illicit) drug use which may have an impairing side effect. Employers should create a culture where employees feel they can disclose this usage without being reprimanded for their honesty.

What needs to be done when an employee brings an issue to the employer?

An employer should document when the employee brings an accommodation issue to a manager or supervisor and the sufficiency of any supporting evidence or documents they provided. The employer is not entitled to know the exact diagnosis. However, an employer is entitled to medical documentation which describes the employee's limitations, the extent and duration of any impairment resulting from the disability itself and/or the treatment, and an estimate of how long the employee will need to be accommodated. Often the employer will also need to provide the employee's doctor with information about what duties the employee will be performing in order for the doctor to provide an opinion on limitations and accommodation requirements.

If sufficient information is not provided, an employer may request the employee undertake an independent medical exam ('IME') by a physician, specialist or other professional. In making these inquiries, the employer's focus should be on the employee's functional limitations and safety issues relevant to accommodation. Only information necessary for determining the accommodation should be shared internally and only with the individuals who need to know. If an employee decides not to cooperate, by refusing to provide adequate information, the employee should be informed that, without adequate information, accommodation may not be provided and the employer's duty to accommodate will have been met.

What do I need to do to accommodate an employee?

Four questions to ask for Disability Management:

1. Does the employee have an illness or injury (disability) that requires accommodation?
 - a. If so, the employee's limitations may need to be accommodated, providing they have supplied evidence establishing the disability and that adequate accommodation is possible without the employer incurring undue hardship.
2. Does the employee have a treatment plan and are they following it?
 - a. If the employee is using prescription or non-prescription (over-the-counter or illicit) drugs, or other forms of remedy, are there side-effects that could potentially impair the employee? Are those drugs being taken according to their doctor's instructions or with their doctor's supervision? (e.g. dosage, time of day when used)
 - b. Will the employee be unfit for their job duties as a result of those side-effects?
 - i. Is there an alternative medication that they could use that would alleviate safety concerns? (This may not excuse the need for accommodation but may speak towards the extent of accommodation necessary)
 - ii. Is the employee willing to get an independent medical exam (IME)?
 1. If the employee fails to provide sufficient evidence to make a determination, an employer is entitled to define the accommodation parameters.
 2. An IME may reveal suitable alternative treatment plans acceptable to the employee that does not impair the employee.
3. What is the prognosis for recovery or reoccurrence?
 - a. Is this a one-time occurrence, temporary, or chronic condition?
4. What can the employer do to get the employee back to work? (accommodations/restrictions)
 - a. Have a doctor explain what the employee can and cannot do. The Employer may be required to supply a job description and/or a physical demands analysis (a.k.a. job demands analysis) to assist the physician in making their assessments.
 - b. Are there other duties available the employee could perform?
 - i. Can the employee productively fulfill their existing job as presently constituted?
 - ii. Can the employee perform the core aspects of the existing job in a modified or re-bundled form?
 - iii. Can the employee accomplish the duties of another job in its present form?
 - iv. Can the employee perform another job in a modified or re-bundled fashion?

***Note:** The employee may not be entitled to their full wage if the duties they are performing are heavily modified or are of a different or lesser scope.

Medical Marijuana

The use and prevalence of medical marijuana is growing in Canada and therefore in the workplace as well. The issues around medical marijuana are complex and can be difficult to navigate. The case law around accommodating medical marijuana usage, the scientific evidence as to its effects, and the practical considerations around disability management in the workplace as a whole, are all continuing to evolve. Guidelines that exist for assisting employers dealing with medical marijuana accommodation issues are available but require frequent updates.

Notwithstanding these complications, the one rule of thumb that should be followed is that an employer must consider and treat medical authorization to use marijuana just as it would any other prescription medication which has potentially impairing effects. Particularly, the employer should avoid making any decisions based on the presumed or stereotypical effects of marijuana usage without making the appropriate inquiries.

Should you have any questions or wish to discuss further the above topic, please contact our offices at 306-352-7909.