Accommodating Employee Disability – Not All That Painful

It can be challenging for an employer to navigate the obstacles presented when attempting to accommodate an employee with a physical or mental disability. Unfortunately, because the legal obligation to accommodate necessitates an individualized approach there is no "one size fits all" formula. However, the process doesn't have to be painful.

Understand the Legal Landscape

Whether the disability is as a result of a workplace accident or a weekend football mishap – the duty to accommodate remains the same.

A. The Human Rights Code – The Most Inclusive Approach

The Ontario *Human Rights Code ("Code")* requires an employer to accommodate an employee with a disability "to the point of undue hardship." This means considering the employee's restrictions and limitations and either modifying the employee's current job or finding other work as close as possible to th e employee's pre-injury job, within the scope of the employee's abilities.

There are four fundamental steps to accommodation:

1. Consider whether a disability exists.

"Disability" is defined broadly under the *Code* to include any degree of:

- physical disability, infirmity, malformation or disfigurement caused by an injury or birth defect or illness
- mental impairment or developmental disability
- learning disability or mental disorder, or
- injury or disability for which benefits are claimed or received under the *Workplace Safety and insurance Act ("Act")*

The definition of "disability" does not consider *where* the injury or illness occurred; only that it exists. A common cold or stress (which does not otherwise

trigger a disability, such as depression or anxiety) is not a “disability” under the *Code*.

2. Complete a procedural analysis.

In most cases, an employer becomes aware an employee has a disability when the employee asks for accommodation. However, in some cases it may be incumbent on the employer to make a proactive inquiry. For example, where the employer observes a dramatic change in the employee’s behaviour causing a disruption in the workplace, the employer may need to inquire whether the employee requires accommodation.

Once it has been established that an employee has a disability, the employer must consider what can be done to facilitate the employee’s continued participation in the workplace. This *procedural analysis* typically begins with an inquiry into the nature of the disability (*e.g.* physical or mental), the employee’s limitations (e.g. no lifting of more than 10lbs) and for how long the limitations – and thus the need for accommodation – may last.

Employers are entitled to ask for and receive timely, accurate and relevant medical in formation. A doctor’s note that simply says “*patient cannot return to work for 3 months*” is not sufficient, nor can an employee refuse to provide information about his limitations on the grounds the information has already been provided to the WSIB or to a private insurance carrier. In fact, decisions made by the WSIB or a private insurance carrier are largely irrelevant to an employer’s duty to accommodate.

Where the information from the employee’s doctor is insufficient, an employer might consider retaining the services of its own doctor or asking the employee to attend an independent medical examination paid for by the employer. When all else fails, an on-going failure to cooperate can lead to discipline or the denial of the accommodation request.

If it is not possible to modify the employee’s regular job, other similar jobs at the same wage rate must be considered. The employer must also explore if the tasks of multiple positions can be combined or bundled. In essence, the duty to accommodate requires the employer to offer work that is as similar as possible to the employee’s pre-injury job.

Important to note – an employer is not required to bump other employees out of their positions or create an new position if that position is not necessary in the workplace. In a unionized workplace, if suitable accommodation does not exist within the employee’s bargaining unit the employer is required to look outside the unit, and the union is required to cooperate in the process. However, accommodation outside of an employee’s bargaining unit is generally viewed as a “last resort”.

3. Complete a substantive analysis.

Although closely related to the procedural analysis, the *substantive analysis* considers the specific modifications that may be required so the employee can fully participate in the workplace. This may include decreased productivity standards, reduced hours, increased breaks and the ability to sit and stand as needed. To this end, while an employee’s input into the accommodation process is important, the employee does not have the right to insist on a more favourable position, and any absence resulting from an employee’s refusal to work in an otherwise suitable position is culpable. Finally, unless the cost of a modification

will significantly impact the *viability* of a business, the cost of accommodation will not be accepted as “undue hardship”.

4. Follow-up regularly.

Once an accommodation plan has been established, the employer should remain in regular contact with the employee and request updated medical information and reports to ensure that as the employee’s disability changes (if at all) the accommodation plan is amended accordingly. Ideally, the employee should be working his way back to his pre-injury position.

B. The Workplace Safety and Insurance Act – Not an Alternative to the Code

Where an employee is injured in the course of employment, and the employer is subject to the obligations of the *Act* (the majority of employers are required, or opt, to have coverage), the *Act* requires the employer to provide “suitable modified duties”. This standard is not as high as the “duty to accommodate” under by the *Code*.

Usually, “suitable modified duties” means adjusting hours of work, productivity standards and exploring other positions on the same shift at the same wage rate. The Workplace Safety and Insurance Board (“WSIB”) does not generally require an employer to make costly modifications to the workplace or to bundle the tasks of multiple positions in order to meet its obligations under the Act.

Where both the *Code and Act* apply, it is advisable that an employer seek to accommodate the employee’s disability to the point of undue hardship – in other words, the higher of the two standards. Failure to do so can expose the employer to whatever costs are associated with an employee receiving WSIB benefits *and* any liability arising out of a breach of the*Code*.

Practical Tips

The duty to accommodate, while at times daunting, can be managed to the benefit of both the employer and employee. To simplify the process remember the following tips:

1. Each case must be evaluated and analyzed on its own merits.
2. Accommodate to the point of undue hardship for all cases of disability, regardless whether the WSIB is involved.
3. Consider every suitable or potentially suitable workplace position, including bundled tasks.
4. Don’t rely on the decisions of the WSIB or an insurance carrier.
5. Continue to seek out updated, meaningful medical information.
6. Work with the employee (and union), to explore and implement appropriate accommodation.
7. When in doubt, reach out to experienced employment counsel who will help you navigate through the process.

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