

# How to Verify an Employee's Disability



Human rights laws require employers to make accommodations for disabled and other employees. Responding to employee accommodation requests is a legal minefield. What if you don't believe employees need the accommodation they're requesting? Or what if you don't even believe they're disabled at all? You can't just flat out ignore or reject the accommodation request. But what *can* you do? Can you ask the employee for proof of the disability and the need for accommodations? If so, what proof can you ask for? And how should you ask for it?

This article will answer these and other questions. In addition to explaining your legal rights and obligations under human rights laws, it will set out a strategy you can use to respond to accommodation requests from your own employees—one that will enable you to verify employees' disabilities and their need for accommodation without violating human rights laws. Plus, there's a Model Letter on p. 00 that you can adapt and use when requesting medical information about a disability from an employee's doctor.

## What The Law Requires

The human rights laws of each province bar employers from discriminating against employees on the basis of personal characteristics such as race, religion, age, sex, marital/family status and disability. Part of this duty is to make accommodations necessary to afford employees with protected characteristics the same opportunities as other persons. Accommodation often involves adjusting employment policies and schedules. If the employee has a physical disability, it may involve physical alterations of the workplace (e.g., installing wheelchair ramps). The duty to accommodate is also subject to limits. Employers needn't make accommodations that would cause them undue hardship.

In a recent case involving a railway company's refusal to make the aisles of its cars wider for people in wheelchairs, the Canadian Supreme Court affirmed two important principles about the accommodation process:

- It must respect the dignity of the person seeking the accommodation; and
- It can't be a blanket accommodation but one based on the particular needs of the individual [*Council of Canadians with Disabilities v. Via Rail Canada Inc.*].

## The Employer's Right to Information

There's no set formula for determining what accommodations are necessary for a particular employee. Accommodation is a two-way process in which employers and employees must work together to forge a mutually acceptable solution. In other words, employees must cooperate with the employer's attempt to accommodate their needs. The employee's failure to cooperate may effectively end the employer's duty to seek an accommodation.

What kind of cooperation are employers entitled to expect from an employee seeking accommodations? Although each situation is different, cooperation usually involves a willingness to work with the employer's HR and occupational health and safety departments. The employee is also required to provide certain key medical information the employer needs to assess the employee's needs and capabilities.

But be careful. Seeking medical information from an employee the wrong way can cause you to run afoul of personal privacy laws like PIPEDA, warns Edmonton labour and employment lawyer Vicki L. Giles. "Such laws make it illegal to collect, use and disclose personal information about a customer or employee without consent," Giles explains. *The general rule:* Employers may collect, use and disclose employees' information to carry out legitimate business functions, provided that they ask for no more than the minimum information necessary to perform the function. Responding to an employee's accommodation request is a legitimate business function. So the question becomes: What's the minimum information necessary to carry out this function?

## Information to Ask For

What medical information *can* you ask an employee for during the accommodation process?

**Verification of disability.** You have the right to ask for information about the employee's physical or mental condition. And, when the claimed disability isn't visible to the naked eye, you can ask for proof that the condition exists, says Giles. In other words, you don't have to take employees who claim that they have disabilities at their word. You're allowed to verify the existence of the disability. "The burden of proving that a disability exists lies with the employee," explains Giles.

**Scope and effect of disability.** You're also entitled to ask for the information you need to determine the scope and effect of the disability and make an appropriate accommodation, says Giles. Employers are actually often entitled to more medical information than they (or employees) think they are, particularly when an employee is asking for accommodation, she adds. For example, Giles explains, case law confirms that employers can ask for medical information about the following (which we've incorporated into the Model Letter on page 4)

- *Nature of the illness or disability*—such as "degenerative spinal disease."

But you generally can't ask for a diagnosis, says Giles [Letter, par. 1].

- *A prognosis*—that is, is the condition likely to worsen, improve or stay the same? Is it permanent or temporary? If the condition is temporary, what is the estimated time frame for improvement? [Letter, par. 2].
- *Details about the employee's limitations*, such as: Can she work full-time, part-time or at all? What changes would be necessary to allow her to work? What other limitations does the employee have? [Letter, par. 3].
- *How the doctor's conclusions were reached*. What kinds of tests were performed? Or are the doctor's recommendations based on the employee's own reports? If the latter, you might want to have your own medical consultants evaluate the employee or at least ask for more reliable and objective evidence, notes Giles [Letter, par. 4].
- *Details about the doctor's exam*. You can ask about the first and most recent times the doctor saw the employee so you can verify that the information is still current. If the doctor hasn't seen the employee in a while, you can ask for updated information, says Giles [Letter, par. 5].
- *Whether there's a continuing course of treatment*. Learning about the existence of an ongoing course of treatment helps you determine how long the disability will last and what changes need to be made to accommodate it [Letter, par. 6].
- *Information about medications the employee is taking*. Again, this could have an impact on what type of accommodation you provide [Letter, par. 7].

## How to Ask for Medical Proof

Legal limits apply to not just *what* medical information you ask for but *how* you ask for it. The safest way to get medical proof of a disability is to ask employees to have their doctors provide the information. In other words, don't contact the employee's doctor directly without the employee's consent. If you want to speak directly to the doctor, ask the employee to fill out a consent form. Or, if the employee is in a union, check the terms of the collective agreement to see if it gives you consent to contact employees' doctors.

*Example:* A trucking company required a driver returning to work after medical leave to provide information about his condition. The driver signed a consent allowing his doctor to release details of his medical condition to the company. But after getting a note from the doctor, the company decided to contact the doctor directly without notifying the driver. The federal Privacy Commissioner ruled that the company was liable under PIPEDA for collecting personal information about the driver without his consent [PIPEDA Case Summary #287].

A good way to ensure that you get the right information is to provide a letter for the employee to give to her doctor setting out the amount and type of information you need to assess the employee's needs for purposes of the accommodation request. We've provided a Model Letter that you can adapt a little further down.

## What to Do If You Can't Get the Medical Information You Need

What can you do if you don't get the information you need to verify the employee's disability and assess his needs? The answer depends on why you couldn't get the information. There are two common scenarios:

## Scenario 1: The Employee Refuses to Cooperate

If you made diligent attempts to get the medical information but the employee unreasonably failed to provide it, your accommodation duties may be at an end. The duty to accommodate requires you to make earnest and good faith efforts to obtain the necessary information, Giles explains. If the employee's lack of cooperation causes those efforts to fail, you will be considered to have met your accommodation duties under the human rights laws, she adds.

**Example:** A nurse told the hospital that she was suffering from medical problems and needed accommodations with regard to the number of her work shifts. The hospital asked her for medical information to verify the disability. But she failed to provide it or allow her doctor to provide it on her behalf. She also refused to give the hospital the results of a recent medical exam because she claimed it contained too much personal information. The hospital didn't accommodate her work schedule. The arbitration board dismissed the nurse's grievance. It was reasonable for the hospital to ask the nurse for more medical information and then deny adjusting her shift schedule when she refused to provide the information, the board said [*Capital Health Authority (Royal Alexandra) v. United Nurses of Alberta (Local 33)*].

## Scenario 2: The Doctor Doesn't Provide the Necessary Medical Information

Doctors may provide information that is incomplete, inaccurate or out of date. If you suspect that the information a doctor has provided to you is inadequate or too old, ask for updated information, says Giles. But if you make accommodations based on medical information that turns out to be wrong, a court will likely rule that you didn't discriminate as long as you can show that your reliance on the information was reasonable, she adds.

**Example:** A clerical employee went on sick leave with a debilitating muscular disease. Her doctor said she could return as long as she was assigned duties that avoided repetitive use of her extremities. The company prepared a modified job description for the employee based on the doctor's recommendation. Unfortunately, the doctor had left out a crucial detail: the fact that the employee would be returning to work in a wheelchair. The modified job description was impossible for a person in a wheelchair to perform. So the employee demanded further accommodations and filed a human rights complaint. The human rights commission ruled, and an Alberta court agreed, that the company didn't discriminate against the employee. Its accommodation attempts were reasonable, even though they were based on inadequate information from the doctor [*Callan v. Suncor Inc.*].

## Conclusion

You can't skirt human rights laws. If a disabled employee needs certain accommodations and these accommodations aren't an undue hardship for you to provide, you must provide them. But just because an employee claims she is disabled and demands certain accommodations doesn't mean you must automatically take her word for it and make those accommodations. You're entitled to ask for medical proof. Knowing what to ask for—and how to ask for it—are key to meeting

your obligations to your disabled employees. The advice in this article should help you process accommodation requests in a way that's both fair to employees and in compliance with your obligations under the human rights laws.