

# Mental Health And The Workplace: Ontario Human Rights Commission Releases New Policy On Mental Health And Addiction



The Ontario Human Rights Commission (the Commission) recently released its “*Policy on preventing discrimination based on mental health disabilities and addictions*” (the Policy). While not legally binding, it reflects the Commission’s interpretation of the *Human Rights Code* and, as with other Commission policies, will likely receive deference from the Human Rights Tribunal of Ontario and the courts. The Policy is a useful guide for addressing accommodation issues arising specifically from mental health and addiction-related disabilities in the workplace.

## **The Policy**

At the outset the Commission explains why this Policy focused on mental health and addiction is timely, observing that:

“[d]espite the prevalence of negative attitudes, prejudice, stereotyping, ignorance and misunderstanding about people with psychosocial disabilities, the reality is that many people have a mental health or addiction disability, or will develop one at some point in their lives.”

The thrust of the Policy is to reinforce the legal duty to accommodate those with mental health disabilities. Further, the Policy emphasizes that providing a discrimination-free environment includes more than accommodation—it means addressing the terms used to describe mental health and addiction issues, as well as being cognizant of any underlying stigma that may be assigned to those with mental health or addiction-related disabilities.

The Policy also reminds employers of the following legal principles that underlie the duty to accommodate:

- The duty to accommodate is both substantive (the actual accommodation) and procedural (the method of assessing the employee’s needs and appropriate accommodation).
- There must be an individual assessment as to the person’s needs and what will constitute reasonable accommodation.
- The employee must be an active participant in the accommodation process and has a duty to cooperate in the process so that appropriate (not necessarily the

“preferred”) accommodation can be provided.

- Accommodation must be provided up until the point of “undue hardship.” In determining what constitutes undue hardship, appropriate considerations include cost, set sources of funding and health and safety requirements. Inconvenience and employee morale, for example, are not accepted as valid considerations in determining whether the undue hardship test has been met.

## **Duty to inquire?**

In addition, the Policy suggests an employer may need to make inquiries of an employee if it appears he or she is in need of accommodation even if the employee has not requested accommodation for a mental health issue. This could be the case where a dramatic change in an employee’s behaviour is observed and/or brought to the employer’s attention.

In making any such inquiry, employers must be cognizant of employee privacy, an issue also increasingly recognized in the workplace. But what then should be done if the same employee denies the need for accommodation? The Commission suggests that in such cases, an employer should still attempt to start the accommodation process and continue to offer it as appropriate. However, there will be a limit to which the employer will be required to go in the absence of the employee’s participation.

## **Looking forward**

Mental health issues pose a particular challenge for employers as they are seldom visible as with many physical disabilities. Moreover, previous studies, such as a Conference Board of Canada 2011 report entitled “*Building Mentally Healthy Workplaces: Perspectives of Canadian Workers and Front-Line Managers*,” suggest that individuals with mental illness are often concerned about disclosing the illness due to stigma and a perceived negative impact on career prospects.

Accordingly, employers are well advised to make reasonable inquiries into an employee’s need for accommodation where it has reasonable knowledge or basis for a belief that the employee has such a need.

## **Norton Rose Fulbright Canada LLP**

*Norton Rose Fulbright is a global legal practice. We provide the world’s pre-eminent corporations and financial institutions with a full business law service. We have more than 3800 lawyers based in over 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.*

*Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare.*

*Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.*

*Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP, Norton Rose Fulbright South Africa (incorporated as Deney's Reitz Inc) and Fulbright & Jaworski LLP, each of which is a separate legal entity, are members (‘the Norton Rose Fulbright members’) of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the Norton Rose Fulbright members but does not itself provide legal services to clients.*

Last Updated: July 18 2014

Article by Jennifer Hodgins and Daniel R. McDonald

**Norton Rose Fulbright Canada LLP**