



Disability Management

All jurisdictions in Canada have human rights legislation which protects employees against discrimination based on prohibited grounds of discrimination. In each jurisdiction, these prohibited grounds include discrimination on the basis of physical or mental disability.

What is a Disability?

A Disability is generally defined as:

- Any degree of physical infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness
- Includes “invisible disabilities” such as mental illnesses and learning disorders (this includes stress and anxiety)
- Generally, transient illnesses such as the common cold/flu are not considered a disability
- Examples of a disability include, but are certainly not limited to, epilepsy, diabetes, cancer, depression, alcoholism, etc.

Please note that not every jurisdiction defines disability the same way. If you have any questions whether an employee may be experiencing a disability, please contact an e2r advisor.

The Duty to Accommodate

In addition to those conditions that qualify as disabilities that are brought to the attention of an employer, an employer may be considered to have constructive knowledge of an employee's disability, which may trigger the obligation of the employer to inquire into the employee's potential disability. Employers cannot turn a blind eye and plead ignorance – they have a duty to inquire.

Once it is determined that an employee is suffering from a disability, employers have a duty to accommodate the disabled employee up to the point of undue hardship. Such accommodation measures must be determined on an individual case-by-case basis and may include, but is certainly not limited to, different forms of assistance including time away from work, modified work hours, special training or tools, or modified workspaces.

What is Undue Hardship?

Undue Hardship is defined by certain provincial legislation and case law. Typically, factors upon which undue hardship might be determined include the cost of accommodation, available outside sources of funding, disruption of operations and employee morale, health and safety concerns, and the interchangeability of work force and facilities. As is evident from the words “undue hardship”, the test is a very onerous one.

What is Disability Management?

1. Immediate Response

- a. When an employer is made aware of or suspects that an employee is suffering from a disability that is impacting their job performance and/or attendance, the employer should move quickly, all the while being respectful of the employee
 - b. The employer should consider any safety issues which may relate to the disability/potential disability
2. Consult
 - a. Consult with appropriate subject-matter experts and/or legal counsel as the law is constantly changing in this area
 - b. For organizations operating in multiple jurisdictions, the responsibilities and procedures might vary between the jurisdictions
3. Identifying the Disability
 - a. Employees generally have the onus of coming forward and identifying the nature of their disability and the need for accommodation
 - b. However, where an employee exhibits aberrant, abnormal, or bizarre behavior, the employer has an obligation to inquire into any potential disabilities which may cause the behavior
 - c. Failure by the employer to do so, may result in the employer being considered to have constructive knowledge of the disability and may result in complaints being filed before a human rights judicial body and/or civil court depending on the jurisdiction
4. Communication
 - a. Ask the employee what is going on – you are allowed to ask this!
 - b. It is important to keep the lines of communication open not only to make the employee feel comfortable but to ensure the appropriate information is exchanged between the parties in order to best determine appropriate steps to move forward
5. Medical Documentation
 - a. Always insist on proper medical documentation to verify the disability and any requirements for accommodation – do not accept the employee's word
 - b. Stay focused on the business concerns and the ability of the employee to perform the essential duties of their job, not on the details of the disability itself
 - c. There is a balance between privacy and the employer's need to verify the disability and implement accommodation
 - d. Employers CAN ask for:
 - i. Nature and description of the illness
 - ii. Whether the disability is permanent or temporary
 - iii. Employee's limitations and restrictions in relation to their job duties
 - iv. Whether the issues are likely to resolve
 - v. If the employee is on medication that will affect performance
 - vi. An opinion that accommodation is medically necessary
 - e. Employers CANNOT ask for:
 - i. Medical diagnosis
 - ii. X-Rays

- iii. Notes or other test results
 - iv. Names of medications
 - f. If a doctor's note is not clear, write back and ask for clarification!
6. Accommodation
- a. Assess the possibility of accommodating the disability
 - b. Each situation must be considered individually
 - c. The dignity of the employee is very important – involve the employee in the decision making process
 - d. Employees MUST facilitate, cooperate, and accept reasonable, but not necessarily perfect, accommodation
 - e. Determine the essential duties of the employee's job and the employee's ability to perform the essential duties of the job with accommodation measures
 - f. Consider modification of the duties, the work procedures, hours of work, and the physical aspects of the job
 - g. If the original duties cannot be performed with accommodation, it may be necessary to consider other positions
 - h. Accommodation may be as simple as time away from work
7. Document, Document, Document
- a. Record all steps you have taken to assess the ability of the company to accommodate the employee
 - b. Record any actual accommodation that you have implemented and the costs of implementing that accommodation
 - c. Keep a file of all correspondence and medical notes as you may need them later
8. Leaves of Absence
- a. The employee may require unpaid time away from work, and in some cases such leaves of absence may be lengthy and not result in undue hardship
 - b. Always remember the administrative side to having an employee away from work including benefit continuation, records of employment, etc.
9. Ongoing Communication
- a. Engage in ongoing communication with employees that are on a medical leave of absence
 - b. You can and SHOULD ask for updated medical information
 - c. The employee is still an employee up to the point of termination/resignation
 - d. Do not ignore employees who are on a medical leave of absence
10. Discipline/Termination
- a. Permanent disabilities requiring a leave of absence for the foreseeable future do not lend themselves to accommodation and may result in a frustration of contract, but the assessment of this should be done very carefully and in consultation with subject-matter experts and/or legal counsel
 - b. The employer's job is to ensure that disability management has been done appropriately and in such a way that will support any determination in law that discipline or termination is the next appropriate step

- c. Be very careful when considering the discipline and/or termination of employees who have been accommodated