ISHCOM PUBLICATIONS SINCE 1986

CANADIAN

Lodging News

July 2015 Vol. 12 No. 6

CANADA'S LODGING BUSINESS NEWSPAPER $5.00

Accommodating employees with disabilities

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Employers identify managing and accommodating an employee with a physical or mental disability as one of the most difficult human resource challenges. Uncertain of what questions they are "allowed" to ask an employee and the extent of personal medical information they are entitled to receive, employers too often hesitate when they should act. Even when detailed medical information is provided, many employers are unaware of what steps must be taken to legally "accommodate" an employee with a disability. Unfortunately, because the obligation to accommodate necessitates an individualized assessment, there is no "one size fits all" formula. However, the following tips and best practices can help make the accommodation process as painless as possible.

The duty to accommodate

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

"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 (WSIA).

The definition of "disability" does not consider when, where or how the injury or illness occurred; only that it exists. In other words, it is irrelevant whether the disability is as a result of a workplace injury, a motor vehicle accident or a weekend sports activity — the duty to accommodate remains the same.

Insufficient medical information

Once it has been established that an employee has a disability, an employer must consider what can be done to facilitate the employee's continued participation in the workplace. This analysis typically begins with questions into the nature of the disability (e.g. physical or mental), the employee's limitations (e.g. no lifting of more than 10 kilos) and the expected duration of the limitations. To assist in this analysis, an employer is entitled to ask for and receive timely, accurate and relevant medical information. A doctor's note that simply says "patient is unable to work for three weeks for medical reasons" is not sufficient. Nor can an employee refuse to provide information about limitations.

Where the information from an employee's doctor is insufficient, an employer may consider asking the employee to attend an independent medical examination paid for by the employer. If the employee fails or refuses to cooperate in the accommodation process, the employer may be justified in refusing the accommodation request and/or taking disciplinary action up to and including dismissal.

The extent of accommodation

If sufficient medical information is provided to establish that the employee requires accommodation, the employer must consider what, if any, modifications are necessary to enable the employee to return to work. This may include reducing productivity standards, reducing hours, increasing the number of breaks, allowing the employee to sit and stand as needed, etc.

If it is not possible to modify the employee's existing job, other similar jobs as close as possible to the employee's wage rate must be considered. The employer must also explore if tasks from 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 and which addresses the employee's disability restrictions. The options are endless and must be tailored to the individual employee.

To this end, while an employee's input into the accommodation process is important, the employee does not have the right to decide the details of the modified work. Refusal by the employee to perform suitable modified duties may give rise to discipline.

It is only if the accommodation causes "undue hardship" to the employer will the employer be relieved of its obligation to provide accommodation. "Undue hardship" is difficult to establish as it must relate to one of the following three factors: cost, outside sources of funding, or health and safety concerns. Moreover, cost will only be considered to be "undue hardship" if accommodating the employee will significantly affect the viability of the business. Business inconvenience, employee morale, customer preference, collective agreements or contracts are not considered to give rise to "undue hardship."

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 toward a return to his or her pre-injury position.

Tips and best practices

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. There is no standard set of accommodation rules.
2. Accommodate to the point of undue hardship for all cases of disability, not just a disability that arises from a workplace accident.
3. Consider every suitable or potentially suitable workplace position, including bundled tasks.
4. Continue to request updated, meaningful medical information.
5. Work with the employee (and union) to explore and implement appropriate accommodation.
6. Reach out to experienced employment counsel who will help you navigate through the process.

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