COVID-19: Legal Obligations Around Childcare Accommodation

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When the Canadian economy “shut down” in March 2020, so, too, did schools and daycares across the country. As a result, many employees found themselves working from home and providing childcare at the same time. As provincial economies reopen and employers encourage employees to return to the physical workplace, the issue of childcare remains as schools, daycares and camps are closed or operating at reduced capacity. Even in jurisdictions in which daycare or camps have reopened or will reopen imminently, some parents may wish to keep their children at home due to fear of exposure to COVID-19. In these circumstances, the question we have been asked is: What are an employer’s legal obligations to accommodate a request for time off, to continue a work-from-home arrangement or to agree to some other arrangement?

Step 1: Determine if the employee’s request qualifies for a statutory leave.

At the outset of the COVID-19 pandemic, most Canadian jurisdictions passed legislation to provide an unpaid job-protected leave for an employee who was unable to work for reasons related to COVID-19. This included taking time off to care for a child who was at home due to a school or daycare closure under an emergency order. An employee who requests COVID-19 leave is generally entitled to the same protections available under other statutory leaves, which may

include continued recognition of seniority during the leave, continued benefits and the right to be reinstated to the employee's position or a comparable position if it no longer exists. The COVID-19 leave provisions in the existing legislation do not require an employer to agree to a work-from-home arrangement or any other form of paid accommodation. As such, a request for a continued leave of absence once schools, daycares and camps re-open or for a work-from-home arrangement while schools, daycares and camps remain closed should be addressed as a potential family status accommodation request under human rights legislation.

Step 2: Determine if the employee is entitled to accommodation based on family status.

An employer need only consider a request for accommodation on the basis of family status if the employee has been able to successfully establish a prima facie case of discrimination. The test for establishing prima facie discrimination varies among Canadian jurisdictions. In 2014, the Federal Court of Appeal held that, in order to successfully claim discrimination on the basis of family status, an employee had to demonstrate four things:

1. The child was under the employee's care and supervision.
2. The childcare obligation engaged a legal responsibility for the child, as opposed to a personal choice.
3. The employee had first made reasonable efforts to self-accommodate.
4. The impugned workplace rule interfered with the fulfilment of the childcare obligation in a way that was more than trivial or insubstantial.

This test applies to any federally regulated employer. Ontario and Alberta have rejected this approach in favour of a test that does not directly distinguish between an employee's needs and wants (preferences), does not require the employee to first self-accommodate and does not require the workplace rule to have interfered in more than a trivial or insubstantial way.

In Ontario and Alberta, an employee must only demonstrate three things:

1. Membership in a protected group (in this case, family status).
2. Adverse treatment.
3. The protected ground of discrimination was a factor in the adverse treatment.

Arguably, this is an easier standard to meet than the standard for federally regulated employees. However, in Ontario, adjudicators have addressed this by acknowledging that not all adverse treatment constitutes discrimination and the treatment must have a "negative impact" that results "in real disadvantage to the parent/ child relationship and the responsibilities that flow from that relationship, and/or to the employee's work."

To this end, it is appropriate to consider other supports available to the employee, but there is no obligation on an employee to first engage in "self accommodation." In British Columbia, courts and adjudicators have set a more stringent test, requiring there to be a change in an employee's existing terms and conditions of employment that results in serious interference with the discharge of a substantial parental obligation. Regardless of which test is applied, in most cases, an employee who has the option of sending their child to school, camp or daycare during work hours and elects not to do so may have considerable difficulty successfully establishing prima facie discrimination. Under the federal test, the obligation to exhaust "self accommodation" would include sending the child to school, camp or daycare.

In Ontario and Alberta, an employee may not be able to successfully establish "adverse treatment" if the request for accommodation is tied to an employee's personal choice. In British Columbia, unless there has been a change to the employee's terms and conditions of employment (for example, to attend work during regular working hours), it will be difficult to establish a prima facie case of family

status discrimination. The duty to accommodate may still be engaged (outside of British Columbia) if: (1) schools, daycares and camps remain closed and an employee wants to continue to work from home (rather than take an unpaid leave) even after being asked to return to the physical workplace, or (2) if schools, daycares and camps open on a limited basis and an employee requests a schedule modification or partial work-from-home arrangement to reflect the amended hours. If the duty to accommodate is triggered, an employer must determine whether the request for accommodation can be accommodated without causing undue hardship on the employer.

Step 3: Determine whether the employee can be accommodated without undue hardship to the employer.

Accommodation is an individualized assessment. For some positions, a work-from-home arrangement is easily accomplished. For many others, a work-from-home arrangement is not feasible because the work requires tools or resources available only in the physical workplace (for example, manufacturing, sanitation or construction). Similarly, work from home is not a realistic option for an employee who serves customers directly in the workplace (for example, hospitality). Even if the work can be performed at home, an employer will want to evaluate how and to what extent this can be done effectively if the employee is also providing childcare. If the answer is not clear, accommodation can be provided on a temporary basis to allow the employer to evaluate the situation. Furthermore, the fact that a work-from-home arrangement may have been tolerable on a temporary basis under an emergency order does not mean that it would not result in undue hardship if the arrangement was indefinite. In other words, an arrangement that was tolerable in an emergency may not be so in the long term, particularly if the arrangement resulted in a situation in which the employee was unable to perform key duties.

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