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Workplace Accommodation Dos and Don'ts

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Agenda

- Legislative Backdrop
- Types of Accommodation Requests
- Responding to Accommodation Requests
- Requesting and Responding to Medical Documentation
- Undue Hardship and Bona Fide Occupational Requirements
- Questions

Legislative Backdrop

Ontario *Human Rights Code*

- Right to equal treatment in employment without discrimination under section 5(1) of the Ontario *Human Rights Code*
 - Applies to all of the Code protected grounds:
 - Race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability
- Gives rise to the duty to accommodate to the point of undue hardship under section 17(2)
- Every province has similar provincial human rights legislation.

Accessibility for Ontarians with Disabilities Act

- Accommodation requirements established in the *Integrated Accessibility Standards Regulations*:
 - Accommodation during the recruitment process
 - Availability of individual accommodations during employment
 - Return to work plans
 - Accommodation during performance management

Types of Accommodation Requests

Most Common Accommodation Issues

- Employees with disabilities (disability)
- Older workers (age)
- Employees with religious needs (creed)
- Pregnant women (sex)
- Employees with caregiving responsibilities (family status)

Common Forms of Accommodation Requested

- Alteration of job duties
- Adding adaptive technologies in the workplace
- Changing the physical landscape of the workplace
- Alteration of work schedules
- Tolerating a degree of absenteeism
- Offering rehabilitation programs

Responding to Accommodation Requests

Responding to Accommodation Requests: Common Principles

- Do: Remember that the accommodation process is individualized and varies according to the characteristics of the workplace, the specific needs of the employees and the specific circumstances in which the decision is made
- Don't: Assume that an employee is entitled to a perfect solution or the specific accommodation they have requested
 - Employee must accept reasonable accommodation, even if it is not the accommodation he or she would prefer
- Positive obligation on employers to engage in dialogue with employee to investigate possible accommodations
- Duty to accommodate is a continuing obligation

The Duties of Employers, Employees and Unions

- Employer Duties:
 - Do: consider the rights of all workplace parties – one individual employee’s rights cannot be considered in isolation to the exclusion of the rights of all others
 - Don’t: ignore the duty to inquire
 - Employers are obligated to inquire where they have reasonable belief that accommodation may be required
 - Recent Ontario case involving an employee that committed suicide in the workplace
 - Arbitrator held that employer breached *OHSA*, collective agreement and its own policies by failing to ensure employee was receiving medical care, ignoring the continuing mental health difficulties, and failing to address concerns raised by employee’s co-workers – this created a safety risk for everyone in the workplace
 - Arbitrator noted that the Ontario *Human Rights Code* explicitly recognizes that health and safety issues must be considered in the accommodation process

The Duties of Employers, Employees and Unions

- Employee Duties:
 - Do: have an obligation to cooperate in the accommodation process including
 - Informing the employer of accommodation needs
 - Cannot expect or demand a perfect solution
 - Provide sufficient medical documentation for disability requests
 - Help look for suitable alternatives and accommodation options
 - Don't: have a right to be impaired at work, compromise their safety or compromise the safety of others

The Duties of Employers, Employees and Unions

- Union Duties:
 - Unions do not have a right to be involved in every unionized employee's accommodation request
 - *Telecommunications Workers' Union v. Telus Communications Inc.*, 2017 BCCA 100 (leave to appeal to SCC refused)
 - Union brought a grievance seeking rights of notice, information and consultation in respect of any request made by a bargaining unit member for accommodation (disability, family status etc.)
 - Collective agreement did not provide such rights – only that Telus would provide notice where accommodation required an employee to be transferred to a different position.
 - Arbitrator held that union has a legal right to be notified, informed and consulted in respect of **any and every accommodation request.**
 - The arbitrator's decision was overturned by the BC Supreme Court. Union participation should be engaged where:
 - The union has participated in creating a discriminatory rule or policy
 - If the union's agreement is necessary to facilitate accommodation (i.e. by alleviating the application of a provision of the collective agreement)
 - If an employee requests the union's involvement

The Duties of Employers, Employees and Unions

- Union Duties continued...
 - Where the union does become involved, it has a corresponding duty to cooperate
 - Union can also be held jointly responsible for creating work rules or practices that ultimately create a discriminatory effect.
 - Union can be found to have acted in a discriminatory manner where it a refuses to cooperate with the employer's efforts to overcome rule or practice in order to provide accommodation

Requesting and Responding to Medical Documentation

Entitlement to Medical Documentation

- In the case of an accommodation relating to a disability, employer is entitled to understand:
 - Restrictions
 - Abilities
 - Expected duration
 - When follow up will occur
- Employers are not entitled to ask for the specific diagnosis or prognosis
- How to respond to a vague or confusing doctor's note:
 - Request additional documentation
 - Ask for specifics
 - Permission to communicate directly with doctor
 - Functional Abilities Form

When Can an Employer Request an Independent Medical Examination?

Bottiglia v. Ottawa Catholic School Board and Human Rights Tribunal of Ontario, 2017 ONSC 2517

- Ottawa Catholic School Board requested an independent medical examination (“IME”) for several reasons after Bottiglia had been absent for more than two years.
 - Concerns include whether Bottiglia was prematurely returning to work based on the fact that he was going to run out of paid sick days
- Bottiglia refused to attend the IME due to concerns about information provided in the request letter sent to the IME examiner

When Can an Employer Request an Independent Medical Examination?

Bottiglia v. Ottawa Catholic School Board and Human Rights Tribunal of Ontario, 2017 ONSC 2517

- **Held**

- The Court held that in certain circumstances, an employer will be justified in requesting an IME as part of the duty to accommodate imposed upon employers under the Ontario *Human Rights Code* (section 17(2)).
- The certain circumstances include when the employer has a reasonable and bona fide reason to question the adequacy and reliability of the information provided by it's employee's medical expert.

Undue Hardship and Bona Fide Occupational Requirements

Undue Hardship

- No unified definition of undue hardship in either human rights legislation or the common law
- Certain factors have been considered as being demonstrative of undue hardship
 - Financial cost
 - *Quesnal v. London Educational Health Centre*, Human Rights Board of Inquiry, 1995
 - Size and resources of employer
 - Disruption of operations
 - Morale problems brought on by the accommodation
 - Substantial interference with the rights of another group
 - Interchangeability of employees and facilities
 - Health and safety concerns
- Do: Remember that something more than a minor inconvenience must be shown

Bona Fide Occupational Requirements

- To show that a workplace rule or standard is a bona fide occupational requirement, an employer must prove all of the following:
 - The standard was adopted for a purpose rationally connected to the performance of the job.
 - The standard was adopted in an honest and good faith belief that it was necessary to fulfill the legitimate work-related purpose.
 - The standard is reasonably necessary to accomplish the work-related purpose.
- Employers cannot impose standards that are either higher than required or irrelevant to the work

Reasonable Accommodation

- As noted earlier, employees have an obligation to accept reasonable accommodation and cannot demand a specific or preferred accommodation
- What happens when accommodation options are outside the employers control?
 - Issue arises often with family status accommodation requests
 - Don't: assume that the employee must self-accommodate
 - Do: engage in a process with the employee whereby you propose potential solutions or alternatives to the accommodation requested
 - E.g. in the case of a request for earlier end time to meet child care obligations, employers can work with the employee to consider whether alternate day care options are available or whether an immediate family member can alternate child care duties if end times cannot be accommodated every day.

Questions?

Thank you!

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