

Member's Quarterly

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Feature

Accommodation of Mental Disability

Four Steps to Help Employers Mentally Prepare

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Mentally healthy employees are productive employees. Yet the Canadian Mental Health Association reported twenty percent of Canadians experience a mental illness in any given year and 500,000 Canadians can't work due to mental illness in any given week. These staggering numbers have led many employers to implement wellness programs to support employees' mental health. But when employees still suffer from mental illness that affects them in the workplace (and clearly they do), employers must be ready to fulfill their legal obligations.

Canadian human rights laws prohibit employers from discriminating against employees based on actual or perceived mental disability and impose on employers a "duty to accommodate": to take steps to offset the discriminatory impact of a workplace rule, policy, requirement or practice by adjusting, revising or eliminating it. Accommodation isn't about ensuring an employee remains in the workplace; it's about ensuring a personal characteristic protected under human rights laws, like mental disability, isn't the basis to exclude them. Accommodation can be challenging for employers in any case. Accommodating mental disability poses particular challenges.

Here are five steps to help employers prepare to meet their duty to accommodate mental disability.

Be Alive to Signs. The duty to accommodate is triggered when either the employer has been made aware of the need for accommodation, or the circumstances are such that it ought reasonably to have known of that need – even without a specific request. Employees might find it hard or impossible to communicate their need for accommodation due to a mental illness, perhaps fearing the (still lingering) stigma associated with mental illness. Since mental illness is often invisible it's often harder to spot. Employers must know and be alive to signs that suggest its presence – and the employee's need for accommodation. Where the signs of a possible mental health issue are there, the employer has a legal duty to inquire, even if it's a difficult conversation, as it often is in the case of mental disability.

Take the Meds. Employees are often reluctant to provide medical information; fear of stigma and resulting privacy concerns can exacerbate this in the context of a mental disability. But the employer needs and is entitled to all relevant information to satisfy its duty to accommodate; when it's mental disability, this includes "reasonable" medical information. What's reasonable depends on the case, but usually includes at least the general nature of the illness, work-related limitations, whether it's permanent or temporary, the anticipated duration, the broad basis for the medical conclusion and the treatment and medications (side effects) that might impact the ability to perform the job. The employee is also obligated to provide it to prove the existence of a disability, its resulting limitations and its relationship with the accommodation sought. The employer's obligation to maintain the confidentiality of employee medical information, sharing it only with those who need to know to fulfill the accommodation duty, and communication of that commitment to the employee is perhaps of heightened significance when dealing with a mental disability.

Don't be Swayed. The duty to accommodate ends when the employer can't accommodate the employee without experiencing "undue hardship", or has accommodated them to the point where further accommodation will result in "undue hardship" to the employer. The threshold is high requiring a genuine assessment to satisfy the duty: make the necessary inquiries to gather enough information (including medical) to make accommodation decisions; identify all of the options; evaluate each one by fully canvassing its pros, using specific criteria; and carefully document the entire process in detail. To undertake the genuine

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assessment required, it's critical that employers be able to set aside their own biases and those of other employees about mental illness and invisible disabilities: the inability of the employer or of co-workers to understand or appreciate a disability they can't see or don't understand does not amount to undue hardship.

Collaborate. The accommodation duty rests primarily on the employer but employees and the union (where applicable) have parts to play too. The employee has a general duty to cooperate in the accommodation process, and specifically to give the employer sufficient and appropriate information (including medical), actively participate and cooperate in the process, accept reasonable accommodation and facilitate the implementation of a reasonable proposal. The employer isn't legally obliged to consult with the union in the accommodation process, but the union has an interest in accommodation. The union could breach its own human rights obligations if it blocks the accommodation process, and the employer might also need its support to implement an accommodation measure that affects others' rights. When the disability is a mental illness, collaboration requires the employer to be knowledgeable about mental disability and the resources it has available, be ready and able to share them with, and possibly educate the affected employee and their co-workers where necessary.

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