



Reasonable accommodation in the workplace

Your rights
Your responsibilities

A guideline developed under The Human Rights Code

Introduction

The Manitoba Human Rights Commission (the “Commission”) is an independent agency of the Government of Manitoba responsible for administering The Human Rights Code (“The Code”).

The Code outlines a complaint process and mandates the Commission to educate the public about The Code and promote human rights principles. The Code has special status over all other laws of the Province of Manitoba.

Section 5 of The Code authorizes the Commission to prepare and distribute guidelines to assist in the understanding and application of The Code.

This guideline represents the Commission’s interpretation of The Code around providing reasonable accommodation for the needs of any person or group when those needs are based on a characteristic protected in The Code. If there is any conflict between this guideline and The Code, The Code prevails.

Failing to provide reasonable accommodation is a form of discrimination

The Code prohibits an employer from discriminating against a person based on various characteristics listed in The Code including physical or mental disability, family status, religious belief and gender identity.

Discrimination means treating a person or group differently because they have, or are presumed to have, one of the characteristics listed in The Code. Discrimination may be based on stereotypes or assumptions and offends a person's dignity because it ignores their individual merit.

Discrimination also means failure to provide reasonable accommodation for the special needs of a person when their needs are based on characteristic protected in The Code. Providing reasonable accommodation for those needs enables the employer to "level the playing field" for an employee so they can equally access opportunities available to others in the workplace.

The employer's duty to accommodate

The duty to accommodate is the responsibility to address and remove unreasonable burdens or barriers based on a protected characteristic that limit access to opportunities and benefits available to others.

The accommodation process is based on the responsibility, shared by all parties, to have meaningful dialogue about accommodation, and to work together respectfully towards accommodation solutions. Everyone involved should engage in the process, by sharing information, consulting with professionals as needed and work towards providing the employee with a solution that allows them to operate in the workplace on an equal level with others.

Although the employer and employee both have responsibilities in the accommodation process, the duty to accommodate is the employer's. This is because The Code imposes an obligation on the employer to provide a discrimination-free work environment.

The employer's duty to accommodate is not triggered until an employee identifies that they have special needs based on a protected characteristic that, if accommodated, would enable them to participate on an equal level with their co-workers. An employee does not need to specifically use the words "accommodation" or "special needs" to trigger the duty to accommodate.

When an employer receives a request for accommodation, they must treat it seriously. The employer must conduct an individualized assessment in each case to determine what can be done to accommodate the employee's needs without causing the employer undue hardship. If the employer fails to reasonably accommodate those needs, the employer has contravened its obligations under

The Code.

The duty to accommodate puts the employer in the best position to offer the employee a way of reasonably accommodating their needs in the workplace, based on an assessment of the employer's operational needs, work environment and other factors.

Most importantly employers should ensure that the employee requiring accommodation is always treated with dignity and respect. Employers should avoid applying their own experience with a disability or other protected characteristic when putting together accommodation options. Instead, the employer should consult with a professional who can assist in identifying the employee's individual needs in the circumstances.

For example:

- An employee is an educational aide and requests time off to manage symptoms related to bipolar disorder. His employer insists that he cannot return to work without providing proof that he has enrolled in group counseling sessions. The employee refuses and provides information from his psychiatrist indicating that he is following his treatment program and managing his symptoms. His employer insists on group counseling sessions because they have dealt with an employee with bipolar disorder in the past and that employee advised them that the key to his re-integration into the workplace was the support he got from group counseling.

Rather than relying upon its experience or assumptions, the employer should make its decisions based on the advice of a professional familiar with the employee's disability and treatment plan.

Employers should maintain confidentiality with respect to sensitive information that underlies the employee's accommodation plan, disclosing sufficient information

about the plan to ensure that managers can monitor how the accommodation is working out.

Concerns from co-workers that the employee is being given “preferential treatment” should be dealt with directly by stating that there may be an accommodation arrangement in place that is confidential.

For example:

- An employee is awaiting the Courts to finalize her custody order. In the meantime, she has a need to start her shift at 7:30 a.m. instead of at 8:30 a.m. so that she can bring her children to daycare. When the manager is asked by a co-worker why the employee is getting special treatment, the manager simply tells him that there is a reason why the company has entered into this type of arrangement with the employee and that the employer is committed to meeting its human rights obligations.

The employer should stress that it encourages a supportive and inclusive work environment.

Employees may not always be in a position to identify a need or request accommodation. This may include situations involving a mental disability, such as addictions. In these cases, if an employer has reason to question, or ought reasonably to have recognized a need for accommodation, the employer may have a duty to make enquiries about whether or not the employee has a disability-related need that requires accommodation. The employer should always proceed cautiously and respectfully to make those enquiries focusing on how the employee may not be meeting the normal expectations of the workplace.

For example:

- An employee with a good attendance and performance history is increasingly absent, often without notifying his manager, and his work performance has deteriorated. The rumour on the shop floor is that he has a drug problem. The line supervisor speaks to him in private about these performance concerns and asks him if there is anything going on that would negatively impact his job performance.

When the employee says “no”, the employer tells him he has heard rumours and asks the employee if he has a drug problem. The supervisor also informs him of the Employee Assistance Program. The employee is granted a leave of absence to attend a treatment program.

Once an accommodation plan is identified and implemented, the employer should monitor the situation to ensure the accommodation is effectively meeting the employee’s needs. The employer should be prepared for an employee’s needs to change over time, which may require adjustments to their accommodation plan.

The employee's obligation to participate in the accommodation process

The employee has a responsibility to participate in the accommodation process. This involves providing information to substantiate or clarify their need or restriction, making suggestions, and trying out options.

The employee should cooperate when their employer requests information to explain how their need is connected to the employee's protected characteristic. The need or restriction must not be something that the employee simply "wants" or something they would "prefer" or that might benefit them.

For example:

- An employee requests a change in his shift schedule so he can coach his son's hockey team.

The employer may consider that although the employee wants a change in his shift schedule, there is no evidence provided to suggest that the employee needs this change because he is a parent or because of a family-related special need.

In the case of disability-related accommodation requests, the employee may have privacy concerns with disclosing health information to their employer. The employer must focus its enquiry on getting information about how the employee's disability might impact their ability to do their job, their specific restrictions or needs, and their prognosis for recovery. The employer should not be concerned with the employee's diagnosis. The employer should also limit disclosure of the information within its organization. In some cases, the employer must obtain the consent of the employee to collect information directly from their health

care provider.

For example:

- An employee identifies that she has osteoarthritis and experiences significant pain in her right shoulder. Also, one of her medications causes her to feel dizzy. The employer gets her consent to contact her doctor directly. The employer provides the doctor with information about the employee's basic job duties and asks the doctor to identify her restrictions and in particular, whether her reported dizziness is related to her medication.

The employee should also cooperate by offering solutions that might meet their needs, sometimes with the assistance of their union. The employee's understanding of their disability-related needs, for example, will allow them to suggest modifications to their job or other jobs that might meet their restrictions in the workplace. Ultimately, the employer decides what kind of accommodation it offers to the employee but meaningful dialogue is important to ensure that the accommodation is successful. The employee, however, should not be required to find a job within the organization that meets their restrictions, nor should the employee be required to compete for a job that meets their restrictions.

The employee should cooperate in the accommodation process by trying out accommodation options offered by the employer, even where those options are not the employee's preference.

For example:

- An employee working at the information desk in a hospital identifies that she has ulcerative colitis and her symptoms are often exacerbated by stress. She provides a doctor's note that clearly outlines that she should avoid having to deal with difficult or aggressive people

by phone or in person. Her union identifies that there is a position being advertised in the records management department where she would not have to interact with difficult people.

The employer should meet with the employee to determine if she can meet the essential qualifications of the position, perhaps with some amount of training. Although the employee has no interest in working in the records management area and is concerned that the workload will cause her stress, she should try out this option.

The employee should expect a reasonable accommodation that meets their identified needs, not necessarily the “perfect” accommodation.

What does “undue hardship” mean?

In most cases, accommodation is simple and affordable. With flexibility and good communication, providing reasonable accommodation may not be a complicated or costly matter. However, situations may arise where providing accommodation is not feasible for safety or cost related reasons. Providing reasonable accommodation for the special needs of a person with a protected characteristic means accommodating those needs to the point at which the employer cannot accommodate those needs without experiencing undue hardship.

Undue hardship is not specifically defined in The Code however we can look at how it has been interpreted by courts and tribunals for guidance. Case law tells us that it is more than minimal hardship and it must be based on actual evidence of hardship and not merely assumptions about how hard it would be to accommodate a person's special needs.

When assessing whether and how to accommodate an employee's needs, the employer should consider the following factors:

- Are there any health and safety risks associated with the accommodating the employee?
- What are the financial implications of accommodating the employee?
- Are there legitimate operational requirements that would limit or prevent accommodating the employee?
- Would accommodating the employee cause disruption to the collective agreement or negatively impact rights that have been bargained for?
- Would accommodating the employee negatively impact workplace morale?

Evidence that the employer has considered these factors is important in establishing that the employer has provided reasonable accommodation for the employee's special needs based on their protected characteristic(s).

For example:

- An employee identifies that since his knee replacement surgery, he has increased pain when doing his assembly job in the manufacturing plant. The employer offers to accommodate his needs by offering him more frequent breaks and giving him the option of sitting if he needs to while performing his duties.

The employer must consider whether or not additional breaks will negatively impact the other employees working in his area in terms of meeting quotas and also from a safety perspective. The employer should also consider whether or not this kind of offer would impact the collective agreement.

The nature, size and scope of a business or organization directly relates to what is reasonable accommodation in the circumstances.

For example:

- An employee requests that her employer reassign some non-essential duties that conflict with her religious beliefs. The employer does not want to reassign the duties because it feels that this will set a precedent. The employer must consider that it has many positions and the ability to be flexible with duties and assignments to allow the employee to be accommodated without causing undue hardship.

Developing an accommodation process

Employers should develop an accommodation process for their workplace. It is always best to have that process documented and distributed to all employees so they know how to request accommodation.

The process or policy may identify who requests should be made to and whether or not documentation to substantiate the need that requires accommodation is required from the outset or must be provided at a later stage. The process or policy may identify that management will arrange a meeting to talk with the employee requesting accommodation to clarify what their need is and how it can best be accommodated in their workplace. The process or policy may also outline the steps the employer will take to maintain the employee's privacy, as well as the guidelines the employer will use to monitor an accommodation plan once it has been implemented.

Employers should ensure that their management and human resources staff are trained on how to deal with requests for accommodation.

Being proactive: thinking about potential barriers

Working proactively to ensure equality means not only addressing specific accommodation requests by employees, but also working to remove potential barriers in the workplace. This might include examining barriers in the physical workspace such as ensuring employees who use assistive devices can safely navigate the workspace, or addressing barriers that result from workplace policies and practices, such as ensuring attendance management policies are not punitive toward employees who require time off as part of an accommodation.

In addition to examining existing barriers, employers should also be mindful of inclusivity when setting up new rules, policies and procedures, buying new equipment or designing work stations, etc. Employers should make choices that do not create barriers for persons protected under The Code. For example, break policies should take into account, where possible, the needs of pregnant or breastfeeding women, persons whose religious beliefs may require them to take time to worship during the work day, and the needs of persons with disabilities. This means that employers should take a proactive approach, incorporating a human rights mindset into all that they do.

Notes



Need more information?

For further information on this guideline or
The Human Rights Code, please contact us at
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