



The duty to accommodate: How far does an employer have to go?



This fact sheet provides a summary of the range of accommodations available to workers with disabilities, based on the duty to accommodate.



For an introduction to the duty to accommodate, see the fact sheet *What is the duty to accommodate?* at cupe.ca/disability-rights



Treating people *equally* does not always mean treating them *identically*. This is especially true for a worker with a disability, who may require adjustments to their working conditions to remain employed. These adjustments are exactly what the duty to accommodate is meant to enable.



Many workers are already familiar with the most common accommodation – a graduated return-to-work program. The duty actually goes far beyond this kind of accommodation.

There are as many individual accommodations as there are individuals with disabilities. Any given worker and workplace may have a unique combination of needs.

Common accommodations

- **Modifying the work environment:** An employer can accommodate a worker by adapting equipment, shelf heights, ramps, technology, or chairs; providing elevators, ramps, or modified technology; and providing updated technology or assistive devices.
- **Modifying duties:** Though workers are generally expected to perform the core duties of their job if possible, employers may be required to modify duties. What is possible for a temporary accommodation can be different than what is required for a long-term one. And if the worker's needs change, the accommodation should be modified as required.
- **Modifying schedules:** This accommodation could include a graduated return to work, giving the worker a different shift pattern, or being flexible about how and when breaks are taken.

Even when collective agreements or employer policies require workers to work certain shift patterns, the duty to accommodate would override those requirements unless doing so created an undue hardship.

- **Transferring the worker:** If there's a vacancy that the worker is qualified for, an employer may be required to transfer the worker into that vacancy and the union must waive the posting language in the collective agreement.
- **Bundling existing tasks:** The duty to accommodate doesn't mean an employer has to create a new non-productive job. When a worker can't do any of the existing jobs, even with modifications, the employer may be required to bundle together and reassign existing tasks other workers already do. Under the law arbitrators and human rights tribunals will require employers to consider bundling certain tasks.
- **Retraining:** Employers have been required to provide a *reasonable amount of retraining* in certain circumstances. While the employer is not expected to invest significantly, a worker is entitled to a reasonable amount of time to become familiar with new tasks.
- **Fashioning an entire program to keep a worker employed:** Sometimes, an employer must fashion an entire set of working conditions for a worker. The accommodated worker might have different reporting mechanisms and supervisory controls.
- **Tolerating lower productivity:** An employer may have to accept lower productivity standards to accommodate a worker.
- **New workplace policy:** In cases of *chemical or environmental sensitivities*, an employer may have to implement a policy on scents and tolerate temporary absences from work, or allow a worker to work from home.

Disability-related absenteeism and misconduct

In cases where a disability is causing a higher than average degree of absenteeism, the duty to accommodate will require the employer to tolerate it to the point of undue hardship. These absences need to be tracked differently than the worker's other absences.

If medical evidence proves that a worker's misconduct is because of their disability, the duty to accommodate may result in a non-disciplinary or modified disciplinary response.

The scope of the duty to accommodate

A number of general principles define the scope of the duty to accommodate.

1. The right to accommodation applies to all workers regardless of unionization, employee status, or seniority.

2. The employer's obligation to accommodate a worker begins at the point of recruitment and hiring. In other words, an employer who does not provide a fair opportunity for a potential worker to learn a position, be interviewed, and have accommodation for a disability explored at this stage may be discriminating against the applicant.
3. The duty to accommodate is ongoing. An employer may have to accommodate a worker several times over the course of his or her career.
4. The definition of the workplace has a broad interpretation. It applies to the employer's entire operation. It is not just the worker's department, worksite or even bargaining unit. It is a last resort, but employers, workers, and unions must sometimes look at accommodation outside the worker's bargaining unit, even at out-of-scope or contract positions.

A worker may have to change work locations if appropriate duties are not available, or if the workplace itself is aggravating the worker's disability. The accommodation may result in the worker taking their work with them, or moving to an existing position in a different workplace. The assignment must still be reasonable.

What is the limit of accommodation?

The duty to accommodate is a substantial one, but not infinite. The accommodation doesn't have to be perfect, just reasonable, and cannot cause undue (a lot of) hardship. Accommodation may result in the worker working fewer hours, having a less desirable assignment or getting a lower rate of pay in a modified assignment. If the only possible accommodation for the disabled worker creates undue hardship for the worker, coworkers or the employer, the duty to accommodate ends and the worker will not be able to work at all.

However, an employer or union must prove that the point of undue hardship has been reached by showing the accommodation would result in things like significant financial costs, disruption to the collective agreement, employee morale problems, safety risks, or that the accommodation cannot be absorbed because of the interchangeability of the workforce and facilities, and the size of the employer's operation.

If a worker, union or employer argues that the accommodation causes undue hardship, they must prove it with real evidence.

Cost is a common objection. An employer cannot simply state that an arrangement for a worker would be too expensive. The employer would have to demonstrate that the cost would be an undue hardship. The costs would have to be:

- a) Directly related to the accommodation;
- b) Not merely assumed or speculative, but actually proven;

- c) Substantial enough that they would either change the essential nature of the operation or impact its financial viability.

The financial costs of any accommodation are assessed in the context of the overall budget and operations of the employer. On the other hand, an employer is allowed to consider all of the steps it has taken over the accommodation-seeker's work life to accommodate a disability.

Accommodation levels the playing field

The duty to accommodate creates important legal rights for workers and unions. Understood and used properly, the duty to accommodate is potentially one of the most powerful tools we have to ensure that our workplaces are truly accessible and inclusive.

Showing our mettle



For more information
cupe.ca/disability-rights