ONTARIO NURSES' ASSOCIATION

Accommodation and Return to Work

A Guide for ONA Leaders

May 2021

The Ontario Nurses' Association (ONA) is the union representing 68,000 registered nurses and health-care professionals, as well as more than 18,000 nursing student affiliates, providing care in hospitals, long-term care facilities, public health, the community, clinics and industry.

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Purpose of this Guide

The A*ccommodation and Return to Work: A Guide for ONA Leaders* has been prepared to assist Bargaining Unit representatives who are advocating for accommodation for members with a disability. This includes representing:

- Injured members, members with a disability returning to work after being on sick leave, long-term disability benefits or Workplace Safety and Insurance Board (WSIB) benefits, and

- Members who have a disability or injury and are still in the workplace but have not lost time from work.

The approach taken in this guide is to provide a high-level overview of disability and the duty to accommodate in the context of human rights legislation and jurisprudence. It is intended to be used as a reference on the key legal rights of our members and obligations on the employer, the fundamental principles regarding the duty to accommodate as well as practical tools and strategies regarding accommodation.

The duty to accommodate disability is a multi-party legal obligation involving the employer, the union and the employee seeking accommodation. These obligations are described throughout the guide. Employers and unions in Canada are required to make every effort short of undue hardship to provide modified work to accommodate the medical restrictions/limitations of employees with disabilities. The primary responsibility, however, rests with the employer who oversees the control and management of the workplace.

Modified work and accommodations will vary according to the specific medical restrictions of the employee. There is no set formula – the needs of the employee seeking accommodation must be assessed on a case-by-case basis. In specific circumstances, ONA will file grievances where the employer fails in its duty to accommodate the medical restrictions of an employee with a disability.

A detailed Table of Contents to this guide is provided for easy reference to specific issues along with a Glossary of Terms at Appendix 1 of this guide.

ONA has produced several comprehensive guides on related topics:

- Human Rights & Equity.
- Attendance Management.
- Workplace Safety and Insurance Board.
- Occupational Health and Safety.

The Bargaining Unit President and Labour Relations Officer can assist ONA members. Your Bargaining Unit Leadership Team may have a Human Rights and Equity Representative and/or Safe Return-to-Work Representative who may be of assistance as well.

Members and Bargaining Unit leaders are encouraged to attend ONA's continuing education programs which are offered regularly across the province. Information on ONA workshops, eLearning and how to register is available on our website under the Education section of the website at www.ona.org/education. Remember that ONA Guides are available on ONA's website at www.ona.org/guides.

Introduction to Human Rights Laws and the Duty to Accommodate

The experience of disability has a profound impact on society. Almost everyone will be personally affected by disability during their lifetime – whether because they have or will develop a disability or through the experiences of a loved one.

The most recent Canadian Survey on Disability (CSD)[1] conducted by Statistics Canada in 2017 states an estimated one in five Canadians (or 6.2 million) aged 15 years and over had one or more disabilities that limited them in their daily activities. The prevalence of disabilities among Canadians tend to increase with age. However, more than 540,000 youths aged 15 to 24 years (13%) had one or more disabilities. This compared with 20% or 3.7 million of working age adults (25 to 64 years), and 38% or 2 million of seniors aged 65 and over. Women (24%) were more likely to have a disability than men (20%) and this was the case across all age groups.

Disability is the most common ground of discrimination claimed at the Ontario Human Rights Tribunal. In the union context, failure to accommodate disability is the most frequently filed grievance claiming a violation of the Ontario *Human Rights Code*. Persons living with a disability - physical, learning and mental - continue to be excluded from employment and participation in society in general. Workers with mental health disabilities have the lowest employment rate and often face significant social stigma from employers and colleagues.

The Human Rights Tribunal of Ontario[2] reports that 56 per cent of the human rights applications filed during the fiscal year 2015-2016 raise allegations of discrimination based on the protected ground of disability.

Equality is a fundamental Canadian right guaranteed by this country's Constitution and Human Rights laws. The principle that difference is to be accommodated is a predominant feature of the right to equality, whether that difference is based on factors such as gender, race and religion or disability.

Legal Obligations

The duty to accommodate is a fundamental multi-party legal obligation involving the employer, the union and the employee seeking accommodation. This duty is derived from three sources: (i) the applicable, provincial human rights legislation; (ii) rulings from the Supreme Court of Canada; and (iii) rulings of labour arbitrators and human rights tribunals.

The case law in the past two decades has consistently reaffirmed and strengthened the duty to accommodate. Unions, especially our union, have been at the forefront in advocating for their members seeking accommodation and advancing the human rights case law.

There is, however, a long way to go. While the experiences of persons with disabilities vary widely, the experience of marginalization and discrimination based on disability is

1 https ://www150.statcan.gc.ca/n1/en/daily-quotidien/181128/dq181128a-eng.pdf?st=Kk8DfJgs
2 http ://tribunalsontario.ca/documents/sjto/2019_11_19-Tribunals-Ontario-Annual-Report.pdf

common. Negative attitudes and stereotypes, manifested at both individual and systemic levels, as well as a tendency to overlook the very existence of persons with disabilities, creates barriers for persons with disabilities across a broad spectrum of environments, including the workplace.

Sources of Human Rights Protection for ONA members

Human rights protections related to disability are granted to ONA members by the Ontario *Human Rights Code* and their Collective Agreement.

The Ontario *Human Rights Code*

The Ontario *Human Rights Code*[3] *(*"Code") provides human rights protections for our members. The *Code* protects members from discrimination based on membership in one of the following groups: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, record of offences and disability.

Like other human rights statutes across Canada, the *Code* prohibits discrimination in employment on the grounds of "disability." This is set out in Section 5 of the *Human Rights Code*.[4]

Under the *Code,* everyone has the right to be free from discrimination on the basis of disability in the social areas of employment, services, goods, facilities, housing, contracts and membership in trade unions and vocational associations. This right means that persons with disabilities have the right to equal treatment which includes the right to accessible workplaces, public transit, health services, restaurants, shops and housing.

The courts have consistently stated that the *Code* should be given a broad and generous interpretation. When there is a conflict between the *Code* and another Ontario law, the *Code* prevails unless that law specifically states it applies despite the *Code.* This means that where a conflict cannot be resolved, the guarantees of protection set out in the *Human Rights Code* take precedence over all legislation and private agreements in the province, including the *Workplace Safety and Insurance Act* and collective agreements. For example, parties to a collective agreement cannot bargain a provision that exempts them from the *Human Rights Code*, either directly or indirectly.

ONA's Collective Agreements

Employees covered by an ONA collective agreement are protected against discrimination and harassment in the workplace in accordance with the provisions of the collective agreement and the *Human Rights Code.*

In 2003, the Supreme Court of Canada issued a decision known as "*Parry Sound,*"[5] which had the effect of incorporating human rights legislation into every collective agreement between unions and employers. At that time, the vast majority of ONA collective agreements already contained anti-discrimination and anti-harassment provisions. Now, every collective agreement in Ontario provides employees with the protections set out in the *Code.*

3 www.ohrc.on.ca/en/ontario-human-rights-code

4 S. 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of disability. (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of disability.

5 *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157*

All of ONA's collective agreements contain language setting out processes and procedures regarding return to work and accommodation.

Arbitrators and the Human Rights Tribunal of Ontario

The Human Rights Tribunal's (the "Tribunal") mandate is to receive and deal with applications alleging a violation of the *Code*. The Tribunal provides a process to assist parties to resolve applications through mediation and to set hearings to decide those applications where the parties are unable to reach a resolution through settlement.

It is not necessary for our members to file an application with the Tribunal. ONA members can and should enforce their rights under the *Code* and the Collective Agreement through the grievance and arbitration procedure. ONA files grievances on behalf of our members where employers have discriminated and have failed in their duty to accommodate based on disability.

ONA does not represent members who file applications with the Tribunal since it enforces the rights of our members under the *Human Rights Code* through grievance arbitration.

As a practical matter, where there is a grievance and a human rights application filed by a member that both deal with the same facts and issues under the *Code*, the normal approach of the Tribunal is to defer to the grievance arbitration process. If a failure to accommodate claim under a grievance is appropriately dealt with at arbitration by settlement or a decision of an arbitrator, then a human rights application dealing with the same claim may be dismissed by the Tribunal.

Ontario Human Rights Commission

The Ontario Human Rights Commission (OHRC)[6] was established in 1961 to administer the *Human Rights Code*. It is an arm's length agency of the government accountable to the people of Ontario through the legislature. The mandate of the OHRC includes developing public policy on human rights and actively promoting a culture of human rights in the province through education. In addition, the OHRC has the power to monitor and report on anything related to the state of human rights in Ontario. This includes reviewing legislation and policies for consistency with the intent of the *Code*.

The OHRC publishes useful policy and guidelines on disability and the duty to accommodate. As a practical matter, the OHRC does not provide assistance to members of the public alleging a claim of discrimination or a failure to accommodate.

See ***Human Rights and Equity – A Guide for ONA Members*** at www.ona.org/guides. Union advocates should consult this guide for further information regarding the prohibited grounds of discrimination.

6 www.ohrc.on.ca

The Legal Test to Establish Discrimination Based On Disability

There is no definition of discrimination in the *Code*. In human rights case law, discrimination on the basis of any of the prohibited grounds, including disability, is understood to be an act or practice that, intentionally or unintentionally, has the effect of imposing burdens, obligations or disadvantages on an individual or group or that withholds or limits access to opportunities benefits and advantages available to others.

It is frequently the case that employers are unwilling to make the effort to investigate the employee's request for accommodation, and/or to implement a reasonable accommodation. In cases such as this a grievance is filed claiming a failure to accommodate up to the point of undue hardship in accordance with the collective agreement and the *Human Rights Code.*

Establishment of a "Prima Facie" Case of Discrimination

To establish discrimination under the *Code*, an employee and the union must demonstrate the following, on a balance of probabilities:

1. They have a disability.
2. They have experienced an adverse or negative impact in employment, for example, the employer has failed to accommodate her return to work, and;
3. The disability was a factor in the adverse impact.

Once these three elements are established by the union, an initial or "prima facie" case has been made out. The burden then shifts to the employer to provide a legitimate, credible reason as to why it could not accommodate up to the point of undue hardship.

See p. 56 of this guide for a description of the factors arbitrators consider when determining whether an accommodation creates undue hardship for the employer.

Workplace Requirements, Standards and Practices

An employer may require employees to meet a standard or possess a qualification that when applied to an employee seeking accommodation is discriminatory under the *Human Rights Code*. For this to be lawful, the employer must establish that the standard or qualification is a bona fide occupational qualification (BFOQ).

Examples of work requirements, standards or practices that result in an adverse impact on employees with disabilities could include:

- The employee seeking accommodation must rotate through all of the operating rooms or emergency department on the basis that all of the employees who work there are required to do so.
- The employee with a physical disability who needs to rest periodically in endoscopy is not permitted to take breaks because the unit is too busy and staff routinely go without taking breaks.
- The employer will not allow modifications to a master schedule to accommodate the medical restrictions of an employee.

Where employers fail to consider and accommodate individual differences by modifying these workplace requirements, where possible, and the employee seeking accommodation suffers a negative consequence, that employee can establish a case of *prima facie* discrimination.

The Supreme Court of Canada - The "Meiorin Test"

In 1999, the Supreme Court of Canada in a case known as *Meiorin* [7] made a precedent-setting ruling that obliges an employer to justify any work requirement, standard or practice that appears discriminatory when applied to the disabled employee.

In this case, a female forest firefighter was laid off on the basis that, even though she could perform the job adequately, she failed an aerobic test that was based on standards set by male firefighters. The Supreme Court of Canada accepted that the test had an adverse effect on women due to their generally lower aerobic capacity.

The issue then became whether the government could defend the aerobic standard as being a reasonable and bona fide occupational requirement (BFOR), in spite of its discriminatory effect. The Supreme Court confirmed that the employer must demonstrate it took all reasonable steps, to the point of undue hardship, to accommodate the discrimination.

The *Meiorin* test requires that once a *prima facie* case of discrimination has been established by the union, the onus shifts to the employer who must establish its defence as to why it has not accommodated the employee up to the point of undue hardship. In order to establish a bona fide occupational qualification (BFOQ) it must satisfy the following three elements:

- Its rule or practice is rationally connected to the workplace operations (i.e., whether safety rules are necessary in the workplace).
- The rule or practice was created in good faith.
- The employee cannot be accommodated without undue hardship.

Many discriminatory work standards or qualifications pass the first two steps – they are usually straightforward for the employer to establish.

The third part of the test is where the legal challenge begins for the employer because the employer is required to accommodate up to the point of undue hardship.

The Supreme Court of Canada has clearly stated that the accommodation obligations on the employer are demanding, and that the undue hardship defence requires significantly more from an employer than demonstrating that the accommodation would result in operational inconvenience. It has stated that blanket or zero tolerance rules and practices may have to be modified or applied in a flexible manner to comply with the duty to accommodate.

7 *British Columbia v B.C.G.E.U.* (1999), 176 D.L.R. (4TH) 1.

The Duty to Accommodate

The duty to accommodate is straightforward: employers and unions in Canada are required to make every effort, short of undue hardship, to accommodate an employee who comes under a prohibited ground of discrimination within human rights legislation. Before any duty to accommodate can be found to exist, it must first be established that the employee has a disability that fits within the definition set out in the *Code* and that the employee has medical restrictions/limitations arising from their disability which require workplace accommodation. Once the employee provides medical documentation that disability impacts their ability to perform the full range of their job duties, the employer's obligation to accommodate is triggered.

The employer bears the primary duty to accommodate. Employers are required to go beyond simply looking at whether an employee can be accommodated in a position already in existence in the workplace.

The case law has established that once the duty to accommodate has been triggered, the employer has both <u>procedural</u> and <u>substantive</u> duties.

- The <u>procedural duty</u> refers to the process or steps taken by the employer to assess accommodation options. Employers must seriously consider and evaluate a request for accommodation -- on an individualized basis -- and obtain all necessary information including the medical restrictions or any functional abilities evaluations (FAE), the job description, the physical or mental demands analysis (PDA) if available. The work duties, responsibilities, physical work setting as well as physical/emotional/mental demands of the unit being considered must be examined closely.

- The <u>substantive duty</u> refers to the outcomes or the reasonableness of the accommodation offered. After an employer has conducted an individualized assessment of the person's capabilities and investigation into accommodation options, the employer must offer and implement a reasonable accommodation suitable to the member's restrictions in a timely manner. This could include temporary and long-term accommodations.

  The employer is required to carefully examine whether the requirement(s) of any position can be modified to accommodate the member. The onus to propose a solution rests with the employer, however the union plays a key role in identifying possible solutions.

Scope of the Duty to Accommodate

The obligation to accommodate applies to all employees including full-time, part-time, casual and probationary employees. There is no formula for accommodating employees with disabilities. Each case must be assessed on an individual basis. The obligation is ongoing as long as there still is a disability and the accommodation over time does not amount to undue hardship.

The duty to accommodation covers a wide range of situations.

- The employer must accommodate an employee with a disability or injured members who are returning to work after being on sick leave, long-term disability (LTD) benefits

or WSIB benefits. In the case of LTD benefits, return to work and the need for accommodation may occur in either the member's own occupation or the any occupation phase of the benefits.

- The employer must also accommodate members who have a disability and are still in the workplace but have not lost time from work.

- The duty to accommodate remains the same, whether the disability is temporary, permanent, recurring or episodic. However, what the accommodation looks like in each individual case may be quite different depending on the nature of the disability and the accommodation needs arising from the disability.

The Definition of Disability

Section 5 of the *Human Rights Code*[8] prohibits discrimination in employment on the grounds of disability.

S.10 (1) of the *Code* defines disability *as* including*:*

- any degree of physical disability, developmental disability, learning disability.
- dysfunction in understanding or using symbols or spoken language.
- mental disorder.
- injury or disability for which benefits were claimed or under WSIB.

The definition provides an expansive meaning, and this has permitted human rights tribunals and labour arbitrators to accept that new illnesses and conditions fit within the definition of disability.

The term "disability" as set out in the *Code* has been broadly interpreted by labour arbitrators, human rights tribunals and the courts. It includes temporary, recurring, long-term and permanent conditions.

Conditions that are of a transitory or minor nature, such as a cold, flu, headache, stomach-ache, pneumonia, muscle pain and/or pulled muscles are not subject to the duty to accommodate. This is because generally common or minor ailments are not considered disabilities under the *Human Rights Code*.

"Disability" includes not only actual, but perceived disabilities. Even in the absence of a disability, discrimination may be found where it is established that an employer has treated an employee differently based on a perception that they have a disability. A common example is employees with mental health or addictions who are ready to return back to work with or without restrictions. However, an employer is unwilling to return them to work due to discriminatory attitudes, assumptions, and stigma surrounding substance dependencies.

Medical Restrictions

The employee seeking accommodation must provide the employer with medical documentation establishing the disability. This is to be provided by the attending physician, nurse practitioner or other medical provider setting out the medical or functional restrictions/limitations that exist and require accommodation.

Restrictions may include mental/cognitive and/or physical tasks and activities the employee is not capable of doing due to their medical condition (i.e., providing direct patient care). Limitations are those mental and/or physical tasks the employee can do but only to a limited extent (i.e., lifting).

8 S. 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of …disability. (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of disability.

The purpose of medical restrictions is to trigger the employer's duty to accommodate and in doing so, safeguard employee health and safety while in the workplace. The employer must provide modified or alternate suitable work that is safe and productive for an employee who is unable to perform any or all of their normal duties as a consequence of an injury/illness. The employer must provide this accommodation up to the point of undue hardship.

Triggering the Duty to Accommodate

It is the employee's obligation to identify the need for accommodation. The employee must inform the employer of the existence of a disability and the medical restrictions/limitations. In this regard, the employee should contact the union early for support and guidance throughout the accommodation process.

The duty to accommodate under the *Human Rights Code* is triggered in two possible ways:

1. Medical Evidence Establishing Disability

The employee seeking accommodation **must** establish the existence of the disability and advise the employer of the medical restrictions or limitations. Once the employer receives the medical documentation, the duty to accommodate is triggered and the legal responsibility shifts to the employer to accommodate to the point of undue hardship. Arbitrators have dismissed grievances where the grievor had failed to tell the employer prior to filing the grievance that they were seeking accommodation on the basis of disability.

2. Employer's Duty to Inquire

An employer must inquire into the possible existence of a disability where it has reason to believe one exists. Failure to do so may be a breach of its duty to accommodate. For example, if an employer observes, suspects or is advised that an employee is suffering from a disability which is affecting work performance, the employer has a duty to take appropriate steps and investigate.

Employers are not expected to accommodate disabilities of which they are unaware. However, some individuals may be unable to disclose their needs because of the nature of their disability. In these circumstances, employers should try to assist the person who is clearly unwell or perceived to have a disability by offering accommodation. For example, an employer is unaware that the employee is suffering from depression but perceives that a disability might exist. The employer may see that the employee is having difficulty concentrating or performing job functions and is showing signs of stress. If the employer imposes discipline or terminates the employee for poor performance, without any attempt to investigate whether accommodation is needed, these actions may be found by arbitrators to have violated the C*ode.*

Where possible, it is best for the union and employee to communicate a request for accommodation in writing and not to rely on the employer to inquire on the need for accommodation.

Bargaining Unit Leaders should ensure their members understand they should contact the union early for support and guidance throughout the accommodation process. Plus, the member will need to provide the employer with the appropriate medicals including medical restrictions. The member should also provide a copy of the medicals to the union. It is important that the union representative independently reviews the medical note and restrictions set out by the treating physician rather than rely on the employer's assertion as to what they are.

Duties and Responsibilities in the Accommodation Process

The duty to accommodate is a multi-party obligation with roles and responsibilities for the employer, union and employee seeking accommodation.

Modified work and accommodations will vary according to a person's unique needs. These needs must be considered, assessed and accommodated individually. Everyone involved must treat human rights arising in the workplace seriously and respectfully.

When an accommodation is requested, everyone involved must share the information regarding the medical restrictions or limitations and actively seek solutions. All three parties share responsibility for making the accommodation process a success. The primary responsibility is on the employer who oversees the control and management of the workplace.

The Supreme Court of Canada, in its 1992 decision *Central Okanagan v. Renaud,*[9] set out the respective roles and responsibilities of the employer, union and employee seeking accommodation. The role and responsibilities have evolved and been clarified in the jurisprudence. Common themes have now been established for each of the parties.

See the following ONA Resources in the Index of Documents:

- **Practical Tool #1 – Successful Accommodation –** A Three-party Partnership. This resource sets out a summary of the roles of the three parties.

Role of the Employer

Overview: The employer has the primary responsibility to offer and implement a safe and suitable accommodation. It is required to take reasonable steps to accommodate short of undue hardship. In doing so, it must actively work with the employee and the union.

Employer Responsibilities:

- Provide a supportive, positive workplace and an effective return-to-work process.
- Accept the request for accommodation in good faith and deal with it in a timely manner. This may include creating a temporary solution until a longer term one is available.
- Request only information that is required to make the accommodation. The employer needs to know the restrictions or limitations and length of time the accommodation will be required (permanent or temporary) but generally not diagnosis. There may be circumstances where more medical information may be requested to explain or implement the requested accommodation.
- Take reasonable measures, short of undue hardship, to accommodate the employee's disability. While the employer is not expected to provide accommodation when it causes undue hardship, it is expected to tolerate some difficulties and challenges. The employer is not required to create an unproductive position regardless of its size or revenues.

9 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

- The employer and its managers, including the occupational health department, should not substitute their own personal views for those of the employee's treating physician.
- Maintain the confidentiality of the employee's health information.
- The employer is required to offer a reasonable accommodation that is consistent with an employee's medical restrictions.

Role of the Employee

Overview: The employee must identify the need for an accommodation arising from a disability, provide the employer with the restrictions and request the accommodation. The employee should contact the union early for support and guidance. The employee must also cooperate and participate in all aspects of the accommodation process and accept reasonable accommodation.

Employee Responsibilities

- Identify the need for accommodation of a disability, inform the employer, and contact the union early for support and guidance.
- Provide the employer with the medical restrictions which triggers the employer's duty to accommodate.
- Cooperate with the employer and the union in all aspects of the accommodation/ return-to-work process including discussions regarding accommodation solutions.
- Comply with the employer's ongoing, reasonable requests for medical information.
- Pursue, commit to and take the necessary steps toward convalescence/rehabilitation.
- Where the employer has initiated an accommodation proposal that is reasonable given the restrictions, the employee must try the proposed accommodation provided it is safe, including on a trial basis. If the employee fails to cooperate and causes the proposal to flounder, a grievance regarding failure to accommodate will be dismissed. Arbitrators will not allow an employee to simply refuse a reasonable accommodation offer without some effort made in the workplace. The employee's cooperation is an integral part of the success or failure in finding appropriate workplace accommodation.
- Work within the medical restrictions and communicate to the manager or other employer representative if the work assignment does not fit within those restrictions.
- Despite the frustrations the employee may feel, it is inappropriate to take matters into their own hands and modify the workplace to self-accommodate. It is outside the role of the employee to engage in self-help measures of this kind.

Role of the Union

Overview: The union must take an active role as a partner in the accommodation process. It must advocate for its member as well as support and facilitate all aspects of the accommodation process so that our member can successfully be accommodated.

Union Responsibilities

- Advocate on behalf of its member.

- Actively work with the member to identify potential accommodations and propose those solutions to the employer.
- Facilitate and support all aspects of the accommodation process so that the employer can make a reasonable accommodation plan that can be successfully implemented.
- Consider the rights of all Bargaining Unit members. The human rights of employees seeking accommodation must be balanced with the seniority rights of other members. The duty to accommodate under the *Ontario Human Rights Code* may prevail over the terms of the collective agreement.
- The union is not required to support an accommodation that would significantly interfere with the collective agreement rights of its other members. This may amount to undue hardship and may justify the union's refusal to agree to an accommodation. Arbitrators have held that employer should consider reasonable alternatives that do not interfere with the collective agreement before considering accommodation options that deprive employees of their seniority rights. This includes the waiver of job postings provisions. The union's role is not to be an impediment, but rather a facilitator in reaching a successful accommodation solution, otherwise it risks being a party to the discrimination of the employee.
- Act as the intermediary between members and the individual being accommodated when members confuse the duty to accommodate with special treatment. Contact the employer and ensure education is provided where appropriate.
- Follow up with the member to ensure the accommodation is still viable.
- Ensure the confidential information related to the accommodation remains confidential while at the same time ensuring that sufficient medical information is shared to support an accommodation.
- File grievances where the employer has failed to accommodate.

See the following ONA Resources in the Index of Documents:

Membership Policies

Membership Policy #1 – Policy Modified Work and Accommodation Service Delivery Model

See the Flow Chart at the end of this Policy setting out the employer's duty to accommodate up to the point of undue hardship. This chart will assist union representatives in monitoring and assessing the employer's procedural and substantive obligations regarding the duty to accommodate.

Membership Policy #2 – Member Policy 14.7 Duty to Accommodate

References

Reference #2 – Safe Return to Work/Work Accommodation Representative – This document sets out the Bargaining Unit accountabilities that have been developed by ONA's Board of Directors for this role. The purpose of the role is to support members in their return to work and to ensure that the appropriate Bargaining Unit leader and LRO are notified of any violation of a member's rights as soon as possible.

Reference #3 – Guideline to Representing Members at Accommodation/Return-to-Work Meetings – This Guideline has two sections:

- General Guidelines.
- Representation of Members with Substance Dependence.

This reference provides a step-by-step approach to representing the member from the initial stages to achieving the accommodation and is especially useful for union representatives new to the process of accommodation.

Practical Tools

Practical Tool #2 – ONA Supports Members in Return to Work: A Checklist. This is directed to Bargaining Unit leaders who are often the first point of contact for members requiring accommodation. It is a useful summary of the accommodation process and is a condensed version of the information found in the Guideline to Representing Members at Accommodation/Return-to-Work Meetings.

Practical Tool #3 – Accommodation Template Letter – This letter can be adapted as needed and sent by the union representative to a member who is in the initial stages of seeking accommodation and now has a return-to-work meeting scheduled. In some cases, this will be the union representative's first contact with this member. The intent of the letter is to let the member know a return-to-work meeting has been scheduled and they will be receiving the representation of the union at all stages. The letter goes on to provide some basic information about the accommodation process including next steps. This first contact will set the stage for your future interaction with and support of this member.

Role of Co-Workers

The employer must communicate the restrictions or limitations to the coworkers of the accommodated employee as well as the specific accommodation. This information is not confidential. The fact that an employee is being accommodated must be understood and accepted by coworkers. They must:

- Cooperate in this accommodation process, not be a barrier, support the accommodated employee, and ensure that they are not asked to work outside their restrictions or limitations.

- Accept that they may be expected to perform some additional duties or share certain duties as part of the accommodation provided to the disabled employee. For example, the accommodated employee may not be able to lift, but can administer medications.

The Responsibility of the Employer to Communicate the Accommodation Needs

The accommodation of an employee may generate negative reactions from coworkers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit. The reaction may range from resentment to hostility. The employer, however, is responsible for providing the accommodation, communicating the restriction or limitation to staff as well as ensuring that staff are supportive and are helping to foster a positive environment for the accommodated employee.

Arbitrators do not tolerate discriminatory attitudes and behaviours that poison the work environment for accommodated employees.

The Elements of Accommodation

Procedural and Substantive Obligations of the Employer

It is well established in the case law that employers have a procedural and substantive duty regarding their duty to accommodate up to the point of undue hardship. Arbitrators will apply this framework when assessing the actions of the Employer. This is the framework we use, as union leaders, to monitor how and whether the Employer is taking the appropriate steps:

Procedural Duty – Gathering Relevant Information: Employers have a procedural obligation to seriously consider and evaluate a request for accommodation and obtain all necessary information including the medical restrictions or any functional abilities evaluations (FAE), the job description, the physical or mental demands analysis (PDA) if available. The work duties, responsibilities, physical work setting as well as physical/ emotional/mental demands of the unit being considered must be examined closely.

- Identifying Work Employee Can Perform:
  The employer should also work closely with the union and employee to identify the duties and responsibilities of the employee's own job that they are able to perform.

- Identifying Barriers and Exploring Accommodation Solutions:

  The employer should also identify the job requirements preventing accommodation and assess whether they can be modified, adjusted or removed. The employer needs to identify any barriers preventing the employee from returning to work and propose solutions to remove or modify the barrier to facilitate the accommodation.

Substantive Duty – Implementing the Accommodations: After an employer has conducted an individualized assessment of the member's capabilities and investigation into accommodation options, the substantive duty requires the employer to offer and implement a reasonable accommodation suitable to the member's restrictions in a timely manner. This could include temporary and long-term accommodations.

This may involve providing an accommodation to facilitate an employee being able to perform their job duties such as providing frequent breaks or rest periods. Alternatively, if accommodation options have been explored and an employee is simply incapable of performing a particular job duty, an employer should consider whether the job can be modified to include only those duties that the employee can perform. The employer is required to carefully examine whether the requirement(s) of any position can be modified to accommodate the member. The onus to propose a solution rests with the employer, however the union plays a key role in identifying possible solutions.

It is important to assess whether the employer has complied with its procedural and substantive duty in meeting its duty to accommodate. ONA should file grievances where appropriate.

Four-Step Process

The pre-disability job is always the starting point in looking for accommodation. Guidelines from the Ontario Human Rights Commission[10] as well as the case law have established that employers are expected to engage in a four-step process:

- Can the employee perform their existing job as is?
- If not, can the employee perform the existing job, modified or "re-bundled?"
- If not, can the employee perform another job in its existing form?
- If not, can the employee perform another job in a modified or "re-bundled" form?

The above exercise requires the employer to look at the requirements of the job and consider whether the requirement(s) can be modified or changed to allow the employee to perform the task or duty.

Accommodation that does not Interfere with Seniority Rights

Arbitrators have held that employers should first consider accommodation options that do not interfere with the collective agreement rights of other members before accommodating an employee with a disability in a way that deprives other workers of their seniority rights. This includes waiver of job posting provisions.

The employer must make efforts to search and consider these reasonable alternatives prior to proposing that a job posting should be waived. For example, if an employee can continue to perform their home position with an accommodation, the employer ought to provide that option prior to proposing a waiver of a job posting that an employee can perform without any modifications. Alternatively, if an employee with a disability can post into a position this should also be considered.

Waiving a Job Posting

ONA will only consider waiving a job posting in those circumstances where no other reasonable alternative for accommodation is possible. The posting can only be waived with the approval of the LRO and the District Service Team Manager.

See the following ONA Resources in the Index of Documents:

- **Practical Tool #4 – Checklist to Assess Employer Proposal to Waive a Job Posting**

Accommodation outside the Bargaining Unit

Arbitrators have generally held that employers must exhaust reasonable options to find accommodation within a Bargaining Unit before contemplating accommodation outside the Bargaining Unit. Employers all too often propose an accommodation outside the Bargaining Unit without exhausting efforts to find an accommodation within it.

10 http ://www.ohrc.on.ca/en

Where a member is still able to practice nursing or another health-care profession in some form, even with significant restrictions, then ONA should advocate for a position within the Bargaining Unit. Accommodation outside the Bargaining Unit should not be considered other than in exceptional circumstances where there is truly no other reasonable alternative.

If an employee is unable to practice their profession and such a restriction is anticipated to be permanent or long-term or no position can be found within the ONA Bargaining Unit, a position outside the ONA Bargaining Unit may have to be considered:

- Ideally it is best to negotiate a non-Bargaining Unit accommodation as an interim arrangement where the employer will continue to search for and consider positions in the Bargaining Unit and where an employee's seniority rights will continue to be recognized for posting into ONA positions.
- If the position is non-union, ONA will attempt to negotiate an agreement whereby the position will be deemed to be an ONA position for the duration of the accommodated worker's occupancy of the position, with all the benefits arising from that status.
- The least desirable option is to transfer the employee to another union's Bargaining Unit, as this would raise issues of seniority. In this case, ONA will try to negotiate an agreement with the other union that the individual maintain all ONA seniority.

Labour Relations Officers must be involved in these situations to advise the Bargaining Unit and take the appropriate steps to protect the rights of our member.

Individual Accommodation – One Size Does Not Fit All

The essence of accommodating people living with disabilities is individual assessment. Each person with a disability must be considered, assessed and accommodated individually. There is no set formula for accommodating persons with disabilities. Each person's needs are unique and must be considered when the accommodation request is made.

A solution may meet one person's restrictions, but not another's, although many accommodations will benefit large numbers of persons with or without disabilities. For example, installing ceiling lifts to accommodate one person's restrictions will have the effect of preventing injury to the staff working in the unit.

Reasonable but not Perfect Accommodation

The duty to accommodate does not require the employer to implement the perfect solution. The case law has established that an employee is entitled only to reasonable and suitable accommodation, not the "ideal" or "perfect" accommodation. Arbitrators have dismissed grievances where the employee declined a reasonable offer of accommodation.

If there is a choice between two accommodations that are suitable to meet the medical restrictions/limitations and each choice provides the employee with dignity, the employer is entitled to select the one that is less expensive or that is less disruptive to the organization.

Permanent and Temporary Accommodation

The employer is required to provide temporary accommodation up to the point of undue hardship where the restrictions are temporary or where there is a delay in establishing a permanent accommodation. The accommodation may change as the employee receives medical treatment and their condition improves or deteriorates. The temporary accommodation may be a graduated return to full duties in the pre-disability job. However, if the employee is temporarily unable to perform all of the duties of their pre-disability job, the employer must consider whether it can provide suitable, alternative work.

If the medical restrictions become permanent, the employee will require a permanent accommodation and that accommodation must be provided up to the point of undue hardship. The medical provider may confirm the restrictions as permanent after the employee has reached maximum medical improvement. Maximum medical improvement is the point at which the medical provider believes the employee's condition is not going to improve any further.

Although temporary or permanent accommodation in the pre-disability job is always preferable and is minimally disruptive in the workplace, it may not always be possible. The following questions can be considered in determining whether alternative work is available as an appropriate accommodation:

- Is alternative work possible and available at present or in the near future?
- Does it require additional training, and does the training impose undue hardship?
- Is there flexibility with an employee's responsibilities?

Where an employee has been accommodated in their position, this does not prevent the employee from applying for other positions through the job posting provisions. If an employer fails to consider with a disability for a job posting because of the disability, that would be considered discriminatory.

Job Accommodation Measures

The employer has an obligation to make reasonable efforts to eliminate barriers to the employee with a disability as defined under the *Human Rights Code* and it must offer reasonable accommodation up to the point of undue hardship.

Reasonable accommodation measures refer to a change to the work, work methods or workplace to enable the person to participate fully in the workplace.

Accommodation measures include the following:

- Desks, specialized chairs and stools, rolling carts, assistive devices, motorized carts, specialized telephones, slant boards, headsets, larger computer monitors, anti-static mats, footrests, arm rests, voice-activated software and in-person training on voice-activated software.
- Provide reading materials in alternative formats including digitized text, Braille or large print.

- Assess the workplace and make changes to ensure a safe and accessible workplace (changing door handles, installing grab bars in washrooms and lowering light switches).
- Provide ergonomic assessments and adaptations to workstations.
- Modify a job duty or requirement to enable the individual to perform it. If this cannot be done, exempt the employee from performing it.
- Modify work schedules to accommodate:
    - Ongoing medical appointments.
    - Required rest periods.
    - The inability to work all shifts.
- Job bundling – Combining tasks that are performed by the staff in the workplace and assigning them to the person seeking accommodation.
- Re-training for alternative positions.

Removing Barriers

Barriers must be removed if they have a discriminatory impact when applied to employees seeking accommodation.

Physical barriers may include the lack of ramps, unsuitable work tools or workstations designed for non-disabled employees.

Attitudinal barriers include discriminating and harassing conduct by a work colleague toward individuals accommodated in their unit. The employer has an obligation under the *Ontario Human Rights Code* to facilitate accommodation. This situation should be brought to the attention of the manager in charge of the unit. The employee should contact the union to report the situation to the employer. Negative attitude by co-workers, if not addressed by the manager, may spread to the other staff and undermine the accommodation of disabled employees.

Work requirements, standards or practices that result in the exclusion of employees with disabilities as described on p. 14-15.

If the barrier to accommodation remains unaddressed by the employer, the union will investigate and take appropriate next steps including the filing of grievances, if necessary.

Confidentiality and Privacy Issues

General Principles

The employer's right to access medical information is a frequently litigated issue in disability accommodation cases. The issues that typically arise include:

- Medical forms that request information that is unnecessary and intrusive, such as diagnosis.
- Requests for more detailed medical information even though the restrictions outlined by the treating health-care professional are sufficient.
- Unreasonable requests to undergo an independent medical examination.
- Positions taken by the Occupational Health Department that its medical opinion should stand in the place of the treating health-care professional.

Although an employee's medical information is private and confidential, an employer is entitled to sufficient medical documentation to enable it to fulfill its obligations under the collective agreement and the *Human Rights Code* and return the employee to safe and timely return to work or provide an accommodation in accordance with the medical restrictions.

There are four generally accepted grounds for employers to request medical information:

- To verify the existence of an illness/disability.
- To understand the employee's capabilities and limitations in order to devise a suitable accommodation.
- To be assured an employee can return to work without posing a safety risk to themselves or others.
- Determine whether an employee's disability still requires the employee to remain away from active employment.

Case law in this area stresses the employee's right to keep personal medical information confidential and that access by the employer be permitted only when the employer can show the medical information is reasonably necessary to satisfy one of the above four grounds.

Arbitrators have clearly and consistently reinforced the following two principles:

- **The Patient-Doctor Relationship is Private:** Employers have no inherent right to interact with employee's physician/nurse practitioner. This means that, absent the express consent of the employee, employers cannot have direct communication with an employee's physician or insist that an employee be assessed by its own physician.

- **Medical Information is Confidential**: The confidentially of the doctor-patient relationship and personal medical information is universally and legislatively recognized as one of the most significant privacy rights in Canadian society. When seeking medical information, employers must use the least intrusive means to satisfy any concerns that are reasonably based.

The right to obtain medical information must at all times be balanced with the employee's right to privacy. The manner in which these competing interests are reconciled will depend on the individual circumstances of the case.

Generally, employees are not required to provide diagnosis, particularly when seeking sick leave benefits. The employee may be required to provide information regarding the nature of illness depending on the language of the sick leave policy. Where the nature of illness is requested, diagnosis, symptoms and treatment plan should not generally be disclosed. The disclosure should consist only of a general statement of a person's illness or injury in plain language without any technical medical details.

The union strongly recommends all members avoid providing a diagnosis at the outset. There may be exceptional circumstances where due to the nature of the restrictions or the magnitude/complexity of the accommodation more detailed medical information is required in developing an accommodation plan. However, such information should only be shared with occupational health, which should keep the information confidential and not share it with Human Resources or the member's manager.

The following are guidelines outlining the type of confidential medical information that employers will generally require for accommodation purposes:

- Whether the disability is permanent or temporary and the prognoses in that respect, i.e., the extent to which improvement is anticipated and the timeframe for same.
- The expected return-to-work date.
- Whether the employee is following a treatment plan, but not the details of the plan itself.
- Specific restrictions or limitations, i.e., a detailed synopsis about what the employee can and cannot do in relation to the duties and responsibilities of their normal job duties (functional abilities).

In addition, employers may also ask for:

- The timeframe regarding the next assessment of the employee.
- Whether diagnostic or other objective tests were performed, but not the test results or clinical notes.

Note that the role of the medical practitioner in the accommodation process is to identify the employee's disability-related needs and restrictions, not to suggest a specific job in which the employee is to be accommodated. It is the employer, who has charge of the workplace and bears the primary duty to accommodate and is therefore in the best position to formulate accommodations in accordance with the restrictions set out by the medical practitioner.

However, a medical practitioner can review a proposal for accommodation including a job description and a physical/mental demands analysis to determine whether the position is consistent with the member's medical restrictions or whether further adjustments are required.

Obligation of the Employee to Cooperate

The employee seeking accommodation is obliged to cooperate with the employer's reasonable request for medical information. Failure to do so will cause the accommodation process to fail, and arbitrators are likely to dismiss a grievance on that basis. Arbitrators stress that an employer cannot be faulted for failure to accommodate if it has not been given sufficient information upon which to conclude that accommodation is necessary, and therefore, to satisfy its accommodation obligations.

Medical Certificates and Reports

Diagnosis and "Nature of Disability"

It is well-established in the case law that employers are not entitled to diagnosis. Where the employer is permitted to ask for the "nature of the disability," the employer is only entitled to a general statement of a person's illness or injury in plain language without reference to any technical medical details including symptoms, clinical notes, test results or medical history. Employers are not permitted to have a blanket policy requiring the disclosure of diagnosis. Nor should employers ask an employee to give blanket permission (consent) for occupational health (or any management person or third-party advisor of the employer) to speak directly to their health-care provider. Arbitrators have consistently ordered employers to strike this type of authorization from the medical form. If the employer is requiring a diagnosis in an individual circumstance, the member should contact the union. Grievances will be filed where warranted.

Standardized Medical Forms

Many employers are using standardized medical forms and questionnaires for the employee's physician/nurse practitioner to complete. ONA will challenge standardized medical forms if they are overly intrusive and seek unnecessary information. The form itself should clarify that diagnosis, treatment, symptoms, test results and clinical notes are not to be provided.

More Detailed Medical Forms

Employers will often ask for more detailed medical if the absence from work has been lengthy. Arbitrators have held that employers may be entitled to additional medical information in these situations because they have an obligation to ensure that employees are capable of performing available work in a safe manner. The employer must, however, establish the basis for the additional medical information and the request must be directly related to the specific disability claimed and accommodation requested by the employee. In this circumstance, the employee should contact their Bargaining Unit representative or Labour Relations Officer for guidance and direction.

Independent Medical Examination

It is, unfortunately, not uncommon for employers to request or require an employee to undergo an independent medical examination (IME) to determine restrictions. Arbitrators consider this to be an unwarranted intrusion into the employee's privacy, but may rule the employer has a valid basis to request an IME in the following situations:

- The employer has a reasonable basis to question the legitimacy of an employee's request for accommodation or the adequacy of the information provided.
- The health-care practitioner has not responded to reasonable requests for medical documentation and the employee has not been successful in asking the practitioner to respond.
- The employee's medical documentation is inconsistent despite the employee's and employer's efforts to resolve the inconsistency.
- If the employee seeking accommodation has not cooperated with reasonable requests for medical documentation.

Statutory Protection of Employee Health Records

Personal Health Information Protection Act

The *Personal Health Information Protection Act,* 2004 (*PHIPA*)[11] governs health-care information privacy in Ontario. The legislation applies to "health information custodians" (HICs) in hospitals, long-term care facilities and clinics as well as the Ministries of Health and Long-Term Care. It also applies to employers and insurance companies that receive personal health information from the health care system.

A "health information custodian" is defined in S. 3 of the *PHIPA.* It can be an individual or an organization that has custody or control of personal health information. Examples of a health information custodian include:

- Health-care providers such as doctors, nurses and physiotherapists.
- Hospitals, long-term care homes and Ontario Health – Home and Community Care Support Services (HCCSS).
- Pharmacies and medical laboratories.

The *PHIPA* limits the "collection, use and disclosure" of personal health information by "health information custodians" unless the health information custodian has the informed and freely given consent of the individual and that the collection, use and disclosure is necessary for a lawful purpose.

Where there has been a violation of *PHIPA*, a member can file a complaint with the Information and Privacy Commissioner of Ontario. ONA may decide to support the member by acting as their representative, but it will be the member's complaint. Such a complaint is initiated by a Collection, Use and Disclosure Complaint Form and there is no cost for filing it. Discuss your concern with your Bargaining Unit representative.

It is important to keep in mind the requirement in *PHIPA* that complaints must be filed within *one year* from the time that a person becomes aware of the problem.

Some employer agencies do not have occupational health departments or occupational health nurses. In these cases, employees normally report off work to their managers. A manager receiving medical documentation is considered a health information custodian and must comply with the rules for the management of personal health information as set out in *PHIPA.*

Occupational Health and Safety Act [12]

Section 63 of the *Act* provides:

> *63 (2) No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.*
> *63 (6) This section prevails despite anything to the contrary in the Personal Health Information Protection Act, 2004.*

11 www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_04p03_e.htm
12 www.e-aws.gov.on.ca/html/statutes/english/elaws_statutes_90o01_e.htm

Under this provision, occupational health departments are prohibited from disclosing confidential medical information to persons outside of their departments such as Human Resources or managers. The occupational health department may communicate a member's restriction(s) and estimated length of illness but cannot communicate information such as diagnosis or other confidential information that comes within its knowledge. This is true regardless of whether the function of the department is done in-house or with the use of a third-party administrator.

Where employers request employees to report off work directly to their manager and to maintain regular contact with their manager, the union's position is that any ONA member who is off for some period of time reports their progress *only* to the occupational health department. This is for two reasons:

(i) The manager should not be privy to any confidential medical information aside from the standard prognosis, expected date of return and restrictions, if any.

(ii) If a manager can call whenever they want, it can be construed as harassment on the basis of disability.

Often the form employers require members to sign contains consent for the physician to talk to the employer's occupational health service. This has the potential to exceed proper limits of communication and is improper. If an employer wants to advise a physician or other health care provider of certain details concerning available work, for example, the employer should set this out in a letter.

If an employer violates s. 63(2) of the *OHSA*, ONA will file a complaint with the Ministry of Labour and request that the Ministry issue an order against the employer for violating the *Act.* This can be done directly by ONA and does not need to be initiated through the Occupational Health and Safety Committee. In this event, the member or the Bargaining Unit leader should contact the Labour Relations Officer for guidance and direction.

A breach of 63(2) of the *OHSA* can also be challenged by filing a grievance. Under s. 48(12) (j) of the *Labour Relations Act* an arbitrator has the authority to interpret and apply employment-related statues, including the *OHSA.* In such a case, ONA may file a grievance as well as a complaint with the Ministry of Labour and then hold the grievance in abeyance pending the outcome of the Ministry's complaint process.

In a recent case, ONA claimed breaches of Ontario's *PHIPA* and *OHSA* with respect to the employer's short-term sick leave benefits form, arguing it was coercive to require employees to sign the form and provide all the information requested or they would be denied benefits. ONA argued the form was too broad as it required the disclosure of diagnosis, descriptions of symptoms and treatment plans. The arbitrator agreed with ONA that, in accordance with the privacy rights found in *PHIPA* and *OHSA*, consent to disclose personal health information must be freely given and that it should only be collected, used or disclosed to the extent it is reasonably necessary to serve the particular purpose. He affirmed the balancing test found in other arbitral jurisprudence, noting that the least intrusive approach that balances legitimate business interests of the employer and the privacy interest of the employee is appropriate.

Profession-Specific Acts

As noted above, public institutions such as hospitals have statutory duties in accordance with *PHIPA* to protect the privacy of medical information.

In addition, each profession in Ontario has profession-specific legislation and regulations governing the confidentiality of medical information. Regulated health-care professionals must adhere to standards to maintain and protect the confidentiality of patient medical records. It is an act of professional misconduct to provide medical information about a patient/client without the consent of the client unless as required or allowed by law.[13]

For example, occupational health nurses (OHN) who collect private health information about employees would be in breach of their professional obligations (with the College of Nurses of Ontario), and may face consequences with the College of Nurses if they improperly disclosed medical information to managers about employees without the employee's consent.

Where there is a breach of confidentiality involving a member of the occupational health department (e.g., OH manager, OH physician, OHN or other professional employed in the OH department, such as a social worker),[14] the employee may consider filing a complaint with the offending party's regulatory College. A grievance may also be filed claiming a violation of privacy.

Professional Obligations of the Occupational Health Nurse, Nurse Practitioner or Physician

It is the professional obligation of an OHN, physician or nurse practitioner to maintain the confidentiality of health records held by the Occupational Health department. For nurses, this obligation is specifically set out in the regulations to the *Nursing Act*, 1991[15] and in the College of Nurses of Ontario's (CNO) Standards of Practice.[16] The Regulations to the *Act* specifically define professional misconduct as including: *"giving information about the client to a person other than the client or their authorized representative, except with the consent of the client or their representative or as required by law."* Other regulated health-care professionals have similar obligations.

Quality of Care Information Protection Act (QCIPA)[17]

This is another piece of relevant privacy legislation to nursing. *QCIPA* provides broad protection to quality-of-care information produced by a health care entity or a governing body.

The purpose of this *Act* is to promote open discussion regarding adverse events or quality of care information while protecting this information from litigation. Therefore, Information obtained from a nurse as part of a CNO or employer Quality Assurance process cannot be used in a legal proceeding.

13 See s. 1(10) of Regulation 799/93 of the *Nursing Act*, 1991, SO, 1991, c 32
14 Some employers staff OH departments with a social worker. The duty to maintain confidentiality is set out in Principle V of the Standards of Practice for the Ontario College of Social Workers and Social Service Workers.
15 S.1(11) Regulation 799/93 to the *Nursing Act.*
16 CNO Practice Standard: Confidentiality and Privacy – Personal Health Information, February 2017.
17 2016, S.O. 2016, c. 6, Sched. 2.

Accommodating Mental Health and/or Substance Use Disorders[18]

Mental health and/or substance use disorders are often referred to as an *invisible disability* as its symptoms can be difficult to detect or are kept hidden by the individual due to the stigma associated with the disease. The *Human Rights Code* specifically recognizes mental illness as a disability, defining it as any "condition of mental impairment" or "mental disorder." Examples include bipolar depression, obsessive compulsive disorder and schizophrenia.

The *Code* also protects persons whose mental illness may not be disabling but is perceived to be. For example, a member with a bipolar condition may suffer from mental illness and colleagues are aware of the medical condition, but the illness itself may not be disabling in the workplace. However, the employee may face barriers and discrimination because of assumptions and stereotypes that limits employment opportunities and advancement.

An employer has no obligation to accommodate an employee with mental health and/or substance use disorders unless it prevents the employee from performing the duties of their employment. For example, a member who suffers from depression and anxiety requests an accommodation to another unit that is perceived to be less stressful. An employer should be under no obligation to accommodate this request unless medical evidence shows there is a causal relationship between a member's mental state and the need for accommodation in a less stressful work environment.

Employees with these disorders are entitled to sick leave and/or long-term disability benefits while completing a treatment program and to accommodation once cleared to return to work.

Accommodation may include modifying the job duties to exclude narcotics administration, implementing a workplace monitor to be "buddied" with the nurse, or transferring the nurse to days to ensure proper monitoring. The restrictions imposed are typically set by a treating addiction specialist who may or may not be working in conjunction with the College of Nurses of Ontario's Fitness to Practice Committee.

Employers will often claim it is impossible to accommodate a nurse with these restrictions. ONA does not accept this position and has won arbitration cases on this very point.

See the following ONA Resources in the Index of Documents:

<u>References</u>

Reference #4 – Guideline for representing ONA Members in Accommodation/Return-to-Work Meetings – This Guideline includes a comprehensive section on representing members with substance dependence.

<u>Practical Tools</u>

Practical Tool #5 – Substance Use Disorders: A Hierarchy of Steps – Outline of the approach to be taken when the member is reluctant to disclose her disability.

18 Substance Use Disorder is the term used Diagnostic and Statistical Manual of Mental Disorders – DSM-5

Where employers insist on a "last chance agreement," consult with your Bargaining Unit President or Labour Relations Officer for direction.

Duty to Accommodate Mental Health and/or Substance Use Disorders

Under the *Human Rights Code*, the Employer has a primary responsibility to accommodate employees with disabilities in the workplace. The legal obligation to accommodate mental health and/or substance use disorders is no different from accommodating physical disabilities in that an employer must make efforts to accommodate an employee to the point of undue hardship. For example, an accommodation may include scheduling restrictions (e.g., the days only) if a member's medications affect sleeping patterns.

As with other disabilities, there is a corresponding duty for members to cooperate in their accommodation. This includes not only cooperation in the accommodation process, but also willingness to seek out appropriate treatment and compliance with treatment. These disorders may impair employees from recognizing they suffer from a disability or from being compliant with treatment. In some cases, employees will withdraw from the world around them, not return phone calls or become openly hostile and distrustful of both the employer and the union and refuse to cooperate. It is important for employers and the union to be conscious of this fact and make efforts to accommodate behaviors that may be a result of the illness itself.

The union plays an important role in facilitating an accommodation as described earlier. However, this role is enhanced with members with mental health and/or substance use disorders who may need assistance in communicating their needs. Further, when an employee is in denial that they suffer from a disability, the union may need to put the employer on notice that it believes there might be a disability without disclosing what the disability is, diagnosis, or other private medical information.

A union's duty to accommodate goes beyond the workplace and involves an obligation to accommodate throughout the grievance-arbitration process. For example, if an employee's mental illness (e.g., depression) affects their ability to respond to communications, the union cannot simply withdraw the grievance without giving consideration to the impact the illness may be having on the member's ability to co-operate and whether there are steps that can be taken to accommodate. An accommodation may include a request for an adjournment, or an extension of time limits. If a member makes threatening comments, the union cannot simply refuse to represent them if the behaviour itself is a result of mental illness.

Limits to the Employer's Duty to Accommodate

The duty to accommodate is limited to the extent it does not cause undue hardship.

The Standard of Undue Hardship

Arbitrators consider the following factors when determining whether an accommodation creates undue hardship for the employer.

Financial Cost

Employers must prove they have incurred significant financial cost before declaring that the "undue hardship" stage has been satisfied. To establish undue hardship, the financial cost needs to be quantifiable and sufficiently substantial to be prohibitive. Each circumstance is examined on a case-by-case basis. Other factors relevant to the consideration of the cost of accommodation measures include:

- The size of the workplace and its relative financial means.
- The employer's ability to spread the cost over time and/or across the organization.
- The availability of outside resources such as grants and incentives, etc.

Health and Safety

The issue of safety continues to be the undue hardship factor with the greatest chance of success by an employer against an accommodation claim. Arbitrators give the most weight to this factor, with particular concern for the accommodation of the employee, the co-workers and clients. The cases are clear, however, that employers must establish a legitimate safety concern and not a hypothetical risk.

Disruption of the Collective Agreement

Employers are expected to first search for an accommodation that would respect the collective agreement. Only if no suitable accommodation is possible without breaching the collective agreement will the employer be entitled to look behind the collective agreement.

Legitimate Operational Requirements of the Organization

The accommodation of an employee must fit within the overall operational mission of the employer. Employers do not have to create new positions or provide unproductive work for accommodated employees. The accommodation itself must reflect the legitimate needs of the workplace.

Interchangeability and Size of an Employer's Operation

Clearly, the more flexible the work environment, the more likely an accommodation of the employee will be possible without causing undue hardship. Similarly, a large workplace will more likely be able to absorb the cost and inconvenience of accommodating the employee.

Essential Duties

Pursuant to Section 17 the *Code,*[19] if a person with a disability requires accommodation to perform the essential duties of a job, the employer must take steps to provide accommodation unless to do so would cause the employer undue hardship.

19 S. 17(1) Disability – A right of a person under this *Act* is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
(2) Accommodation – No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost outside sources of funding, if any, and health and safety requirements, if any

An essential duty is any task which is basic, necessary and an integral part of the work to be done. When considering if the duties are essential, one must focus on whether the duty is essential to the job, as opposed to the department, as a whole. For example, blood pressures must be taken on a regular basis by the employee, but if the employee is unable to perform this task, this work can be redistributed to others in that unit. In return, the employee being accommodated can take on other duties which are required by the employer and assigned to others.

The employer is required to consider whether it can modify the way the essential duty is performed. The employee may not be able to lift due to restrictions but is able to perform this task if an assistive device such as a ceiling lift is installed in the patient's room. If the employee still cannot perform the essential duty, with this modification, the employer can excuse the employee from it or consider whether alternative work is available within the medical restrictions.

The responsibility to establish that an employee is incapable of performing essential duties rests with the employer. Conclusions about the inability to perform the essential duties should not be reached without testing the ability of the person with a disability and considering whether the duty itself can be modified to allow the employee to perform it. If the essential duty to be performed in the workplace unit cannot be modified, the employer must consider excusing the employee from performing that duty or consider whether alternative work is available on another workplace unit.

Employers will often categorize many duties of a position as essential. ONA representatives need to challenge these padding of duties to ensure that members can get back to work. The employer must engage in this assessment and must demonstrate through objective evidence that it has undertaken measures to accommodate up to the point of undue hardship.

Innocent Absenteeism

The employer's duty to accommodate does <u>not</u> extend where the employer can establish a case of innocent absenteeism:

- The employee has an extensive record of absenteeism and the medicals state there is no reasonable prospect for improved attendance in the foreseeable future.

- The employer has tried unsuccessfully to accommodate the employee up to the point of undue hardship.

(3) Determining if undue hardship – In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

Remedies

The union can seek a wide range of remedies at arbitration:

- Reasonable and suitable accommodation.
- Reinstatement where the employer has terminated employment.
- Compensation for lost wages and other benefits resulting from discriminatory conduct. The amount awarded is subject to the efforts of the employee to find work to mitigate the loss of wages.
- Declaration of the employer's violation of the *Ontario Human Right's Code* and the collective agreement.
- Damages for:
    - Expenses that arise as a result of the employer's duty to accommodate, for example medical reports and treatment/counseling to deal with the effects of the employer's discriminatory conduct.
    - Human rights damages for injury to the grievor's dignity, feelings and self-respect as a result of the discrimination.
- Systemic remedies:
    - Training.
    - Policy change where a job requirement, standard or policy is deemed by the arbitrator not to be discriminatory as applied to the employee seeking accommodation.

Index of Documents
References
Reference #1- Glossary of Terms

Accommodation

S. 17 of the *Ontario Human Rights* Code requires the employer to take steps short of undue hardship to accommodate the employee's disability as it relates to performing the essential employment duties. The Supreme Court of Canada has set out the respective roles and obligations of the employer, union and employee regarding the duty to accommodate. While all three parties share this responsibility, the primary responsibility is on the employer.

The duty to accommodate applies to all employees, including part-time, casual and probationary employees. This obligation applies whether the employee is returning to work from short-term or long-term disability benefits or WSIB benefits. There is no set formula for accommodating employees with disabilities – each case must be assessed on an individual basis. The obligation is ongoing as long as there still is a disability and the accommodation over time does not amount to undue hardship.

The employer is required to carefully examine whether the requirement(s) of any position can be modified to accommodate the member. The onus to propose a solution rests with the employer, however the union plays a key role in identifying possible solutions.

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Accommodation Measures

The employer has an obligation to make reasonable efforts to eliminate barriers to the employee seeking accommodation and to offer reasonable accommodation up to the point of undue hardship.

Accommodation measures refer to a change in the work methods or workplace to allow the disabled employee to participate fully in the workplace. This includes purchasing adaptive equipment such as voice-activated software and adaptations to workstations as well as modified hours.

Accommodation measures also include modifying the duty to enable the employee to perform it and, if this is not possible, reassigning the duty unless doing so causes undue hardship to the employer.

Bona Fide Occupational Requirement (BFOR)

An employer may require employees to meet a standard or possess a qualification that may discriminate against members of one of the protected groups under the *Ontario Human Rights Code.* For this to be lawful, the employer must establish that the standard or qualification is a bonafide occupational requirement or qualification.

As a result of a three-part test established by the Supreme Court of Canada, the employer must establish that the work standard or qualification is rationally connected to the function of the job, established in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, and reasonably necessary to the accomplishment of that legitimate work-related purpose.

To show that the standard is reasonably necessary, the employer must demonstrate the employee cannot be accommodated without undue hardship. If it cannot, the standard or qualification must be modified to allow the disabled employee to perform the task.

Disability

Disability is one of the prohibited grounds of the *Ontario Human Rights Code*. It is defined under the *Code* as any person who has or is believed to have had any degree of physical disability or disfigurement, learning disability or any dysfunction in the ability to understand and use symbols or speech, mental impairment, mental disorder, or injury or disability for which benefits were claimed or received under the *Workplace Safety and Insurance Act.* For example, discrimination based on disability will have taken place if a nurse with a back injury was not accommodated short of undue hardship.

Discrimination

Discrimination is defined as treating people unfairly based on their membership in one of the following groups identified as a prohibited ground under the *Ontario Human Rights Code:* race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, record of offences and disability.

In general, discrimination is an act or practice that intentionally or unintentionally has the effect of imposing burdens, obligations, or disadvantages on an individual or group not imposed on others, or that withholds or limits access to opportunities, benefits and advantages available to others.

Employment Barriers

Employment barriers are any policies, procedures, practices or conditions that result in disadvantage to any of the designated, protected groups listed under the *Ontario Human Rights Code.*

Equal Treatment

Equal treatment does not necessarily mean identical treatment. It refers to treatment which results in the same outcome for everyone. The term “equity” is often used instead of equal treatment to refer to treatment which results in equal outcomes.

Essential Duties

S. 17 of the *Ontario Human Rights* Code requires the employer to take steps short of undue hardship to accommodate the employee's disability as it relates to performing the essential employment duties.

An essential duty is any task which is basic, necessary and an integral part of the work to be done. When considering if the duties are essential, the focus is whether the duty is essential to the job as opposed to the department as a whole. For example, blood pressures must be taken on a regular basis by the employee, but if the employee is unable to perform this task, this work can be redistributed to others in that unit.

Non-essential duties are duties that are considered to be peripheral or incidental to the job or a minimal part of the job, for example photocopying. The employer is required to consider whether it can modify the way the essential duty is performed, allowing the employee to perform the task. The employee may not be able to lift due to restrictions but is able to perform this task if a ceiling lift is installed in the patient's room.

The onus to establish that an employee is incapable of performing essential duties rests with the employer. It must conduct an individualized assessment of the employee's capabilities. Conclusions about the inability to perform the essential duties should not be reached without actually testing the ability of the person with a disability and considering whether the duty itself can be modified to allow the employee to perform it.

The employer cannot claim the defence of undue hardship unless it can demonstrate through objective evidence that it has taken measures to accommodate up to the point of undue hardship.

Four-Step Process

The pre-disability job is always the starting point in looking for accommodation. The Human Rights Commission as well as the case law has established that employers are expected to engage in a four-step process:

- Can the employee perform their existing job as is?
- If not, can the employee perform the existing job, modified or "re-bundled"?
- If not, can the employee perform another job in its existing form?
- If not, can the employee perform another job in a modified or "re-bundled" form?

The employer is required to look at the requirements of the job and consider whether the requirement(s) can be modified or changed to allow the employee to perform the task or duty.

Functional Abilities Evaluation (FAE)

A functional abilities evaluation is an intensive, short-term (usually one day) evaluation that focuses on major physical tolerance abilities related to musculoskeletal strength, endurance, speed, and flexibility.

Functional Abilities Form (FAF)

The Functional Abilities Form is primarily a communication tool for the workplace parties to facilitate return to work discussions between the employer and the injured/ill worker.

Either the employee or the employer can request that the form be completed – it provides the employer, the union and the injured/ill employee with a common frame of reference about the worker's functional abilities to identify jobs that are suitable for the worker. The form should only be used when the worker is functionally able to return to some kind of work.

Ontario Human Rights Commission

The Ontario Human Rights Commission (OHRC) was established in 1961 to administer and enforce the *Code*. It is an arm's length agency of government accountable to the people of Ontario through the legislature.

The mandate of the OHRC includes developing public policy on human rights and actively promoting a culture of human rights in the province through education. In addition, the OHRC has the power to monitor and report on anything related to the state of human rights in the Province of Ontario. This includes reviewing legislation and policies for consistency with the intent of the *Code*.

Human Rights Tribunal of Ontario

All claims of discrimination under the *Ontario Human Rights Code (OHRC)* are dealt with through applications filed directly with the Human Rights Tribunal of Ontario (HRTO). The Ontario Human Rights Commission is no longer responsible for receiving discrimination complaints from individuals and then referring them to the Tribunal.

The Tribunal's primary role is to provide an expeditious and accessible process to assist parties to resolve applications through mediation, and to decide those applications where the parties are unable to reach a resolution through settlement.

Innocent Absenteeism

The employer's duty to accommodate does <u>not</u> extend where the employer can establish a case of innocent absenteeism:

- The employee has an extensive record of absenteeism and the medicals state there is no reasonable prospect for improved attendance in the foreseeable future.
- The employer has tried unsuccessfully to accommodate the employee up to the point of undue hardship.

Medical Restrictions and/or Medical Limitations

The attending physician, nurse practitioner or medical provider determines medical restrictions/limitations that exist for an employee with a disability as a result of injury or illness.

Restrictions are those mental and/or physical tasks and activities the employee is not capable of performing as a result of their medical condition, i.e., administering direct patient care. Limitations are those mental and/or physical tasks the employee can perform, but only to a limited extent such as lifting.

The purpose of medical restrictions is to safeguard employee health and safety while in the workplace. The employer must provide modified or alternate suitable work that is safe and productive for an employee who is unable to perform any or all of their normal duties as a consequence of an injury/illness. The employer must provide this accommodation up to the point of undue hardship.

Modified Work

This term is used to describe the changes made to the job and/or to the workplace to facilitate the return to work of an employee with medical restrictions. It is the provision of modified work that satisfies the employer's duty to accommodate in accordance with the *Ontario Human Rights Code,* whether this is on a short-term, temporary, or permanent basis. The decisions made to provide modified work are to be in consultation with the union and employee seeking accommodation.

Physical Demands Analysis (PDA)

A Physical Demands Analysis is a systematic procedure conducted by the employer to quantify and evaluate the physical, cognitive, and environmental demands of the job. PDAs can have a variety of uses in the workplace. They can be used *reactively* for rehabilitation and return to work purposes, and *proactively* to prevent injury to:

- Identify suitable alternate work or modified work.
- Identify jobs, work processes and equipment that require further ergonomic analysis and intervention.
- Identify and prioritize of safety concerns.
- Help discover ways to modify jobs and tasks.

PDAs should <u>not</u> be used to as a vehicle to identify which job is a match for the medical restrictions of the person seeking accommodation. The duty to accommodate disability requires an employer to go beyond simply looking at whether an employee can be accommodated in a position already in existence in the workplace.

Poisoned Work Environment

This environment is one in which some form of discrimination takes place that effectively poisons the space for those who are the targets of discrimination as well as others in the workplace. Discrimination, for example, on the basis of disability, has a direct impact on those targeted, altering the conditions of respect and dignity they have a right to expect. Moreover, it has additional impact on those not targeted because it creates tension in the workplace and may be offensive to others.

Procedural and Substantive Duty

Employers have a procedural obligation to seriously consider and evaluate a request for accommodation, on an individual basis, and obtain all necessary information, including the medical restrictions or any functional abilities evaluations (FAE), the job description, the physical or mental demands analysis (PDA) if available. The work duties, responsibilities, physical work setting as well as physical/emotional/mental demands of the unit being considered must be examined closely.

After an employer has conducted an individualized assessment of the person's capabilities and investigation into accommodation options, the substantive duty requires the employer to offer and implement a reasonable accommodation suitable to the member's restrictions in a timely manner. This could include temporary and long-term accommodations.

The employer is required to carefully examine whether the requirement(s) of any position can be modified to accommodate the member. The onus to propose a solution rests with the employer, however the union plays a key role in identifying possible solutions.

Permanent and Temporary Medical Restrictions

Temporary restrictions are restrictions that will be in effect for a specific period of time. These will and should change as an injured employee receives medical treatment and their condition improves.

Permanent restrictions are restrictions in effect for the duration of a person's working life or as long as the employee remains permanently disabled. The medical provider assesses these restrictions after the employee has reached maximum medical improvement. Maximum medical improvement is the point at which the medical provider believes the employee's condition is not going to improve any further.

Undue Hardship

Undue hardship is a measure used to assess whether an employer is required to accommodate an employee. Undue hardship would be incurred by the employer if the required accommodation threatened the organization's financial sustainability or posed an unreasonable safety threat to others. Outside sources of funding must be explored by the organization when assessing its ability to accommodate.

Arbitrators assess whether there is undue hardship on the employer on a case-by-case basis with consideration of six non-exhaustive factors:

- Financial cost.
- Impact on the collective agreement.
- Interchangeability of the workforce and facilities.
- Size of the employer's operations.
- Safety.

- Problems of employee morale.

Workplace

Workplace is often defined as any location in which activities related to the mandate of the organization are performed. It is not confined to the physical space in which work typically takes place.

Reference #2- Safe Return to Work/ Work Accommodation Representative Local Executive and Bargaining Unit Accountabilities

SAFE RETURN TO WORK/ WORK ACCOMMODATION REPRESENTATIVE

PURPOSE:

The Safe Return to Work/Work Accommodation Representative is essential in supporting members in their return to work (enforcing their legal and contractual rights). The Safe Return to Work/Work Accommodation Representative is charged with the responsibility for ensuring the appropriate Bargaining Unit leaders and LRO are notified of any violation of members' rights as soon as possible in the process.

Reference #3- Guideline to Representing Members at Accommodation/RTW Meetings

Introduction

Modified work and accommodations will vary according to a person's unique needs. These needs must be considered, assessed and accommodated individually. Everyone involved must treat human rights issues arising in the workplace seriously and respectfully.

The duty to accommodate is a multi-party obligation with encompassing roles and responsibilities for the employer, union and employee seeking accommodation. The employee seeking accommodation must advise their employer of the medical restrictions that will require accommodation in the workplace. This will trigger the employer's duty to accommodate under the *Ontario Human Rights Code*. When an accommodation is required, everyone involved must share functional abilities information and actively seek solutions. While all three parties share responsibility for making the accommodation a success, the primary responsibility is on the employer.

The duty to accommodate applies to all employees including part-time, casual and probationary employees. This obligation applies whether the employee is working or is returning to work (i.e., from short-term or long-term disability (LTD) benefits or Workplace Safety and Insurance Board [WSIB] benefits). There is no set formula for accommodating employees with disabilities – each case must be assessed on an individual basis. Under the *Ontario Human Rights Code,* the employer is obliged to provide accommodation up to the point of undue hardship. This obligation is ongoing as long as there is a demonstrated disability.

The Supreme Court of Canada in its 1992 decision C*entral Okanagan School District No. 23 v. Renaud* set out the respective roles and responsibilities of the employer, union and employee seeking accommodation. The roles and responsibilities set out in this decision have evolved and been clarified in the jurisprudence. Common themes have now been established for each of the parties.

ONA has a legal obligation to represent its members and is entitled to be at the meetings. The purpose of your attendance at the meeting is to support the member, act as the member's advocate and take notes.

This guideline is directed to the ONA Safe Return-to-Work/Accommodation Representative (or designate) who has been asked by the Bargaining Unit President to represent the member regarding accommodation/return to work**.**

This Guideline consists of two parts:

Part A: General Guidelines in Representing Members at Accommodation/RTW Meetings

Part B: Representing Members with Mental Health and/or Substance Use Disorders.

Part A: General Guidelines in Representing Members at Accommodation/RTW Meetings

Prior to the meeting:

Confirm with management:

- The purpose of the meeting, who will be attending as well as the duration of the meeting.
- Confirm the date, time and location of the meeting.
- Ask to be provided with the following information, in advance of the meeting:
  - Whether the accommodation meeting deals with an occupational injury or a non-occupational medical condition.
  - The employer's position regarding the required accommodation, including the information the employer has regarding the medical restrictions.
  - The physical demands analysis (PDA) for the positions considered by the union or the employer as possible accommodations.
  - An updated list of job vacancies and job postings.
- Review the Local Collective Agreement language regarding the process of return to work/accommodation.
- Contact the Bargaining Unit President as needed for support and guidance.

Note: If you have a conflict of interest with this member, you should **NOT** act for the member by attending the meeting. Advise the Bargaining Unit President or Labour Relations Officer (LRO) and request that another representative be assigned to represent the member.

It is very important that you meet with the member prior to the meeting to ensure you are properly prepared to represent the member and provide advice.

Meeting with the Member

General Points

- Ask the member if they know why the meeting is taking place. Share with the member what you have learned from the employer.
- Ask the member to provide you with:
  - The medical restrictions, if you do not have a copy.
  - Any other medical notes that may be helpful to review.
  - Reassure the member that the medical information they are providing to you, other than the medical restrictions, is confidential and will not be shared with the employer.
- Advise the member of the four steps you expect the employer to follow:
  - Can the employee perform their existing job as is?

- If not, can the employee perform the existing job, modified or “re-bundled”?
- If not, can the employee perform another job in its existing form?
- If not, can the employee perform another job in a modified or “re-bundled” form?

- Ask the member to write notes to you during the meeting if they are feeling threatened or uncomfortable or wants to talk to you privately and then rejoin the meeting.

Specific Points

- Discuss the nature of the illness/injury with the member. Advise the member you do not need to know the diagnosis, as this is confidential health information that is not required to return the member to work.
- Ask for a copy of the member’s restrictions and the functional abilities evaluation (FAE) if one has been done.
- Review the restrictions with the member; ask if the member agrees with them and, if not, why not.
- If the accommodation/return-to-work meeting is in the context of a longstanding history of disability, review that history with the member as well as the previous accommodations.
- If the member is returning to work from an occupational injury:
  - Ask how the injury happened.
  - Discuss with the member the barriers in the workplace currently preventing the member from being fully integrated in the workplace.
  - Begin the discussion with the member as to what the solutions might be to address the barriers.
  - Review the PDA, if available, but stress this is a guideline only, not a matching tool.
  - Advise the member the employer has a duty to accommodate under the *Ontario Human Rights Code* and is required to do its own investigation regarding the accommodation options available to meet the medical restrictions. The employer cannot rely on WSIB findings regarding restrictions and the suitability of modified work.
  - Let the member know you will be raising the above points with the employer.
- Review with the member the following key principles regarding accommodation:
  - The employer has a duty to accommodate under the *Ontario Human Rights Code* up to the point of undue hardship. The burden of proving undue hardship lies with the employer and it is a difficult standard to meet. The employer cannot rely on the defense of undue hardship unless it can demonstrate, for example, that the required accommodation threatens the organization’s financial stability or posed an unreasonable risk to co-workers.
  - Disability as defined under the *Ontario Human Rights Code* covers a broad range and degree of medical conditions including physical, mental and learning disabilities, environmental sensitivities and addiction.
  - The duty to accommodate is a multi-party legal obligation with roles and responsibilities for the employer, the union and the employee seeking the

accommodation, but the primary responsibility to provide the accommodation is on the employer**.**

- The employer must make every effort to accommodate the worker, short of undue hardship. Not to do so constitutes discrimination under the *Code.*
- The obligation to accommodate is ongoing as long as the disability continues.
- The employer must conduct an independent assessment of the individual facts and medical basis underlying the request to accommodate. In addition, Occupational Health cannot substitute their opinion for that of the treating physician/nurse practitioner.

- Discuss possible accommodations with the member that could be proposed to the employer. Examples are:
  - Purchase of adaptive equipment such as motorized carts, voice activated software, specialized chairs and sit/stand desks.
  - Ergonomic assessments and modifications to the workspace.
  - Job bundling – combining tasks performed by the staff in the workplace and assigning them to the person seeking accommodation.
  - Modify work schedules to accommodate:
    - Ongoing medical appointments.
    - Required rest periods.
    - The inability to work all shifts.
  - Retraining for alternative positions.
- Regarding the role of the member seeking accommodation, advise or review with the member their obligation to:
  - Cooperate in the accommodation/return-to-work process.
  - Provide appropriate medical documentation and comply with reasonable requests for additional medical information.
  - Take all necessary steps toward recovery/rehabilitation.
  - Try a proposed, reasonable and suitable accommodation.
- If the member is about to placed in an attendance management program, advance to a progressive step in the program or is about to be terminated, ask the member:
  - What is the level of absenteeism?
  - Has the employer included absences that should not be included? Examples of such absences are:
    - WSIB, LTD.
    - Documented chronic illness or disability.
    - Scheduled surgery.
    - Statutory leaves such as compassionate and emergency leave.
  - Approved collective agreement leaves such as pregnancy leaves. Is the lack of accommodation in the past contributing to the member's absence from the

workplace? Or has the previous accommodation been unsuitable and therefore contributing to the sick time?

- Is there a pattern of harassment by the employer?

Refer to ONA's "Guide for Attendance Management Programs" for further information.

At the Meeting

- Bring a copy of the collective agreement, the medical restrictions, FAEs, job vacancy list, job postings, PDAs, and any other appropriate documents to reference, if necessary, during the meeting.
- Take detailed notes. Do not hesitate to ask the people who are speaking to slow down or stop so you can capture the information – verbatim if possible.
- Request copies of documents referred to in the meeting.
- Ensure the meeting is respectful. If the tone of the meeting becomes threatening, confrontational, or similar to an interrogation, tell management this is unacceptable.
- Request a caucus if the member seems to be struggling or feeling threatened.
- End the meeting if it continues to be threatening or confrontational**.**
- Present possible accommodation solutions to the employer.
- If the employer proposes an accommodation that is not in keeping with the restrictions set out, request a caucus to discuss this with the member.
- If a return-to-work plan is proposed in this meeting, advise the employer you must review the plan with the Bargaining Unit President prior to it being finalized. A return-to-work plan should be in writing and include the following components:
  - A record of the actions taken including timelines.
  - Intervals for monitoring and feedback.
  - An outline of the responsibilities of those involved in implementing the plan.
- The member is not required to sign the return-to-work plan but must cooperate.
- Prior to leaving the meeting, review next steps with the employer and document.

Following the meeting

- Reassure the member (privately, at the end of the meeting) that you as the ONA representative will follow-up and provide all documents, etc., to the Bargaining Unit leadership immediately.
- Maintain confidentiality of all personal health information.
- Follow-up with the Bargaining Unit leadership immediately and provide them with all documentation from the meeting and any conversations related to this incident.
- Ensure the member knows the union will represent them throughout the process of accommodation.
- Follow up with the member to ensure the accommodation has been implemented.

Part B: Representing Members with Substance Use Disorders

Substance Use Disorder is a Disability

- Human rights tribunals and labour arbitrators recognize substance use disorders (alcohol and/or drug addiction) as a disability protected under the *Human Rights Code.* The employer has the primary duty to accommodate employees suffering from substance use disorder in the workplace. The union plays an important role to advocate for its members, as well as to facilitate and support the accommodation process. A member with substance use disorder has a corresponding duty to cooperate in the accommodation process.

- Substance use disorder can result in behaviours that lead to disciplinary consequences such as theft of narcotics. Individuals may engage in theft in order to satisfy the need for large dosages and/or frequent usage and to avoid the effects of withdrawal.

- Allegations of theft are often accompanied by other allegations of professional misconduct, such as improper charting, diversion of narcotics from patients, or practicing while impaired.

- Denial is a central feature of the disease when untreated. It is important that ONA representatives understand the powerful role denial plays in the disease. Individuals may not be able to accept that they are suffering from a substance use disorder until they begin a treatment program.

- However, it is important that the employer be notified as early as possible if the employee could be suffering from a disability even if it is not admitted or confirmed. This will trigger an employer's duty to inquire and seek information.

- Substance use disorders can be arrested through treatment followed by an active lifelong recovery program. Most ONA members return to work and have successful, long-term careers in health care.

ONA Representation

- It is not our role as ONA representatives to judge members who engage in theft or other inappropriate conduct related to their disease. Our role is to represent the member in the context of a disability and not to lose sight of that objective.

- As an ONA representative, your goal is to ensure the member is placed on sick leave, continues to have access to extended health benefits and is not terminated by the employer or pressured to resign.

- Your role is also to support an employee to disclose to the employer that they may have a substance use disorder in order to explain any misconduct. If an employee is in denial, ONA can alert the employer to the possible existence of a disability without disclosing the medical condition, diagnosis, or other private medical information. This alert triggers the duty to accommodate and to make inquiries.

- Urge the employer to respond to the alleged misconduct in the context of the member's disability. Discipline/discharge is not the appropriate response for misconduct related to substance use disorder and constitutes discrimination contrary to the *Code*. Urge the employer to place the member on sick leave so the member can start a treatment program.

- A member is unlikely to be successful at a grievance arbitration, regulatory College, or criminal hearing without undergoing residential and comprehensive aftercare treatment. It is important to note that full-time members whose employment has been terminated will no longer have access to extended health-care benefits. If an employer is intent on terminating a full-time member, the ONA representative may be able to convince the employer to defer the termination until the member has completed residential treatment such as the program at Homewood.

- Never encourage a member to resign to avoid being terminated and/or reported to the College of Nurses or their regulatory College. Resignation will not prevent a report to the College.

- It is not uncommon for members with substance use disorder to miss meetings with ONA, fail to return calls, or fail to commence a treatment program. Although a member has a duty to cooperate with ONA throughout the grievance-arbitration process, ONA must take steps to accommodate behaviors that may be symptomatic of the disease. Such steps may involve rescheduling meetings, giving members more time to respond to requests for information, or adjourning a hearing if a member relapses to substance use.

Meeting with the Member

- Always try to meet with the member in advance of any disciplinary meetings or investigations. If the meeting involves allegations of substance use disorder or theft of narcotics, ask whether they are suffering from this disability. Tell the member that NOW is the time to reveal any substance use disorder if they wish to attempt to avoid termination or if they wish to challenge a termination through the grievance procedure. The longer the delay in disclosing the disability, the less likely it is that an arbitrator will order reinstatement.

- Never advise or encourage a member to resign their employment in order to avoid termination or a report to the College. Once a member resigns, there may be little ONA can do to assist them.

- Keep in mind that if an individual is attempting to withdraw from alcohol or drugs, their ability to recall events, to think rationally and to exercise sound judgment will be impaired by the symptoms of withdrawal.

- Recommend and assist the member in obtaining and submitting medical information to support sick time before the employer takes steps to terminate.

- If the member denies substance use disorder altogether, then advise them to say as little as possible in the meeting and to not deny or affirm any of the allegations.

Meeting with the Employer – Allegations of Theft or Other Misconduct

- Denial is a key feature of the disease. Confronting an individual with facts and appealing to logic will not necessarily bring an individual to admit they have a problem with alcohol and/or drugs. This realization and admission may come only after the consequences of their behaviour are felt for a period of time.
- Prepare with the member in advance of the meeting with the employer. Ask them directly and without judgment if they have a disability that would help shed light on the situation.
- Advise the member that theft is automatic grounds for termination and that the employee can only claim protection under the *Human Rights Code* if the member has a disability that caused them to commit the conduct. Arbitrators will generally only consider reinstatement to employment in cases where the member is forthright when confronted with dishonest behaviour and discloses a substance dependency problem.
- If substance use disorder issues only come up after a meeting has started, ask to stop the meeting so that you can caucus with the member in private.
- Advocate on the member's behalf when meeting with the employer. Don't simply take notes. Demand the employer provide documentation and specifics about any allegations of wrongdoing before the member is asked to respond. Demand a recess from the meeting to caucus with the member to review the allegations and canvass the possibility of substance use disorder.
- Advise the employer that the allegations it is raising are serious and that the member should not be forced to respond until they have had a full opportunity to review all of the allegations and documentation and has had an opportunity to speak to a legal representative through the Legal Expense Assistance Plan (LEAP).
- The LEAP representative will provide the member with information regarding possible College and criminal consequences. However, the LEAP representative will not instruct the member on how to respond to the allegations.
- If the police are contacted or present at a meeting, advise the member not to speak without the benefit of legal counsel and have the member contact LEAP immediately.

Nurses' Health Program

- The Nurses' Health Program was developed by the College of Nurses of Ontario (CNO), the Ontario Nurses' Association (ONA), the Registered Nurses' Association of Ontario (RNAO) and the Registered Practical Nurses Association of Ontario (RPNAO).
- Launched in January 2019, it offers a proven approach to the assessment and treatment of mental health and/or substance use disorders. Modeled on similar programs used by regulated health professions, it recognizes these disorders as illnesses and takes a non-punitive approach that reduces stigma and focuses on recovery.
- The NHP is a voluntary bilingual program designed to encourage nurses to seek treatment for mental health and/or substance use disorders that may affect their ability to practice nursing safely.
- Contact LEAP for further information.

Accommodation/Return-to-Work Meetings

- Return-to-work meetings should take place only after the member provides clearance from a qualified addiction specialist. ONA recommends that this be the member's treating addiction specialist and not a family doctor.
- Advise the member to provide medical information that clearly sets out the restrictions in place and what accommodation may be required (e.g., no administration of narcotics for the first six months).
- Employers will often claim it is impossible to accommodate members with restrictions such as no access to narcotics or a workplace monitoring requirement. ONA does not accept this claim and has won arbitration cases on this very point.
- The employer's duty to accommodate may include modifying a nurse's job duties to exclude narcotics administration, arranging for a workplace monitor (discussed in detail below), or transferring the nurse to strictly days to ensure proper monitoring.
- The restrictions imposed are typically set by a treating addiction specialist who may or not be working in conjunction with the regulatory Colleges' Fitness to Practise Committee.

Workplace Monitor

- One of the conditions frequently imposed by the College on a member's Certificate of Registration is that the member practise nursing only in a setting where another RN can act as a workplace monitor.
- The College has confirmed that a workplace monitor is not a shadow. The expectation is that the monitor will be in the same facility while the member is working**,** but not necessarily in the same department**,** and will have contact with the member from time to time during the member's shift.
- The member is expected to make the monitor aware of their addiction history**.** If the monitor suspects the member has relapsed, the College expects the monitor to report this to the member's supervisor, and document specific deficiencies in nursing performance or behaviours which the monitor suspects may be due to the possible influence of substances.
- The College recognizes that it is possible for someone to relapse without demonstrating warning signs despite the diligent efforts of the monitor.
- ONA knows of no case where a monitor has been reported to the College for failing to notice a relapse.

College of Nurses and other Regulatory Colleges [20]

- Employers have a mandatory obligation to report a member to the College of Nurses if there is a reasonable belief that a member suffers from a health condition, including a substance use disorder and it is affecting their ability to practise nursing safely.
- Resignation will not prevent a report to the College.

20 Other regulatory colleges, other than the College of Nurses have similar regulatory obligations.

- Members should be advised to call the Legal Expense Assistance Plan (LEAP) Intake immediately as soon as the employer makes a report to the College and to not contact or respond to the College.
- The College will undertake a health inquiry and will likely order that the member be assessed by a physician of the College's choice.
- If the inquiry shows that the member likely suffers from a substance use disorder, the matter is referred to the Fitness to Practise Committee.
- Many matters before the Fitness to Practise Committee are resolved by way of an Undertaking/Agreement rather than a formal order of the Fitness to Practise Committee.
- Members who are unable to work for a significant period of time may surrender their certificates of registration until they have received medical clearance to return to nursing from a physician specializing in addiction medicine.
- If members are well enough to work with certain restrictions on their practice, they may agree to the terms of an Undertaking/Agreement. Restrictions may include no administration of or access to narcotics, the need for a workplace monitor and continued comprehensive aftercare treatment for up to five years.
- If a member does not agree to enter an undertaking/Agreement, the matter proceeds to a contested hearing before the Fitness to Practise Committee. The Fitness to Practise Committee may suspend a nurse's certificate of registration if they do not demonstrate the insight to recognize that their health does not permit them to practise nursing safely.
- The outcome of a Fitness to Practise hearing depends on the medical evidence from the College's and the member's physicians. The Committee may order that the member's Certificate be suspended until the member has medical clearance to return to nursing work from a physician specializing in addiction medicine, or the Committee may impose conditions on a member's Certificate of Registration such as no administration or access to narcotics, a workplace monitor and continued comprehensive aftercare treatment for up to five years.
- Portions of the Undertaking/Agreement or an order of the Fitness to Practise Committee are posted on the College's website under "Find A Nurse."
- The best way for the member to avoid a suspension is to follow all recommendations of an addiction specialist. Recommendations may include residential or intensive out-patient treatment and comprehensive aftercare treatment.
- If a member's physician clears her to return to work, before or during the College's health inquiry process, the member does not need to wait for the process to be completed before returning to work.

Criminal Charges

- Some employers will involve the police if the member is alleged to have engaged in potentially criminal behaviour such as theft of narcotics or fraud.
- Health-care professionals must report charges and convictions to their regulatory College. This information will appear on the public register if the College deems it to be relevant to practice.

- If a member is charged and convicted, the criminal record will be a real barrier in finding nursing work with a new employer. Reinstatement with the appropriate accommodation may be the only way a member will be able to engage in finding work until a pardon is granted.
- The member should call LEAP immediately and not talk to the police. Members can tell the police that they are happy to co-operate but first need to contact LEAP. LEAP only provides financial coverage until such time as a member is charged. The member will be reimbursed for their legal costs at the end of the criminal matter only if a conviction is not entered.

Last Chance Agreements (LCAs)

- Last chance agreements generally provide that if the member relapses, their employment will be automatically terminated without any right to reinstatement. This can result from a single negative result on a urine screen.
- Some arbitrators have ruled that LCAs violate the *Human Rights Code* for this reason. Other arbitrators have taken the opposite view ruling that LCAs create an incentive to maintain sobriety and can be utilized as part of the accommodation process.
- Members will often accept LCAs as an alternative to the threat of discharge**. ONA representatives ARE NOT to sign such agreements simply on the basis that the member accepts it. The Labour Relations Officer must be contacted in these circumstances.**

Relapse

- The medical community and arbitrators accept that relapse is a part of the disease. A person may relapse one or more times before successfully achieving life-long sobriety.
- If a member relapses while under College restrictions, the member may voluntarily agree not to practise until cleared to return to work by their treating physicians. If they do not agree voluntarily, the Fitness to Practise Committee could suspend them until they are able to provide evidence that they can practise safely.
- If a member relapses after returning to work, the employer must still consider its duty to accommodate the member's disability. If a member is terminated, the prospect of reinstatement may be diminished as the duty to accommodate is not limitless and is subject to undue hardship. There is no answer as to how many times a member may relapse before undue hardship is reached. If relapse involves further theft, the employer will argue that undue hardship is reached at this first instance of misconduct. Each case will turn on its own facts.
- Individuals who relapse after completing a treatment program are generally in a better position to identify and take the necessary steps to discontinue their substance use because they are familiar with the resources and tools available to assist them.

Please note: These Guidelines are only intended to provide an overview of the return-to-work/accommodation process and the issues with respect to representing members with substance abuse.

Contact your Bargaining Unit President or Labour Relations Officer (LRO) for more specific information, guidance, and support.

Membership Policies
Membership Policy #1: Modified Work and Accommodation Service Delivery Guidelines

Revised March 2021

CONTEXT FOR SERVICE

When an employee requires an accommodation or returns to work (RTW) after an injury or illness, the employer has a duty under the *Ontario Human Rights Code* to accommodate the employee's medical restrictions.

The duty to accommodate is a legal obligation shared among three parties: the employer, the union and the employee seeking accommodation. Accommodation will vary based on the employee's individual and unique needs which must be considered, assessed, and accommodated.

The union is legally obligated to represent its members in accordance with the *Ontario Human Rights Code* and the collective agreement. The primary responsibility, however, is on the employer which oversees the management of the workplace.

These Guidelines are intended to address the level of service ONA provides to the member seeking accommodation.

Below are the responsibilities and roles of each party in the accommodation/RTW process:

Employer Responsibilities in the Accommodation Process

- Provide an effective written return to work process for its employees and ensure this policy or process is communicated to the bargaining unit.
- Accept the request for accommodation in good faith and deal with it in a timely manner. This may include creating a temporary solution until a longer term one is available.
- Request only information that is required to make the accommodation. The employer needs to know the restrictions or limitations and length of time the accommodation will be required (permanent or temporary) but generally not diagnosis. There may be circumstances where more medical information may be requested to explain or implement the requested accommodation.
- Take reasonable measures, short of undue hardship, to accommodate the employee's disability. While the employer is not expected to provide accommodation when it causes undue hardship, it is expected to tolerate some difficulties and challenges. The employer is not required to create an unproductive position regardless of its size or revenues.
- The employer and its managers, including the occupational health department, should not substitute their own personal views for those of the employee's treating physician.
- Maintain the confidentiality of the employee's health information.
- The employer is required to offer a reasonable accommodation that is consistent with an employee's medical restrictions.

Union Responsibilities during the Accommodation Process

- Ensure that the employer is meeting its duty to accommodate to the point of undue hardship.
- Ensure that the employer is actively involving the member and the union in its efforts to accommodate and assess the needs of employees on an individual case-by-case basis.
- Actively work with the employer and member to identify potential safe and suitable accommodations and propose these to the employer. ONA will assess whether the employer has given adequate consideration to accommodation options that minimize any impact to other members in the workplace and to the collective agreement.
- Advocate for and support the member in all aspects of the accommodation process.
- The union's goal is to ensure the employer agrees to and implements a reasonable accommodation in a timely way.
- Educate our members on the duty to accommodate, the role of the union in advocating for and facilitating the accommodation of its members and the role of co-workers in supporting their colleagues who are being accommodated.
- Ensure personal health information related to the accommodation remains confidential.
- Ensure requests for accommodation are properly made by the member and file grievances where the employer has failed to accommodate.

Employee Responsibilities during the Accommodation Process

- Identify to the employer the need for accommodation as this will trigger the employer's duty to accommodate.
- Cooperate in all aspects of the accommodation, cooperate in obtaining all necessary information, including reasonable requests for medical.
- Participate in discussions regarding accommodation solutions and accept a reasonable and suitable offer of accommodation.
- Cooperate fully in attempts to return to work and try all suitable work accommodations.
- Work with the union and employer on an ongoing basis to manage the accommodation process.

The quality of service provided by staff is contingent upon ongoing regular communication between staff and Bargaining Unit President/representative.

PLANNING AND CONSULTATION

- The Human Rights/Return-to-Work Specialist on the Litigation Team provides organizational support regarding accommodation and return to work. In particular, the Specialist provides support and guidance to LROs, with respect to next steps, in individual cases.

TEAM INTAKE

- Call is received from the bargaining unit representative or member, regarding a need for modified work. A response to this initial call will be provided within 48 hours.
- If a member calls directly to the District Service Team, the LRO may refer them back to the bargaining unit to talk to the return-to-work designate at the agency level.

FACT FINDING/INFORMATION GATHERING

Staff Accountability

- The LRO will determine if all the appropriate medical information has been obtained and provided to the employer, including hours of work, restrictions/limitations, disability permanent or temporary, return to work date. The LRO may request the member's consent to release medical files to ONA, including occupational, LTD and WSIB files.
- The LRO will advise the local/bargaining unit representatives that all medical information is confidential (see Board of Directors policy # 14.8).
- The LRO, with assistance from the bargaining unit representative, will determine what accommodations if any have been reviewed, by whom, and if it is a suitable match considering the member's restrictions.
- The waiver of job postings to accommodate a member **must** be approved by the LRO. ONA will not waive the application of the Collective Agreement provisions such as job postings, seniority rights, bumping rights etc. except in those circumstances where no other reasonable means of accommodation is possible. The LRO **must** be involved in situations where the employer is considering accommodation outside of the bargaining unit.
- The LRO determines whether short-term disability, long-term disability, Workers Safety Insurance Board, Canada Pension Plan or Social Assistance applies, and advises member to apply for income protection.

Bargaining Unit/Local Representative Accountability

- The bargaining unit representatives are accountable for educating the bargaining unit on human rights responsibilities.
- The bargaining unit/local representative advocates on behalf of the member and maintains the confidentiality of member-specific information (see Board of Directors policy 14.7 and 14.8).

  Meet with the member prior to the return-to-work meeting with the employer:

  - Review the medical restrictions with the member.
  - Discuss potential accommodation solutions with the Contact the LRO for advice and direction as needed.
- Attend meetings with the LRO and/or employer as necessary and take notes. Propose accommodation solutions to the employer during the return-to-work meetings.
- Provide additional information and documentation as requested by ONA staff.

- Ensure appropriate bargaining unit representatives are in attendance and informed on the progress.
- Contact the LRO for direction if the employer is proposing either of these solutions to accommodate the member:
    - Waiver of a job posting; or
    - Transferring the member to a non-union position or to a position within another union.
- When grievance language is provided by the LRO ensure that grievance language is provided to the member.
- Keep the member informed on an ongoing basis.
- Keep a log of permanent accommodations by employer in conjunction with the LRO.

STRATEGIES/TACTICS

- Meetings with the employer are generally conducted by bargaining unit representative; the LRO, Workplace Safety and Insurance Board representative and insurance company representative may also be present.
- If the employer fails to provide safe and suitable accommodation in a timely manner, a grievance will be filed.
- At the meeting, the representative and/or the LRO would clarify the income protection available to the member during modified work.

RESOLUTION AND IMPLEMENTATION

- Where the member is provided appropriate modified work, the bargaining unit representative or LRO (depending on who is handling the case) will communicate this to the Bargaining Unit President, and member. A Memorandum of Agreement may be signed.
- Where the member is not provided appropriate modified work, the LRO will determine if a grievance is to be filed and/or forwarded to arbitration.
- Where the LRO decides not to proceed with the grievance, the member will be notified of their rights under ONA Policy 14.1.
- The LRO will keep a log of permanent accommodations by the employer with information provided by the bargaining unit.

Membership Policy #2: Duty to Accommodate

SECTION: GRIEVANCES POLICY: 14.7
SUBJECT: DUTY TO ACCOMMODATE
PAGE: 1 of 3
EFFECTIVE: SEPT. 1994
REVISED: DECEMBER 2018

Policy:

The Ontario Nurses' Association recognizes that, as a union, we have a shared responsibility, along with employers and other employees, to assist disabled workers to maintain productive and fulfilling working lives.

In meeting its obligation to accommodate a member:

- ONA must be inform8ed about and involved in all situations where members require accommodation. All medical information gathered concerning the affected employee, if the accommodation is required due to a disability, shall be kept in the strictest confidence.
- While the primary responsibility to provide accommodation rests with the employer, ONA will assist by investigating and proposing suitable accommodation. The factors to be considered in proposing alternatives are:
    1) The requirements of the individual seeking accommodation in conjunction with the medical opinion. Ideally this will be in the accommodated worker's home area or unit. If this is not possible then other Bargaining Unit positions within the workplace may be considered.
    2) Consideration will be given to alternatives that are least disruptive to others in the workplace and to the Collective Agreement.
    3) If there is more than one ONA Bargaining Unit in the workplace then consideration will be given to those, and ONA will endeavour to allow the accommodated worker to transfer all service and seniority rights into the new Bargaining Unit.
- If a position cannot be found within an ONA Bargaining Unit, then a position outside the Bargaining Unit may have to be considered. If this position is non-union then ONA will attempt to negotiate an agreement whereby the position will be deemed to be an ONA position for the duration of the accommodated worker's occupancy of the position with all of the benefits arising from that status.
- The least desirable option would be that the accommodated worker transfers into another union's Bargaining Unit as an accommodation. This would raise issues of seniority. ONA will try to negotiate an agreement with the other union that the accommodated worker would maintain all ONA seniority.
- ONA will **not** waive the application of the Collective Agreement provisions such as job postings, seniority rights, bumping rights except in those circumstances where no other reasonable means of accommodation is possible.
- ONA will seek the most suitable accommodation for the member requiring accommodation. The factors for determining suitability will be the professional,

economic, physical, social and emotional requirements of the member being accommodated.

- ONA will assist members in filing grievances and Human Rights complaints when suitable accommodation is not provided.

Note: The sections of the *Human Rights Code* applicable to accommodation are as follows:

11.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where:

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

11.(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c.18, Schedule C, s.2(1); 2009, c.33, Schedule 2, s. 35 (1).

Disability

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c.32, s.27(5).

Accommodation

(2) No Tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c.18, Sched. C, s. 3(1); 2006, c.30.

Practical Tools

Practical Tool #1: Successful Accommodation: A Three-Party Partnership

When an employee requires an accommodation or returns to work (RTW) after an injury or illness, the employer has a duty under the Ontario Human Rights Code to accommodate the employee's medical restrictions. The duty to accommodate is a legal obligation among three parties: the employer, the union and the employee seeking accommodation. Modified work and accommodation will vary based on each member's individual and unique needs which must be considered, assessed and accommodated.

The employer, the union and the employee each share in the responsibility in making the RTW process a success. However, the primary responsibility is on the employer who oversees the management of the workplace. The union is a partner that works with the employer and member to support an accommodation for the member.

Below are the responsibilities and roles of each party in the accommodation or RTW process:

The Role of the Employer

The employer has the primary responsibility to offer and implement a safe and suitable accommodation. In doing so, it must actively work with the employee and the union. ONA will raise concerns and file grievances where appropriate. The employer's obligations include the following:

- Provide an effective written return-to-work process for its employees and ensure this policy or process is communicated to the Bargaining Unit.
- Accept the request for accommodation and deal with it in a timely manner. This may include creating a temporary solution until a permanent or long-term one is available.
- Request only that information that is required to identify and implement the accommodation including medical restrictions and length of time the accommodation may be required.
- Take reasonable measures – short of undue hardship – to accommodate the employee's disability.
- Once an accommodation is agreed to, an employer needs to ensure effective implementation of the accommodation. The employer must respect the privacy of the employee's medical information, at the same time they should provide enough information for managers and co-workers to understand the nature of the accommodation being provided.
- The employer and its managers – including the occupational health department – should not substitute their own personal views for those of the employee's treating physician.
- Maintain the confidentiality of the employee's health information and disclose information necessary to implement the accommodation.

The Role of the Employee

- The employee must identify the need for accommodation arising from a disability.
- Contact the union early for support and guidance.
- Request accommodation and provide the employer with the medical restrictions.
- This will trigger the employer's duty to accommodate.
- Cooperate with the employer and the union in all aspects of the accommodation/return-to-work process including attending meetings and discussions about accommodation solutions.
- Comply with the employer's ongoing reasonable requests for medical information or updates.
- Comply with treatment and rehabilitation recommendation from treating practitioners.
- Where the employer has offered an accommodation that is reasonable based on the medical restrictions, the employee must try the proposed accommodation, including on a trial basis.
- Work within the medical restrictions and communicate to the manager if the work assignment does not fit within those restrictions or whether further modifications to the job are needed.

The Role of the Union (ONA)

- Ensure that the employer is meeting its duty to accommodate to the point of undue hardship.
- Ensure that the employer is actively involving the member and the union in its efforts to accommodate and assess the needs of employees on an individual case-by-case basis.
- Actively work with the employer and member to identify potential safe and suitable accommodations and propose these to the employer. ONA will assess whether the employer has given adequate consideration to accommodation options that minimize any impact to other members in the workplace and to the collective agreement.
- Advocate for and support the member in all aspects of the accommodation process.
- The union's goal is to ensure the employer agrees to and implements a reasonable accommodation in a timely way.
- Educate our members on the duty to accommodate, the role of the union in advocating for and facilitating the accommodation of its members and the role of co-workers in supporting their colleagues who are being accommodated.
- Ensure personal health information related to the accommodation remains confidential.
- Ensure requests for accommodation are properly made by the member and file grievances where the employer has failed to accommodate.

The most optimal approach for a worker's return to work is when all three parties – the employer, the employee and ONA – work together to ensure a smooth and successful accommodation or transition back to work.

Contact your Labour Relations Officer for more specific information, guidance and support.

Practical Tool #2: ONA Supports Members in Return to Work

The checklist below provides a brief overview of the return-to-work process and is directed toward Bargaining Unit leaders who are often the first point of contact for our members requiring accommodation. **Please refer to ONA's Accommodation and Return to Work: A Guide for ONA Members for more detailed information.** The Guide is available on the ONA website at www.ona.org.

If a member in your Bargaining Unit has been off work due to a disability including injury or an illness and they are ready to return, you can assist the injured member in a safe return to work (RTW). ONA is legally obligated to represent its members and is entitled to attend all RTW meetings. It is important to take detailed notes during each of the meetings described below.

If your employer has requested a meeting to discuss a member's return to work:

Prior to the Return-to-Work Meeting with the Employer

Before the meeting, ask management to provide you with the following information:

- Is it an occupational injury or a non-occupational medical condition?
- What is the employer's position regarding the required accommodation including any information the employer has regarding medical restrictions?
- What is the Physical Demands Analysis (PDA) for the positions being considered by ONA or the employer as possible accommodations and is the employer willing to modify the position, if needed, to accommodate the member's restrictions?
- An updated list of job postings including any jobs posted that remain unfilled.
- Be sure to review your Local Collective Agreement language regarding the RTW process.

Meet with the Member: Ask and raise the following issues:

- What is the nature of the disability, illness or injury? Is it occupational or non-occupational?
- Ask for a copy of the medical restrictions. Review the restrictions, any functional abilities evaluations and reports.
- Review the Physical Demands Analysis (PDA) and explain to the member that the PDA is a guide to identify the physical or mental requirements of the job. It does not mean that the member has to be able to perform every single duty listed on the PDA to be accommodated into the position as duties may be modified or adjusted.
- Discuss the duty to accommodate under the Ontario Human Rights Code. The employer is required to investigate all accommodation options available to meet the member's medical restrictions.
- Discuss possible accommodation options that could be proposed to the employer.
- Review with the member their obligation to cooperate in the accommodation/ return-to-work process as well as the obligation to try a proposed, reasonable and suitable accommodation.

At the Return-to-Work Meeting with the Employer

- Ensure the meeting is respectful. If the tone of the meeting becomes adversarial, confrontational or becomes an interrogation, advise management that this approach is unacceptable.
- Present possible accommodation solutions to the employer and ensure that the employer is meeting its duty to accommodate our members.
- If the employer rejects proposed accommodation solutions or states that it would be undue hardship to accommodate the member, insist the employer explain specifically why and document their answers.
- If a RTW plan is proposed in the meeting, advise the employer you may need additional time to review the plan with the member and other union officials including ONA staff before it is finalized. A RTW plan must be in writing and include the specifics about the accommodation, timelines for monitoring and feedback, and the responsibilities of those involved in implementing the plan.
- Before ending the meeting, review next steps with the employer to ensure a timely accommodation.

After the Meeting

- Advise the member that you will maintain confidentiality of all personal health information.
- Advise the member you will continue to represent them throughout the process of accommodation.
- Advise the member to call you immediately if the employer contacts them directly so that you can support and advise the member.
- Advise the member to call you if their medical condition or restrictions change.

Please contact your Labour Relations Officer for more specific information, guidance and advice.

Practical Tool #3: First Contact with the Member Seeking Accommodation - Template Letter

Dear Member,

As your union representative, I have been contacted by occupational health to let me know you will require an accommodation based on your medical restrictions or limitations and am requesting a meeting to discuss your return to work. Return-to-work meetings are normally scheduled with your nurse manager, employee health nurse and a union representative. The employer has a duty to take all reasonable steps to accommodate your medical restrictions/limitations and I will guide and support you throughout this process.

ONA has a legal obligation to represent its members and is entitled to be at all meetings. If a meeting is scheduled for you but the union has not been invited, be sure to let me know and I will arrange to have it rescheduled if I am not available on the date.

Prior to meeting with the employer, I will contact you to review your medical restrictions/limitations as well as any prior accommodations. Please bring to the meeting a copy of your medical restrictions and any other relevant medical documentation. We will discuss any ideas you have as to how you could be accommodated in your unit. The medical information you provide to me, other than the medical restrictions, is confidential and will not be shared with the employer without your consent. I am available to meet on….. Please let me know if any of these time slots will work for you.

At any of the return-to-work meetings, I will be your spokesperson and your advocate and will be taking notes. Ideally, we want to come to that meeting to present possible accommodation solutions so that you can return to work in your unit. If a return-to-work plan is proposed in this meeting, I am likely to request a caucus to review the plan with you.

Your cooperation with the union and the employer is an integral part of the success or failure in finding appropriate work accommodation. You will need to:

- Provide appropriate medical documentation and comply with reasonable requests for additional medical information.
- Pursue, commit to and take all necessary steps towards rehabilitation.
- Try a proposed, reasonable and suitable accommodation, including on a trial basis.
- Work within your medical restrictions and communicate with ONA and your manager if the work assignment does not fit within the restrictions.

Once an accommodation has been agreed to, I will follow up to ensure it is being implemented. If there is any change in your medical restrictions or you are having difficulties with your accommodation, contact me for support and guidance regarding next steps.

I look forward to meeting with you. Do not hesitate to contact me for more specific information or if you have questions.

Sincerely, Name, Title

Practical Tool #4: Checklist to Assess Employer Proposal to Waive a Job Posting

ONA will <u>only</u> consider waiving a job posting in those circumstances where no other reasonable alternative for accommodation is possible. The posting can only be waived with the approval of the Labour Relations Officer and the District Service Team Manager.

The fundamental importance of seniority rights in a collective agreement context is well established – collective agreement provisions should be strictly interpreted so as to not undermine seniority rights. The union has a duty to represent all of its members and part of its job is to insist that the rights of other employees, including seniority rights, must be taken into account and balanced with the human rights of the employee seeking accommodation. An employer must, therefore, exhaust all reasonable alternatives that do not interfere with the collective agreement before proposing an accommodation that deprives other workers of their seniority rights.

Employers all too often propose to the union that it waive a job posting in order to accommodate the employee without exhausting efforts to find reasonable alternatives. In this type of situation, it is usually the case that the employer has not actively involved the union in coming to its view that a job posting needs to be waived.

The employer oversees and controls the management of the workplace and therefore bears the primary responsibility regarding the duty to accommodate up to the point of undue hardship. If the employer wants the union to waive a job posting it must demonstrate to us, in writing, that it has exhausted reasonable measures that do not affect collective agreement seniority rights.

Remember that the Union cannot be passive in the accommodation process. ONA must actively work with the employer and the member to identify suitable accommodations and propose these to the employer. ONA should first consider accommodation options that comply with the collective agreement and seniority rights under the job posting provisions.

The first step is to require the employer to demonstrate in writing why there is no reasonable alternative to waiving a job posting. ONA should advocate for the employer to exhaust reasonable accommodation options that upholds or respects the job posting provisions. For example, sometimes an employee with a disability can be accommodated in their home position or post into a position without waiving the job posting provisions but the employer is unwilling. ONA should file grievances.

If the employer can demonstrate that there are no reasonable alternatives to waiving a job posting, then ONA needs to consider agreeing to the request. The union cannot stand in the way of a reasonable accommodation where no other reasonable alternatives exist. At the same time, ONA needs to be able to explain a decision by the employer and the union to not post a position to senior employees in the Bargaining Unit.

Given the complexities of these situations which need to be assessed on a case-by-case basis, the LRO and District Service Team Manager need to be involved to approve the waiving of a job posting.

The following is a checklist for evaluating the Employer's response:

1. The Employer's Procedural Obligation

Did the employer:

- Seriously consider and evaluate the request for accommodation?
- Obtain all of the necessary information, including the medical restrictions, the physical demands analysis if available, as well as any functional ability evaluations?
- Consider the options for accommodation and take the necessary steps to determine what modifications to the job duties and physical workplace might be required? This includes assessing the emotional/mental demands of the employee's home position and unit being considered.

The pre-disability job is should always the starting point in looking for accommodation. Has the employer worked through the following order of accommodation options?

- Can the employee perform their existing job as is?
- If not, can the employee perform the existing job, modified or "re-bundled"?
- If not, can the employee perform another job in its existing form?
- If not, can the employee perform another job in a modified or "re-bundled" form?

2. The Employer's Substantive Obligation

After the employer has conducted an individualized assessment of the person's capabilities and investigation into accommodation solutions, the substantive duty requires the employer to offer and implement a reasonable accommodation suitable to the employee's restrictions in a timely manner. This includes a temporary or long-term accommodation. The key question is "Could the employer have offered and implemented a safe and suitable accommodation but failed to do so?"

Temporary accommodations should be considered for employees while they maintain their home position if it is expected that the employee may eventually recover.

If an employee's restrictions are long-term and the home position of an employee cannot be modified to accommodate them because of undue hardship, then the following options should be considered:

- Temporary vacancies on other units
- Consider vacancies which have been posted but remain unfilled
- Encourage employees to post into positions that are suitable
- Consider re-training to facilitate accommodation into other units or areas where there are vacancies such as mental health unit
- Consider bundling of duties from different positions or combing part-time positions

As noted above, ONA will only consider waiving a job posting in those circumstances where no other reasonable alternative for accommodation is possible.

If the employer fails to meet its duty to accommodate in either taking steps to investigate and assess accommodation options or in failing to offer reasonable accommodations in a timely manner, then ONA should file grievances. Where a member is without income, these grievances will be referred through an expedited route of arbitration.

Practical Tool #5: Substance Dependence: A Hierarchy of Steps

Human rights tribunals and labour arbitrators recognize substance use disorders (alcohol and/or drug addiction) as a disability protected under the *Human Rights Code*. This means the employer and union have a joint duty to accommodate employees suffering from substance dependence in the workplace. A member with substance dependence has a corresponding duty to cooperate in the accommodation process.

Substance use disorders can result in behaviours that lead to disciplinary consequences such as theft of narcotics. Individuals may engage in theft to satisfy the need for large dosages and/or frequent usage and to avoid the effects of withdrawal. Allegations of theft are often accompanied by other allegations of professional misconduct, such as improper charting, diversion of narcotics from patients, or practicing while impaired.

Denial is a central feature of the disease. when untreated. It is important that ONA representatives understand the powerful role denial plays in the disease and that individuals may not be in a position to accept that they are suffering from a substance use disorder until they begin a treatment program.

Faced with evidence of a commitment to treatment and a good prognosis many arbitrators will return the grievor to work. This will often depend, however, on the timing of the disclosure of the disability. The earlier the employee discloses the disability and undergoes treatment, the better the chance the employee will be reinstated.

The employer's duty to accommodate is triggered when the disability is disclosed OR when the employer suspects a disability. As soon as the employer is given notice by the union or employee they may be suffering from a disability and that the disability may have impacted the member's conduct at work, the employer has a duty under the *Code* to inquire whether an accommodation is needed.

ONA recently won a case where the member was terminated for diverting drugs from the hospital. After the investigation meeting and before the termination meeting, the union representative notified the employer that the member was suffering from a disability and needed help. The arbitrator found that the employer failed in its duty to inquire and investigate whether an accommodation was required. Our member was reinstated.

The employer will typically terminate employment when the employee does not admit to the substance use disorder and/or the misconduct related to it. Take the following steps to assist and advocate for our member:

1. Encourage the member to disclose the disability as soon as possible before the employer takes steps to discipline.

2. The disclosure should be before or during the discipline/termination meeting. Explain that the longer the delay in disclosing the disability, the less likely it is that an arbitrator will find that the employer discriminated against the member or that their duty to accommodate was triggered. Therefore, it is less likely that an arbitrator will order reinstatement.

3. Where we believe the member is in denial, disclosure by the Bargaining Unit leader to the employer that a disability may exist will trigger the employer's duty to inquire to

find out more information. This may in turn trigger the employer's duty to accommodate.

4. Failing the above, disclose the disability as quickly as possible after the disciplinary/termination meeting and well before the arbitration as well as the member's treatment/rehabilitation.

Practical Tool #6: Linking Accommodation/Return to Work and Disability (Primary) Prevention

The Basis of an Effective Return-to-Work Program

The disability prevention model is the model ONA advocates for and promotes as representing best practices with respect to accommodation/return to work. Disability prevention is viewed as a primary method to prevent injuries from happening in the first place whereas accommodation is viewed as a secondary means to prevent re-injuries or exacerbation of pre-existing disabilities.

In this way, the obligation of employers under the *Human Rights Code*, the *Occupational Health and Safety Act* (*OHSA)* and the *Workplace Safety and Insurance Act* (WSIA) are integrated.

OHSA sets out the obligations of the employer with respect to maintaining a healthy and safe work environment for workers as well as the role of the Joint Health and Safety Committee (JHSC) in supporting workplace parties. The purpose of *WSIA* is to promote health and safety in the workplace and to facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease. The *Ontario Human Rights Code* is the overarching legislation that requires employers to accommodate up to the point of undue hardship.

The goal of disability prevention is to reduce the risk of injury or illness in the workplace. This is done by modifying the workplace in ways that will remove barriers, decrease risk and prevent work-related injury or illness for all employees.

Linking disability prevention with individual accommodation presents the employer with an opportunity to implement solutions that will both accommodate the employee and eliminate future risk to other employees. For example, if the employer implements voice activated software at the nurse's station for a nurse with carpel tunnel syndrome or neck/shoulder restrictions this will have the effect, over time, of reducing injury for other employees.

At the RTW meeting the parties should identify the barriers which are preventing the individual from returning to work and possible solutions to remove or modify the barriers to facilitate the individual accommodation. The information regarding barriers and accommodation solutions is summarized on a monthly basis by occupational health and forwarded to the JHSC for consideration regarding disability prevention. An electronic chart documenting barriers and accommodation solutions is maintained and distributed to all managers.

Outlined below are Accommodation/RTW policies and processes ONA has negotiated that include linking disability prevention with accommodation.

Accommodation/RTW Policy Goals

- Establish a work environment that promotes a culture of health and safety and decreases the risk of illness or injury.
- Committed to providing a safe and timely return to productive and sustainable employment for employees disabled through occupational or non-occupational illness or injury.
- Apply the RTW program fairly and consistently and ensure every attempt is made to return the employee to their pre-disability position.
- Promote a strong relationship between primary (hazard identification and injury prevention) and secondary (safe and rehabilitative return to work) prevention and ensure JHSC and the employee are active partners in the process.
- RTW is a prevention Opportunity:
    - To identify root causes for in the case of an occupational injury and remove the hazard for the injured worker and other workers, and
    - To implement solutions that will:
        - Accommodate the worker.
        - Eliminate risk to other workers and prevent future injuries.

Return-to-Work Meeting

- The electronic return-to-work form will include a section for identifying the barriers to the employee's return to work and the possible accommodation solutions as well as an action plan.
- The employee's manager will be present.
- Once the accommodation plan is agreed to it is forwarded to the Manager of Occupational Health. The Manager will compile the information in summary form and forward it to the JHSC on a monthly basis.
- Develop a communication strategy to implement the accommodation including informing co-workers of the accommodation.

Joint Health and Safety Committee

- Enhanced processes to identify and track workplace hazards.
- Systematic assessment of MSD (musculoskeletal disorders) hazards.
- The monthly summary reports generated by occupational health are a standing item on the agenda and sent to all site managers. The Committee will consider the hazards identified and review accommodation solutions for implementation in other units to prevent injury.
- Development of a chart to document accommodation solutions on an ongoing basis. The chart is maintained and available on the employer's intranet.

See ONA's Occupational Health and Safety Guide for support and guidance on how to establish a strong and effective Joint Health and Safety Committee.

Contact your Labour Relations Officer for further information, support and guidance.