



**Northwest Territories
Human Rights Commission**

Duty to Accommodate: A Guide for Employers

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Duty to Accommodate: A Guide for Employers

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Introduction

These guidelines are for employers in the NWT who want to know more about their duty to accommodate people under the *NWT Human Rights Act*. The information in this document is intended to help you:

- understand what accommodation means
- learn about your duty to accommodate
- put in place policies and procedures to make your workplace more inclusive.

Landlords, service providers, unions and professional associations also have a duty to accommodate. These guidelines specifically address the responsibilities of employers only.

The situations or case studies included in these guidelines are examples. These guidelines do not replace legal advice. The Human Rights Commission can provide general information. If you need legal advice about the duty to accommodate, contact a lawyer.

These guidelines do not replace the NWT *Human Rights Act*. The *Act* can be found at www.nwthumanrights.ca.

These guidelines have drawn from existing materials developed by the Canadian, Yukon, Manitoba, Alberta and New Brunswick Human Rights Commissions. The NWT Human Rights Commission appreciates the support of these Commissions in developing its own guidelines.

The Duty to Accommodate

What is accommodation?

Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to make sure that a person is not discriminated against – or excluded – because of their age, race, sex or any other protected ground.

Accommodation is based on the principle that treating everyone the same does not always result in equality. Sometimes we need to treat people differently in order to achieve equality of opportunity in the workplace. Some examples of simple things an employer can do to accommodate include:

- purchasing or modifying tools, equipment or aids;
- altering the premises to make them accessible;
- altering aspects of the job, such as job duties;
- offering flexible work schedules;
- offering rehabilitation programs;
- allowing time off for recuperation;
- adjusting policies (for example, relaxing the requirement to wear a uniform.)

The legal duty to accommodate arises when a workplace rule, standard, or policy creates a barrier for employees based on a ground of discrimination in the NWT *Human Rights Act*. Those grounds are:

- Race, colour, ancestry, place of origin, ethnic origin and nationality
- Sex, sexual orientation, or gender identity
- Family or marital status, or family affiliation
- Social condition
- Religion or creed
- Political belief or association
- A pardoned criminal conviction
- Disability
- Age

Discrimination is against the law, even if an employer does not intend to discriminate.

Accommodation in employment most often involves the grounds of physical or mental disability, gender (including pregnancy), and family status.

An employer's duty to accommodate employees and job candidates is far reaching. It involves both the process used to consider accommodation, as well as the accommodation itself. It can begin when a job is first advertised and finish when the employee requiring accommodation leaves the job.

Accommodation balances the diverse needs of individuals, groups, organizations and businesses in our society. Accommodation may cause inconvenience, disruption and expense. Most often, accommodation costs very little. Accommodation usually costs less than hiring and training a new employee.

Who shares this responsibility?

Accommodation is a shared responsibility. Flexibility, good communication and cooperation between the worker and the employer are keys to successful accommodation.

The duty to accommodate applies to all NWT employers. Some employers, such as the federal and First Nations governments and the Canadian Broadcasting Corporation, may be covered under the *Canadian Human Rights Act*, rather than the *NWT Act*. Both laws require the duty to accommodate.

Accommodation is not a nicety or a courtesy
- it is required by law.

The employee should tell the employer what their specific needs are. The employee should be willing to provide supporting documentation, and to help to find a suitable accommodation. Employers cannot be expected to automatically understand the accommodation needs of an employee, particularly if the needs are not obvious.

Both employees and job candidates should ask about any accommodation they would need to overcome a disadvantage in the workplace. For example, a job candidate could ask for a different office chair, computer equipment or software to accommodate their disability if they are successful in the job.

Employers must respond to a request for accommodation. Employers must consider all options available for accommodation. The employer is expected to provide the accommodation that most respects the dignity of the employee at the same time as not imposing an undue hardship on the employer. There is more information on undue hardship below.

Archie has been diagnosed with bipolar disorder. He does not tell his new employer about his illness because he believes a mental disability will be held against him. He experiences a crisis at work and does not return to the job for a few days. When his employer contacts him, Archie lets him know that he has a mental health problem. They agree that he access counseling during work hours through the Employee Assistance Program.

Employees are expected to be reasonable in their requests and when considering proposals that address their needs effectively. Employees must cooperate in the development of reasonable accommodations. A human rights complaint may not stand up if an employee has not cooperated.

Unions are an important part of the accommodation process. Through collective agreements unions can, without meaning to, create workplace rules that have discriminatory effects. Unions can become a party to discrimination if they block an employer's efforts to find an accommodation. Unions are expected to facilitate accommodation up to the point of undue hardship on the union.

When is accommodation required?

Employers have a legal duty to take reasonable steps to accommodate an employee who requests accommodation when it is based on one of the prohibited grounds of discrimination listed on page 4.

Sometimes, employers have a duty to accommodate even if there has not been a specific request from an employee. For example, there may be a dramatic change in the employee's behaviour that suggests that her or she needs accommodation. An employer should approach the employee about accommodation if the employer suspects that the worker might have difficulty at work relating to a prohibited ground under the *Act*.

When is accommodation not required?

Here are some exceptions to the duty to accommodate:

- denominational schools if the preference is related to its religious beliefs;
- non-profit groups and charities, if the preference is related to the goals of the group;
- a business owner giving employment preference to a family member because of their family relationship;
- unequal pay based on something other than the prohibited grounds of discrimination, such as seniority, merit or regional differences in the cost of living;
- if the request for accommodation does not fall under one of the grounds of discrimination in the *Act*;
- where there is a bona fide occupational requirement; bona fide occupational requirements are discussed in more detail on page 7.

Hilda delivers mail for a large company. She always mixes up the mail for two employees with similar names. Hilda has an intellectual disability. Her supervisor understands that the problem might be related to Hilda's disability. He also suspects she is unable to ask for a workplace accommodation. Her supervisor talks to Hilda and develops a way for mail to be addressed that helps Hilda distinguish between the two employees.

There are times when an employer will have met its duty to accommodate, for example:

- An employee denies there is anything wrong and refuses the employer's assistance. The employer met its duty to accommodate by discussing and offering accommodation options to the employee.
- The employee refuses a reasonable offer of accommodation. The employer and employee discuss various options for accommodation. The employer offers an accommodation that is reasonable and that respects the employee's dignity. However, the employee refuses everything but his or her ideal accommodation.

What is a bona fide occupational requirement?

Discrimination may be allowed if an employer can show that a job requires a discriminatory standard, policy or rule. An obvious example is when an employer refuses to hire a legally blind person as a driver. A *bona fide occupational requirement* of a driver position would be the ability to obtain a driver's license.

To defend a job requirement as a *bona fide occupational requirement (bfor)*, an employer must prove that the accommodation requested imposes an undue hardship on the organization. Specifically, an employer should be able to answer “yes” to the following three questions:

- Is the job standard reasonably connected to the performance of the job?
- Was the job standard adopted in the honest belief that it is necessary?
- Would it create an undue hardship for the job standard to be changed or removed to accommodate the employee? The criteria for determining if an accommodation creates undue hardships are discussed in more detail below.

Jim was a rock truck driver for an open pit mine. He broke his hip and became permanently disabled after a workplace accident. A *bona fide occupational requirement* for a rock truck driver is to sit for long periods of time. Jim could no longer do this. He needed to work in a position that allowed him to sit and walk at regular intervals. The mine continued to employ Jim while he was on long-term disability, but did not hold his job for him. The insurance company and compensation board paid for re-training. Jim returned to the mine and was placed in the ore processing plant in a position that accommodated his disability.

What is undue hardship?

Undue hardship occurs when an accommodation creates unmanageable workplace issues for an employer. Examples might be unbearable financial costs or serious disruption to business. The facts of each situation are different. Determining undue hardship depends on the individual circumstances. Employers can consider the factors listed below to decide if an accommodation would result in undue hardship.

- **Financial costs**—Financial costs must be substantial to cause undue hardship. When assessing undue hardship, consider both lost revenue and any financial gains, such as increased productivity, tax exemptions, grants or subsidies.
- **Size and resources of the employer**—For example, large organizations with a lot of resources are usually better able to absorb the impacts of accommodation than the small family-run business with only a few employees.
- **Disruption of operations**—Consider the extent to which the accommodation would disrupt carrying out essential business. For example, could a workplace be modified in a way that would not substantially interfere with workflow?

- **Morale problems of other employees**—Is morale negatively affected by the accommodation because of such things as an increased workload and more overtime being required of other employees? Are other employees experiencing difficulties with sleep or other health issues?
- **Substantial interference with the rights of other individuals or groups**—A proposed accommodation should not interfere significantly with the rights of others or discriminate against them. The objections of others must be based on well-grounded concerns that their rights will be affected. For example, a substantial departure from the terms of a collective agreement could be a serious concern.
- **Interchangeability of work force and facilities**—Can an employer relocate employees to other positions on a temporary or permanent basis? This may be easier for a larger company.
- **Health and safety concerns**—Consider the level of risk and who bears that risk.

Jeremy asks for five days off to travel and to attend his uncle's funeral. The company's policy provides only three days of compassionate leave for the funeral of a member of the extended family. Three days is not enough time for Jeremy to travel and to attend the funeral. Jeremy asks for, and receives, additional unpaid leave to be with his family because in his culture it would be inappropriate to miss his uncle's funeral.

The following hardships are not normally considered to be undue:

- reasonable overtime or leave costs
- the costs of responding to a grievance or a minor disruption to a collective agreement
- the cost of meeting building codes or other legislation
- customer or other employees' preferences

What can I ask about accommodation?

The privacy rights of a worker must be balanced with the employer's need for information in order to provide the most appropriate accommodation.

Privacy issues usually come up when an employee requests an accommodation based on disability. Employers can ask for information about:

- the prognosis for full or partial recovery;
- the employee's fitness to return to work;
- the employee's fitness to perform specific parts of their job;
- the likely length of time for any physical or mental restrictions or limitations.

Employers are not automatically entitled to a diagnosis of an employee's illness or disability. They are also not necessarily entitled to information about an employee's specific medical treatment. It is the worker's responsibility to provide information that will help the employer assess an accommodation request.

Frequently asked questions

Q. Do I have to create a new job?

A. An employer does not have to create a job that otherwise would not exist, other than short-term light duty or rehabilitation assignments. Employers are required to try to modify existing job tasks between employees to meet their duty to accommodate.

Q. How much time off work do I have to give a worker before letting them go?

A. Each situation is different. An employer might consider factors that could prove an undue hardship, such as unpredictable absenteeism and how critical regular attendance is to the position. In many cases it is seen as reasonable to hire a temporary worker to fill in for periods of up to 18 months.

Q. Can an employee refuse certain job duties because of religious belief?

A. It could be reasonable to exempt an employee from occasional, non-essential or incidental duties that cause a conflict with their beliefs. An example might be excusing a devout Catholic social assistance worker from authorizing medical coverage for an abortion. That particular file could be transferred to a different worker. In other cases, it could be undue hardship for an employer to exempt someone from performing core job functions.

Accommodation is meant to enhance a worker's abilities and ensure workplace standards are met, not compromised.

Q. What happens if I have provided accommodation but the situation is still not working out?

A. Accommodation is not always a one-time action. An employee's needs could change over time. A request for a new or different accommodation may be legitimate. However, some behaviours, such as consistently arriving late for work, may be a management issue. Employees must understand the performance and workplace ethics expected of them.

Q. Do I have to pay the employee the same rate of pay if they can't do the job?

A. An employee should continue to receive the same rate of pay they received before the accommodation. Exceptions might be if the employee's duties have changed significantly or the employer would experience undue hardship to maintain their rate of pay.

Q. What happens if an employer does not meet its duty to accommodate?

A. If an employer refuses to accommodate to the point of undue hardship, it leaves itself open to a complaint under the *Act*. The employer would have to provide information to show that it would be impossible to accommodate the employee without undue hardship, or that it attempted to accommodate the employee, but the employee refused reasonable accommodation. An employee cannot be fired for making a human rights complaint.

Planning for Workplace Accommodation

The best defence against human rights complaints is to develop an inclusive workplace, an accommodation policy and to be informed of your responsibilities.

There are benefits to developing policies and procedures that support a discrimination free workplace. Damaged reputations, as well as costly and upsetting legal processes can be avoided by letting everyone know the rules and what behaviors are acceptable.

Employers should consider developing an accommodation policy and procedures and providing ongoing education about human rights issues to its management and staff.

Suggestions for a workplace accommodation policy

Most employers have human resource policies to ensure that all workers are treated fairly and consistently. A policy for workplace accommodation provides everyone with a common set of expectations and understandings about the duty to accommodate.

Here are suggestions of what you might include in your workplace accommodation policy.

1. **Policy Statement** – Include the purpose of the policy, the employer’s commitment and the legal context. For example, include what the *NWT Human Rights Act* says about the duty to accommodate and the prohibited grounds of discrimination.
2. **Employer Responsibilities** – Include the responsibility to review requests, verify needs, respect confidentiality, assess, identify and implement accommodations.
3. **Employee Responsibilities** – Include the responsibility to advise the employer of needs, provide backup information about needs, cooperate in the search for and implementation of accommodation. Indicate that a failure to cooperate may lead to denial of the employee’s request for accommodation.
4. **Education** – Identify how the workforce is educated about the employer’s legal obligations and employee responsibilities.
5. **Monitoring** - Include how accommodations will be monitored for effectiveness, the need for change, and to determine when the accommodations are no longer required.
6. **Appeals** – If possible, include information about the right to appeal if an accommodation is refused. You could also advise that there is a formal complaint process through the NWT Human Rights Commission.

Suggestions for workplace accommodation procedures

A thorough policy includes procedures. Procedures provide details for how a policy is implemented. Here are some items that can be included in your accommodation procedures.

1. **Information and initiating requests** – Who has the responsibility to inform employees and job applicants about their rights? Who is an employee who needs accommodation to approach?
2. **Processing requests** – Describe the process used to deal with requests for accommodation. Consider including financial or other authority that is delegated to managers.
3. **Undue hardship** – Who is responsible for making decisions concerning questions of undue hardship?
4. **Appeal process** – Describe the appeal process if a job candidate or employee is refused accommodation or is unhappy with the accommodation offered.
5. **Training** – Describe the training that is provided for staff responsible for workplace accommodation policy and procedures.
6. **Review** – How often will the policy and procedures be reviewed? Include who is responsible and any requirements for reporting on the review.

Bob has an interview for a job he really wants. However, when Bob dropped off his application form, he noticed that there was a strong perfume scent. He explained to the employer that his asthma is aggravated by the scents. He asked if the interview could take place outside the office. The employer said that he has been thinking of establishing a scent-free workplace anyway and asks Bob to come to the office for his interview.

Sarah's child care provider insists that children in her care be picked up by 4:30 pm. Sarah asks to leave work at 4:15 pm and make up the time in the morning and at lunch break. Her employer's small store is open until 5:30 pm but her boss agrees to look after customers during the last hour of business or hire a part-time employee.

Checklist for responding to a request for accommodation

Here is a suggested checklist of steps to take when faced with a request for accommodation. You can also use these suggestions if you suspect that an employee might need an accommodation to meet the normal expectations of the workplace.

Gather information

- Find out if an employee's request for accommodation, or your suspicion about a possible need for accommodation, falls under *Act* or the collective agreement. There is no legal duty to accommodate the request if it does not fall under the *Act* or the collective agreement. When in doubt, contact the Commission for information, or contact your lawyer for legal advice.
- Review the information that the employee provides to support the request, eg. medical documents.
- Listen to and consider the needs of the employee and his or her suggestions for accommodation.
- Do you need more information than the employee has already given you, for example, further medical information?
- As much as possible, ask the employee in writing for the information you might need from them.
- Once you have the information that allows you to assess the employee's accommodation request, proceed to the next steps.
- Reply to the request for accommodation within a reasonable amount of time.

Review current job

- Can the employee perform his or her current job without accommodation?
- If not, determine if the employee can perform the existing job in a modified form.
- If this is not possible even with accommodation, document this and explain the reasons in writing.

Examine other jobs in the workplace

- Identify all other job possibilities in the organization.
- Determine if the employee can perform another job in its existing form.
- If not, determine if the employee can perform another job with modifications.
- Identify which of the essential duties of those jobs the employee can do and what they cannot do.
- Identify what can be done to enable the employee to perform any of the possible jobs.
- If an accommodation in another job is not possible, document this and explain the reasons in writing.

Discuss job assessment results with relevant parties

- Get input from the employee and the union (if there is one). Discuss what the employee can do from the options you have identified.
- Get input from medical or other relevant experts on what the employee can do for any of the options you have identified.

Decide on appropriate and reasonable accommodation

- An employee is entitled to reasonable and appropriate accommodation. An employee is not entitled to the precise accommodation they want or the most ideal solution.
- If full accommodation is not possible without undue hardship, try to suggest options that may partially meet the needs of the person seeking accommodation.
- If accommodation is not possible at all due to undue hardship, make certain you have the necessary information to support this. Document in writing why you cannot accommodate. For example, if cost is a factor, show why the particular cost of implementing an accommodation is an undue hardship.

Implement

- Outline in writing what will be done and include any terms or conditions that apply.
- Make sure supervisors and co-workers are aware of what is being done and why. Ask for and obtain their support if needed.
- Respect the privacy of the employee. For example, keep information verifying the need for an accommodation confidential.

Monitor

- Follow up to ensure that the accommodation meets the needs of the person who requested the accommodation.
- Review and modify the accommodation if circumstances or needs change (including if accommodation is no longer required).

List of useful resources

The links to websites referred to in the following list were correct at the time of publication, but may have changed since.

Government resources

Office for Disability Issues (ODI): This office offers information on disability issues, the Government of Canada Disability Agenda and related programs, services and activities of Human Resources and Social Development.

www.hrsdc.gc.ca

Non-government resources

NWT Council of Persons with Disabilities: Based in Yellowknife, this non-profit group represents the needs and issues of persons with disabilities across the NWT. The Council provides advice, consultation, advocacy, information and assistance related to national, territorial, local and personal issues.

www.nwtability.ca

Canadian Council on Rehabilitation and Work: This Canada-wide network of organizations and individuals offers information, education, training and internet-based services to support the employment of people with disabilities.

www.ccrw.org

Human rights organizations

Canadian Human Rights Commission: Provides information on the rights and responsibilities of employers, employees, including advice on barrier-free employment practices.

www.chrc.ccdp.ca

Computer and website accessibility

Government of Canada Internet Guide: This Guide provides guidance on the design and maintenance of websites to ensure access for all users.

www.tbs-sct.gc.ca/ig-gi

Including women, persons with disabilities, and minorities

Gender-Based Analysis: A Guide for Policy-Making. Status of Women Canada. A handbook and brochure offers step-by-step techniques for integrating gender throughout the policy development and analysis process, and assessing the impact of proposed or existing policies or programs on women and men.

www.swc-cfc.gc.ca under “Publications.”

The Disability Lens. Government of British Columbia. This is a tool for identifying and clarifying issues affecting persons with disabilities.

www.mhr.gov.bc.ca/PUBLICAT/DB/DisabilityLens.htm

Manager's Toolkit: This toolkit contains advice, tips and tools to attract, retain and promote visible minorities in the federal public service.

www.hrma-agrh.gc.ca/ee under “Embracing Change.”

Accommodation Ideas: Consultants from the U.S. Job Accommodation Network have compiled several ideas on how to accommodate individuals with disabilities. The information is organized by disability.

www.jan.wvu.edu/media/ideas.html

Assistive Devices Industry Office (ADIO): This Industry Canada **AT-Links (Assistive Technology Links)** site gives information about assistive technologies and programs and services related to technical accommodations.

www.at-links.gc.ca

Mental Health Works: This initiative of the Canadian Mental Health Association in Ontario helps organizations to manage their duty to accommodate employees experiencing mental disabilities such as depression or anxiety in the workplace.

www.mentalhealthworks.ca

References

These guidelines draw on documents developed by other human rights commissions in Canada. These documents are listed below.

A Place for All: A Guide to Creating an Inclusive Workplace. Canadian Human Rights Commission. December 2006. www.chrc.ccdp.ca

Accommodation at Work: Frequently Asked Questions – Employers, Guidelines on Accommodating Physical and Mental Disability at Work. New Brunswick Human Rights Commission. www.gnb.ca

Duty to Accommodate Interpretive Bulletin, Alberta Human Rights and Citizenship Commission. May 2002. www.albertahumanrights.ab.ca

Employment and the Law. Yukon Human Rights Commission. www.yhrc.yk.ca

Policy and Guidelines on Disability and the Duty to Accommodate. Ontario Human Rights Commission. November 2000. www.ohrc.on.ca

Reasonable Accommodation, Reasonable Accommodation Policy Checklist, Reasonable Accommodation Checklist for Employers. Manitoba Human Rights Commission. www.gov.mb.ca

The Duty to Accommodate (Reasonable Accommodation) Policy and Procedure Manual. British Columbia Human Rights Commission.



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E-mail: info@nwthumanrights.ca
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Call:

Toll Free: 1-888-669-5575
Yellowknife: 867-669-5575

Visit:

Main Floor, Laing Building, 5003-49th Street
(Entrance on Franklin Street, next to Motor Vehicles.)

Web:

www.nwthumanrights.ca