



Impaired at Work

A guide to accommodating
substance dependence

By the Canadian Human Rights Commission



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© Minister of Public Works and Government Services 2017
Cat. No. HR4-40/2017E-PDF
ISBN 978-0-660-07799-4

This publication is available on the CHRC's website at: www.chrc-ccdp.gc.ca

DISCLAIMER: This guide is not a substitute for legal advice. Drug and alcohol testing can raise questions not only about the human rights of employees but also their privacy rights as well as other legal and regulatory requirements. An employer considering drug and alcohol testing should seek legal advice.

This guide represents the most recent guidance on this issue, and replaces any and all previous CHRC guidance or policy documents on this issue.

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Introduction

The purpose of this guide is to help federally-regulated employers address substance dependence in the workplace in a way that is in harmony with human rights legislation. This guide outlines the rights and responsibilities of the employee, job applicants, the employer, unions and/or employee representatives.

The *Canadian Human Rights Act* defines dependence on drugs or alcohol (substance dependence) as a disability. This means that when an employee is diagnosed with substance dependence, they have a right to be accommodated by their employer—just as anyone else with a disability.

As with all other disabilities, the employee, the employer, and union and/or employee representatives must all cooperate to find reasonable accommodation for the employee. This guide helps employers respond to possible substance dependence in the workplace—whether it is through:

- disclosure by the employee,
- observation of signs of substance dependence, or
- a positive drug or alcohol test.

The guide also takes employers through the process of accommodating an employee with substance dependence.

It is important for employers to remember that fear of stigma and discrimination often prevents people with substance dependence from addressing the problem and seeking treatment.

Therefore, while it is often necessary to accommodate people's needs on an individual basis, organizations should foster a workplace culture of respect and inclusion by building accommodation into the way they do business.

The duty to accommodate

Employers have an obligation to take steps to adjust rules, policies or practices that have a negative impact on individuals—or groups of individuals—based on prohibited grounds of discrimination in the *Canadian Human Rights Act*. This is called the **duty to accommodate**.

The duty to accommodate means that sometimes it is necessary to treat someone differently in order to prevent discrimination. Employers have a duty to accommodate an employee's needs when they are based on any of the grounds listed in the *Canadian Human Rights Act*.

If an employer believes that an employee may be substance-dependent, everyone involved—the employee, the employer, and the union and/or employee representative—has a responsibility to approach the issue in a respectful, collaborative and timely manner.

About the *Canadian Human Rights Act*

The *Canadian Human Rights Act* protects people in Canada from discrimination when they are employed by, or receive services from, the federal government, First Nations governments or private enterprises that are regulated by the federal government such as banks, trucking companies, broadcasters and telecommunications companies. Disability is one of the grounds of discrimination prohibited by the *Canadian Human Rights Act*. Other grounds include race, sex, age, and sexual orientation.

Five steps to accommodating substance dependence

Step 1: Recognize the signs

Observe

An employer may observe changes in an employee's attendance, performance or behaviour, such as:

- personality changes or erratic behaviour (e.g. increased interpersonal conflicts; overreaction to criticism).
- appearance of impairment at work (e.g. odor of alcohol or drugs, glassy or red eyes, unsteady gait, slurring, poor coordination).
- working in an unsafe manner or involvement in an accident.
- failing a drug or alcohol test.
- consistent lateness, absenteeism, or reduced productivity or quality of work.

Don't assume

There could be many reasons that explain these situations, such as:

- another disability or temporary medical conditions.
- conflict at work.
- job dissatisfaction or low morale.
- the stress in balancing work and caregiving obligations.
- personal problems unrelated to work.

Employers should keep in mind that the employee may just be having a bad week or month. However, in some cases, the observed behaviour could be the consequence of substance dependence.

Sometimes, immediate action is required

An employee may need to be removed immediately from the workplace if:

- they are involved in a workplace accident, or near accident, where impairment is suspected.
- their behaviour or performance is having a serious impact on the workplace, owing to suspected impairment.
- their behaviour puts their own safety or the safety of others at risk.

Step 2: Talk about it

Generally, it is the employee's responsibility to disclose their accommodation needs. However, people with substance dependence may not recognize or admit that they have a disability. As well, stigma and fear of losing their job can make them reluctant to admit there is a problem.

When an employer observes changes in an employee's attendance, performance or behaviour that may indicate possible substance dependence, it triggers the employer's legal obligation to initiate a discussion with the employee about a need for accommodation of a disability. This is called the **duty to inquire**.

In workplaces with safety-sensitive positions where there is drug and alcohol testing, the employer's duty to inquire is also triggered upon receipt of a positive test result.

Because denial is often a characteristic of substance dependence, the employer may need to have more than one conversation with the employee.

What is a safety-sensitive position?

A safety-sensitive position can be defined as one that, if not performed in a safe manner, can cause direct and significant damage to property, and/or injury to the employee, others around them, the public and/or the immediate environment.

Having the conversation

During the various conversations with the employee, **the employer should not** try to diagnose substance dependence or recommend treatment.

Instead, in order to fulfil their duty to inquire, **the employer should:**

- be respectful, compassionate and non-judgemental.
- understand that the employee might be feeling pressured, guilty, or anxious.
- ensure the conversation is confidential.
- identify concerns about an employee's performance, behaviour or positive test results.
- explain the employer's duty to accommodate all disabilities, including substance dependence, and refer the employee to any internal accommodation policies.
- only ask questions relevant to the employee's possible need for accommodation, such as whether the employee has been assessed by a medical professional.
- let the employee know about other workplace support, if available. (e.g. an Employment Assistance Program.)

- allow the employee to involve their union or employee representative in discussions.

If the employee does not disclose a disability, such as a substance dependence, the employer should clearly outline the consequences of the employee's behaviour and deal with the attendance, performance or other behaviour issues according to workplace policies. However, if the employee later provides a disability-related explanation, the employer must reconsider their approach. This includes reconsideration of the appropriateness of any disciplinary or other action already taken.

Step 3: Gather and consider the relevant medical information

In order to appropriately accommodate an employee, the employer requires information from a medical professional.

Employers need to know:

- whether the employee has a disability; and if so
- what accommodations the employee needs.

These are medical questions and they need to be answered by a medical professional—the employee’s family doctor or specialist. The medical information will allow the employer to make an informed decision about reasonable accommodation options.

Employers need to keep in mind that requesting medical information for the accommodation process requires the balancing of two competing rights: the employer’s right to manage the workplace and the employee’s right to privacy. When requesting medical information, employers must use the least intrusive means possible and respect the employee’s privacy rights. Requests must be limited to information related to the employee’s essential duties and their accommodation needs.

The employer is rarely entitled to the specific diagnosis. They are not entitled to the content of the diagnosis, or details of the treatment plan.

Information the employer should provide

The employer should provide the medical professional with the following information:

- Description of the employee’s job function/responsibilities.
- The employee’s work schedule.
- Whether the employee is in a safety-sensitive position.
- Any other relevant information that is particular to the workplace.

Information the employer should request

The employer should ask the following questions:

- Does the employee have a disability that requires accommodation?
- Are there any restrictions or limitations to the performance of the job?
- Has a treatment plan been developed? If so, how might this affect the employee’s behaviour, attendance, performance, schedule?
- What is the employee’s prognosis?
- If the employee is off work, are there specific recommendations for accommodation that will facilitate a safe and successful return to work?

- For an employee in a safety sensitive position, is the employee medically fit to safely perform their job? Does the employee require medication where side effects may prevent them from working in their safety sensitive position?

Medical information may come in various formats—from a hand-written note to a formal report.

Based on this information, the employer should be able to determine whether the employee:

- is able to perform the essential duties of their position with appropriate accommodation.
- needs to move to a different position (e.g. a non-safety-sensitive position.)
- needs to be off work pending further medical assessment or treatment, and if so, for how long.

The employee has a duty to cooperate and provide the employer with the relevant medical information. This can include attending appointments as scheduled, and providing complete and accurate information to the medical professional.

The employee has the final say whether their medical information can be released.

A final note: the employer and the employee may also decide that the medical information is not required in order to facilitate the accommodation process.

When to remove an employee from the workplace?

If an employee is showing signs that they are unable to perform the core duties of their job, the employer should discuss this directly with the employee.

Generally, an employee should not be removed from the workplace unless there is medical information to clearly support this. However, if an employee has health needs requiring urgent attention, or if they pose a serious risk to the safety of themselves or others, an employer should deal with this immediately. An employer should obtain legal advice when removing an employee from the workplace, and other agencies or offices may need to be contacted.

Independent Medical Evaluations (IME)

There are specific circumstances when an employee can be evaluated by an independent medical professional who is not their family doctor or specialist. This is called an Independent Medical Evaluation or IME.

1. When an employer lacks sufficient or clear medical information, they should first go back to the employee's medical professional for this information. If that medical professional does not provide the necessary information, an employer may at that point consider requesting an IME.

Note: Employers should exercise caution and seek legal advice before seeking an IME because requesting an employee to undergo one infringes on their privacy rights. As with any other medical assessment, the employer is entitled only to the medical information they need to accommodate the employee.

2. When there is contractual right to request an employee to undergo an IME, provided, for example, in a collective agreement.
3. When there is a legislative requirement in certain industries.
4. When an employee requests the assistance of a specialist.

Good Practices

- One good practice for an IME is to permit the employee to select the physician from a list of acceptable specialists.
- It also is recommended that both parties agree in advance to accept the medical results of an IME.
- In all cases, employers should facilitate the IME by providing time off work and paying for the cost of the IME.

The employer cannot ask for any more medical information from an IME than they can ask from the employee's own family doctor or specialist. Likewise, the employer should provide the same information given to the employee's medical professional.

Step 4: Accommodate

An employee has the right to be accommodated to the point of undue hardship when they have a diagnosed substance dependence. However, this does not give the employee the right to their ideal or preferred accommodation. The accommodation has to work for everyone.

The best way to approach accommodation is on an individual, case-by-case basis. When looking at available options, the employer should work with the employee and their representatives and be as creative, open and as flexible as possible. Doing so will increase the likelihood that the parties will find a solution that meets the needs of everyone involved.

Relapse is often a symptom of substance dependence. Accommodating an employee with this disability may mean accommodating them through more than one relapse.

Throughout the accommodation process, the goal should be to keep the employee at work (where appropriate) or support the employee in returning to work as soon as possible. The employer is in the best position to know what is possible within the context of their particular work environment, and should remain open-minded to options that will facilitate the maintenance of, or return to, active employment.

If an employee is not willing to participate in the process or take responsibility for their own workplace behaviour, or rejects a reasonable accommodation solution, accommodation may not be possible.

Examples of accommodation measures or solutions

- Short- or long-term changes in the employee's schedule to allow for treatment or regular meetings—with supports such as a sponsor or medical professional.
- Adjustments in hours or performance requirements to meet any needs set out in the medical assessment.
- Re-assignment to a position that is not safety-sensitive, particularly in the early days of treatment.
- Short-term or long-term sick leave to allow for treatment.

Developing an accommodation plan

The primary responsibility for developing the accommodation plan rests with the employer. Once the employee's accommodation requirements are established, the employer works in consultation with the employee to develop the accommodation plan. The employee may wish to involve their union or employee representative in these discussions.

The accommodation plan should:

- Be put in writing and signed by all parties.
- Identify the specific accommodation measures or solutions that have been agreed to based upon the employee's medical information (e.g. timelines/dates, work schedule, duties and restrictions/limitations.)
- Designate to whom the employee may go with concerns or questions about the accommodation plan.
- Identify what changes in the employee's behaviour or performance will be understood as "significant" and therefore requiring updated medical information.
- Be flexible and subject to change based on the employee's needs and updated medical information.
- Allow for whatever treatment the employee may require, whether urgent or ongoing. The employee may require time away from work to pursue treatment.
- Take into consideration that an employee who is substance-dependent may also have another physical or mental disability that requires accommodation.

The accommodation plan may include a **return to work agreement** that specifies the conditions the employee agrees to meet when returning to work.

Treatment Plans

Treatment plans are not accommodation plans. They are individualized, confidential plans between the employee and their doctor and do not involve the employer. An employer's responsibility is to ensure that the accommodation plan respects the parameters of the required treatment.

- The employer is not entitled to know the details of a treatment plan.
- The employee is only required to provide the employer with enough information about the treatment plan to develop an accommodation plan.
- Each employee will have different treatment needs, and these may change over time.
- Treatment for substance dependence can range in intensity and in duration. For example, an employee may be required to attend counselling during the day, in the evenings, or for an extended period of time for in-patient residential treatment.

Implementing an accommodation plan

The process for implementing the plan should be spelled out clearly within the accommodation plan itself so everyone understands their roles and responsibilities.

It is important for the employer, the employee, and their union or employee representative to communicate clearly during the implementation of the accommodation plan. Any issues or setbacks in the process should be flagged as soon as possible.

The details of the accommodation plan, including any medical information, should only be shared with those who need to know.

Return to work agreement

To ensure the successful implementation of the accommodation plan, the employer and employee may need to meet to develop and sign a **return to work agreement**.

A return to work agreement outlines the expectations for an employee's conduct when returning to work and the agreed-upon conditions that the employee must meet. These conditions may include expectations about attendance, performance, safety, behaviour and compliance with an existing workplace drug and alcohol policy.

The return to work agreement should not include treatment expectations or any other details of an employee's confidential treatment plan.

In the context of safety-sensitive positions, the return to work agreement may include some form of medical monitoring, such as **drug or alcohol testing**.

Some employers make use of tools such as **relapse prevention agreements** or **last chance agreements**. Employers should be aware that the use of agreements like these does not replace the obligation to accommodate an employee to the point of undue hardship under human rights legislation.

Step 5: Follow-up and adjust

The last step in the accommodation process is ongoing. Employers should plan on following up on a regular basis with the employee and making regular adjustments to the accommodation plan as required.

It is not always possible to foresee how the accommodation process will unfold. Flexibility and communication are necessary to ensure the employee's successful accommodation.

It is useful to build follow-up meetings right into the accommodation arrangement. The purpose and scope of the meetings should be clearly explained to all parties.

As previously mentioned, relapse is often a characteristic of substance dependence. An employee may start using substances again after several tries at rehabilitation or even after years of sobriety. Therefore the accommodation plan may need to be adjusted to address the employee's evolving situation.

An employer may also request periodic updates from the medical professional to confirm that the employee is still able to continue in their current position. An employer should communicate changes to the employee's accommodation arrangements on a need-to-know basis to other managers, supervisors, staff, as well as union or employee representatives.

How far does accommodation for substance dependence have to go?

The duty to accommodate ends when an employer reaches the point of undue hardship. Under the *Canadian Human Rights Act*, an employer can only claim undue hardship when adjustments to a policy, practice, by-law or physical space would **cost** too much or create **health** or **safety** risks.

There is no standard formula or precise legal definition of undue hardship. Each situation should be viewed as unique and assessed individually. The point of undue hardship varies for each employer and for each accommodation situation. The larger the organization, the more likely it is to have a range of options to accommodate an employee with substance dependence.

A claim of undue hardship must be supported with facts. It is not enough to claim undue hardship based on an assumption or opinion, or because there is some cost. Employers must provide evidence as to the nature and extent of the hardship. They should also be able to show that all reasonable means of accommodation have been exhausted.

To satisfy a claim of undue hardship on the basis of cost, the financial impact of the accommodation would typically have to be so great that it would either change the essential nature of the organization's operation, or it would substantially impact the employer's financial viability.

Employers should be both innovative and practical when considering accommodation options. If individual needs for accommodation can be met without imposing undue hardship on the employer, a refusal to accommodate is not justified.

Safety is often raised as the basis for undue hardship. Employers must first consider whose safety is at risk and the magnitude of the risk. Employers must also consider whether an employee can be moved to a non-safety sensitive position.

An employee cannot hold out for a preferred accommodation if a reasonable accommodation is offered by the employer. Should an employee reject a reasonable solution that provides for accommodation, the employer will be found to have met their duty to accommodate. The employer's duty to accommodate ends when the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future.

Once undue hardship is demonstrated, the employer is no longer required to accommodate the employee.

Key considerations regarding drug and alcohol testing

Many federally-regulated workplaces have safety-sensitive positions, leading some employers to have concerns regarding employee impairment by drugs or alcohol while at work. These employers may decide to conduct drug or alcohol testing as an additional precautionary measure.

In deciding whether and how to conduct drug or alcohol testing in the workplace, an employer must consider a variety of factors including human rights law, safety, privacy, labour standards, the provisions of any applicable collective agreements, regulatory requirements, the level of supervision available in the workplace, among other considerations.

Whether or not testing is permissible will depend on the nature and context of the employment. The same will be true in deciding what action is appropriate in the event of a positive test result. Employers should note that conducting testing on a person who does not occupy a safety-sensitive position is rarely permissible.

Employers should also remember that conducting testing is a form of medical examination, and it constitutes a significant invasion of privacy. It may also be discriminatory within the meaning of the *Canadian Human Rights Act*.

A positive result on a drug or alcohol test may be treated as an indicator of potentially greater risk, but should not be taken as concrete evidence of a substance dependence or that the person has or will, in fact, come to work impaired by drugs or alcohol.

When an employer receives an employee's positive test result, they have an obligation to initiate a conversation about possible substance dependence. This will help determine what workplace consequences, if any, are appropriate, and will provide an opportunity to discuss what support, assistance and accommodation the employee may need. Further medical assessment may be necessary or advisable in such circumstances.

Taking disciplinary action without initiating a conversation about substance dependence may run contrary to the provisions of the *Canadian Human Rights Act*.