

A Manager's Guide to Accommodation and Return to Work

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Centres of Excellence
Integrated Health, Safety and Wellness

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1. Overview

Under the Saskatchewan Human Rights Code and the Saskatchewan Employment Act employers and unions have the legal duty to accommodate the needs of people with disabilities who are adversely affected by a requirement, rule or standard. Accommodation is necessary to ensure that people with disabilities have equal opportunities. Employment should be designed inclusively and must be adapted to accommodate the needs of a person with a disability in a way that promotes integration and full participation.

The Supreme Court of Canada has described the goals and purposes of accommodation. The goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

1.1 Purpose

These guidelines have been developed to provide a consistent approach to accommodation and RTW planning across the Public Service and assist managers and supervisors to:

- Understand the roles and responsibilities in the accommodation process;

Government as One Employer

The Government of Saskatchewan is one employer and while the home ministry has the greatest responsibility for their employees, a reasonable accommodation may mean alternatives in other ministries are considered and evaluated. Reasonable accommodation planning should take into consideration such things as location, level and appointment type. If after a thorough search, the manager is unable to find a reasonable accommodation within the home ministry, the next step is to consult with the Human Resource Business Partner (HRBP) to explore potential opportunities in other ministries.

- Accommodate injured or ill employees in order to safely continue productive employment;
- Work with employees who are absent from the workplace due to illness or injury to facilitate their RTW in a safe and timely manner; and,
- Understand and meet their legal obligations in the accommodation process.

2. Legal Framework

Accommodation is the right thing to do. A responsive style of management during the accommodation process benefits all employees and helps to create a respectful and productive work place.

In addition, legal obligations for employers arise from the Saskatchewan Human Rights Code (SHRC), the Saskatchewan Employment Act, (SEA) arbitral jurisprudence and applicable collective bargaining agreement provisions. These protect the rights of persons with disabilities against discrimination in employment and ensure fair and equitable treatment. Failure to consider an accommodation to the point of undue hardship is a contravention of legislation.

2.1 Duty to Accommodate

The duty to accommodate refers to the legal obligation of an employer to take measures to eliminate disadvantages to an employee, or prospective employee that result from a rule, practice or physical barrier that has or may have an adverse impact on protected individuals or groups.

The duty to accommodate has both a procedural and substantive component. The procedure to access an accommodation is as important as the substantive content of the accommodation. Each accommodation must be developed based on the individual circumstances of the employee. Blanket policies and procedures do not meet the components of the accommodation process.

The accommodation process is a tri-partite arrangement between the employer, employee and union:

- The employer is obligated to find an appropriate accommodation;
- The employee is obligated to participate by providing appropriate documentation and participating in work trials and placements. The employee is entitled to a reasonable accommodation not a perfect accommodation; and,
- The union is obligated to facilitate the accommodation by not impeding reasonable efforts of the employer. The accommodation process supersedes provisions of the CBA such as staffing provisions that may impede a reasonable accommodation.

Once an employee has been placed into a reasonable accommodation they have met their duty to accommodate and the process is ended. There is no further obligation to continue to search for more accommodations unless the employee's circumstances change. If an employee refuses a reasonable accommodation the employer has met their duty to accommodate.

2.2 What is Employment Accommodation

Accommodation in an employment context means adapting work places, working conditions, job duties or assignments to address any discriminatory barriers related to a prohibited ground under the *SHRC*.

Requests for accommodation may arise at any point in an employment relationship, from the hiring process through to retirement, where a need for accommodation is identified by an employee or prospective employee. This may mean recruitment and selection processes (job

applications, assessment); working conditions and performance of job duties; learning and development opportunities, RTW and work related social activities.

2.3 What is Discrimination

Discrimination is the harmful treatment of an individual or group, based on certain personal characteristics. The *SHRC* establishes which characteristics are protected. These are referred to as “prohibited grounds.”

Prohibited grounds for discrimination in employment are:

- Mental or physical disability;
- Age;
- Religion or religious creed;
- Family status (being in a parent-child relationship);
- Marital status;
- Sex (including pregnancy and gender identity);
- Sexual orientation;
- Ancestry;
- Colour;
- Race or perceived race;
- Nationality;
- Place of origin; and,
- Receipt of public assistance.

2.4 What is Disability

Disability is defined broadly by the *SHRC* and includes physical, mental, and intellectual disabilities. Any degree of physical disability, infirmity, malformation or disfigurement, and without limiting the generality of the foregoing, includes:

- Epilepsy;
- Any degree of paralysis;
- Amputation;
- Lack of physical coordination;
- Blindness or visual impediment;
- Deafness, or hearing impediment;
- Muteness or speech impediment; and,
- Physical reliance on a service animal, wheelchair, remedial appliance or device.

Or:

- An intellectual disability or impairment; and,
- A learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language.

Or:

- A mental disorder – a disorder of thought, perception, feelings or behaviour that impairs a person’s:
 - Judgment;
 - Capacity to recognize reality;
 - Ability to associate with others; and,
 - Ability to meet the ordinary demands of life.

The courts, human rights tribunals and labour arbitration boards have placed a wide range of impairments under the legal definition of “disability” over the past two decades and the definition continues to expand. All of these conditions may have to be accommodated, depending on the employee’s specific restrictions and the requirements of the workplace.

If you have questions about the duty to accommodate in a specific situation, please contact your HRBP.

2.5 What is Undue Hardship

Undue hardship refers to the limit beyond which employers are not expected to accommodate. Employers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship. The Supreme Court has stated that “undue hardship infers that some hardship is acceptable, it is only undue hardship that satisfies the test” in addition the Supreme Court has identified four factors to consider in assessing undue hardship:

- Interchangeability of workforce and facilities;
- Disruption of a collective agreement;
- Problems of morale of other employee(s); and,
- Costs.

3. The Accommodation Process

The duty to accommodate and the process of accommodation is triggered by an employee identifying a need for a medical accommodation, returning from an absence or by a duty to inquire. When the employer is made aware of the need for an accommodation it is important to respond in a timely manner and promote an open and cooperative process, involving all of the stakeholders.

The medical accommodation process is administered through a software application in PSC Client. The application provides a number of benefits to help managers and supervisors manage employee medical accommodations, such as:

- A standard approach for managing medical accommodation cases.
- All and entire case management files stored electronically in one location.
- Increasing privacy of employee medical records.
- Supporting existing ministry processes for managing medical accommodation cases.
- Access to tools and training in the application.
- Reporting and delegation features.

When to use the application

Managers and supervisors will use the application in the following situations:

- An employee requires a medical leave or sick leave absence for more than five consecutive workdays or shifts e.g. extended illness or upcoming surgery;
- An employee experiences a workplace illness or injury;
- A manager or supervisor requires additional medical information to validate sick leave; and,
- An employee requires or requests an accommodation or specialized equipment to address a medical restriction.

Managers and supervisors who receive a new case or are currently managing an active medical accommodation file are required to enter the employee into the Be At Work application. Medical accommodation cases that have concluded and resolved do not require to be added into the application.

Accessing the application

The Be At Work application is accessed through PSC Client.

The goal of an accommodation process is to provide a reasonable accommodation which allows the employee to remain at work or to RTW performing meaningful work within medical restrictions.

3.1 Determining an Accommodation

The primary focus is to determine what accommodation needs to be made to allow an employee to continue to perform the essential duties of their current job. The type of accommodation possible and available is determined by the employer in consultation with the employee and with the advice of the health care provider.

A successful accommodation would allow an employee to continue to perform the essential duties of their current position. The essential duties are the vital or indispensable aspects of a job. The duty to accommodate does not require the employer to fundamentally alter the essential duties of employees, assign the essential duties of an employee with a disability to other employees or change the essential duties of a position.

If there is no accommodation available that would allow an employee to continue in their current position, then an alternate position should be considered.

Accommodation may include but is not limited to:

- Allowing a flexible work schedule;
- Modifying job duties;
- Modifying policies;
- Making changes to the building;
- Modifying work stations;
- Providing specialized adaptation or assistive devices for computers, accessible technology;
- Providing alternate ways of communicating with the employee;
- Additional training;
- Allowing short or long term disability leave;
- Job bundling and unbundling; and,
- Alternative work.

For example, a truck driver is required to load and unload the truck. He suffers a back injury and no longer can perform this essential duty. The employer is not obligated to hire someone to load the truck for him. However, if there is a way to allow him to continue to load/unload the truck by purchasing a lifting device than this would be an appropriate accommodation.

An Accommodation does not need to be complicated. For example, computer software may be available to assist an employee with visual limitations; ergonomic adjustments to a work station

may be helpful; and perhaps accessible parking may be a solution. In many situations the employee themselves may have some good ideas as to how they might best be accommodated safely and reasonably.

3.2 Receiving a Request for Accommodation

The manager should:

- Create a case in the Be At Work Application in PSC Client;
- Review any medical documentation to ensure that there is enough information to support the accommodation request and clearly outline the employee's medical restrictions. If a clear statement of readiness to work and restrictions/limitations are not provided, request this information in a clear and concise written form as soon as possible. Review your request with your HRBP;
- Meet to discuss the required accommodation with the parties involved (employee, Third Party Vocational Rehabilitation Consultant (VRC), if applicable; and HRBP). If the employee is in-scope, he/she should be notified that they can involve a union representative, if appropriate, if they wish to do so;
- Listen to the employee's needs and suggestions regarding a possible accommodation;
- Review current position description:
 - Determine if the employee can perform their current job as is, within medical restrictions.

If not:

- Determine if the employee can perform their current job with accommodation (modified or "re-bundled" form).

If it is determined that the employee cannot perform the essential duties of their current job, even with accommodation:

- Document this and set out the reasons why; and,
- The HRBP should make a formal referral to the Vocational Rehabilitation Consultant, IHSWB, at the Public Service Commission.

The manager and the HRSC will continue to explore options for a reasonable accommodation within the home ministry.

3.3 Identifying an Accommodation Option

The manager should:

- Discuss the details with the employee and any other parties involved e.g. HRBP, Third Party VRC, or union representatives; and,
- If required, research and test the option to ensure suitability. For example, a job description may need to be reviewed by the health care provider to ensure fit with restrictions; a term appointment or work trial may be required to test the fit for restrictions and/or qualifications.

3.4 When an Accommodation Option is Determined to be Reasonable

The manager should:

- Make a formal offer in writing and expect a written agreement from the employee;

- Note: A reasonable accommodation does not necessarily mean that all of the employee's preferences will be met. If a reasonable offer is declined by the employee for reasons other than medical, the employer's duty to accommodate has been met. In this situation the manager should consult their HRBP and Labour Relations Consultant to determine if this is the case.
- Work with the employee to develop a RTW plan with the assistance of the Third Party VRC (if applicable) and/or the HRBP.
- Consult with the employee as to their wishes and with the employee's privacy in mind, prepare the workplace by informing co-workers about the duty to accommodate, the accommodation efforts being undertaken, and how to show support for the returning employee;
- Work with the employee and the Third Party VRC (if applicable), HRBP, and/or the health care provider, to implement, monitor and review accommodations; and,
- Identify workplace issues that may affect achieving a safe and timely RTW.

3.5 Union Notification (Where Applicable)

It is up to the employee to involve the union or not. In some circumstances the union may have to be involved, for example placing an out of scope employee into an in scope position or placing an employee into a position in a different union.

Placing an employee into a vacant position, adjusting hours of work and rates of pay are contemplated by the process and do not require union agreement.

3.6 Duty to Inquire

There may be situations where an employer ought reasonably to have suspected that an employee may be dealing with a condition based upon noted changes in an employee's behaviour and or performance. In those situations, the employer is obligated to make appropriate inquiries to determine if an accommodation is appropriate. If a disability is confirmed, it should be addressed the same as an accommodation request.

If the employer has made reasonable attempts to verify the accommodation need and the employee denies there is anything wrong and refuses assistance, the employer will be relieved of their duty to accommodate.

If you have concerns about a particular situation, please discuss your approach with your HRBP as soon as possible. They can provide you with resources to assist you in determining an appropriate course of action.

4. Communication in the Accommodation Process

The procedural aspect of the accommodation process is as important as the accommodation. All communications with the employee, union representatives and medical professionals should be documented. All options that were considered and rejected should be outlined as to why the option wasn't implemented. The employer is obligated to find a reasonable accommodation and if there is a challenge from the employee or union it is important to be able to show that every option was considered.

4.1 In the Workplace

Effective and open communication between employees and their managers is essential. Managers should endeavor to provide an open and supportive environment where employees feel comfortable approaching management with accommodation issues and concerns. In turn, managers respectfully acknowledge and support the accommodation needs of employees.

Exchange of appropriate information between employees and their manager is a key element throughout this process. Managers need to be informed about the employee's restrictions, and employees need to be aware of the availability of modified or alternative duties.

Note: Any health information received must be treated as confidential and only shared when required to facilitate an accommodation.

Discussions may be initiated by the employee or the manager as outlined below:

4.1.1 Informal Communication

Employees are encouraged to discuss with their manager any issues that could result in absence from the workplace, such as:

- Illness or injury (including addiction);
- Workplace environment (safety, harassment, inappropriate behaviour, performance, stress, workload);
- Personal/family obligations; and,
- Job satisfaction.

Important Considerations

- Safeguard the confidentiality of all health information provided by the employee.
- Document any meetings and considerations/decisions made regarding accommodations, and inform/involve the HRC as required.
- Maintain close contact with the employee while searching for appropriate work assignments and discuss RTW options with the employee.
- If unsure about the fit with restrictions, provide the employee with job descriptions and summaries of job duties, outlining the demands of a potential accommodation for the employee to take to the health care provider or Third Party VRC for review and response.
- Follow up to ensure that the accommodation implemented meets the needs of the person who requested the accommodation.

Note: When discussing a RTW plan, managers should keep in mind the duration of the leave period. In short-term absences (one or two days), it is likely not appropriate to develop a RTW plan.

4.1.2 Formal Communication

Sick Leave: If unable to work due to illness, employees are required to notify their immediate supervisor (or designate).

4.2 Employee Absence Due to Illness or Injury

At the onset of an absence, employees, managers are encouraged to discuss:

- The expected duration of the leave period;
- Potential limitations or restrictions (if known); and,
- Whether the employee can safely RTW sooner than expected with modified or alternate duties (or remain at work without an absence).

4.3 Employee Absence for a Prolonged Period

Early and ongoing communication between the employee and manager benefits both the employee and the employer. It ensures that the employee maintains a connection to the workplace to keep social connections with colleagues, keep abreast of any changes in the workplace, and ease the eventual successful RTW.

As well, open communication allows the employer and the employee to track the employee's recovery and make plans to for a safe RTW at the earliest possible date. The manager can anticipate the employee's RTW, consider any required accommodations, ready the workplace and explore, arrange and pay for any costs associated with the required accommodation that may not be covered by the insurer.

It is recommended that the manager and the employee establish regular communication during the absence period at reasonable intervals (considering the employee's situation).

In the course of a prolonged absence, it may be determined that the employee will not be able to return to their previous position even with accommodation, due to their medical restrictions. When the employee and the manager become aware that that is the case, it may be appropriate to begin looking at other employment possibilities within the Executive Government of Saskatchewan. The manager should consult with the HRBP, and if appropriate a referral to the PSC Vocational Rehabilitation Consultant should be made (refer to the Rehabilitation Placement Process Guidelines for more information).

4.4 Discretion: Balancing Privacy and the Right to Information

Managers need to respect an employee's privacy and recovery. Each individual situation must be evaluated on its own merits and managers should exercise discretion when deciding whether it is appropriate to contact an employee. In most situations it is the role of the manager to stay in contact with their employee, but there may be situations where it is not appropriate and another contact person should be designated (another manager or supervisor or HRBP).

When determining whether to request medical information from an employee, the employee's right to privacy needs to be balanced against the legitimate business interests of the employer. At the outset of an absence, the employer is entitled to the amount of information required to justify the absence. This is usually limited to medical information noting that the employee is unable to work due to illness, the expected duration the employee will be away, details of medical restrictions impeding on the employee's ability to return to work.

Form 111 will assist you in obtaining information not typically found in a doctor's note provided by the employee. Form 111 will help you and the employee obtain relevant information such as medical restrictions and other pertinent details from health care providers. This information

assists the employee to stay at work if possible, or plan for the employee's safe return to work at the earliest possible date.

If your employee provides you with medical information you believe to be sufficient to make decisions regarding the absence and or accommodation, it is not necessary for you to request the completion of Form 111. However, if your employee has requested time away from work, or a medical accommodation, but has not provided clear medical restrictions from their health care provider it is recommended that you request your employee have Form 111 completed.

When requesting the completion of Form 111, be reasonable in the amount of time you provide your employee to return the requested information. Especially if your employee has provided you with information to make an initial decision regarding the request for a medical leave of absence.

However, in longer, more complex absences, the employer is entitled to additional medical information. Even though the employer has a legitimate business interest or even a legal obligation to require medical information (duty to accommodate, efficiency in staffing, etc.), that interest will be trumped by the employee's right to medical privacy in the early stages of a straight forward absence.

Unfortunately, there are no concrete guidelines establishing when it is appropriate to require medical information. Managers are advised to discuss the individual details of specific cases with their HRBP to determine the appropriate approach.

4.5 Follow-up & Evaluation

Once an accommodation or RTW program has been implemented, it is important to maintain communication between the employee and the manager. The manager should continue to evaluate the arrangement to ensure its effectiveness. Likewise, employees should approach management if they experience difficulties and have any questions or concerns.

It is also important for management to review situations to determine whether a larger, systemic problem exists (e.g. safety issues, workload pressures, poisoned work environments).

4.6 Medical Information

The employer is entitled to the information necessary to determine a reasonable accommodation. In order to implement an accommodation and employer is entitled to:

- a clear understanding of the restrictions;
- a prognosis;
- likelihood of any limitation or need for accommodation on RTW;
- whether the condition is permanent or temporary; and,
- if the condition is temporary, the length of time the accommodation is required.

In some instances, where the accommodation request is complicated or long term the employer may be entitled to additional medical information. In this situation consult with your HRBP for assistance.

An employer should not ask for or accept any more information than is required to seek an accommodation and plan a RTW. In situations where health care providers have provided more

information than that to which the employer is entitled (such as diagnosis), the HRBP should redact such information before sharing with the manager.

Aside from Form 111, any request for medical information should be directed to the HRBP and kept securely and separately from the employee's personnel file. The information received should be treated confidentially and shared with the employee's manager only after the information has been reviewed and redacted if required, by the HRBP.

4.6.1 Requesting Medical Information

Clear and comprehensive medical restriction information is critical to a successful accommodation. However, getting the appropriate information may be a significant challenge for a variety of reasons. For example, health care providers are busy, may not understand the work their patient does or the workplace and what information an employer needs in order to make a safe accommodation plan.

Getting this information in a timely manner is also important as experience shows that the longer an employee is away the more difficult it becomes for the employee to return. Delays can have a negative impact not only for the employee, but also for the employer and the work unit in terms of lost productivity and morale.

In most accommodation requests the information will be provided by the employee's attending health care provider. If there are further questions resulting from the information provided and clarification is needed the manager, in consultation with the HRBP, should make the request clearly describing the additional information or clarification that is required.

In situations where there is a Third Party VRC involved, requests for clarification can be made to the Third Party VRC who can either provide further information or can act as an intermediary between the health care provider and the employee.

Where there is no Third Party VRC involved, any requests for medical information are made via the employee. Questions should be clear, in writing and given to the employee to take back to their health care provider. The questions must be specific to the employee's circumstances and should be carefully crafted to ensure the appropriate information is received. There is a standard format for the letter to the health care provider which can be adapted to ensure that the questions for the health care provider are clearly stated for a specific situation. There is also a standard release form to be used in order to allow the health care provider to share the restriction information with the employer. It also may be helpful to include a job description or list of proposed duties for the health care provider to consider when determining if a potential placement may be appropriate.

4.6.2 Independent Medical Assessments

There may be situations where, even after repeated attempts, the employer is not able to get the required information to plan an accommodation. This may cause a significant delay in accommodation or RTW planning. In these circumstances the manager may consider accessing an Independent Medical Assessment for an employee to a health care provider who has not had a previous relationship with the employee and who can provide an independent medical assessment where it is appropriate. In these situations, consultation with your HRBP and Integrated Health, Safety and Wellness Branch is required.

4.6.3 Payment

When the employer is requesting medical restriction information for an accommodation either initially or for further clarification, the employer will typically pay any associated costs. Typically, the employee would bring in the bill and submit it to their manager for payment through the usual processes.

5. Definitions

5.1 Accommodation/Reasonable Accommodation

Provide an opportunity for an employee to have meaningful, productive work that respects the employee's abilities and limitations, while contributing to the business of the ministry. It means exploring all possible options so people with different needs can do their jobs, handling each accommodation individually. It may mean modifying the employee's duties or reassigning the employee to another job. An employee is not entitled to a "perfect" accommodation but rather a reasonable accommodation.

5.2 Adjudicated Claim

A claim filed by an employee and accepted by a third party medical insurer, such as LTD, WCB or SGI for workplace injury, disability or prolonged illness. Adjudicated claims are either accepted or declined.

Note: Employers are obligated to explore accommodation options for any request for an accommodation, even if there is no adjudicated claim, as required by *SHRC* and the Saskatchewan Employment Act. Such requests must be supported by medical documentation outlining the need for an accommodation.

5.3 Bona Fide Occupational Requirements

According to the Supreme Court of Canada these are requirements that:

- the employer has adopted for a purpose or goal that is rationally connected to the functions of the position,
- the employer has adopted in good faith, in the belief that they are necessary to fulfill the purpose or goal; and
- are reasonably necessary to accomplish the purpose or goal in the sense that the employer cannot accommodate persons with the characteristics of a particular group without incurring undue hardship.

5.4 Job Bundling

Analyzing the workplace to determine which duties from various positions would fit an employee's medical restrictions and qualifications. These duties could be "bundled together" to develop a meaningful position for an employee with a disability, and allow colleagues to focus on other duties that are required of the position.

5.5 Essential job duties

These are the vital or indispensable aspects of a position. The main focus of an accommodation should be to determine what accommodation is necessary to allow an employee to maintain performance of these duties.