

The Duty to Accommodate: To What Extreme?

This past spring, Cowan Insurance Group conducted a seminar related to an employer's Duty To Accommodate, which provided some interesting insights into this potentially challenging requirement. "In recent years, we have seen an increase in case law regarding an employer's Duty to Accommodate employees pursuant to the Human Rights Code, arising out of attendance management issues related to disabilities," says Lauri Reesor, an Associate lawyer with the law firm, Hicks Morley Hamilton Stewart Storie LLP. "We are beginning to see an emerging trend in the accommodation jurisprudence that represents a shift away from the standard of "impossibility" to which many adjudicators previously held employers."

What Does Duty to Accommodate Mean?

Quite simply, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might otherwise be suitable for them. These decisions are based on the medical documentation provided that substantiate the absences or restrictions on returning to work. This responsibility requires the employer to look at all other reasonable alternatives. Generally, the trigger to accommodate comes from either: (1) a direct request from the employee or (2) the employer becomes reasonably aware that an employee requires accommodation. Once aware, the employer must make sensitive inquiries into the situation; legally it cannot be ignored.



"The goal of accommodation is to facilitate equal participation in the workplace for employees with disabilities and to assist the employee to perform the essential duties of the job to a reasonable standard," continues Ms. Reesor. "It is important to recall that accommodation requires an employer to help the employee meet those standards rather than imposing any specific obligation to lower those standards. However, standards and rules cannot be applied in a blanket manner without looking at the individual case. In some circumstances, there may be a requirement to accommodate workplace standards. When the reasonable and substantiated medical needs of the employee are met to facilitate a return to work; the duty of the employer is satisfied."

In order to ensure that accommodation efforts are serious and conscientious, it is vitally important for the employer to follow a process and document everything.

"Don't take shortcuts," stresses Dr. Graeme Magor, Medical Consultant for Cowan Insurance Group. "Document every step and every effort made to reasonably accommodate the disability at hand. Documentation is just as important as the outcome." It is also wise to obtain additional opinions from medical professionals to better understand the disability and to be able to make the right kind of accommodations.

The Process

When the possible need to accommodate arises there are a few questions an employer should consider before accommodating:

- Is there a disability?
- What is the extent of the disability?
- Is the employee willing to co-operate?

Once it is determined that a disability exists, (e.g., physical, mental, developmental, learning or injury. Note: this does not include temporary ailments like a cold or flu) then the employer is expected to do the following:

- Determine what barriers might affect the person requiring accommodation.
- Explore all options for removing those barriers:
 - Can the employee's own job be modified?
 - Are there other available jobs or bundles of tasks the employee can do?
- Implement:
 - Apply the accommodation.
 - Review the progress.
 - Document every stage of the process.

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Undue Hardships

The Ontario Human Rights Commission holds a clear position regarding limits to the Duty to Accommodate to the point of undue hardship. The primary factors used to assess the degree of hardship are:

- **The costs of an accommodation** - The cost of accommodation is considered 'hardship' once it affects the survival of the organization or business, or changes the essential nature of the business.
- **Outside sources of funding** - Accommodation funding is occasionally available through government grants and loans to offset the cost of an accommodation.
- **Potential safety risks** - An employer must consider the health and safety of all employees and ensure that no one is assuming a serious risk in order to accommodate an employee.

"If the employer finds that removing the barrier or changing the workplace rule creates an undue hardship on the business, then that rule or practice is a Bona Fide Occupational Requirement (BFOR), in which case the employer does not have to accommodate. If an employer

Case Study

An employee was missing an excessive amount of work and their employer requested they bring in a doctor's note each time they were away from the job.

This is the right course of action and proper procedure for the accommodation process. It promotes regular contact between the employer and treating physician, and between the employee and the physician who supports effective treatment.

After some time had passed, the employer started to question the legitimacy of the notes when they became more and more cryptic. As a result, the employer requested that the employee meet with the company's doctor. The employee refused.

The employer wasn't playing hard ball, there was a legitimate concern and the employer was trying to understand the extent of the disability. In the best case scenario, the employee would have co-operated and met with the doctor as requested. Under the Duty to Accommodate, the employee had an obligation to co-operate. Given the lack of co-operation, the employer had no legal obligation to satisfy the modification any further.

Employers have a Duty to Accommodate but they also have the right to productive work from an employee.

fails to follow [the] process [and claims undue hardship, therefore not accommodating], they can be found to have discriminated, per the Canadian Human Rights Act."¹



In the event that accommodations cannot be made as a result of predicted undue hardship, there is a strong possibility that the employer will be challenged. To prove due diligence was exercised, it is important to have appropriate documentation on hand to support the employer's findings.

The Employee's Role

The employee also has a responsibility to the process. It helps everyone involved if the employee communicates all relevant information about the issue to their employer. For example, if there are medical limitations, the employee should provide an overview and evidence of their disability. In addition, they should be proactive and have reasonable expectations about the accommodations. It is reasonable to assume that compromising may be necessary. An employee's failure to accept a reasonable solution may end an employer's obligation.

For more information on the Duty to Accommodate, please contact your Cowan consultant.

With sources from:

¹ *Disability and the Duty to Accommodate in the Canadian Workplace: Fact Sheet/Michael Lynk*
Duty to Accommodate – Hicks Morley Hamilton Stewart Storie LLP: Presentation. Lauri Reesor
The Ontario Human Rights Commission Factsheets/disability4, 2009, How Far Does the Duty to Accommodate Go?
Duty to Accommodate – Supreme Court of Canada Rehabilitates the Undue Hardship Threshold
WeirFoulds LLP Litigation - Employment Update - Winter 2008, November 27, 2008

Generation Y in the Workforce – New Attitude, New Applications

Employers often wonder why younger employees don't fit the mold - at least the traditional baby boomer mold. Until recently, the benefits programs offered by the majority of plan sponsors, predominantly smaller employers, were "same old, same old."

As Generation X and more importantly, Generation Y employees began to impact the demographics of many workplaces, the need for radically different benefits plans became more evident. What worked in the past for their parents, did not work for their children.

Demographers have predicted that Gen Yers (now aged 17 to 28) will surpass the numbers of "Boomers" (their parents) in the workforce by approximately 2020. This will profoundly change the type of benefits plans employees will be demanding and insurance companies will have to provide to attract and retain key talent.

Gen Yers have a completely different social culture and business ethic. Today's young business recruits have noticeably different social attributes from their parents.

For example:

- They get married (partnered) and start families much later in life.
- They demand convenience 24/7 and expect personalization.
- They are technologically adept and accept rapid change.
- They live for the moment and for personal gratification, especially while still unattached to a spouse, partner and family.
- They are often less acquainted with benefits plans until later in life and even then, they want flexibility and technology-based plans and systems.
- They are looking for more wellness, health and lifestyle options.

Gen Yers have grown up and now live and thrive in the Internet and communication revolution. Technology is second-nature and social networks and instant communication are a way of life rather than merely "tools".



With this lifestyle, it is no wonder that younger employees want their benefits plans to reflect their culture. They want quick and easy access to information and flexibility with their benefits coverage.

What can we do to satisfy this demand for immediacy and flexibility? We need to endorse, if not embrace benefits plans that encompass greater flexibility (i.e., healthcare spending accounts, flex-centered plans and simpler designs).

We need to deliver:

- Direct, provider-based, claims submission.
- Electronic claims submission, directly by the claimant.
- Online enrollment.
- Clear, plain language communication.
- Health and wellness options.
- Online help capabilities for inquiries.

In order to gain the support of the Generation Y culture, we must listen and understand their needs; design appropriate applications; and deliver quality products that respond to their preferred way of sending and receiving information – lessening the divide.

For more information please contact your Cowan consultant.

What is Critical Illness Insurance – Why Would It Be Good Coverage for my Plan Members?

Just over a decade ago, a new insurance product made its way onto the Canadian scene, from South Africa, following successful forays into the marketplaces in the UK and Australia. Initially available only as an individual (personal) insurance product, Critical Illness (CI) insurance has now grown to include group insurance through employer-sponsored plans and association groups.

CI insurance is a form of health insurance that provides a lump-sum payment should you become seriously ill from

one of several critical illnesses. Although the illnesses covered differ between insurance companies, typical illnesses and diseases covered by CI insurance include life-threatening cancer, heart attack and stroke. Recently the list of covered illnesses has grown, with some companies offering more than 20 illnesses such as, blindness, Alzheimer's, Multiple Sclerosis, organ transplants, kidney failure, paralysis and Parkinson's disease.

continued...

What is Critical Illness Insurance – continued

Typically, someone who develops one of the critical illnesses must survive the illness for at least 30 days before being eligible for a payment from the policy.

This is not life insurance, so this initial survival is a critical part of the coverage. Coverage can also vary according to the degree of severity of, or conditions associated with, an illness or disease. The illness must be life-threatening. Group CI insurance is much the same as personal CI insurance, but is sold on a mass-marketed, group basis, typically with more liberal underwriting rules and definitely at a lower cost. This makes it quite attractive to employers as an employee benefit.

CI insurance is available as a compulsory or voluntary benefit and may even be purchased for spouses and dependent children, depending on the insurance carrier and employer preferences. CI insurance is not disability insurance.

No impairment is required to be eligible for a payment. Put quite simply, a person has to survive the onset of one of the

listed illnesses. While not disability insurance, the lump-sum paid to the insured could be helpful in offsetting lost income, but it can be used for anything the insured wants: a car, home alterations, relocation, education, rehabilitation, anything; even a well-deserved vacation. CI insurance is designed to make the post-illness period more bearable for the insured person, family and caregivers.

CI insurance has become one of the most sought after insurance products available to employers and plan sponsors. When it is needed, it is praised by beneficiaries, often as a financial life saver. Even modest amounts of CI insurance can make a substantial difference in someone's life as they struggle with the aftermath of a devastating illness. For these reasons, we encourage you to explore CI insurance as a way to enhance your employees' benefit program.

For more information on Critical Illness insurance, please contact your Cowan consultant.

Quick Synopsis: Expanded Power to Prescribe in Ontario

Getting a prescription is now more convenient than ever before. The Ontario Government recently provided optometrists and pharmacists with the authority to prescribe medication in Ontario. This new legislation is expected to ease wait times, pressure on doctors, emergency rooms, and walk-in clinics. It will prove especially helpful in remote areas where access to medical care can be limited.

Optometrists

Ontario optometrists, who meet the educational prescribing requirements from the Ontario College of Optometrists, will be able to treat a wide range of eye conditions such as: eye inflammation, infections and pain, red eye due to contact lenses, eyelid infection and inflammation, allergies affecting the eyes, superficial foreign bodies in the eyes and glaucoma. Thanks to the approved legislation, optometrists now have the authority to prescribe medication in the following categories:

- Topical and oral anti-infective agents.
- Topical anti-inflammatory agents.
- Topical anti-allergic agents.
- Topical anti-glaucoma agent.

Pharmacists

Pharmacists practicing in an accredited pharmacy can now renew a prescription under certain conditions and consult with the prescribers (i.e., doctors and nurses) on issues such as:

- Potential adverse drug or allergic reactions.
- Duplication of therapy.
- Changes to dosage levels.
- Follow-up consultations with patients to ensure medications are being taken and working as intended.

Narcotic or controlled drugs are not included in the enhanced scope of the pharmacist's practice.

It is important to note that this increased power to prescribe does not replace the patients' need to see their physician or other health care professional. It is meant to facilitate better patient care and improve accessibility.

For more information please contact your Cowan consultant.

With sources from:

ClaimSecureENews: Ontario Pharmacists to Provide More Services...Beginning March 15, 2011.
Green Shield Canada: The Inside Story Newsletter: "Here we go again ... Now Optometrists have more power to prescribe in Ontario"
Pubmed Central: Journal-Pharmacist Prescribing: Improving Access to Care in Mental Health: Author Rekhajabba, BSP

This bulletin is produced by the Benefits and Retirement Consulting Division of Cowan Insurance Group and its subsidiary, Wentworth Financial Services. We help public and private-sector clients manage their group benefits, retirement and health, and disability management plans.

Hold the Date

Pension - Benefit Update Seminar

Wednesday, October 26, 2011
Cambridge ON

More information to follow soon.

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