

Workplace Law Bulletin

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Emerging Issues in Human Rights: Family Status and Transgender Accommodation in Employment – A Webinar Recap

The issue of accommodation is a hot topic for employers these days, particularly when it comes to family status and transgender accommodation. By dealing with these requests in a diligent manner, employers will contribute to a positive work environment.

In our latest Workplace Law webinar, Lorenzo Lisi, Michael Horvat, Fiona Brown and Meghan Cowan discussed the topic of “Emerging Issues in Human Rights: Family Status and Transgender Accommodation in Employment.” They addressed some of the biggest issues faced by HR professionals and provided practical tips for employers to deal with these situations efficiently and effectively.

Under the *Ontario Human Rights Code*, every employee has a right to equal treatment in the workplace without discrimination. As such, employers have a duty to accommodate individuals who encounter barriers due to a protected ground, up to the point of undue hardship. So what does accommodation entail? Accommodation is the removal of workplace barriers that prevent a qualified employee from performing his or her job. Accommodation has a procedural component and a substantive component. Procedurally, employers are required to make inquiries with respect to the employee’s situation and to conduct an individualized assessment to determine whether it can accommodate the employee’s needs. This requires a dialogue between the employer and employee. The substantive component requires the employer to offer, if it can do so without undue hardship, a reasonable accommodation proposal. Typically, the employer will learn of the employee’s needs and will come up with a proposal that makes sense for both parties. The important thing to keep in mind is that employers are not obligated to implement an employee’s favoured and preferred accommodation, but

one that meets the needs of both the employee and the workplace. Here are some general accommodation tips for employers:

- Take all requests seriously
- Request evidence of both need and attempts to self-accommodate
 - Find out what the employee has done to help him or herself
- Consider what may have changed in the workplace that has caused the request
- Take time to consider and investigate alternatives
- Consider workplace/employee goodwill
- Consider temporary arrangements
- Document every step of the process

When it comes to family status accommodation, requests which are connected to personal family choices will be considered differently than requests that relate to a fundamental family relationship and obligations beyond the control of the employee. According to Ontario’s *Human Rights Code*, family status includes both marital status – “the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage” – and family status – “the status of being in a parent and child relationship.” However, the Ontario Human Rights Commission is striving for a broader definition with respect to the protections on family status and marital status. In response to this, the Ontario Human Rights Tribunal is expanding the application under family status,

recognizing that it is about the relationship factor, not solely the legal factor. So, when considering family status accommodation, keep these following tips in mind:

- Not every request requires an accommodation
- Information must be requested and provided in support of the accommodation
- Be flexible and consider alternatives
- Not every accommodation must last forever – ask for and get updates
- Consider the application of company policy and collective agreements
- Ensure that an employee who is returning from parental leave or to a normal work schedule is treated fairly
- Ensure that an employee who asserts their rights under the *Human Rights Code* is not subject to unfair scrutiny or reprisal.

Accommodation for gender identity in the workplace is an evolving issue. The Ontario Human Rights Commission states that “a person’s felt identity or core identity may differ in part or in whole from their birth assigned sex. Individuals whose birth-assigned sex does not conform to their gender identity includes transsexuals, transgenderists, intersexed persons and cross-dressers.” This is a real issue for employers because it can create conflict in the workplace if you have people with conservative beliefs or values. How an employer deals with this conflict affects both the employee and the workplace. If and when issues of gender identity arise in the workplace, deal with them as you would any other alleged violation of a human rights ground under the *Human Rights Code*. Make sure that all managers and supervisors are trained on how to deal with transgendered employees and the various issues that may occur. When dealing with allegations of discrimination and issues

relating to gender accommodation, it is important to deal with the issues in a timely basis and to make sure that there are proper procedures in place. Here are some other important tips that employers should follow:

- Gather all the information that you can and have the employee provide medical support, documents and timelines
- Understand what is being requested
 - Identification of new name (change name plate, email address, etc.)
 - Dress code exception (but not where there would be an impact on safety)
 - Consider the use of an all-gender washroom
 - Review privacy options related to change rooms
 - Discuss with the employee individual accommodation options
- Work with the employee regarding messaging and communication
- Limit disclosure to relevant information and people involved, based upon the needs of the employee and the implementation of any accommodation being provided
- Most importantly, be respectful at all costs!

Family status accommodation and particularly gender accommodation are two areas of the law that we are going to see develop over the next few years. In order to maintain a positive and fair working environment, make sure that processes and policies are in place and that you have open communication with your employees. The thing to keep in mind is that not all your employees’ requests will be accommodated, but at least show that you’re willing to work with them to find a resolution that will hopefully work from both an employee and a workplace perspective.

If you have questions regarding any aspect of workplace law, please contact any member of the Aird & Berlis LLP Workplace Law Group:

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