Workplace Law Bulletin

Aird & Berlis LLP
Barristers and Solicitors

You Asked, We Answered: Accommodation in the Workplace

By Lorenzo Lisi, Fiona Brown and Meghan Cowan

One of the great things about the webinar format is that we get to interact with those who are listening. It gives us a sense of not only the questions they may have on our material (and Workplace Law in general), but the topics they would like to see us tackle in the future.

Following our Webinar held on May 31, 2016, we had a number of questions, including many which focused on the process of accommodation in the workplace. We thought we might use this newsletter as an opportunity to respond to some of the most frequently-asked questions. We hope this is of interest.

Is undue hardship considered only by the total size of the organization? What about organizations with smaller satellite offices, and accommodating employees at those locations?

The Ontario *Human Rights Code* (the "**Code**") prescribes three considerations in assessing whether an accommodation would cause undue hardship. These are:

i. financial cost;

ii. outside sources of funding, if any; and

iii. health and safety requirements, if any.

The size of an organization may be relevant in this assessment in that it often speaks to whether the financial cost of the proposed accommodation can reasonably be absorbed by the organization. Broadly speaking, it is accepted that what might prove to be a cost amounting to undue hardship for a small mom and pop business will not be one for a larger organization.

In addition, the Ontario Human Rights Tribunal's caselaw is clear that the appropriate basis for considering the financial costs of the requested accommodation should be viewed in light of the entire organization's budget – as opposed to the budget for the division or department of the organization in which the employee with the disability has requested an accommodation.

Employers should be aware that the assessment of whether an accommodation constitutes undue hardship is a highly fact-specific inquiry and other factors, such as the existence of and impact on a collective agreement, could also be taken into account.

How does an employer accommodate an employee with respect to specific religious observances?

Under the Code, 'creed' is a prohibited ground of discrimination that encompasses a "professed system and confession of faith, including both beliefs and observances or worship."

The Code imposes a duty of accommodation on employers. This means that employers have a duty to consider and grant requests for religious leave. This may result in the employee using paid vacation days, a mix of paid and unpaid days, or an unpaid leave. Other options to consider are flexible scheduling arrangements.

Always remember that there is a corresponding duty on employees to communicate their needs and work with

their employer to find a form of accommodation. One size does not fit all and employees are not entitled to accommodation based on their own personal preference.

An employee has asked to be able to work from home for three days a week due to the cost of child care – what is the employer's duty to accommodate this request?

The Code protects employees from discrimination on the basis of "family status," which is defined under the Code as "being in a parent and child relationship." The Ontario Human Rights Tribunal's caselaw has broadly interpreted this term.

Employers are obligated to accommodate employees in a parent-child type relationship. Broadly speaking, employers' duty to accommodate often includes the obligation to provide flexible scheduling and permitting some time off of work. However, as noted above, the accommodation required by an employer is a highly fact-specific inquiry and will depend on a wide variety of factors, including the circumstances surrounding the need for the accommodation and the anticipated impact of the requested accommodation on the employer's business.

Importantly, an employee is not entitled to a perfect accommodation. The accommodation must be reasonable. Where there is a request for "child care" accommodation, the employer is entitled to information concerning the employee's attempts to ensure that they have taken reasonable steps to obtain childcare in the circumstances.

Can you comment on employer obligations and best practices with respect to continuation of group benefit plans after age 65?

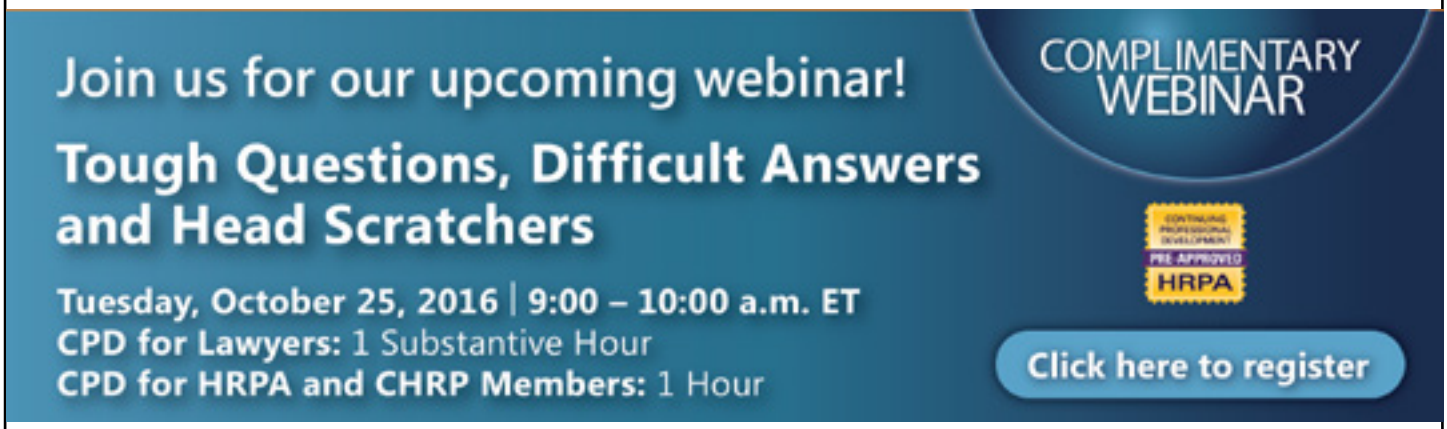
With a rising number of employees choosing to remain in the workplace past age 65, employers are facing a number of new issues when managing this segment of their workforce.

One such issue is whether to provide benefits to employees over age 65, as insurers' plans typically do not provide such coverage (or the coverage is prohibitively expensive).

The Code addresses this and provides at section 25(2.1) that differential treatment on the basis of age is permitted if the person is over 65 and if the group benefit plan complies with Ontario's *Employment Standards Act*, 2000 (the "**ESA**"). Accordingly, for now, the Code permits differential treatment based on age with respect to the provision of group benefit plans.

It is important for employers to note, however, that there have been challenges to this exemption and whether it violates the Canadian Charter of Rights and Freedoms. As the law involving older employees in the workplace is still evolving, we may see further changes to this area. We recommend that employers review their current benefit plans to determine if any distinctions are made at age 65, and encourage employers to stay on top of this area of the law with their insurers.

Be sure to register for our upcoming webinar, "Tough Questions, Difficult Answers and Head Scratchers," where we will answer more of your frequently-asked questions and tackle the tough issues faced by you!



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

Lawyers:

Fiona Brown	416.865.3078	fbrown@airdberlis.com
Meghan Cowan	416.865.4722	mcowan@airdberlis.com
Michael F. Horvat	416.865.4622	mhorvat@airdberlis.com
Lorenzo Lisi	416.865.7722	llisi@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
David S. Reiter	416.865.4734	dreiter@airdberlis.com
Cynthia R.C. Sefton	416.865.4730	csefton@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

This *Workplace Law Bulletin* offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.