

**Alberta WCB
Policies &
Information**

Chapter:

BENEFITS

Subject:

RETURN-TO-WORK SERVICES

Authorization

BoD Resolution 2018/02/15

Date:

April 17, 2018

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

1. *What are the requirements in the Workers' Compensation Act (WCA) regarding duty to accommodate?*

Section 88.1(3) requires that an employer shall accommodate the work or the workplace to the needs of the worker to the extent that the accommodation does not cause the employer undue hardship.

This provision applies when an employer has an obligation under s.88.1 to offer to reinstate an injured worker (see Application 2, Question 3 and Questions 9 – 24).

2. *How do the provisions of the WCA interact with requirements of human rights legislation?*

All employers have a duty to modify the work or the workplace to accommodate the needs of the worker under either the *Alberta Human Rights Act (AHRA)* or (for federally regulated employers) the *Canadian Human Rights Act (CHRA)*.

In circumstances where s.88.1 applies, WCB is responsible for determining whether an employer has met its obligation to accommodate the worker to the point of undue hardship. If WCB determines that an employer has not fulfilled its obligation, the employer has the right to request a review or appeal of that decision through the normal WCB processes (see G-2, The Review and Appeal Process).

WCB's jurisdiction to deal with issues of accommodation applies only to the workplace accommodation required for the compensable work injury. If the worker also requires accommodation for other protected grounds under the *AHRA* or *CHRA*, employers may have additional accommodation requirements during the return-to-work process. Complaints about accommodation for those other protected grounds should be made to the Alberta Human Rights Commission or the Canadian Human Rights Commission.

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Interaction with human rights legislation (continued)

For the purposes of s.22 of the *AHRA*, when WCB is making a determination regarding a complaint about failure to accommodate, it must notify the director of the Alberta Human Rights Commission. The Appeals Commission must do the same if a matter under s.88.1 is under appeal.

When the employer is federally regulated, WCB and the Appeals Commission will, instead, notify the Canadian Human Rights Commission.

The purpose of this notification is so the appropriate Human Rights Commission is aware that there is a dispute that is being addressed by another body with the jurisdiction to undertake the review, thereby avoiding simultaneous reviews of the same issue.

3. *What sort of accommodation is the employer expected to provide?*

Employers are required to look for any reasonable accommodations, up to the point of undue hardship, that will meet the worker’s needs. The expectations and requirements for accommodation are consistent with those required by human rights law. The type of accommodation required will depend on the injured worker’s work restrictions and the nature of the job. Examples of possible accommodations include, but are not limited to, such things as:

- supplying or modifying tools or equipment
- making the premises accessible
- modifying the hours of work or offering flexible work schedules
- moving the worker to a different work location
- altering aspects of the job, such as job duties

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*Employer accommodation
(continued)*

- moving the worker to a different job

See Application 2, Question 16, for information on the assistance WCB may provide in the accommodation process.

When considering what accommodation may be required, an important consideration is whether accommodation will enable the worker to perform the essential duties of the position in question.

4. What is meant by “essential duties”?

Essential duties are the duties that are fundamental to the position that the worker must be able to perform, with or without accommodation (see also Application 2, Question 12). Essential duties may also be referred to as bona fide occupational requirements (BFORs).

An example of an essential duty that cannot be accommodated is if a truck driver has a work injury that renders the worker legally blind. Without adequate vision the worker cannot maintain the necessary license or safely operate a vehicle. Another example is a heavy equipment operator with a compensable injury who is taking prescribed medication that causes drowsiness and affects concentration and motor skills. The worker cannot safely operate the machinery while taking the prescribed medication.

When it is impossible to accommodate an essential duty of the pre-accident employment, the employer must explore options for alternative suitable work that the worker can perform, with or without accommodation.

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5. *What is the worker’s role in the accommodation process?*

The worker has a duty to cooperate with the employer and WCB during the process. See Application 2, Questions 5 – 8 for details.

The worker also is expected to accept reasonable accommodation that meets the requirements of s.88.1 of the WCA. See Application 2 for information. It is not necessary that the proposed accommodation is the worker’s preferred choice, provided it fulfills the requirements of s.88.1.

6. *What is considered to be “undue hardship”?*

Undue hardship is more than inconvenience. The threshold for undue hardship is high – the Canadian Human Rights Commission describes it as when an employer or service provider cannot sustain the economic or efficiency costs of the accommodation.

There are general principles that set out the factors usually considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. However, unless there are unusual and compelling circumstances, WCB would not consider undue hardship to arise where the worker is fit to return to full pre-accident employment within 6 weeks of the date of accident or, for progressive conditions such as tendonitis, the date of the worker’s first absence from work.

7. *What factors will WCB consider when assessing undue hardship?*

WCB may consider any or all of the following:

1. Employer size and available resources

Employer size can affect the range of accommodation options that the employer can reasonably provide. Usually, a large employer will have more

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Factors in assessing undue hardship (continued)

opportunities and greater flexibility than a small employer. Depending on the type of business, employer size may also limit the length of time that an employer is able to hold open a position for the injured worker without significantly impacting the business.

2. Financial costs

To be considered undue hardship, financial costs must be considerable, so that they would substantially interfere with business operations. Employer size and financial situation are considerations in determining whether the cost of accommodation is an undue hardship. External funding from other sources, including WCB, to assist with accommodation should be taken into consideration when evaluating the overall financial impact.

3. Disruption of operations

If accommodation would significantly disrupt operations so that it affects the employer’s ability to carry out essential business, it may be an undue hardship. For example, an employer does not have to create and pay for a new position if it is superfluous and does not add value or provide a benefit to the employer. A further example is if the workplace is small and necessary modifications to the injured worker’s workspace would impede access to other work stations or materials and supplies. Another example is if an employer is already accommodating a number of other employees and cannot accommodate another without impacting productivity to the point that other workers may be required.

4. Interchangeability of work force and facilities

An employer’s ability to move a worker to a different facility or position is a consideration. The more options there are, the more likely it is that the

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Factors in assessing undue hardship (continued)

employer can accommodate the worker without undue hardship. When looking at accommodation options, the employer should consider options throughout the organization, not only in the location where the worker was at the time of the accident.

5. Health and safety concerns

An accommodation must meet health and safety requirements and should not create risk for the worker or coworkers. If it does, it would be considered an undue hardship.

6. Morale problems of other employees due to the accommodation

If the problems are simply resentment that the accommodated worker has light or modified duties, it is not undue hardship. In those circumstances, the employer can mitigate the problem by educating all its workers on the principles and benefits of accommodation. If, however, other workers are required to work substantial overtime or much heavier workloads because of the accommodation, so that the increased load negatively affects their health, there may be undue hardship.

7. Substantial interference with the rights of others

An accommodation should not interfere significantly with the rights of others or discriminate against them. For example, even though the provisions of s.88.1 may take precedence over a collective agreement, a substantial departure from the terms of the collective agreement could be a serious concern for other employees. However, the employer must show that other employees have objections based on well-grounded concerns that their rights will be affected. Similarly, if coworkers with appropriate qualifications are not given the opportunity to apply for a vacant

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Factors in assessing undue hardship (continued)

position because a worker without qualifications is given the position as an accommodation, there may be undue hardship.

8. *What should an employer do if it believes that an accommodation would create undue hardship?*

When an employer believes that accommodating an injured worker would create undue hardship, it must contact WCB.

The employer is required to provide supporting evidence to demonstrate that there would be undue hardship (for example, a cost-benefit analysis, including long-term financial impact, if the claimed undue hardship is financial; detailed information about job positions and requirements, if the grounds are lack of any suitable work; etc.). It is not sufficient to claim undue hardship without providing the supporting evidence.

9. *What if WCB determines that a proposed accommodation would create undue hardship?*

If a proposed accommodation would create undue hardship, the employer is not required to provide that accommodation. However, the employer is required to consider if there are other options that would accommodate the injured worker without undue hardship.

10. *What happens if an employer does not fulfill its duty to accommodate an injured worker?*

When WCB determines that an employer has not fulfilled its duty to accommodate the worker (that is, the employer has not explored the possible options or is not willing to do so), WCB will first try to work with the employer to resolve the issue. If that is not possible, WCB may levy a penalty in an amount up to the worker's net average earnings for the year before the accident (see also Application 2, Question 6). When WCB does levy a penalty, it may pay some or all of the penalty amount to the worker (see Question 11, below).

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Employer does not fulfill its duty to accommodate (continued)

If the worker has remaining work restrictions and impairment of earning capacity, WCB will provide the worker with appropriate wage loss benefits and vocational services, with the goal of helping the worker become competitive in the labour market.

11. *When WCB levies a penalty, when would it consider paying some or all of the penalty amount to the worker?*

WCB will consider paying the penalty to the worker only when the worker suffers a financial loss due to the employer’s failure to meet its obligation, and the worker is not eligible for wage loss benefits from WCB. The penalty may be paid either periodically or by lump sum.

12. *When is this policy application effective?*

This policy application (Application 3 – Accommodation and Undue Hardship) is effective September 1, 2018, and applies to all claims with a date of accident on or after that date, except when noted otherwise in a specific policy section(s).