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***The Duty to  
Accommodate and the  
Older Worker:  
Employer Obligations***

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# *The Duty to Accommodate and the Older Worker: Employer Obligations*

Presenter:

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## *What is Accommodation?*

**ACCOMMODATION** = adaptations to the workplace to remove barriers preventing an otherwise qualified individual from performing the essential duties of his/her job

# *What is Accommodation?*

Some examples of accommodations:

- improving accessibility
- modifying schedules
- altering duties
- acquiring or modifying equipment
- providing support or assistance
- retraining or re-assigning employees
- tolerating absences

# *The Legal Duty to Accommodate*

Various statutes impose this duty, including the :

- *Canadian Human Rights Act*
- *Ontario Human Rights Code*
- *Workplace Safety and Insurance Act*

## *The Legal Duty to Accommodate*

### *Ontario Human Rights Code, s. 5(1):*

*Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*

## *The Legal Duty to Accommodate*

### *Workplace Safety and Insurance Act, s. 41(1):*

*The employer of a worker who has been unable to work as a result of an injury and who, on the date of the injury, had been employed for at least 1 year...shall offer to re-employ the worker.*

(note: s. 41 does not apply to e'ers who regularly employ less than 20 e'ees)

## *The Legal Duty to Accommodate*

*Workplace Safety and Insurance Act, s.  
41(6):*

*The employer shall accommodate the work  
or the workplace...to the extent that the  
accommodation does not cause the  
employer undue hardship.*



# *When Does Duty to Accommodate Arise?*

## What is a “disability”?

*Human Rights Code, s. 10(1) :*

*Disability includes any degree of physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness... a mental impairment...a learning disability, a mental disorder ...or an injury for which WSIA benefits are claimed or received.*

# *When Does Duty to Accommodate Arise?*

## What is a “disability”, cont’d?

- typically the condition must be more than **transitory**
- the condition may arise from either a **work-related** or **non-work-related** condition or injury

## *Fulfilling the Duty to Accommodate*

### Employer:

An employer's duty to accommodate requires that it to do **whatever is necessary, short of undue hardship**, to accommodate the employee.

# *Fulfilling the Duty to Accommodate*

## Employer must:

- determine **needs, restrictions or limitations**
- determine **barriers**
- **remove barriers**

## *Fulfilling the Duty to Accommodate*

### Other considerations for employer:

- accommodation may be **temporary** or **permanent**, **simple** or **complex**
- accommodations must be addressed on a **case-by-case basis**

# *Requests for Information*

## Employers have right to:

- be satisfied of e'ee's fitness for work
- be advised of e'ee's functional limitations and prognosis
- request e'ee's doctor to respond to specific questions

## *Requests for Information*

**Employers generally do NOT have right to:**

- know the diagnosis
- require employee to be seen by doctor chosen by employer

## *Requests for Information*

**If medical information not provided, employer may:**

- request additional information
- contact physician directly if employee consents
- sanction employee, where appropriate



# *Role Of The Union In Accommodation*

## Responsibilities of union include:

- advocating for e'ee
- facilitating communication and sharing of information between e'ee and e'er
- facilitating search for, and implementation of, reasonable accommodations

# *Role Of The Union In Accommodation*

## The Union and administration of the collective agreement:

- e'ee's right to accommodation may prevail over provisions of collective agr't
- however, if accommodation involves **significant interference** with **fundamental rights** under collective agr't, union may be entitled to withhold consent

# *Employee Duties and Responsibilities*

## Employee duties and responsibilities include:

- communicating the need for accommodation
- providing timely and useful information (including medical information) regarding functional abilities and limitations
- cooperating in the search for a reasonable accommodation

# *Undue Hardship*

**“Undue hardship” constitutes a threshold:**

- employer has a duty to do whatever is necessary to accommodate employee, short of undue hardship
- the undue hardship threshold is flexible, difficult to define, changeable and fact or circumstance specific

# Undue Hardship

The fact/circumstance specific nature of accommodation and undue hardship may be especially apparent in the context of a religious belief:

## Syndicat Northcrest c. Amselem (SCC) [2004]

*“a [sincerely held] practice or belief, having a nexus with religion, [requiring either objectively or subjectively obligatory or customary conduct], or... subjectively engendering a personal connection with the divine...irrespective of whether a particular practice or belief is required by official religious dogma or [conforms] with the position of religious officials.”*

# *Undue Hardship*

## *OHRC Policy and Guidelines on Disability and the Duty to Accommodate:*

According to the OHRC, only 3 considerations are relevant to assessing whether the undue hardship threshold is met in any particular case:

1. cost
2. outside sources of funding, if any
3. health and safety requirements

# Undue Hardship

## *OHRC Policy and Guidelines..., cont'd:*

According to the policy:

- business inconvenience, e'ee morale and customer preferences are **not** relevant to assessing whether the threshold has been met
- cost will constitute undue hardship **only** if it is so substantial as to alter the essential nature of the enterprise or affect its viability

# *Undue Hardship*

## Other interpretations of the undue hardship threshold:

- courts and arbitrators have accepted that additional factors may be relevant
- regardless, there is agreement that e'er must show that burden is **substantial** and **not trivial**



## *Undue Hardship*

### *Renaud v. Central Okanagan School District* *No. 23 (SCC) [1992]*

*"short of undue hardship" [imports] a limitation on the employer's obligation so that measures that occasion **undue interference** with the employer's business or **undue expense** are not required."*

## *Undue Hardship*

The core or essential duties of a job are key to the determination of undue hardship:

- accommodation may require distinguishing between **essential** and **non-essential** duties of a job
- a core or essential duty is a **bona fide occupational requirement (BFOR)**

## *Undue Hardship*

### The extent of the duty to accommodate:

- the nature of the accommodation varies according to **specific needs of the individual**
- **non-essential duties** which cannot be performed should be altered, eliminated or reassigned
- if **essential duties** cannot be performed, even with accommodations, **alternative available jobs** must be explored

## ***HUMAN RIGHTS CODE: Definition of “Age”***

Prior to 12/12/06:

s. 10(1) – “age” means an age that is 18 yrs or more, except in subsection 5(1) [i.e. equal treatment in employment] where “age” means an age that is 18 years or more and less than 65 yrs

## ***HUMAN RIGHTS CODE: Definition of “Age”***

Effective 12/12/06:

- s. 10(1) – “age” means an age that is 18 years or more

# WHAT DOES THIS CHANGE MEAN FOR EMPLOYERS?

- *mandatory* retirement at age 65 no longer permissible **unless** the particular employer can establish that mandatory retirement is a *bona fide occupational requirement (BFOR)*

## WHAT DOES THE *CODE* SAY ABOUT *BFOR*'S?

s.24(1)(b)-the right to equal treatment in employment is not infringed where there is discrimination on the basis of age, sex, record of offenses or marital status provided the age, etc. of the person is a ***reasonable*** and ***bona fide*** qualification because of the nature of the employment

# THE SUPREME COURT OF CANADA ON *BFOR'S*

The SCC has stated that employer must satisfy 3 requirements in order to establish a BFOR:

1. employer must show it adopted the requirement (e.g. mandatory retirement) **for a purpose that is rationally connected** to the performance of the job



# THE SUPREME COURT OF CANADA ON *BFOR'S*, CONT'D

2. e'er must show it adopted the requirement **in good faith in the honest belief that it is necessary** for the fulfillment of that work-related purpose; and
3. e'er must show that the requirement is **reasonably necessary** to the accomplishment of that work-related purpose in the sense that the e'er cannot accommodate persons with that characteristic without **undue hardship**

# PERFORMANCE MANAGEMENT AND THE OLDER WORKER

- with the end of mandatory retirement, e'ers may be less inclined to allow older workers to "*play out the string*"
- where performance an issue, effective performance management required – i.e. assessing & documenting performance with appropriate consequences
- performance mgmt programs must be fair and equitable across entire e'ee group – i.e. can't target older e'ees

# PERFORMANCE MANAGEMENT AND THE OLDER WORKER, CONT'D

- disabilities interfering with performance must be accommodated to the point of undue hardship;
- accommodation of age-related disabilities, conditions and/or needs are likely to become more important

# TERMINATION OF THE OLDER WORKER

- what is reasonable notice of termination for older, long term employee who is terminated on a without cause basis after age 65?
- employment contracts with upper limits on notice and severance likely to become more important

# TERMINATION OF THE OLDER WORKER

- even where “cause” not an issue, well-documented e’ee file may be important
- e’er may need to counter adverse inference of age-based discrimination – i.e., that termination was motivated by e’ee’s age

# WORKERS' COMPENSATION AND THE OLDER WORKER

- age-based distinctions in the *Workplace Safety and Insurance Act* (“WSIA”), its regulations and its policies continue despite amendment of *Code*

## ***WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D***

e.g. *WSIA*,s.43(1) - loss of earnings payments will **continue until earliest of:**

- a) day on which the loss ceases;
- b) day on which worker reaches 65 (if less than 63 when injured); and
- c) 2 yrs after date of injury if 63 or older when injured

## ***WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D***

e.g. *WSIA*, s. 41(7) – e'er obligated to re-employ an injured worker **until earliest of:**

- a) 2nd anniversary of date of injury;
- b) 1 yr after worker medically able to resume pre-injury job; and
- c) date worker reaches age 65



## ***WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D***

WSIA, s. 40 – the duty of the worker and the employer to co-operate *in the early and safe return to work* of the worker remains unchanged (i.e. no age limitation)

- will LMR's for older workers become more common?

# AGE-BASED DISTINCTIONS IN BENEFITS PLANS AFTER 12/12/06

- *ESA*, Regulation 286/01: Benefit Plans- definition of “age” remains 18 yrs to 65 yrs
- *Human Rights Code*: s. 25 – right under s. 5 to equal treatment on basis of age not infringed where benefits and pension plans comply with *ESA*

# POSSIBLE LEGAL CHALLENGES

Will the continuation of these age-based distinctions in various Acts survive legal challenges?

- legislation may be declared unconstitutional
- potential constructive dismissal claims
- provide advance notice to e'ees if benefits to cease at age 65

# POSSIBLE LEGAL CHALLENGES

- Grievances In Unionized Workplaces
  - potential for arbitration awards extending benefits to older workers based on collective agreement language
  - who provides benefits?

# POSSIBLE LEGAL CHALLENGES

CKY-TV v. C.E.P., Local 816 [2008]

*“... what is the message delivered by forcible retirement of an employee who wishes to continue working and is capable of doing so? In my respectful opinion, the answer must be that a reasonable employee in these circumstances would conclude that he or she is less worthy or capable as a human being; less deserving of concern, respect and consideration.”*

# POSSIBLE LEGAL CHALLENGES

CKY-TV v. C.E.P., Local 816, [2008] cont'd

*“Considering all the foregoing,... it is my finding that section 15(1)(c) of the [Canadian Human Rights Act] has an effect which is discriminatory within the meaning of the equality guarantee in section 15(1) of the Charter. I therefore find that section 15(1)(c) of the Act contravenes section 15(1) of the Charter.”*

# POSSIBLE LEGAL CHALLENGES

*Assn. of Justices of Peace of Ontario v. Ontario (Attorney General)* (Ont. Superior Court of Justice) [2008]

- application brought regarding constitutionality of mandatory retirement requirements (at age 70) for justices of peace
- the latter requirements were preserved post 12/12/06 by s. 24 of the *Code*

## POSSIBLE LEGAL CHALLENGES

### *Assn. of Justices of Peace, cont'd*

“...mandatory retirement of justices of the peace, ...is based on the stereotypical application of a presumed group characteristic that serves to perpetuate the view that they are less capable and deserving of respect in Canadian society”



# POSSIBLE LEGAL CHALLENGES

## Assn. of Justices of Peace, cont'd

“...it has demeaned the Applicants on a subjective level and... viewed from the perspective of a reasonable person in the position of the Applicants, it adversely affects their human dignity in one of its most basic aspects -- participation in life-affirming work. Whether mandatory retirement of the judiciary may be a socially-necessary limitation on their rights does not lessen its discriminatory sting.”

# WHAT SHOULD EMPLOYERS DO?

- communication with employees regarding retirement plans is still legal
- voluntary retirement plans and incentives are still legal
- mandatory retirement policies may be possible if BFOR exists (unlikely)

# WHAT SHOULD EMPLOYERS DO?

Implement a comprehensive disability mgmt program to address 3 fundamental facts:

1. the population and the workforce are aging;
2. older e'ees, though less likely to get injured, tend to remain disabled for longer periods;
3. older e'ees tend to be less able to adapt to displacement by securing alternate employment

# WHAT SHOULD EMPLOYERS DO?

Disability mgmt solutions for older e'ees may include:

- increased focus on ergonomics
- increased focus on job rotation and recovery
- fitness initiatives to encourage fitness and healthy lifestyles
- use of outside resources to provide information on wellness, disease prevention

# WHAT SHOULD EMPLOYERS DO?

- review demographics of the workplace and plan for anticipated needs
- update policies, pension and benefits plans, group insurance plans, employment contracts to delete references to mandatory retirement

# WHAT SHOULD EMPLOYERS DO?

- review employer obligations under collective agreements, employment contracts, insurance contracts
- perform cost/benefit analysis to assess implications of extending benefits to older employees

# WHAT SHOULD EMPLOYERS DO?

- ensure workplace policies and approaches are free from negative stereotypes about aging and older workers:
  - older e'ees often are valuable mentors
  - older e'ees are a protection against skills shortages
  - older e'ees often have extensive but undocumented knowledge that is of great value

# WHAT SHOULD EMPLOYERS DO?

- speak with benefits insurers
- seek legal advice with respect to contracts, retirement policies and communications with employees