PART II:
Accommodation and Workplace Safety

By Kathryn Willms

On January 1, 2016, a day when many crawled out of bed, vowing a fresh start, Ontario employers were waking up to a fresh set of Accessibility for Ontarians with Disabilities Act (AODA) regulations. These regulations define the requirements for training employees on the Human Rights Code related to disability, and providing the public with, and notifying them of, accessible formats and communication supports. This legislation speaks to a larger trend: not only are people's rights being supported by legislation like the AODA, but employees are more informed about and comfortable exercising those rights. This provides some unique challenges for employers seeking to balance the bottom line with good stewardship of their employees.

One challenge is accommodation. Accommodation simply means that employers cannot discriminate against individuals (there are 15 protected grounds under human rights law: race, sex, age, disability, family circumstance, etc.). "Well, of course they can't," said everybody everywhere, but the implications of this are myriad. It means that employees can tell their employers that they have a medical condition, or childcare challenges, or an aging parent in distress, and the onus is on the employer to help them to continue to do their job. Our Markham lawyers say that, with aging workforces made up, increasingly, of employees who are straddling responsibilities between children and parents and who are more open about their own illnesses and their right to accommodation, businesses must know their responsibilities.

"No one wants to run afoul of the Human Rights Code," says Sarah Kauder of Minken Employment Lawyers. "But employers have businesses to run. It's about finding that happy medium, where they can fulfill their obligations while running things efficiently."

Accommodation changes depending on the employee's circumstances, the nature of the request, and the type of business.

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In this second article of a two-part series, we enlist Markham law firms that specialize in employment law to break down emerging trends and new legislation that employers can't afford to ignore. To read the first part of this series, on employment agreements and workplace policies, visit markhamvoice.com.

Kauder relates a case involving a client with sleep apnea who received a warning letter after falling asleep in a meeting. This spurred the worker to tell his employer about his condition in order to develop a strategy, such as flexible hours, to accommodate it. In another case, an employee caring for an elderly parent was refused the right to work from home, and a human rights tribunal determined that the employer knew the stress the employee was under and should have done more.

What employers might be surprised to realize is that sometimes their responsibilities extend beyond granting accommodation requests; sometimes it's their job to trigger the conversation, says Laura Williams of Williams HR Law, and she says that it comes into play most often in one of the most challenging topics in employment law – accommodating mental health in the workplace.

"It's a very difficult issue," Williams says. "We've had cases where an employee has had a length of service with an employer, and all of a sudden they're acting very agitated or they're very withdrawn, their behaviours are erratic, and particularly if they are working in a safety-sensitive environment, the employer may have the obligation to trigger the accommodation process."

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The question of employee responsibility made headlines in 2015 after it became clear that authorities were aware that the Germanwings co-pilot who crashed in the French Alps had previously experienced mental illness, although he had been cleared to fly. The reality is 20 percent of Canadians experience a mental illness in their lifetime, which means that employers of all types and sizes must grapple with this debate about responsibility, identification, and accommodation for mental illness every day.

Our employment law experts identify three key takeaways for employers relating to accommodation. The first is that employers only have a duty to accommodate up until a certain point, which means that an employee cannot single-handedly dictate what their accommodation will look like.

"The courts have said accommodation doesn't have to be perfect," says Kauder, "it has to be reasonable."

And it cannot be so extreme that it affects the viability of the business; for

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example, a home business does not need to install an elevator to accommodate an employee in a wheelchair.

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Secondly, when it comes to accommodation, one size definitely doesn't fit all.

"It's important to get legal advice," says Kauder. "As lawyers, we can help get you out of a bind, but it's better if you have us guiding you from the beginning."

Finally, there are ways to be proactive around accommodation.

"You can make your life easier by developing effective workplace policies," says Williams. For example, if you already have a flextime schedule, make employees aware of it, so you do not need to reinvent the wheel each time an employee requires flexible hours.

"And a policy can address the information an employer requires when there is an accommodation request," Williams points out.

Policies are also critical to manage another increasingly challenging issue for employers: dealing with harassment in the workplace.

"Harassment and bullying are behaviours that employers should never tolerate," says Williams. "These issues have become increasingly problematic in the age of social media."

Minken, whose firm spearheaded Bill 168 training for businesses and lawyers in the region of York, says that "the purpose of that legislation was to protect employees from violence and harassment in the workplace." Bill 168 dictates that companies must assess and control workplace risks, and create policies around harassment and violence which are reviewed annually, as well as have programs to implement the policies, such as a reporting structure and action plan. It also requires employers to act if they are aware of domestic violence that might harm an employee, and it allows employees to refuse to work if they feel in danger of violent behaviour. So far, our experts say they've seen Bill 168 invoked in cases of wrongful termination, where employers argue that the employee was a threat in the workplace. Of course our lawyers have also seen employees argue that the performance management taken prior to their termination constituted harassment. What's the takeaway from this? There's no uncontested ground in employment law, so thank goodness for our friendly Markham lawyers.

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