**ACCOMMODATIONS AND RETURN TO WORK RESOURCE SHEET
*Created on: January 25, 2022***

**ACCOMMODATIONS**

* Legal requirement: under the *Code,* organizations are required to prevent and remove barriers and provide accommodations to the point of undue hardship.
* May include changing specific tasks or jobs, speech-to-text software, room for mobility aids, braille keyboards or large text keyboards, flexible work schedules, reserved parking, widening doorways, ramps at the entrances/exits, automatic doors, or leaves of absences. Accommodations are reasonable adjustments or changes to the work, work tools or the work process to allow the worker to complete the essential duties of the job.
* It would be unfair to exclude someone from the workplace or activities in the workplace because their *Code*-protected needs are different from the majority. However, think of it as all part of being an inclusive workplace.
* Be aware that a person may need an accommodation even if they haven’t requested one.
* An accommodation may be needed at any stage in the employment relationship including pre-employment (testing, interviews), work environment, training and/or promotions.
* An accommodation may not be considered to evaluate the merits of an applicant during selection.
* The probationary period should start after an employee has been accommodated. Ensure that your policies and practices reflect this.
* The duty to accommodate means that sometimes it is necessary to treat someone differently to prevent or reduce discrimination. For example, asking all job applicants to pass a written test may not be fair to a person with a visual disability. In such cases, the duty to accommodate may require that alternative arrangements be made to ensure that a person or group can fully participate.
* Collective agreements or other contract arrangements cannot function as a bar to providing accommodation. The courts have determined that collective agreements and contracts must give way to the requirements of human rights law. Subject to the undue hardship standard, the terms of a collective agreement or other contract cannot justify discrimination that is prohibited by the *Code*.

**NON-OCCUPATIONAL VS. OCCUPATIONAL**

* Non-occupational accommodations fall under human rights whereas the occupational accommodation is the result of a workplace injury/illness.
* In terms of accommodating an employee, the difference has little to no impact on employees in terms of what can and should be done to assist them to stay at work or in assisting during a graduated return to work.
* The duty to accommodate (non-occupational) can arise in many different situations as a result of a person’s ***disability***, ***age***, ***creed***, ***marital status***, ***family status***, ***ethnic origin***, ***race***, or other prohibited grounds of discrimination listed in the *Code*.
* Many requests for accommodation are made in the employment context due to an employee’s physical and/or mental disabilities.
* While occupational and non-occupational disabilities are derived from a difference source, accommodations are treated similarly regardless of the source.
* Organizations will not be able to argue persuasively that providing accommodation would cause undue hardship if it has not taken steps to explore accommodation solutions, and fulfil the procedural component of the duty to accommodate.
* The duty to accommodate is informed by three principles: respect for dignity, individualization, as well as integration and full participation.
* **Example:** An accommodation that shows little respect for the dignity of a person with a disability is an accessible entrance over a loading dock or through a service area or garbage room. People who use mobility devices should have the same opportunity as others to enter a building in a pleasant and convenient manner.
* Accept the employee’s request for accommodation in good faith, unless there are legitimate reasons for acting otherwise. Get expert opinions or advice where needed.
* Take an active role in making sure alternative approaches and accommodation solutions are investigated, and research various forms of accommodation and alternative solutions as part of the duty to accommodate.
* Keep a record of the accommodation request and action taken.
* Maintain confidentiality.
* Limit requests for information to those related to the nature of the limitation or restriction, to be able to respond to the accommodation request.
* Grant accommodation requests in a timely way, to the point of undue hardship, even when the request for accommodation does not use any specific formal language.
* Pay the cost of any required medical information or documentation. For example, employers should pay for doctors’ notes and letters setting out accommodation needs.
* Where accommodation would cause undue hardship, explain this clearly to the employee and be prepared to demonstrate why this is the case.

**UNDUE HARDSHIP**

* The *Code* sets out only three items that may be considered in assessing whether an accommodation would cause undue hardship. These are set out in sections 11(2), 17(2) and 24(2) and are:
	+ - **Cost**: must be quantifiable and so substantial that it would alter the essential nature of the enterprise or viability;
		- **Outside sources of funding**, if any: the availability of outside sources of funding and other business considerations and practices that may alleviate any accommodation costs must first be considered;
		- **Health and safety requirements**, if any: risk to an employee's own health and safety, or the risk to health and safety of others. When considering the impact of an accommodation on health and safety, look at the extent of the risk and identify anyone who would bear that risk. However, balance this risk against the right of employees to participate fully in the workplace. The goal is not absolute safety, but reasonable safety. The existence of a health and safety rule (such as a hard hat requirement) does not automatically constitute a bona fide occupational requirement.
* This means that the employer must present evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship.
* There is no doubt that an employer will have to spend some effort to accommodate its employees’ needs. However, some degree of hardship is to be expected – hence the test in the *Code* is “*undue*hardship” rather than “mild hardship” or “reasonable hardship.”
	+ - An employer should only conclude that an accommodation request will amount to undue hardship after careful and rigorous consideration of all elements of the request and the organization’s ability to meet it. This should never be a first response to a request for accommodation.
		- Factors that are excluded from consideration and cannot be used to justify undue hardship include business inconvenience, employee morale and customer preference. Collective agreements cannot function as a bar to accommodation requests.
* **Example of Perceived Undue Hardship**: An employee requests a week off to attend to a family member’s mental illness. The employer says, “Sorry, but if I let you go off then everyone else will want time off – this would be an undue hardship for the company.” This has not been proven and is only speculation.
* **Example of Actual Undue Hardship**: A pilot for a small airline develops a medical condition that limits his peripheral vision. Because of his condition, he is no longer allowed to fly planes. The airline has very few employees, and there are no other jobs to offer him. The employer could argue that keeping the pilot on their payroll would cause undue hardship, and that letting him go is their only option.
* Out of fear of stigma or discrimination, employees may, quite understandably, hide accommodation requirements until it is absolutely necessary to disclose them. The fact that an employee has lied about accommodation requirements in an early stage of a job screening or application process is not relevant to the analysis of whether the employer met the duty to accommodate once an accommodation need has been identified on the job.
* Similarly, employees may disengage from a flawed process of accommodation conducted by an employer. An assessment of an allegation that an employee’s lack of cooperation undermined an accommodation process will always include a critical assessment of the sequence of events that preceded the breakdown in the accommodation process.
* If the accommodation process is inflexible, punitive, or not carried out in good faith by an employer, a tribunal might find that the employee’s actions are reasonable in the circumstances and that it is the employer who has failed in its duty to accommodate.
* Remember that the employers defence of undue hardship most likely will be tested by the Human Rights Tribunal and/or the courts.

**DOCUMENTATION REQUIRED FOR THE ACCOMMODATION**

* Once the worker requests an accommodation, they need to explain why the accommodation is required, so that needs are known, preferably in writing.
* The worker will need to answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, lawyers etc., where appropriate and as needed.
* The worker is only expected to discuss his or her accommodation needs only with persons who need to know. This may include the supervisor, a union representative, or human resources staff.
* An employer may ask questions about an individual’s ability to perform the functions of the job but does not have the right to ask for specific information about the disability such as the diagnosis.
* In some cases, the need for accommodation is obvious and there is no need for special documentation. For example, persons who use wheelchairs will have difficulty entering buildings that have steps, and pregnant employees will often need more bathroom breaks. Even where some documentation is required, this does not justify a “fishing expedition.”
* **Example:** a request for adjustments to computer equipment related to diminishing eyesight would not usually justify a request to review the accommodation seeker’s complete medical file.
* A careful approach to collecting documentation protects the privacy of the accommodation seeker and protects the accommodation provider from potential complaints.
* All parties must exercise good faith in seeking and giving information. Employers can ask for more information about an accommodation request in the following cases:
	+ - where the accommodation request does not clearly show a need related to the *Code* ground;
		- where more information on the employee’s limitations or restrictions is needed to find an appropriate accommodation;
		- where there is an objective reason to question whether the request for accommodation is legitimate.
* The worker needs to take part in discussions on accommodation solutions.
* The employers should engage experts if additional assistance is required.
* Determine agreed-upon performance and job standards once accommodation is provided.
* For people to feel comfortable to make accommodation requests, they must feel confident that the information they provide will be treated confidentially and shared only as needed for accommodation.
* Personal information should be kept in a secure place, separate from the person’s personnel file.
* It should only be shared with people who need the information to provide the accommodation or to investigate any human rights allegations that may arise from the accommodation request and the employer’s response.
* Subject to applicable privacy legislation and rules under the *Employment Standards Act*s, these records should be kept until they can no longer serve one of the following purposes:
* help the accommodation provider take appropriate accommodation steps (a past accommodation plan may need to be updated as needs change)
* document the employer’s response to the employee’s human rights concerns and requests for accommodation for any court action or tribunal hearing. These documents should not be destroyed until any limitation periods have expired or, where an action or claim has been started, until it has ended.
* For example, the Ontario *Employment Standards Act* provides that employee records about a leave should be kept until three years after the leave has ended, and that other types of records should be kept for three years after employment ends. These are minimum requirements and should be extended where a human rights claim may be filed. The employer is expected to keep all records where a human rights claim has been initiated and could be held liable if relevant documents are destroyed.
* An employer who prematurely destroys accommodation records may be unable to show that the process and substance of the accommodation were appropriate and to establish the existence of undue hardship.
* **Example:**In 2002, an employer provided an employee with accommodation, including a leave. This employee returned to work in spring 2003 and was fired in the fall of 2005. At the termination meeting, he said that he intended to file a human rights complaint. Before receiving the complaint and in accordance with company policies, all the employment records on this employee’s accommodation and leave were destroyed in early 2006. A human rights complaint is received in the summer of 2006, alleging that the employer failed to accommodate his disability in 2002 and 2003 and that this was a factor in terminating his employment in 2005. Proceedings before a human rights tribunal do not start until much later. The employer may have met its duties under the *Code* and the termination may have been non-discriminatory. However, when the case is heard, the employer will have a challenging time proving this without documents created at the time the incidents occurred.

**TIMING OF THE RETURN-TO-WORK OFFER**

* This should be offered right away.
* When an injury occurs, the goal for both the workplace and the worker is to get things back to the way they were before the injury.
* Many employers believe that a medical professional’s word is law when it comes to compensation claims, so when they are provided with such a note, they assume doctor’s orders must be followed.
* However, this does not always translate to suggest that the worker is totally disabled and is therefore *incapable* of completing *suitable* modified work.
* What many employers fail to understand is that the difference between a lost time and no lost time claim often lies in the suitability of modified work, **despite** the existence of a “two weeks off” doctor’s note.
* In cases such as this or where you don’t receive any physical limitations, look to standard medical precautions for determining suitable modified duties. Examples of standard medical precautions can be found on most provincial compensation websites.
* Ideally, modified duties should be as closely related to the original job as possible given the worker’s restrictions, and the modified assignment should be short-term.
* A date to return to regular duties should be clearly determined at the outset based on when the worker is physically able to return to their original job.

**WORKERS WHO ARE NOT PHYSICALLY 100%**

* Let’s face it – no one is ever at 100% so this is an unrealistic expectation
* Recovery begins as soon as there is injury to the body.
* The rate of recovery is based on many factors such as weight, age, physical wellness, pre-existing conditions.
* *“Strong evidence suggests that activity hastens the recovery while inactivity delays it”* (American College of Occupational and Environmental Medicine).
* Remaining active, productive, and connected to the workplace helps workers to recover more quickly.

**IMPORTANCE OF CLEAR AND CONCISE MODIFIED WORK OFFERS**

* Clearly outline what exact duties the worker will be expected to preform, such as answering phones, reviewing invoices etc.
* Don’t use vague language such “perform all job duties without your limitations.” This does not provide the adjudicator the information they need in order to determine exactly what the worker will be doing.
* Make sure that you add the date the offer was made at the top of the document. This will be important should the worker decline the offer.
* It is a good practice to include the following in the written offer language such as:
	+ *“OPTIONAL:* Transportation will be provided in the event you are unable to drive and/or take public transit to the workplace.” (By offering transportation to the workplace it eliminates the workers argument that they were unable to come into work).
	+ “Any treatments such as physiotherapy should be booked before or after work. It is your responsibility to inform the employer of your doctor’s visits, treatments, and any changes to your condition. “
* Outline the expectation that they will obtain addition medical information, such as an FAF in a timely manner, as set out by the employer.
* If the worker refused to sign the written documentation, note on the documentation that the worker refused to sign and the date this occurred.

**SUBMITTING A WORKPLACE CLAIM WHEN YOU HAVE DOUBTS ABOUT A CLAIM BEING WORK RELATED**

* If a worker stated that they suffered a workplace injury or illness, the employer is legally responsible for filing a claim with the appropriate compensation board, even if the do not agree with the worker.
* Remember that adjudication of the claim is the role of the compensation board and not the employer.
* If you have concerns regarding a claim, clearly outline these concerns to the compensation board and provide supporting documentation.
* This is why doing a thorough investigation of the incident or occupational illness is vital.
* The compensation board will consider all relevant information when making their decisions regarding allowing or denying a claim.
* If the employer is not able to present appropriate documentation, with all things being equal the compensation board will rule on the side of the worker.

**MONITORING WORKERS ON MODIFIED DUTIES**

* It is a good practice to have the worker complete a daily progress report at the end of each modified shift.
* In doing so, it puts the onus back on the worker to report concerns so they can be addressed in a timely manner.
* If the worker does not express any concerns to you but reports to the compensation board that they are having difficulties, you now have proof that you were never made aware of such concerns.
* If the worker has regressed (e.g., 2 weeks into the modified duties they bring in a doctor’s note stating that they cannot work), ask the Case Manager is there any medical evidence to support this change in circumstance.
* If not, ask the Case Manager to further explore if the worker has a pre-existing medical condition that may be affecting the worker’s healing.
* Make the Case Manager aware of any disputes or disagreements between you and your employee about their return to work.
* If you feel that the modified duties are suitable, but the worker does not agree, send a copy of the modified duties to the Case Manager for review. The Case Manager will be able to compare the modified duties to the workers medical restrictions in order to determine if they are appropriate.
* If the Case Manager deems them appropriate and the worker still declines the modified duties, you will already have the compensation board on your side. This will allow you to object to the lost time.
* You may have reason to believe that the worker has not bee following their treatment plan. For example, it comes to your attention that the worker who has a back injury is still playing recreational hockey on the weekend. Bring your concerns to the Case Manager and let them determine if the worker is or isn’t cooperating.

**WORKER REFUSAL OF OFFER OR ACCOMMODATIONS**

* If an injured worker has declined modified work, do not be afraid to discuss your concerns with the Case Manager.
* Submit the written offer of modified duties to the Case Manager so they can review the offer to ensure that the offer is suitable, given the worker’s restrictions.
* Remember that the compensation board has access to all of the medical documentation. Keep the compensation board well informed as this will be beneficial when objecting to any lost time if the worker declines the modified duties.
* Submit an objection letter that states the loss of earnings should not be allowed for the claim as the employer offered modified work to the worker and request that it be reviewed for suitability.
* In this letter question the severity of the injury such that the worker is **TOTALLY** disabled and is required to remain off work.
* Employees are expected to be cooperative and reasonable when considering proposals that effectively respond to their needs.
* Employees should not make impractical accommodation demands. Often, an employer will take reasonable steps to accommodate, but those steps might not meet the employee’s idealized expectations.
* If the employee rejects a reasonable accommodation, they may be absolving the employer from liability. For example, an employee returning to work after surgery may ask for another employee’s position as part of a return-to-work program. The employer may instead suggest modifying the returning employee’s duties. In this case, the employer has met its duty to accommodate.
* **REMEMBER TO DOCUMENT!**

**WORKPLACE CULTURE**

* Culture is the character and personality of your organization.
* It's what makes your business unique and is the sum of its values, traditions, beliefs, interactions, behaviors, and attitudes.
* Positive workplace culture attracts talent, drives engagement, impacts happiness and satisfaction, and affects performance.
* The personality of your business is influenced by everything. Leadership, management, workplace practices, policies, people, and more impact culture significantly.
* The biggest mistake organizations make is letting their workplace culture form naturally without first defining what they want it to be.
* Ask yourself “how does your workplace culture relate to accommodations and return to work.”
* Inclusion is not just about “having a seat at the table” or being in the loop. Workers need to feel that they have a voice as well.
* Employees should feel heard and comfortable to freely voice their feelings, opinions, and concerns without the fear of retaliation. They should feel confident that their workplace supports and embraces their differences.
* Drive change through education so worker can be aware of their own unconscious bias.
* Practice what you preach.
* Address possible toxic situations head on.
* Celebrate employee differences.