

Duty to Accommodate:
Focus on Mental Health &
Disabilities

EP 51

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Meet Your Presenters

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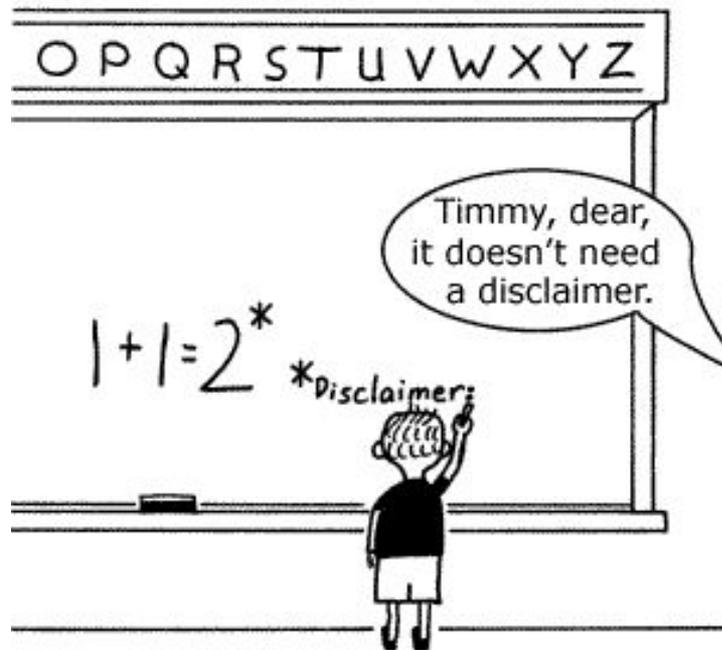


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Timmy
doesn't need
a disclaimer
but we do...



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Presentation Roadmap

- 1) What is the duty to accommodate?
- 2) Step 1: Inquire
- 3) Step 2: Substantiate
- 4) Step 3: Accommodate
- 5) Step 4: Communicate
- 6) Alternatives to the accommodation process
- 7) Takeaways

Employee Accommodation: Where to start?

- Ontario *Human Rights Code*
 - Ontario: s. 17
- Employer policies and contracts
 - Accommodation
 - Drug & Alcohol
 - Discrimination/ Harassment
- Employee Assistance Programs/ benefits plans

What is the Duty to Accommodate?



What is the Duty to Accommodate?

- When a disability interferes with job requirement or enjoyment of a workplace benefit, the employer has a duty to accommodate the employee to the point of undue hardship

What is the Duty to Accommodate?

- **Procedural:** obtain required information to assess the employee's disability and the availability of appropriate accommodations
- **Substantive:** offer appropriate accommodations to the point of undue hardship to allow the employee to fully participate in the workplace

Step 1: Inquire



Step 1: Inquire: Does the employee have a disability?

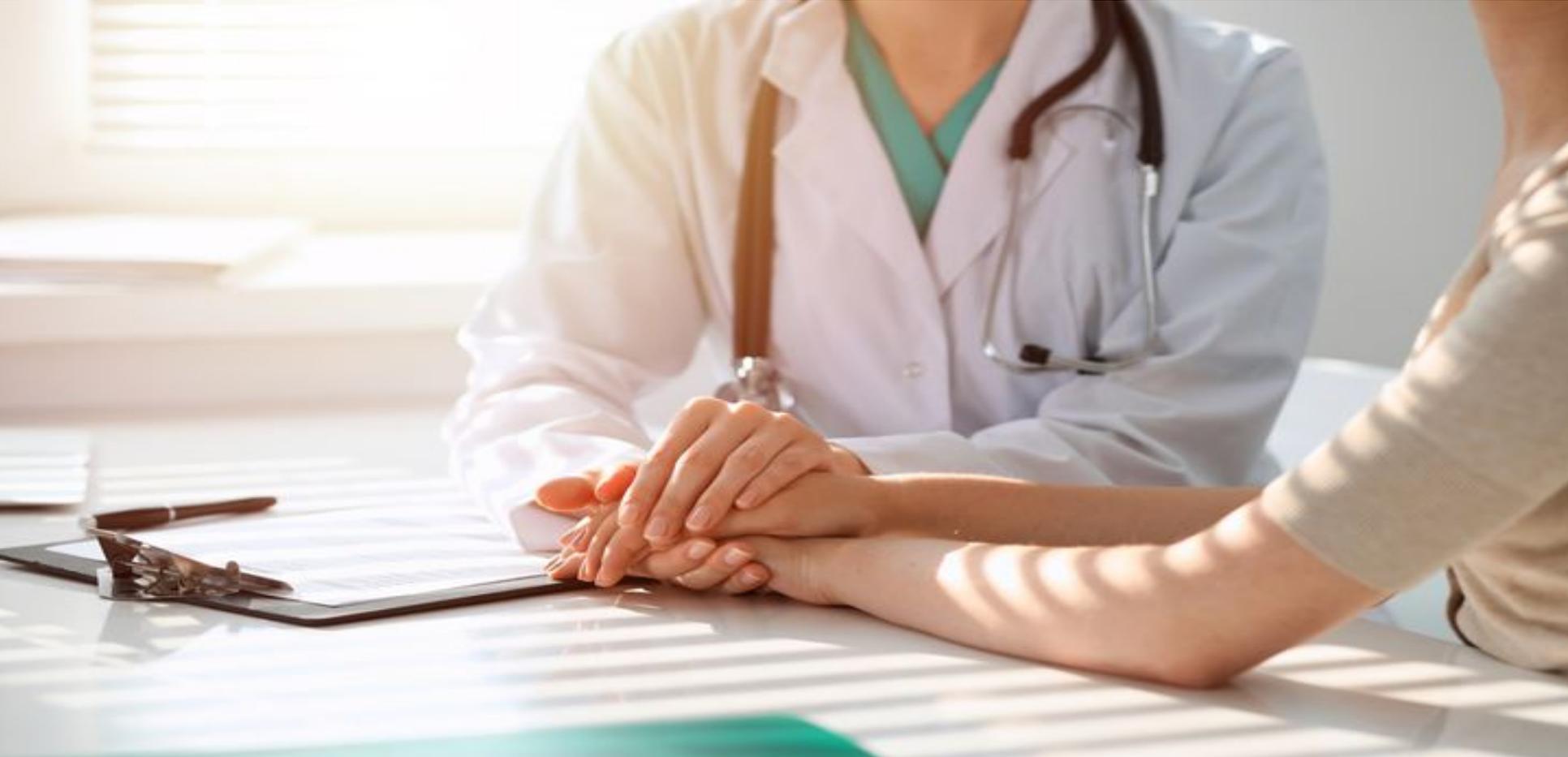
“disability” means,

- any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- a condition of mental impairment or a developmental disability,
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- a mental disorder, or
- an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

Step 1: Inquire: Receiving Accommodation Requests and the Duty to Inquire¹³

- Usually begins with a request from an employee
- Duty to inquire where the employer should reasonably be aware of a need for accommodation
- The duty to inquire is very relevant for mental health issues:
 - Often invisible
 - Social stigma

Step 2: Substantiate



Step 2: Substantiate

- Generally- accept accommodation requests in good faith
- In meeting the duty to accommodate, employers can request sufficient medical information to:
 - Understand whether the employee has a disability (which therefore triggers the duty to accommodate);
 - Understand how the disability restricts the employee's ability to work; and
 - Determine what accommodations may be appropriate in light of the employee's restrictions.

Step 2: Substantiate

- Functional Abilities Form or note from medical practitioner
- As minimally intrusive as possible
- Information limited to the nature of the limitation or restriction, to assess the employee's needs, unless the employee volunteers more info
- Disclosure of diagnosis: where reasonable and necessary
- Maintain confidentiality

Step 3: Accommodate



Step 3: Accommodate

- Duty is the same for mental and physical disabilities
- Guiding principles:
 - Individualization
 - Integration and full participation
 - Most appropriate

Step 3: Accommodate

- Based on [guidance](#) from the Ontario Human Rights Commission
- Employee duties:
 - Make their needs known
 - Answer questions/provide information regarding restrictions, including providing information from health care professionals
 - Take part in discussions regarding possible accommodation solutions
 - Meet job standards once accommodation has been provided
 - Work cooperatively with accommodation providers and experts

Step 3: Accommodate

- Based on [guidance](#) from the Ontario Human Rights Commission
- Employer duties:
 - Duty to inquire- even if employee has not formally made their needs known
 - Accept accommodation requests in good faith
 - Actively investigate possible accommodation solutions
 - Keep records of accommodation requests and actions taken
 - Maintain confidentiality
 - Limit requests for information to those reasonably related to the nature of the limitation or restriction
 - Implement accommodation in a timely manner

Step 3: Accommodate: Undue Hardship

- Core duties- employee must still be able to perform basic job duties with accommodation
- Safety - risk must be substantial
- Cost - significant burden on the employer's operations

Step 3: Accommodate: Examples of Workplace Accommodation

- Modifying job duties and deadlines
- Modifying break times or policies
- Allowing flexible work schedules
- Time off for recovery or treatment

Step 4: Communicate



Step 4: Communicate

- Implement accommodations promptly
- Keep employees informed throughout the process
- Check-in with employees on leave at reasonable intervals
- Record all the steps you take!

Alternatives to the Accommodation Process

- Frustration of contract
- Mutually agreeable separations
 - Where initiated by the employee
 - Proceed with caution
 - Recommend and contribute to cost of employee's independent legal advice
- Risk assessments and terminations unrelated to disabilities

Key Takeaways

- Employers have a duty to inquire where they should be reasonably aware of a need for accommodation
- Accept accommodation requests in good faith
- Both employers and employees are required to participate in the accommodation process
- Employees need to be accommodated to the point of undue hardship
- Communication is key and can lead to creative & positive outcomes
- Document, document, document!
- [Lexa's blog! Navigating Disability Accommodation Requests: Balancing Privacy and Information](#)

QUESTIONS



Thank you!

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