

Know Your Rights



Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Accommodation in the workplace

The information contained in this publication is information about the law, but it is not legal advice. For legal advice, please contact a lawyer in your region.

Copies of this brochure are available at www.aidslaw.ca



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1. What rights do I have to accommodation within the workplace?

Under Canadian human rights law, all persons capable of performing the essential duties or requirements of a job or service are entitled to be treated equally. Living with HIV should pose no barriers for the vast majority of jobs — other than the barriers sometimes created by misinformation, stereotypes and prejudice.

You have a right to work free from discrimination as long as your health allows you to perform the essential duties of the job after

accommodation has been provided. Human rights laws in Canada require an employer to provide “reasonable accommodation” to an employee with a disability. To accommodate an employee means to remove barriers so that he or she is able to do the essential duties of the job. Every employer has a legal duty to accommodate you, short of “undue hardship” (see below).

2. What are some possible ways to accommodate an employee with HIV in the workplace?

HIV is an *episodic* disability, meaning that people living with HIV can have periods of good health and periods of illness. Because the effects of HIV on an employee may change over time, as with other health conditions, the specific ways in which an employee needs to be accommodated could also change over time. Accommodation will always vary according to a person’s unique needs, which must be considered, assessed and accommodated on an individual basis.

Some examples of reasonable accommodations include, but are not limited to:

- physical modification of a work site (e.g., installing a ramp to improve accessibility, altering the lighting for vision impairments);
- job modifications or reassignment to less demanding duties;
- ergonomic assessment and purchase of assistive devices (e.g., lumbar support for chair, voice-activated software) or modifications to existing equipment;
- modifying performance standards or productivity targets;
- flexible work schedule (e.g., to permit an employee to shift from full-time to part-time work and back again to accommodate periods of illness and wellness);
- additional time off to attend medical appointments;
- extra breaks or altering break schedules (e.g., to allow employees to take their medications at prescribed times or to deal with the side effects of medication);
- job sharing; and
- leaves of absence.

3. Can my employer require me to disclose my HIV or other medical diagnosis if I request accommodation at work?

Generally, employees have a right to keep their medical information confidential. You do not need to disclose your specific medical condition(s) to obtain accommodation in employment. However, you do have to tell your employer of the *need* for accommodation. You should provide relevant and appropriate information, explaining the limitations and requirements that you have (often related to the symptoms of your illness or side effects from medications) in order to fulfill the essential duties of your job.

When considering a request for accommodation, your employer is entitled to ask for independent medical documentation (e.g., a doctor's note or a more detailed medical exam) that confirms that you have a disability *and* describes the limitations it places on your ability

to do your job. This documentation does not necessarily have to reveal the underlying illness or condition. However, if you don't provide adequate medical information, your employer may not be required to accommodate your needs. We don't know of any reported decisions from courts or tribunals in which an employee has been required to disclose his or her HIV status as a condition of accommodation.

If you choose to disclose that you have HIV, your employer must keep this information confidential. Legally, your employer cannot disclose information about your HIV status or other medical information to third parties such as your co-workers or other employers without your consent. For more information, see "**Disclosure at work**" in this series.

4. How should I make a request for accommodation?

In order to request accommodation in the workplace, you must disclose that you have a disability and inform your employer of your needs and relevant restrictions or limitations.

If you need accommodation in order to continue working or to return to work, you have a duty to cooperate with your employer and to facilitate and accept reasonable accommodation.

This might entail:

- cooperating to obtain necessary information (e.g., medical or other expert opinions);
- participating in discussions about solutions;
- helping to develop an accommodation plan; and
- working with the employer on an ongoing basis to manage and monitor the accommodation process.

5. What does my employer have to do if I request some accommodation?

It's up to you whether you disclose your HIV status to your employer. But your employer should respect your right to privacy and should request only the information that is required to determine how it can reasonably accommodate you.

For example, your employer should only request medical documentation that is relevant to your ability to continue working as well as any steps required to accommodate you or to protect your health and the health of co-workers or other people with whom you have contact. Your employer should make these requirements clear when requesting documentation from your health care provider. If it is not made clear, and you don't want your employer to know you have HIV, you should make this known to whichever doctor or other health professional is providing the information. Whatever health information is disclosed, your employer is legally obliged to keep it confidential.

When reviewing a request for accommodation, an employer should separate the *essential duties* of the job from the non-essential duties of the job. Only the essential duties of the job should be considered in determining what accommodation is necessary, and whether making that accommodation would impose "undue hardship" on the employer.

Your employer cannot refuse to accommodate you without legitimate, or *bona fide* ("good faith"), reasons. Should the employer claim that the accommodation you've requested imposes "undue hardship," then the employer is required to prove that this hardship is real, measurable and significant.

An employer is also expected to:

- deal with your request for accommodation in good faith and in a timely manner;
- discuss with you the purpose and essential functions of your job and the accommodation you require;
- obtain expert advice or opinion, where necessary;
- identify potential accommodation options and assess whether they would allow you to perform the job optimally;
- identify any costs, benefits or detriments;
- develop an accommodation plan and agreement with you;
- manage and monitor that plan to ensure it's being applied correctly; and
- promote an inclusive and supportive workplace in relation to people living with episodic disabilities and their accommodation needs.

HIV is an *episodic* disability, meaning that people living with HIV can have periods of good health and periods of illness. Accommodation will vary according to a person's unique needs, which must be considered, assessed and accommodated on an individual basis.

6. If I belong to a trade union, can it help me with my request for accommodation?

Yes. In a unionized workplace, the union negotiates a collective agreement with the employer to help protect employees, including against unfair treatment. Those agreements include the protections against discrimination set out in the applicable human rights code, including the employer's duty to provide reasonable accommodation for employees with disabilities.

If you need accommodation in order to work, your union can help by supporting this

request. If the employer discriminates by refusing to provide reasonable accommodation, the union can file a grievance on your behalf under the collective agreement. The union is also under a duty not to discriminate and to agree to reasonable measures by the employer to accommodate an employee with a disability, unless this would impose undue hardship on the union and its members.

7. When could my request for accommodation create "undue hardship" for my employer?

Your employer is required to accommodate a request for accommodation unless it would create "undue hardship" for the employer. There is no precise legal definition of what this means, and the criteria for assessing it vary between federal and provincial laws and between provinces and territories. Therefore, it is important to consult with the appropriate federal or provincial human rights office in your location to determine the correct interpretation for your jurisdiction.

- the health and safety of the employee, co-workers and the public;
- the impact on other employees, including employee morale; and
- any disruption of the collective agreement.

An arbitrator, tribunal or court assessing cost as an undue hardship will require your employer to provide evidence showing that the financial cost is too high. It may consider a variety of factors such as the size of the company, the ease with which the workforce and facilities can be adapted to the circumstances, the length of time accommodation is needed, and the prevailing economic climate.

Where the accommodation poses a *risk to the health or safety* of the employee, co-workers or the public, undue hardship will generally be accepted, although arbitrators, tribunals and courts have used different approaches to assessing the level of risk. With respect to the impact of any accommodation on the *morale of other employees*, the Supreme Court of Canada has stated that only employee objections based on well-grounded concerns about their rights should be considered; objections based on "attitudes inconsistent with human rights" are irrelevant to the determination of undue hardship. Similarly, provincial human rights bodies such as the Ontario Human Rights Commission have stated that it is always discriminatory for an employer to claim that other employees or customers would object to hiring a person who is HIV-positive.

Finally, in some cases employers have successfully argued that a substantial departure from key terms of a *collective agreement* has a disruptive effect on the morale of other employees or unduly impairs normal business operations, thereby causing undue hardship. However, as noted above, where the rules in the collective agreement themselves have a discriminatory effect, it will be difficult to claim that breaching terms of the collective agreement will result in undue hardship.

In order to claim undue hardship, your employer has the burden of proof. The evidence required to prove undue hardship must be objective, real, direct, and in the case of cost, quantifiable. This means your employer must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship.

You have a right to work free from discrimination as long as your health allows you to perform the essential duties of the job, after accommodation has been provided. Every employer has a legal duty to accommodate you, short of "undue hardship."

Each situation should be assessed individually and according to the criteria for the relevant jurisdiction. However, here are some factors commonly considered in assessing whether an accommodation would cause undue hardship to the employer:

- the cost of the measure(s) required;
- the nature, size and scope of the employer;
- whether the workforce and facilities are interchangeable;
- the degree to which the accommodation measures would interfere in the operation of the employer's business, and the overall economic climate;

The Canadian Human Rights Commission has affirmed in its *Policy on HIV/AIDS* (2010):

“As a result of new drugs and forms of intervention, people with HIV infection are now able to continue productive lives for many years. If individuals with the requisite workplace accommodation are able to continue to work they should be allowed to do so. Any decision made by an organization relying on health and safety considerations to exclude a person must be based on an individual assessment supported by authoritative and up-to-date medical and scientific information.”

8. What can I do if I think I have been unfairly treated by being denied accommodation?

If you think you have been discriminated against by a government employer, one remedy is to initiate legal proceedings before a court alleging a breach of your constitutional right to equality under the *Canadian Charter of Rights and Freedoms*. However, court proceedings are expensive, complex and lengthy.

Whether you work for a public sector or private sector employer, the primary remedy is to pursue a complaint under the applicable human rights statute, whether federal or provincial/territorial. In most jurisdictions, the relevant human rights commission receives and investigates the complaint, and also undertakes mediation efforts between the person alleging

discrimination and the person or entity accused of discrimination. If this does not succeed, then the commission takes the case before the human rights tribunal on your behalf. In some jurisdictions (such as British Columbia and Ontario), you can file your complaint directly with the tribunal.

For unionized employees, another option is to have the union file a grievance on the employee's behalf, alleging a breach of the collective agreement with the employer.

For more information, see **“Remedies for discrimination and privacy violations in the workplace”** in this series.

For further information

- AIDS Calgary, “HIV/AIDS and Employer Rights/Responsibilities,” Briefing Document (January 2008).
On-line: www.aidscalgary.org
- Canadian Human Rights Commission, “The Importance of Accommodation” (last updated 2011).
On-line: www.chrc-ccdp.ca
- Episodic Disabilities Employment Network, “Workplace Accommodation” (undated).
On-line: edencanada.ca
- Interagency Coalition on AIDS and Development, “HIV/AIDS and the Duty to Accommodate,” *HIV/AIDS and the Workplace: Information Sheets for PHAs* (2009).
On-line: www.icad-cisd.com