

# Duty to Accommodate Physical and Mental Disability Guidelines

Nova Scotia Public Service Commission

## Duty to Accommodate Physical and Mental Disability Guidelines

This document has been developed to provide guidance to employees and managers when requesting and/or reviewing requests to provide workplace accommodations for civil service employees and other direct employees working for the Province. These Guidelines are intended to assist the parties in understanding accommodation principles and processes and to support government's goal to be a diverse workplace that promotes diversity and inclusion.

Copies of this document are available on the Nova Scotia Public Service Commission's website at: <http://novascotia.ca/psc/about/overview/publicationsPolicies/>

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## Overview

The 'duty to accommodate to the point of undue hardship' is a legal requirement arising from human rights case law in Canada. Employers may be required to accommodate various protected characteristics of their employees (disability, religion, family status, gender identity, etc.). However, these Guidelines relate specifically to the accommodation of physical and mental disabilities.

The Province of Nova Scotia has a duty to accommodate its employees when, due to a disability, an employee's ability to do their job has been impaired, temporarily or permanently. The Province of Nova Scotia is committed to working with employees in identifying and providing safe, timely and reasonable accommodation measures to the point of undue hardship.

Accommodation measures are individualized and designed or determined on a case-by-case basis depending upon the employee's documented medical limitations and restrictions as well as job demands. Accommodation options for employees with a disability may differ depending on the situation and circumstances. To demonstrate that the duty to accommodate has been met, the Employer must be able to document the steps it has taken and possibilities it has considered in responding to an accommodation request.

Accommodation is a tripartite (three party) process involving the Employer, the employee and, where applicable, the Union. Unions and Union Representatives have a responsibility to work collaboratively with the Employer and the employee in identifying and accepting reasonable accommodation measures; as part of this responsibility, the Employer will ensure that changes to a bargaining unit employee's job duties, as a result of a request for an accommodation, are done in consultation with the Union.

## Objectives

These guidelines seek to:

- Inform directors, managers and supervisors of their responsibilities with respect to accommodation;
- Inform employees of their responsibilities with respect to accommodation;
- Assist in determining the abilities and/or work restrictions in order to assess accommodation options;
- Assists in implementing accommodation measures that support the needs of the employee requiring accommodation while causing the least disruption to the operations as possible.
- Clarify the Employer, Employee and Union obligations in the accommodation process.

## Principles

- The accommodation process is one of open communication and all parties working together in good faith to try to find an accommodation.
- All parties involved in the accommodation process are responsible for respecting the individual's right to privacy and confidentiality while fulfilling their obligations regarding the duty to accommodate.
- All documents and information relating to an employee's medical condition and history are to be treated with the utmost confidentiality by all participants involved.
- The Employer will work to accommodate an employee in their own occupation and home department wherever possible.
- The employee has an obligation to cooperate in the process and accept an offer of accommodation that would be reasonable in all of the circumstances.
- A reasonable accommodation respects the dignity and ability of the employee.

# Definitions

## Accommodation Measures

Action(s) taken to accommodate to the point of undue hardship the temporary, long term or permanent disability of an employee so that they are able to perform part or all of their job function. In the context of these Guidelines, the accommodation seeks to eliminate barriers in the workplace, allowing an employee, with a physical or mental disability, the opportunity to apply their skills and abilities in the workplace.

## Department

Any government department, office or public service entity listed in Category 1 of Appendix I-A, Management Manual 100, Chapter 1, Policy 1.2 Management Manuals Policy.  
(<http://novascotia.ca/treasuryboard/manuals/100MgmtGuide.htm>;  
<http://nslegislature.ca/legc/statutes/human%20rights.pdf>).

## Home Department

The department where an employee's 'base' or home position is located.

## Deputy Head

The deputy of the member of the Executive Council presiding over a department and all others whom the Governor in Council from time to time designates as having the status of deputy head.

## Disability

A physical or mental disability as defined in the Nova Scotia Human Rights Act.

## Duty to Accommodate

The "duty to accommodate to the point of undue hardship" is a legal requirement arising from human rights case law in Canada. Employers may be required to accommodate various protected characteristics of their employees (disability, religion, family status, gender identity, etc.). However, these Guidelines relate specifically to the accommodation of physical and mental disabilities.

## Employee

An employee as defined in the Civil Service Act; the Highway Workers' Collective Bargaining Act and any other person directly employed by the Province of Nova Scotia.

## Employer

The Province of Nova Scotia. In the context of these Guidelines, the Employer is all of government and includes the employee's manager, other hiring managers and Public Service Commission representatives including Human Resources Consultants (HR Consultants), (Senior) Corporate Employee Relations Consultants, Recruitment and Transition Unit employees and staff who perform ability case management.

## Medical Practitioner

Is usually a physician; however, in certain circumstances, also includes an occupational or physical therapist, nurse practitioner, nurse in charge of a community health clinic, psychologist or addictions counsellor.

## Undue Hardship

Occurs when all reasonable means of accommodation have been exhausted and only unreasonable or impracticable options remain which would create a substantial and unmanageable workplace burden for the Province of Nova Scotia and/or it is determined that the employee's safety would be impacted resulting in an unsuccessful return into the workplace. Such a burden may include significant, financial, operational and/or safety considerations. If challenged by a grievance or human rights complaint, the Employer has the burden of proving that an accommodation would result in undue hardship.

# Duty to Accommodate FAQs

## How is the duty to accommodate triggered?

An accommodation may be triggered in the following circumstances:

- A request from an employee, substantiated by medical information, is received by the Employer (the Employer can include the employee's manager, an HR representative and or a professional from the Ability Case Management unit and service provider);
- Observations or concerns by the Employer which necessitate a discussion with an employee and which identify the need for accommodation; the duty to accommodate is subsequently substantiated by medical information;
- Observations or concerns by the Union which prompts a discussion with an employee which identifies the need for accommodation; the duty to accommodate is subsequently substantiated by medical information;
- A recommendation from the Employer, based on medical information from an appropriate medical practitioner, which may include an independent medical practitioner, in collaboration with the employee and/or the Union.

Employees may be reluctant to share any information or ask for an accommodation for the following reasons:

- Fear of being singled out and treated differently than others in the work unit;
- Discomfort about asking a Manager or HR representative for help;
- Fear that telling a Manager or HR representative about a problem or asking for accommodation will have negative consequences, such as the employee losing their position, being refused future promotions or career benefits, being demoted, receiving fewer hours, or being humiliated by co-workers;
- Belief that the disability is not relevant to performance. For example, a person with a learning disability who has developed successful strategies for dealing with it may not wish to inform you of the disability;
- Concern that confidential and sensitive information will become common knowledge in the workplace;
- Embarrassment over admitting that accommodation is required; for example, due to the perceived stigma associated with mental disability or substance addiction.

Despite an employee's reluctance, the Employer is entitled to receive sufficient information to provide effective reasonable accommodation. Such information may include details relating to functional limitations and, when an employee's functional limitations are not readily apparent, a thorough assessment of their medical restrictions and limitations affecting job performance. Examples include disabilities pertaining to mental functioning, concentration or memory; disabilities pertaining to physical functioning (e.g. multiple sclerosis); and/or temporary disabilities, such as recovery from an injury or operation.

Employees are entitled to reasonable accommodation, which may not be their ideal or preferred accommodation. There may be instances where the employee is cleared to return to work off LTD and/or STI; however, due to the complexity involved in finding work, which meets the accommodation requirements (i.e.

specific limitations and restrictions), work is not immediately available. In these instances, while the employer actively searches for a reasonable accommodation, the employee may be required to remain at home, off pay. In these circumstances, Employee Benefits will be notified and will initiate contact to determine if the employee wishes to maintain and contribute to the extended benefit plans. The Employer will work quickly in all instances to minimize the negative impact of cessation of pay for the employee.

## How do I assess the request?

In order to determine whether the Employer has a duty to accommodate, the employee must submit medical information regarding their medical restrictions, limitations and requirements. The specific medical information may be submitted directly to the Human Resources Consultant (HR Consultant) and/or staff who perform ability case management who will provide the manager with information on the specific limitations, restrictions and requirements

Managers are not to assess medical accommodation requests on their own. The HR Consultant or Ability Case Management Consultant will consult with the (Senior) Corporate Employee Relations Consultant who will advise whether the medical information triggers the legal threshold requiring the duty to accommodate to the point of undue hardship, or if additional medical information is required. Once Employee Relations confirms the duty to accommodate exists, the Employer will begin to explore accommodation options.

Accommodation measures vary according to the medically substantiated limitations and restrictions of the employee and may be temporary, long term or permanent in nature. It is important to note that in searching for an accommodation, the Employer is seeking a reasonable accommodation, which may not be a 'perfect' accommodation. In simple terms, an employee has an obligation to cooperate in the process and accept an offer of accommodation that would be reasonable in all of the circumstances.

Accommodation can entail a number of solutions, including, but not limited to:

- Modifying appropriate aspects of an employee's job;
- Modifying hours of work;
- Gradual return to work schedule;
- Changing or modifying the work environment;
- Purchasing or modifying tools, equipment and aids;
- Searching for an alternate position (where the employee cannot be accommodated in their own position);
- Reallocating work duties within the work unit;
- Bundling duties;
- Changing an employee's place of work.

Managers will work with their HR Consultant and other PSC staff, the employee, medical practitioners and, where the employee is a member of a bargaining unit, the Union, in identifying and providing safe, timely and reasonable accommodation measures. A reasonable accommodation respects the dignity and ability of the employee.

The nature of the search for a reasonable accommodation and the number of meetings required is dependent on the accommodation required and the employee's circumstances.



## How do I implement the duty to accommodate?

Once an appropriate accommodation has been found, the manager, in consultation with the HR Consultant and Recruitment and Transition) will draft an Accommodation Plan. Generally, the employee and the employee's medical practitioner are involved in developing the Accommodation Plan. Other parties, such as the Nova Scotia Workers' Compensation Board, LTD service provider and the Union, may also be involved, where appropriate.

The Accommodation Plan may include:

- Duration of the accommodation, i.e. whether it is a temporary, short term or permanent accommodation (this could be subject to change/modification; the employer's duty to accommodate has no end date, so if one accommodation does not work out that is not necessarily result in the end of the duty);
- Payroll information (e.g. part LTD coverage, #hours worked at current rate);
- Adjustment to the hours of work and/or the duties to be performed, i.e. ease back/work hardening component (phased in hours of work or duties);
- Limitations and/or restrictions being accommodated;
- Specific details of the accommodation;
- When and how the employee, the manager and the medical practitioner will monitor the employee's progress;
- When required, identify a schedule to re-evaluate and make appropriate adjustments to the accommodation;
- Timelines, including whether a particular accommodation is offered for a trial period;
- Relevant signature blocks (manager, employee, etc.).

Once the Accommodation Plan has been finalized, the HR Consultant will obtain all relevant signatures. The original signed Accommodation Plan will be placed on the employee's personnel file and copies will be distributed to the signatories, as well as the Recruitment and Transition Unit and the Union, where applicable.

The home department is required to pay any costs associated with the implementation of accommodation measures.

## What if the Employer cannot accommodate the employee in their current role?

The search for an appropriate accommodation will be expanded within the department to include placement in a different position and/or classification.

Prior to placement in another classification, best efforts are made to place the employee in a position at their current classification and pay rate, however, this is not always possible. The HR Consultant will consult with Employee Relations and the Recruitment and Transition Unit when the search for a reasonable accommodation extends beyond the employee's own occupation and/or home department.

## **What if the Employer cannot find a placement in a different position and/or classification in the home department?**

If an appropriate placement in a different position and/or classification cannot be made within the employee's home department the HR Consultant will work with the department to document, in detail, the steps taken and the rationale for not being able to place the employee within the home department. This will include a list of positions considered and the reasons why those positions were not suitable accommodation. This information will be discussed with the Recruitment and Transition Unit.

Where the Recruitment and Transition Unit determines that a reasonable placement is not available in the home department, the Recruitment and Transition Unit will be the lead and case manager in the search for a vacancy in a different position and/or classification in other departments across government. However, the HR Consultant remains the key contact for the employee and the manager throughout the process. The Recruitment and Transition Unit and/or Employee Relations representative will consult with the Union as appropriate.

The HR Consultant and staff in the Recruitment and Transition Unit will monitor all job vacancies prior to positions being advertised to determine if a potential accommodation placement is available and, if not, the reasons those positions were not suitable accommodation. If the employee's transferrable skills match those required for the position and the work can be performed in a manner consistent with the documented medical restrictions and limitations, the employee will meet with the hiring manager and be assessed for the position. If a suitable match is determined, the employee will be accommodated in the vacant position.

## **What if the Recruitment and Transition Unit cannot find a reasonable placement in a different position and/or classification in any government department?**

Where a reasonable placement into a vacant position cannot be achieved, the Recruitment and Transition Unit will explore other options, first with the employee's home department, and where this is not feasible, with any government department. Other options include the bundling of work duties between positions within a department, or within several departments, where it is operationally feasible and can result in meaningful work being created for the department(s) and for the employee.

For placement in bargaining unit positions, the agreement of the Union is required prior to confirming a placement.

## **When has the Duty to Accommodate been met?**

The duty to accommodate is met when:

- An employee is successfully accommodated/placed;
- An employee does not accept an offer of accommodation that would be reasonable in all of the circumstances;
- An employee does not fulfill their duty to participate and cooperate in the accommodation process, including failure to provide the appropriate medical information outlining the limitations, restrictions and requirements as they relate to the position and updated medical restrictions and limitations; or,
- The Employer cannot provide a reasonable accommodation without "undue hardship."

## What is undue hardship?

Undue hardship occurs when an accommodation would create a substantial and unmanageable workplace burden for the Employer. Undue hardship is assessed on a case-by-case basis, as the facts of each situation are different. Operational costs and financial impact must be substantial in order to declare an undue hardship. Accommodation measures must not pose a risk to public safety, the workplace, the employee being accommodated and other employees within the workplace.

The following examples do not meet the test of undue hardship:

- Reasonable absences/leaves;
- A minor disruption to a collective agreement provision (requires Union agreement);
- Minor building or office renovations;
- Operational inconvenience;

Accommodation does not require the creation of a job for which there is no need. Rather, it involves finding productive, meaningful work that can be performed by the employee and which meets the employee's medical limitations/restrictions and requirements as well as the business needs of the department. It is not about "make-work" projects.

## When has the Employer met the duty to accommodate?

Managers are not responsible for determining when the Employer has met its duty to accommodate to the point of undue hardship. The Recruitment and Transition Unit will provide all relevant documentation to Employee Relations and request a review in this regard. Employee Relations, in consultation with Legal Services, will make a determination as to whether the Employer has met its duty to accommodate to the point of undue hardship.

## General Considerations

The Duty to Accommodate does not preclude management's right to ask for medical substantiation of sick leave at any time where there is a demonstrated and reasonable basis for doing so. Absence reporting procedures for both the employee and the Employer are outlined in the Nova Scotia Attendance Management Policy and continue to apply.

The Nova Scotia Attendance Management Policy found in the Management Manual 500, the various collective agreements and the Civil Service Act and regulations outline the Employer's requirements regarding proof of illness, sick leave application, examination by an alternate licensed healthcare practitioner, ongoing treatments, etc. The applicable provisions continue to apply.

In general, though, keep the following in mind:

- The information Managers seek must focus on the functional limitations and safety issues in order to determine the appropriate accommodation (**Managers are not entitled to know the exact diagnosis**);
- Managers and the Human Resources professionals must respect the confidentiality and sensitivity of the information provided by the employee and the employee's medical practitioner;
- The HR Consultant or staff performing ability case management will work with the employee and the manager to receive information from functional specialists or professionals, including a description of the limitations and an estimate of how long the employee will need to be accommodated;
- Only the information that is necessary for determining the accommodation should be shared, and only with the people who need to know. When gathering and sharing information, all parties involved in the accommodation process must adhere to privacy legislation;
- Employees are required to cooperate throughout the accommodation process;
- All steps taken in the accommodation process are documented and all accommodations, whether they involve short term duty changes or longer term placements into new positions and/or new departments, are confirmed in writing and stored on the employee's file.
- Managers in receipt of medical information are required to forward the information, without making copies, to the HR Consultant or staff performing ability case management. All medical information is to be held in accordance with STAR/STOR standards and access is tightly restricted. If there is no designated staff performing ability case management, an employee's medical information is placed in a separate file in a locked cabinet, or sealed in an envelope, prior to being placed on the employee's personnel file. Generally, it is the Accommodation Plan, outlining limitations/restrictions and requirements, which can be accessed by the HR Consultant and you, as the employee's manager.

# Roles and Responsibilities

## Deputy Heads

- Ensure all departments comply with government's duty to accommodate;
- Ensure administration and implementation of these Guidelines in their departments and agencies;
- Ensure the Employer's duty to accommodate is met and carried out in a timely, safe, reasonable and dignified manner;
- Approve accommodation measures that have been appropriately vetted through the process set out by these Guidelines;
- Ensure employees are aware of the Duty to Accommodate Physical and Mental Disability Guidelines.

## Public Service Commission

- Evaluate the effectiveness of these Guidelines;
- Ensure appropriate communication of these Guidelines;
- Develop a process document for PSC staff to ensure role clarity throughout the process;
- Provide support, direction, training and advice on the mandate of these Guidelines and procedural issues;
- Provide advice on the Employer's duty to accommodate and appropriate accommodation measures;
- Work collaboratively with employees and department managers in all aspects of reasonable accommodation measures;
- Ensure documentation is in place in regard to all aspects of the accommodation process;
- Consult with the Union where appropriate;
- Facilitate the search for, and case management of, accommodations including outside an employee's home department or own occupation;
- Promote the acceptance of reasonable accommodation measures within areas of responsibility;
- Assist the hiring manager to effectively monitor the return to work/accommodation placement and assist in resolving issues, if any, throughout the return to work/placement.

## Managers/Supervisors

- Implement the accommodation process for employees under their supervision;
- Work collaboratively with PSC and employees in identifying and accepting reasonable accommodation measures.
- Provide support to the employee throughout the accommodation and placement process, including ensuring the employee is reintegrated and/or welcomed into the new position. More specifically, ensuring that coworkers are respectful, supportive and balance inclusion with privacy for the employee.

## Employees

- Advise their Employer of any medical restrictions/limitations and requirements related to disability which affect their ability to perform their job;
- Respond in a timely manner to Employer requests for appropriate medical information in regard to restrictions, limitations and prognosis as well as to provide an up-to-date resume and skills inventory when required;
- Work collaboratively with the Employer in identifying reasonable accommodation measures;
- Accept an offer of accommodation that would be reasonable in all of the circumstances

## References

- Nova Scotia Human Rights Act
- Nova Scotia Employment Equity Policy
- Nova Scotia Visual Display Terminal Operations Policy
- Nova Scotia Attendance Management Policy
- Nova Scotia Healthy Workplace Policy
- Nova Scotia Occupation Health and Safety Policy
- Nova Scotia HIV/AIDS in the Work Place Policy
- Nova Scotia Respectful Workplace Policy
- Nova Scotia Language Interpreter Services Policy for Deaf and Hard-of-Hearing Nova Scotians
- Civil Service Master Agreement – NSGEU
- Highway Workers Collective Agreement – CUPE Local 1867