



## FREQUENTLY ASKED QUESTIONS

### SICK, INJURED, EMPLOYEES WITH DISABILITIES

## INTRODUCTION

The Saskatchewan Human Rights Commission receives hundreds of inquiries per year from businesses, government agencies, service providers, and other employers. Most of the inquiries are about employees who are sick, injured, or have a disability.

Offering businesses the information they need to avoid Code infractions is an important outreach for the Commission.

*Please note that this document provides general information only. This is NOT legal advice. We hope you find it useful but encourage you to seek legal advice where applicable.*

## NEED HELP? CONTACT US

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## BACKGROUND INFORMATION

The Saskatchewan Human Rights Code prohibits employers from discriminating against employees on the basis of “prohibited grounds.” Prohibited grounds are protected personal or individual characteristics.

Allegations of discrimination may result in a human rights complaint against your business. Resolving a complaint might involve pre-complaint discussions with an intake officer, mediation, or directed mediation. Employers who receive formal complaints will be provided with the opportunity to explain their decisions and actions.

The Saskatchewan Human Rights Code, 2018 requires employers to accommodate the needs of employees who are sick, injured, or have a disability to the point of undue hardship. Undue hardship generally refers to an intolerable financial cost, or a disruption to business, or interference with the rights of others. Employers must investigate whether accommodation is possible, but are not required to provide an accommodation that would cause undue hardship.

In general, employers should be cautious when laying-off or terminating the employment of someone who is away on sick leave or disability leave. Prior to taking any action, an employer may wish to seek legal advice regarding the possible repercussions. If you are unsure, or have questions, please contact our business helpline for information.



Employees have right to “reasonable” accommodation. They also have responsibilities:

- They have an obligation to inform an employer of their need for accommodation, where possible and practical, and to assist in securing an appropriate accommodation.
- The employee should not turn down any reasonable proposal for accommodation that is offered. Accommodation may be a continuum of measures and not a perfect or final solution.

Employees are obligated to provide necessary detailed medical or other information that justifies the request for accommodation. This could include undertaking a functional assessment. Employees must co-operate with rehabilitation efforts and should work within medical restrictions.

The employee must accept the rate of pay for the type of work performed. Benefits may also be adjusted to reflect time worked.

An employee may not likely displace another employee to achieve accommodation.

Excessive absenteeism and the prospects of returning to work or not may be considered by the employer in determining the on-going duty to accommodate, as may safety considerations.



## FREQUENTLY ASKED QUESTIONS

**Q: We have an employee who is sick and away from work. The employee has only worked for us for a couple of days, far less than the three-month “probation” period under the Saskatchewan Employment Act. Can we terminate the employee?**

A: Under the Code, an employer must not discriminate against an employee because of a disability (Section 16). There is no minimum employment duration or service period for this legal requirement – an employee receives this protection at all times during the employment relationship.

**Q: The employee submitted a doctor’s note, but it doesn’t say anything about a disability or even what the illness is. How do I know if my employee has a disability?**

A: In the Code “disability” is defined broadly. It means “any degree of physical disability, infirmity, malformation or disfigurement.”

It can also mean a mental disorder, or an intellectual, cognitive or learning disability.

Some examples include:

- epilepsy;
- any degree of paralysis;
- amputation;
- lack of physical co-ordination;
- blindness or visual impediment;
- deafness or hearing impediment;
- muteness or speech impediment;
- or physical reliance on a service animal, wheelchair or other remedial appliance or device.

Disabilities are normally assessed according to their severity and duration, so that minor ailments are not normally classified as a disability (e.g., the “common cold” or “flu”). But “disability” can mean other common medical conditions, such as diabetes, cancers, chronic muscle or joint problems, depression, and anxiety disorders.

**Q: My employee is sick or has a disability. What kind of medical information can I request from my employee?**

A: For the purposes of assessing an employee’s accommodation request, an employer is entitled to clear and credible information that supports the request. Often, the employee’s doctor or other medical professional will provide a written description of the limitations or restrictions for the employee (e.g., “no lifting of an object that weighs more than 10 kg over shoulder height”). The documentation might offer a prognosis for recovery, or suggestions for a gradual return-to-work (e.g., “the patient can work 4 hours a day this week, returning to full-time hours the week following”).

An employer may also need to know information about the possible impact of medication on an employee’s work performance or abilities. An employer is not entitled to a diagnosis.



**Q: My employee has given me written authorization to communicate directly with his or her doctor. Is that okay?**

A: Yes. An employee may prohibit an employer and/or doctor from speaking directly about the details of a medical situation. However, if an employee chooses to provide that authorization, an employer can obtain information directly from their doctor.

**Q: My employee doesn't want to provide any medical information. What can I do?**

A: An employee requesting accommodation on the basis of a disability is required to participate in the accommodation process. This normally includes providing the employer information from a physician or specialist describing their needs. However, there could be situations when such information is unavailable, or the employee is unresponsive. Employers must make all reasonable efforts to discover the reasons for the employee's absence or behaviour before escalating a request for information, or dismissing the employee.

**Q: I have an employee who has been away sick for more than 12 weeks. Is it legal to terminate their employment?**

A: There is no maximum amount of time that an employee can be away from work due to disability. In some cases, an employee may be away from work due to disability for several years and still be expected to return to work.

**Q: My employee is off work due to a non-employment related injury. Can I terminate them now?**

A: While the Worker's Compensation Board only covers employees who are sick or injured in the workplace, the Code applies to all disabilities whether acquired at work or elsewhere. This includes disabilities acquired by the employee before they began working for a company or organization.

**Q: My employee is seeking an accommodation that does not seem reasonable, but claims it is the law that I give in to their request. Is this correct?**

A: Employers are required to accommodate an employee for their disability, up to the point of undue hardship. Furthermore, the requested accommodation must arise from a need related to the disability. If it is not obvious how a requested accommodation will meet the needs of an employee's disability, the employer may inquire further.

**Q: What are the Employer's rights?**

A: In general, an employer has broad discretion in assigning work or setting the terms of employment, including scheduling and salary. However, the reasons for employer decisions must not be discriminatory according to the Code, and must adhere to other legal requirements under the Employment Act and other pertinent laws and rules. Specifically, an employer is prohibited from discriminating against an employee on the basis of a prohibited ground.

If an employee is requesting an accommodation for reasons related to a prohibited ground (such as disability or religion), an employer is entitled to reasonable information that supports the accommodation request.

**Q: I've been informed that the insurance provider has denied my employee disability benefits, or these benefits have now been cancelled. Can I now safely terminate the employee?**

A: No. An employer must not rely on the insurance provider's actions. Employers must seek to determine for themselves whether or not an employee is able to return to work. In this situation, an employer should contact the employee and discuss the situation.



**Q: Can I terminate an employee who I believe is using drugs or alcohol?**

A: In some cases, an employee who is using drugs or alcohol inappropriately is addicted, and this addiction may be classified as a disability. As with other disabilities, employees who suffer alcoholism or other drug addictions may need to be accommodated. As such, an employer should seek to gather more information from the employee before dismissing her or him. Some workplaces will have stringent alcohol and drug policies because of the safety-sensitive nature of their work. Employees who work in an impaired state may be a danger to themselves and others, and employers have a responsibility to provide a safe work environment.

**Q: How long do I have to keep a sick/disabled employee's job for them? My employee has been away from work for more than 1/2/3/ or more years?**

A: Under human rights legislation, there is no limit to how long an employee may be kept as an employee while away on sick or disability leave.

**Q: We have an employee who is away on sick/disability leave. We have been paying for their health benefit premiums since they have been gone. Can we stop paying for them now?**

A: Every employer will have their own policy for how and when they pay for health benefit premiums. Employers are not under any obligation to pay for these premiums, except that employers should not discriminate against employees with disabilities. Proper notice should be given to employees affected by changes in such policies. Where an employer ceases to pay for the premiums for a benefit plan due to an employee leave of absence, the employee is entitled to continue participating in that benefit plan so long as they pay for the premiums. Employer's should inform employees of this option. *(See subsection 2-48(2) of Saskatchewan Employment Act.)*

**Q: We hired an employee who we believe purposely misled us during the hiring process, neglecting to disclose a disability that will seriously impact their ability to do the job we hired them for. Are we required to accommodate them, or can we terminate their employment?**

A: Employees are generally not required to disclose a disability during the hiring process. In some cases, individuals may choose not to share this information due to concerns about stigma or discrimination. However, once an accommodation need becomes apparent in the workplace, the employer's duty to accommodate applies regardless of whether the disability was disclosed earlier.

If the employee can perform the job with reasonable accommodation, the employer must provide that accommodation up to the point of undue hardship. Termination should only be considered if the employee's limitations make it impossible to meet a bona fide occupational requirement—an essential job duty that cannot be modified without causing undue hardship. Even then, employers should explore whether the employee can be accommodated in a modified role or an alternative position.