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Section  
Early and Safe Return to Work

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Subject  
**Human Rights Legislation and Accommodation in the ESRTW/LMR Process**

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## Law

Both the Ontario *Human Rights Code* (the Code) and the *Canadian Human Rights Act* (CHRA) prohibit discrimination in relation to employment, and in relation to the provision of goods and services, on the ground of disability, among other grounds.

The Code applies to all agencies and levels of the Government of Ontario, including the WSIB, and to all provincially regulated businesses across Ontario including all Labour Market Re-entry (LMR) service providers and all provincially regulated employers and unions.

The Code provides that, in the event of a conflict between the Code and other provincial legislation (such as the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act*), the Code prevails unless the other legislation provides otherwise.

The CHRA applies to all agencies and levels of the Government of Canada as well as to all federally regulated employers and unions.

For a complete listing of the prohibited grounds of discrimination specific to both the Code and the CHRA see **Appendix 1** at the end of this document.

## Policy

In accordance with both the Code and the CHRA, the WSIB provides benefits and services to injured workers equally and without discrimination. When circumstances require, the WSIB also educates employers, workers and unions about their human rights obligations in relation to work-related injuries/diseases.

Although the WSIB has no authority to enforce provincial or federal human rights statutes or policies, the WSIB encourages compliance with such obligations wherever possible.

### NOTE

For ease of use, this document uses the term “the Code” when referring to applicable human rights legislation. Where the context requires, however, the term CHRA should be substituted.

## Guidelines

### Definitions under the Code

**Disability**—the Code defines the term “disability” to mean

- any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness
- a condition of mental impairment or a developmental disability

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- a learning disability, or 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* or the *Workers' Compensation Act* (the Act).

For the applicable CHRA definition of disability, see **Appendix 1**.

**Accommodation**—under the Code, in the context of employment, “accommodation” refers to the duty placed on all employers to modify the work or the workplace to accommodate the needs of disabled persons to the extent of undue hardship. This duty co-exists with the duty to accommodate contained in the re-employment provisions of the Act (see 19-04-07, *Accommodating Workers*).

In the context of unionized workplaces, accommodation may require employers and unions to adapt or modify the operation of a collective agreement if necessary to satisfy a legitimate accommodation request.

The duty to accommodate also applies to the WSIB, and may require the WSIB in certain circumstances to

- adapt or modify early and safe return to work (ESRTW)/LMR plans or programs, and/or
- provide financial assistance towards the cost of workplace modifications or assistive devices that would allow a disabled worker to return to suitable work.

### **Disability protection under the Code and the Ontario Human Rights Commission's policy**

The Code guarantees equal treatment regarding employment opportunities to any person with a disability, whether such disability is work- or non-work-related.

According to the Code, if a person with a disability requires accommodation to perform the essential duties of a job, the employer **must** provide accommodation unless to do so would cause the employer **undue hardship**. Unions may have separate and distinct accommodation duties, and generally may not rely on the terms of a collective bargaining agreement to hinder or interfere with the legitimate accommodation requirements of disabled workers.

### **Accommodation requests**

According to the Ontario Human Rights Commission's (OHRC's) *Policy and Guidelines on Disability and the Duty to Accommodate* (OHRC policy), a person with a disability is not required to reveal the disability. However, if a person with a disability requests accommodation, everyone involved, including the employer, union, and the disabled person, is required to co-operate by

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- sharing information, and
- actively seeking solutions that will make the accommodation process a success.

The most appropriate and successful accommodation

- respects the dignity of the person with a disability
- meets individual needs (each case is unique)
- promotes integration and full participation in the workplace
- ensures confidentiality, and
- allows the person with a disability to perform a useful and productive job for the employer.

Accommodation may require

- job restructuring
  - re-assignment to positions that become available
  - retraining for alternative positions
  - combining or removing job duties
  - modifications to facilities and/or workstations, or
  - assistive devices (see 19-03-07, Workplace Modifications and Assistive Devices)
- as long as it does not constitute undue hardship for the employer.

### **Undue hardship**

When determining what constitutes undue hardship, the Code provides that consideration is given to

- the cost of accommodation
- the health and safety needs of employees and/or customers, and
- any outside sources of funding that may be available to the employer.

### **Return to work**

The Code protects persons who return to work after a disability-related absence (either work- or non-work-related), or after an absence related to another protected ground listed in the Code (e.g., family status).

According to the OHRC's policy, workers who are returning to work generally

- have the right to return to their pre-disability job, and
- can insist on co-operation between their employers and their unions in relation to their accommodation requirements.

Whenever possible, a worker who is returning to work must be given the opportunity to prove his or her ability to perform the essential duties of the pre-disability job.

If the worker is unable to perform the essential duties of the pre-disability job, according to the OHRC's policy, accommodation in the form of temporary or permanent alternative work may be required.

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### Further information

For further information on disability protection under the Code, including information on

- correctly handling particular return to work situations, and
  - how and when to access temporary and permanent alternative jobs,
- refer to the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*. This document contains the OHRC policy positions on disability, accommodation, and undue hardship, as well as practical guidance on compliance with the Code. This publication is available on the OHRC website at [www.ohrc.on.ca](http://www.ohrc.on.ca).

### Impact of the Code and OHRC policy on WSIB claims

Employers, workers, unions and the WSIB must have regard for an injured worker's rights under the Code when providing services or co-operating with each other in the worker's early and safe return to work (ESRTW), or in the provision of LMR services.

### NOTE

Where appropriate, the term "worker" includes surviving spouses.

The workplace parties and the WSIB must consider any work-related and pre-existing non-work-related disabilities/impairments a worker may have when

- identifying employment that is suitable and available
- selecting suitable employment or business (SEB) options
- determining entitlement to an LMR assessment, re-assessment, or plan, or
- conducting an LMR assessment, re-assessment, or preparing an LMR plan.

The WSIB does not disqualify a worker from receiving ESRTW or LMR services, nor can the WSIB withdraw ESRTW or LMR services, because a worker's pre-existing non-work-related disabilities makes participation in these services difficult.

### NOTE

The workplace parties are also required to have regard to any post-injury non-work-related disability/impairment a worker may suffer. In these circumstances the WSIB may provide accommodation support if to do so will allow the worker to successfully return to work with the accident employer (see 19-02-03, WSIB's Role in Return to Work), or complete his or her LMR plan. However, the wage loss associated with a work-related injury is calculated **only** on the basis of a worker's pre-existing and work-related limitations/functional abilities.

### Accommodation in ESRTW

Because all employers are subject to human rights legislation, during the ESRTW process the WSIB expects employers to

- comply with human rights legislation and associated policies
- make reasonable efforts to accommodate a worker's pre-existing and work-related disabilities/impairments in the absence of a re-employment obligation

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(see 19-02-02, Return to Work: Key Concepts, Definitions and Responsibilities), and

- where a re-employment obligation exists, accommodate the work or the workplace for the worker to the extent of undue hardship (see 19-04-07, Accommodating Workers).

If an employer was accommodating a stable non-work-related disability prior to the work-related injury/disease, the WSIB expects that this accommodation will continue after the injury/disease and be modified, if necessary, to take into account the work-related injury/disease. The WSIB also takes the position that for a post-injury job to be considered “suitable,” it has to take into account both pre-existing non-work-related disabilities as well as any work-related disabilities/impairments.

In collective agreement workplaces, during the ESRTW process the WSIB expects unions to

- co-operate with employers in the accommodation process, and
- consider how to adapt or modify the operation of specific provisions of the collective bargaining agreement where such provisions hinder or interfere with the legitimate accommodation requirements of injured workers.

**NOTE**

This policy provides a current snapshot of the basic legal requirements with respect to accommodation in unionized workplaces. However, because the law in this area is evolving, readers are encouraged to contact the relevant human rights commission for more complete and/or up to date information.

**Accommodation in LMR**

LMR providers and the WSIB must have regard for a worker’s rights under the Code when arranging for and providing LMR services.

The WSIB conducts an LMR assessment to determine whether a worker needs assistance to re-enter the labour market and reduce or eliminate the loss of earnings that may result from the work-related injury/disease (see 19-03-02, LMR Assessments). Such assistance may be provided through an LMR plan (see 19-03-04, Entitlement to LMR Plans).

To be in compliance with the Code, when conducting an LMR assessment or developing/implementing an LMR plan, the WSIB and LMR providers **must** consider all of a worker’s pre-existing and work-related disabilities/impairments, and must make every effort short of undue hardship to accommodate a worker’s participation in an LMR plan.

**Cost of treatment**

Accommodation required by the Code does not generally include payment for the treatment of a non-work-related disability. For non-Code related exceptions, see 17-03-04, Health Care for Non-Work-Related Conditions.

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## Accommodation examples

### Example 1 – accommodating a pre-existing non-work-related disability (ESRTW)

On January 15, Theresa, an auto parts delivery clerk, injured her left wrist and elbow in a work-related motor vehicle accident. Prior to the work-related accident, Theresa's employer had been accommodating Theresa's non-work-related lower back condition through modifications to her delivery vehicle, and through limitations on the weight of the parts that Theresa was required to deliver.

On February 1, Theresa's doctor indicated Theresa could return to suitable work as long as she had no use of the left arm. As Theresa was right hand dominant, Theresa's employer was able to find an alternative job as a customer service representative. While this job was suitable for Theresa's left arm condition, it did require prolonged walking and standing. Recognizing that the job may not be suitable for Theresa's non-work-related lower back condition, the employer contacts the claims adjudicator to ask whether the customer service job would be considered suitable by the WSIB.

Recognizing that Theresa's employer has an ongoing duty under the Code to accommodate her non-work-related lower back condition, the WSIB claims adjudicator informs the employer that before a job is considered suitable, it must take into account the clinical restrictions associated with both the pre-existing, non-work-related condition and the work-related injury/disease. Based on this information, the employer provides a mobile, height-adjustable chair which allows Theresa to comfortably perform her customer service duties.

### Example 2 – accommodating a pre-existing non-work-related disability (LMR)

In August, a bricklayer named Joseph suffered a serious work-related low back injury when a scaffold collapsed. He received health care and underwent various medical assessments until he reached maximum medical recovery (MMR) in December. Joseph's non-economic loss (NEL) benefit was assessed at 38%.

Due to the seriousness of his work-related back impairment, it was determined that Joseph was no longer able to work as a bricklayer. When Joseph first met with his LMR provider, he showed a keen interest in pursuing a particular SEB that was suitable for his back impairment but that required a two-year community college academic program. Tests conducted during the LMR assessment phase, however, showed that Joseph had a learning disability that would make it difficult for him to successfully complete the two-year academic program.

The SEB and LMR plan that Joseph and his LMR provider agreed upon is a three-year apprenticeship program that is appropriate and suitable for Joseph's work-related back impairment, as well as for his non-work-related learning disability.

### Example 3 – accommodating a post-accident non-work-related disability (LMR)

A worker named Nikolai has been granted a 20% non-economic loss (NEL) benefit for a work-related lower back injury. A SEB of Computer Hardware Technician has been selected and Nikolai has completed one year of a two year Community College program. During the second year of his LMR program, Nikolai develops a bacterial meningitis condition which significantly affects his hearing ability and consequently his ability to complete his LMR training.

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In these circumstances the WSIB decision-maker chooses to provide appropriate hearing aids to accommodate Nikolai's non-work-related hearing loss. The provision of hearing aids will allow Nikolai to successfully complete his LMR program and perform the duties of the associated SEB. The costs associated with the provision and/or maintenance of hearing aids are limited to the period of time during which Nikolai is attending his LMR program.

### **Employer cost relief**

In some cases, Schedule 1 employers may be entitled to cost relief in a claim because of the effect of pre-injury disabilities. For more information see 14-05-03, Second Injury and Enhancement Fund (SIEF).

### **Application date**

[Prospective date to be determined]

### **Document history**

New document.

## **References**

### **Legislative authority**

*Workplace Safety and Insurance Act, 1997, as amended*  
Sections 40, 41, 42, 43, 48, 102, 108, 159

*Workers' Compensation Act, R.S.O. 1990, as amended*  
Sections 37, 53, 54

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## Appendix 1

<b>Ontario Human Rights Code (The Code)</b>	<b>Canadian Human Rights Act (CHRA)</b>
<p>The Code guarantees to every person the right to equal treatment with respect to services, goods, facilities, occupancy of accommodation, contracts and employment without discrimination because of</p> <ul style="list-style-type: none"> <li>• race</li> <li>• ancestry</li> <li>• place of origin</li> <li>• colour</li> <li>• ethnic origin</li> <li>• citizenship</li> <li>• creed</li> <li>• sex</li> <li>• sexual orientation</li> <li>• age</li> <li>• marital status</li> <li>• same-sex partnership status</li> <li>• family status, or</li> <li>• disability.</li> </ul> <p>With respect to “employment,” the prohibited grounds of discrimination include “record of offences,” in addition to the grounds listed above.</p> <p>With respect to “occupancy of accommodation,” the prohibited grounds of discrimination include “the receipt of public assistance,” in addition to the grounds listed above.</p>	<p>The CHRA guarantees to every person the right to equal treatment with respect to the provision of goods, services, facilities or accommodation, or in matters related to employment, without discrimination because of</p> <ul style="list-style-type: none"> <li>• race</li> <li>• national or ethnic origin</li> <li>• colour</li> <li>• religion</li> <li>• age</li> <li>• sex</li> <li>• sexual orientation</li> <li>• marital status</li> <li>• family status</li> <li>• disability, or</li> <li>• conviction for which a pardon has been granted.</li> </ul> <p>The CHRA defines “disability” as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.”</p>