Obtaining and responding to

MEDICAL INFORMATION IN THE WORKPLACE

Alberta Human Rights Commission

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HUMAN RIGHTS GUIDE

This guide is produced by the Alberta Human Rights Commission (the Commission). If you have questions related to this guide, please contact the Commission.

This guide does not provide legal advice. Should you require legal advice, please consult legal counsel.

Introduction

This publication discusses medical information as it relates to human rights issues in the area of employment only. The Commission receives many inquiries from both employers and employees about medical information issues related to medical absences and an employee's ability to work. The Commission has developed this publication to help employers, employees, and medical professionals achieve good communication and reasonable workplace accommodations for employees.

In this document the term "medical information" is interpreted broadly. It refers to information coming from a medical professional and information that an employee chooses to share about their health.

Who will benefit from reading this publication?

Employers will find details on how to request and manage medical information related to employee absences and their ability to work.

Employees will find information about what documents they may be required to present to employers if they are absent from work for medical reasons, and what information an employer can request before allowing the employee to return to work (with or without accommodation).

Unions will find information about their role as employers and in providing support to members. They will learn what kind of medical information an employer can request from an employee.

Doctors will find a *Sample Medical Absence Form* and a *Sample Medical Ability to Work Form* that are easy to use and can be adapted for their practices, as well as other information about medical absence requirements. They will gain an understanding of what medical information an employer can request from them.

Organizations that provide employee benefits will also find this guide useful to assist in obtaining appropriate medical information for employees who are applying for benefits.

Employers, employees, unions, and doctors all play a role in gathering relevant medical information on an employee's ability to work.

- **Employers** play a key role in requesting relevant medical information.
- **Employees** and **unions** have a duty to provide information to support a medical absence or request for accommodation, and to respond to employers' requests for medical information.
- **Doctors** have a duty to respond to patient requests for medical information by releasing the information to a third party in a reasonable time frame.

Employers can request medical information to:

- Confirm that an employee's absence from work is due to medical reasons
- Decide whether an employee is fit to return to work after a medical absence
- Understand an employee's restrictions and limitations related to the job in order to provide appropriate accommodation
- Be aware of the type of accommodation(s) that would be reasonable for an employee or potential employee
- Decide whether an employee or potential employee's request for accommodation can be met without incurring undue hardship

In this publication you will find:

- Common questions about medical information in the workplace
- A *Sample Medical Absence Form*
- A *Sample Medical Ability to Work Form*
- Case law related to human rights and medical information in the workplace

For questions related to human rights matters, contact the Commission. For questions about privacy issues, contact the Office of the Information and Privacy Commissioner (OIPC). Inquiries regarding injuries at work should be directed to the Workers' Compensation Board (WCB). For other questions, see the **Related resources** section.

> The **Workers' Compensation Board – Alberta** (WCB) is mandated by law to make decisions about workers' compensation. WCB has specific medical forms, which apply only to WCB assessments. Employers have a duty to accommodate employees to the point of undue hardship even when employees are not approved for WCB benefits.

Under the *Alberta Human Rights Act* (the *Act*), an employer has a responsibility to consider information related to the employee's limitations, illness, injury, or disability and, in cooperation with the employee, assess options for accommodating them.

In order to establish a case for discrimination, the employee must establish the following:

1. They have a protected characteristic under the *Act*.
2. They experienced an adverse treatment. An adverse impact is a negative consequence. In the employment context, this involves assessing how a reasonable employer should treat an employee with a protected characteristic to ensure they can fully and equitably participate in the workplace.[1]
3. There is a connection between the protected characteristic and adverse treatment.

Once an employee establishes a case for discrimination, the onus shifts to the employer to demonstrate that they accommodated the employee to the point of undue hardship. Under the concept of reasonable accommodation, employers have a duty to do whatever is reasonably possible to accommodate persons with disabilities. The goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that does not cause the employer undue

[1] *Mitchell v Edmonton Public School Board,* 2023 AHRC 16 at para 21

hardship and ensures that the employee can work. The purpose of the duty to accommodate is to ensure that individuals who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.[2]

There will be situations where it is not possible to offer substantive accommodation without incurring undue hardship. In employment practices, a discriminatory practice will be considered reasonable and justifiable where the employer can show that they adopted the practice for a purpose that is rationally connected to the performance of the job, that the practice was adopted with an honest and good faith belief, and that the practice is reasonably necessary to accomplish the work-related purpose and it is impossible for the employer to accommodate the individual employee without imposing undue hardship on the employer.[3] This is referred to as a bona fide occupational requirement or qualification—a "BFOR" or "BFOQ."

The duty to accommodate requires participation from all involved parties, including the employer, the employee, and, in the case of unionized employees, the employee's union.

For more information on accommodations, see the Commission's human rights guide *Duty to Accommodate*.

> Employers must take significant steps to fulfill their duty to accommodate to the point of undue hardship. Undue hardship implies that there may be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields the need to accommodate.[4]

Mental and physical disability

Section 44 of the *Act* defines mental and physical disability as follows:

> **Mental disability** means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder.
>
> **Physical 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 epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device.

The definitions are broad and therefore it is difficult to have a complete list of conditions considered to be a disability under the *Act*. In order to meet the "disability threshold," a person's condition must have a "certain measure of severity, permanence and persistence." A person must have a substantial limiting and ongoing physical condition to be able to rely on the protection against discrimination found under the *Act*.[5]

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[2] *Hydro-Québec v Syndicat des employées de techniques professionnelles et de bureau*

[3] *British Columbia (Public Service Employee Relations Commission) v B.C.G.E.U.,* [1999] 3 S.C.R. 3

[4] *CYB v University of Alberta,* 2021 AHRC 156 at para 122

[5] *Syncrude Canada Ltd. v Saunders,* 2015 ABQB 237 at para 57

The Tribunal approaches the concept of physical disability broadly and does not restrict the meaning of disability to a specific biomedical diagnosis, but rather interprets physical and mental disabilities in a broad and purposive manner, including looking at the nature of the disability in terms of functional limitations.[6]

An employee's right to be free from discrimination extends to situations involving a perceived disability. An employer who treats an employee differently based on a perceived disability or limitation that could potentially impact the employee's performance is engaging in conduct that is a form of prohibited discrimination.

What information may an employer request from an employee who is absent for medical reasons?

This section addresses what information an employer may request from an employee who is or will be absent for medical reasons. **Appendix A** includes a *Sample Medical Absence Form* that may be used in conjunction with the information in this section.

When requesting medical information, the employer should consider:

- Whether the information requested is needed to determine the employee's job responsibilities
- Whether the information is needed to accommodate the employee
- How the employee's privacy will be protected if the information needs to be shared with other people and whether the request meets specifications in the collective agreement (if one is in place)

The goal of requesting medical information is to help employers determine whether the illness or disability is one that needs to be accommodated, and what impact it will have on the employee's presence and attendance. This right to access information must be balanced with the employee's right to privacy. As a result, an employee's medical information can only be requested when doing so is:

a) "Reasonably necessary" for assessing an employee's prognosis for their return to work (with or without restrictions); and

b) "Consistent" with the collective agreement.[7]

The *Personal Information Protection Act* (*PIPA*)[8] protects a person's health information. Section 3 of *PIPA* governs the collection, use, and disclosure of personal information. *PIPA* balances an individual's right to have his or her personal information protected with an organization's need to collect, use, or disclose personal information for purposes that are reasonable, that is, for legitimate business purposes. Under *PIPA*, while you may need to collect, use, and disclose certain personal information, you must explain the reason for collecting the information and how it may be used or disclosed.

[6] *Woods v North American Construction Group Inc.,* 2022 AHRC 26 at para 9

[7] *Summary by Arbitrator Burke in the January 2010 award of ICBC v Canadian Office and Professional Employees' Union Local 378,* [2010] B.C.C.A.A.A. No. 22.

[8] *Personal Information Protection Act,* SA 2003, c P-6.5.

Despite privacy laws, an employee may need to provide medical information to their employer to substantiate their request for accommodation, and employers have a right to request medical information from an employee in appropriate situations. In addition, an employer can request medical information from an employee who is having difficulty performing their duties due to a health condition.

Requesting relevant medical information

An employer may request medical information that would otherwise be considered personal and private if that information is required to allow the employer to support an employee's accommodation request. The amount of medical information required depends on the circumstances of each case, including the nature of the worksite, the extent of the medical restrictions, and the accommodation requested.[9] The request for medical information may include, but is not limited to:

1. Details surrounding the nature of the illness; however, an employee is not required to provide a diagnosis of their condition
2. Whether the illness is permanent or temporary, and the anticipated timeframe for improvement
3. The restrictions or limitations that flow from the illness, particularly as they relate to the employee's duties and responsibilities
4. The basis for the medical conclusions, including the examinations or tests performed (but not necessarily the test results or clinical notes made in that respect)
5. The treatment, including any possible side effects of medication, which may impact the employee's ability to perform their job

An employer only has a right to an employee's confidential medical information to the extent needed to accommodate an employee and assess the employee's ability to perform their duties in the workplace.

It is important to remember that accommodation is a two-way process: an employer cannot meet their obligations to provide reasonable accommodation if the employee does not release reasonably necessary medical information.

Sharing medical information

As mentioned above, employees have a right to privacy regarding their personal medical information. The improper disclosure of the employee's medical information can constitute a breach of *PIPA*. Therefore, this information may be shared with other personnel on a need-to-know basis. Employers should only release medical information to staff who need it for a specific purpose. For example, an employee may need to sit down while using the cash register because they have a physical limitation or medical need. Only the supervisor who received the doctor's note regarding this issue needs to know the reason the employee is sitting while working with the public.

[9] *Wearmouth v West Fraser LVL,* 2021 AHRC 203 at para 32

It is inappropriate for an employer to discuss an employee's medical information with other employees. Employees who have disclosed their medical information in order to be accommodated have the right to confidentiality. Medical information that an employee shares with their employer should be kept private unless the employee gives their consent to the employer to disclose the information.

The Office of the Information and Privacy Commissioner (OIPC) can provide more information on protection of privacy of medical information in an organization. See **Related resources** for contact information.

Collective agreement

The employer/employee relationship may be governed by a collective agreement. Labour law cases and related legislation govern the kind of medical information that can be requested in the context of a collective agreement. Human rights law applies to a collective agreement even if it is not mentioned within the agreement itself. Violations of the collective agreement fall within the jurisdiction of the Alberta Labour Relations Board.

What information can an employer request when an employee wants to return to work or needs accommodation at work?

When an employee is returning to work after a medical absence, the employer may request that the employee's doctor confirm in writing that the employee is fit to return to work. See **Appendix A** for a *Sample Medical Absence Form*.

If the employee's doctor has found that the employee can return to work with certain restrictions or limitations, the employer may require specifics about the restrictions or limitations to better accommodate the employee, including modifying the employee's job duties (if required). A helpful way for an employer to obtain information about an employee's restrictions or limitations is by using a medical ability to work form. A medical ability to work form is typically completed by a physician. It allows the employer to obtain information to assess whether the employee is capable of returning to work and/or to provide the necessary and appropriate accommodation to ensure that the employee can work without jeopardizing his or her safety, or the safety of other employees. It is helpful for an employer to provide a copy of the employee's job duties and/or a detailed job description to allow the physician to complete the medical ability to work form comprehensively. See **Appendix A** for a *Sample Medical Ability to Work Form*.

If an employee's doctor finds that the employee is ready to return to work without restrictions, then the employee can return to work without the employer providing any accommodation.

Employers must try less intrusive methods of obtaining medical information before requiring information through other means. For instance, if an employee submits a short note from their doctor that the employee can return to work with modified duties, the employer may request

further information on what restrictions or limitations the employee has. If the employee is unable to provide this information, the employer can request the employee's permission to contact their doctor for more information before asking for specific tests or an independent medical examination (IME). This is best done in written form, such as a signed release from the employee and a written request from the employer to the doctor. This process is discussed further under *How may an employer respond to receiving medical information*?

What are an employee's rights and responsibilities in providing medical information?

Privacy

While an employee's personal medical information is acknowledged to be private and confidential, an employer is entitled to access relevant and sufficient information for legitimate work-related purposes. This involves situations where the employer requires assurance that the employee is able to continue or return to work, and where the employer is trying to determine whether they can accommodate the employee in the workplace.

The exact nature of the information that an employer can request from their employee will vary based on the facts, circumstances, and purpose of each situation. However, an employee will generally not be required to disclose their medical files, diagnosis, or any treatment they are undergoing, except in very rare circumstances where the employer requires information to assess the employee's accommodation request.

Some examples of situations where an employer may seek medical information include:

1. To assess an employee's request for accommodation
2. To consider whether an employee is fit to return to work following a leave of absence
3. To consider whether to accommodate an employee's request for short-term sick leave
4. To consider whether to accommodate an employee's request for an extended medical leave
5. To assess whether to grant an employee's application for disability (or related) benefits

Contact from the employer

An employee is usually expected to report an absence from work as soon as possible and, if possible, before their next shift begins. If requested, an employee is expected to make every reasonable attempt to get a medical note to explain the absence. An employer will usually request a medical note for longer absences, including a prognosis on when an employee may be expected to return to work. If the medical note does not include a return to work date, an employer can request clarification on this from the employee to allow the employer to accommodate the employee while also meeting operational needs. See **Appendix A** for a *Sample Medical Absence Form*.

While an employee should not be expected to report to work during a medical leave of absence, it is appropriate for an employer to contact an employee who is on medical leave in certain situations.

See *Mitchell v Edmonton Public School Board*, 2023 AHRC 16 in the **Appendix B: Case law** section as an example of a case where the Tribunal found it was appropriate for the employer to propose a meeting with the employee while they were on a medical leave of absence to address their concerns about returning to work.

Medical information from the employee's own doctor versus a specialist

The employer usually gets information from the employee's doctor as to whether the employee is fit to work. In complex medical situations, where the employer requires more detailed information, the employee could suggest:

- Getting further information from their doctor
- Asking their doctor to refer the employee to a specialist of his or her choice (the decision to refer is at the doctor's discretion)
- Getting a consultation between an employee's doctor and a doctor chosen by the employer
- Choosing a specialist that the employee and employer agree upon to conduct an independent medical examination (IME) when there is a difference of opinion between specialists

For more information on independent medical examinations, see the section on *Requesting an independent medical examination*.

How may an employer respond to receiving medical information?

The employer's response to receiving medical information depends upon their evaluation of the information. The employer may:

- find there is sufficient information for the employee to be absent
- find there is sufficient information for the employee to return to their regular duties
- use the existing information to evaluate what accommodations are needed
- determine that further medical information is necessary

Determining whether sufficient medical information has been provided

To determine whether the medical information supplied is sufficient, the employer must look at the individual facts of each case. An employer will likely require additional information the longer an employee remains off work to ensure they have updated medical information to assess accommodation options. However, when requesting information during extended absences, these should not be so frequent as to harass the employee while on sick leave. With the employee's consent, an employer may obtain additional medical information from

the employer's doctor or a specialist if the request is made in good faith and for the purposes of accommodating a leave of absence or finding suitable work for an employee.

Before asking for more medical information, the employer should first determine whether the information that the employee has already provided can be used to assess the employee's situation. If not, and the employer decides to ask for more medical information, the employer can:

- Inform the employee in writing that the employee needs to supply further medical information and state the reason this information is necessary
- Specifically identify the information that is being requested
- Remind the employee that all information will be kept in the strictest confidence
- Continue to be open to any concerns an employee has about providing further medical information and try to resolve these concerns upfront

If the employer is still not satisfied with the medical information provided, they may ask for further information.

The employer is **not** entitled to:

- **Contact the employee's doctor without obtaining the employee's consent.** Employers can request a medical note from an employee to confirm that an absence from work was related to medical reasons. If the employee gives the employer permission to contact the doctor directly, the employer may choose to communicate with the doctor in writing to prevent inadvertently disclosing confidential information and potentially violating the employee's privacy rights.
- **Terminate the employee before exploring the duty to accommodate to the point of undue hardship.** The employer must ascertain the employee's needs and work in collaboration with the employee to assess how their needs can be met, short of undue hardship.
- **Demand a definitive opinion that the employee will have no further medical problems.** It is unreasonable to expect a doctor to guarantee that an employee's disability is completely resolved or that they will have no further medical issues.
- **Request medical information that is not employment-related.** Only information that is related to the employee's ability to work is relevant to the analysis of an employer's needs. For instance, an employer does not need to know information about an employee's restriction on lifting if their job does not involve lifting.
- **Know the employee's diagnosis, except in limited cases.** An employer does not have an automatic right to access the employee's confidential medical information, such as the cause of the disability and/or illness, symptoms, or treatment, unless access to this information clearly relates to the accommodation that the employee is seeking or if the employee's needs are complex and unclear.

Requesting an independent medical examination

An employer's duty to accommodate may permit the employer to request that an employee undergo an independent medical examination (IME) and/or a functional capacity evaluation (FCE). The reasonableness of an employer's request for an IME and FCE will depend on the employer's basis for questioning the legitimacy, reliability, and/or accuracy of the employee's proposed accommodation. Examples of situations where an employer may be permitted to request an IME and/or FCE may include, but is not limited to, the following:

1. Where the employee's medical provider provides inconsistent medical information or drastically changes their opinion on the employee's ability to return to work;
2. Whether the timing of the medical opinion stating that the employee can return to work coincides with the end of the employee's ability to take paid time off work; and
3. Whether the employee's proposed returned to work includes onerous accommodations on the employer.[10]

IMEs and FCEs: An IME is an evaluation performed by a doctor who is not involved in the patient's care to establish if and how medical issues will impact the employee's ability to perform their job duties. An FCE examines an employee's physical tolerance related to strength, endurance, speed, and flexibility.

An IME should be distinguished from an FCE. An FCE may not involve a doctor, but rather someone such as an occupational therapist who assesses an employee's physical capacity as it relates to their work responsibilities. An FCE has a different purpose than an IME and may be necessary to properly determine an employee's physical ability to carry out certain duties.

It is important to note that an employer's right to request an IME and/or FCE is not freestanding or unrestricted and cannot be used as a way to second-guess the opinions of the employee's medical providers. The information requested should be least intrusive on the employee's privacy, while still giving the employer enough information to meaningfully assess the accommodation request. It may also help facilitate the IME and FCE process if the employer and employee can agree on who conducts the examination. It is important that the employer is careful with their communications to the IME and FCE examiner and refrains from providing any information that might reasonably be expected to impair the examiner's objectivity and cause the employee to refuse to attend the IME and/or FCE.

See *Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 in the **Appendix B: Case law** section as an example of a case where the Court required an employee to submit to an IME by a doctor of the employer's choosing as part of the employee's duty to participate in the human rights accommodation process.

[10] *Bottiglia v Ottawa Catholic School Board,* 2017 ONSC 2517

What if different doctors give conflicting medical information?

Conflicting medical opinions between the employee's doctor and a specialist, between two specialists, or between a WCB doctor and other medical providers can arise.

If two specialists give conflicting information on an issue, then the employer has a duty to inquire further before making any conclusive decisions on their ability to accommodate the employee. The duty to inquire may include:

- Reviewing the medical information to see if it is in conflict on issues that impact the employer's ability to accommodate the employee
- Requesting further information from the specialists to provide clarity on the conflicting issues
- Engaging further expert medical opinion to provide clarity on the conflicting medical opinions

It is also important to recognize that there are novel medical conditions that are still being scrutinized in the medical field and attract conflicting opinions, such as chronic fatigue syndrome, irritable bowel syndrome, and multiple chemical sensitivity. The Tribunal accepts that medical experts may not always reach consistent diagnosis on specific conditions, and not having a firm diagnosis in certain circumstances reflects the challenges in diagnosing certain disabilities.[11] The absence of a consistent medical diagnosis does not preclude the complainant from receiving the protections under the *Act*.

Termination and discipline

Before deciding to discipline or end the employment relationship, an employer must consider whether the employee's actions are a result of a disability that requires accommodation under the *Act*. As noted in this guide, the employer has a duty to accommodate the employee to the point of undue hardship.

Performance issues

In certain situations, an employer has a duty to inquire into an employee's condition. The duty to inquire is not a standalone duty and arises when the employer knew, or reasonably ought to have known, that there was a connection between an employee's job performance and a disability.[12] The duty to inquire will most often arise when the employee is unaware of the extent of, or the existence of, the disability itself, but their conduct is noticeable to others as something that might be connected to a disability.[13]

The duty to inquire is an exception to the general principle that an employee has a duty to disclose relevant information and to participate in the accommodation process, including by requesting accommodation.

[11] *Mitchell v Edmonton Public School Board*, 2023 AHRC 16 at paras 11 and 12

[12] *Cliff v Her Majesty the Queen in Right of Alberta (Human Services),* 2021 AHRC 190 at para 36

[13] *Ibid*

Examples where the Alberta Human Rights Commission's Tribunal (the Tribunal) has recognized the duty to inquire include the following:

1. An employer had a duty to make further inquiries before terminating the employment of an employee who had communicated that she was undergoing difficult circumstances that impacted her mental capacity, including her brother's suicide. The employee did not expressly request accommodation from her employer; however, the Tribunal found that the employer had enough knowledge about the employee's circumstances to engage the duty to inquire and consider whether the employee's performance was related to her mental health and whether the employee required accommodation prior to making the decision to terminate her employment.[14]
2. An employer has a duty to inquire prior to terminating an employee for workplace intoxication when the employer knew or ought to have known that the employee had an alcohol addiction.[15]
3. In certain circumstances, the duty to inquire can be triggered even after the decision to terminate employment has already been made. Even if the employer has a zero tolerance policy for certain workplace conduct (that is, intoxication) they are required to make inquiries to determine if the employee had an alcohol addiction and/or other disability that may have contributed to the conduct prior to proceeding with terminating the employee's employment.[16]

Excessive absenteeism

Although it is discriminatory to take disability-related absences into account when deciding to terminate an employee for excessive absenteeism, the employer can justify the decision to dismiss an employee for excessive innocent absenteeism if the employer can establish that requiring employees to meet a reasonable attendance standard is rationally connected to job performance (that is, the attendance standard/policy is a BFOR/BFOQ).[17] Excessive innocent absenteeism has been recognized as grounds for dismissal even when the absenteeism is the result of a disability.[18]

When deciding whether an employer is justified in dismissing an employee for excessive absenteeism, human rights tribunals and courts will consider the following factors:

1. Was the absenteeism excessive?
2. Was the employee warned that his or her absence was excessive and failure to improve could result in dismissal from their employment?
3. Was there a positive prognosis for regular future attendance at the time of dismissal?
4. If the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal?[19]

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[14] *Pratt v University of Alberta*, 2019 AHRC 24

[15] *Kvaska v Gateway Motors (Edmonton) Ltd.*, 2020 AHRC 94

[16] *The Estate of Donald Mitchell v South Country Co-op Limited*, 2023 AHRC 115

[17] *Saunders v Syncrude Canada Ltd.,* 2013 AHRC 11 at para 85, rev'd on other grounds 2015 ABQB 237

[18] *Ibid* at para 87

[19] *Canadian National Railway Company v Teamsters Canada Rail Conference,* 2018 ABQB 405 (CanLII).

See *Telecommunications Workers Union v TELUS Communications Inc.,* 2011 BCSC 1761 and *Syncrude Canada Ltd v Saunders*, 2015 ABQB 237 in the **Appendix B: Case law** section as examples of cases where the courts found that the decision to terminate employees for excessive absenteeism did not amount to discrimination.

Refusal to supply medical information

The Tribunal recognizes that privacy is a core value of our legal system and medical information is some of the most private of personal information.[20] This is why tribunals and courts generally do not impose a duty to disclose a specific diagnosis and limit employers from seeking more medical information than is reasonably necessary.

An employee has an obligation to ask for accommodation and to provide sufficient medical information, including necessary and otherwise private medical information, to establish the accommodation required and to participate in and facilitate both the search for and implementation of accommodation. The employer has a legitimate need for sufficient information to permit the employer to satisfy their accommodation obligations.

See *Wearmouth v West Fraser LVL,* 2021 AHRC 203 in the **Appendix B: Case law** section as an example of a case where the Tribunal found that the employee failed to cooperate in the accommodation process by refusing to provide additional medical information to the employer.

Accommodating medical cannabis in the workplace

The Tribunal recognizes that accommodating disabilities treated through medical cannabis is a complex and challenging area for both employer and employees, especially with ongoing developments in both science and the law.[21] According to Access to Cannabis for Medical Purposes Regulations (SOR/2016- 230), any patient must obtain a medical document from a licensed medical practitioner in order to purchase and use medical cannabis.

In assessing whether an employee experienced discrimination due to a disability that required treatment through medical cannabis, the Tribunal will consider the following issues:

1. Did the employee have a disability and, if so, was medical cannabis reasonably required to treat it?
2. Did the employee experience an adverse impact and, if so, was their disability a factor in any such impacts?
3. Did the employer reasonably accommodate the employee to the point of undue hardship?
4. Did the employee meet their obligations to cooperate in the accommodation process?[22]

The employer must establish that any restriction on the use of medical cannabis is directly related to the employee's position. The Tribunal is unlikely to accept a blanket conclusion that a restriction from any amount of medical cannabis is reasonable and to the point of undue hardship without understanding the nature of the employee's work and core job functions.

[20] *Wearmouth v West Fraser LVL,* 2021 AHRC 203

[21] *Robert v National Process Equipment Inc.,* 2021 AHRC 133 at para 20

[22] *Robert v National Process Equipment Inc.,* 2021 AHRC 133 at para 12

The following is a non-exhaustive list of factors that will be considered in assessing whether the employer met their duty to accommodate to the point of undue hardship:

1. Evidence of actual impairment from the employee's use of medical cannabis
2. Level of THC, the psychoactive compound in cannabis, found in the employee's system
3. The nature of the risks of impairment from THC generally
4. Any accommodation options explored by the employer[23]

Recreational cannabis was legalized in Canada on October 17, 2018, and edible cannabis has been legal since October 17, 2019. Despite legalization, employers can still require employees to be sober in the workplace. Employers who suspect that an employee might be under the influence of cannabis should distinguish between recreational versus medical use of cannabis, and address requests for accommodation. Under human rights legislation, substance dependencies are considered a disability and may require accommodation. Even though employers have an obligation to reduce risk and protect workers, their employees' privacy and human rights must be protected in the process.

See *Greidanus v Inter Pipeline Limited,* 2023 AHRC 31 in the **Appendix B: Case law** section as an example of a case where the Tribunal ruled that an employer's decision to revoke an employment offer after the prospective employee failed a pre-employment drug test was not discriminatory.

Managing medical information in the workplace

An employee who has an ongoing disability may begin to feel overwhelmed by requests for medical information. Treating employees with respect and compassion will create the groundwork for a more positive experience. An employer can reduce the employee's worries about providing medical information by:

- Implementing a policy that clearly explains the process for accommodation and medical requests and how they will be handled by the employer, which will ensure that employees are not caught by surprise when the employer requests additional medical information to assess accommodation options
- Meeting with employees individually early on so that specific issues regarding their disability can be addressed quickly
- Letting employees know that the employer encourages early reporting of potential medical issues if those issues are expected to have an impact on their job performance
- Keeping all medical information in strict confidence; release this information only to those who need to know about it so that they can accommodate the employee and discuss medical information in private and only with those staff who need to know the details
- Discussing individual needs with employees in return to work or accommodation situations

[23] *Ibid* at para 20

- Reviewing legislation and recent cases in the area of obtaining and responding to medical information
- Ensuring that the employer is applying a consistent approach to medical absences and employees' return to work with accommodations by creating your own forms or using the sample forms in **Appendix A**

Treating employees with respect and compassion will create the groundwork for a more positive experience.

Related resources

Commission information sheets

The key points from this human rights guide are summarized in these separate information sheets:

- *Obtaining and responding to medical information in the workplace: A summary for **employees***
- *Obtaining and responding to medical information in the workplace: A summary for **employers***
- *Obtaining and responding to medical information in the workplace: A summary for **doctors***

Privacy

The following statutes govern privacy in Alberta:

- *Health Information Act* (HIA)
- *Freedom of Information and Protection of Privacy Act* (FOIP)
- *Personal Information Protection Act* (*PIPA*)

To read these statutes, see the Office of the Information and Privacy Commissioner (OIPC) website at **oipc.ab.ca** and follow the links. Cases about medical information have been decided within the privacy law context. These can be found by searching the OIPC Orders and Investigation Reports. You can also find contact information for the OIPC on their website.

Workers' Compensation Board

See the Workers' Compensation Board (WCB) website at **wcb.ab.ca** for information on workers' compensation.

The *Sample Medical Absence Form* and the *Sample Medical Ability to Work Form* are linked from this publication. The Commission developed these forms to assist employers and employees with common medical information issues that arise in the workplace.

- Employers may provide the forms to employees and ask that their doctors complete them.
- Employees may use the forms to get information from their doctors for their employers or benefit carriers.
- Doctors may adapt the forms for use in their practices.

Appendix A: Sample forms

The sample forms provided in this document and available online:

- Are not intended to replace any medical forms that are required by WCB or a third-party insurer, or employer-prescribed forms for an employer-funded benefit plan
- Take into consideration the employee's right to privacy, as well as the employer's right to all information that is reasonably necessary for a proper inquiry into accommodation
- Assist in minimizing barriers that are created in workplaces due to limited medical information

The *Sample Medical Absence Form* (see page 18) provides general information on the employee's:

- absence
- doctor's name
- health information

Sample Medical Absence Form (pdf)

The *Sample Medical Ability to Work Form* (see pages 19 - 20) provides more comprehensive information on limitations or restrictions that the employee has upon returning to work. It is intended to ensure that:

- the employer, not the doctor, decides which modified duties are available
- the doctor's information reflects a functional analysis of the employee's abilities rather than advice about which jobs the employee can do

Sample Medical Ability to Work Form (pdf)

Sample Medical Ability to Work Form (Page 1 of 2)

Q3L-2504

(To be completed by attending physician)

The purpose of this form is to provide the patient with the necessary information that they need to give to their employer to help the employer make decisions about accommodating the patient, providing disability leave, or assessing if the patient can return to work.

Notes to physician

1. This form is not intended for Workers' Compensation Board (WCB) purposes. For a work-related injury or illness, the required WCB forms must be completed.
2. This form **does not replace** forms related to an employee's ability to work that are required by:
   - the Workers' Compensation Board,
   - third-party insurers, or
   - employer-funded medical benefit plans.
3. Where choices are indicated below, mark your selection.
4. Sign and date both pages 1 and 2, and keep a copy of this form.

When completing this form, disclose only information necessary to meet the purpose of the form. Typically, it is not necessary to provide a diagnosis or treatment information.

Physician's name and address (typewritten or printed)

_____

_____

I saw _____ on _____.
(Print patient's name) (Date)

Date of injury or illness _____.
(Date)

This patient is medically able to work with limitations or restrictions as of _____.
(Date)

Restrictions or limitations (see page 2 for details)

In my opinion, these restrictions or limitations are:

☐ Temporary:
- ☐ _____ days
- ☐ less than 2 weeks
- ☐ 2 to 4 weeks
- ☐ 4 to 6 weeks
- ☐ 6 weeks to 3 months
- ☐ more than 3 months

☐ Permanent

Date of next appointment is (indicate **n/a** if not applicable) _____.
(Date)

My opinion is based on the factors indicated below:

☐ Information provided by the patient

☐ My examination of the patient and my assessment of the findings and health information

I have provided this form to the patient named above.

_____ _____
(Physician's signature) (Date)

NOTE: Completion of this form is an uninsured medical service. There may be a fee to the patient for completion of this form.

Alberta Human Rights Commission developed this form in consultation with the Alberta Federation of Labour, Alberta Medical Association, Alberta Workers' Health Centre, and the College of Physicians and Surgeons of Alberta. **This sample form is available as a separate form from the Commission or online at albertahumanrights.ab.ca.**

Sample Medical Ability to Work Form (Page 1 of 2)

Q3L-2504

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   - the Workers' Compensation Board,
   - third-party insurers, or
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4. Sign and date both pages 1 and 2, and keep a copy of this form.

When completing this form, disclose only information necessary to meet the purpose of the form. Typically, it is not necessary to provide a diagnosis or treatment information.

Physician's name and address (typewritten or printed)

_____

_____

I saw _____ on _____.
(Print patient's name) (Date)

Date of injury or illness _____.
(Date)

This patient is medically able to work with limitations or restrictions as of _____.
(Date)

Restrictions or limitations (see page 2 for details)

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- ☐ _____ days
- ☐ less than 2 weeks
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- ☐ 6 weeks to 3 months
- ☐ more than 3 months

☐ Permanent

Date of next appointment is (indicate **n/a** if not applicable) _____.
(Date)

My opinion is based on the factors indicated below:

☐ Information provided by the patient

☐ My examination of the patient and my assessment of the findings and health information

I have provided this form to the patient named above.

_____ _____
(Physician's signature) (Date)

NOTE: Completion of this form is an uninsured medical service. There may be a fee to the patient for completion of this form.

Alberta Human Rights Commission developed this form in consultation with the Alberta Federation of Labour, Alberta Medical Association, Alberta Workers' Health Centre, and the College of Physicians and Surgeons of Alberta. **This sample form is available as a separate form from the Commission or online at albertahumanrights.ab.ca.**

(To be completed by attending physician)

Specific functional restrictions and/or limitations

Patient's name _____

Check ☑ only those items that apply in Section A, and provide details in Section B.

Definitions

Restriction: This patient is advised not to perform this activity in any capacity.

Limitation: This patient is able to perform the activity in a reduced capacity. For example, the patient is not able to perform the job with the usual speed, strength or number of repetitions, or for the usual duration.

Section A

	Restriction	Limitation
Physical		
Sitting	☐	☐
Standing	☐	☐
Walking	☐	☐
Lifting	☐	☐
Carrying	☐	☐
Pushing/pulling	☐	☐
Climbing stairs	☐	☐
Climbing ladders	☐	☐
Climbing scaffolding	☐	☐
Crouching	☐	☐
Crawling	☐	☐
Kneeling	☐	☐
Bending/twisting/turning	☐	☐
Repetitive activity	☐	☐
Sustained postures	☐	☐
Gripping	☐	☐
Reaching	☐	☐
Fine dexterity	☐	☐
Balance	☐	☐
Vision/hearing/speech	☐	☐
Other *(specify in Section B)*	☐	☐

Does patient require medical aids (e.g. splint, brace) Or personal protective equipment (e.g. gloves, mask)?

☐ No ☐ Yes *(specify in Section B)*

	Restriction	Limitation
Mental		
Thinking/reasoning	☐	☐
Concentration	☐	☐
Memory	☐	☐
Critical decision-making	☐	☐
Interpersonal contact	☐	☐
Alertness	☐	☐
Other *(specify in Section B)*	☐	☐
Environmental		
Exposure to heat/cold	☐	☐
Exposure to dust/fumes/odors	☐	☐
Exposure to chemicals	☐	☐
Food handling	☐	☐
Other *(specify in Section B)*	☐	☐
Other		
Shift/attendance duration	☐	☐
Consecutive shift attendance	☐	☐
Shift work	☐	☐
Overtime	☐	☐
Operating vehicle	☐	☐
Operating equipment	☐	☐
Working at heights	☐	☐
Other *(specify in Section B)*	☐	☐

Section B

Please provide necessary details about any restrictions or limitations you have identified. Typically, it is not necessary to provide a diagnosis or treatment information.

_____

_____

I have provided this form to the patient named above.

_____ _____

(Physician's signature) (Date)

Appendix B: Case law

Alberta cases

Mental disability

Mitchell v Edmonton Public School Board,
2023 AHRC 16 (Alberta Human Rights Commission)
Mental disability – employer's engagement with employee while of medical leave of absence

Ms. Mitchell (the complainant) required a medical leave of absence due to a mental disability. The central issue before the Tribunal revolved around how the Edmonton Public School Board (the respondent) engaged with the complainant during her medical leave of absence. The complainant argued that she experienced harassment from the respondent and the harassment contributed to her psychological injuries. The complainant provided an example of a return to work meeting that the respondent scheduled while she was on medical leave. The complainant argued that the request to hold the meeting while she was on sick leave and the way she was treated at the meeting amounted to adverse treatment.

The Tribunal disagreed and dismissed the complaint. In response to the meeting, the Tribunal noted that, while it is unusual for an employer to request a return to work meeting when an employee is on a medical leave of absence, the proposal here was reasonable in the circumstances and not an adverse impact. The Tribunal noted that the meeting was not mandatory and the respondent proposed the meeting to address concerns raised by the complainant and any barriers to returning to work.

Wearmouth v West Fraser LVL,
2021 AHRC 203 (Alberta Human Rights Commission)
Employee request to work fixed daytime hours – employer request for additional medical information – failure to provide adequate medical information to consider accommodation options

Ms. Wearmouth (the complainant) originally worked 11-hour daytime shifts from Monday to Friday in the beam and header department of West Fraser LVL (the respondent). The complainant was then reassigned to the respondent's dryer department, which required 12-hour shifts on a rotating schedule, including afternoon and night shifts. She began experiencing mental health issues and consulted her doctor. The complainant then presented the respondent with a medical note stating that it would be beneficial for her work fixed day-time hours. The respondent agreed to accommodate this request temporarily, but informed the complainant that they would require further medical information. The complainant then brought in a completed physician's form stating that she was limited to working 11-hour shifts and, due to her medications (which can cause drowsiness if shifts are irregular), she should work only day shifts, or night shifts with limited crossover. The respondent was concerned about the medications' ability to cause drowsiness in a safety sensitive worksite. They also believed that there was not enough medical information to explain or justify the medical accommodation being sought, and that the limited

information pointed solely to the complainant's preferred accommodation. The respondent determined that they could no longer temporarily accommodate the complainant in the beam and header department in light of these concerns. They escorted her out of the workplace, and provided her with application forms for short term disability. A week later, the complainant provided a further medical note stating that she was medically fit to work and is not disabled, and she wanted to return to work in the beam and header department. The respondent requested additional medical information to clarify her accommodation request; in particular, the respondent wanted to understand the need for the 11-hour restriction, the meaning of "frequent shift changes," and safety concerns around drowsiness from the medications. The complainant refused to provide additional information and maintained that the respondent already had all the relevant information needed to grant her accommodation request.

The central issue in the complaint was whether the respondent reasonably accommodated the complainant to the point of undue hardship when they kept her off work while asking for further medical information. The Tribunal found that the respondent's obligations to provide reasonable accommodations to the complainant could not be fulfilled because she did not provide reasonably necessary medical information to allow the respondent to assess accommodation options. The Tribunal found that the complainant understood the nature of the respondent's concerns and still did not provide the necessary information. The specific accommodation requests the complainant made were unusual and required explanation through further medical information. Providing this information would have substantiated the request and helped the respondent understand the full extent of her restrictions. The Tribunal dismissed the complaint and found that the complainant's refusal to provide additional medical information made it impossible for the respondent to accommodate her without imposing undue hardship.

Physical disability

Woods v North American Construction Group Inc.,
2022 AHRC 26 (Alberta Human Rights Commission)
Failure to accommodate employee's return to work post surgery – termination of employment – insufficient search for accommodation – undue hardship

Mr. Woods (the complainant) was required to take time off for surgery to address a gastrointestinal disorder and was away from work for two months. Prior to the surgery, the complainant only worked day shifts. Upon his return, the complainant learned that his employer, North American Construction Group Inc. (the respondent), changed his shift, and he was now required to work a mixture of day and night shifts. As the complainant's acid reflux symptoms were worse at night, he saw his doctor and the doctor agreed that he should work days only as he continued to recover from surgery. The complainant refused to accommodate the request to work day shifts only, believing that this was not a proper accommodation request and the complainant simply preferred to work day shifts. The respondent called medical experts to challenge the complainant's assertion of a disability post-surgery. After the respondent refused his accommodation request to work day shifts, the complainant went on long term disability and the respondent terminated his employment while he was on disability.

The Tribunal found that the respondent discriminated against the complainant both by refusing to accommodate his request to work-day shifts and by terminating his employment. The Tribunal acknowledged that the decision to switch the complainant to a mixture of day and night shifts was made for a business-related purpose and in good faith, the respondent did not establish that accommodating the complainant's request to work day shifts only would amount to undue hardship. The respondent argued that in order to accommodate the complainant, they would need to create an unnecessary position or hire an additional supervisor, which would cause undue hardship. The Tribunal rejected this position, noting that the respondent provided no evidence to support that they took steps to explore accommodation options.

Syncrude Canada Ltd v Saunders,
2015 ABQB 237 (Alberta Court of Queen's Bench[24])
Poor performance and absenteeism – physical disability – perceived disability – credibility and sufficiency of medical evidence – adverse inference

The Court overturned the Tribunal's decision that Syncrude (the respondent) discriminated against Mr. Saunders (the complainant) by terminating his employment on the basis of a disability or perceived disability. The Court noted that the Tribunal did not adequately address credibility issues, including inconsistencies between the complainant's testimony and the medical evidence. The Court also noted that the Tribunal should have drawn an adverse inference for the complainant's failure to call his doctor as a witness. In addition, the complainant had a questionable pattern of illness and could not offer medical documents to support certain absences, the respondent made the complainant aware of their policies (including absenteeism), they met with the complainant on numerous occasions to underscore the significance of being at work, and the complainant acknowledged that he knew that unauthorized and unexcused absences could lead to his employment being terminated. Additionally, the Court noted that the complainant's absences took place either immediately prior to or following scheduled days off, and this was indicative of patterned absences. The Court concluded that it would be impossible for the respondent to accommodate the complainant without undue hardship given the evidence of his history of patterned absenteeism.

Schmidt v FOUR20 Premium Market LTD.,
2024 AHRC 47 (Alberta Human Rights Commission)
Return to work – employer request for updated medical information – ability to work safely and necessary accommodation

Mr. Schmidt (the complainant) alleged discrimination in the area of employment on the ground of physical disability. After taking a medical leave for surgery relating to a pre-existing disability, his employer, FOUR20 Premium Market LTD (the respondent), requested medical information confirming the complainant's ability to return to work safely when he expressed a desire to do so.

The Director dismissed the complaint, and the Tribunal upheld the Director's dismissal. The Tribunal found that there was no medical information in the record to support that the complainant could have returned to work when he desired to do so, nor was there any

[24] Now called the Alberta Court of King's Bench

information provided in support of him requiring accommodations at the relevant time. The complainant did not provide an explanation as to why he thought the information he provided was sufficient to support his request for accommodation or why he thought he was able to return to work; an explanation is required. No duty to accommodate arose here because insufficient information was provided to substantiate the requests or put them into practice properly. The respondent's duty to accommodate required the complainant's participation and cooperation; he did not adequately cooperate. The Tribunal found that the complaint had no reasonable prospect of success.

Greidanus v Inter Pipeline Limited,
2023 AHRC 31 (Alberta Human Rights Commission)
Medical cannabis – pre-employment drug testing – revocation of job offer following failed drug test

The Tribunal upheld the Inter Pipeline Limited's (the respondent's) decision to revoke an offer of employment after Mr. Greidanus (the complaint) failed a pre-employment drug test. The complainant was diagnosed with Hashimoto's disease, which includes symptoms of chronic pain, depression, and low energy. He took CBD oil to alleviate his symptoms. He did not inform the respondent of his diagnosis and his use of CBD oil until after he learned that he failed the pre-employment drug test.

The Tribunal acknowledged that the complainant had a physical disability (Hashimoto's disease) and experienced an adverse impact (revocation of his job offer). However, the Tribunal found that the respondent was not aware of the complainant's physical disability at the time that the job offer was revoked, and there is no evidence to suggest that they reasonably ought to have known that he had a disability. The complainant did not inform the respondent, or the third-party company conducting the pre-employment drug test, that he had a disability and used cannabis to treat his symptoms. The Tribunal also noted that there was no duty to inquire on the respondent's part because they only became aware of the disability after the pre-employment drug test. The Tribunal further held that it was unnecessary to consider the duty to accommodate because the complainant did not establish discrimination and there is no free-standing duty to accommodate, including conducting an individualized assessment to determine how the disability might be accommodated in the workplace to the point of undue hardship. Individualized assessments are reserved for situations where an employer knows that an employee is medically authorized to use cannabis and the employee has medical authorization and/or a prescription for the cannabis at the time the adverse impact took place.

Relevant cases in other jurisdictions

Bottiglia v Ottawa Catholic School Board,
2017 ONSC 2517 (Ontario Superior Court)
Employer requiring independent medical examination – return to work – duty to accommodate – conflicting medical information

Mr. Bottiglia (the complainant) worked as a superintendent with the Ottawa Catholic School Board (the respondent). He experienced anxiety and stress, and was diagnosed with unipolar depressive disorder with anxiety features. As a result of his condition, he took an extended leave of absence from his employment. The complainant's last day of work was April 16, 2010,

and he had accrued enough paid sick days where he could take paid time off work until October 2012. In February 2012, the complainant informed the respondent that he was unable to return to work and that his recovery would take a prolonged period of time. In June 2012, the respondent learned that the complainant remained unable to return to work and a return might place him at a serious risk of a relapse. However, in August 2012, the complainant's doctor informed the respondent that the complainant was capable of returning to work on a limited basis sometime in the next two months. The proposed return to work plan would involve the complainant initially working for eight hours a week with no evening meetings, and the work hardening process would take approximately 6-12 months, during which time the complainant might not be capable of returning to full-time duties. The respondent had concerns about the adequacy and reliability of the information provided by the complainant's doctor; specifically, the significant and unexpected changes in the complainant's stated ability to return to work, the doctor's lack of knowledge and understanding of the workplace and the superintendent's essential duties, and that the proposed return to work after an absence of over two years coincided with the end of the complainant's paid leave. The respondent requested that the complainant attend an independent medical examination (IME) with a doctor of the respondent's choosing. The complainant refused and alleged that the respondent discriminated against him by failing to allow him to return to employment unless he submitted to an examination by a doctor of the respondent's choosing.

The Tribunal dismissed the complaint, and the Court upheld the dismissal noting that the respondent was justified in requesting an IME. In certain circumstances, the procedural aspect of an employee's duty to accommodate will permit, or even require, the employer to ask for a second medical opinion. Here, the respondent had a reasonable and bona fide reason to question the adequacy and reliability of the information provided by the complainant's medical provider. An employer is not entitled to request an IME in an effort to second-guess an employee's medical expert. An employer is only entitled to request that an employee undergo an IME where the employer cannot reasonably expect to obtain the information it needs from the employee's expert as part of the employer's duty to accommodate.

Telecommunications Workers Union v TELUS Communications Inc.,
2011 BCSC 1761 (British Columbia Supreme Court)
Innocent absenteeism – undue hardship

The Court upheld TELUS's (the respondent's) decision to dismiss a long-term employee for excessive absenteeism and found that the respondent had accommodated the employee to the point of undue hardship. The employee suffered from chronic depression, which led to excessive innocent absenteeism from the workplace. The respondent had issued 20 oral warnings and seven written warnings, they had implemented all of the specific accommodations requested by the employee, and had relaxed absenteeism standards and tolerated significant absenteeism over several years. However, the employee's absences were of a volume and persistence that supported the conclusion that she was incapable of future regular attendance.

To read additional cases related to obtaining and responding to medical information in the workplace, visit **CanLII**, the Canadian Legal Information Institute.

Contact us

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