

Employers' Duty to Accommodate during COVID-19



This 'Cheat Sheet' explains an employer's duty to accommodate during the Covid-19 pandemic. Please note, accommodations are approached on a case by case basis, and this document is meant to serve only as a general guide.

What are the steps in the accommodation process?

Before any individual accommodation process begins, employers have to create [COVID-19 safety plans](#) to reduce the risk of transmission. If an individual member has circumstances that the safety plan does not properly address, then the accommodation process can begin. The steps in this process are:

1. Express need for accommodation.

- › The member should notify their supervisor/manager that they require an accommodation. Remember, the employer is not usually entitled to the member's diagnosis - only how their job duties/work environment increase their risk to serious complications from COVID-19.
- › If the member is unable to address their issue directly with the employer, they should speak to their shop steward and explain why they think they need an accommodation.
- › The Employer may have a duty to inquire if it thinks that an employee could have a disability that would require accommodation. However, this does not mean that members should wait for the employer to take action. The law does require individuals to come forward about their needs if they are able. And practically speaking, the parties can find a solution faster if the employee comes forward.

2. Provide Reasonable information to show why accommodation is necessary

- › If an employee needs to take [a leave because of COVID-19](#), changes to BC's *Employment Standards Act* say that an employer **cannot** require the employee to give a medical note in order to access that leave.¹
- › However, there is no legislation that prevents an employer from asking for medical information when an employee asks for other types of accommodation. Employees who seek accommodation should respond to reasonable requests for medical

information that shows why they require an accommodation.

- › In fact, the employer may have a duty to ask for more information if it does not think an accommodation is called for based on the initial information.²
 - › The employee should respond to reasonable requests for information.
 - › If the member is unsure if the request is reasonable, please discuss with a union representative.
- ### 3. If the information shows that the employee needs some form of accommodation, the employer must propose a solution that responds to their needs.
- › Employers have to offer a reasonable solution, not a perfect solution.
 - › The employer's legal duty is to accommodate "to the point of undue hardship." Undue hardship is a high bar, however, the employer may not be required to accommodate the member if it involves **excessive** cost, resources, and/or restructuring.
 - › For example, even if a member would prefer to work from home 100% of the time, the employer may be justified in proposing a solution in which the employee comes to the workplace with significant precautions in place.
- ### 4. Members should agree to reasonable accommodation.
- › The law requires employees to agree to reasonable proposals. If an employee rejects a reasonable proposal, the employer may have met its legal duty.
 - › For example, an employee may be required to work a different shift that ensures they can avoid interaction with the public, even if they do not prefer these hours.
 - › Remember: **all workers have the right to refuse unsafe work** - see *Occupational Health and Safety Regulation*, section 3.12.

¹ Employment Standards Act RSBC 1996, Chapter 112, section 51.12(5). However, according to section 51.12(2)(4), an employee does have to provide "reasonably sufficient proof" that they qualify for the leave.

² For example, a Federal Labour arbitration found that the Employer did not meet its duty because it failed to ask for additional information before declining to accommodate: ADM Milling Co. and UFCW, Local 401 (Schoenberg), Re, 2017 CarswellNat 186, 130 C.L.A.S. 9, 274 L.A.C. (4th) 333.

Will the employer have a duty to accommodate in my specific situation?

I am at increased risk of severe illness if I get sick with COVID-19.

- › If you have a health condition that makes you more vulnerable to complications should you contract COVID-19, your employer may need to make special arrangements so that you can stay safe. The employer will need to work with the member and the union to accommodate the medical need.

I live with a family member who is at increased risk of severe illness if they get sick with COVID-19.

- › BC courts/tribunals have not yet ruled on how the duty to accommodate family status applies during the COVID-19 pandemic.
- › Although this situation may or may not trigger the employer's formal duty to accommodate based on family status, members may be able to discuss a case-by-case arrangement with their employer.
- › For example, employees who live with and care for dependants who are at high risk of complications from COVID-19, should speak to their employer about an arrangement to further limit their risk of contracting the virus and bringing it home ([click here for the current version of the BC Public Service's FAQ for members - information is accurate as of Nov 10, 2020](#)).

I do not have access to caregiving support for my child or another dependent due to the pandemic.

- › BC courts/tribunals have not yet ruled on how the duty to accommodate family status applies during the COVID-19 pandemic.
- › However, if the conditions of your employment have changed, and this caused you to be unable to care for a dependent, you may have a right to accommodation.
- › At minimum, members who are affected by school or daycare closures have access to the new COVID-19 related leaves under the Employment Standards Act.
- › The Employer should be as flexible as it can be if school and daycare closures affect workers. This could include allowing employees to work from home or work varied hours (see PSA FAQ link above).

I have a condition, such as a mental health concern, that has gotten worse during the COVID-19 pandemic.

- › The employer always has a duty to accommodate people with mental health conditions or other medical needs to the point of undue hardship. This remains true during the pandemic, when workers may be experiencing increased symptoms.

What are examples of accommodation?

As discussed above, accommodation is not one-size-fits-all. Different solutions will be acceptable depending on the situation. Accommodation measures that the employer could take to meet its legal duty may include:

- › Permitting a member to work from home some or all of the time;
- › Creating a work schedule that limits a member's face-to-face interaction with other workers, clients, or the public;
- › Creating a work schedule that allows a member to be at home with a child or another dependent when necessary;
- › Ensuring that a member has a private work space if possible; and/or
- › Providing a member with equipment such as PPE or a Plexiglas screen to limit the risk of transmission of the virus at work.

This list does not capture all possible accommodation solutions. Part of the employer's duty is to be flexible and open to creative solutions.

What are the Union's responsibilities in the accommodation process?

The steps above show that the employer has the duty to provide reasonable accommodation and that the employee must give necessary information and agree to a reasonable solution. The Union also has responsibilities in the accommodation process and must facilitate the accommodation of members. This could involve:

- › Notifying the employer of the need for accommodation;
- › Advocating for the member, such as by suggesting solutions. The Union will advocate for solutions that keep members safe and do not interfere unnecessarily with other workers' rights, such as their right to a safe workplace and layoff rights;
- › Advising the member of their rights and responsibilities, including when it would be in their interest to accept a reasonable solution and when they should seek a different solution.

If at the end of the accommodation process, the member believes that the employer failed to properly accommodate, they should consider filing a grievance on the basis of a breach of human rights law, the collective agreement, and other legislation that might apply.



This resource is just a brief overview of the legal duty to accommodate during the pandemic. However, employers always have a duty to accommodate employees with disabilities and family status claims to the point of undue hardship. For more information on how human rights apply in the workplace, please see the [BC Human Rights Tribunal's page on Human Rights and Duties in Employment](#).