

**Preventing discrimination based on**  
**Mental health**  
**and addiction**  
**disabilities**

**An overview for employers**



**Ontario**  
**Human Rights Commission**  
**Commission ontarienne des**  
**droits de la personne**

## **The Ontario *Human Rights Code***

The Ontario *Human Rights Code* (the *Code*) is the law that provides for equal rights and opportunities, and freedom from discrimination. The *Code* recognizes the dignity and worth of every person in Ontario. It applies to the social areas of employment, housing, goods, facilities and services, contracts, and membership in unions, trade or professional associations.

Mental health issues and addictions are “disabilities” that are protected under the *Code*. For example, the *Code* protects people who have anxiety disorders, panic attacks, post-traumatic stress disorder (PTSD), depression, schizophrenia, bipolar disorder, or addictions to alcohol or drugs, just to name a few.

At work, people with mental health disabilities or addictions are entitled to the same opportunities and benefits as everyone else. “Employment” is interpreted broadly and includes employees, independent contractors and volunteers.

The *Code* makes it illegal to discriminate based on someone’s mental health disability or addiction in all aspects of the work environment and employment relationship. This includes job applications, recruitment, training, transfers, promotions, apprenticeship terms, dismissal and layoffs. It covers rate of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations. It also includes the “extended

workplace” – for example, business trips and off-site work events.

## **Mental health and addiction disabilities**

People with mental health or addiction disabilities experience impairment and barriers in different ways. Disabilities are often “invisible” and episodic, with people experiencing periods of wellness and periods of disability. All people with disabilities have the same rights to equal opportunities under the *Code*, whether their disabilities are visible or not.

People with addictions have the same right to be free from discrimination as other people with disabilities. There is often a cross-over between addictions and mental health disabilities, with many people experiencing both. The *Code* also protects people from discrimination because of past and perceived disabilities.

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**Example:** A person is not hired as a teacher because many years ago, she had an alcohol addiction. This is discrimination based on disability.

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## **Discrimination**

Discrimination against people with mental health or addiction disabilities is often linked to prejudicial attitudes, negative stereotyping, and the overall stigma surrounding these disabilities.

Discrimination in employment may happen when a person experiences negative treatment or impact because of their mental health or addiction disability. Discrimination does not have to be intentional. And, a person's mental health or addiction disability needs to be only one factor in the treatment they received to be able to show that discrimination took place.

People with a mental health or addiction disability who also identify with other *Code* grounds (such as sex, race or age) may be distinctly disadvantaged when they try to find or keep a job. Particular stereotypes may exist that are based on combinations of these identities that place people at unique disadvantage.

## **Forms of discrimination**

Discrimination can take many different forms. It can happen when employers specifically exclude people with mental health disabilities or addictions in the workplace, withhold benefits that are available to others, or impose extra burdens that are not imposed on others, without a legitimate reason. This discrimination is often based on negative attitudes, stereotypes and bias.

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**Example:** An employer learns that an employee has depression. Because of this, the employer doesn't think she can do the job, and fires her.

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Discrimination may also happen indirectly. It may be carried out through another person or organization.

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**Example:** A company contracting services from a temp agency hires a worker who later tells the employer she has an addiction and asks for accommodation. The employer tells the agency that in the future, they should screen out anyone who has a mental health or addiction disability.

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People associated with persons with mental health disabilities or addictions are also protected from discrimination and harassment. This could include family, friends, or someone advocating on a person's behalf.

Discrimination is often subtle. It may not be likely that discriminatory remarks will be made directly. Subtle forms of discrimination can usually only be detected after looking at all of the circumstances of a situation to see if a pattern of behaviour exists. Individual acts themselves may be unclear or explained away, but when viewed as part of a larger picture, may lead to an inference that discrimination based on a *Code* ground was a factor in the treatment a person received.

### **Adverse effect discrimination**

Sometimes seemingly neutral rules, standards, policies, practices or requirements have an "adverse effect" on people who have mental health or addiction disabilities.

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**Example:** When hiring for a job, an employer does not consider any applicant who has a gap in their employment history. This process could have a negative effect on people with mental health or addiction disabilities who have been temporarily out of the workforce due to their disability.

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## Harassment

Harassment happens when someone shows a vexatious (which means distressing or annoying) pattern of doing or saying something based on a person's mental health or addiction disability that they know, or ought to know, is unwelcome.

Harassment could include:

- ❖ Slurs and name-calling
- ❖ Graffiti, images or cartoons showing people with mental health disabilities in a negative light
- ❖ Singling out a person for teasing or jokes related to their mental health disability or addiction
- ❖ Unwanted personal questions or remarks about someone's disability, medication or accommodation needs
- ❖ Repeatedly excluding people from the work environment, or "shunning" them
- ❖ Revealing that someone has a mental health issue or addiction to people who do not need to know

- ✧ Circulating offensive material about people with mental health disabilities or addictions at an organization by email, text, the Internet, etc.

## **Poisoned environment**

A poisoned environment may be created when unwelcome or comments or conduct are widespread in a workplace, which may result in a hostile or oppressive atmosphere for one or more people from a Code-protected group. Although the definition of harassment refers to “repeated” actions or comments, sometimes a single remark or action can be so serious that it results in a poisoned environment.

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**Example:** A bartender at a club experienced depression after the death of her father, and took a medical leave. The Human Rights Tribunal of Ontario (HRTTO) found that, among other things, her employer publicly posted confidential details about her medical condition for club members and staff to see, and directed staff to give a copy of the posting to any member who requested one. The HRTTO said that this was discrimination because it stigmatized the employee and poisoned her work environment.<sup>1</sup>

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## **Mental health profiling**

Mental health profiling is any action taken for reasons of safety, security or public protection that relies on stereotypes about a person's mental health or addiction disability instead of on reasonable grounds, to single out a person for greater scrutiny or different treatment. A "stereotype" is a generalization about a person based on assumptions about qualities and characteristics of the group they belong to.

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**Example:** An employer tells its employees that one of their colleagues attempted suicide in the past. Even though there are no concerns with the employee's behaviour, the employer treats him as a risk to other people because of his mental health history.

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## **Systemic discrimination**

Systemic discrimination refers to patterns of behaviour, policies or practices that are part of the structure of an organization or sector, which create a position of relative disadvantage for people with mental health disabilities or addictions. The policies or practices may appear neutral on the surface, but have an adverse effect or exclude people with mental health disabilities or addictions.

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**Example:** A person was taken to hospital by police for a mental health disability five years ago. When he applies for an educational co-op placement at a hospital, his contact with the police comes up on a police record check and he is denied the placement. The policies and practices that led to this situation can be systemic discrimination.

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### **Failure to accommodate**

When an organization does not accommodate a person's mental health or addiction disability to the point of undue hardship, this also violates the *Code*.

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**Example:** A tribunal found that an employer discriminated against an employee with anxiety and depression when it failed to give him a stress leave. Instead, it required him to either retire or transfer to another province.<sup>2</sup>

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## **Reprisal**

It is also against the *Code* for a person to be punished or threatened with punishment because they try to enforce their rights under the *Code* (for example, by making a complaint). This is called reprisal (or “payback”).

## **Removing barriers and designing inclusively**

People with mental health disabilities or addictions face many kinds of barriers every day. These could be attitude, communication, physical or systemic barriers. Employers should identify and remove barriers voluntarily instead of waiting to answer individual accommodation requests or complaints. Effective inclusive design reduces the need for people to ask for individual accommodation. Employers should use the principles of inclusive design when creating policies, programs, procedures, standards, requirements and facilities.

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**Example:** A workplace designs a performance management procedure. It builds in flexible processes to make sure it effectively responds to people who may be having difficulty doing their work due to a mental health or addiction disability, by offering accommodation, short of undue hardship. In its approach to assessing and accommodating employees who are experiencing difficulty doing their work, it focuses on the employee’s behaviours at work, and asks “what can I do to make sure you are successful at work?” It also identifies that accommodation is available, if needed. This approach allows employees to focus on their needs, decide if they want to disclose that they have a disability or other *Code*-related issue (for example, family status obligations) that is affecting their work, and allows them to begin a conversation about accommodation, if necessary.<sup>3</sup>

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Negative attitudes about people with mental health disabilities or addictions can also be barriers. Taking steps to prevent “ableism” – attitudes that devalue and limit the potential of people with disabilities – will help promote respect and dignity, and help people with disabilities to fully take part in community life.

## Duty to accommodate

Under the *Code*, employers have a duty to accommodate the needs of people with mental health or addiction disabilities to the point of undue hardship to make sure they have equal opportunities, equal access and can enjoy equal benefits. The goal of accommodation is to allow people to equally benefit from and take part in employment.

This means that employers and others may need to change their rules, procedures, policies and requirements to allow for equal access and equal opportunities.

Three key principles drive the duty to accommodate:

- ❖ Respect for dignity
- ❖ Individualization, and
- ❖ Integration and full participation.

The steps taken to assess an accommodation (the “procedural” part of the duty to accommodate) are just as important as the accommodation that is provided (the “substantive” part of the duty to accommodate).

An employee who needs a disability-related accommodation must:

- ❖ Tell the employer or union what their disability-related needs are in relation to their job duties, in writing, where possible
- ❖ Provide supporting information about the needs and limitations relating to their disability, including information from

health professionals where appropriate and as needed

- ❖ Co-operate with the employer on an ongoing basis to manage the accommodation process.

Employers must:

- ❖ Accept requests for accommodation from employees in good faith, unless there are legitimate reasons for acting otherwise
- ❖ Ask only for information they need to provide the accommodation. For example, an employer may need to know that someone needs time off to go to medical appointments related to their disability, but not that they have schizophrenia
- ❖ Take an active role in looking at accommodation solutions that meet individual needs
- ❖ Deal with accommodation requests as quickly as possible, even if it means creating a temporary solution while developing a long-term one
- ❖ Respect the dignity of the person asking for accommodation, and keep information confidential
- ❖ Cover the costs of accommodations, including any needed medical or other expert opinion or documents.

Unions also have a duty to work with the employer to make sure someone's needs are accommodated.

Maintaining confidentiality for people with mental health disabilities or addictions may be especially important because of the strong social stigmas and negative stereotyping that exist about these disabilities.

Sometimes, a person with a mental health or addiction disability cannot identify they need accommodation. Employers must try to help a person who is clearly unwell, or is thought to have a mental health disability or addiction. They must inquire if the person has needs related to a disability and offer assistance and accommodation.

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**Example:** An employer is unaware of an employee's mental health disability, but thinks that a disability might exist due to noticeable changes in his behaviour. The employer sees that the employee is having difficulty doing his work, and is showing obvious signs of distress that include crying a lot at his desk. The employer asks him if he has any accommodation needs and offers to refer him to an employee assistance program.

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However, organizations are not entitled to try to diagnose illness or “second-guess” a person's disability.

## **Forms of accommodation**

There are many different accommodation methods and techniques for responding to the unique needs of people with mental

health disabilities or addictions. Many accommodations can be made easily, and at low cost. Where putting the best solution in place right away may result in “undue hardship” because of significant costs or health and safety factors, employers still have a duty to look at and take next-best steps that would not result in undue hardship. Such steps should be taken only until better solutions can be put in place or phased in.

Depending on a person’s individual needs, examples of accommodation may include:

- ❖ Modified job duties
- ❖ Changes to the building (for example, building partitions in an open office space to increase someone’s ability to concentrate)
- ❖ Job coaching (someone to help the employee adjust to the workplace)
- ❖ A referral to an employee assistance program
- ❖ Alternative supervision arrangements (such as having meetings more often)
- ❖ Different ways of communicating with the employee (such as giving instructions in writing)
- ❖ More training, or training that is delivered in a different way
- ❖ Changes in break policies (for example, to allow people to take medication when they need to)
- ❖ Short-term and long-term disability leave
- ❖ A flexible work schedule

- ❖ Job bundling (taking various tasks from existing positions and creating a new job that supports the employer's business needs)
- ❖ Alternative work.<sup>4</sup>

An employer should take steps to resolve any tension or conflict that may occur as a result of resentment on the part of others who are expected to help implement an accommodation. They are required to educate themselves about the nature of disabilities as part of the procedural duty to accommodate, and to clear up any misperceptions or stereotypes that people in the workplace may have about people with disabilities that could lead to inequitable treatment.

Contracting with a disability management company does not mean that an employer cannot be held responsible if the accommodation process is not managed properly.

## **Medical information**

When asking for accommodation, the type of information that employees may generally be expected to provide includes:

- ❖ That the person has a disability or a medical condition
- ❖ The limitations or needs associated with the disability
- ❖ Whether the person can perform the essential duties or requirements of the job

- ❖ The type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job
- ❖ Regular updates about when the person expects to come back to work, if they are on leave.

Where more information about a person's disability is needed, the information requested must intrude the least on the person's privacy, while still providing enough information to make the accommodation.

Generally, the employer does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms or treatment, unless these clearly relate to the accommodation asked for. In **rare** situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to provide more information, up to and including their diagnosis. In these situations, the employer must be able to clearly justify why the information is needed.

Accommodating a person's mental health or addiction disability, by modifying processes, procedures, requirements or facilities to allow equal access, is not the same as treating someone's mental health or addiction disability. An employer is usually not expected (or qualified) to give counselling, treatment or medication to a person. An employer, for example, would not generally

be expected to “counsel” their employee with a mental health disability or provide social work services as part of their duty to accommodate.

## **Preventing and responding to discrimination**

Under the *Code*, employers must make sure their organizations are free from discrimination and harassment. Employers violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they authorize, condone or adopt behaviour that is contrary to the *Code*.

Organizations must take steps to address negative attitudes, stereotypes and stigma to make sure they do not lead to discriminatory behaviour toward people with mental health disabilities or addictions.

Education on human rights works best alongside a strong proactive strategy to prevent and remove barriers to equal participation, and effective policies and procedures for addressing human rights issues that do arise. A complete strategy to prevent and address human rights issues should include:

- ❖ A barrier prevention, review and removal plan
- ❖ Anti-harassment and anti-discrimination policies
- ❖ An education and training program
- ❖ An internal complaints procedure
- ❖ An accommodation policy and procedure.

See the OHRC's *A policy primer: Guide to developing human rights policies and procedures* for more information.

## **For more information:**

The Ontario Human Rights Commission's *Policy on preventing discrimination based on mental health disabilities and addictions* and other publications are available at [www.ohrc.on.ca](http://www.ohrc.on.ca).

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- 1 *Knibbs v. Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII).
  - 2 *Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R.R. D/433 (C.H.R.T.).
  - 3 This example is adopted from the approach by Great West Life Centre for Mental Health in the Workplace and Mental Health Works. See: [www.workplacestrategiesformentalhealth.com/display.asp?l1=177&l2=207&l3=229&d=207](http://www.workplacestrategiesformentalhealth.com/display.asp?l1=177&l2=207&l3=229&d=207).
  - 4 For more information about these and other accommodation strategies, please see Great West Life Centre for Mental Health in the Workplace, "Workplace Strategies for Mental Health," online: Great West Life, Centre for Mental Health in the Workplace <http://gwlcentreformentalhealth.com/display.asp?l1=175&l2=6&d=6#3> (retrieved April 24, 2014).

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