Covid-19 and Accommodation for Working Parents

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As part of our ongoing series of Covid-19 updates, we are looking to answer the question "How does workplace law protect you?" In response to the Covid-19 pandemic, many organizations have opted to allow employees to continue their work from home; however, as restrictions are lifted some organizations are encouraging their employees to return to the workplace. When an organization makes that request, there are many aspects that must be considered, such as the duty to accommodate up to the point of undue hardship. In this article, we will examine how this issue is affecting parents in the workplace as a result of the government's decision to postpone a return to the classroom, and the associated legal considerations. As part of the challenges in relations to working from home, workers with child-care obligations must balance their work productivity and effectiveness with the added stress of their parental duties.

What does the law require?

As mentioned above, the duty to accommodate, outlined by the Ontario Human Rights Commission, stipulates that reasonable accommodations must be made to allow parent workers (including non-biological parents) facing child-care obligations to continue to perform their jobs while providing children with essential care. This is reinforced by human-rights laws across Canada. One of the many issues for debate is the flexibility an employer must offer to accommodate employees. Employees are not entitled to dictate the extent of accommodation based on their predilections but must do so based on their necessity for child-care needs. As a result, employees who require this accommodation must demonstrate that they have made efforts in pursuing safe alternative caregiving, such as daycare, spouses, or other family members and that ultimately no other reasonable option can be safely arranged.

Due to the current Covid-19 restrictions and guidelines imposed by governments and health authorities alike, close contact with anyone outside of the household is restricted/highly limited. Therefore, safely arranging alternative caregiving can prove to be a difficult challenge, and the employer will have to recognize this reality. However, employees will still be required to make attempts to utilize reasonable alternatives for caregiving.

Once the genuine need for accommodation has been established, employers must evaluate the essential requirements of the job and determine if the job can be performed by a parent who is provided with a flexible working arrangement. If a reasonable solution exists, one that will not cross the threshold of undue hardship, then by law, the employer must offer the employee an accommodation to assist them with parenting during Covid-19.

Some solutions/accommodations include:

- Flexible work hours
- Reduced work hours
- Remote Work
- Changing job duties

The last alternative that should be considered to accommodate an employee is an unpaid leave of absence. If an employee is unable to meet the essential duties of the job without any form of reasonable accommodation, then the employer

must provide parents with an un-paid leave of absence. Although some employees may be pleased by this option, many employees will prefer to continue working in order to meet other needs such as financial obligations. Therefore, an unpaid leave of absence should be considered as a last resort in the accommodation process. If the employee accepts the offer or voluntarily undertakes a leave of absence, then the employee will have various statutory protections upon the end of the leave, including the right to reinstatement. A list of protections associated with various leaves can be found under the *Employment Standards Act*.

It is important to note that termination or retaliation is prohibited under *The Ontario Human Rights Code*. Employers have no legal grounds to fire or retaliate against parents in any fashion when they are seeking accommodation in consideration of their provision of necessary care for their children. In the case that an employee has been terminated, the human rights and labour tribunals place the onus on the employer to demonstrate that the actions were not illegal. There are many remedies that may be sought in the findings of discrimination under the protected grounds of family/marital status (including single status) including but not limited to backpay, additional damages and reinstatement.

Child-care discrimination can be subtle. Although it may not be the employer's intent to discriminate, indirect or "adverse" discrimination will still apply under the *Ontario Human Rights Code (OHRC)*. If a policy/procedure is put in place with the intention to affect everyone equally but has the adverse effect of singling out parents or caregivers, then this would classify as adverse discrimination, and therefore would be subject to a legal challenge under the *OHRC*.

In conclusion, the duty to accommodate is a legal requirement. The perfect solution may not always be available or exist, but any possible solution must be considered and presented to parent(s) biological or otherwise.

Questions? We are here to help!

Contact us at mckillop@integrityconsultation.com or faggioni@integrityconsultation.com

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References:

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