



## PAYROLL PROFESSIONALS AND THE DUTY TO **ACCOMMODATE**

*By Jordan Rodney*

**I**t is no secret that the role of a payroll professional within an organization is constantly evolving. Anyone familiar with this role will be able to acknowledge the myriad of hats that payroll professionals wear on a regular basis. Not only are they tasked with managing the organization's payroll function, submitting government remittances, and overseeing group benefits, among other things, almost 50% are now being asked to handle human resources functions in smaller organizations. HR responsibilities also involve compliance and include the mandatory legal obligation to ensure that the work environment is free from any form of discrimination outlined in provincial Human Rights legislation. In Ontario, the Human Rights Code ("Code"), expressly prohibits discrimination and harassment in the workplace.

When discrimination arises, either directly or indirectly, employers have a legal duty to accommodate, to avoid a claim of discrimination. Accommodation does not mean treating everyone equally – the essence of accommodation is the recognition of individual differences.

The *Code* explicitly outlines numerous prohibited grounds, based on personal characteristics of groups that employers must accommodate. A few examples of those prohibited grounds include: race, gender, age, religion, disability and sexual orientation. Bear in mind, the prohibited grounds of discrimination outlined in the *Code* are not meant to be exclusive. In fact, the prohibited grounds continue to expand and evolve as workplaces are continually put to the test. For instance, the prohibited ground of "disability" has become far broader and today includes both physical and mental impairments including,

disabilities ranging from obesity, alcoholism and substance abuse to mental impairments and learning disorders, such as Attention Deficit Hyperactivity Disorder (ADHD) or Anxiety Disorder, all of which are afforded protection by the Code under the umbrella of disability.

Payroll professionals must be mindful of recent amendments to the Code, which have added 'gender identity' and 'gender expression' as protected grounds of discrimination. A further recent development in accommodation, involves the workplace challenges that are posed by the pending legalization of medical marijuana. Payroll professionals can expect to face the challenging conflict of reconciling employee safety and human rights as marijuana consumption increasingly becomes more prevalent among employees.

When assessing whether employers have met the accommodation threshold, it is important to note that they cannot escape their duty to accommodate by turning a blind eye. While the employer is not always expected to have actual knowledge of an employee's disability, *the critical question is whether the employer was aware or ought reasonably to have been aware of the employee's health issues*. This is known as the 'duty to inquire'. Accordingly, as a payroll professional, it is important to keep close attention on your team members to assess whether there are any behavioural changes that seem out of the ordinary and/or may be impacting a team members' performance. In certain cases, as a payroll professional you may be expected to initiate accommodation, even if the employee has not asked for it.

With that said, the duty to accommodate is not limitless. Accommodation requires a balancing of the right of an employee to be free from discrimination and the right of an employer to operate a productive workplace. The Code requires employers to accommodate the needs of those employees up to the point of 'undue hardship'. While undue hardship is outlined as a defence for employers – there is no set formula for determining what precisely meets this threshold. The Code only sets out three items that employers may consider when assessing whether an accommodation would cause undue hardship. These factors include: (1) cost (2) outside sources of funding, and if any, (3) health and safety requirements. This denotes that employers must prove that the financial cost of the accommodation – even when outside sources of funding, or health and safety risks would cause the employer undue hardship. Other factors have also been considered such as the size of the operation, the impact on other employees and the precedent that the accommodation may set.



## CONSIDER THE "ELEVATOR ANALOGY"

Picture an empty elevator. Every person who enters the elevator is one step in the accommodation process. Before the elevator reaches its maximum capacity with people, it may be inconvenient and uncomfortable to get in, but of course, it is still possible to enter that elevator. Until you get to the point where you cannot fit another person in that elevator, you have not reached the point of 'undue hardship'.

In short, the fundamental challenge facing payroll professionals boils down to: how do I ensure that I am providing suitable accommodation to an individual seeking the protection of the Code while effectively running the department and/or organization? Unfortunately, there is no hard and fast rule for how best to accommodate. Instead, the Code outlines three essential principles that support accommodation: dignity, inclusion and individualization. Overall, these factors encourage removing existing barriers in a way that best respects an individual's dignity. Moreover, these principles emphasize that each individual has their own particular set of circumstances and impediments and as such, a unique approach must be taken when faced with a new accommodation request.

As a payroll professional, when you are faced with accommodating an individual, it is important to keep in mind that employers have several duties, such as determining whether the worker's job can be modified or whether other work is available. You are encouraged to come up with creative solutions in these situations. On the flip side, employees who request accommodation need to understand that accommodation requires a reasonable, not a perfect solution. Furthermore, the employee has an equal obligation to participate and cooperate in the accommodation process and this burden does not sit completely with the employer. ■

*This article provides general information and should not be relied on as legal advice or opinion.*

*Jordan Rodney is President at MaxPeople and Founder, Rodney Employment Law. MaxPeople is a professional Human Resources consulting firm that offers premium on-site HR services and Employment Law support for organizations in need of an effective people strategy to grow their business. Special thanks to articling student Arjun Dhir for assistance with the research and writing of this article. To learn more, please visit [maxpeoplehr.com](http://maxpeoplehr.com)*