

Executive Employment

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Highlights

RELEASES

preventing litigation with good releases

When an employee is terminated, the employer will often offer a severance package in exchange for a signed release. This release is meant to protect the employer from any future litigation or other claims by the employee. However, what happens when the employee later believes that he or she has not made a good deal or becomes aware of other information that would have affected his or her decision to take the severance offered. Should an employee be entitled to commence litigation, whether in the courts, under applicable employment standards, or to a human rights commission, after signing a "final" release? Eric Durnford and Amy Bradbury review the current state of the law regarding releases, and offer guidelines for maximizing the likelihood that a release will not be set aside or disregarded. 538

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accommodating disabled workers in Ontario

Human rights legislation prohibits discrimination based on disability and guarantees equal access to employment and freedom from harassment in the workplace. In an effort to identify, remove and prevent workplace barriers and to facilitate further integration, the Ontario government has enacted new legislation, the *Ontarians With Disabilities Act, 2001*. This legislation establishes accessibility obligations on the part of the provincial government, municipalities, and the broader public sector, including public transit organizations, school boards, hospitals, colleges and universities. Joe Conforti reviews the legislation and its impact on private sector employers. 545

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HUMAN RIGHTS

Accommodating Disabled Workers in Ontario: New Legislation Increases Accessibility for Disabled Workers

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People with disabilities have the right to equal treatment without discrimination. This protection is guaranteed by human rights legislation in all Canadian jurisdictions and includes equal access to employment and the right to freedom from harassment in the workplace.¹ Under existing laws, employers and others have a duty to consider the particular needs of the disabled.

This means, for example, designing buildings, processes, programs and job responsibilities inclusively. If existing physical structures, systems or attitudes create barriers, they must be removed. Where it is possible to remove barriers without undue hardship, special arrangements or "accommodation" must be made so that the disabled can fully participate and workplaces are fully accessible. Legislation also attempts to facilitate integration of disabled persons by mandating mandatory re-employment obligations in the case of workers injured in workplace accidents.²

As with job barriers, employers must demonstrate that the needs of the disabled person's return to work "cannot be accommodated without undue hardship ... considering the cost, outside sources of funding, if any, and health and safety requirements, if

any."³ Accommodation will vary according to a person's unique needs which are assessed individually.

Notwithstanding current legislation, however, workers with disabilities continue to experience barriers in participating in the mainstream of society, including the workplace. According to the Ontario's Ministry of Citizenship, that province alone has 1.9 million people with disabilities – a figure which is expected to increase as the general population ages. It is an unfortunate commentary on the state of health and safety in the workplace that many disabilities are caused by workplace accidents or hazards. For example, every year approximately one million Canadians suffer an injury from their jobs (including fatalities or illnesses); more than half of these injuries result in lost time. Over 700 workers annually are killed on the job.⁴

Statistics also demonstrate that the disabled are chronically unemployed or underemployed.

In an effort to identify, remove and prevent barriers and to facilitate integration, the Ontario government enacted the *Ontarians With Disabilities Act, 2001* (the "ODA") on December 14, 2001, mandating that various organizations make additional efforts to improve opportunities for the disabled.

On September 30, 2002, certain provisions of the ODA were proclaimed into force setting out specific accessibility obligations on the part of the government of Ontario, municipalities, and the broader public sector, including public transit organizations, school boards, hospitals, colleges and universities.

Key Definitions

As the objective of the ODA is to remove "barriers" to persons with a "disability," understanding the meanings of these terms is essential.

Under the ODA, a "disability" includes:

- any degree of physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness. This includes, for example: diabetes

¹ See, e.g., Ontario Human Rights Code, R.S.O. 1990, c. H. 19.

² *Workplace safety and Insurance Act*, 1997, S.O. 1997, c. 16.

³ See, e.g., Ontario Human Rights Code, sections 11(2) and 17(2).

⁴ Prentice-Hall, *Human Resources Management in Canada*, vol. 3, paragraph 60,002.

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mellitus; epilepsy; brain injury; paralysis; amputation; lack of physical co-ordination; blindness/visual impediment; deafness/hearing impediment; muteness/speech impediment; physical reliance on a guide dog or other animal or on a wheelchair or other remedial device;

- mental impairment/disorder or a developmental or learning disability; and
- an injury or disability for which benefits were claimed or received under workers' compensation legislation.

A "barrier" is anything that stops a person with a disability from fully taking part in society because of that disability, including:

- physical barriers;
- architectural barriers;
- information or communications barriers, attitudinal barriers, technological barriers; and
- barriers created by policies or practices.

Examples include a lack of elevators in a building, assumptions that persons with disabilities cannot perform a certain task or assignment when in fact they can, failure to accommodate by offering different ways to complete a task or the essential elements of a job.

Who Does the ODA Apply to?

The ODA applies to the provincial government and the broader public sector, specifically to:

- the Ontario government;
- municipalities with a population of 10,000 or more;
- school boards, hospitals, colleges and universities and other prescribed agencies; and
- defined "public transportation organizations," namely any service for which a fare is charged for transporting the public by vehicles operated pursuant to or under any license issued by the Ontario government or a municipality (such as local, intra-provincial and inter-city bus operators and taxicab companies).

Government Responsibilities

The ODA requires the government of Ontario to:

- develop barrier-free design guidelines for buildings that the government buys, leases, builds or renovates;
- consider the accessibility of equipment, supplies or services the government is buying for itself, its employees or the public;
- accommodate the accessibility needs of government employees and those taking part in the selection process for employment;
- provide training to managers and supervisors regarding the ODA and the government's obligations regarding accessibility and employment; and
- develop and publish annual accessibility plans for each Ministry considering barriers to people with disabilities and ways to prevent or remove them.

Designated government agencies must also develop "accessibility policies."

Responsibilities of Other Organizations

Municipalities, public transportation providers, hospitals, school boards, colleges and universities are required to establish "accessibility plans," which must include:

- a report on the measures that the organization has taken to identify, remove and prevent barriers to persons with disabilities;
- the measures in place to ensure that the organization assesses its proposals for by-laws, policies, programs, practices and services to determine their effect on accessibility to persons with disabilities; and
- a description of the organization's process for reviewing its practices and the measures that the organization intends to take in the coming year to identify, remove and prevent barriers to persons with disabilities.

Guidelines and Enforcement

Accessibility plans are to be developed annually and will be made public. The deadline for the first accessibility plans is one year

from the ODA's proclamation, that is, by September 30, 2003.

Newly created bodies, the Accessibility Directorate and the Accessibility Advisory Council, will assist in providing resources and implementing regulations to provide guidance to organizations in the establishment of accessibility plans.

The ODA provides for offences and fines of up to \$50,000 for failure to meet certain requirements. In addition to direct fines for offences, the ODA requires the provincial and municipal governments to consider accessibility when purchasing goods and services or when implementing government-funded capital programs.

Impact on the Private Sector

Even though the legislation is not specifically directed at them, private sector employers will be affected by several aspects of the ODA.

First, the provincial government and all municipalities are required to consider accessibility in choosing which goods or services to purchase. This has the potential to affect many private sector companies that regularly contract with the government and will provide an incentive to implement accessibility plans compatible with the government's.

Second, the ODA creates additional municipal powers, which may, in turn, affect the private sector. In particular, the ODA gives municipalities the power to require that businesses be accessible to the disabled as a prerequisite to obtaining, continuing to hold, or renewing a license. New "Municipal Accessibility Advisory Committees" also have the power to review draft site plans and drawings of proposed new subdivisions.

Third, the Accessibility Directorate and the Accessibility Advisory Council will work with the private sector to facilitate the development of voluntary accessibility standards and codes. To the extent voluntary compliance does not result in improved accessibility, then mandatory legislation may be introduced in the future.

Fourth, the ODA includes regulation-making authority that allows the Lieutenant Governor and Council to permit the adoption of accessibility standards and codes by

reference to new organizations not currently covered by the legislation.

Finally, the ODA supplements existing legal obligations to have a discrimination-free environment.

As a result, even private sector employees are well-advised to review their own systems and practices to ensure that any improper barriers have been removed and that steps to permit accommodation are available.

Accessibility Reviews

At minimum, employers should take steps to demonstrate their accommodation efforts.

Existing guidelines published by the Ontario Human Rights Commission, suggest that all organizations develop accessibility review plans, undertaking reviews and implementing necessary changes to make facilities, procedures and services accessible to disabled persons.⁵ In conducting accessibility reviews, employers should:

- acknowledge the organization's obligations under the Ontario Human Rights Code to ensure accessibility for disabled persons;
- ensure that all managers and supervisors are aware of legal requirements and that there is a communications plan to inform all other relevant personnel;
- identify potential barriers as they may relate to procedures and practises, facilities, services and communications;
- determine the essential functions of each job in the workplace and those non-essential functions that can be re-assigned if necessary; and
- consider all accommodations, for example: re-assignment, modification of hours, leave of absence, job-sharing, new equipment or training, and also with consideration for:
 - the essential job requirements;
 - other positions available within the organization;

⁵ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate*, (2000) at A-36.

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- any collective agreement requirements (e.g., seniority, bumping);
- any mandatory health and safety requirements;
- the specific wishes of affected personnel;
- outside sources of information or resources with respect to specific kinds of disability (e.g., Canadian Cancer Society, Muscular Dystrophy Association); and
- the cost of accommodations.

Summary

It is important to recognize that the ODA supplements, but does not replace, existing

protections under human rights legislation. Together, the legislation confirms the accessibility and other protection available to workers with disabilities. The legislation also imposes substantial obligations on and incentives to employers to create and maintain a barrier-free workplace.

Fairness in employment will occur when employers fully integrate equity and accessibility practices into their workplaces. This does not entail a reduction in the quality of the job expected but rather an elimination of improper barriers.

The Supreme Court of Canada has identified a "healthy working environment" as an important societal goal.⁶ The ODA is another step taken towards achieving this goal.

⁶ *Robichaud v. Brennan*, [1987] 2 S.C.R. 84, at 94.