



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

ONTARIO HUMAN RIGHTS COMMISSION
Submission to the
Employment Accessibility Standards Development
Committee
Regarding
The Initial Proposed Employment Accessibility Standard
May 22, 2009

The Ontario Human Rights Commission has reviewed the initial proposed Employment Accessibility Standard prepared by the Employment Accessibility Standards Development Committee pursuant to the Accessibility for Ontarians with Disabilities Act (AODA). The proposed Standard would see the establishment of employment policies, procedures and training addressing accessible recruitment, hiring and retention as well as accommodation of persons with disabilities within specified timelines.

The Commission would like to raise the following issues for consideration by the Committee as it deliberates and prepares to submit to government a final proposed standard following the public consultation period.

Once passed into Regulation, the Employment Accessibility Standard will be an important legal tool to help bring about accessible workplaces across Ontario alongside other AODA standards, including customer service, information and communications, and built environment, as well as the Human Rights Code itself, which has primacy overall.

In this regard, the Commission is pleased to see the **Preface** acknowledge that nothing in the proposed Standard diminishes an employer's duty under the Code to accommodate individuals with disabilities short of undue hardship. To help employers interpret the Standard in light of this obligation, the Commission recommends the following human rights principles be set out: create no new barriers, design inclusively, identify and remove existing barriers, favour integration over segregation, provide interim measures where appropriate, and accommodate individual need short of undue hardship by exploring solutions through a cooperative process that maximizes confidentiality and respect.

The **Scope** of the Standard proposes to limit its application to "paid" employees, excluding volunteers as well as organizations that only employ family members. The Commission has previously taken the position that "equal treatment with respect to employment" in section 5 of the Code should be interpreted to protect anyone in a work-like context. This would include family members as well as volunteers and others who work without a salary to gain experience, such as students on a practicum or those being mentored. While it is recognized that unpaid employment falls outside the Committee's terms of reference, the Commission recommends that the scope of the Standard be broadened to include family members as well as volunteers and other unpaid individuals who perform work.

Under **Standard 3.2** employers would be required to develop an accessible employment policy statement with a number of minimum commitments. The Commission suggests adding commitments for employers, especially larger organizations, to develop accommodation procedures as well as an appeal mechanism to help facilitate requests and resolve any disputes.

Standard 3.4 sets out requirements for staff training in order to support accommodation for employees with disabilities. The Committee might consider amending this standard

to specifically identify management training, especially in larger organizations, as managers share corporate responsibility for accommodating employees with disabilities.

Standard 4.1.1 sets out a requirement, with delayed implementation, for employers to explain to applicants, upon request, that accommodation shall be provided. While setting out timelines for implementing this standard is appropriate, the Commission is concerned that employers might misinterpret the standard to mean they have no duty to accommodate until after the specified number of years. Under the Code, Commission policy, and human rights jurisprudence, all employers have an immediate and ongoing duty to respond to individual accommodation requests and explore and provide solutions as soon as possible, short of undue hardship. This standard should be amended accordingly.

Standard 4.2 would require employers, upon request of applicants, to begin providing information only after the specified number of years on essential duties of vacant jobs, as well as document the information. Applicants who ask for such information to help facilitate disability related accommodation needs should receive the necessary information as soon as possible. Again, the standard should be amended to meet the higher standard already set by the Code, Commission policy and human rights jurisprudence.

The Commission also recommends that this standard be amended to require employers to document and provide information on any bona fide occupational requirements that may classify or exclude applicants or employees because of their disability. For example, agencies who serve vulnerable sector clients, such as children or older persons, sometimes require candidates to undergo a police record check as part of a bona fide occupational requirement that could disclose information on apprehensions under the Mental Health Act. Employers might need to provide information upon request for vacant as well as existing positions in order to help facilitate accommodation requests whenever they might arise. As a best practice, employers might be encouraged or required over time to document information on essential duties and bona fide occupational requirements as well.

Standard 4.4 would require employers to begin informing all applicants, by the specified implementation timelines, that assessment and selection processes and materials are available in accessible formats and methods. This standard should clarify that employers still have an immediate duty, upon request of an applicant with a disability, to ensure that processes and materials are made accessible, short of undue hardship. And where disability related accommodation requests have been made, employers have an immediate duty to “ensure that accommodations allow for assessment against the essential duties of the job.” This standard should be amended accordingly.

Standard 4.6 would require employers to make accessible information and communications available at all stages of employment in accordance with the proposed Information and Communications Standard. This standard should clarify that employers

still have an immediate duty, upon request of applicants or employees, to explore and provide accessible information and communications, short of undue hardship.

Standard 5.1 would require employers to develop, adopt, document and maintain a procedure for the establishment of individual accommodation plans when requested by the employee. The standard should clarify that employers shall develop procedures within the specified implementation timelines regardless of whether an employee has asked for an individual accommodation plan. The specified timelines for developing procedures set out in this standard are much longer than the timelines set out under standards 3.2 and 3.3 for developing the policy related to this standard. The Committee might wish to reconsider this gap.

As well, while this standard exempts class A and B employers with less than 50 employees from developing policies and procedures, all employers still have a duty to engage in the process to explore and provide accommodation, short of undue hardship.

Standard 5.1 also breaks down what shall be included in an individual accommodation plan. In response to the Committee's question, while the standard could set out more detailed components for individual accommodation procedure or plans, the Commission finds the minimum components have been sufficiently identified.

Under **Standard 5.5**, employers would be required to develop return-to-work procedures for employees absent because of disability unrelated to the Workplace Safety and Insurance Act, and document efforts to return individuals to the same or equivalent job. While it is proposed that workplaces with less than 50 employees would not have to develop such procedures, all employers still have a duty to accommodate a disabled employee's needs upon request, short of undue hardship, regardless of whether their disability was a result of a workplace injury.

In addition, under the Code, Commission policy and human rights jurisprudence, employees returning to work and unable to perform the essential duties of the original or equivalent job might have a right to accommodation in alternative work depending on the circumstances. The Committee should consider amending Standard 5.5 accordingly.

The balance of **Standard 5** sets out a number of requirements around new employee orientation, performance review and management, career development, return-to-work and redeployment, separation and termination, emergency and safety, and accessible information and communications. While the standard may appropriately set implementation timelines for the provision of related information and training to all employees, it should be made clear that employers still have an immediate duty to provide any information or training that may be necessary to help facilitate the accommodation needs of an individual employee with a disability. Similarly, any requirements, practices and benefits related to terms and conditions of work such as performance management or career advancement that are applicable and available to other employees cannot be delayed or denied for employees with disabilities. They

must apply immediately and be in accordance with an individual employee's disability related accommodation needs, short of undue hardship. Standard 5 should be amended accordingly.

In addition, the timelines under Standard 5 to begin providing employees with information on policies and procedures should be the same as the timelines elsewhere in the Standard for developing those same policies and procedures.

The Committee might also consider amending Standard 5 to set out requirements and timelines for employers to review, identify and remove barriers to make workplace systems more inclusive for employees with disabilities in general.

Monitoring compliance with the Employment Accessibility Standard and measuring its impact on the lives of persons with disabilities will be important to its success. The Commission is pleased to see that the Committee has set out **Standard 6**, which calls for employers to identify indicators and collect data for measuring progress.

The Committee has asked whether this standard should prescribe specific indicators. While identifying some indicators in the Standard would help promote consistency across the province, the Commission also recognizes that measuring progress requires some flexibility to apply relevant indicators across different size organizations, occupations, and sectors. Government could provide helpful resources in this regard including both quantitative and qualitative research tools. For example, detailed census data on the representation of employees with disabilities and their needs across occupations, sectors and different levels of geography could help employers focus and prioritize their efforts to identify and remove barriers. Such data would also provide a comparative baseline for employers, particularly larger organizations, who may wish to survey representation and measure barrier removal and inclusive design efforts within their own workplace. Other ways employers could measure progress include monitoring for a drop in employee accommodation requests or complaints as well as gauging employee perceptions and actions using qualitative data collection techniques, such as focus groups, interviews, and surveys.

The Committee might consider adding definitions to the Standard for other terms and concepts that the Commission has used above such as "duty to accommodate", "short of undue hardship" and "bona fide occupational requirements".

Finally, the Commission agrees with the Committee's recommendation set out in its transmittal letter that government needs to play an active role in supporting education and compliance including the provision of resources that will help employers, particularly smaller organizations, implement the Employment Accessibility Standard.