Accommodation at Work

Assuring the continued employment of New Brunswickers after a permitted leave or a workplace accident

RIGHTS, OBLIGATIONS AND BEST PRACTICES UNDER NEW BRUNSWICK'S

- *Workers' Compensation Act*
- *Employment Standards Act*
- *Human Rights Act*

WorkSafe Travail sécuritaire NB

New Nouveau Brunswick Canada

New Brunswick Human Rights Commission
Commission des droits de la personne du Nouveau-Brunswick

A digital copy of this document can be found online at any of the following websites:

www.worksafenb.ca
www.gnb.ca/hrc-cdp
http://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/labour.html

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Published jointly by WorkSafeNB, the New Brunswick Department of Post-Secondary Education, Training and Labour and the New Brunswick Human Rights Commission.
January 2013

Introduction

New Brunswick has a proud reputation as a champion of human rights. It was a New Brunswicker, John Humphrey, who wrote the first draft of the *Universal Declaration of Human Rights*, a document adopted in 1948 that became the model for constitutional documents around the world, including Canada's own *Bill of Rights* and *Charter of Rights and Freedoms*.

International human rights documents also led to the adoption of anti-discrimination laws such as the New Brunswick *Human Rights Act*[1], which recognizes that "all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity."[2]

Today it is generally understood that you cannot achieve equality by assuming that everyone is the same and treating them accordingly. This is especially true for people with a disability. Adverse effect discrimination occurs when uniform policies, practices or facilities have an adverse effect on a group of persons because they do not take into account their particular characteristics. The "duty to accommodate" arose from this understanding.

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1 In this guide, expressions that are highlighted are defined in the Glossary found on p. 23.

2 As of January 2013. For the latest information, check *www.gnb.ca/hrc-cdp*.

The duty to accommodate refers to an employer's obligation to identify and eliminate any rules, policies, practices, facilities or equipment that may have a discriminatory effect against employees or potential employees and limit their opportunities for employment. The duty to accommodate most often applies to persons with disabilities. Regardless of the disability's origin, nature or severity, and whether or not it is temporary or permanent, the duty to accommodate is a legal requirement, not a courtesy. However, employers are not required to make accommodations that would cause them "undue hardship," taking into account such factors as financial costs, service disruption, health and safety concerns, and collective agreements.

This guide was developed to help New Brunswick employers and workers understand their legal rights and obligations regarding the right to return to work, particularly in regard to the duty to accommodate disability in the workplace. These rights and obligations are legislated under three provincial Acts:

- *Workers' Compensation (WC) Act*
- *Employment Standards (ES) Act*
- *Human Rights (HR) Act*

The information in this guide applies to employers and employees who fall under provincial jurisdiction, about 90% of the workforce. It does not apply to federally-regulated employers such as railways, pipelines, ferries, air transport, radio and television broadcasting, banks, cable systems, extra-provincial trucking and shipping, federal Crown corporations and many First Nation activities.

Bottom line: Employers and employees need to be aware that the various leaves guaranteed to employees under the *ES Act* and the right to return to work under the *WC Act* are minimums only. It is important to remember that the duty to accommodate under the *HR Act* often provides more extensive rights, especially for employees with a disability.

The *Employment Standards Act*

The Employment Standards Branch of the provincial Department of Post-Secondary Education, Training and Labour (PETL) administers the *ES Act*. It applies to part-time, full-time, casual, seasonal and permanent employees, whether unionized or not, except when the employees fall under federal jurisdiction. The Act sets out several minimum rights for employees, including the right to return to work after several types of leave (see p. 11).

It is important to keep in mind that the *HR Act* may provide rights to pregnant employees and mothers beyond the maternity leave requirements of the *ES Act*. In addition, the right to return to work for injured workers under the *WC Act*, and for all employees with a disability under the *HR Act*, may continue beyond the five-day sick leave period mentioned in the *ES Act*.

The *Workers' Compensation Act*

The *WC Act* applies to employers and employees under provincial or federal jurisdiction. Where an employer has 10 or more employees, its injured workers who have been employed for at least one year have the right to return:

- To the same or equivalent job if they are capable of performing its required duties.
- To a suitable alternate employment if one becomes available. (see p. 6).

This right applies without loss of seniority or benefits, and lasts for:

- One year, if the employer regularly employs 10 to 19 employees.
- Two years, if the employer regularly employs 20 or more employees.

Again, the right to return to work under the *WC Act* is a minimum. Injured employees who have a disability often have more extensive rights under the *HR Act*. Nevertheless, they should always file a workers' compensation claim even if they decide to file a human rights complaint, since WorkSafeNB provides workers with monetary benefits as well as extensive rehabilitation services to help injured employees return to work.

With respect to provincially regulated employees, the right to return to work under the *WC Act* is enforced by the Employment Standards Branch.

The *Human Rights Act*

The New Brunswick Human Rights Commission (HRC) administers the New Brunswick *HR Act*. It prohibits discrimination based on several grounds, including gender and physical and mental disability, in employment and certain other activities.

It applies to unions and professional associations, to all employers regardless of size, and to job applicants and employees, whether casual, probationary or permanent, part-time or full-time, unionized or not, and regardless of length of employment or type of occupation. However, it does not apply to federally-regulated employment. Federally-regulated workplaces are subject to a similar law called the Canadian *Human Rights Act,* which is administered by the Canadian Human Rights Commission.

Both human rights acts give persons with a physical or mental disability the right to be accommodated by employers and unions so they can be hired or can return to work, whether or not the disability resulted from a work-related accident or illness. Employers, professional associations and unions have a corresponding duty to accommodate.

To accommodate means to modify or adjust policies, practices and facilities to eliminate their discriminatory effect.

A common example of accommodation is holding a position open so an employee who has become disabled can return to work upon recovery (see p. 17).

The right to return to work under the *HR Act* may last longer than the five-day sick leave period of the *ES Act*, and may extend beyond the one and two year return-to-work periods under the *WC Act*. Furthermore, the right under the *HR Act* applies also to disabilities that are not caused by work, and to employees and employers who are not subject to the *WC Act*.

However, the right to return to work and the duty to accommodate under the *HR Act* are not unlimited. They are subject to the *Meiorin* test, which sets out general principles that limit the duty to accommodate based on the specific circumstance of each employer and employee. In short, the *Meiorin* test says that an employer rule (a policy, practice, job description, etc.) that has a discriminatory effect is nevertheless valid when three criteria are met (see p. 18):

1. Its purpose is rationally connected to the job.

2. The rule was adopted in good faith and with the belief that it is necessary to that purpose.

3. The rule is reasonably necessary to accomplish that purpose or goal (that is, accommodation is impossible without causing undue hardship to the employer).

What constitutes undue hardship depends on numerous factors that should be applied with common sense and flexibility. The most common are safety, cost and impact on co-workers and customers. The requirements are quite strict. In most cases, accommodation is required and employees are entitled to return to work (see p. 18).

This guide has been prepared with input from the Human Rights Commission, the Employment Standards Branch of the Department of Post-Secondary Education, Training and Labour, and WorkSafeNB. The information is up-to-date as of January 2013.

What is WorkSafeNB?

WorkSafeNB promotes a safe and healthy work environment through education and enforcement, and provides no-fault workplace accident and disability insurance to employers and workers in New Brunswick. Regional offices are located in Saint John, Dieppe, Bathurst and Grand Falls.

WorkSafeNB is an employer-funded Crown corporation, and not a provincial government department. WorkSafeNB reports to the New Brunswick Legislature through the Minister of Post-Secondary Education, Training and Labour (PETL) and provides accident prevention services, occupational health and safety assistance, disability and liability insurance, and medical aid, rehabilitation and return-to-work services to approximately 14,300 employers and 356,100 workers in New Brunswick.

WorkSafeNB administers four pieces of legislation: (1) the *Workplace Health, Safety and Compensation Commission (WHSCC) Act;* (2) the *Occupational Health and Safety (OHS) Act* and Regulations; (3) the *Workers' Compensation (WC) Act* and Regulations; and (4) the *Firefighters' Compensation (FC) Act* and Regulations.

What is the *Workers' Compensation Act*?

Like other workers' compensation legislation in Canada, the *WC Act* of New Brunswick is based on the Meredith Principles, which formed the basis of a historic agreement between

labour and business. According to the Meredith Principles, employers agreed to fund the workers' compensation program and, in exchange, workers gave up the right to sue employers for compensation of work-related injuries. In New Brunswick, workers' compensation is administered by WorkSafeNB through a no-fault insurance system set up under the *WC Act*.

Jurisdiction and application

With some exceptions for specific industries, the *WC Act* applies to all New Brunswick employers with three or more workers at any time during the year. These employers must register with WorkSafeNB for what is called "Mandatory Coverage" under the *WC Act*. This includes federally-regulated employers such as banks, telecommunications companies, port authorities, and others.

Employers with fewer than three workers may also request coverage under the *WC Act* on a voluntary basis. This is referred to as "Voluntary Coverage." Employers making such an application must anticipate operating for at least six months and employ at least one full-time worker.

RE-EMPLOYMENT OBLIGATIONS UNDER THE *WC ACT*

Under the *WC Act*, section 42.1 states that employers with 10 or more workers have a legislated responsibility to re-employ injured workers in:

- The same or equivalent job, if the injured worker is capable of performing the required duties.
- Suitable alternate employment that may become available with the employer, with no loss of seniority or benefits, if the injured worker is incapable of performing the required duties of the pre-accident job.

If an employer has less than 10 workers, the *WC Act*'s re-employment obligation does not apply. (*However, please note that the right to return to work under the HR Act applies to all employers, regardless of the number of workers or length of employment, and has no specific restriction on the time frame for re-employment.*)

Stipulations

In order to qualify for protection under the re-employment obligations of the *WC Act*, the worker must have **suffered a workplace injury/injury recurrence** or **occupational disease** by accident; the worker must be entitled to compensation; and the worker must have been employed by the employer for at least one year, or, in the case of construction work, be employed at the time of the injury.

Who decides?

WorkSafeNB uses the expert opinions of rehabilitation specialists, case managers, occupational therapists, professional adjudicators, physicians, and others to determine:

- Whether an injured worker is entitled to compensation for their injury or occupational disease.
- When and whether an injured worker is ready to return to work.
- Whether an injured worker is fit to return to the same position, and/or if the worker is fit to return to work in an alternate position offered by the accident employer.

Re-employment obligation time frames

Employers who are subject to the *WC Act*'s re-employment obligation are required to offer re-employment to an injured worker if they are ready to return to work within the following time frames:

- One year, for employers who regularly employ 10 but fewer than 20 workers.
- Two years, for employers who regularly employ 20 workers or more.

The re-employment obligation begins on the date the injured worker was entitled to receive compensation, and continues until the one or two-year period has expired.

Special considerations

Construction industry

Employers in the construction industry may have an obligation to re-employ injured workers doing construction work in the position held immediately before the accident if the construction project and position still exist. The re-employment obligation is subject to the rules and practices respecting hiring and placement in the injured worker's trade.

Collective agreements

When injured workers are covered by the re-employment provisions of both a collective agreement and the *WC Act*,

the Act applies unless the collective agreement provides injured workers with greater rights. WorkSafeNB determines whether the *WC Act* prevails, and, in writing, notifies the workplace parties of the finding as soon as possible.

Promotion

WorkSafeNB actively promotes the re-employment obligation to New Brunswick workplaces.

WorkSafeNB has maintained a disability management program for many years. The program was designed to help employers understand the benefits of re-employment, and smoothly manage the process. In 2004, WorkSafeNB simplified this program with the Workplace Accommodation Process.

WorkSafeNB Education Consultants are able to use this process to proactively identify workplaces with numerous lost-time accidents, and target them for the co-operative development of a workplace accommodation plan to effectively re-integrate more injured workers into their previous place of employment in a timely way.

WorkSafeNB educates workplace parties on the re-employment obligation, and on the Workplace Accommodation Process before an accident occurs, early in the claim process, and throughout the claim when barriers arise.

WorkSafeNB also works co-operatively with the Employment Standards Branch and the HRC to educate workplace parties about their responsibilities and legislative obligations in return-to-work.

SUITABLE OFFERS OF ALTERNATE EMPLOYMENT

If, due to restrictions resulting from an injury or occupational disease covered under the *WC Act*, an injured worker is unable to resume their pre-accident position – and the employer is subject to the *WC Act*'s re-employment obligation – the employer must permit the worker to resume work in suitable alternate employment that may become available with the employer.

WorkSafeNB determines if the offer of alternate employment is suitable. If it is, and the worker refuses to accept the offer of employment, the employer is no longer bound by the re-employment obligations under section 42.1 of the *WC Act*. However, the employer may still have a reemployment obligation under the *HR Act* (see p. 17).

WorkSafeNB uses a variety of criteria to determine if an offer of alternate employment is suitable. Suitable alternate employment means appropriate employment that a worker is capable of doing, which does not endanger their health, safety or physical well-being, and considers their physical abilities and employment qualifications.

If the offer of suitable alternate employment still leaves the worker in a loss of earnings, WorkSafeNB will compensate the worker for this loss of earnings, up to 85% of their pre-accident net earnings. Although the alternate employment may result in a pay decrease, paragraph 42.1(3)(*e*) states that the worker will incur "no loss of seniority or benefits."

If an alternate position is offered and there is a gap in the worker's technical capabilities, WorkSafeNB will consider providing training assistance to the worker so they can meet the new job requirements.

Mediation

WorkSafeNB facilitates early and safe return-to-work by working with injured workers, accident employers, unions and health care providers to explore re-employment options.

WorkSafeNB communicates re-employment options or alternatives that will meet the needs of both parties. In the event that a stalemate is reached, however, WorkSafeNB can arrange for a third party mediator to assist the workplace parties to resolve the issue.

Refusal

Injured worker

WorkSafeNB requires that injured workers actively participate in their rehabilitation and return to work. Injured workers must co-operate with employers in this process, and accept suitable offers of alternate employment.

Consequences of refusal

If evidence shows that an injured worker has refused a suitable offer of alternate employment, WorkSafeNB may reduce or suspend that injured worker's benefits.

WorkSafeNB may also relieve the employer of its obligation to hold the employee's position open under the *WC Act*. However, the employer may still have an obligation to hold the position open under the HR Act (see p. 17).

Disputes

If an injured worker disagrees with WorkSafeNB's decision that an alternate offer of employment is suitable, they can:

- Appeal WorkSafeNB's decision through the Appeals Tribunal.
- Pursue a complaint with the Employment Standards Branch.
- Pursue a complaint with the HRC of New Brunswick.

Employer

WorkSafeNB requires that employers actively participate in the return-to-work process. Employers must take their re-employment obligation seriously, and be prepared to extend suitable offers of alternate employment, should an injured worker be unable to perform the duties associated with their pre-accident position.

Consequences of refusal

If an employer refuses to meet their re-employment obligation, a formal complaint may be filed with either the Employment Standards Branch and/or the HRC of New Brunswick to require that they comply with legislation.

In the event that the Employment Standards Branch or the Labour and Employment Board hearing the complaint finds that the accident employer did not comply with their re-employment obligation, WorkSafeNB may charge the accident employer an administrative surcharge, or "demerit," equal to $2,500 per offence. The demerit amount will be added to the employer's assessed premium for the year the non-compliance event took place.

In the event that a complaint is filed with the HRC, the employer will be required to demonstrate that retaining the injured worker in their original position, or, if this is not possible, providing alternate employment would amount to undue hardship. If the HRC agrees that the employer has proven undue hardship, WorkSafeNB will not charge the employer a demerit. (WorkSafeNB does not make a determination of undue hardship.)

Disputes

If an employer disagrees with a WorkSafeNB decision, they can appeal the decision through the Appeals Tribunal.

COMPLAINTS

When an accident employer does not re-employ an injured worker, WorkSafeNB reviews the claim to determine if it is likely that the accident employer did not comply with the re-employment obligation of the *WC Act*.

If an employer did not comply with this obligation, WorkSafeNB:

- Informs the accident employer of their legislative obligation, verbally and in writing.
- Gives the accident employer a reasonable period of time to comply with their legislated obligation.

Injured worker-generated complaints

If the employer still does not re-employ the injured worker, WorkSafeNB will encourage the injured worker to file a complaint with the Employment Standards Branch. They may also file a complaint with the HRC.

When an injured worker has filed a complaint with the Employment Standards Branch or the HRC, WorkSafeNB will:

- Ask the injured worker to sign a consent form allowing WorkSafeNB to share information with the organization investigating the complaint, as appropriate.
- Contact the organization investigating the complaint to initiate the information-sharing process.

WorkSafeNB-generated complaints

If the injured worker does not file a complaint and WorkSafeNB is satisfied that the employer did not comply with the *WC Act*, WorkSafeNB may file a breach of legislation complaint with the Employment Standards Branch on the worker's behalf.

When filing a complaint, WorkSafeNB:

- Informs the accident employer, injured worker and any other appropriate workplace parties of the WorkSafeNB's intent to file a complaint with the Employment Standards Branch.
- Explains to the workplace parties what happens once a complaint is filed.

HOW TO CONTACT WORKSAFENB

Injured workers who believe their employer has failed to meet their legislated duty to accommodate are encouraged to contact WorkSafeNB by:

1) Toll-free: 1 800 222-9775

2) Visiting the regional office nearest you:
- Saint John – 1 Portland Street
- Dieppe – 30 Englehart Street, Suite F
- Bathurst – Place Bathurst Mall, 1300 St. Peter Avenue, Suite 220
- Grand Falls – 166 Broadway Boulevard, Suite 300

3) Mail:
WorkSafeNB
1 Portland Street
P.O. Box 160
Saint John, N.B. E2L 3X9

4) Discussing the matter with your case manager.

What is the Employment Standards Branch?

The Employment Standards Branch is part of the New Brunswick Department of Post-Secondary Education, Training and Labour (PETL). Regional offices are located in Bathurst, Edmundston, Fredericton, Dieppe and Saint John. The Branch provides services to all members of the public, in particular employers and employees. These services include responding to general inquiries, investigating complaints, and providing information sessions to public and private groups.

The Branch is responsible for enforcing the New Brunswick *ES Act*, which sets out minimum standards for employers and employees.

What is the *Employment Standards Act*?

The *ES Act* establishes minimum rights and responsibilities for New Brunswick employers and employees. These standards promote a productive and efficient workforce and allow workers to balance family and workplace responsibilities. Some of the standards included in the *ES Act* are minimum wage, overtime pay, vacations with pay, paid public holidays, sick leave, and return to work following a workplace injury.

It is important to note that section 42.1 of the *WC Act* of New Brunswick – including the re-employment obligation – is deemed to be a provision of Part III of the *ES Act* and is therefore enforced by the Employment Standards Branch.

Jurisdiction and application

The *ES Act* applies to most employees and employers in New Brunswick. The Act does not distinguish between part- time, full-time or casual employees; therefore all employees are entitled to these minimum employment rights. It also provides for minimum standards for seasonal employees and construction workers.

Federally-regulated industries

Employees and employers who are covered by federal employment legislation – the *Canada Labour Code* – fall outside of the jurisdiction of the Employment Standards Branch. Examples of these are railways, pipelines, ferries, air transport, radio and television broadcasting, banks, cable systems, extra-provincial trucking and shipping, federal Crown corporations and many First Nation activities. Any inquiries regarding federally-regulated work practices should be directed to Service Canada by calling 1 800 206-7218 or visiting *www.servicecanada.gc.ca*.

Unionized employees

Employees who are members of a union are generally subject to a collective agreement. With some exceptions, collective agreements must provide for at least the minimum standards of employment provided in the *ES Act*.

Employees covered by a collective agreement must first attempt to use the grievance process to handle any employment issues, including issues relating to the right to return to work following a workplace injury.

Other occupations

Other workers not subject to the *ES Act* include persons who work in or around a private home for the homeowner (babysitters, home care workers, construction workers who are employed directly by the homeowner, etc.), workers providing agricultural services to small family farms, and independent contractors. These workers, however, may still be entitled to the right to return to work after a workplace injury under the *ES Act* or the *HR Act*.

RETURN-TO-WORK UNDER THE *ES ACT*

The *ES Act* states that employers cannot dismiss, suspend or lay off employees during permitted leave for reasons arising from the leave alone. Upon completion of the leave, employers must allow the employee to resume work in the position held immediately before the beginning of the leave – or an equivalent position – with no decrease in pay.

Permitted leave

Types of leaves covered under the *ES Act* include:

- **Maternity leave**
  Employers shall grant an employee 17 weeks unpaid maternity leave, or a shorter period if the employee wishes, beginning no earlier than 11 weeks prior to the probable delivery date.
- **Child Care leave**
  Employers shall grant an employee who is the natural parent of a newborn or unborn child, or who is adopting or has adopted a child, 37 consecutive weeks unpaid leave, or such a shorter period as the employee requests, so as to enable the employee to care for the child.
- **Bereavement leave**
  Employers shall grant an employee five consecutive days unpaid leave to begin no later than the day of the funeral, in the event of the death of a person in a close family relationship with the employee.
- **Compassionate Care leave**
  Employers shall grant an employee up to eight weeks unpaid leave to care for someone in a close family relationship with the employee, where the person in the close family relationship has a serious medical condition with a significant risk of death.
- **Court leave**
  Employers shall grant an employee an unpaid leave for any period of time the employee is absent from work as a result of: being summoned to serve on a jury; selected to serve on a jury; or served with a summons to attend the hearing of an action application or proceeding as a witness.
- **Family Responsibility leave**
  Employers shall grant an employee a three-day unpaid leave during a 12-month period, so the employee can attend to the health, care or education of a person in a close family relationship with the employee.
- **Sick leave**
  Employers shall grant an employee who has been in the employ of an employer for more than 90 days, upon request, a total of five days unpaid leave of absence during a 12-month period. An employer may, after three consecutive calendar days of absence

due to illness or injury, require the employee to provide a medical certificate, certifying that the employee is incapable of working due to illness or injury.

- **Reservists' leave**
  Under certain circumstances, employers shall grant an employee a leave of absence to allow them to participate in active duty or training in the Reserve Forces for up to 18 months.
- **Workplace injury**
  Although an absence due to a workplace injury is not listed as a " leave" under the *ES Act*, it is still covered under subsection 42.1(1) to 42.2(7) of the *WC Act*.

Public awareness

Through ongoing communication with labour, management and government officials, the Branch works to increase the public's awareness of legislated rights and obligations of employers and employees. This is achieved through various services offered by the Branch, including toll-free lines operated by the intake personnel, educational workshops provided by the officers, and investigations/audits conducted regionally by Employment Standards Officers.

Under the *ES Act* (and also subsection 42.1(6) of the *WC Act*) an employer is required to hold a position open for either one or two years, depending on the size of the employer's workforce. However, longer periods may be required under the *HR Act*.

COMPLAINTS

Who can complain?

Employees

Employees denied any right under the *ES Act* may file a complaint with the Employment Standards Branch. This includes a denial of the opportunity to return to work following a workplace injury.

Unionized employees

Employees who are members of a union are generally subject to a collective agreement. Unionized employees who feel they have been denied a right guaranteed under the *ES Act* must first pursue their complaint using the grievance process under their collective agreement. The Director of Employment Standards does not have jurisdiction to investigate a complaint where the party is able to grieve the matter under a collective agreement.

Injured workers

Injured workers who have been denied the opportunity to return to work, or who have been discriminated against because of a workplace injury, may file a complaint with the Branch.

WorkSafeNB

If WorkSafeNB has evidence that an employer has refused to meet their re-employment obligations under the *WC Act*, and the injured worker affected by this refusal has not filed a complaint, WorkSafeNB may file a complaint against the employer with the Branch on the worker's behalf.

The complaint process

A complaint received by the Branch is assigned to an Employment Standards Officer who then conducts an investigation. The officer works with the employer, WorkSafeNB and the employee to determine whether there is a violation of the Act.

The officer contacts both parties, in order to gather the relevant facts from both sides of the issue. During the course of the investigation, the officer will collect all supporting information relating to a complaint. If the complaint pertains to the right to return to work, some of the information gathered could include:

- Medical input
- WorkSafeNB claim information
- Employer documentation of the leave
- Information related to any attempts to accommodate
- Any other relevant information

Once the investigation is complete, the officer makes a determination and communicates it to everyone involved.

Refusal to comply with the *ES Act*

If the determination is not complied with, the Employment Standards Officer then makes a recommendation to the Director of Employment Standards. An order may then be issued, requiring compliance.

If an employer does not comply with the order as issued, they can be brought before the New Brunswick Labour and Employment Board for a hearing, where they will be

required to explain the lack of compliance with the Director's order. The Director can order that the employee be put back in his or her job, and that the employer must pay any economic loss suffered by the employee.

Right to appeal

In the event either party is dissatisfied with the Director's decision, they have the right to appeal to the Labour and Employment Board for adjudication.

The Labour and Employment Board is an independent body that hears and renders decisions on matters referred by the Director of Employment Standards. The Chairperson is not a representative of either employers or employees.

Employers and employees may represent themselves or be represented by counsel. Both parties may bring witnesses to support their case. If required, witnesses can be formally summoned to appear before the Labour and Employment Board, by making a request to the Board.

A decision of the Labour and Employment Board is final and conclusive except on the grounds of:

- An excess of jurisdiction (issues outside of the realm of the *ES Act*).
- A denial of natural justice (one of the parties before the Labour and Employment Board was not afforded all rights related to the full presentation of their case).

HOW TO CONTACT THE EMPLOYMENT STANDARDS BRANCH

Employees who believe that their employer may be in violation of the *ES Act* are encouraged to contact the Employment Standards Branch for assistance. Injured workers denied the opportunity to return to work or who feel their employer has failed to meet the re-employment obligations under the *WC Act* may also file a complaint with the Employment Standards Branch. Employees can file a complaint by:

1) Toll-free: 1 888 452-2687

2) Visiting the Employment Standards Branch nearest you and speaking with an officer. (Contact the toll-free line for the nearest location.)

3) Mail:
Department of Post-Secondary Education, Training and Labour,
Employment Standards Branch
P.O. Box 6000
Fredericton, N.B. E3B 5H1

4) Completing the online complaint form provided on the Employment Standards Branch website: *https://www.pxw1.snb.ca/snb7001/e/1000/CSS-FOL-61-6264-04E.pdf* and sending it by fax to: 506 453-3806; or by mail to the above-noted address.

What is the Human Rights Commission?

The New Brunswick Human Rights Commission (HRC) is a provincial government agency created in 1967 with a mandate to administer the New Brunswick *HR Act*.

The HRC is dedicated to promoting equality, eliminating discriminatory practices, and contributing to more equitable, productive and inclusive environments in which to work, learn and live.

The Commission has two components, the Chair and Commission members, and Commission staff.

The Lieutenant-Governor in Council appoints commission members. They meet several times a year to decide on complaints filed under the *HR Act*.

The staff carries out the Commission's day-to-day work. They investigate and mediate discrimination complaints, and promote an understanding of, acceptance of, and compliance with the *HR Act*.

The Commission cannot intervene in situations that do not involve a violation of the *HR Act*. It does not enforce the Canadian *Charter of Rights and Freedoms*, which is part of the *Constitution* and is enforced by the courts, or the various international human rights instruments.
The HRC cannot investigate federally-regulated activities. They are subject to the Canadian *Human Rights Act*, which is administered by the Canadian Human Rights Commission.

The rights, responsibilities and exceptions provided by the federal act are somewhat different than those set out in the provincial act. For more information, please see the Canadian Human Rights Commission's website at *www.chrc-ccdp.ca*, email info.com@chrc-ccdp.ca, or phone 1 888 214-1090.

What is the *Human Rights Act*?

The *HR Act* of New Brunswick is a provincial law that prohibits certain types of discrimination in employment, housing, public services, certain associations, and publicity, in both the private and public sectors. It is also called the *Human Rights Code*.

The *HR Act* applies to all aspects of employment. It applies to all unions and professional associations, to all employers regardless of size, and to all job applicants and employees, whether casual, probationary or permanent, part-time or full-time, unionized or not, and regardless of length of employment or type of occupation. However, it does not apply to federally-regulated employment.

The grounds of prohibited discrimination currently[3] listed in the *HR Act* are: race, colour, national origin, place of origin, ancestry, religion, age, physical or mental disability, marital status, social condition, political belief or activity, sexual orientation or sex, including pregnancy.

Human rights laws override other laws, as well as policies, contracts and collective agreements.

The *HR Act* of New Brunswick can be found at:
http://laws.gnb.ca/en/showfulldoc/cs/2011-c.171//20110916
http://laws.gnb.ca/en/ShowPdf/cs/2011-c.171.pdf

[3] As of January 2013. For the latest information, check *www.gnb.ca/hrc-cdp*.

DEFINITIONS

Discrimination

Discrimination is a policy or practice that is not reasonably necessary, that has the effect of putting persons at a disadvantage because of shared personal characteristics, such as race or disability, and that is based on stereotypes about them or perpetuates the view that they are less capable, or less worthy, of recognition or value.

Discrimination need not be intentional, nor does it need to involve differences in treatment. It is the discriminatory effect of an action or policy that makes it discriminatory.

For example, the failure to provide an accessible washroom or to adjust the duties of a position so that a worker with a disability can perform the job may constitute adverse effect discrimination based on disability.

Accommodation

Employers must go beyond treating everybody the same. To avoid adverse effect discrimination, an employer must specifically accommodate the 14 personal characteristics listed in the *HR Act*, unless this would cause the employer undue hardship or require it to sacrifice its legitimate objectives.

To accommodate means to eliminate the discriminatory effects of a policy, practice or facility on a group protected in human rights legislation, such as women or people with a disability. Examples of accommodation include installing a wheelchair ramp, re-assigning the heavy lifting duties of a position, or holding a position open temporarily so that an employee with a disability can return to work.

Disability

Disability under the *HR Act* is not limited to workplace injuries. It includes most physical and mental conditions that affect ability or are perceived by others as affecting ability, whether due to bodily injury, illness or birth defect.

Generally, courts will find a physical or mental condition to be a disability if it prevents an employee from performing significant functions that most people can perform; is ongoing rather than temporary; and cannot be controlled by the employee.

This includes conditions that are visible (use of a wheelchair, etc.) or invisible (diabetes, epilepsy, etc.).

The definition of disability includes, for example:

- Intellectual impairments
- Learning disorders
- Mental disorders
- Drug and alcohol dependency
- Depression or burnout

WORKPLACE ACCOMMODATION UNDER THE *HR ACT*

Duty to accommodate workers with a disability

Employers and unions have a duty to accommodate workers with a disability so that they may be hired and retained. This duty applies to all aspects of employment, including hiring, job descriptions, facilities, and equipment, as well as return-to-work after an injury or illness that constitutes a disability.

- If an employee becomes disabled, the employer and union must make the necessary accommodation for the worker to remain on the job, unless this would cause them undue hardship.
- If the employee must be absent from work due to a disability, the employer and union must make the necessary accommodation for the worker to return to the original position, if possible, or to an alternate position. However, the employer and union need not incur undue hardship.

These legal requirements are essentially the same throughout Canada. The duty to accommodate disability is widely recognized in the United States as well.

An employer can accommodate the needs of an employee with a disability in a variety of ways, depending on the facts of each case. Here are examples:

- Purchase or modify computers for use by employees with visual or other impairments.
- Provide wheelchair ramps and accessible bathrooms.
- Modify job duties (light duties).
- Rebundle job duties.
- Alter job schedule.
- Provide time off for medical appointments.
- Allow for part-time hours, full-time hours, or flex-time.
- Accept some degree of absenteeism due to a disability.
- Move employee from night shift to day shift.
- Transfer employee to a different position.
- Offer rehabilitation.
- Offer training.
- Hire an assistant or a temporary replacement.

These accommodations are not required in every case. What is required, and what constitutes undue hardship, depends on several factors (see below.)

Return to work

Employees who return to work after an absence related to one of the 14 personal characteristics listed in the *HR Act* have:

- A right to return to their original job, if possible, without loss of pay, benefits or seniority.
- A right to a modified or alternate job without loss of pay, benefits or seniority.
- A right to reasonable accommodation from both their employer and union so that they may return to their original job, or a modified or alternate job.

While the *WC Act* has one or two-year time frames for the re-employment obligation, there is no fixed period in human rights law as to how long an employer must hold a position open for an employee with a disability in order to meet its duty to accommodate. It depends on what would constitute undue hardship, which depends on the facts of the case, including:

- The prognosis for full or partial recovery.
- The rehabilitation efforts of the employee.
- The nature and scope of the job.
- The size and financial resources of the employer.

It should be noted that in human rights cases the duty to accommodate may extend beyond the period an employer is required to hold a worker's position available under the *WC Act* or the *ES Act*. Also, moving the employee to a lower paying job is not acceptable as accommodation.

Limits to accommodation

The Meiorin *test*

The limits to the duty to accommodate were set out by the Supreme Court of Canada in the *Meiorin*[4] case in 1999.

According to the *Meiorin* test, an employer's rule (a policy, practice, job description, etc.) that has a discriminatory effect is nevertheless valid when three requirements are met:

1) The purpose of the rule is rationally connected to the job.
2) The rule was adopted in good faith and with the belief that it is necessary to that purpose.
3) The rule, in fact, is reasonably necessary to accomplish that purpose or goal, that is, accommodation is impossible without causing undue hardship to the employer.

In the *Grismer*[5] case in 1999, the Supreme Court of Canada further explained the *Meiorin* test. It stated that an individual assessment of each case is usually required. The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions.

Undue hardship

The key element of the third requirement of the *Meiorin* test is undue hardship. What constitutes undue hardship will vary from one case to the next, depending on numerous factors that should be applied with common sense and flexibility. Undue hardship may take the form of impossibility, serious risk or excessive cost, for example. The most common factors are:

- **Safety**
  Objective medical evidence of the likelihood of injury or serious health and safety risk is needed to prove undue hardship. Potential increases in workers' compensation premiums or the mere prospect of increased exposure to liability will not amount to undue hardship.
- **Cost**
  According to the Supreme Court, costs will amount to undue hardship if they are: quantifiable, shown to be related to the accommodation and so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability. Costs must be thoroughly checked and quantified.
- **Impact on co-workers and customers**
  An accommodation may be found to cause undue hardship if it significantly interferes with the rights of others, or discriminates against them.

When an employer against which a human rights complaint has been filed claims that the accommodation in question would have caused undue hardship, the HRC will take into account a variety of factors, including the following:

- The extent to which the inconvenience would prevent the employer from carrying out the essence of its business.
- The costs to the employer, taking into consideration its size and financial situation.
- The employer's capacity to absorb the cost of revenue lost from the measures taken, to the extent that they are not offset by increased productivity, tax exemptions, grants, subsidies or other gains.
- The employer's ability to absorb the cost of modifying premises or equipment, and the ability to amortize such costs before implementing planned changes to ensure accessibility.
- The employer's ability to absorb the cost of retrofitting in light of plans to move to accessible premises.
- The scope of the demands made on other workers or customers of the business.
- The fact that a proposed accommodation cannot significantly interfere with the rights of others, or discriminate against them. The interchangeability of the employer's workforce and the safety of the complainant and others involved can have an impact on the ability to accommodate.
- Costs such as overtime, special leave, or costs in responding to a threatened grievance are not necessarily considered as undue hardship, nor is minor disruption of a collective agreement. However, a substantial departure from the normal operation of a collective agreement may amount to undue interference with a business.

[4] British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3; *http://scc.lexum.org/en/1999/1999scr3-3/1999scr3-3.html.*

[5] British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868; *http://scc.lexum.org/en/1999/1999scr3-868/1999scr3-868.html.*

Best practices

Advice to employers

- Accept requests for accommodation in good faith.
- Obtain expert opinions or advice where needed.
- Take an active role to ensure that alternative approaches and possible solutions are investigated.
- Keep a record of the accommodation request, action taken or why accommodation was impossible. This is critical should a complaint later be filed.
- Maintain confidentiality of employee information.
- Request only medical information about restrictions or limitations that require accommodation.
- Grant accommodation requests in a timely way.
- Assume the cost of any required medical information or documentation.

Advice to unions

- Assume joint responsibility with the employer to facilitate accommodation.
- Take an active role in the accommodation process.
- Support accommodation regardless of collective agreements or seniority lists, except when this would constitute undue hardship.

Advice to employees

- Discuss your disability with persons who need to know (supervisor, union representative, occupational health staff, etc.). Understand that you have no obligation to divulge intimate personal information that is unrelated to the request for accommodation.
- Provide medical information proving that you have a physical or mental disability when that is the reason for the request for accommodation.
- Discuss possible solutions.
- Co-operate with experts whose assistance is required to manage the accommodation process.
- Accept reasonable accommodation when it is offered.
- Where the employer takes reasonable steps toward accommodation, and further steps would result in undue hardship, you may have to accept the accommodation, despite any perceived shortcomings.

The HRC has published a guideline on *Bona Fide Occupational Qualifications* and the duty to accommodate, as well as a specific guideline on accommodating employees with a disability. They are available at: *www.gnb.ca/hrc-cdp/07-e.asp.*

With respect to injured workers, WorkSafeNB can provide advice and other assistance to help an employer meet its duty to accommodate.

COMPLAINTS

Filing a complaint with the HRC

A complaint should be filed with the HRC within one year of the alleged discrimination. However, a time extension may be granted on a case-by-base basis. Filing a complaint is free, and does not require a lawyer.

Agencies such as WorkSafeNB or the Employment Standards Branch cannot file a complaint under the *HR Act* on behalf of an injured worker. The complaint must be filed by the individual involved.

It is illegal to retaliate against someone who has filed a complaint or given evidence; for example, an employer cannot fire an employee for filing a complaint.

Complaints against federally-regulated employers cannot be filed with the HRC. They must be filed with the Canadian Human Rights Commission.

The complaint process

There are three main steps to the complaint process: investigation, mediation and Labour and Employment Board.

Mediation

Mediation is a flexible process designed to promote a negotiated settlement of a complaint. Mediation attempts are usually made when a complaint is first received, but may also be made at any point throughout the process.

Investigation

A human rights officer conducts an investigation into a discrimination complaint and then prepares a case analysis report. The report is distributed to the parties, who may respond in writing. The HRC examines the investigation report and the parties' written responses and then dismisses the complaint, if the evidence does not support the claim, or refers the case to the Labour and Employment Board, if the evidence supports the claim.

Labour and Employment Board

The Board is an independent tribunal and not part of the HRC. It holds a public hearing, much like a labour grievance arbitration. If the Board finds that there has been a violation of the *HR Act*, it can order, for example, that:

- The victim be compensated for expenses, loss of pay and emotional suffering.
- A dismissed employee be rehired.
- An employee refused a return-to-work after a disability be reinstated with the necessary accommodation.
- An employer develops policies and practices aimed at eliminating discrimination.

HOW TO CONTACT THE HRC

Extensive information is available on the HRC's website: *www.gnb.ca/hrc-cdp.*

1) Toll-free: 1 888 471-2233
(TDD: 506 453-2911)

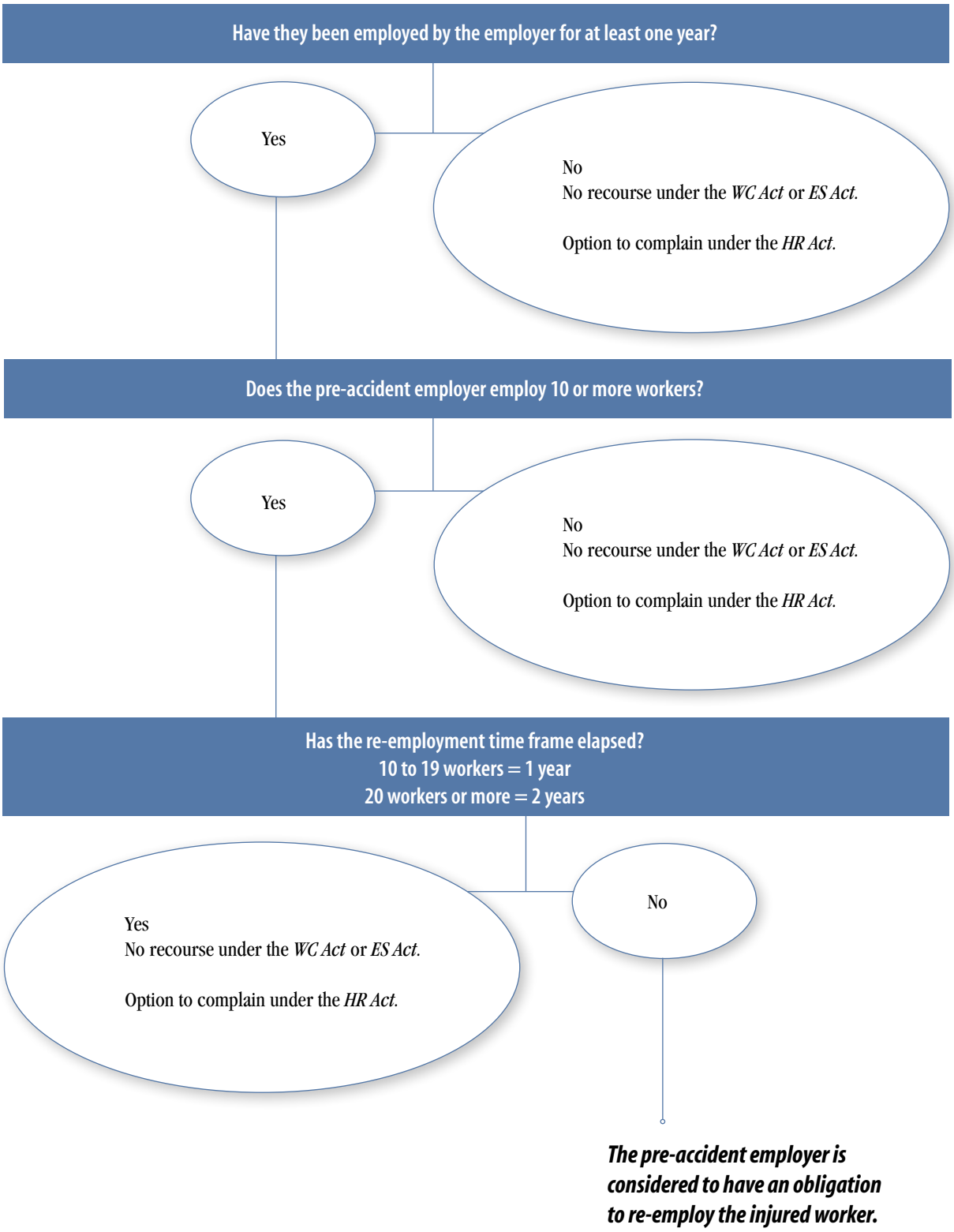
2) Mail:
Human Rights Commission
P.O. Box 6000
Fredericton, N.B. E3B 5H1

3) Email:
hrc.cdp@gnb.ca

APPENDIX A

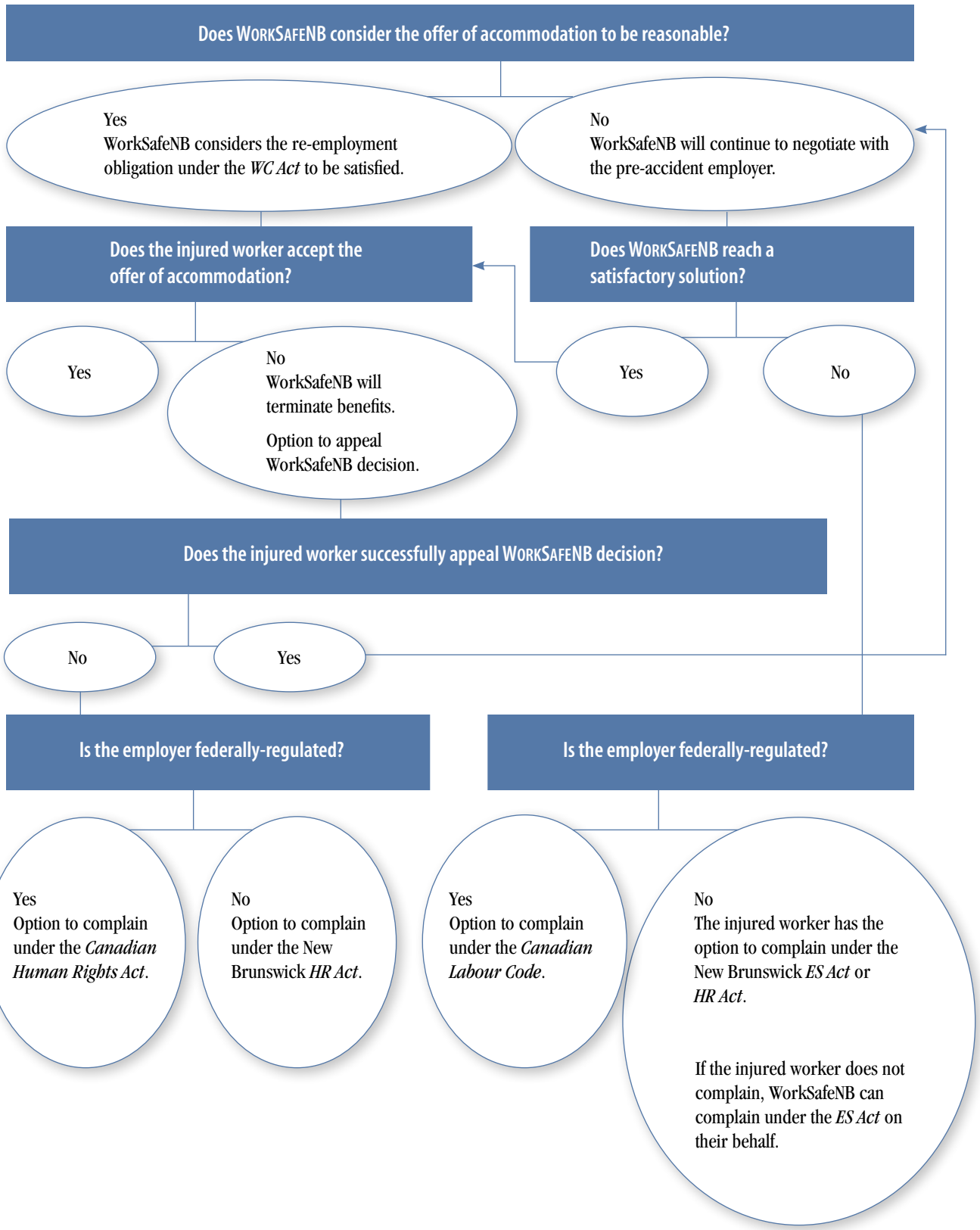
INJURED WORKER
in receipt of loss of earnings benefits

Does the pre-accident employer have a re-employment obligation?



APPENDIX B

INJURED WORKER
in receipt of loss of earnings benefits
Accommodation offer scenarios



GLOSSARY

Accident (*WC Act*)

Under the *WC Act*, an accident must arise out of employment and in the course of employment, and can be one of the following:

- A wilful and intentional act, not being the act of the worker who suffers the accident.
- A chance event or incident occasioned by a physical or natural cause.
- A disability caused by an occupational disease.
- A disablement or disabling condition.

An accident does not include the disablement of mental stress or disablement caused by mental stress, unless that disablement resulted from an acute reaction to a traumatic event.

Accommodation

Accommodation means eliminating the discriminatory effects of rules, policies, job descriptions, practices or facilities or equipment on a group protected in human rights legislation, such as women or people with a disability. Examples of accommodation include reassigning the heavy lifting duties of a position, or holding a position open so that a worker with a disability can return to work. The duty to accommodate is not limited to disability; it applies to all the grounds (sex, race, etc.) listed in human rights legislation.

Adverse effect discrimination

A uniform practice or standard that has a negative or adverse effect on a group of persons (people with a disability, etc.), because it does not accommodate their particular characteristics. Such discrimination is also called indirect discrimination, or systemic discrimination. It may occur even when everyone is treated the same and there is no intent to discriminate. What makes a practice discriminatory is its effect, and the failure to accommodate the particular characteristics of the affected group. Depending on the facts of each case, adverse effect discrimination may include workplaces that are not wheelchair accessible, and job descriptions that require every worker to be able to do every task.

Close family relationship (*ES Act*)

The *ES Act* defines a "close family relationship" as the relationship between persons who are married to one another, between parents and their children, between siblings, and between grandparents and their grandchildren. It also includes a relationship between persons who, though not married to one another or not related by blood, demonstrate an intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned.

Disability, mental (*HR Act*)

(a) Any condition of mental retardation or impairment.
(b) Any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language.
(c) Any mental disorder.
(Section 2, New Brunswick *Human Rights Act*)

Disability, physical (*HR Act*)

Any degree of disability, infirmity, malformation or disfigurement of a physical nature caused by bodily injury, illness or birth defect including, but not limited to, any disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance.
(Section 2, New Brunswick *Human Rights Act*)

Discrimination

Discrimination is a practice that is not reasonably necessary that has the effect of putting persons at a disadvantage because of shared personal characteristics (race, sex, etc.) that is based on stereotypes about them, or perpetuates the view that they are less capable, or less worthy, of recognition or value.

Discrimination need not be intentional, nor does it need to involve differences in treatment. For example, adverse effect discrimination involves a uniform policy or practice that nevertheless has a discriminatory effect on certain groups. It is the discriminatory effect of an action or policy that makes it discriminatory.

Employee (*ES Act*)

The *ES Act* of New Brunswick defines an "employee" as a person who performs work for, or supplies services to, an employer for wages. This definition does not include independent contractors. The sections in the *ES Act* on

return-to-work after a workplace injury also apply to a "worker" as defined under the *WC Act*.

Employer (*ES Act*)

The *ES Act* of New Brunswick defines an "employer" as a person, firm, corporation, agent, manager, representative, contractor or sub-contractor having control or direction of, or being responsible, directly or indirectly, for the employment of one or more persons. This includes "employer" as defined in the *Public Service Labour Relations Act*, but does not include a person having control or direction of, or being responsible, directly or indirectly, for the employment of persons in or about his private home.

The sections in the *ES Act* on return-to-work after a workplace injury also apply to an "employer" as defined under the *WC Act*.

Employer (*HR Act*)

The *HR Act* defines an "employer" as every person, firm, corporation, agent, manager, representative, contractor, or sub-contractor having control or direction of, or being responsible, directly or indirectly, for the employment of any other person.
(Section 2, New Brunswick *Human Rights Act*)

ES Act

The *Employment Standards Act* of New Brunswick R.S.N.B. *c. E-7.2*
http://laws.gnb.ca/en/showfulldoc/cs/E-7.2//20120313
http://laws.gnb.ca/en/ShowPdf/cs/E-7.2.pdf

Federally-regulated activities

Employees and employers engaged in federally-regulated activities fall outside of the jurisdiction of the Employment Standards Branch and the New Brunswick HRC. Examples are railways, pipelines, ferries, air transport, radio and television broadcasting, banks, cable systems, extra-provincial trucking and shipping, federal Crown corporations and many First Nation activities. They are subject to the *Canada Labour Code* and the *Canadian Human Rights Act*. Inquiries regarding federally-regulated work practices should be directed to Service Canada by calling 1 800 206-7218 or visiting *www.servicecanada.gc.ca.*

Human Rights Act

In Canada, human rights acts are the federal, provincial and territorial laws that prohibit certain types of discrimination and harassment, whether by governments, businesses or organizations. They are usually enforced by human rights commissions and tribunals. These human rights laws are not the same as the Canadian *Charter of Rights and Freedoms*, which is a part of the *Constitution* and is enforced by courts, not human rights commissions.

The *Human Rights Act* of New Brunswick is also called the *Human Rights Code*. It may be found at:
http://laws.gnb.ca/en/showfulldoc/cs/2011-c.171//20110916
http://laws.gnb.ca/en/ShowPdf/cs/2011-c.171.pdf

HRC

New Brunswick Human Rights Commission.

Human Rights Commission

In Canada, human rights commissions are government bodies that administer human rights laws (not the Canadian *Charter of Rights and Freedoms*), usually through investigation, mediation and education. They should not be confused with ombudsmen, or with human rights boards of inquiry, which are independent human rights tribunals.

Occupational disease (*WC Act*)

An occupational disease is any disease, which by the regulation is declared to be an occupational disease, and any other diseases peculiar to, or characteristic of, a particular industrial process, trade or occupation.

Worker (*WC Act*)

The *WC Act* of New Brunswick defines a "worker" as a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes:

a) A learner.
b) An emergency services worker within the meaning of any agreement made under the *Emergency Measures Act* between the Government of Canada and the Government of New Brunswick, which provides for compensation with respect to the injury or death or such workers.
c) A member of a municipal volunteer fire brigade.

d) A person employed in a management capacity by the employer, including an executive officer of a corporation, where that executive officer is on the payroll.

As well, subsection 70(3) of the *WC Act* gives WorkSafeNB the authority to determine that an independent contractor working for a principal – who is considered an employer under the Act – is in fact a worker of that employer.

WC Act
Workers Compensation Act of New Brunswick
http://laws.gnb.ca/en/ShowTdm/cs/W-13//
www.gnb.ca/0062/PDF-acts/w-13.pdf

A digital copy of this document can be found online at any of the following websites:

www.worksafenb.ca

www.gnb.ca/hrc-cdp

http://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/labour.html