



# Substance Use Disorder as a Disability In Safety Sensitive Occupations

Updated September 2024

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Distribution

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## SUBSTANCE USE DISORDER AS A DISABILITY IN SAFETY SENSITIVE OCCUPATIONS

This resource can guide trucking and logistics employers in Canada on addressing substance use disorder as a disability in the workplace. It presents information about what employers can and cannot do; details about bona fide occupational requirements, duty to inquire and accommodate; and policy examples.

**In Canada, substance use disorder or addiction is classified as a disability.** It is an example of an “invisible” disability, and there is often a link among substance use, mental health difficulties, and other disabilities.

- Each employer should have consistent policies and practices about substance use and disability accommodations.
- Working with an employee who has a substance use disorder can be a very complex situation. By understanding the law and using best practice, employers can appropriately address and/or accommodate substance use disorder as a disability in the workplace.

### What Does this Mean for Employers?

- Employers in safety-sensitive industries such as trucking must have clear policies related to substance use, with reasonable accommodation in place for employees who are identified as having a disability due to addiction or substance use disorder.
- Employees who use drugs or alcohol recreationally are not protected. Whether or not the employee admits to a substance use disorder, you should address safety and performance concerns. When there is no indication of a dependence, you can follow through with discipline and/or termination if they have repeatedly and willfully violated company policy, although it is recommended to speak to a lawyer for advice prior to acting.
- Employers have a **duty to inquire** with the employee, if they notice changes in the individual’s attendance, performance, or behaviour that may indicate a possible substance dependence or other disability.
- When there is a substance dependence, employers have a **duty to accommodate** within reason and must approach the issue with care and concern. “Within reason” is generally understood as being to the point of undue hardship for the employer. As an example, a driver who has a substance use disorder that compromises safety could perhaps be accommodated in another occupation; if no other employment is available, the employer does not need to create a job for this individual.

*NOTE: Substance use disorder can be a complex employment issue, with evolving practices and requirements. The information in this resource is not a substitute for updated legal advice relevant to your company’s operations and employment jurisdiction.*

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Many organizations routinely provide updated guidance on policies related to drug and alcohol use in safety-sensitive positions. See the resources listed at the end of this tool for a starting point.

- Federal and provincial / territorial human rights frameworks generally define dependence on drugs or alcohol as a disability.
- The government of Canada does not have a federal regulation that requires drug testing for drivers.
- Bona fide occupational requirements (see below) allow for drug testing and restrictions on substance use for safety-sensitive positions.
- The law only sees substance use disorder or addiction as related to having a disability, and therefore protected. Recreational drug use is not entitled to protection or accommodation.
- Testing of employees for drug and/or alcohol use in safety-sensitive positions is permissible in certain situations:
  - Testing may be permissible where potential safety outweighs potential intrusion to employee privacy. This includes after an incident or accident and where an employee reports for work in an unfit state.
  - If there is a bona fide occupational requirement, employers can conduct pre-employment drug testing for safety-sensitive positions.
  - Alternatives to drug testing are recommended to recognize when an employee is impaired. This includes observation, supervision, and frequent face-to-face conversations.

### Bona Fide Occupational Requirements

The consideration of what is a bona fide occupational requirement (BFOR) comes into play when considering accommodation for disability in employment. A BFOR is a necessary condition or standard essential for performing a job; generally it is something that cannot be accommodated without creating undue hardship for the employer (cost or safety). This applies to accommodation for the full range of disabilities, whether visible or non-visible, physical or mental, ongoing or temporary, including substance use disorders.

- **BFOR for Substance Use:** Employers can have a BFOR that requires employees in safety-sensitive positions to be free from the influence of substances that might affect their performance, such as alcohol, cannabis, illegal drugs or potential behavioral impacts of medications while on the job. This ensures a safe work environment and protects both employees and the public.
- **Balancing BFORs with Accommodation:** As with any disabilities, employers must consider accommodation options when a qualified employee or job applicant with a substance use disorder is considered for employment. This could involve adjustment to the work activities, documented participation in a rehabilitation program and/or follow-up support measures.

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- **Undue Hardship:** Similar to other invisible and visible disabilities, the employer will need to consider accommodation for substance use disorder unless it causes undue hardship (see below for further details).
  
- **Additional considerations:**
  - **Off-Duty Conduct:** Generally, employers cannot have BFORS related to off-duty substance use unless it directly impacts job performance or safety.
  - **Withdrawal:** Employees who are undergoing treatment for a substance use disorder might experience temporary disabilities related to the symptoms and process of withdrawal.
  - **Medical Substances:** Employers must consider the distinction between illegal drugs and medical substances prescribed by a healthcare professional. Accommodation for medical marijuana use may be required in some cases.

### Duty to Inquire

When an employer observes changes in an employee's attendance, performance, or behaviour that may be related to substance dependence, it **triggers an obligation to initiate a conversation with the employee** about accommodating their possible disability.

#### What to do:

- Be respectful and non-judgmental; understand the employee may feel pressured, guilty, embarrassed or anxious.
- Be prepared to have additional conversations if needed; denial is often characteristic of substance dependence.
- Ensure confidentiality, including avoiding potential unintended disclosure to the worker's supervisor, colleagues or customers.
- Clearly identify concerns about the employee's performance or behaviour.
- Explain the employer's duty to accommodate within reason and give the employee the opportunity to disclose a disability if relevant.
- If a disability is disclosed, ask if the employee would like to progress to developing an accommodation plan.

#### What **NOT** to do:

- Do not try to diagnose substance dependence.
- Do not recommend treatment.
- Do not threaten dismissal.

If an employee **does not disclose a disability** (substance abuse disorder, dependence, or addiction), the employer can then outline the consequences of the employee's behaviour or performance.

If an employee **does disclose a disability**, the employer must work with the employee to gather and consider relevant information to determine next steps. These might include a temporary leave, support for treatment, and an accommodation plan (see below).

### Gathering Health Information

*Note, an employer and employee may jointly decide medical information is not required to develop an accommodation plan.*

Gathering medical information must balance the employer's right to manage the workplace and the employee's right to privacy. Requests must be limited to the employee's essential duties.

An employer should provide a medical professional with a description of the job function/responsibilities, including details related to particular aspects of a safety-sensitive position.

An employer should request/ask the following from the employee's medical provider:

- Does the employee have a disability that requires accommodation?
- If the employee is in a safety-sensitive position, are they fit to perform their job?
- Are there restrictions on the performance of the job?
- Has a treatment plan been developed? How may this impact work performance?
- If an employee is taking leave, what recommendations or accommodations can facilitate a safe return?

### Accommodating a Substance Use Disorder as a Disability

Accommodation is about making reasonable adjustments or removing barriers to ensure an employee can perform their job and contribute fully.

- Employer accommodation for a disability, including substance dependence, is required to the point of undue hardship.
- Accommodation may include changing the employee's duties or moving the employee to a completely different position (e.g., from truck driver to warehouse worker).

### Examples of Accommodation Measures or Solutions

- Reassigning the employee to a non-safety sensitive position.
- Providing short-term or long-term sick leave to facilitate treatment.
- Building flexibility into the employee's schedule to accommodate treatment or appointments.
- Adjusting work hours, duties or work methods to meet any needs specified by a medical professional. These adjustments might be temporary or long-term.

### Developing an Accommodation Plan

It is the employer's responsibility to lead the development of the accommodation plan. The employee should be actively involved, as well as any union representation if desired, to finalize the plan. The plan should:

- Be clearly documented and signed by all parties.
- Specify any measures based on medical information (e.g., work schedule or restrictions).
- Designate a contact person for concerns or questions about the plan.
- Allow for necessary treatment, including time away from work.
- Be flexible and adaptable based on the employee's needs and updates.
- Define what changes in behaviour or performance will require updated medical information.

For guidance, see this practical step-by-step template of what to include in an [Individual Accommodation Plan](#). The THRC tool [A Managers Tool for Having Accommodation Discussions](#) is a guide for approaching the situation effectively.

### Return to Work Agreement

In many situations of substance dependence disability, the accommodation plan may involve a temporary set of changes to, or removal from, the employee's regular duties. The employer and employee should **sign a return-to-work agreement** outlining expectations for conduct, attendance, performance, safety, and policy compliance. For safety-sensitive roles, medical monitoring may include **drug or alcohol testing**. **Relapse prevention agreements** or **last chance agreements** may be used, but they don't replace the duty to accommodate to the point of undue hardship.

### How to Determine Undue Hardship

There is a limit to accommodating, but there is no set formula for defining that limit. Factors such as the costs and safety impacts will determine whether an employer has satisfied its obligation. Employers who believe they cannot accommodate an individual without facing undue hardship should:

- Document their genuine best efforts to accommodate.
- Include input from employee and union representatives.
- Include input from human resources specialists and substance abuse professionals.
- Consult legal advisors, if applicable.

Customer or public preference that is based on prejudice or stereotyping is not a factor that can be considered in determining undue hardship. To substantiate a claim of undue hardship, the evidence provided must be objective, specific, and measurable (for costs). This includes:

- Financial records and budgets
- Expert opinions

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- Details about the job responsibilities and the requested accommodation
- Information about employment conditions and health and safety limitations

Be aware that relapses are common with addictions. Your company may be expected to accommodate several relapses and leaves before being deemed to have reached the point of undue hardship.

### Sample Content for Policies

A comprehensive policy for substance dependence as a disability will balance disciplinary considerations with supportive approaches. Employers have a right to expect a certain level of performance from their workers, and employees have a right to be accommodated for their disabilities to the point of undue hardship.

It is good practice to involve employees in the creation of the policy. By soliciting feedback and input from employees, employers can create a policy that is more likely to be effective and well-received. This can be done through approaches such as focus groups, employee surveys, a health and safety committee/representative, and/or collaboration with the union (if present).

Here is some content that should be in your company's policy:

#### 1. Statement of Purpose

The policy should include a clear statement of purpose, outlining your company's commitment to a safe and healthy workplace.

#### 2. Prohibited Conduct and Impairment

The policy should clearly outline the types of conduct that are prohibited, including the use, possession, sale, or distribution of drugs or alcohol in the workplace. Statements should provide a definition of impairment and indicate that impairment while at work is unacceptable. The policy may also need to state what actions may be taken if impairment is suspected, such as: how discussions will take place, what options are available if the ability to work safely is a concern (e.g., assigned less safety-critical work, sent home, etc.), and other actions that may be necessary. If an employee may be sent home, it should be clear if this action is taken, under what circumstances is it appropriate and whether it is done via sick time or how pay will be affected, if relevant.

#### 3. Consequences

With an emphasis on safety, there should be a statement regarding what actions will be taken when there are concerns about the behaviour of a person if it might have an impact on the workplace or when the behaviour puts the safety of the person or others at risk



The policy should clearly outline the consequences of violating the policy, including the potential for disciplinary action, up to and including termination of employment. It is good practice to clearly state the employer's commitment to supporting employees who may have substance use disorder, which is a disability. Here is one sample statement:

*Before undertaking disciplinary measures with an employee who has failed to comply with this Policy, the Company will undertake to determine if the employee has a disability. Employees with disabilities may be accommodated in accordance with applicable law.*

#### **4. Recognition of Disability**

The employer should clearly state that substance dependency is recognized as a disability.

Here is a sample statement:

*The Company recognizes that alcohol and drug dependencies are illnesses, which can respond to therapy and treatment. The Company is committed to employee safety, health and wellness and will assist employees in obtaining treatment for such illnesses.*

#### **5. Accommodation for Disability**

Include a statement regarding the employer's duty to accommodate employees with substance dependence, in accordance with relevant legislation and up to the point of undue hardship. Clearly outline the option to accommodate an employee through reassignment, if an alternative position is available; i.e., from a safety-sensitive position (driver) to a non-safety sensitive position.

The employee also has responsibilities, which should be outlined in the policy. Sample statements might include:

*Employees with an alcohol or drug/medication problem are expected to seek assistance before it impacts their work performance.*

*Employees who have been prescribed a medication that may cause impairment or when they feel they might be otherwise impaired are required to confidentially report the situation to [Human Resources representative or supervisor]. Declaring a problem does not remove an employee from any potential consequences under this policy.*

*Employees who voluntarily request help will be provided with support as outlined elsewhere in this policy. However, failure by an employee to attend assessments with a Substance Abuse Professional or follow recommended treatment programs may be cause for termination regardless of whether the employee has a disability. Full participation in the program and rehabilitation activities is required as is maintenance of satisfactory performance levels.*

### 6. Confidentiality

An assurance of confidentiality is important. Clearly outline the procedures for handling confidential information regarding an employee's drug or alcohol use, including who has access to the information and how it will be stored and protected.

### 7. Training

The policy should outline the procedures for training employees on the policy, including how to recognize and report drug and alcohol use in the workplace.

### 8. Support and Resources

Describe the support and resources available to employees who may be struggling with substance abuse, including employee assistance programs, counselling services, treatment options, health benefits, and leave provisions during a rehabilitation period. Outline the process for a return-to-work, including maintaining contact while on leave, providing adequate notice of a return date, and the process for defining and implementing accommodations that may be needed.

## Frequently Asked Questions

### My employees drive into the U.S. – how can I comply with regulations?

Canadian drivers who drive through the U.S. must comply with US DOT and FMCSA laws and policies. The FMCSA states: *If a driver in the intra-Canadian group were to take on driving duties into the US, the driver would be subject to a pre-employment [drug] test to take on this driving task.*

If your drivers work in the U.S., you may implement a drug and alcohol testing program that mirrors U.S. requirements as a bona fide occupational requirement. This could include pre-employment, random, reasonable suspicion, post-accident, and return-to-duty testing.

Policies may change – review the [US DOT](#) and [FMCSA](#) websites and seek legal counsel for up-to-date details.

### What should we say to colleagues if a person is being accommodated by being reassigned to a non-safety-sensitive job?

Be brief and neutral: say something like, *“We’re making some adjustments to the team structure, and John will be taking on new responsibilities going forward.”* This is truthful and direct.

Address questions directly: if colleagues ask for clarification be prepared to offer brief explanations. You can say, *“These changes are necessary to ensure our team can perform at their best,”* or *“I’m not able to discuss this in any greater detail, but we’re confident this transition will be positive for everyone involved.”*

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Your goal is to be informative and respectful while protecting the employee's privacy. If a colleague is pressing for more detail or gossiping, you should redirect the conversation and remind them that privacy is a company policy.

### What should we do when we have decided we cannot accommodate an employee?

If an employee's drug use is related to a substance use disorder, reasonable accommodation must be thoroughly explored. If (1) the employee refuses to accept reasonable accommodation offers, or (2) the requested accommodation presents undue hardship, then you may explore termination.

Carefully document all communications, incidents, and efforts towards accommodation. Before any disciplinary action or termination, seek legal or expert advice.

### When should we seek legal or expert advice?

It is recommended to seek **legal counsel** prior to any disciplinary action or termination related to substance use, especially involving any case where an employee has claimed a substance use disorder. Because substance use disorder is a protected ground under Canadian disability law, employees have legitimate grounds for legal recourse if they are wrongfully disciplined or terminated.

A **Substance Abuse Professional (SAP)** should be consulted when a substance use issue has been identified through self-disclosure or through testing. SAP's can be a licensed physician, licensed or certified social worker, psychologist, or employee assistance professional who is involved in the return-to-duty process.

## Additional Resources

- [Impaired at Work – A guide to accommodating substance dependence](#) – Canadian Human Rights Commission
- [Impaired at Work – A guide to accommodating substance dependence](#). Tools for employers (Canadian Human Rights Commission)
- [Position statement on the implications of cannabis use for safety-sensitive work](#) – Occupational and Environmental Medical Association of Canada
- [Bona Fide Occupational Requirements](#) – Government of Canada
- [Substance use in the workplace](#) (Canadian Centre for Occupational Health and Safety)
- [The role of the Substance Abuse Professional](#) – Canadian MRO
- [US DOT Guidance: What employers need to know about DOT Drug and Alcohol Testing](#) - US Department of Transportation