

Guideline on Family Status

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NEW BRUNSWICK
HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Please Note:

The New Brunswick Human Rights Commission (“Commission”) develops guidelines as part of its mandate to prevent discrimination. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* (“Act”).

This guideline gives the Commission’s interpretation of the provisions of the *Act* relating to discrimination on the basis of family status. It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Act*. If there is any conflict between this guideline and the *Act*, the *Act* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission’s staff.

Introduction

On May 5, 2017, the *Act* was amended to include family status as a prohibited ground of discrimination. As a result of this amendment, the *Act* now prohibits discrimination on the basis that a person:

- Is a caregiver to a child, an elderly parent or other family member;
- Has (or does not have) children or a family;
- Is related to (or in a familial relationship with) a particular person or family; or
- Is perceived to have any of the above characteristics.

The prohibited ground of “family status” is not defined in the *Act*, and it is not strictly limited to the above situations. As with all human rights complaints, a complaint alleging discrimination on the basis of family status cannot be based on mere speculation. A person filing a complaint must set out sufficient information in the complaint form to support the allegations of discrimination and a failure to do so may result in the complaint being dismissed at a preliminary stage of the process.

While family status is a new prohibited ground of discrimination in the *Act*, many forms of discrimination covered by family status were previously prohibited under other grounds. For example, a parent denied a service or housing on the basis of having a child could previously file an age discrimination complaint on behalf of that child in some situations. Parents can continue to file such complaints on behalf of their children, but they may now be able to file their own complaints alleging family status discrimination.

1.0 Meaning of “Family”

“Family” is not defined in the *Act*. The Commission’s interpretation of “family” includes being related to another person through blood, marriage, adoption or legal guardianship, but it is not strictly limited to these relationships. “Family” can include relationships where there are close emotional bonds to the point that the relationship is familial in nature. However, “family” does not extend to close friends, roommates, babysitters, hired caregivers or similar individuals unless there are also familial bonds present in the relationship.

When a person is seeking accommodation on the basis of family status, or is filing a human rights complaint with the Commission alleging family status discrimination, that person has an obligation to provide sufficient information to demonstrate that a familial relationship exists.

2.0 Family Status Discrimination

Family status is a prohibited ground of discrimination in all the areas that the *Act* applies to. There is a duty to accommodate people on the basis of family status to the point of undue hardship. What constitutes undue hardship will depend on the circumstances, and the employer, service provider, housing provider or association bears the burden of establishing that accommodation is not possible without incurring undue hardship. The duty to accommodate and the exceptions to it are discussed further in section 3.0, Duty to Accommodate and *Bona Fide* Qualifications, of this guideline.

The duty to accommodate includes accommodation of family caregiving obligations, which are discussed in more detail in section 4.0, Family Caregiving Obligations, below.

2.1 Employment

The *Act* prohibits discrimination in employment by employers, co-workers, people acting on behalf of the employer, employment agencies, trade unions and employers' organizations. These individuals and entities cannot:

- Refuse to hire or continue to employ (even with notice) someone because that person's family status, such as where that person:
 - Is related to a particular person (e.g. a current or former employee or customer/client);
 - Is a member of a particular family or related to people with a particular characteristic (e.g. a disability or criminal conviction);
 - Has a caregiving obligation to a family member;
- Demote, withhold a promotion, or fail to consider an employee for a promotion because of the employee's family status;
- Harass an employee with respect to that employee's family status, or permit such harassment to occur;
- Subject an employee to adverse treatment by taking advantage of that employee's family status;
- Post a job advertisement that indicates people with children or childcare obligations should not apply;
- Make working conditions unacceptable for an employee on the basis of that employee's family status, thereby forcing the employee to resign;
- Deny or place restrictions on the membership (in the case of a union or employers' organization) for someone based on that person's family status.

As noted above, the responsibilities of a caregiver and an employer with respect to the duty to accommodate caregiving obligations are addressed in section 5.0, Family Caregiving Obligations, of this guideline.

2.2 Accommodation, Services or Facilities Available to the Public

The *Act* prohibits discrimination in accommodation (e.g. hotels), services or facilities available to the public (e.g. stores, restaurants, schools, government programs, public spaces, shopping malls). Providers of these services and facilities cannot:

- Refuse service to people because they:
 - Are related to a particular person (e.g. a current or former employee or customer/client);
 - Are a member of a particular family or related to people with a particular characteristic (e.g. a disability or criminal conviction);
 - Are with their children or a family member under their care;
- Restrict or limit access to the service or facility normally available to the public because people are with their children or a family member under their care;
- Prohibit breastfeeding or limit someone's ability to breastfeed;
- Charge additional fees to people because they are with their children (aside from what is charged to provide the service to a child);
- Harass someone with respect to that person's family status, or permit such harassment to occur.

While the duty to accommodate family caregiving obligations is more likely to arise in employment situations, some service providers may need to accommodate these obligations (e.g. education providers, or other service providers that have an attendance requirement). Section 5.0, Family Caregiving Obligations, of this guideline is applicable (with appropriate modifications) to service providers when these situations arise.

2.3 Housing and Sale of Property

The *Act* prohibits discrimination by housing providers (e.g. landlords, property management corporations, a condominium's board of directors) and those selling property (e.g. home owners, condominium unit owners). These individuals and entities cannot:

- Refuse to rent or sell property to people because they:
 - Are related to a particular person (e.g. a current or former employee or tenant);
 - Are a member of a particular family or related to people with a particular characteristic (e.g. a disability or criminal conviction);
 - Are with their children or a family member under their care;
- Prohibit a unit owner from renting or selling to a person with children;
- Include terms or conditions in a contract or conveyance that restricts the sale of property on the basis of family status (e.g. the property cannot be sold to a particular family member or family);
- Place restrictions on access to common areas of an apartment building or condominium (e.g. laundry room; party/social room) customarily available to tenants or residents if people are with their children;

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- Harass someone with respect to that person's family status, or permit such harassment to occur;
- Charge additional fees to tenants because they have children or are providing care to a family member.

2.4 Professional, Business or Trade Associations

The *Act* prohibits discrimination by professional, business and trade associations (e.g. professional accreditation or certification bodies, chambers of commerce). These organizations cannot:

- Deny or place restrictions on membership for people because they:
 - Are related to a particular person (e.g. a current or former employee or member);
 - Are a member of a particular family or related to people with a particular characteristic (e.g. a disability or criminal conviction);
 - Have children or a family member under their care;
- Restrict or limit opportunities or benefits because people have children or a family member under their care;
- Harass someone with respect to that person's family status, or permit such harassment to occur.

3.0 Duty to Accommodate and *Bona Fide* Qualifications

The *Act* requires that policies having a discriminatory effect on people on the basis of family status be avoided. It also imposes a duty to accommodate people on the basis of family status to the furthest point possible short of undue hardship. A person is only entitled to a reasonable accommodation, not a perfect one.

Conduct may be found to be non-discriminatory if it can be shown that the limitation, specification or preference is based upon a *bona fide* ("in good faith") qualification ("BFQ").

In order to be a BFQ the standard adopted by the organization must pass the "*Meiorin* Test". This three-part test requires establishing that the standard:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed;
2. Was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that the employer, service provider, housing provider or association cannot accommodate persons with the characteristics of the person without incurring undue hardship.

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The third part of the test requires individually assessing the needs of the person to determine whether it is possible to accommodate that person without incurring undue hardship.

What constitutes undue hardship will depend on the circumstances, but examples could include:

- Extremely high financial costs;
- A serious disruption to a business;
- Health and safety considerations, including obligations pursuant to a federal or provincial statute;
- A very long absence of indefinite duration;
- A substantial interference with the rights of others, including employees, customers or tenants;
- Inability to renovate the facilities to accommodate the person;
- Inability to interchange, alter or substitute duties within the workforce;
- The extent to which the inconvenience would prevent the business from carrying out the purpose of that business.

4.0 Family Caregiving Obligations

The *Act's* protections for family status include protections for people who have an obligation to provide care for a family member, such as a child, an elderly parent, or a disabled sibling.

In human rights proceedings, a complainant must establish a *prima facie* case of discrimination (a case sufficient on its face). To establish a *prima facie* case of family status discrimination in employment under the *Act* based on caregiving obligations, a complainant must be able to show:

1. That they have a family caregiving obligation protected from discrimination under the *Act*;
2. That they experienced an adverse impact with respect to their employment; and
3. That the family caregiving obligation was a factor in the adverse impact.

Once a *prima facie* case of family status discrimination is established, the employer must be able to justify the conduct or practice as a BFQ. If the employer cannot do so, discrimination on the basis of family status will have been found to occur.

While only the Labour and Employment Board (“the Board”) may make a finding that there is a *prima facie* case of discrimination, the Commission’s role is to determine whether an arguable case of discrimination is present or a BFQ has been established. This is part of the Commission’s “gatekeeping” or screening role, where the Commission decides whether referral of a complaint to the Board is warranted in the circumstances. What follows is the Commission’s interpretation of the above framework

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with respect to the protections for family caregiving obligations under the *Act*, which the Commission will use when determining whether a complainant has established an arguable case of discrimination.

Please note that while this framework is intended to address caregiving obligations that come up in an employment context, it is applicable (with appropriate modifications) to the other areas and activities the *Act* covers, such as services.

Family caregiving obligation

Only family caregiving obligations are protected from discrimination. The caregiver and person being cared for must have a familial relationship in order for the caregiving obligation to be covered by the *Act's* family status protections.

A legal obligation is not required for family caregiving obligations to be protected. While the obligation will often be a legal one in situations where caregivers are providing care to their children, obligations can stem from the nature or closeness of familial relationships, or the particular circumstances within families. For example, a family caregiving obligation may exist where an adult child is providing care to an elderly parent or another close family member. An obligation may also arise where a disabled family member requires care, but there are very few others within the family who can provide that care. Whether a person has an obligation to provide care to a family member is determined on a case-by-case basis and takes into account the nature of the familial relationship and the surrounding circumstances.

Caregiving obligations are responsibilities that flow from, and are essential to, the caregiving relationship. Whether providing care is a caregiving obligation depends on the circumstances. For example, a caregiving obligation could include:

- Ensuring that a child is not left in an unsupervised or unsafe situation;
- Attending to the medical needs of a child or family member (e.g. taking the child or family member to medical appointments or therapy);
- Ensuring the safety and wellbeing of a family member with a disability (e.g. ensuring that an elderly parent with Alzheimer's is fed);
- Attending important life events (e.g. a child's graduation ceremony);
- Attending a court proceeding in relation to the custody of a child or guardianship of a family member; or
- An obligation stemming from a custody agreement.

Not all aspects of the relationship between caregivers and those receiving care are caregiving obligations. If something is not an essential aspect of the caregiving relationship but is instead reflective of a personal choice or preference, it is unlikely that it would be considered a caregiving obligation. For example, a caregiving obligation is unlikely to include:

- A family vacation, trip or activity, even if scheduled well in advance;
- Spending birthdays, holidays or recreational time with a child or family member;

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- Volunteering for a child's activity (e.g. being a chaperone on a child's school field trip, coaching a child's sports team); or
- Attending a game for a child's or family member's sports team.

The Commission will consider whether a caregiver's role in a child's extracurricular activities (e.g. taking a child to music lessons or an after school program) constitutes a caregiving obligation on a case-by-case basis, having regard for the nature of the activity and its importance to the child's development.

An adverse impact

For there to be an adverse impact with respect to employment, the workplace rule or policy (e.g. scheduling rules, attendance policy, etc.) must have led to or resulted in some sort of disadvantage or negative consequence for the caregiver. An adverse impact could include:

- Disciplinary action;
- Termination of employment;
- Demotion or being passed over for promotion;
- Lost or reduced wages and/or benefits;
- Significant difficulty in fulfilling the caregiving obligation, or an inability to fulfil it;
- A significant increase in the cost required to fulfil the caregiving obligation; or
- Less favourable working conditions or choice of shifts/schedules.

A factor in the adverse impact

Assessing whether the caregiving obligation was a factor in the adverse impact requires looking at the caregiving obligation in its full context. This includes looking at the amount of control the caregiver's has in relation to the caregiving obligation, as well as the extent of the caregiver's participation in the accommodation process with the employer. Where a caregiver has considerable control over the caregiving obligation, the caregiver may be expected to first make reasonable attempts to find suitable alternative arrangements. In cases where the caregiver has less control over the caregiving obligation, the caregiver and the employer will be expected to work together to find a reasonable accommodation.

When looking at the amount of control a caregiver has over the caregiving obligation, relevant considerations could include:

- The employer's policies with respect to scheduling and attendance (e.g. flexibility of the work schedule and ability to take time off);
- Whether there have been recent changes to the caregiver's work schedule, and the amount of input the caregiver had in those changes;
- The ability of the caregiver's spouse or partner to provide care;
- Whether there is a custody agreement in place, and if so, the terms of that agreement;
- The availability of babysitters or daycares in the area, the cost of those services, and their ability to meet the needs of the family member receiving the care;

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- The caregiver's personal circumstances (e.g. financial situation, whether the caregiver has a disability);
- The caregiver's support network in the area (e.g. family and friends) and their ability to provide care; and
- The nature and predictability of the caregiving obligation, and the needs of the family member receiving the care (e.g. whether the family member receiving care has a disability that sometimes requires urgent medical attention).

There may be instances where a caregiver normally has considerable control over the caregiving situation, but the specific circumstances (e.g. a medical emergency) temporarily limit the caregiver's control. In such situations the caregiver may not have the opportunity to attempt to find suitable alternative arrangements.

When a caregiver requires accommodation from an employer in relation to the caregiving obligation, the caregiver and employer must work together to find a reasonable accommodation. Employers have a duty to accommodate their employees' caregiving obligations to the furthest point possible short of undue hardship. The search for an accommodation is a multi-party inquiry that includes the caregiver and employer, and may also involve unions and health care professionals. A caregiver is only entitled to a reasonable accommodation, and not necessarily the "perfect" accommodation or the caregiver's preferred accommodation (e.g. preferential scheduling). The caregiver must accept a reasonable accommodation if it is offered by the employer.

The caregiver is required to provide the employer with sufficient information about the nature of the caregiving obligation if the employer seeks it as part of the accommodation process. This could include a letter from the child's or family member's doctor explaining the nature of the caregiver's role and need for accommodation (but not the medical diagnosis for the child or family member), or other supporting documentation about the situation. A caregiver should keep track of attempts to find suitable alternative arrangements and be prepared to provide this information to the employer in support of the need for accommodation.

For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

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