

Employment and Labour Fall seminar

Managing candidate and employee medical issues



Russell Groves
Partner



Larysa Workewych
Associate

Learning objectives: why is this important?

- Medical leave and restrictions are increasingly common issues
- Minimize the risk of discrimination claims and ensure you have a defensible position if a claim is made
- Avoid “ghost employees” and associated risks

The duty to accommodate

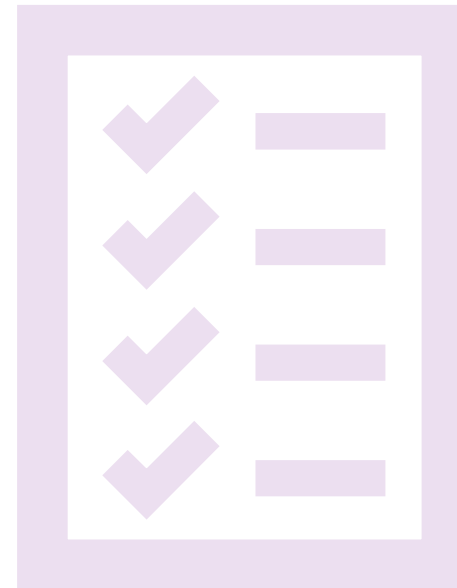
- Accommodation focuses on:
 - Prevention and removal of barriers in the workplace (up to undue hardship)
 - Appropriate accommodation that best ensures inclusiveness and equal opportunity
 - Respect for individual privacy, dignity and autonomy
 - An individual (not formulaic) approach
 - Enabling the individual to perform the essential duties of their job
- The duty to accommodate is not unlimited: undue hardship is the limit beyond which employers are not expected to accommodate

Accommodation: the process

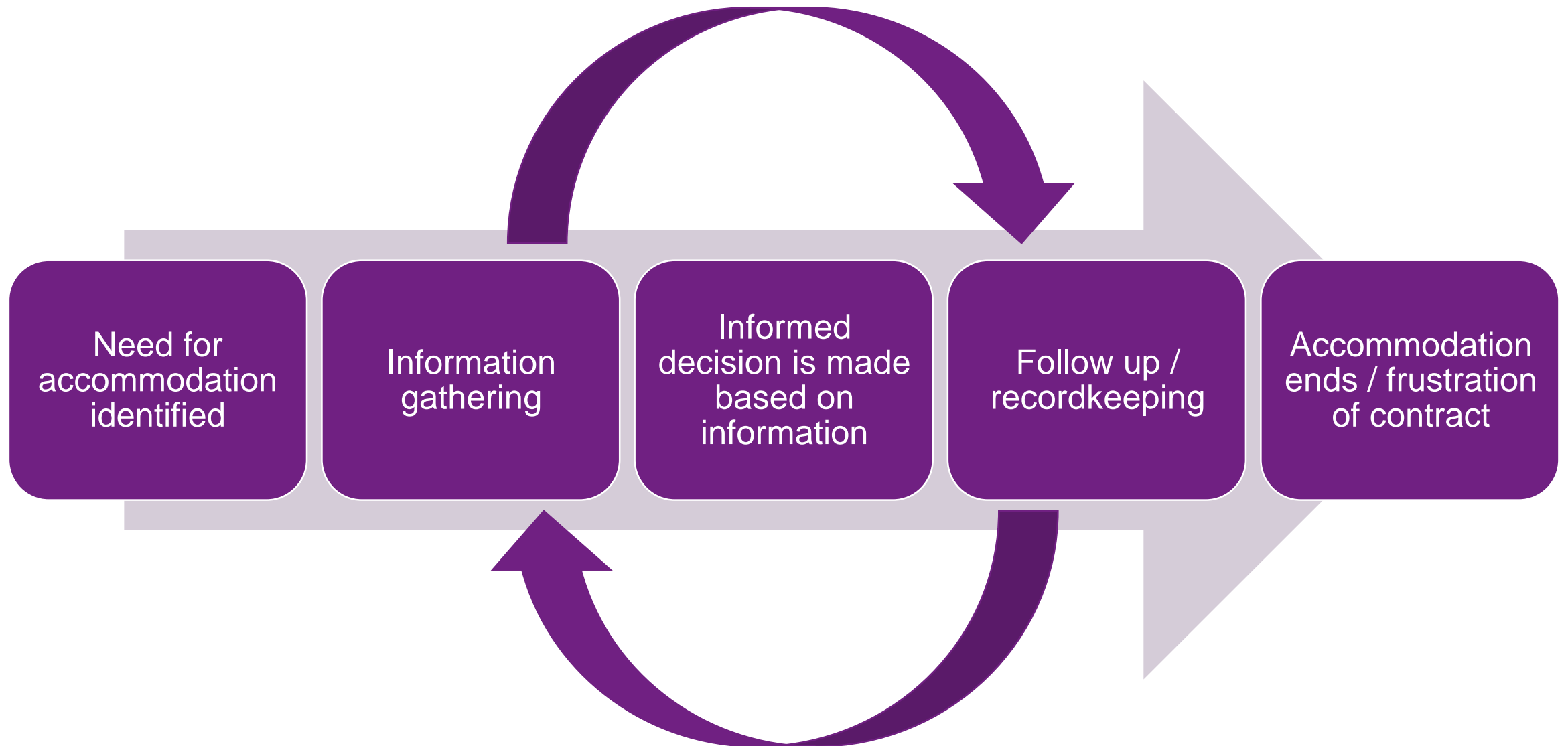
- Balancing act involving employer, employee and any involved union
- Applies at all stages of the employment relationship
- Employers have an obligation to proactively engage in assessment of accommodations needs and steps to be taken to provide reasonable accommodation
 - Employees have a reciprocal obligation to cooperate
- Gathering information is key – focus on functional abilities

Accommodation: the substance

- What reasonable accommodations can be made?
- Accommodation often comes in the form of modifications. Common examples of modifications:
 - Adding adaptive technologies to the workplace
 - Changing the physical landscape of the workplace
 - Alteration of job duties
 - Alteration of work schedules
 - Tolerating a degree of absenteeism
 - Offering rehabilitation programs
 - Working from home



Life cycle of the accommodation process



Bona fide occupational requirements

- Employer can justify a discriminatory practice or rule if it is a *bona fide* occupational requirement (BFOR)
 - Standard or rule is integral to carrying out the essential functions of a specific position
 - For a standard to be a BFOR, employer has to establish that any accommodation or changes to the standard or rule would create an undue hardship

Managing medical issues: prospective candidates

- Only get information about qualifications and job requirements needed for the essential duties of the job
- Medical examinations should only be undertaken after a conditional offer of employment has been made
 - Medical examinations or inquiries as part of the applicant screening process as prohibited under the *Human Rights Code*
- Any information gathered should be kept separate from employee file and should not be available to those who make employment decisions unless necessary



Managing medical issues: existing employees

- Right to medical information will depend on the circumstances
- If medical information is not provided or is lacking, an employer can:
 - Request additional medical information
 - Seek consent to contact a physician directly (in writing)
 - Set timelines for a response and follow-up
 - Request an independent medical evaluation (IME)
- Keep notes on everything – proof of accommodation rests with the employer
- Maintain reasonable contact with employees who are absent from work
- Attendance management – what is the absence related to?

Frustration of contract

- Termination may be appropriate if:
 - Employee's rate of absenteeism is excessive
 - Employee has been warned that a failure to improve attendance could result in termination
 - There is no possibility of regular attendance in the foreseeable future
 - If the absence is caused by a disability, and the employer has accommodated to the point of undue hardship
- Ontario *Employment Standards Act, 2000* statutory minimums are owed at termination in the case of frustration of contract due to disability