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## Bona Fide Occupational Requirement (BFOR)

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Under human rights law employers have a duty to accommodate up to the point of undue hardship<sup>1</sup>. This fact sheet looks at accommodation in employment and instances where accommodation cannot be made because a workplace standard or rule is a bona fide occupational requirement (BFOR).

### **Accommodation, the Duty to Accommodate and Undue Hardship**

Accommodation is the process of making changes or adjustments that eliminate discriminatory barriers to equal participation and enjoyment of opportunities in employment, education, public services, and other areas covered by *The Saskatchewan Human Rights Code* (the “Code”).

Accommodation is a way to balance diverse needs of individuals and groups with the needs of organizations and businesses in our society. Accommodation is achieved by removing or changing standards or rules that create barriers for certain people based on their personal characteristics.

The duty to accommodate requires employers, service providers, and others covered by the Code to accommodate up to the point of undue hardship in areas such as employment and service provision.

Undue hardship describes the limit on the duty to accommodate for employers, service providers and others covered by the Code. Undue hardship can only be defined on a case-by-case basis as its determination relies on the specific facts of each case. The point of undue hardship is only

reached when the employer or service provider has done everything reasonably possible to accommodate a need.

### **Bona Fide Occupational Requirement (BFOR)**

A BFOR is a standard or rule that is integral to carrying out the requirements of a particular position within a workplace. For a standard to be a BFOR, an employer must establish that any accommodation or changes to that standard or rule would create an undue hardship.

If an organization determines that removing barriers or changing workplace standards or rules cause an undue hardship, then it is likely that the standard or rule is a BFOR. Where a BFOR exists, the organization does not have a duty to accommodate to the point of undue hardship.

#### *Example:*

A taxi driver must be able to see in order to carry out the requirements of his position – to drive a car that transports passengers. This requirement is integral to carrying out the duties of a taxi driver. Perfect eyesight may not be required for taxi drivers, since glasses or contact lenses can often accommodate eyesight issues.



### **Is There a Way to Determine If a Workplace Standard or Rule Is A BFOR?**

The Supreme Court of Canada developed a three-stage test to determine if a workplace standard or rule is a BFOR<sup>2</sup>. This three-step test encourages the development of workplace standards that:

- are not discriminatory, and
- accommodate employees and allow for potential contributions of all employees in the workplace.

#### **STEP ONE:**

##### **Establish A Rational Connection**

*Was the rule adopted for a purpose rationally connected to the performance of the job?*

At step one of the BFOR test the employer identifies the general purpose of the standard to determine whether it is rationally connected to the performance of the job in question.

*Example:*

For the taxi cab driver, the requirement of good eyesight is rationally connected to driving a car. The requirement that taxi cab drivers possess a specific driver's license is also rationally connected to the performance of the job.

If there is no rational link between the standard and requirements of the job, the employer must accommodate the employee and the standard or rule is not a BFOR.

*Example:*

The taxi company has a rule that all its drivers must be male. There is no rational connection between being male and the requirements of the job. Therefore this rule is discriminatory and must be changed in order to allow female cab drivers within the company.

#### **STEP TWO:**

##### **Establish Good Faith**

*Did the employer adopt the rule in an honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose?*

Step two is the subjective part of the BFOR test. The employer must show that the standard or rule is required because of a sincere belief that it is necessary to meet a known business purpose. At this step the employer's intentions are considered.

The employer will likely establish good faith where that employer conscientiously considers the necessity of the standard or rule and its impact on all employees.

*Example:*

Where the owner of the taxi company indicates that he wants men as drivers because, in his opinion women are bad drivers; this will not meet the requirements of establishing a good faith connection.

#### **STEP THREE:**

##### **Establish "Reasonably Necessary"**

*Is the rule reasonably necessary to the accomplishment of the legitimate work-related purpose?*

The facts of each situation determine whether a standard or rule is reasonably necessary. An important consideration is the rational business purpose behind the standard or rule.

Here the employer must thoroughly consider all reasonable options for accommodation. If the employer, after making these thorough considerations determines that an accommodation cannot be made, then the standard or rule is likely a BFOR.



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Alternatively, if the employer determines that the employee can be accommodated, then the employer must change the standard or rule to incorporate the accommodation.

Employers can consider the following to help determine whether a standard or rule is reasonably necessary:

- Were alternatives to the standard or rule considered?
- If alternatives were considered, why weren't they adopted?
- Must all employees meet a single standard or rule, or could different standards be adopted?
- Does the standard or rule result in some people being treated more harshly than others, based on personal characteristics?
- Were steps taken to accommodate? If yes, what were they? Were they enough?
- Is there evidence of undue hardship if an accommodation was considered and attempted?

### Summary

Unless a workplace standard or rule is a BFOR, the employer must accommodate employees up to the point of undue hardship. In order to establish whether a workplace standard or rule is a BFOR employers must meet the three-stage test as established in the *Meiorin* case. The three-stage test establishes that the standard or rule:

1. is rationally connected to the requirements of the job;
2. was established in good faith; and
3. is reasonably necessary.

### Notes:

<sup>1</sup>See the Commission's publication *Accommodation, The Duty to Accommodate & Undue Hardship* for more information

<sup>2</sup>British Columbia (Public Service Employee Relations Commission) v. BCSGEU [1999] 3 S.C.R. 3 (CanLII) (referred to as the case name *Meiorin*)