

COVID-19 AND THE NEW BRUNSWICK *HUMAN RIGHTS ACT*

As the New Brunswick government introduces exceptional measures to contain and combat the spread of COVID-19, the NBHRC, pursuant to its mandate to protect and promote human rights in the province, reminds all New Brunswickers that certain population groups, including, but not limited to, seniors, persons with disabilities, racial minorities, and persons disadvantaged by their socioeconomic condition, could suffer harsher adverse impact of these measures. Consequently, the NBHRC reminds government departments, employers, service providers, and all other stakeholders currently developing emergency response plans, that we all have a responsibility to ensure that the rights of vulnerable population groups are duly protected in these response measures. The NBHRC has developed a series of questions and answers to help you understand your rights and obligations under the New Brunswick *Human Rights Act* during the COVID-19 pandemic. These questions and answers cover the rights and responsibilities of employers and employees, tenants and landlords, and providers and users of services.

Disclaimer: The following answers do not constitute legal advice. The NBHRC continues to monitor the evolving situation around the pandemic, and it will update these questions and answers on an ongoing basis as needed.

Should an employer, service provider or housing provider fail to properly adhere to the rights and obligations under the *Human Rights Act*, a Complaint could be filed by the person who believes their rights have been violated.

GENERAL:

1. Is COVID-19 covered by the *Human Rights Act*?

Answer: Yes. COVID-19 is classified as a pandemic. Individuals who exhibit symptoms of COVID-19 or test positive for the virus would, for the purposes of human rights, be considered as persons with [physical disability](#), which is protected as a ground of discrimination under the New Brunswick *Human Rights Act*.

2. Does the Declaration of Emergency affect my human rights?

Answer: No. The Declaration of Emergency made pursuant to the *Emergency Measures Act* has not suspended any human rights at this time. However, legal requirements under the Declaration of Emergency may impact the ability of employers, service providers, property owners, organizations or the government to accommodate certain rights protected under the New Brunswick *Human Rights Act*.

3. What assumptions can be drawn from a person's race or national origin regarding their exposure to the virus?

Answer: It is a violation of the New Brunswick *Human Rights Act* to make any assumptions about a person's exposure to the virus based on their race or national origin.

4. What is the meaning of undue hardship in the context of human rights?

Answer: If a person gets sick from COVID-19, employers and housing or service providers have a duty to accommodate that person's reasonable employment, housing or services related requests. However, the duty to accommodate ends at the point of undue hardship, i.e. when the accommodation begins to pose serious health or safety risks to coworkers, tenants, or members of the public, or when the cost of the accommodation is too high for the employer, housing or service provider. Employers and housing or service providers must show clear evidence of undue hardship; they must show that they acted reasonably and in good faith, and that they offered individualized assessment where necessary.

For more details, see the Commission's guideline at:

<https://www2.gnb.ca/content/dam/gnb/Departments/hrc-cdp/PDF/Guideline-Accommodating-Disability-at-Work-New-Brunswick.pdf>

5. Has the one-year limitation period in the *Human Rights Act* been affected at all during this time?

Answer: Yes. On June 19, 2020, the Minister of Public Safety of New Brunswick issued a revised [Mandatory Order](#) that states that the limitation periods, that had been suspended retroactive to March 19, 2020, will be in effect again on September 19, 2020.

In other words, if, for example, the one year for you to file a Complaint after the alleged violation ended on March 22, 2020, and you hadn't yet filed your Complaint with the Human Rights Commission, you will have until September 19, 2020 to file your Complaint. However, it's better that you file your Complaint as soon as possible and within that time frame as you may need to add revisions.

6. Has the 30-day period for filing an appeal of the Director's decision under the *Human Rights Act* been affected at all during this time?

Answer: Yes. On June 19, 2020, the Minister of Public Safety of New Brunswick issued a revised [Mandatory Order](#) that states that the limitation periods, that had been suspended retroactive to March 19, 2020, will be in effect again on September 19, 2020.

In other words, if, for example, the 30 days for you to file your appeal of the Director's decision ends on March 22, 2020, and you hadn't yet filed your appeal with the Human Rights Commission, you will have until September 19, 2020 to file your appeal. However, it's better that you file your appeal as soon as possible.

EMPLOYMENT

1. I have been diagnosed with COVID-19. Do I need to tell my employer?

Answer: It depends on the nature of your employment. Typically, an employee does not have to disclose a diagnosis to their employer. However, flu, colds, and other short-duration conditions have historically not been considered disabilities under the New Brunswick *Human Rights Act* and, therefore, do not trigger the protections guaranteed under the *Act*. However, COVID-19 is a pandemic and if someone contracts

the virus it may be interpreted as a physical disability under the *Act*; therefore, if you have tested positive for COVID-19, it would be reasonable, necessary, and responsible, in accordance with public health guidelines, to disclose your condition to your employer.

Employees who work from home and have no physical contact with their coworkers may not need to disclose their diagnosis to their employer, but they must fulfill their obligations as directed by provincial and federal health authorities and pursuant to the corresponding legislation.

2. Can an employer force an employee to get tested for COVID-19 if they show symptoms of the virus?

Answer: If an employer has legitimate reasons, based on authentic information, to believe that an employee has COVID-19, it would not be discriminatory for the employer to refuse the employee from entering the workplace (depending on the nature of the workplace), or to take other measures to reduce contact with that employee, until the employee either ceases to have symptoms or tests negative for the virus. Under such circumstances, an employer could "force" an employee to get tested.

3. Is my employer allowed to terminate me for having COVID-19?

Answer: No. It could be a violation of the New Brunswick *Human Rights Act* if your employer terminates your employment because you have been diagnosed with COVID-19 or because they perceive you to have it.

4. Does an employer have a duty to accommodate an employee who tests positive for COVID-19?

Answer: Under the New Brunswick *Human Rights Act*, employers, service providers, and housing providers have an obligation not to discriminate against a person with COVID-19. They also have a duty to accommodate a person in relation to the protected grounds, including physical disability, up to the point of undue hardship. For the meaning of undue hardship, see the "General" section above.

5. I feel unsafe at work. Do I have a right to refuse work?

Answer: A worker's right to refuse work falls under the *Occupational Health and Safety Act*.

For further information on the right to refuse work, and safety in the workplace more generally, visit WorkSafeNB's website at <https://www.worksafenb.ca/safety-topics/covid-19/covid-19-frequently-asked-questions/> or <https://www.worksafenb.ca/policy-and-legal/policy/view-our-policies/right-to-refuse-during-pandemics>

6. I have an employee in an essential position who is refusing to attend work out of fear of contracting COVID-19. What can I do?

Answer: Employers have an obligation pursuant to the *Occupational Health and Safety Act* to provide their employees with a safe working environment. Several factors come into play in this type of a situation.

Generally, if an employee raises this issue, you can apprise them of the measures that have been put in place to reduce the risks associated with COVID-19 in the workplace. If the employee refuses to return to work, you should consult your legal counsel to seek appropriate guidance going forward. For more information, employers and employees should consult the WorkSafeNB website at www.worksafenb.ca.

It should be noted that if the said employee identifies with a characteristic protected under the New Brunswick *Human Rights Act* (for example, physical disability, mental disability or family status), you have a duty to accommodate them to the point of undue hardship.

7. A member of my family is immunocompromised, and I work in an essential position. Do I have to go to work? If not, does my employer have to pay me?

Answer: It depends on your responsibilities towards that family member. The ground of family status includes having caregiving responsibilities towards a child or elderly parent. If the family member with the existing condition lives with you and/or relies upon you to provide necessary care to them, and reasonable alternative arrangements are not available, your employer may have an obligation to accommodate you up to the point of undue hardship, including allowing you to stay home. Depending on the benefits provided through your employer, you may need to take an unpaid leave.

You can obtain further information by contacting the Employment Standards Branch at 1-888-452-2687.

8. I suffer from severe anxiety that has aggravated during the COVID-19 outbreak, but I work in an essential position. Do I need to continue working under these circumstances?

Answer: If your employer is aware that you have a condition that would be considered a mental disability under the New Brunswick *Human Rights Act* and it is one that requires accommodation, and you have requested an accommodation, your employer has an obligation to accommodate you to the point of undue hardship. As an employee, you have an obligation to accept all reasonable accommodations offered by your employer to facilitate your continued employment, and you have a duty to provide medical documentation supporting the need for accommodation. This medical documentation needs to set out your limitations or restrictions. Please note that being anxious in and of itself is not a disability under the *Act*. Only an anxiety disorder or severe anxiety disorder would be considered a mental disability under the *Act*.

9. I have been laid off because of shortage of work following the COVID-19 pandemic. Does my employer need to keep paying me?

Answer: No. You can obtain further information by contacting the Employment Standards Branch at 1-888-452-2687.

Besides applying for federal Employment Insurance benefits, laid off employees may also be eligible for New Brunswick's one-time Workers Emergency Income Benefit:

https://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/promo/nbweib.html

10. Is an employer allowed to terminate an employee who has children who require childcare? If so, does the employer have to accommodate this employee?

Answer: Employees have an obligation to seek all reasonable childcare options for their children. If the employee is the only person who can care for their children and they need to stay home to be their caregiver, these responsibilities fall under the ground of family status. The employer has an obligation to accommodate the employee to the point of undue hardship. However, depending upon the employer's leave policies, the situation may only entitle the employee to an unpaid leave of absence. The employer could look at ways to accommodate including permitting the employee to work from home.

In addition, retroactive to March 12, 2020, job protection is now in place for employees who cannot go to work due to childcare responsibilities stemming from school and daycare closures.

More information on job protection can be found here:

https://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/job_protection.html

11. I am being harassed by my colleagues due to a perception in my workplace that I must have COVID-19 due to my race. Is this legal?

Answer: No. The COVID-19 virus is not connected to any particular race. Harassment by your colleagues based on your race is discriminatory under the New Brunswick *Human Rights Act*.

12. Can my employer implement screening for COVID-19 as a condition for my continued employment?

Answer: It depends on the nature of your employment. Your employer has an obligation pursuant to the *Occupational Health and Safety Act* to provide a safe working environment. If you are in an essential position and need to come into work, employers can ask whether you are suffering from any of the known symptoms of COVID-19. If your employer notices that you are exhibiting signs of COVID-19, they may require you to go home and obtain further medical information before coming back to work.

In the case of employees who work from home and have no physical contact with their coworkers, then their employers would not need to screen you, but the employees must fulfill their obligations as directed by provincial and federal health authorities and pursuant to the corresponding legislation.

You may contact the Employment Standards Branch at 1-888-452-2687 for more information.

13. What obligations does an employer have to "screen" employees for COVID-19 before they enter the workplace? For example: Is an employer obligated to take employees' temperatures when they arrive at work?

Answer: An employer's obligations to provide a safe work environment falls under the *Occupational Health and Safety Act*. Employers must ensure that their screening measures are reasonable and not rooted in assumptions based on personal characteristics protected under the New Brunswick *Human Rights Act*, for example, a person's race, colour, national origin, age, or a pre-existing medical conditions.

For more information, visit WorkSafeNB at <https://www.worksafenb.ca/safety-topics/covid-19/covid-19-frequently-asked-questions/>

14. I have a pre-existing medical condition that would make me more vulnerable to health complications if I catch COVID-19. What information do I have to disclose to my employer if I want to be accommodated?

Answer: You do not have an obligation to provide your employer with your diagnosis. Where possible, you should provide a medical note to your employer indicating your need for accommodation. Your employer also has the right to request additional medical information, for example, regarding tasks that you can safely perform.

In keeping with the directives of provincial health authorities, the Commission encourages employers to show flexibility and desist from overburdening the healthcare system with requests for medical notes and additional medical information during this time.

Remember that your employer has a duty to provide reasonable accommodation, but not the perfect accommodation. The employer's duty to accommodate ends at the point of undue hardship.

15. My employer, because of reduced work load due to COVID-19 closures, inquired if any employee wanted to volunteer for a layoff. Can my employer deny my request for a voluntary layoff due to my physical disability (which makes me susceptible to COVID-19) to allow an employee with more seniority to receive the voluntary layoff?

Answer: No. The employer has a duty to accommodate physical disabilities to the point of undue hardship. You would be required to provide your employer with medical documentation supporting the need for the layoff during the COVID-19 pandemic. The duty to accommodate trumps seniority rights.

16. As restrictions begin to ease on businesses so that they can open with social distancing, I am going to need to return to work. I am immunocompromised, however, and I am afraid it will still be unsafe for me to return to work as I am at higher risk of contracting COVID-19. Do I have a right to refuse work?

Answer: Employers have an obligation pursuant to the *Occupational Health and Safety Act* to provide their employees with a safe working environment and an employee's right to refuse work falls under this Act as well.

If you, as an employee, raise that you fear returning to work, your employer can apprise you of the measures that have been put in place to reduce the risks associated with COVID-19 in the workplace. If you identify with a protected ground under the New Brunswick *Human Rights Act*, and request an accommodation, your employer has an obligation to accommodate you to the point of undue hardship. If you are seeking an accommodation, you will need to provide your employer with a medical note, if your employer requires it, confirming that you are immunocompromised.

17. I was on a medical leave from my position before the COVID-19 pandemic and I was terminated from my position. Would this be discrimination under the New Brunswick *Human Rights Act*?

Answer: If the termination of your employment is due to your medical leave, it could constitute discrimination under the New Brunswick *Human Rights Act*. However, if you were terminated from your position for reasons unrelated to your medical leave such as closures related to COVID-19, it would not be considered discriminatory under the *Act*.

18. I was on a medical leave from my position before the COVID-19 pandemic and I am looking to return to work but my employer is saying there is no work available. Does the employer have an obligation to return me to work?

Answer: If your employer's inability to return you to work has to do with workforce reductions caused by the COVID-19 pandemic and you would have been laid off had you not been on a medical leave, then the employer does not have an obligation to return you to work at this time. However, your medical leave of absence shouldn't be a deciding factor in your employer's decision. If it is a deciding factor, it could constitute discrimination under the New Brunswick *Human Rights Act*.

HOUSING

1. I have lost my job due to COVID-19 and may not be able to pay my rent on time. As a tenant, can I get evicted for non-payment of rent during this time?

Answer: Tenants are required to pay rent when it's due but, pursuant to the Declaration of Emergency, the government has suspended the power of Residential Tenancies Officers to evict tenants for non-payment of rent until May 31, 2020.

Further questions should be directed to the Residential Tenancies Tribunal at www.snb.ca/irent. They can also be reached by email at irent@snb.ca, or by phone, 1-888-762-8600. For information about evictions during the State of Emergency, click [here](#).

2. I am a tenant who has been diagnosed with COVID-19. Is my landlord allowed to evict me because of my diagnosis?

Answer: No, you cannot be evicted for being diagnosed with or perceived to have COVID-19. That said, you do need to follow the directives of the provincial and federal health authorities and corresponding legislation.

If your landlord begins a process because you are not following these directives, it may not be considered discriminatory under the *Human Rights Act*.

SERVICES

- 1. My grocery store has put in place hours for senior citizens and vulnerable members of the population. Is this discriminatory against other population groups?**

Answer: Under normal circumstances, these measures could be discriminatory; however, under the exceptional circumstances of the current crisis, such steps would not be regarded as discriminatory. Grocery stores have an obligation to provide a safe environment for all patrons and employees. Because senior citizens and other vulnerable members of the population are more susceptible to COVID-19, allocating special hours is an accommodation to afford these individuals an opportunity to obtain the necessities of life.

- 2. Can a public service refuse to provide a service to me because I identify with a racial group that has been stigmatized in relation to COVID-19?**

Answer: No. The New Brunswick *Human Rights Act* prohibits discrimination (whether it's intentional or not) based, among others, on the grounds of race, colour or national origin in the provision of services available to the public.

- 3. My service provider is requiring all patrons to wear a face mask. I am unable to wear a face mask due to medical reasons. Is it discriminatory for the service provider to require me to wear one?**

Answer: The New Brunswick *Human Rights Act* does not prevent service providers from requiring patrons to wear a face mask. However, should a patron be unable to wear a face mask due to a mental or physical disability, the patron has a duty to inform the service provider of their inability to do so. Once the service provider is advised of same, the service provider has a duty to accommodate to the point of undue hardship. Even though the patron cannot wear a mask for medical reasons, they must continue to follow recommendations from the New Brunswick Chief Medical Officer such as following physical distancing rules, coughing into their sleeve, hand washing, etc.