

MEDICAL DIVULGENCE

(During Employment)

DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

Introduction

This information is designed for Victorian, Tasmanian and Queensland employees who have or may be asked to disclose personal medical information to their employer. This infosheet does not deal with requests for medical information in relation to workers' injury compensation claims.

Who can use this infosheet?

This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

Glossary

Summary Dismissal: This is when an employer dismisses an employee, effective immediately, without notice or pay in lieu of notice.

© Job Watch Inc - August 2019

Employment Rights Information for Workers – Job Watch Inc is an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to workers.

Hours: Mon-Fri 9am-5pm (Wednesdays until 8:30pm).

Statutory Declaration: A written statement that allows a person to declare something to be true.

Disclosure of Information

All employees are obliged to obey the **lawful and reasonable directions** of their employer. Any failure to obey a lawful and reasonable direction may amount to serious misconduct. This means that the employer may be entitled to dismiss the employee without notice.

A requests/demand for medical information is likely to be a lawful and reasonable direction if it relates to the employer's concern to provide a healthy and safe workplace or to make changes to accommodate a worker with a disability.

There is no general rule regarding what directions are lawful and reasonable and each request/demand made by an employer has to be dealt with on a case by case basis.

DO I NEED TO TELL MY EMPLOYER WHY I WAS SICK?

Generally, you do not need to give information to your employer about a condition which does not affect your ability to work.

If you need to take sick leave, you do not usually have to inform your employer of the details of your illness or injury. Although, you must make sure that you:

- notify your employer as soon as possible; and
- provide a medical certificate or statutory declaration that covers the period of your absence within 24 hours or as soon as reasonably possible.

To better protect your rights, you should also advise your employer of the expected period of your sick leave.

WHAT MEDICAL INFORMATION MUST I DISCLOSE TO MY EMPLOYER?

You may be obliged to tell your employer about your illness or injury where your ability to perform the **inherent requirements** of your job is affected. The inherent requirements of a job are the key tasks or skills needed to do the position.

If you feel you are able to return to work if your employer makes reasonable adjustments to your job, you have the right to request those adjustments. An employer is obliged to make reasonable adjustments to accommodate your illness or injury. If you request adjustments, it will usually be lawful and reasonable for your employer to request medical information about what duties you can and cannot do.

Do I have to see the company doctor?

It is your right to choose your own doctor for treatment purposes.

You may be required to attend a **medical examination** with another doctor as part of a workers' injury compensation claim.

It may also be lawful and reasonable for your employer to direct you to see its nominated doctor in some cases. For example, where you have requested reasonable adjustments or where your employer has a reasonable concern regarding health and safety.

If you do see your employer's doctor, you should obtain your job's position description with details of the inherent requirements of your job. The medical assessment should only assess your ability to perform your pre-injury duties and the inherent requirements of your job.

Your employer is not entitled to request general information about your health.

EXAMPLE

Jim had worked as a miner doing a very physical job. Jim injured his shoulder at home after a fall and could not work for 8 months. Jim attempted to return to work after 8 months and gave his employer his ‘clearance to work’ medical certificate.

The certificate Jim gave to his employer did not give details about the injury, rehabilitation or any restrictions on Jim’s ability to work. Jim’s employer thought it best to organise a medical assessment with its own doctor to confirm Jim’s fitness to work and to comply with its work health and safety obligations.

Jim refused to attend his employer’s doctor for a medical assessment. Jim was warned by his employer that if he did not attend he may be dismissed. Jim failed to attend the next medical assessment and was dismissed. Jim made an unfair dismissal claim but lost because the Fair Work Commission found that it was lawful and reasonable in the circumstances for Jim’s employer to direct him to see its doctor because further information was required to make sure that it had met its work health and safety obligations.

CAN MY EMPLOYER ASK TO SPEAK TO MY DOCTOR?

An employer can only speak to your doctor with your consent. If you do consent, your employer should advise you of the reasons for the discussion with your doctor. Your doctor should also obtain your consent to speak to your employer. You should instruct your doctor to discuss only what is relevant to your job.

MY SICK LEAVE HAS RUN OUT. WHAT IF I GET SICK?

If you have used all of your accumulated paid sick leave, it is common for an employer to allow you to be absent on unpaid sick leave or you may be able to use your accrued annual leave. Even if you are on unpaid sick leave, all of the protections discussed above still apply.

What do I do if I have been dismissed?

You have legal options if your employer dismisses you because of your medical condition or because you exercised a workplace right (for example, you took sick leave).

If you are dismissed you may be eligible to lodge an Unfair Dismissal claim at the Fair Work Commission. Alternatively, you may consider lodging a General Protections (Termination) Claim at the Fair Work Commission. You have **21 days** from when your dismissal takes effect to file an Unfair Dismissal or General Protections Dispute (Termination) Claim at the Fair Work Commission.

What do I do if my employer discriminates against me because of my medical condition?

If your employer discriminates against you because of your illness or injury you may consider making a disability discrimination complaint.

You have **6 months** to file a discrimination claim with either the Australian Human Rights Commission ('AHRC') or, in Victoria, the Victorian Civil and Administrative Tribunal (via the Victorian Equal Opportunity and Human Rights Commission) or, in Tasmania, Equal Opportunity Tasmania or, in Queensland, the Anti-discrimination Commission from the date of the discriminatory conduct.

You should also obtain independent legal advice before choosing which claim to make, as there may be differences between the state and federal jurisdictions, which could affect your claim.

Also, you can usually only choose one course of legal action so choosing which course of action to take is very important. For more information see 'Where to get help' below.

If you are unsure about any information in this infosheet, it is important to obtain legal advice as soon as possible.

Where to get help

ORGANISATION	PHONE	WEBSITE
Australian Human Rights Commission	Complaints Infoline: 1300 656 419 General enquiries: 1300 369 711	https://www.humanrights.gov.au
Fair Work Commission Helpline	1300 799 675	https://www.fwc.gov.au/
Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94	http://www.fairwork.gov.au/
Job Watch Inc	Metro:(03)9662 1933 Rural: 1800 331 617	www.jobwatch.org.au
Victorian Civil and Administrative Tribunal	(03) 9628 9900	http://www.vcat.vic.gov.au
Victorian Equal Opportunity and Human Rights Commission	1300 292 153	http://www.humanrightscommission.vic.gov.au
Anti-discrimination Commission Queensland	1300 130 670	https://www.adcq.qld.gov.au/
Equal Opportunity Tasmania	1300 305 062	www.equalopportunity.tas.gov.au/
WorkSafe Victoria	Metro: (03) 9641 1444 Rural: 1800 136 089	http://www.vwa.vic.gov.au/home
WorkSafe Tasmania	1300 366 322	www.worksafe.tas.gov.au
WorkSafe Queensland	1300 362 128	www.worksafe.qld.gov.au

JobWatch acknowledges and is grateful for the financial support of the State and Federal Governments, the Office of the Fair Work Ombudsman and Victoria Legal Aid.



Fair Work
OMBUDSMAN



Victoria Legal Aid

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.