

# Medical Divulgence

In this Fact Sheet, we discuss medical divulgence (also known as the sharing of medical information) with a prospective employer *before* employment, and with an employer *during* employment.

## Before employment

You are not legally obliged to volunteer your medical information to a prospective employer. You may be asked to disclose whether you have an existing injury or medical condition when you apply for a job, but you can choose whether or not you do so. However, if the request is reasonable and you do not give the information, this could result in being excluded from the recruitment process.

If you get the job and you were not honest about your condition, your employer may treat this as misconduct and dismiss you or take other disciplinary action. You may also have difficulties obtaining workers injury compensation if your condition is worsened by your work and your employer never knew about your condition.

## What is a 'reasonable request' for medical information?

A request to disclose personal medical information may be reasonable if:

- your condition will affect your ability to carry out the *inherent requirements of the job*;
- your condition will affect your health and safety and/or the health and safety of co-workers (for example, if you are on medication that interferes with your ability to drive or operate heavy machinery); or
- your condition is affected, or could be affected, by the nature of the employment (for example, a person applying for a job as a fire fighter may be required to disclose any history of breathing difficulties).

An employer may also request disclosure of medical conditions for the purposes of workers' injury compensation insurance.

## What questions can my prospective employer ask me?

Any questions asked in an interview should be about your ability to perform the job and not your general health.

An employer may ask for your consent to get a copy of your claims history from a workers compensation authority.

Any request for information that is irrelevant to the inherent requirements of the position may breach anti-discrimination laws.

**Definition:** '*Inherent requirements of the job*' means the core activities, tasks or skills that are essential to a specific position and the workplace in general.

## Disclaimer

This Fact Sheet 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 Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

### Note!

For example, an inappropriate question would be "does your family have a history of mental illness?".

## What is a pre-employment medical assessment?

A pre-employment medical assessment may be lawful as long as it relates to the inherent requirements of the job and/or workers' injury compensation insurance.

If it relates to the inherent requirements of the job, employers can use pre-employment medical assessments for all prospective employees (not selectively) as part of the recruitment process but not rely on them solely. An employer should not use information from medical assessments to reject applications during the pre-interview stage. The results of the medical assessment must be kept confidential.

## Can a prospective employer assess your employment application based on your medical information?

An employer may be able to assess your application based on your medical information if:

- Your medical condition prevents you from performing an inherent requirement of the job even if reasonable adjustments were made;
- It would be unreasonable for an employer to accommodate your condition for economic or other reasons; and/or
- Employing you would breach occupational health and safety laws.

It is unlawful for prospective employers to refuse to employ you just because you have told them that you have a medical condition.

## During employment

All employees are obliged to obey the lawful and reasonable directions of their employer. Any willful 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 request or demand for medical information is likely to be a lawful and reasonable direction if it relates to the employer's obligations to provide a healthy and safe workplace or to make changes to accommodate a worker with a disability.

## 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 (a written statement that allows a person to declare something to be true) 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.

### Note!

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

## 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 perform the work.

If you feel you are able to return to work if reasonable adjustments are made 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.

### CASE STUDY

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 Dispute – 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.

## I think I've been discriminated against, what should I do?

If you think you may have been excluded from employment or discriminated against at work because of a medical condition, you may be able to make a disability discrimination complaint through federal or state jurisdictions. You can only choose one course of legal action, so you should obtain specific legal advice before filing any claim.

## Where to get help

### JobWatch's free and confidential Telephone Information Service

**P:** (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

**W:** [jobwatch.org.au](http://jobwatch.org.au)

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Australian Human Rights Commission	1300 656 419
Victorian Equal Opportunity and Human Rights Commission	1300 292 153
Victorian Civil and Administrative Tribunal	1300 018 228
Queensland Human Rights Commission	1300 130 670
Queensland Industrial Relations Commission	1300 592 987
Equal Opportunity Tasmania	1300 305 062
Tasmanian Civil and Administrative Tribunal	1800 657 500
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

### Note!

Please see JobWatch's 'Unfair Dismissal', 'General Protections Dispute – Termination claim' and 'Disability Discrimination' Fact Sheets for more information.

### Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Victoria Law Foundation, the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and 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.