

Know the risks: obtain pre-employment  
medical information but use the  
information with care

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## Today we will cover:

- Why you should obtain medical information before offering employment
- Risk of liability for discrimination, unfair dismissal
- What happens if an employee is dishonest on a pre-employment medical
- Your organisation's privacy obligations
- Tips: dos and don'ts

## Why you should obtain a worker's medical information before employment commences

- Obligations under *Work Health and Safety Act 2012* (SA)
- Obligations under disability discrimination legislation
- Impact on workers compensation rights and entitlements
- Medical examination vs medical questionnaire?
- Can you ask about workers compensation history?

## The risks of obtaining medical information: discrimination law

- *Disability Discrimination Act 1992 (Cth), Equal Opportunity Act 1984 (SA)*
- Unlawful discrimination against job applicants
- Unlawful discrimination against employees
- Unreasonable requests for information
- But when is it lawful to not offer employment on medical grounds?

## The risks of obtaining medical information: general protections claims under Fair Work Act

- *Fair Work Act 2009* (Cth)
- What are the ‘general protections’?
- Claims by prospective employees
- Claims by employees after employment

## Reducing the risks

- Limit and control access to the medical information
- Have effective policies prohibiting disability discrimination
- Ensure decision makers are aware of their legal obligations
- Clearly communicate with job applicants about the reasons for seeking the information
- Ensure the medical information does not affect decisions about employment, promotion, etc, unless lawful to do so

## **When an employee has been dishonest: unfair dismissal**

- When can you lawfully dismiss an employee for being dishonest on a pre-employment medical?
- What will you need to prove?
- What considerations should you take into account?
- Following a fair process
- Dismissal with notice or summary dismissal (without notice)?

## **When an employee has been dishonest: workers compensation implications**

- *Return to Work Act 2014 (SA)*
- Is worker entitled to any services or benefits in relation to an injury?
- Can you reject a claim and/or discontinue weekly payments?
  - Serious and wilful misconduct
  - Obligation of mutuality



## Privacy obligations

- Private or public sector organisation?
- Employee records exemption
- Dealing with medical information of unsuccessful job applicants
- Dealing with employee records
- Providing a suitable privacy statement

## Tips – dos and don'ts

- **Do** seek information about capacity to safely perform inherent requirements of job
- **Don't** ask for information about specific injuries or conditions if using your own form – leave that to a doctor performing full pre-employment medical
- **Do** provide applicant/doctor with detailed description of inherent requirements of job, list of tasks etc (not a position description)
- **Don't** ask for workers compensation claims history, marital status, etc
- **Do** use an independent medical examination if possible (at least for physically demanding / high risk jobs)
- **Don't** dismiss an employee for failure to disclose a condition, without seeking expert legal advice

# Key Contacts



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