

FAQ: Mental Illness and Health – An employer’s perspective

For an employer, managing employees who are experiencing a mental health condition in the workplace can be challenging. Employers are often confused about their legal rights and responsibilities and that often results in inaction. Similarly, many employers do not properly consider their legal responsibilities to protect their employees’ mental health at work in the first place. Set out below are some common questions raised by employers in this area and brief responses. As this is a complex area of law, it is recommended that employers seek legal advice about their specific circumstances.

Q1 As an employer, do I have a legal responsibility to protect the mental health of my employees?

Yes, employers have a legal responsibility to protect the mental health of all workers while at work.

Workplace Health and Safety

The *Workplace Health and Safety Act 2011* (Qld) (WHS Act) requires that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of their workers. If your firm employs or engages workers, it will be ‘a person conducting a business or undertaking’ for the purposes of the WHS Act.

‘Health’ in this context means both physical and psychological health.

Employers should adopt a risk management process to assess and minimise potential psychological hazards arising in the workplace. It is important to note that a ‘workplace’ is broadly defined and will include working from home arrangements and client and site visits.

WorkCover

If a worker sustains a psychological injury ‘arising out of or in the course of employment’ they may have a claim under the *Workers Compensation and Rehabilitation Act 2003* (Qld) (WCRA). For a psychological injury to arise out of or in the course of a person’s employment, their employment must be a ‘major significant contributing factor to the injury’. A psychological injury arising out of or in the course of employment will not be compensable under the WCRA if it arises out of ‘reasonable management action taken in a reasonable manner.’

Q2 What can I do if I think an employee is suffering from a mental health condition that is affecting their work?

It is appropriate for an employer to take action if an employee's work performance or conduct appears to be negatively affected by a mental health condition. The appropriate actions include speaking with the employee and asking them about their health, communicating your concerns about their work performance and/or conduct, and enquiring whether you can make any reasonable adjustments to the employee's working environment or duties to assist them.

Q3 Does an employee have to disclose they are suffering from a mental health condition at any stage during their work?

All employees have a duty to present fit for work and to ensure that their conduct at work does not create an unreasonable risk to their own health and safety or the health and safety of others at work.

Further, under the *Australian Solicitor's Conduct Rules 2012*, solicitors have a duty to deliver their services competently. Therefore, a solicitor may be required to disclose that they are suffering from a mental health condition where it affects their capacity to engage in legal practice.

Employees do not have to disclose medical conditions that do not affect their work.

Q4 What if an employee hasn't disclosed a mental health issue and they subsequently go off sick?

All employees are entitled to take personal leave when they are unfit for work. Employees do not have to disclose the nature of their medical condition to the employer unless it is creating an unreasonable risk to their own health and safety or the health and safety of others at work.

Regular or long-term absenteeism is a matter that the employer should address with the employee. It is preferable that the employee voluntarily discloses the mental health condition, but if they do not, and there is doubt as to the employee's ongoing fitness for work, an employer may require the employee attend a fitness for work medical examination.

Q5 Do I have to make workplace adjustments for employees who are suffering from a mental health condition?

The State and Federal discrimination legislation requires employers to make reasonable adjustments for employees who are suffering from an impairment (eg a mental health condition). Reasonable adjustments might include a temporary or permanent change to the working environment, or the employee's duties or responsibilities.

There is also a specific requirement for employers to participate in the rehabilitation of employees who suffer from a compensable mental health condition under the WCRA.

Q6 What can I do if the employee refuses to speak with me about their mental health condition?

If an employee's work performance or conduct requires improvement, speak to the employee about that and explain what it is you require of them. Assure them that if there is a medical reason why their work performance or conduct has declined, you are willing to help them through that, to the extent possible. Communicate to the employee that if you do not know about a medical issue that is affecting their work, you cannot take it into account when assessing their work performance or conduct.

If you reasonably believe the employee's work performance or conduct creates a risk to their health and safety at work or to the health and safety of others at work, you may be able to require the employee to undergo a medical assessment as to their fitness for work.

Q7 Can I performance manage an employee with a mental health condition?

Employers are entitled to performance manage all employees where there is legitimate performance or conduct concerns. It is important that proper performance management processes are implemented and that any mitigating circumstances, such as a mental health condition is considered.

Q8 Can I dismiss an employee because of their mental health condition?

It can be lawful to dismiss an employee who is not able to perform the inherent requirements of their role, even if this is caused by a mental health condition. Whether an employee's mental health condition prevents them from performing the inherent requirements of the role is a medical question having regard to the essential duties and responsibilities of the role. On this basis, employers should seek a doctor's report before making a decision to dismiss an employee on these grounds.

Employers can also dismiss an employee for continued poor performance and/or conduct, even if they have a mental health condition. However, it is important that employers consider whether any reasonable adjustments can be made to accommodate the employee's mental health condition that would enable the employee to meet the employer's performance and conduct expectations. It is also important that proper performance management processes are implemented and that any mitigating circumstances, such as a mental health condition is considered.

Q9 Can I ask a candidate if they are suffering from a mental health condition during the recruitment process?

Generally, employers should not ask candidates if they are suffering from a mental health condition during the recruitment process. This is likely to constitute unlawful discrimination.

An exception to this general rule is found in the WCRA which provides that a prospective employer may request a candidate to disclose all pre-existing injuries or medical conditions that could reasonably be expected to be aggravated by performing their employment related duties.

A request of this kind by the employer must be accompanied by details of the nature of the employment duties. The employer should ask these questions in writing stating they are made pursuant to the WCRA. The employer should advise the candidate, also in writing, and prior to the employment, that if they knowingly supply false or misleading information, they will not be entitled to compensation or damages for any event that aggravates the non-disclosed pre-existing injury or condition.

Q10 What strategies does an employer have to manage long term absenteeism, in particular if they have micro to small practice?

Employers need to regularly communicate with employees and talk about any regular absenteeism, preferably before the employee is on long term personal leave. Generally, employers are entitled to request a medical certificate for the employee's absences and to be kept up to date on the expected duration of the absence. There are many steps involved when managing long term absenteeism and employers should seek legal advice if this happens.

For more information
qls.com.au/wellbeing

Author: Belinda Winter, Partner, Cooper Grace Ward

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