

Practical guide... managing ill or injured workers

A possible scenario is where an employee has been absent on a number of occasions and their medical certificates state the employee is suffering from a "medical condition".

Your business relies on that employee to function as a member of a team and his/her absences are impacting on both the work that needs to be done and their colleagues.

When employee does not provide any further information about his/her medical condition, can you require him/her to submit to a medical examination and what happens if he/she refuses?

Taking the plunge

The first step is for you to ask and, if necessary, direct the employee to undergo a medical examination. Where he/she refuses, you need to decide whether the direction is defensible in a legal sense and what the consequences of that direction are – ie: can you dismiss him/her?

The employee may challenge your right to give that direction by alleging such a direction is not a lawful or reasonable direction; or it amounts to disability discrimination; or adverse action as it constitutes a 'detriment' and detriment is due to the disability.

General principles

In your employment agreements, you can give lawful and reasonable directions to your employees and they are required to comply.

It is generally lawful and reasonable to direct an employee to attend a medical examination to determine whether the employee is fit to perform his/her duties and whether he/she can do so safely. This follows from your duty under workplace health and safety legislation.

The situation may involve employees with disabilities within the meaning of discrimination legislation, giving rise to potential breaches of that legislation. However, discrimination legislation does not make all disability discrimination unlawful – eg: it is not unlawful for you to discriminate against employee due to their disability if the disability prevents the employee from safely carrying out inherent requirements of his / her work (even after reasonable adjustments or accommodation is made). Focusing on the disability as it affects the work and its safety is not necessarily unlawful discrimination.

Where the direction to undergo a medical examination is lawful and reasonable, the employee will not have suffered a 'detriment' in employment'; therefore requirement to undergo a medical examination cannot constitute unlawful disability discrimination or adverse action.

Not complying with the direction can give rise to a valid reason to dismiss the employee.

When will requirement to undergo a medical examination be a lawful and reasonable direction?

You cannot randomly or routinely require employees to undergo medical examinations on workplace health and safety grounds, even if they have been absent due to illness. What makes such a direction lawful and reasonable is two-fold:

- ▶ existence of circumstances that genuinely justify a need for a medical examination for the particular employee;
- ▶ the setting of reasonable terms for the requirement to undergo a medical examination.

You can show there was a genuine need for a medical examination when the following types of factors exist:

- ▶ frequent, lengthy or many unexplained absences from work or inability to perform the work or its inherent characteristics; particularly where information about the employee's medical condition or its impact on the work is unknown.
- ▶ Where the medical condition is known broadly – eg: a back injury – and the nature of the work the employee is required to perform is likely to be affected by such an injury.
- ▶ Inconsistencies in information available to you about the employee's state of health.
- ▶ Genuine concerns raised by other employees about an employee's fitness for work.



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The terms of the medical examination will be reasonable where:

- ▶ The medical examination's focus is on inherent job requirements, workplace health and safety obligations and/or fitness for work generally.
- ▶ An appropriate medical expert is arranged to conduct the medical examination.
- ▶ The employee is advised of the reasons for the medical examination.
- ▶ Privacy and confidentiality in the process is maintained as far as possible.
- ▶ The process is conducted in a sensitive manner.

You should only require a medical examination when there is a genuine issue with the employee being able to safely do their job; you must also conduct the process carefully and sensitively.

If an employee refuses a reasonable and lawful direction to undertake a medical examination, you may be entitled to dismiss the employee for failure to follow that direction, without breaching adverse action, unfair dismissal or discrimination laws. This is subject to procedural requirements, including that the employee is aware of the possibility of dismissal.

What does an employer need to do with the expert's opinion?

Of course, when the employee attends the medical examination, the information or opinion provided by the medical expert will need to be acted upon by you.

If the medical expert confirms the employee can do their job safely; you then risk a disability discrimination or unfair/unlawful termination claim if you nevertheless dismiss the employee or prevent them doing that job. This risk includes circumstances in which the expert states the employee can perform the role safely, but with reasonable adjustment or assistance or, in some cases, if they can do so on a part-time basis rather than full-time, or if they cannot do the job currently but may be able to do so in the short term.

If the expert supports a conclusion the employee cannot safely perform the inherent requirements of the role, grounds may exist to validly dismiss the employee without breaching discrimination, unlawful termination or unfair dismissal laws (subject to proper processes being followed). However, you need to consider whether the incapacity is such that dismissal can be justified.

Checklist: obtaining an independent medical assessment

- ✓ Have you considered obtaining consent from the employee to speak to his/her treating doctor?
- ✓ If the employee does not consent, have you directed him/her to undergo an independent medical assessment?
- ✓ Is the independent medical practitioner an appropriate specialist to assess the worker's work capacity?
- ✓ Have you ensured confidentiality and sensitivity is maintained as far as possible in requiring that independent examination?
- ✓ If the employee refuses the direction, are you in a position to proceed to dismiss the employee for failure to follow a lawful and reasonable direction?
- ✓ Have you provided the independent medical practitioner (or treating doctor, if requesting his/her opinion) with a description of the employee's pre-injury duties, noting the inherent requirements of the position?

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