



# FITNESS FOR WORK: MANAGEMENT GUIDE

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## 1. INTRODUCTION

The aim of the Fitness for Work Management Guide is to provide guidance on the management of employees with injuries and illnesses in the workplace.

The Management Guide provides an outline of an employer's legal obligations including:

- Ensuring Workplace Health and Safety (WHS) of employees;
- Avoiding discrimination and making reasonable adjustments; and
- Managing the legal risks if an employee cannot fulfil the inherent requirements of their role.

The Management Guide refers to employees and other workers engaged by an employer (together, Workers). This includes independent contractors.

This document is written for **Human Resource employees and managers only** and is not intended for distribution amongst broader staff.

## 2. LEGISLATION

WHS laws apply in all States and Territories (**WHS Legislation**). Both an employer together with its employees have certain duties regarding safety under the WHS Legislation and other relevant legislation in the State or Territory where they work.

## 3. AN EMPLOYER'S LEGAL OBLIGATIONS

Employers are legally required, so far as is reasonably practicable, to provide a safe and healthy workplace for Workers. This includes both physical **and** psychological safety.

An employer's legal obligations include:

- Proactively identify hazards and eliminate risks in the workplace so far as is reasonably practicable (not just manage the consequences);
- Ensuring Workers are fit and healthy to carry out their duties and do not pose a risk to themselves or others; and
- Monitoring the health of Workers.



Workers also have obligations to take reasonable care to minimise risks to their own safety and the safety of others.

The risks in not managing workplace health and safety are not just breach of a WHS Legislation but may also result in workers' compensation claims or unlawful discrimination claims.

#### 4. LEGAL RISKS – WORK HEALTH AND SAFETY

Work health and safety obligations are relevant when considering an ageing workforce. Employers must so far as reasonably practicable, provide a working environment that is safe and without risks to health.

An employer cannot ignore obvious health and safety issues, which may include an employee's capacity or ability to undertake their role because of factors related to their age.

This is important because if an employer breaches their WHS obligations, they can be subject to significant penalties, but worse still employees can suffer work related injuries. These injuries may be the subject of workers compensation claims, which come with their own variety of risks and obligations for employers.

#### EXAMPLE – BUS DRIVERS

Declining physical health may be an issue for drivers given the sedentary nature of the work.

Sitting for long periods of the day can also create physical health issues that are not age-related.

There are some tasks, such as cleaning buses or doing pre-drive checks, that become harder with age. Other examples include fatigue and the need for bathroom breaks.

There are also specific health issues that can impact drivers of any age. These include weight gain, diabetes, medications, back issues, and eyesight.

Employers should be aware that employees sometimes hide health issues as they think they will be forced to leave their job.

#### 5. WHAT CAN EMPLOYERS DO TO MANAGE THESE RISKS?

Employers can take a number of steps to mitigate health and safety risks and promote wellbeing in the workplace. The following are some examples of strategies to implement, and although are not legal requirements, they do encourage best practice for employers to ensure that Workers are fit for work:

- Using pre-employment screening processes



- Requesting employees complete pre-employment questionnaires
- Requesting Workers undergo fitness for work assessments
- Having fitness for work policies and provisions in employment contracts
- Having clear position descriptions which set out the physical and mental requirements of the role
- Monitoring the health of Workers – and if there are concerns regarding physical and/or psychological health, then taking action
- Having Workers assessed against the inherent requirements of their role
- Training managers in health and safety obligations and in company processes

These are considered in further detail below.

### PRE-EMPLOYMENT SCREENING

An employer must ensure that employees are fit to meet the inherent requirements of their position and are able to perform work safely.

Best practice provides that prospective employees be provided with detailed descriptions outlining the nature of their proposed employment prior to accepting employment. Descriptions should include any key physical or mental requirements of the role, e.g. 'ability to sit for long periods of time', etc. These are known as the 'inherent requirements of the role'.

Prospective employees should be advised if they need to complete pre-employment screening, which may include:

- A full fitness for work assessment
- Pre-employment health questionnaire
- Psychometric testing
- Drug and/or alcohol testing
- Hearing testing

Where pre-employment screening reveals that a job applicant has a disability that may impact their ability to fulfil the inherent requirements of the role for which they are applying, it is a legal requirement for an employer to consider if there are any reasonable adjustments that could be made to enable them to safely fulfil those requirements should they be employed.

### PRE-EMPLOYMENT HEALTH QUESTIONNAIRES

Pre-employment health questionnaires are also directed at ascertaining an employee's capacity to fulfil the inherent requirements of their role. Pre-



employment health questionnaires are not legally required but form part of best practice for employers. Questionnaires should:

- Ask whether the individual has any pre-existing injuries or conditions which prevent them from fulfilling the inherent requirements of their role or which put them at risk of an exacerbation/other risk to their health and safety; and
- In the case of Victoria, refer to specific consequences under section 41(2) of the *Workplace Injury Rehabilitation and Compensation Act 2013* if false/misleading disclosure made (i.e. possible denial of workers' compensation if exacerbation of pre-existing injury/condition).

Collection of sensitive health information must be with the individual's consent and must be handled in accordance with privacy obligations.

## EMPLOYMENT CONTRACTS

It is recommended that the provisions in employment contracts require employees to acknowledge that prior to accepting employment, they have been informed about the nature of their proposed employment and that they do not have a pre-existing injury or condition that would prevent them from fulfilling the inherent requirements of their position.

It is also recommended that employment contracts require employees to acknowledge that it is their responsibility to disclose all pre-existing injuries, conditions and diseases of which they are aware and which they could reasonably be expected to foresee could be affected by the nature of the proposed employment.

It is in an employer's interests that employment contracts provide that, during the course of employment, they can direct an employee to attend a medical assessment, at the employer's expense, to ascertain the employee's fitness for work and whether the employee is able to perform the inherent requirements of their role.

## 6. WHAT ARE INHERENT REQUIREMENTS?

The inherent requirements of the job are the key physical, cognitive and psychosocial demands of a role. They are characteristics or essential requirements of the employment, as opposed to peripheral requirements.

By understanding what the inherent requirements of the role are will assist an employer with pre-employment screening, workers compensation claims management and determining ongoing fitness for work.

An employer may seek support from external consultants to appropriately identify and document the inherent requirements of a role.



## 7. MONITORING THE HEALTH OF EMPLOYEES DURING EMPLOYMENT

Employers should take a proactive approach – rather than waiting for an incident/injury to occur or escalate. Safety is the justification for any assessment of capacity.

To minimise challenges, it is recommended that employers include express provisions in employment documentation (employment contract, policies and procedures) about when an employer can request a medical assessment.

If an employee is required to undergo such assessment, they will be directed to provide a written consent for the practitioner performing the assessment to disclose the information regarding their fitness for work to the employer.

A medical assessment may be needed where an employee sustains an injury or if the employer has concerns that the employee does not have capacity to undertake their role safely.

Some signs that medical information may be needed to assess fitness for work include:

- Visible physical issues or complaints (weight/back issues);
- Absenteeism patterns and decline in punctuality;
- Minor incidents/accidents; and
- Psychological health – change in behaviour/performance.

## 8. UNLAWFUL DISCRIMINATION

There is legislation in all States and Territories, and at the Federal level, which prohibit discrimination based on a broad range of protected attributes including age and disability.

Discrimination may be direct or indirect.

**Direct discrimination** means treating a person or group with a protected attribute or characteristic unfavourably because of that attribute. Direct discrimination can arise through refusal to hire, dismissal, providing unfavourable working conditions, or limited opportunities.

**Indirect discrimination** means imposing an unreasonable requirement, condition or practice on a person with a protected attribute or characteristic that disadvantages that person. Indirect discrimination can be the result of the interaction of decisions, actions, regulations, policies, practices, social attitudes, and systems.



## AGE DISCRIMINATION

Unless the individual is a judge or pilot, there is no compulsory retirement age for employees, and it is open to individuals to work as long as it is appropriate and safe to do so.

Age discrimination is prohibited in relation to:

- Recruitment and job applicants – who is offered employment, the terms of employment, denying access to training.
- Employment – who is offered a promotion, access to training, termination or any other detriment.
- Contractors – terms, termination, access to benefits, other detriment.
- Provision of goods and services – refusing to provide, imposing discriminatory terms, other detriment.

It is irrelevant whether the 'victim' is aware of the discrimination or considers the treatment less favourable.

Further the attribute does not need to be the only or dominant reason for the treatment – it only needs to be a substantial reason.

## DISABILITY DISCRIMINATION

Under anti-discrimination legislation, a person discriminates against another person on grounds of disability if:

- Reasonable adjustments are not made, or proposed to be made, for the person; and
- The failure to make these adjustments has, or would have, the effect that the person is, because of their disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

A person also discriminates against another person on the ground of a disability if:

- An aggrieved person is required to comply with a requirement or condition;
- Because of their disability, the person would comply, or would be able to comply, with the requirement or condition only if reasonable adjustments were made for the person, but these adjustments are not made, or not proposed to be made; and
- The failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.



Employers are obliged to make reasonable adjustments as a legal requirement to allow a person with a disability to perform the role safely unless such an adjustment would result in 'unjustifiable hardship' to the employer.

To determine at which point the hardship caused by the reasonable adjustments becomes 'unjustifiable' to the employer, all relevant circumstances must be taken into account. The following is generally considered:

- The employee's condition and capacity for work;
- The employee's position;
- The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- The cost of the adjustment required in respect of the employer's financial situation.

Where an employer is unable to make reasonable adjustments because it results in 'unjustifiable hardship', this will be based on the individual circumstances of the employee, taking into account the above, which will be unique in each case.

Where an employer refuses to implement reasonable adjustments on the basis that if they make an adjustment for one employee, they may need to do it for many employees, this would only be permitted where it would result in unjustifiable hardship to the employer. In other words, the nature of the reasonable adjustments and whether they are possible should be personalised to each individual employee's needs.

If several employees need the same adjustments because they have the same impairments, this should be facilitated, unless the employer can show it would result in unjustifiable hardship, e.g. the cost of implementing the change would be significant and disproportionate to the benefit to employees.

It is a defence to unlawful discrimination if the reason for the discrimination is that the person cannot fulfil the inherent requirements of the role – the 'inherent requirements defence'. This means that where an employer can show that the employee's disability would prevent them from performing the inherent requirements of the position, they can defend themselves from a claim of disability discrimination.

This is an objective test to determine whether the employee is able to carry out the inherent requirements of the position, and as such, medical evidence as it relates to the particular tasks of the role is highly relevant.



## 9. WHAT ARE SOME EXAMPLES OF REASONABLE ADJUSTMENTS?

The legal requirement to make reasonable adjustments in the workplace refers to the administrative, environmental, or procedural alterations required to enable a person to work effectively.

Employers are required to provide reasonable adjustments where it is reasonable to do so **and** where a reasonable adjustment does not constitute an 'unjustifiable hardship' for the employer. There are a number of ways employers can make reasonable adjustments, and these may include:

- Provision of appropriate equipment or assistance;
- Job redesign and adjustment to work methods;
- Training or retraining, flexible work arrangement, hours of work, and use of leave;
- Accessible information and systems;
- Provision of assistive technology software;
- Modifications to equipment or the supply of specialised equipment, furniture or work-related aids; and
- Alterations to premises or work areas.

Reasonable adjustments for one employee do not need to be the same for others. An employer should discuss possible reasonable adjustments with the employee concerned to ascertain what support they required, and only if adjustments cannot be identified/agreed to, seek the opinion of medical experts.

## 10. WHAT HAPPENS WHERE A WORKER HAS AN ONGOING INCAPACITY FOR WORK?

WHS Legislation recognises that an employer cannot hold an employee's position open indefinitely if they do not have capacity to perform the inherent requirements of their role.

An employer can terminate an employee if they cannot fulfil the inherent requirements because of personal injury or other personal matters as long as a fair and equitable process is followed which considers the medical advice and individual circumstances of the employee.

However, even where an employer ends the employment relationship for lawful reasons, there are still legal risks that can arise. The principal risks of terminating an employee are:





- Unfair dismissal claims
- General protections claims
- Discrimination claims

Legal advice should be sought on the risks of terminating an employee on grounds of the inability to fulfil the inherent requirements of their role prior to the termination, where necessary.

***NOTE TO EMPLOYER:*** where making modifications to the policy or management guide, please seek legal advice to ensure it meets minimum legal requirements.



## CHECKLIST FOR FITNESS FOR WORK POLICY AND FRAMEWORK

The following checklist can be used to guide managers through an appropriate process as they implement the Fitness for Work Policy.

<p><b>Pre-employment:</b></p> <ul style="list-style-type: none"><li>• Confirm whether prospective employees require pre-employment screening (including health questionnaires) in order to ascertain whether they are fit for work. <input type="checkbox"/></li><li>• Outline different types of pre-employment screening and confirm the purpose to ascertain fitness to fulfil inherent requirements of the role. <input type="checkbox"/></li><li>• Confirm whether prospective employees are required to disclose pre-existing injuries and conditions which may impact their ability to perform their role safely and/or prevent the employee from performing the inherent requirements of their role. <input type="checkbox"/></li><li>• Confirm what reasonable adjustments may be considered if applicant has a disability that impacts their capacity to fulfil the inherent requirements of their role. <input type="checkbox"/></li></ul>	
<p><b>During employment:</b></p> <ul style="list-style-type: none"><li>• Confirm that employees may be subject to fitness for work assessments in order to ascertain whether prospective employees are fit for work. <input type="checkbox"/></li><li>• Confirm requirement that the employee consents to medical practitioner or assessor releasing report to employer. <input type="checkbox"/></li><li>• Confirm privacy of health information collected by the employer. <input type="checkbox"/></li></ul>	
<p><b>Workcover procedure:</b></p> <ul style="list-style-type: none"><li>• Outline process to be followed if employee injured at work. <input type="checkbox"/></li><li>• Outline Return to Work process. <input type="checkbox"/></li><li>• Describe suitable duties and how these will be identified/provided. <input type="checkbox"/></li></ul>	



<p><b>Non-work related injuries and illnesses:</b></p> <ul style="list-style-type: none"><li>• Confirm requirement that employees must be able to fulfil the inherent requirement of their role and perform their role safely. <input type="checkbox"/></li><li>• Confirm obligations under Equal Opportunity laws and WHS legislation. <input type="checkbox"/></li><li>• Outline early warning signs of illness/injury managers will look out for (i.e. monitoring health of employees). <input type="checkbox"/></li><li>• Outline role of managers to monitor health and provide support to injured workers e.g. through regular meetings. <input type="checkbox"/></li><li>• Confirm process regarding fitness for work assessments. <input type="checkbox"/></li></ul>	
<p><b>Pregnant employees:</b></p> <ul style="list-style-type: none"><li>• Outline process for ensuring fitness for work of pregnant employees. <input type="checkbox"/></li><li>• Confirm transfer to safe job entitlement. <input type="checkbox"/></li><li>• Confirm no safe job leave entitlement. <input type="checkbox"/></li></ul>	
<p><b>Fatigue management:</b></p> <ul style="list-style-type: none"><li>• Confirm risks of fatigue. <input type="checkbox"/></li><li>• Outline risk management approach. <input type="checkbox"/></li><li>• Outline risks of driving and risk management measures. <input type="checkbox"/></li></ul>	
<p><b>Other measures (outside policy framework):</b></p> <ul style="list-style-type: none"><li>• Review employment contracts to check requirement for employees to disclose a pre-existing injury or condition and to submit to fitness for work assessments. <input type="checkbox"/></li><li>• Provide training to managers to identify signs and symptoms of when employees may not be fit for work. <input type="checkbox"/></li><li>• Provide training to all staff on unlawful discrimination. <input type="checkbox"/></li><li>• Ensure Human Resources/Managers are familiar with and trained on fitness for work processes including Workcover and non-Workcover procedures. <input type="checkbox"/></li><li>• Identify reasonable adjustments where appropriate to allow prospective and existing employees with a disability to work safely and effectively. <input type="checkbox"/></li></ul>	