

Disclosure of disability and privacy

The following frequently asked questions relate to disclosure of disability and privacy:

- Is there a legal obligation for an employee to disclose their disability?
- What are my obligations as the employer if an employee does disclose disability?
- What questions can I ask about a person's disability or injury?
- What information about disability can I disclose to other parties?
- What are my obligations under the Privacy Act when employing a person with disability?

Is there a legal obligation for an employee to disclose their disability?

For the purpose of this web site, the term 'disclosure' refers to the personal decision to tell another person or institution about a disability.

There is no legal obligation for an employee to disclose their disability to you, unless it is likely to affect their ability to meet the inherent requirements of the job. The inherent requirements of the job are tasks that must be carried out in order to get the job done. Not all of the requirements of a job will be inherent and the focus should be on achieving results rather than the means for achieving those results.

Visible disability

For people with an obvious disability, disclosure is usually inevitable. When disclosure occurs, it is important to treat the employee with respect and dignity, and refer to the person as opposed to the disability.

Non visible disability

Employees with disability that is not visible have more choice as to whether or not they disclose their disability. They may choose not to disclose, as the disability may not affect their job performance. In particular, many people with mental illness are unwilling to disclose as they are concerned about being stigmatised and discriminated against.

Mental illness is often episodic, so a person who has a psychological or psychiatric disability may not have symptoms that affect their job performance all the time. A person who has experienced an episode of mental illness in the past will not necessarily have a repeat experience.

Other non visible disability may include back injury, vision or hearing impairment, arthritis and medical conditions such as diabetes.

Medication

An employee is only required to advise you about what medications they are taking if there is a likelihood of side effects occurring that will affect their work performance or safety in the workplace.

What are my obligations as the employer if an employee does disclose disability?

Once an employee has disclosed a disability, you are required, as the employer, to consider appropriate responses, including training or work related adjustments, to accommodate the employee with disability. Remember that state and federal laws prohibit discriminating against someone because of their disability.

Employer responsibilities

Once an employee has disclosed a disability, your main obligations under the Disability Discrimination Act 1992 are:

- not to discriminate directly by treating a person with disability less favourably than a person without the disability would be treated in the same or similar circumstances
- not to discriminate indirectly by having a requirement or condition or practice that is the same for everyone but which is less favourable in its impact on a person with disability
- to make reasonable adjustments for a person with disability where required and
- to avoid and prevent harassment of employees with disability.

What questions can I ask about a person's disability or injury?

As an employer, you can only ask questions about a person's disability or injury if the questions relate to:

- any adjustments required to ensure a fair and equitable interview and selection process
- if or how the disability may impact on the inherent requirements of a job or safety in the workplace
- any adjustments that may be required to adequately perform the inherent requirements of the job.

Any other questions about a person's disability are inappropriate, including questions about:

- how the person acquired their disability
- specific details of the person's disability.

For example, you can ask an employee: 'Will you need any adjustments to work practices or equipment to do this job?' You should not ask them 'How can you do this job?'.

What information about disability can I disclose to other parties?

Information about an employee's disability will often involve sensitive personal issues.

To encourage employees to be open with you about disability issues, you need to be able to assure them that any information they provide will be treated appropriately.

In order to share the information about an employee's disability with other people within your organisation (for example, staff in the human resource department), you must get the written consent from the employee, unless the sharing of that information is otherwise authorised or required by or under law.

It is important to remember that you are required by law to respect the employee's right to privacy. Failing to protect confidential personal information in relation to a person's disability may involve or lead to discrimination in some circumstances.

What are my obligations under the Privacy Act when employing a person with disability?

The Commonwealth Privacy Act 1988 provides for the protection of personal information held by Commonwealth and Australian Capital Territory agencies and certain private sector organisations. Broadly speaking, the Privacy Act regulates the collection, use and disclosure, quality and security of personal information. In addition, the Privacy Act, among other things, gives people the right to:

- know for what purpose their personal information is being collected
- know whether the collection of their personal information is required or authorised by or under law
- know to whom their personal information is usually disclosed
- access a record containing their personal information
- make amendments to their personal information to ensure it is accurate.

What does this mean for employers?

The Privacy Act regulates the way some organisations handle personal information. The private sector provisions in the Privacy Act may apply to your organisation if it:

- has an annual turnover of more than \$3 million
- is a health service provider—regardless of turnover or
- is a small business with an annual turnover of \$3 million or less and is, for example,

trading in personal information, related to a larger business, or a contractor to a Commonwealth agency.

Handling personal information

The private sector provisions centre around ten National Privacy Principles that set out how certain private sector organisations should collect, use, keep secure and disclose personal information. The Office of the Privacy Commissioner has specific privacy information for employers.