

# BREAST CANCER, WORK RIGHTS AND RESPONSIBILITIES – FOR EMPLOYEES

## FACT SHEET

June 2018

This fact sheet was produced by Breast Cancer Network Australia

This fact sheet includes information on the following:

- knowing your legal rights
- potential challenges
- organisational policies for serious illnesses
- the *Disability Discrimination Act 1992*
- legislation related to workplace rights
- leave entitlements
- flexibility in the workplace
- potential conflicts
- disclosure and privacy.

If you are self-employed the information in this fact sheet will be useful. However, you will find specific information for your circumstance on BCNA's website [bcna.org.au](http://bcna.org.au).

### Knowing your legal rights

While most employers and workplaces are supportive of employees with breast cancer, managing work duties, taking a break from work, or finding alternative suitable employment during this time can be difficult.

As an employee, it is important for you to know your legal rights and responsibilities. This will help you to make decisions about work and have discussions with your manager about how your diagnosis and treatment may impact your ability to perform your current role.

*I didn't feel I had enough information about my legal rights. I knew an employer was required to make 'reasonable adjustments' for people with a disability but I wasn't aware that a cancer diagnosis was considered in the same way.*



### Potential challenges

It's important to be aware of potential challenges you may face following your diagnosis, including:

- physical and emotional side effects of your diagnosis and treatment, for example, pain, nausea, fatigue, hair loss, skin changes, feelings of stress or fear, joint pain and sleep disturbances
- difficulty fulfilling some of your usual work duties or requirements
- inflexibility in your workplace e.g. with your tasks and hours
- communication issues and/or lack of support from your employer and/or colleagues
- lack of awareness of your legal rights and obligations
- lack of awareness of financial or other supports which may be available to you
- high out-of-pocket costs from tests, scans, treatments and medical appointments, as well as financial difficulties due to time away from work
- managing appointments around work, particularly if you live in a rural area and need to travel long distances to attend appointments.





### Organisational policies for serious illnesses

Both employees and employers can be equally confused about their legal rights and responsibilities when there is someone with a serious illness in the workplace.

As an employee, you can ask your manager or human resources representative if there is a serious illness policy. You may find some employers do not have policies in place and prefer to deal with a serious illness on a case-by-case basis.

If your workplace does not have a policy, your first step is to request a meeting with your manager or human resources representative to discuss your options for managing work during and after treatment. This may include talking about the likely side effects of treatment, potential adjustments to your work tasks and responsibilities, working from home, taking a block of leave or taking time off to attend medical appointments.

*Every situation is different, so what works for one workplace or woman may not work for another. Open communication is crucial.*

Your needs are likely to change as you progress through your treatment, therefore clear communication with your employer is vital. Your employer is more likely to agree to make changes to suit your needs if they are aware of your circumstances.

This fact sheet includes an overview of legislation related to employment to help you understand the workplace protections and laws that apply to employees affected by cancer. It is important to be familiar with the legislation because it outlines adjustments employers need to make and your entitlements as an employee.

### The Disability Discrimination Act 1992

Discriminating against a person at work because they have cancer is illegal under the Commonwealth *Disability Discrimination Act 1992*.

Disability discrimination can take two forms: direct discrimination and indirect discrimination.

#### Direct disability discrimination

Direct disability discrimination occurs when a person with cancer is treated less favourably than a person without cancer.

Examples include a person with cancer being overlooked for a promotion or being fired because of their diagnosis.

#### Indirect disability discrimination

Indirect disability discrimination occurs when there is a rule or policy that is the same for everyone but has an unfair effect on people with a particular disability. For example, a rule that stipulates employees must stand while working even though this causes great discomfort to an employee with cancer, or the regular scheduling of team meetings at a time when an employee with cancer has permission to be absent from work to attend a treatment session.

For more information about the *Disability Discrimination Act 1992*, visit the Australian Human Rights Commission website [humanrights.gov.au](http://humanrights.gov.au).

You have a right to ask for reasonable adjustments to be made to your working conditions to allow you to work safely and productively. Your employer is required to support you by making reasonable changes to your role to accommodate what you can and can't do during or after treatment.

Your employer has the right to ask you for medical evidence of your requirements for reasonable adjustments. Your GP or breast cancer specialist will be able to provide advice about your capabilities for your return to work, including your need for rest breaks and other support. Reasonable adjustments may include agreeing to flexible working arrangements for you, such as part-time or home-based work.

#### When discrimination may not be unlawful

There are two exceptions to the general rule prohibiting employment discrimination against people affected by cancer. The discrimination may not be unlawful if:

- the person would be unable to carry out the necessary parts of a job safely to an acceptable standard (known as the inherent requirements of the job), because of the cancer diagnosis or history, even if the employer made reasonable adjustments for the person
- avoiding the discrimination would impose an unjustifiable hardship on the employer (for example, where the costs of making the adjustments would be unreasonably high).



In the case of unjustifiable hardship, employers would need to demonstrate how making those changes would cause such hardship. Many adjustments involve little or no cost, and the Australian Government's Workplace Modifications Scheme can assist where there are costs in modifying the workplace or purchasing equipment for eligible employees with disability.

For more information about unjustifiable hardship visit the Australian Human Rights Commission website [humanrights.gov.au](http://humanrights.gov.au).

### Legislation related to workplace rights

Many employees with breast cancer worry their diagnosis may have a negative impact on their job and what this may mean for them and their family. Just as there are human rights laws protecting employees with a disability from being discriminated against in the workplace, there are also workplace rights that apply to most Australian employees.

Workplace rights are a set of employment laws that were created by the *Fair Work Act 2009*. The *Fair Work Act 2009* is a combination of minimum standards called the Fair Work system and workplace protections that employers and employees must abide by.

The Fair Work system's key features are the 10 Minimum National Employment Standards, particular industry awards, the national minimum wage and protection from unfair dismissal. Together these make up a safety net of entitlements for those covered by the Fair Work system. The employment standards that are relevant for people exploring their options due to a breast cancer diagnosis are those relating to entitlements and workplace flexibility. They are discussed in more detail in the next section. For more information Fair Work system, visit [fairwork.gov.au](http://fairwork.gov.au).

### Workplace protections

Workplace protections are laws that protect certain rights including:

- workplace rights
- the right to be free from unlawful discrimination
- the right to be free from undue influence or pressure in negotiating individual arrangements.

Employees cannot be treated differently or unfairly because they possess or have exercised a right, or for

a discriminatory reason. Employees are also protected from unlawful actions, including the following.

- *Adverse action* is an action that is unlawful in particular circumstances. For example, the employee being made redundant because they shared their breast cancer diagnosis.
- *Coercion* means forcing someone to do something that is against their will. For example forcing an employee to resign when they don't want to or forcing them to accept another role within the organisation that is not at the same level as their previous role.
- *Undue influence or pressure* is when an employer uses their position of power to influence or pressure an employee to change their conditions of employment.
- *Misrepresentation* is when someone of authority knowingly misleads an employee about a topic they should rightfully know. For example if an employer advises the affected employee that they are not entitled to take personal leave or have reasonable adjustments made to accommodate their illness.

### Resolving a workplace rights complaint

If you believe your workplace rights have been breached, contact the Fair Work Commission to lodge a complaint.

You may feel you've been pressured to make a change you did not want to make, or you may have been unjustly dismissed because of your breast cancer. You have 21 days from the day of the change or dismissal to lodge an application with the Fair Work Commission.

### Leave entitlements

As stated in the National Employment Standards, full-time and part-time employees are entitled to four weeks of paid leave and 10 days of paid personal/sick leave per year. If unused, these entitlements flow on to the following year. You may also be entitled to long service leave if you have been working with the same employer for an extended period of time.

### Taking leave

You are entitled to use paid leave entitlements (personal and annual) or ask for unpaid time off if you are unable to attend work due to illness or treatment. An employer cannot dismiss you for temporary absences due to illness, as long as a medical



certificate is supplied and the absence is less than three months, or less than a total of three months within a 12-month period (whether based on a single illness or separate illnesses).

You will be required to let your employer know when you are taking leave and provide the appropriate documentation required by your workplace policies or agreements. When taking leave for treatment, employees are usually required to take personal leave first, then annual leave, then any long-service leave and finally unpaid leave if necessary.

### Flexibility in the workplace

An employee affected by breast cancer may require reasonable adjustments to be made so that they can continue to meet the conditions of their employment, for example, more flexible working arrangements (hours, location) to enable attendance at medical appointments, or the ability to work from home the day after chemotherapy.

Many people find a gradual return to full duties following treatment is the best way to manage energy and stress levels.

### Suggestions for flexible working conditions

Under the National Employment Standards (NES) you have the right to ask for flexible working arrangements if you have at least 12 months of continuous service with your employer. Some examples of flexible arrangements are:

- taking a few hours off for treatment instead of the whole day
- scheduling your treatment sessions at a time that gives you more recovery time (e.g. late in the day or before rostered days off)
- working from home – not having to commute may help you to conserve energy
- considering whether colleagues may be able to help with some of your tasks during your absences
- reducing your work hours or allowing you to job share.

When requesting flexible working arrangements, you need to ask in writing, giving details of the change you want and the reasons for this requested change. Your employer needs to accept or refuse your request in writing within 21 days of receiving the request. They can only refuse your request on reasonable business

grounds, for example, the changes are too expensive or would cause a significant productivity loss.

If your employer refuses your request and you don't think their explanation is reasonable, you may be able to seek assistance from the Fair Work Commission or the discrimination agency in your state or territory.

The employer needs to be able to show they have given the request serious consideration and that the request is not workable in their organisation.

### Potential conflicts

Employers must take reasonable steps to accommodate the effects of cancer under the *Disability Discrimination Act 1992* and the *Fair Work Act 2009* whether a person continues to work during treatment or returns to work after taking leave for treatment.

Conflicts can arise when an employee returns to their position after extended leave and finds they are offered reduced hours, responsibilities or pay because their employer thinks they will no longer be capable of performing at their pre-illness level. While this is not best practice, if the employee has had more than three months off work over a 12-month period it is not against the law.

However, if the employee hasn't had more than three months off over a 12-month period, this is illegal. Conflicts arise if the employee does not agree to the changed circumstances proposed by the employer.

If you find yourself in this position, you do not have to agree with the proposed changes. You can contact the office of the Fair Work Ombudsman about your rights and whether your employer is acting within the law.

### Disclosure and privacy

#### Disclosure

There is no law that requires you to tell your employer about your diagnosis, however you do have some obligations.

You must tell your employer about anything that will affect your ability to undertake the essential requirements of your job or anything that could reasonably cause a health and safety risk to you or others in the workplace.

If you are unsure if you want to tell your employer, it may help to remember that open and honest

communication can help to avoid issues around keeping up with workload due to medical appointments and treatment side effects.

### **Privacy**

If you have told your employer about your diagnosis the *Privacy Act 1988* regulates how this personal information is handled and shared.

It is against the law for your employer to share personal information without your permission, and care needs to be taken to ensure your personal information is protected.

You can also decide who you would like to share news of your diagnosis with in the workplace and how it is shared. If at any time you feel your health information has been shared without your consent speak to your employer or you can visit [oaic.gov.au](http://oaic.gov.au).

### **More information and support**

#### **Breast Cancer Network Australia**

BCNA's Helpline offers free and confidential information, support and referral. Call us for workplace support on 1800 500 258 or visit [bcna.org.au](http://bcna.org.au).

#### **Cancer Council**

Cancer Council provides a pro bono program, which provides free legal, financial and workplace assistance to people affected by cancer who cannot afford to pay for advice. You can find out more about this service by calling 13 11 20 or visit [cancer.org.au](http://cancer.org.au).

#### **Fair Work Ombudsman**

For work-related rights and discrimination information, call 13 13 94 or visit [fairwork.gov.au](http://fairwork.gov.au).

#### **Australian Human Rights Commission**

For information regarding the *Disability Discrimination Act 1992* and the *Fair Work Act 2009*, call 1300 656 419 or visit [humanrights.gov.au](http://humanrights.gov.au).

#### **Fair Work Commission**

For information or to lodge an unfair dismissal application, call 1300 799 675 or visit [fwc.gov.au](http://fwc.gov.au).

#### **Office of the Australian Information Commissioner**

For information regarding privacy infringements, call 1300 363 992 or visit [oaic.gov.au](http://oaic.gov.au)

The information in this document is current as of July 2018.

This publication is intended to be a general guide only and does not constitute legal advice. For advice tailored to your personal circumstances, please contact one of the organisations listed above or your preferred legal adviser.

The logo for Sussan, featuring the word "sussan" in a lowercase, bold, sans-serif font.

Breast Cancer Network Australia acknowledges the assistance of Sussan in producing this resource.