

BREAST CANCER, WORK RIGHTS AND RESPONSIBILITIES – FOR EMPLOYERS

FACT SHEET

June 2018

This fact sheet was produced by Breast Cancer Network Australia

As an employer of a person diagnosed with breast cancer, you may feel shocked or sad, and unsure of what to say or do – this is a normal reaction. However, there are things you can do to help support your employee in the workplace.

This fact sheet includes information about:

- breast cancer
- making adjustments to support your employee
- benefits of serious illness guidelines
- the *Disability Discrimination Act 1992*
- the *Fair Work Act 2009*
- leave entitlements
- flexibility in the workplace
- the *Privacy Act 1998*.

A person diagnosed with breast cancer may face physical, emotional and financial challenges. The way you approach the situation and how you communicate with them that can make all the difference.

Some of the challenges they may face include:

- the physical and emotional effects of a breast cancer diagnosis and treatment
- communication issues and/or lack of support from employers and/or colleagues
- uncertainty about legal rights and obligations, or financial or other supports that may be available
- high out-of-pocket costs from tests, scans, and treatments and medical appointments, as well as financial difficulties due to time away from work
- difficulty managing appointments around work, particularly for those living in a rural area, who may need to travel far to attend appointments.

Each breast cancer experience is different, so there is not one way of dealing with an employee who has breast cancer.



Open communication is important to ensure you meet their changing needs during and following breast cancer treatment.

Making adjustments

Reasonable adjustments are key to supporting an employee diagnosed with breast cancer. In consultation with your employee, you may consider:

- reducing their work hours
- supporting them to take time off work
- allowing them breaks as required
- changing/adjusting duties
- allowing them to work from home some or all of the time
- flexible deadlines
- a graduated return to work.

Developing a work and breast cancer plan may assist both you and your employee to better navigate any work changes required while your employee undergoes and recovers from breast cancer treatment. The most important thing to do is to initiate the conversation and ensure your employee feels supported in the process.



The benefits of having guidelines around serious illness

Both employees and employers can be equally confused about their respective rights and responsibilities when it comes to a serious illness in the workplace. Small- to medium-sized businesses may not have policies in place for dealing with an employee who has a serious illness. This can result in a confusing and stressful situation.

BCNA recommends workplaces develop flexible guidelines around how they can assist employees that have been diagnosed with a serious illness.

As many managers may not have the experience to deal with this complex situation, training and support can help ensure the correct processes are followed and the employee receives the best support.

Putting the guidelines in action

It is important that an employee receives clear communication about what flexible arrangements are available to them. Not knowing can create unnecessary stress and potentially expose an employer to legal action by an employee.

Knowing your rights and responsibilities as an employer is beneficial for setting guidelines on how to support an employee diagnosed with breast cancer. Doing so will assist both parties to be better prepared to address and negotiate conflicts that may arise.

Important points to consider

- Think about ways that you can be flexible and supportive of your employee. It may only be a short-term arrangement until they get back to full capacity.
- It often costs more to hire or retrain someone else than to support someone to continue to work throughout treatment in the short-term.
- It is recommended that staff within your workplace are briefed on the *Disability Discrimination Act 1992*, the *Privacy Act 1998* and work rights.
- It is important to ensure the organisation is able to demonstrate it has taken all necessary steps to make staff aware of the legislation in the event a problem arises.

You will find an overview of legislation related to employment below. This will help you to understand the workplace protections and laws that apply to employees affected by cancer. Being familiar with legislation that relates to employees is important to understand what adjustments employers need to make and what employees are entitled to.

The Disability Discrimination Act 1992

Discriminating against a person at work because they have cancer is unlawful 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. Examples include a rule that stipulates employees must stand while working, which may cause great discomfort to a person 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 treatment.

For more information about the *Disability Discrimination Act 1992*, visit the Australian Human Rights Commission website humanrights.gov.au.

Employees have a right to ask for reasonable adjustments to be made to their working conditions to allow them to work safely and productively.

Employers are required to support their employees by making reasonable changes to their role to accommodate what they can and can't do during or after treatment.

As the employer, you have the right to ask your employee for medical evidence of their requirements for reasonable adjustments. Your employee's health professional may be able to

provide useful information and advice about their capabilities when they return to work, including their need for rest breaks and other supports.

Reasonable adjustments may include flexible working arrangements, 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.

Employers should also have policies and programs in place to prevent discrimination and harassment in the workplace to ensure an employee does not unwittingly discriminate against another employee due to lack of knowledge and training.

If you're unsure of the best way to proceed or would like more information about your obligations as an employer, contact the Human Rights Commission for advice at employers@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 cover most Australian employees.

Workplace rights are a set of employment laws that were created by the *Fair Work Act 2009*. The *Fair Work Act* is a combination of minimum standards called the Fair Work system and work place 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 the Fair Work Ombudsman's website at 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 news of 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.

Need help resolving a workplace complaint?

If you have an employee who has requested adjustments that may cause the organisation 'unjustifiable hardship' it is recommended that you seek advice from the office of the Fair Work Ombudsman or the Human Rights Commission.

Leave entitlements

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

Taking leave

Employees are entitled to use paid leave entitlements (personal and annual) or ask for unpaid time off if they are unable to attend work due to their illness or treatment.

You cannot dismiss employees for temporary absences due to illness, as long as a medical certificate is supplied and the employee's 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).

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 to manage flexible working conditions

- Allow your employee to take a few hours off instead of the whole day.
- Suggest your employee schedule treatment sessions at times that enable them to have more recovery time (e.g. late in the day or before rostered days off).
- Explore working from home. Not having to commute may help them to conserve energy.
- Consider colleagues who may be able to help do some of the work during absences. Write down a plan so you and your employee can agree on work to be shared.
- Reduce hours or organise job sharing.
- Let other team members know about changes to the employee's work hours.

Privacy

The Commonwealth *Privacy Act 1998* regulates how personal information is handled. It is against the law to share personal information without permission and care needs to be taken to ensure personal information is protected.

Open and honest communication with your employee can avoid issues, such as difficulties in keeping up with workload due to busy appointment schedules and treatment side effects. However, an employee is not obligated to advise their employer of their breast cancer diagnosis.

An employee can also decide who they would like to share news of their diagnosis with in the workplace and how it is shared. In regards to a work and breast cancer plan, only the details relating to the employee's revised hours and duties need to be provided to their direct manager.

More information and support

Breast Cancer Network Australia

BCNA is here to help all Australian's affected by breast cancer, including family, friends, carers, employers and colleagues.

For information, support and referral, call BCNA's Helpline on 1800 500 258 or visit bcna.org.au.

Fair Work Ombudsman

For work-related rights and discrimination information, call 13 13 94 or visit 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.

Fair Work Commission

For free employer advice, call 1300 799 675 or visit fwc.gov.au.

Office of the Information Commissioner

For information about privacy infringements. Call 1300 363 992 or visit 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.

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