

# Employment and cancer

## Information for people affected by cancer

**Many people affected by cancer have questions about work. You may wonder whether you have to tell your employer you have cancer, or whether you will be able to have time off for treatment.**

**People returning to work after cancer treatment wonder how they'll cope, or if they have to disclose they've had cancer when applying for a new job. Carers often have questions about their rights at work, too.**

This fact sheet answers some common questions people have about their rights at work. It explains the law that applies to most employees in Australia, other than some state and local government employees, and employees of partnerships.

The law that applies to you depends on what organisation you work for and whether you are characterised as an 'employee' or other type of worker (such as an independent contractor). You should obtain specific advice on the law that applies to you.

**Q: I have been diagnosed with cancer. Do I have to tell my employer?**

**A:** You're not legally required to tell your employer about your diagnosis, but it can help. If your employer is reasonable, providing them with early and straightforward information about your condition may assist them in planning, and enable them to support you appropriately. If you think your employer is unlikely to behave reasonably, a more careful approach may be better.

If your employer knows you have cancer, they may be more understanding if you need time off for treatment, tests or follow-up care. The

law says they have to do what is reasonable to help you. They can make changes to your workload and environment so you can continue to work productively. This may include making minor changes to your work duties or modifying your workstation.

If you do disclose your diagnosis, your employer ordinarily must keep the information confidential. They can't tell your co-workers about your diagnosis unless you agree.

If you decide not to tell your employer, it can be difficult if the cancer and treatment affect your work or you miss a lot of work because of medical appointments.

**Q: I am being bullied and harassed at work because I have cancer. What can I do?**

**A:** Some people with cancer may feel isolated at work. They may think people are talking about them behind their back, saying that they're not pulling their weight or that they're taking too much time off. It can be hard to go to work when you feel like you're being bullied or harassed.

The first step to take to deal with these issues is to talk to your manager or the human resources department. If your manager is the person who is bullying you, then you can go to someone higher up.

You should keep detailed notes of all the incidents of bullying, including dates. This will help you remember everything that has happened so you can explain it later.

If the bullying means you have to take time off work due to stress or another mental illness, such as depression or anxiety, you may be

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entitled to workers' compensation. You'll need to get a WorkCover medical certificate confirming that your mental illness is due to the bullying or harassment.

You can also make an application to the Fair Work Commission, which can make orders that the bullying stop.



If your employer doesn't help you, or you need more information on workers' compensation, call Cancer Council 13 11 20.

### Q: I am being discriminated against at work because I have cancer. What can I do?

**A:** Most employers are supportive when an employee is diagnosed with cancer. However, misconceptions about cancer may mean some people are treated unfairly. Sometimes, this may amount to discrimination. Discrimination in the workplace on the basis of cancer is unlawful.

Examples of discrimination may include an employer:

- stopping you from taking personal leave if you have entitlements
- telling you to quit or firing you
- demoting you to a lower-paid or less demanding job after a temporary absence
- sacking you for a reason relating to your cancer
- promoting another employee over you with less experience or ability to do the job.

If you think you're being discriminated against, you can lodge a complaint with the Fair Work Ombudsman, Fair Work Commission, Australian Human Rights Commission or the Anti-Discrimination Board of NSW.

If you're sacked, this is called adverse action or unfair dismissal. You can apply to the Fair Work Commission for help. You have 21 days after being dismissed to lodge an unfair dismissal claim or adverse action claim

associated with termination. For adverse action, you can also lodge a complaint with the Fair Work Ombudsman.

### Q: I can't do my usual job during treatment. What are my rights?

**A:** Australian law requires an employer to make reasonable changes to help you perform the core or essential elements of your job if you are unable to perform those elements because of an illness or disability. These elements (known as the inherent requirements of the job) include being able to work safely, productively and as part of a team.

This may mean, for example, if you work in a call centre and you're not able to hold the phone in your hand, your employer may need to purchase a hands-free headset for you to use. The inherent requirements of the job are that you can speak and hear on the phone – not that you can hold a phone.

You can only be sacked if you can't perform the inherent requirements of your job even after reasonable changes. Being sacked because you can't do things that are not inherent requirements of the job may be unfair dismissal or unlawful discrimination. You have 21 days to lodge an unfair dismissal application with the Fair Work Commission, and longer periods for discrimination.

### Q: I have to take some time off work for treatment. Can I be sacked?

**A:** In general, it is against the law to sack someone who is off work due to illness for less than three continuous months, or a total of three months over a 12-month period. This includes casual employees.

If you think you've been sacked unfairly, this may be unfair dismissal. It will not automatically be a 'fair' dismissal if you are sacked for taking more than three months off work in a year. You may be able to lodge a complaint with the Fair Work Commission and this must be done within

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21 days of the dismissal. You may also be able to lodge an application for adverse action with the Fair Work Commission within 21 days of being terminated, or make a complaint to the Fair Work Ombudsman.

Most workers in Australia (other than casual employees) are entitled to a minimum of 10 days' paid personal/carers' leave (this includes sick leave). You are required to advise the employer as early as possible if you are unable to attend work for a day or a period, and to provide appropriate medical certificates if required.

If you fail to provide notice to your employer or evidence if they ask for it, you may not be entitled to be paid for the leave and may be exposed to disciplinary action, potentially including termination.

### Q: Do I have to use my annual leave when I'm having time off for treatment?

**A:** Usually, you need to take your personal/carers' leave, then your annual leave, then your long-service leave and, finally, unpaid leave. Your employer may allow you to take unpaid leave before using up your paid leave, but this is not required by law.

Whether or not you are sick, your employer can also direct you to use your annual leave if you have accumulated an excessive balance.

### Q: I need to take time off to care for a family member with cancer. Can my employer refuse?

**A:** All employees (except casuals) are entitled to receive 10 days of paid personal/carers' leave each year, which you can use to care for a family member. You are also entitled to 2 days each of unpaid carers' leave and unpaid compassionate leave each year. You cannot be sacked for using these entitlements.

Discrimination against you at work because of your caring responsibilities is against the law.

If this happens, you can lodge a complaint with the Fair Work Ombudsman, the Australian Human Rights Commission or the Anti-Discrimination Board of NSW.

If your employer sacks you, this may be unfair dismissal. You may be able to lodge a complaint with the Fair Work Commission and this must be done within 21 days. You may also be able to lodge an application for adverse action with the Fair Work Commission within 21 days of being terminated, or make a complaint to the Fair Work Ombudsman.

### Q: My employer has ordered me to have a medical examination to show I'm fit for work. Is that legal?

**A:** If you attend work and your employer reasonably believes that you are not fit for work, or if your colleagues may be exposed to infection or contaminants (e.g. if you are vomiting), your employer has the right to ask you to undergo a medical examination. You will need to see your GP and ask them to determine whether or not you are fit for work.

Your employer must allow you to return to work if you:

- have a certificate from your doctor saying you're fit to return to work
- can perform the inherent requirements of your job after the provision of reasonable changes.

### Q: I want to return to work part-time. Does my employer have to agree?

**A:** In general, your employer is required to help you by making minor changes to your role to take account of what you can and can't do during and after treatment. Making flexible working arrangements, including allowing part-time work, may be one of these changes. If your employer generally permits people to work part-time, but refuses to permit you to do so, this may be discrimination. Sacking you because you can't work full-time may be unfair dismissal.

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Imposing a requirement that everyone works full-time – where this is not an inherent requirement of the job – may also be indirect discrimination. Indirect discrimination is where a policy or rule applies to everyone equally, but it is harder for a person with an illness or disability to comply.

If your employer refuses to allow you to work part-time, you should not resign. Call Cancer Council 13 11 20, or speak with a lawyer about your situation.

### Q: I want to return to work, but my employer has offered me a more junior role/lower pay. Is this lawful?

- A:** Being offered a more junior role or lower pay may be adverse action or constructive dismissal. Constructive dismissal means that you could have effectively been terminated from your old job and offered a new job with different employment terms. As this includes termination, it may be an unfair dismissal or adverse action. This is only lawful if the dismissal was not unfair or unlawful, such as where you:
- can no longer perform the inherent requirements of your old job
  - have been absent from work for longer than three months in one year and it was unreasonable for your employer to keep your job open for you.

Talk to a lawyer before accepting the offer of a new role or lower pay.

### Q: I am applying for a new job. Do I have to tell a prospective employer I had cancer? How do I explain a gap on my résumé due to cancer treatment?

- A:** You have no legal obligation to tell a prospective employer about your cancer diagnosis unless it will affect your ability to perform the inherent requirements of the job.

You should answer all questions in the interview honestly. However, the employer is not allowed to ask specifically about illnesses, whether past or current. They can ask you whether you will be able to perform particular tasks.

If you disclose your cancer diagnosis and you are not given the job due to the cancer, you may be able to make a discrimination complaint. Keep in mind, though, that this is very difficult to prove and any compensation rewarded is usually quite small.

If you have a gap on your CV due to treatment, you may want to write 'Career break' next to the time period. This is relatively common, and if you write something on your CV, many employers will not ask. If they do, you could say that you had a health or family issue, but that it's resolved now.

#### Where to get help and more information

- Cancer Council 13 11 20 for Information and Support
- Cancer Council's booklet *Cancer, Work & You*
- Fair Work Infoline 13 13 94; [fairwork.gov.au](http://fairwork.gov.au)

#### Note to reader

This fact sheet provides general information relevant to NSW only and is not a substitute for legal advice. You should talk to a lawyer about your specific situation.

#### Cancer Council NSW

153 Dowling Street, Woolloomooloo NSW 2011  
 Cancer Council 13 11 20 for Information and Support  
**Facsimile** (02) 9334 1741  
**Email** [feedback@nswcc.org.au](mailto:feedback@nswcc.org.au)  
**Website** [cancerCouncil.com.au](http://cancerCouncil.com.au)



For information and support on cancer-related issues, call Cancer Council 13 11 20. This is a confidential service.