

4: Rights, Responsibilities and Tips for Employees



IN SHORT – WORKSHOP HANDOUT WHO 13

Rights Responsibilities and Tips for Employees

- WorkChoices is estimated to apply to 85% of the workforce and is referred to in this section. However, there is a range of industrial instruments that currently apply to different employers in different states and there will be a period of transition for many employers with the implementation of WorkChoices. Every effort has been made to ensure that information included here was correct at the time of publication, however employees should also seek their own legal advice as necessary.
- If you are an employee with a cancer diagnosis, it is important you:
 - Ask your employer (HR department as appropriate) about your statutory rights, in particular how much paid and unpaid time off you are entitled to.
 - Get information from your doctors and other health professionals about your cancer, the likely effects of the cancer and whether it will make it difficult for you to work.
 - Ask if the organisation can provide any other relevant benefits that could help you.
 - Verify that the information and advice you have obtained from your employer is comprehensive and up to date; use independent sources such as a trade union, professional association or solicitor.
 - Keep a work diary of key meetings, tasks, important conversations, time, leave taken and appointments.
 - Use and conserve your energy wisely; you are not much good at work when you are absolutely exhausted. It's less likely that you will make good decisions and more likely that you'll make some mistakes. Consider using a 'Fatigue Diary' (see Appendix 5) or include this as an element in a work diary.
 - Give your employer as much notice as you can when you need to take time off. This makes it easier for the organisation to make more flexible arrangements.
- You are not legally obliged to tell your employer if you have cancer; however, if you choose not to do so and the cancer and its treatment affects your ability to do your job properly this could have the potential to cause problems for you.
- If you tell your employer about a cancer diagnosis but do not want your workmates to know, your right to privacy should be respected.
- If you want your workmates to know about a diagnosis but don't feel able to do this yourself, you can ask the HR manager or another manager, or one of your closer workmates to do this for you.
- Take the time off/days off that you need to feel better, then go back when you are ready.
- Organise your important and relevant information in a special file or folder.
- If you need advice about discrimination in the workplace talk to a social worker, solicitor, the Human Rights and Equal Opportunity Commission (HREOC), Department of Social Security or a local community health or welfare centre.
- If you need to find a lawyer who specialises in this area you can check the website of the Federal Court of Australia <http://www.fedcourt.gov.au> and check the section 'Information for Litigants' which contains many useful links.

You can also check with the various Law Societies and Institutes for individual states and territories who provide referrals to specialist lawyers (see URLs provided in this section).

Important Disclaimer

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4.1 Returning to Work

Work is an important part of life for many people. Besides income, it provides satisfaction and a chance to socialise with workmates. Returning to work is one way to make life feel normal again. The individual is the best judge of when to return to work. This will be different for everyone and will depend on how well they feel. It may help them to go back for short periods and build up as they start feel to better. People can be anxious to prove that their skills have not been affected by their illness. It is important for them to try to pace themselves so that they do not get too tired. If it looks like it will help, they should be encouraged to talk to their employer about working part time, job sharing or working from home.

People can find that relationships with colleagues change when they return to work. Some workmates may pretend the employee never had cancer, while others may underestimate the seriousness of the illness because the person looks well and is able to function. Like family and friends, colleagues can be unsure of what to say or may be trying to protect the feelings of the employee (or their own feelings). Some people have found that being open about their condition eases relationships with co-workers. Others returning to work might appreciate a casual attitude to their illness. If a person is being overprotected at home, returning to a situation where others don't think of them as sick might be just what they need.

If treatment has made it impossible to return to work, people can be encouraged to look into rehabilitation and retraining programs that can prepare them for another job. If cancer treatment meant having to leave their old job, discrimination may be a hurdle to returning to work. Even the person who has completely recovered may find it difficult to get work or find they are overlooked for promotion. Employers may think that people who have had cancer take too many sick days, are a poor insurance risk or will make co-workers uncomfortable.

4.2 Taking Time Off

You may want to make logs or diaries of your usual work schedule and duties, and refer to it when organising any flexi-time, shifted duties or time off. You may also want to make a detailed list of duties so you may direct others in handling situations and procedures while you're out of the office.

4.3 Discrimination

Some people with cancer face a number of challenges related to employment and workplace discrimination. Union officials can be good sources of information about illness and the workplace. You may want to keep records of your contacts with office personnel, including the names of the people with whom you have spoken about your illness, the date and place you spoke, and the information you received. It's also a good idea to keep documentation of your job performance evaluations. If you need advice about discrimination in the workplace talk to a social worker, solicitor, the Human Rights and Equal Opportunity Commission (HREOC), Department of Social Security or a local community health or welfare centre.

4.4 Talking to workmates about cancer

Some workmates may react to the news of a cancer diagnosis and absences with understanding and helpfulness; others may feel uncomfortable around the person because of their cancer. Some people can find cancer an unpleasant reminder of their own mortality; others may resent the thought of taking on extra workload because of cancer-related absences. A lack of knowledge may lead some people to ask intrusive questions about the person's health or conversely to avoid them altogether. People can behave in awkward ways because of vague fears or uneasiness about cancer. For them cancer may represent some unspecified but nonetheless threatening danger.

It is a personal decision for a person with a cancer diagnosis as to how open they wish to be with their workmates about their condition. In some work environments, it may not benefit the person to share these details – for instance in a highly competitive and fast-paced work environment, it might first be wise to consider who is likely to be empathetic and supportive. It may then be possible to confide in that person and ask for their help in developing the best plan for telling others and asking for time off. Only the individual can decide which approach will work best for them in their situation; if a person asks for privacy then it must be respected.

4.5 Superannuation and Insurance for people living with cancer

This material is derived from information provided by The Cancer Council Victoria:

<http://www.cancervic.org.au/cancer1/patients/legal/superannuation.htm>

This section includes general information about superannuation and insurance policies, superannuation contributions, making claims (particularly for disability benefits), the effect on your social security payments and what happens if you return to work. It also includes details of your rights of appeal and the Superannuation and Insurance Advice Service. Note that the Australian Government has introduced legislative changes that give certain employees a choice of superannuation fund from 1 July 2005. If you wish to find out more information about this initiative, eligible employees or employer obligations you should visit the Super Choice website at www.superchoice.gov.au or telephone 132 864 for more information.

Superannuation Benefits

Many people living with cancer may be able to claim a lump sum or pension if they have a superannuation policy. Superannuation has been compulsory since 1992. Superannuation funds often provide for a lump sum to be paid if you cannot keep working due to illness. This lump sum benefit is often provided as an 'extra' on top of your superannuation contribution. Some funds provide a further benefit of a disability pension paid for two years or more. Many people do not know that they can claim disability benefits from their superannuation fund or when they can get a payout of their contributions. Superannuation funds send out statements every year but they can be hard to understand. If you are not sure whether you are entitled to any disability benefits, or if you cannot find any of your statements, you should ask your employer, your superannuation fund or someone who has expertise in this area.

When must Superannuation contributions be made?

Under the superannuation laws, your employer must pay your superannuation contributions into a fund at least once every three months. However, many employers have agreements with superannuation funds to pay contributions more often, eg monthly or fortnightly. Some industrial awards also state that employers must pay superannuation contributions more often. To find out, contact the Superannuation and Insurance Advice Service, your employer, your union in relation to your award, or read your employment agreement.

What if Superannuation contributions aren't paid?

If your employer does not pay superannuation contributions into a fund for you, you should inform the Australian Taxation Office (ATO). If the contributions are not being paid, get help immediately from the ATO, a lawyer who specialises in this area, the Superannuation and Insurance Advice Service or your union.

Obtaining your Superannuation contribution payouts

Your own contributions can be paid to you when you leave a superannuation fund, though the general rule is that contributions by your employers must stay in a fund until you are 55 or 60 years old.

However, there are exceptions to this rule, and you can get hold of your employer's contributions if any of the following applies:

- (a) You have been on social security payments for at least six months (or nine months, if you are over 55 years and nine months of age) and can't pay your living expenses
- (b) Your house is about to be sold by a bank or other mortgagee
- (c) You need money for palliative care, death expenses, changes to your house or car, or medical expenses outside the public health system for you or a dependant
- (d) You are totally and permanently incapacitated
- (e) You have a superannuation account balance of less than \$200
- (f) You are a temporary resident and leave Australia permanently.

Superannuation Disability Claims

Claiming Disability Benefits

Many people living with cancer are able to claim disability benefits. To get a disability lump sum, you usually have to show you can't ever go back to your previous job or any other suitable work that fits your education, training or experience. For example, if you have worked all your life as a labourer or process worker, you will have to show that you cannot do manual work again. It doesn't matter how a disability or illness came about. All disabilities and illnesses are acceptable for a superannuation disability claim. Many people on social security benefits will be able to claim.

Making a Disability Claim

You can usually make a claim at any time. It doesn't matter if you have already had your superannuation contributions paid out to you, even if that happened a long time ago. Disability claims can also be made by the estate of a person after they die. There will be claim forms to complete, medical reports and other papers to send in. It is important to give the right information and reports to support a disability claim. It may take many months before a decision is made, and you may be asked to have some medical examinations. If a claim is rejected, you can appeal to a court or the Superannuation Complaints Tribunal. It is often worth appealing as many appeals settle before they reach court or are successful when they are heard in court. It is important to get help from a lawyer experienced in insurance claims or appeals.

Superannuation Death Claims

Superannuation funds pay death benefits to the dependants or the estate of a deceased person. In most cases, the superannuation fund trustee is not bound to give benefits to the nominated beneficiaries. A decision of the superannuation trustee can be appealed.

Personal Insurance Benefits

Some people living with cancer may be able to claim disability benefits from other insurance or superannuation policies that they hold.

Types of Insurance Policies

Some people have their own superannuation or life insurance policies which may include disability lump sums or 'premium waiver benefits'. Premium waiver benefits are when the insurance company pays your premiums for you when you are unable to because you are ill and/or not working. Most self-employed people have income protection insurance to cover them if they cannot work. Banks and finance companies sometimes ask their customers to take out insurance to cover mortgage or loan repayments if they cannot keep up the payments because of disability. You will need to check with your bank or among

your personal records to find out if you are covered. Some credit cards include disability lump sums as a benefit. You will need to check with your credit card provider to find out if your credit card has such a policy. Some banks, employers, unions, credit unions and sporting and social clubs have disability insurance policies for their members. You should check your records with each organisation.

Making Claims and Appeals

Insurance disability claims can usually be made at any time although it is better to make a claim as soon as possible. There will be insurance claim forms to complete and medical reports and other papers to send to the insurance company. It is important to provide the right information and reports to help your claim. It may take many months before a decision is made, and you may be asked to have some medical examinations. If the insurance company rejects your claim, you can appeal their decision to a court or a low-cost insurance complaint scheme.

Obtaining New Insurance or Superannuation Policies

If you already have cancer, it may be difficult to take out a new policy with disability or death benefits.

If you try to take out your own insurance or superannuation policy, you will usually have to complete a medical questionnaire for the insurer to calculate your health risks and decide whether they wish to cover you.

If you know you have cancer, the usual practice is that you have to inform the insurer. They may then refuse to cover you for disability payments. If you know that you have cancer when you join but do not inform the insurer, then they may refuse to fulfill their obligations and will not pay disability payments to you. However, this is not always the case. If you have had cover for more than three years, an insurance company may only refuse to pay you or reduce your payments if:

- You did not inform the insurer about your condition when you started your insurance cover; and
- If your failure to disclose that information was fraudulent (meant to deceive) and dishonest.

However, it may be possible to get disability and death cover by joining a 'group' superannuation or insurance scheme, eg with your employer, union or credit union. In such schemes, you may be offered automatic cover without any health tests or questions.

Superannuation/Insurance and your Social Security Payments

Superannuation Lump Sums

A superannuation lump sum will usually be taken into account in an assets test to determine your social security payments. However, if you keep the money in a superannuation fund, it will not count as an asset until retirement age.

Superannuation Pensions

Superannuation pensions are treated as income, and may reduce your social security payments.

Insurance Lump Sums

An insurance lump sum payout will be taken into account in the assets test to determine your social security payments.

Insurance Income/Pension Payments

Insurance income replacement payments are usually treated as income, and may reduce your social security payments.

Superannuation/Insurance and Returning to Work

If you have stopped work because of cancer, you can return to work if your health improves and you feel that you are able to go back to work. If you do go back to work and you have already been paid a superannuation or insurance disability lump sum, you will not have to repay the lump sum. If you are receiving a superannuation or insurance pension, you have to tell the fund or insurer that you are returning to work. If you do not tell them, you may be liable to repay any payments received. If you return to work and you are earning more than \$450 per month, your employer will once

again have to pay your superannuation contributions. Your new superannuation fund may also include death and disability benefits even though you have cancer.

Superannuation and Insurance Advice

Need to get advice?

Many people do not know that they can claim disability benefits from their superannuation or insurance. If your working life is cut short, you probably won't have enough superannuation because your superannuation is designed to last for an 'average' period of retirement, not longer. Extra disability benefits will help you.

Where can I get help?

The Chronic Illness Alliance website <http://www.chronicillness.org.au> incorporates a section called 'Work Welfare Wills', designed to help people with chronic illnesses when they need to make changes to their paid employment and make decisions about their future.

The Chronic Illness Alliance operates a free Superannuation and Insurance Advice Service on (03) 9805 9126.

You may wish to ask lawyers who have expertise in superannuation and insurance for advice or to see a financial advisor.

To find a lawyer who specialises in this area you can check the website of the Federal Court of Australia <http://www.fedcourt.gov.au> and check the section 'Information for Litigants' which contains many useful links.

You can also check with the various Law Societies and Institutes for individual States and Territories who provide referrals to specialist lawyers:

ACT

Law Society of the Australian Capital Territory
<http://www.lawsocact.asn.au>
 Level 3, 11 London Circuit,
 Canberra City
 Canberra ACT 2601
 Ph: (02) 6247 5700

NEW SOUTH WALES

Law Society of New South Wales
<http://www.lawsociety.com.au>
 170 Phillip Street
 Sydney NSW 2000
 Ph: (02) 9926 0333

NORTHERN TERRITORY

Law Society Northern Territory
<http://www.lawsocnt.asn.au>
 Suite G16, 1st Floor,
 Paspalis Centrepoint
 48-50 Smith Street (Mall)
 Darwin NT 0800
 Ph: (08) 8981 5104

QUEENSLAND

Queensland Law Society
<http://www.qls.com.au>
 179 Ann Street
 Brisbane Qld 4000
 Ph: (07) 3842 5842

SOUTH AUSTRALIA

Law Society of South Australia
<http://www.lssn.asn.au>
 124 Waymouth Street
 Adelaide SA 5000
 Ph: (08) 8229 0222

TASMANIA

Law Society of Tasmania
<http://www.taslawsociety.asn.au>
 28 Murray Street
 Hobart TAS 7000
 Ph: (03) 6234 4133

VICTORIA

Law Institute of Victoria
 Online legal referral service
<http://www.liv.asn.au/directory/firmsref/>
 470 Bourke Street
 Melbourne, VIC 3000
 LIV Legal Referral Service
 Ph. (03) 9607 9550

WESTERN AUSTRALIA

Law Society of Western Australia
<http://www.lawsocietywa.asn.au/>
 PO Box Z5345
 St Georges Tce
 Perth WA 6831
 Ph: (08) 9322 8277

4.5 Tips for Employees

- Get information from your doctors and other health professionals about your cancer, the likely effects of the cancer and whether it will make it difficult for you to work.
- Ask your employer (HR department as appropriate) about your statutory rights and in particular how much paid and unpaid time off you are entitled to.
- Ask if the organisation provides any other additional benefits that could help you.
- It may be worthwhile verifying through independent sources such as a trade union, professional association or with a solicitor that the information and advice you have obtained from your employer is comprehensive and up to date.
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- If you tell your employer about your cancer diagnosis but do not want your workmates to know, your right to privacy should be respected.

- If you want your workmates to know about your diagnosis but don't feel able to do this yourself, you can ask the HR manager or another manager, or one of your closer workmates to do this for you.
- Take the time off/days off that you need to feel better, then go back when you are ready.
- Organise your important and relevant information in a special file or folder.
- Examples of the types of information to keep track of in a folder or filing system include:
 - A copy of your employer's policy on leave/sick leave and any relevant information about benefits provided by the organisation
 - Medical reports and other information provided to you about the cancer you are dealing with
 - Information or letters about treatments, the likely effect(s) and the knock-on effects this may have on your work
 - Information/letters from doctors about what adjustments, support or extra help you might benefit from
 - Copies of any appraisals or performance reviews or other documents about your work such as 'Employee of the Month' awards.

References for Section 4

1. Workplace

The Australian Workplace website is an initiative of, and is administered by, the Australian Federal Department of Employment and Workplace Relations. It provides access to online services and information, employment information, government assistance, jobs, careers, training, working conditions and Indigenous Employment Centres.
<http://www.workplace.gov.au/workplace/>

2. WorkChoices

The Department of Employment and Workplace Relations (DEWR) manages this website which provides general information about WorkChoices.
<https://www.workchoices.gov.au/>