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AMENDMENTS TO QUEENSLAND WORKERS' COMPENSATION LEGISLATION: IMPLICATIONS FOR HIRING EMPLOYMENT UPDATE

The recent changes to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCR Act) have generated debate. The focus has been on the introduction of a threshold for common law claims.

However, employers should pay attention to the amendments relevant to obtaining information about pre-existing injuries and workers' compensation claims of prospective employees. The changes could be a "two-edged sword" because of the potential to breach the WCR Act itself, or the general protections provisions of the *Fair Work Act 2009* (Cth) (FW Act).

THE WCR ACT AMENDMENTS

Relevantly, the amendments include:

- A provision requiring a "prospective worker" to disclose pre-existing injuries or medical conditions if asked by an employer (section 571B). Making a "false or

misleading" disclosure about a pre-existing injury or medical condition in response to an employer's request prevents a worker from seeking compensation or damages for any "event" that aggravates the injury or condition (section 571C).

- A provision allowing the prospective employer of a person to apply to "the Workers' Compensation Regulator" (now part of the Office of Fair and Safe Work Queensland) for a copy of the person's "claim history summary", which details any Queensland workers' compensation claims made by the person.

On first reading, the WCR Act amendments will be attractive to employers to utilise as part of their recruitment practices. However, other relevant statutory obligations mean that despite these changes, employers should proceed with caution.

OTHER RELEVANT STATUTORY OBLIGATIONS

Not to take "adverse action" against employees

- An employer commits "adverse action" under the FW Act by refusing to employ a prospective employee because that prospective employee has exercised a "workplace right".
- The right to claim workers' compensation under the WCR Act is a "workplace right". Consequently, an employer will be guilty of adverse action if it does not employ a prospective employee because of a previous workers' compensation claim.
- However, an employer can lawfully refuse to employ a person for an injury that prevents them from performing the inherent requirements of the role.

Not to obtain or use a "workers' compensation document" for an employment purpose

- The WCR Act prohibits an employer from obtaining or using (or attempting to obtain or use) a "workers' compensation document" in the process to select a person for employment.
- A "workers' compensation document" means any document relating to the worker's application for compensation or damages under the WCR Act. A claim history summary will therefore be a "workers' compensation document".
- So, an employer could commit an offence by obtaining a prospective employee's claim history summary from the Regulator to decide whether to employ that person.

Not to discriminate because of a person's physical or mental disability

- Relevantly, under the *Anti-Discrimination Act 1991* (Qld) and the *Disability Discrimination Act 1992* (Cth) an employer must not discriminate on the basis of physical or mental impairment in deciding who should be offered employment in a position.
- Therefore, an employer could breach the discrimination legislation by deciding not to employ a job applicant because of an injury revealed in the claim history summary.

- However, broadly, employers can discriminate on the basis of physical or mental impairment if because of an inherent requirement for the relevant position.
- Importantly, unlawful discrimination against a prospective employee is also adverse action under the FW Act.

TIPS FOR EMPLOYERS

Employers should proceed with caution when requesting and using information about previous injuries and claim history of prospective employees.

Although every situation should be assessed on a "case by case" basis, employers should adopt the following:

- Focus on obtaining information from the prospective employee about pre-existing injuries or medical conditions - particularly those relevant to the position for which the person is applying.
- Ensure any request for prospective employees to provide information about pre-existing injuries or medical conditions is carefully worded and meets the relevant statutory requirements. This will improve the prospect of preventing employees who knowingly make false and misleading disclosures from receiving workers' compensation.
- Exercise caution when considering the information provided by prospective employees about pre-existing injuries or medical conditions. Avoid deciding not to employ a person because of an injury that is not relevant to their ability to perform an inherent requirement of the position.
- Carefully consider whether you need to request a prospective employee's claim history summary from the Regulator. You may need to be able to establish that you did not use the fact of previous claims to decide whether to employ the person.

MORE INFORMATION

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