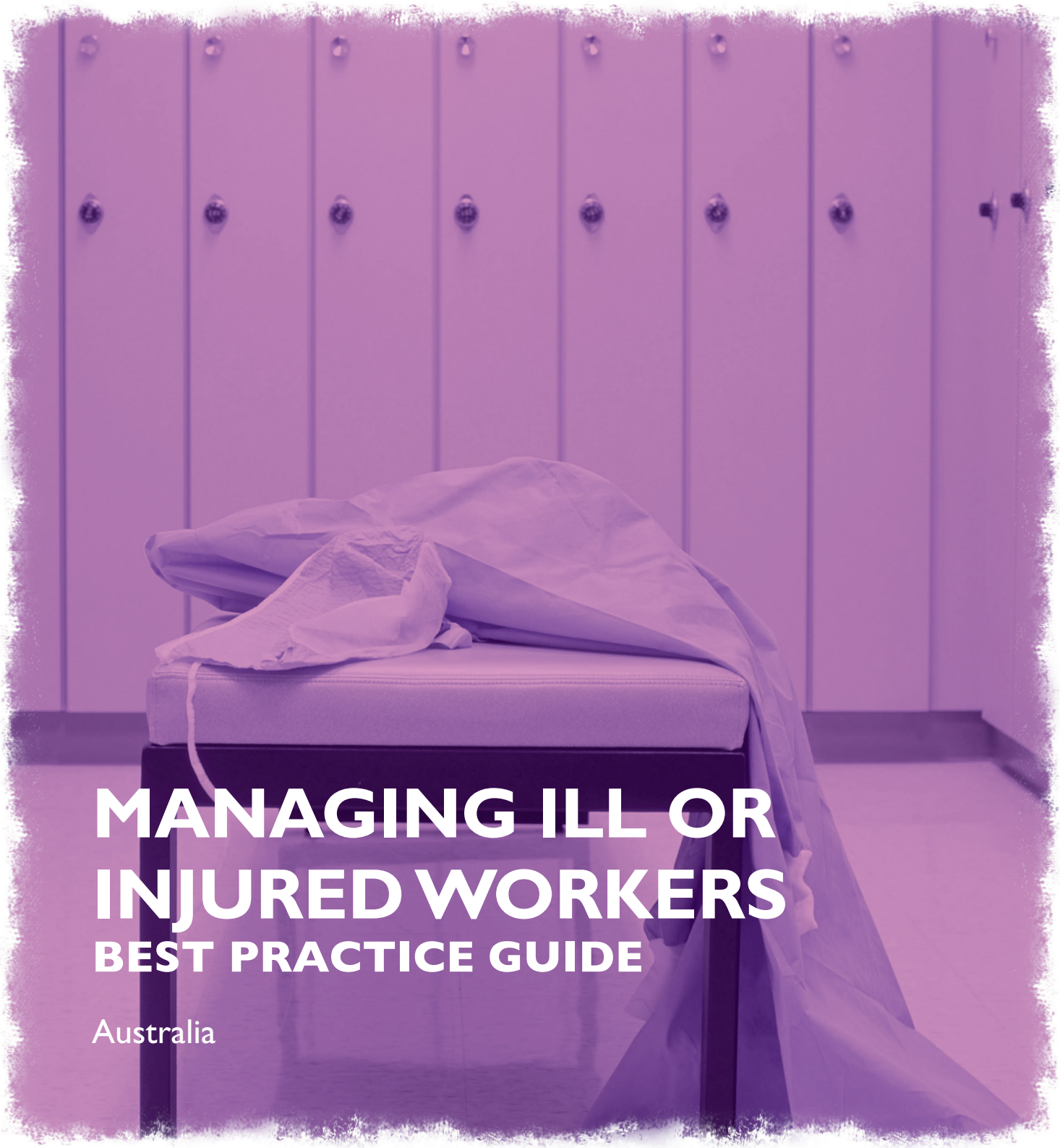

MANAGING ILL OR INJURED WORKERS
BEST PRACTICE GUIDE

Australia

DLA PIPER

An employee has been absent on a number of occasions. The medical certificates state that the employee is suffering from a "medical condition". The workplace relies on that employee to function as a member of a team and his/her absences are impacting on the work being done and their colleagues. The employee does not provide any further information about his/her medical condition. Can you require the employee to submit to a medical examination and what happens if the employee refuses?

TAKING THE PLUNGE

Often, the first step is for an employer to ask, and if necessary, direct the employee to undergo a medical examination. Where the employee refuses, the employer needs to decide whether that direction will stand up and what the consequences of that direction are (that is, can the employer dismiss the employee?).

Typically, the employee will challenge the employer's right to give that direction by alleging that such a direction is not a lawful or reasonable direction or that it amounts to disability discrimination or adverse action because it constitutes a "detriment" in employment and the detriment is due to the disability.

GENERAL PRINCIPLES

In employment contracts, employers can give lawful and reasonable directions to their employees and employees are required to comply with those lawful and reasonable directions.

It is generally lawful and reasonable to direct an employee to attend a medical examination to determine whether the employee is fit to perform his or her duties and whether he or she can do so safely. This follows from an employer's duty under occupational health and safety legislation in Australia. Typically, this situation will involve employees with disabilities within the meaning of discrimination legislation, which may give rise to potential breaches of that legislation.

However, discrimination legislation does not make all disability discrimination unlawful. For example, it is not unlawful for an employer to discriminate against an employee due to the employee's disability if the disability prevents the employee from safely carrying out the inherent requirements of his or her work (even after reasonable adjustments or accommodation is made). Therefore, focusing on the disability as it affects the work and its safety is not necessarily unlawful discrimination.

Where the direction to undergo a medical examination is lawful and reasonable, the employee will not have suffered a "detriment" in employment and therefore the requirement to undergo a medical examination cannot constitute unlawful disability discrimination or adverse action. In that case, the direction can give rise to a valid reason to dismiss the employee.

WHEN WILL THE REQUIREMENT TO UNDERGO A MEDICAL EXAMINATION BE A LAWFUL AND REASONABLE DIRECTION?

Employers cannot randomly or routinely require employees to undergo medical examinations on occupational health and safety grounds, even if they have been absent due to illness. What makes such a direction lawful and reasonable is two-fold:

- The existence of circumstances that genuinely justify a need for a medical examination for the particular employee

- The setting of reasonable terms for the requirement to undergo a medical examination.

Employers will be able to show there was a genuine need for a medical examination when the following types of factors exist:

- Frequent, lengthy or many unexplained absences from work or inability to perform the work or its inherent characteristics, particularly where information about the employee's medical condition, or its impact on the work, is unknown.
- Where the medical condition is known broadly (eg a back injury) and the nature of the work the employee is required to perform is likely to be affected by such an injury.
- Inconsistencies in information available to the employer about the employee's state of health.
- Genuine concerns raised by other employees about an employee's fitness for work.

The terms of the medical examination will be reasonable where:

- The medical examination's focus is on the inherent requirements of the work, occupational health and safety obligations and fitness for work generally.
- An appropriate medical expert is arranged to conduct the medical examination.
- The employee is advised of the reasons for the medical examination.
- Privacy and confidentiality in the process is maintained as far as possible.
- The process is conducted in a sensitive manner.

Employers should therefore only require a medical examination when there is a genuine issue with the employee being able to safely do their job and the employer must also conduct the process carefully and sensitively.

If an employee refuses a reasonable and lawful direction to undertake a medical examination, an employer may be entitled to dismiss the employee for failure to follow that direction, without breaching adverse action, unfair dismissal or discrimination laws. This is subject to procedural requirements, including that the employee is aware of the possibility of dismissal.

WHAT DOES AN EMPLOYER NEED TO DO WITH THE EXPERT'S OPINION?

Of course, when the employee attends the medical examination, the information or opinion provided by the medical expert will need to be acted upon by the employer.

If the medical expert confirms the employee can do their job safely, an employer then risks a disability discrimination or unfair/unlawful termination claim if they nevertheless dismiss the employee or prevent them doing that job. This risk includes circumstances in which the expert states the employee can perform the role safely, but with reasonable adjustment or assistance, or, in some cases, if they can do so on a part-time basis rather than full-time, or if they cannot do the job currently but may be able to do so in the short term.

If the expert supports a conclusion that the employee cannot safely perform the inherent requirements of the role, grounds may exist to validly dismiss the employee, without breaching discrimination, unlawful termination or unfair dismissal laws (subject to proper processes being followed). However, the employer needs to consider whether the incapacity is such that dismissal can be justified.

CHECKLIST: OBTAINING AN INDEPENDENT MEDICAL ASSESSMENT

- ☐ Have you considered obtaining consent from the employee to speak to his/her treating doctor?
- ☐ If the employee does not consent, have you directed him/her to undergo an independent medical assessment?
- ☐ Is the independent medical practitioner an appropriate specialist to assess the worker's work capacity?
- ☐ Have you ensured confidentiality and sensitivity is maintained as far as possible in requiring that independent examination?
- ☐ If the employee refuses the direction, are you in a position to proceed to dismiss the employee for failure to follow a lawful and reasonable direction?
- ☐ Have you provided the independent medical practitioner (or treating doctor, if requesting his/her opinion) with a description of the employee's pre-injury duties, noting the inherent requirements of the position?

WHEN IS AN EMPLOYEE'S ABSENCE ENOUGH TO JUSTIFY DISMISSAL?

When does an employee's absence from work or their continued inability to perform their full-time pre-injury duties reach a point where an employer can consider ending the employment?

WHAT LENGTH OF TIME IS NECESSARY?

Subject to certain issues, there is no minimum period of absence or inability to perform the pre-injury job that must have elapsed before an employer can consider termination of the employment.

Where the illness or absence is work-related, in many cases, workers' compensation legislation compels an employer to find suitable employment for the employee for a certain period of time.

If the employee is dismissed because of their incapacity during that protected period, it may expose the employer to a successful unfair dismissal claim by the employee. It is therefore prudent for employers not to dismiss an employee in that protected period for incapacity if the incapacity is work-related. Also, employers should carefully consider whether the employee may nevertheless have rights under some states' workers' compensation to be reinstated if they are dismissed due to work-related incapacity.

Where the incapacity is due to a non work-related illness or injury, that protected period will not apply. However, it is unlawful to terminate an employee because they are temporarily absent from work. Temporary absence is a three month period, either consecutively or a series of absences totalling three months over a 12 month period. An employee is also temporarily absent if they are absent on paid sick leave for the duration of the absence, even if the paid sick leave period extends beyond three months (workers' compensation absence will not be regarded as sick leave).

Apart from the protected period for work-related absences and the temporary absence period, there is no minimum or ideal period of time when an employer is able to consider dismissing an employee for incapacity. Employers should avoid hard and fast rules about when to make decisions like this. It will depend on the facts of each case.

WHEN CAN DISMISSAL BE CONSIDERED?

In general terms, after any protected period for work-related absences or temporary absence has elapsed, employers can consider dismissal if:

- The employee still cannot perform the inherent requirements of their pre-injury or pre-illness position, even with reasonable modification to the duties or with reasonable assistance.
- The employee is unlikely to be able to perform the inherent requirements of those pre-injury or pre-illness duties for the foreseeable future.
- An employer needs to consider the extent to which the employee is incapable of performing the pre-injury role, as well as whether the employee's medical condition has stabilised, is improving or deteriorating. This will determine whether a decision can be made or should be delayed.
- An employer needs to have appropriate medical evidence to assist in determining the above matters.

Where the above factors suggest the employee cannot perform the inherent requirements of the position currently and into the foreseeable future, an employer will also need to consider whether or not there are any other productive duties that are available that the employee may be able to perform that are consistent with their medical restrictions.

MODIFIED DUTIES

Consideration of alternative duties is particularly important when the employee is performing modified duties and/or hours. If the duties they are performing are productive, it may still be unfair to dismiss them even if they cannot perform the inherent requirements of the position. In addition, the employee may be medically capable of performing productive duties elsewhere in the organisation.

Care also needs to be taken that an employee's modified duties have not become their "new position" as then their level of incapacity may be assessed by a court or tribunal against the modified duties rather than the pre-injury duties. Employers need to ensure that the documents and other discussions surrounding the initial and ongoing offer of modified duties does not create a situation (or suggestion) that the modified duties will be, or have been, accepted permanently in substitution for the pre-injury duties. Employers should also carefully consider how long modified duties are offered to avoid suggestions that since they have been offered for so long, it is not a burden for the employer to continue offering the modified duties and it is unfair to withdraw them.

FREQUENT ABSENCES

When an employee is absent frequently but otherwise able to perform their normal duties when they are at work, the situation is usually more complex. In that situation, the employee is not unable to perform their normal or pre-injury duties all the time, only some of the time.

In those situations it may therefore be more difficult to establish that an employer has a valid reason to dismiss the employee due to incapacity, depending upon the frequency of the absences and the reason.

In these situations, employers should obtain medical evidence that is directed at the nature of the medical condition, how it impacts upon the pre-injury duties, whether modifications to the employment can be made to alleviate the effects of the medical condition and whether the situation is likely to continue into the future, and if so for how long. The employer will also need to carefully assess and demonstrate any adverse effects on operational issues (but these should be real and significant, not just inconvenient). All of these factors will be relevant in making an assessment about whether an employer has a valid reason to dismiss the employee in this circumstance.

THE MEDICAL EVIDENCE

Employers need to carefully weigh up whether an independent medical opinion should be obtained to consider a decision about an employee's incapacity and ongoing employment, or whether it can be obtained from the employee's treating doctors.

Sick leave certificates, workers' compensation certificates, or other information obtained through a workers' compensation claim may be limited in how they address the necessary factors, particularly prognosis (and employers should also be wary of using information obtained through a workers' compensation claim due to restrictions on its use in some workers' compensation legislation). Reliance on these alone is not recommended. Nor is it enough to assume that because an employee has been totally incapacitated for a long period that this will continue to be the case in the future.

In some cases, obtaining information from the employee's treating general practitioner or specialist may provide sufficient information for the employer to make an informed decision about the employee's ongoing employment without the need for an independent medical examination. The employee's consent to obtaining that information must be requested. Where that consent is refused, an independent medical examination may be a necessary step. Whenever a medical opinion is sought, it must be directed at the inherent requirements of the relevant position and the employee's ability to undertake those, both at the current time and into the future. A written medical opinion, in response to prepared and focussed questions, is highly recommended.

An overriding consideration is ensuring that the medical evidence available to, and relied upon by, the employer is current. For example, medical information that is out of date may be insufficient to support a decision made by an employer to dismiss the employee.

PROCESS

If dismissal is being considered by the employer, before any decision is made, the employee needs to be given an opportunity to comment on the possible decision. This should normally involve a meeting with the employee where the employer discusses the reasons for the possibility of the employment ending and the medical evidence being relied upon, as well as giving the employee the opportunity to comment. Only after the employee is given that opportunity should the employer make a decision about the employee's ongoing employment.

As is usually the case when considering dismissing an employee, issues such as giving the employee an opportunity to be represented, informing them in advance of the purpose of the meeting and considering a range of circumstances (including the employee's length of service) must be considered prior to any decision being made.

DISMISSING AN EMPLOYEE DUE TO ABSENCE

- ☐ Has the employee's absence extended for more than three months consecutively or for more than a total of three months in the last 12 months (but see below)?
- ☐ Is the employee no longer on paid sick leave?
- ☐ If the employee's absence is due to a workers' compensation injury, has the protected period under workers' compensation legislation (eg 12 months) elapsed from the date of the injury/claim?
- ☐ Do medical certificates provided by the employee state that he/she cannot perform the job?
- ☐ Do you have up-to-date medical evidence that the employee cannot perform the inherent requirements of the position?
- ☐ Have you explored alternative duties?

CHALLENGING SICK LEAVE CERTIFICATES

In many cases when an employee is absent and provides a medical certificate or other documentary proof in support, employers are still suspicious about the genuineness of the absence.

The question remains: when can an employer challenge or not accept the validity of a medical certificate provided by an employee to explain an absence from work?

THE STARTING POINT

The general rule is that a medical certificate or other documentary evidence specified as evidence of illness or injury must be accepted as evidence of that illness or injury.

An employer who is merely suspicious about the validity of a medical certificate will generally be obliged to accept the certificate as valid, notwithstanding those suspicions, unless circumstances exist that enable the employer to challenge or reject the certificate. Generally it will only be where unusual or exceptional circumstances exist that an employer can reject the validity of a certificate.

DEVIATION FROM THE GENERAL RULE

A situation where the general rule may not apply involved a case where a certificate did not diagnose a medical condition, there was evidence the employee attended a social event and the certificate was dated five days after it was issued. Unusual or exceptional circumstances were found to exist.

However in another case, rejection of a medical certificate issued from an overseas doctor immediately following annual leave taken overseas was insufficient to justify rejecting the certificate.

SICK LEAVE CERTIFICATES AND DISCIPLINARY ACTION

Another area where employers often question the genuineness of medical certificates is where the employee produces one to delay or prevent a disciplinary or performance management process from being undertaken. In those circumstances, an employer cannot simply refuse to accept a medical certificate and continue with the disciplinary or performance management process simply because they are sceptical about the validity of the medical evidence.

The employer may mount a challenge where there is objective evidence that contradicts the medical certificate.

Alternatively, employers may consider other means to continue with the disciplinary or performance management process. For example, if the medical certificate states that the employee is too sick to attend work during a disciplinary process, and the employee therefore does not attend a disciplinary meeting, employers might consider requiring a response from the employee in writing rather than attending a face-to-face meeting (as this may not be contrary to the employee's medical restrictions). This is particularly so if the incapacity is due to an illness or injury that would not affect the employee's ability to participate. For example, a back injury preventing an employee performing their duties physically will not prevent them dealing with a disciplinary issue. While greater care needs to be taken if the employee is suffering from a stress-like condition, even in that case, responding in writing may be appropriate, depending on the nature and cause of the stress.

An employer may also consider obtaining an independent medical assessment from a treating practitioner to examine whether the employee can nevertheless participate in the disciplinary or performance process, even though they have a medical certificate stating they are unfit for work. An employer's ability to do so is strengthened when the medical certificate does not specifically state the medical condition or address the employee's ability to effectively participate in the disciplinary or performance process. An unreasonable refusal by the employee to undertake that medical assessment may, in some circumstances, enable the employer to terminate the employment for failing to follow a lawful direction, provided an appropriate process is followed. Where the inability to attend the meeting or respond in writing continues beyond a short period, the employer is in a stronger position to require the medical examination.

KEY POINTS:

- Medical certificates are evidence of illness or injury and must be accepted unless there is sound evidence, rather than suspicion, to the contrary.
- Employees can be lawfully directed to undergo a medical examination in circumstances including where they have been absent for a long period of time, or have numerous unexplained absences, or there are genuine safety concerns.
- Medical evidence an employer relies upon must be current, focused on the inherent requirements of the position and consider the prognosis for the future.
- For more information or assistance, please contact your DLA Piper lawyer or any of the contacts listed on the back page of this guide.

Dealing with employees who are absent from work or otherwise unable to perform their duties creates the perfect storm of legal obligations. Discrimination, adverse action, occupational health and safety, unfair dismissal, privacy, national employment standards, common law and enterprise agreements converge to make it one of the most challenging issues facing employers.

Understanding the obligations and adopting some simple rules gives employers the tools to navigate through the issues.

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