SQUIRE SANDERS

WORKPLACE VIEW

June 2013

Managing Employees' Medical Information

While medical examinations form a routine part of the recruitment process and are regularly conducted in the course of employment as a consequence of a workplace accident or injury, they can create a minefield of legal and ethical issues for employers.

The purpose of a medical examination is to ensure that a job applicant or employee is fit to perform the role without putting themselves or others at risk. This is particularly important when the job involves working in a hazardous environment or when the safety of workers or the public is at risk. But if medical information is used by an employer for a purpose other than the "fitness for work" purpose, there is a risk that anti-discrimination and/or privacy laws will be breached.

Avoiding Discrimination Claims

The general principle is that a job applicant should be recruited on the basis of merit and suitability, and employment should continue provided the employee can perform the inherent requirements of the job. A medical examination should therefore be conducted to determine a person's fitness to work and not to determine their susceptibility to an illness or indeed the existence of an illness.

Anti-discrimination legislation exists at the state and federal level – the *Equal Opportunity Act 1984 (WA)* and *Disability Discrimination Act 1992 (Cth)* respectively, which prohibit an employer from discriminating against both a job applicant and employee on the grounds of a medical condition in circumstances where a reasonable adjustment could be made to enable that person to perform the inherent requirements of the job.

Only where the adjustment – e.g. a change to the employee's duties or the provision of specialised equipment which allows the person to carry out the work – imposes an unjustifiable hardship on the employer does the discrimination avoid being unlawful.

Privacy Implications

Under the *Privacy Act 1988 (Cth)*, the National Privacy Principles (NPPs) prohibit an organisation from using or disclosing personal information (which includes health information arising from a medical examination) about an individual for a secondary purpose (NPP 2) and require the organisation to destroy or permanently de-identify information which is no longer needed for the purpose for which it was collected (NPP 4).

The effect of this is that an organisation must destroy the pre-employment medical examination of an unsuccessful job applicant. When health information held by an organisation pertains to an employee, the way in which the record must be handled will depend on whether the organisation is a private sector employer or public sector employer. This is because the Privacy Act deals with the employee records of public sector and private sector employees differently.

Health information is "personal information" which forms part of an employee's "employee record", which, for a private sector employee, is exempt from the provisions of the Privacy Act. This means that the employer's use of health information is not subject to the NPPs and the employer is not, for example, obliged to give the employee access to the information.

The "employee record exemption" does not apply to the public sector. Such employers must comply with the NPPs in relation to health information collected about an employee.

March 2014 Brings Added Obligations for Private Organisations

As reported in the February edition of Workplace View, from March 2014, all private organisations (except small businesses) will be required to have a privacy policy in place which outlines the kinds of personal information the employer collects and holds and the purposes for which it collects, holds, uses and discloses that personal information.

What Should Employers Be Doing?

- Destroy pre-employment medicals for unsuccessful candidates.
- Implement anti-discrimination and privacy policies.
- Develop an information collection statement for job applicants which explains the purpose of the medical, how it will be used, to whom it will be disclosed.
- Ensure recruitment decisions comply with anti-discrimination legislation.
- Use a medical examination to determine fitness for work, not absence of illness.

Did You Know?

The Fair Work Commission (FWC) has introduced three new initiatives to assist self-represented parties. They are:

- A pro bono legal scheme for self-represented parties involved in unfair dismissal proceedings (a pilot programme is currently underway in Victoria with NSW next in line).
- An unfair dismissal handbook summarising key principles of unfair dismissal case law and how these have been applied in decisions.
- The introduction of an Appeals Practice Note to ensure consistency when dealing with appeals and providing for the option to determine appeals "on the papers" without the need for a hearing.

CLIENT NOTICEBOARD

International Focus

On 14 May 2013, the French Senate passed a controversial new law giving employers greater flexibility to respond to changing economic conditions while, at the same time, introducing new rights for employees.

The changes are likely to have a significant impact on the French labour market and are highly controversial, resulting in industrial action across France even before their implementation.

The key changes which will affect companies doing business in France are:

- Employers now have a choice of procedure to follow for implementing redundancies of ten or more employees.
- Employers facing "economic difficulties" may be able to avoid redundancies for up to two years by entering into agreements with trade unions under which employees agree to detrimental changes to their terms and conditions of employment (such as a reduction in wages or an increase in hours).
- In certain circumstances, employees will now have the right to work for a different company for a fixed period and then return to their "original" employer.
- Employees will be granted new rights to complimentary health insurance which may continue if they lose their jobs for up to 12 months after the end of their employment.
- Employees will have a new personal training allowance entitling them to earn up to 20 paid hours per year for training (up to a maximum of six years).
- Large organisations (with at least 5,000 employees in France or 10,000 worldwide) must appoint employee representatives on their board of directors or surveillance board if the head office is located in France.

Events

Squire Sanders 2013 Australian Labour & Employment Breakfast Series

- 19 June – Unwell Employees
- 21 August – Executive Remuneration and Restrictive Covenants
- 23 October – Redundancy Refresher

External Events

- 30 August - Employment Law Fundamentals 2013; Rydges Hotel, Perth

Dominique Hartfield will present on "Highlighting Adverse Action Compliance Risks and How to Avoid Breaking the Law" as part of the Employment Law Fundamentals series hosted by Konnect Learning.

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Employer Reminder

From 1 April 2013, all private sector employers which employ 100 or more employees (including employees of subsidiary companies) must provide information to the Workplace Gender Equality Agency on a set of key "gender equality indicators."

The gender equality indicators relate to:

- the gender composition of the workforce;
- the gender composition of governing bodies of relevant employers;
- remuneration levels of women and men;
- sexual harassment and discrimination;
- consultation with employees on workplace gender equality; and
- flexible working arrangements.

The reporting obligations have been expanded from the previous regime created by the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)*, which was replaced with the *Workplace Gender Equality Act 2012 (Cth)* late last year.

The Minister for the Status of Women specifies what information must be contained in a reporting employer's annual report. 31 specific matters have been specified for the 2013-14 reporting year. From 1 April 2014, minimum standards of compliance will also apply.

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