



Discrimination v Safety: Determining an Employee's Capacity for Work

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Our 8 March 2017 seminar raised a number of hot topics about dealing with employee injuries, illnesses and absences that are not work-related. In this Alert we explore one of those topics in more detail.

Discrimination v Safety: Determining an Employee's Capacity for Work

The *Fair Work Act 2009* (Cth) (**FW Act**) allows employees to request flexible work arrangements for a range of reasons, including if they have a disability. Employers can only refuse a flexible work request on reasonable business grounds.

However, an employee's right to request flexible work arrangements is not enforceable under the FW Act. If an employer refuses a request, an employee cannot challenge that decision unless they have a separate right to the arrangement under a contract or enterprise agreement.

Of course, employers need to remember that under State discrimination laws they may also have an obligation to make reasonable adjustments to accommodate ill and injured employees. This obligation is separate to an employer's obligations under workers' compensation legislation, and applies unless the relevant employee cannot adequately perform the genuine and reasonable requirements of their role even after reasonable adjustments are made.

There are therefore four matters employers must consider when assessing if, and how, they may accommodate an ill or injured employee:

1. Determine the genuine and reasonable requirements of the employee's role.
2. Identify the adjustments that are necessary to accommodate the ill or injured employee.
3. Determine whether the employee can adequately perform the role with the adjustments.
4. If the employee would be able to perform the genuine requirements

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of the role if an adjustment was made, determine whether those adjustments are reasonable.

Each of the above steps involve a number of moving parts, and require a thorough analysis of an employee's position and a clear understanding of the medical evidence about the employee's condition. It is our experience

that employers often find it difficult to make these assessments alone, and they will be criticised for making assumptions or drawing conclusions without a proper foundation.

For this reason, we recommend that employers seek legal advice when making a decision refusing a request for adjustments to an employee's role, or when considering dismissing an employee due to incapacity. For advice when making these and other decisions, please contact Russell Kennedy's [Workplace Relations, Employment and Safety Team](#).

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