

Pre-Employment Pre-Existing Injury or Medical Condition Disclosure

Queensland Only

Explanatory Note & Template Letter

In certain circumstances workers may not be entitled to workers compensation or damages if they aggravate a pre-existing injury or medical condition at work.

HIES has prepared this HIES Knowledge Tree explanatory note to provide continuing professional development and education for members and clients around asking candidates / prospective employees about any pre-existing injuries or medical conditions the person may have during the recruitment process. Additionally, we have drafted a Pre-Employment Disclosure Notice (**PED Notice**) template letter you can issue to relevant candidates / prospective employees as part of the recruitment process.

Asking someone whether they have a pre-existing injury or medical condition needs to be managed carefully, so please contact HIES with any questions.

What the law says

In October 2013, the *Workers' Compensation and Rehabilitation Act 2003* (**the Act**) was changed to ensure employers could avoid a claim for compensation or damages, in certain circumstances, where an employee aggravates a pre-existing injury or medical condition.

What is a pre-existing injury or medical condition?

According to section 571A of the Act, a “pre-existing injury or medical condition” means an injury or medical condition existing during the period of the employment process that a person suspects or, ought reasonably to suspect, would be aggravated by performing the duties the subject of the employment.

For example, if Sam has a ruptured disc in their lower back, and subsequently accepts a position involving heavy lifting, they have a pre-existing injury under s571A the Act, as they ought to have reasonably suspected their back injury would be aggravated if they lifted heavy items for work.

What does a prospective employer need to do?

Sections 571A to 571C of the Act set out formal requirements employers must meet to ensure they can take advantage of these provisions and avoid such claims. These provisions do not appear to have been tested in any Court or Tribunal. However, provided the employer takes the steps set out in these provisions, they are likely to have the benefit of the provisions.

STEP 1 PRE-EMPLOYMENT STAGE

To begin with, the provisions only apply if the Clinic makes a request in writing that the prospective worker disclose details of their pre-existing injury or medical condition.

In practice, this means that a form like the attached Pre-Employment Disclosure Notice should be sent to prospective employees as part of the recruitment process.

¹ This document was prepared in August 2021.

**STEP 2
NOTIFICATION** The request for disclosure must also contain notification, in writing that if they make a false or misleading disclosure, they will not be entitled to compensation or damages in any event that aggravates the pre-existing injury or medical condition.

**STEP 3
DESCRIPTION OF
DUTIES** The Clinic must also tell the person, in writing, the nature of the duties the subject of the employment. The simplest way of meeting this requirement is to attach a detailed position description to the disclosure notice.

**STEP 4
REASONABLE
OPPORTUNITY** The person must be given a reasonable opportunity to disclose the information requested by the Clinic as their prospective employer.

While no period of time is prescribed, it is considered that by sending a prospective employee the PED Notice at least a few days ahead of the date the information is required, this requirement would be met. The length of time may vary depending on the complexity of the information requests in the form and the requirements of the role being applied for.

Consequences of non-disclosure by a prospective employee

A prospective worker must, where requested in writing by a prospective employer, disclose all pre-existing injuries or medical conditions of which they are aware, that could reasonably be expected to be aggravated by performing the employment related duties.

If a person has not properly disclosed a pre-existing condition prior to starting work, and subsequently makes a claim for an aggravation allegedly caused by their employment, the employer will be given an opportunity to inform WorkCover of the steps taken to seek disclosure of pre-existing conditions. WorkCover should then take this information into account in determining whether to accept the claim.

What happens if the Clinic employs the person before we receive their PED Notice?

If the prospective worker is employed before making the disclosure (or being requested to make the disclosure), his or her entitlement to compensation is unaffected.

Discrimination matters

Unlawful discrimination

Using information obtained about candidate / prospective employee during the recruitment process must be done in compliance with the *Anti-Discrimination Act 1991 (AD Act)*.

Unlawful discrimination may occur if personal injury information that is obtained is used to refuse employment to a candidate solely because:

- the person is assumed to have a predisposition to an illness or injury; or
- it is assumed, without medical information, that the person cannot perform the role, or the work will aggravate an established illness or injury.

Reasonable adjustment

Even if there is evidence a candidate / prospective employee would have difficulty safely performing the position, the effect of the AD Act is that a prospective employer may have to make reasonable adjustments (eg. by providing services or modifying facilities), to enable a person with an impairment who is chosen based on merit, to carry out the job demands of a position. Relevantly, prospective employers can use information about a prospective worker's pre-existing injury or medical condition to consider:

- whether a prospective worker can perform the genuine occupational (inherent) requirements of the job

- whether adjustments can reasonably be made to accommodate a prospective worker's impairment
- whether particular modifications will assist the prospective worker to perform the required work duties
- any reasonable work, health and safety issues for the prospective worker or other persons at the workplace.

Any decision on the issue of reasonable adjustment should be based on evidence and the particular circumstances of the prospective worker. Conclusions based on unsupported generalisations about impairment should be avoided.

Variations between individuals with particular types of impairment, the degree of impairment experienced by the person, as well as the person's individual characteristics (ie. skills, qualifications and experience) should be considered.

Record Keeping and Privacy

Any health information provided in the PED Notice must be stored in accordance with the *Privacy Act 1988* (Cth).

A copy of the PED Notice should be placed on the successful candidate's personnel file for future reference, as this information will be requested where applicable during the claims determination process.

If the Workers' Compensation Regulator has previously provided a copy of the prospective employee's claims history summary the Clinic must not:

- disclose to anyone else the contents of or information contained in the summary
- give access to the document to anyone else
- use the contents of or the information contained in the summary for any purpose other than for the purposes of the employment process (penalties apply).

Contact HIES for support

HIES is here to support you and your business with safe recruitment and selection processes. Should you have any questions or queries on this topic we are here to help and provide guidance on compliance. You can contact HIES on 07 3386 6488 or by emailing:

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Insert logo or print on letterhead

PRIVATE & CONFIDENTIAL

Dear Candidate

REQUEST FOR INFORMATION ABOUT ANY PRE-EXISTING INJURIES OR MEDICAL CONDITIONS & PRE-EMPLOYMENT DISCLOSURE NOTICE ATTACHED FOR COMPLETION & RETURN

At [Clinic Name] the health, safety and wellbeing of our team is paramount! We are also committed to ensuring that each person can safely perform their position and duties.

As your application for employment with us progresses through the recruitment process, we are now at the stage where we need to provide you with a Pre-Employment Disclosure Notice (**PED Notice**).

Please take your time reading this document, and complete, sign and return the PED Notice to me ASAP.

What is a Pre-Employment Disclosure Notice?

The *Workers' Compensation and Rehabilitation Act 2003 (the Act)* permits prospective employers (ie. [Clinic Name]) the right to ask prospective employees (ie. You) to disclose any pre-existing injuries or medical conditions that:

- may be affected by the nature of work that you would be expected to carry out; and/or
- may impact your ability to safely perform the position you have applied for.

A pre-existing injury or medical condition means an injury or medical condition existing during the period of the employment process that a person suspects or, ought reasonably to suspect, would be aggravated by performing the duties the subject of the employment.

For example, if Sam has a ruptured disc in their lower back, and subsequently accepts a position involving heavy lifting, they have a pre-existing injury under s571A the Act, as they ought to have reasonably suspected their back injury would be aggravated if they lifted heavy items for work.

The Act also requires prospective employees to provide prospective employers with correct and accurate information of pre-existing injuries or medical conditions where requested to do so – which you are.

Attached at Appendix 1 is a copy of the relevant sections from the Act for your reference.

Position Description

You have applied for the position of [insert position] (**Position**).

To help you complete the PED Notice, attached at Appendix 2 is a copy of the position description. The Position Description sets out the duties, responsibilities, and in some circumstances physical and/or psychological capabilities and frequency of tasks of the Position.

Take your time reading the position description. Then, consider whether you have any pre-existing injuries or medical conditions that:

- may be affected by the nature of work that you would be expected to carry out; and/or
- may impact your ability to safely perform the Position

if you were otherwise employed by [Clinic Name] in the position of [Position].

Consequences of non-disclosure

We ask that when you complete the PED Notice that you answer honestly.

If a prospective employee who has a pre-existing condition knowingly makes a false or misleading disclosure about it, then they will not be able to claim compensation or seek damages for any aggravation of that pre-existing injury. The most common form of false or misleading disclosure is probably a simple failure to disclose the pre-existing condition.

If a person has not properly disclosed a pre-existing condition prior to starting work, and subsequently makes a claim for an aggravation allegedly caused by their employment, the employer will be given an opportunity to inform WorkCover of the steps taken to seek disclosure of pre-existing conditions. WorkCover should then take this information into account in determining whether to accept the claim.

Record keeping and your privacy

Any health information provided in the PED Notice will be stored in accordance with the *Privacy Act 1988* (Cth).

Should your application for employment be successful, a copy of your PED Notice will be placed on your personnel file for future reference.

Who can I contact at the Clinic if I have questions?

If you have any questions about the position description, our pre-employment request for information about any pre-existing injury or medical condition or the PED Notice, you can contact me [or alternatively you contact [Insert Name], [Title] on [mobile / contact number] or via email at [email].

Sincerely

[Employer Representative]

[Title]

E | [insert email address]

T | [insert contact number]

Insert logo or print on letterhead
Pre-Employment Disclosure Notice

Please return this document to the Clinic ASAP as it forms part of your recruitment process

The person named below is a **Prospective Employee** who has applied to [Clinic Name] (**Prospective Employer**) to be employed in the Position of [insert position].

Prospective Employee Details

Name	
Address	
Email	

Disclosure of Pre-Existing Injury or Medical Condition

I confirm the Prospective Employer has requested that I provide them with information about any pre-existing injury or medical condition that I may have.

To assist me in completing this disclosure, the Prospective Employer has provided me with a copy of the relevant:

- position description describing the nature of the work of the Position that I have applied for; and
- a copy of section 571B Obligation to disclose pre-existing injury or medical condition and 571C False or misleading disclosure from the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

I acknowledge and confirm:

- No**, I do not have a pre-existing injury or medical condition, of which I am aware, that could impact my ability to perform the Position and the duties safely.
- Yes**, I do have a pre-existing injury or medical condition that could impact my ability to perform the Position and the duties safely.

If '**Yes**' please provide details about the pre-existing injury or medical condition

Declaration

I acknowledge and declare that the information I have provided above is true and correct.

Signature: _____ Date: _____

Appendix 1

Workers' Compensation and Rehabilitation Act 2003

571B Obligation to disclose pre-existing injury or medical condition

- (1) If requested by a prospective employer, a prospective worker must disclose to the prospective employer the prospective worker's pre-existing injury or medical condition, if any.
- (2) Subsection (1) applies only if the request is made in writing and includes the following information—
 - (a) the nature of the duties the subject of the employment;
 - (b) that if the prospective worker knowingly makes a false or misleading disclosure, under [section 571C](#), the prospective worker or any other claimant will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.
- (3) However, subsection (1) does not apply if the prospective worker is engaged, as a result of the employment process, by the prospective employer before the worker has had a reasonable opportunity to comply with subsection (1).

571C False or misleading disclosure

- (1) This section applies if a prospective worker—
 - (a) has a pre-existing injury or medical condition; and
 - (b) knowingly makes a false or misleading disclosure under [section 571B](#) in relation to the injury or medical condition; and
 - (c) is employed under the employment process.
- (2) The prospective worker or any other claimant is not entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

Appendix 2 | Position Description

[Insert position description]