



AUSTRALIA
Giving life back

Employment and MS

Your questions answered

Now that you have had some time to adjust to your recent diagnosis and learn about multiple sclerosis (MS), you may have concerns about the potential impact of MS on your working life. This information sheet helps answer some commonly-asked questions about employment and MS. However, it is not a substitute for professional medical or legal advice.

Disclosure in the workplace: To tell or not to tell

Should I disclose that I have MS to my employer and work colleagues?

Deciding whether to disclose a diagnosis of MS is not simple. In general, the decision should be based on your own needs and priorities, whilst also taking into account the needs and priorities of those who you choose to tell. There is no single answer or strategy that is right for everyone. It may help to take some time to consider the possible benefits and consequences of making your diagnosis public.

On the positive side, disclosing may:

- provide you with additional support from your employer and colleagues once they have a better understanding of what you have been experiencing.
- reduce the difficulties associated with 'covering up' (e.g. explaining absences from work).
- give you an opportunity to ask for adjustments to the workplace that can maintain or even improve your productivity and ease your employer's concerns, misconceptions or questions.

The potentially negative consequences of disclosure are that:

- employers and colleagues may have negative views or inaccurate stereotypes about MS (e.g. they may assume that you will be unable to continue performing your job).
- employers and colleagues may also be concerned that you will become unreliable and frequently need to take time off, putting more pressure on them.

- your employer may assume that you will not want or be eligible for further training or promotions.
- colleagues may react to you differently, focusing on your health status rather your work talents and abilities.

When is the best time to disclose?

If you are not experiencing any work-related difficulties and have no visible symptoms you may wish to consider delaying disclosure in the workplace.

Before you disclose, consider the possible benefits and consequences of making your diagnosis public. You cannot take it back once you have told an employer or work colleague.

If you are a member of a union, get their help.

Before you disclose, you may find it helpful to talk through your decision with a health professional at MS Australia – ACT/NSW/VIC. They can guide you through your options and to appropriate sources of information and legal support.

If you do decide to disclose to your employer, make an appointment at a mutually convenient time. Try to avoid peak work times when your employer may be preoccupied with other pressing matters.

Do I have a legal obligation to disclose my MS to my employer?

No, not unless your symptoms are an occupational health and safety risk to you or others. For example if you have symptoms of optic neuritis and you are a truck driver, you will probably have to tell your employer about your symptoms.

There are a few occupations where there is a statutory duty to tell your employer about any pre-existing health problems. Otherwise, it is up to you whether you choose to tell an employer about your symptoms or that you have MS.

Get professional advice about whether you must or should tell your employer that you have MS.

Do I need to disclose at a job interview?

If your symptoms of MS are visible or impact on your work, you may wish to disclose at the interview and provide information about MS, how it affects you and your work, and what workplace adjustments you need to meet the job requirements. Some employers will require you to disclose anything which impacts on your ability to meet the job requirements. Failing to disclose relevant information may have consequences, such as termination of employment – but not always.

Ultimately, the aim of an interview is to match an individual's abilities with the inherent job requirements and to find the best applicant for the job. In some circumstances, having MS may be irrelevant and you may decide to defer disclosure until after the initial interview, once the employer is already interested in hiring you on the merits of your qualifications and experience.

Can an employer ask me to submit a pre-employment medical assessment which might result in disclosing I have MS?

Generally speaking, yes, if the assessment is genuinely and reasonably designed to assess your physical and/or mental ability to perform the requirements of the position. Of course, you can't be forced to go to a pre-employment medical assessment but it will probably affect your chances of getting the job if you don't.

Where do I stand if I don't disclose and become unwell on the job?

You have the same rights and responsibilities as any person who is unwell at work. This includes the right not to be discriminated against or dismissed because you are unwell, as well as the responsibility not to endanger your own safety or the safety of others. Becoming unwell at work may create a reason (or obligation) to disclose, if only to explain to your employer what is happening.

If you tell your employer that you have MS, having lied about it before you started work, your employer may have the right to terminate your employment – but not always (e.g. if you have a reasonable explanation as to why you didn't tell them, if it was a long time ago or if it was not relevant to being able to do the job).

Do I need to disclose to my employer if I have already disclosed to the driver licensing authority in my state?

Yes, the driver licensing authority in your state or territory requires that you notify them about any medical or neurological conditions which might affect your driving ability. This is entirely separate from any obligation you might have to your employer.

Adjustments in the workplace: What is considered reasonable?

If I am already employed when diagnosed, what responsibilities does my employer have to assist me – such as modifications to the workplace or flexibility of hours?

Under the Fair Work Act employers must take reasonable steps to accommodate the working needs of employees with MS, unless this causes unjustifiable hardship to the business.

Adjustments may include re-negotiating an employee's hours, relocating or modifying an employee's workstation, allowing the employee to take time off work for medical appointments and treatment or, in some circumstances, changing an employee's job duties.

Get specialist advice about your situation.

What is considered 'unjustifiable hardship' in terms of making adjustments for MS?

This depends on a number of factors such as the effect of the symptoms you are experiencing, the nature of your work, the impact of the adjustments on others and the associated costs. Some adjustments might be considered an unjustifiable hardship for a small business but could be accommodated in a larger business.

What can I reasonably expect from my employer if I wish to negotiate reduced hours? Can my employer insist I keep working full-time when I have a doctor's letter saying I should only work part-time?

The answers to these questions depend on the nature of your work and your symptoms, as well as the nature and circumstances of the business. An employer is not obliged to accommodate you if, by doing so, it would cause them unjustifiable hardship. If the inherent (core) requirements of the job genuinely include working full-time hours, then the employer can insist you work full-time. If you cannot comply, the employer may terminate your employment.

However, determining the inherent (core) job requirements as opposed to the way the job has always been done is not always straightforward. Some employers may be willing to try a new approach, particularly if it means keeping a valued employee.

Bear in mind, a 'negotiation' is most likely to be successful if both you and your employer are able to approach it with goodwill, openness and flexibility.

I work full-time now. Can my employer force me to work part-time or casual hours now that I have disclosed I have MS?

This will depend on your contract of employment and any Enterprise Bargaining Agreement (EBA) or award. Generally, unless the employer has a right to do this under your contract, EBA or award, they can't reduce your hours without your permission.

However, in circumstances where the symptoms of MS are interfering with your ability to continue working full-time, your employer might be able to insist that you change your hours if you want to keep working there.

My company is being restructured. What can I do if I suspect my employer will make me redundant knowing that I have MS?

If the redundancy is genuine and you have been fairly selected for retrenchment, then your employer may have to offer you an alternative position or terminate your employment. If no suitable position can be found and your employment is terminated for redundancy, you may be entitled to a redundancy or severance payment. This will depend on the terms of your employment.

If your employer selected you for redundancy unfairly or singled you out because you have MS, you may have a right to claim unfair dismissal or unlawful discrimination. Speak to a lawyer.

I can perform my duties but cannot access the building, which is a rental property. What obligation does the landlord have to make the building accessible?

The obligation of landlords and tenants can overlap as a result of both the legislation and the terms of the lease. Both landlords and tenants (if they control the premises) have an obligation under discrimination law not to discriminate against people with disabilities. Sometimes, but not always, this will include an obligation to make modifications to a building.

Disability discrimination: How am I protected?

Can my employer terminate my employment just because I have MS?

No, this would be unlawful discrimination as well as unlawful termination.

An employer can terminate your employment if you:

- can no longer perform the inherent (core) requirements of your job.
- can only perform the inherent requirements of your job if your employer makes adjustments to accommodate you in a way which would impose unjustifiable hardship.

However, under the Fair Work Act, your employer must take reasonable steps to try to accommodate you in the work place.

If I disclose I have MS, how do I know if I am being unlawfully discriminated against?

There are two types of unlawful discrimination:

- **Direct disability discrimination** is where you receive less favourable treatment because of your disability. Whether treatment is less favourable is determined by examining how a person without a disability is or would be treated in similar circumstances.
- **Indirect disability discrimination** is where practices that might appear to be neutral and

may be intended to be fair have an unequal and unfair effect on people with a disability.

It is not unlawful for an employer to discriminate against you if you can no longer perform the inherent (core) requirements of your job or can only do so if the employer needs to make adjustments to accommodate you in a way which would impose unjustifiable hardship.

Factors that may be relevant in considering whether there is an unjustifiable hardship are unreasonable financial costs to the employer, technical difficulties with implementing the special services or facilities, or if jobs are not reasonably available.

What should I do if I feel I have been discriminated against because I have MS?

Make time to talk to your employer. Speak to a health professional at MS Australia – ACT/NSW/VIC if you feel you need help. If you are a member of a union, seek their assistance.

If the issue cannot be resolved to your satisfaction you can make a complaint to the Human Rights and Equal Opportunity Commission or the appropriate organisation for managing complaints in your state or territory.

It is best to seek professional advice before lodging a formal complaint.

Fitness for work, leave of absence and workers compensation

How long can I take off work due to MS without losing my job?

This will depend on the terms of your employment contract and any Enterprise Bargaining Agreement (EBA) or award which applies to your employment. You might have an entitlement to paid or unpaid leave, or both.

It would be unlawful for your employer to terminate your employment for a temporary absence from work due to illness; however, what is considered 'temporary' may depend on the circumstances.

Can an employer refuse to accept an employee back into the workplace after a period of illness even if the person has a doctor's letter of fitness for work?

Generally, an employer cannot refuse to allow an employee back to work if the employee has been cleared by a doctor as being able to perform all his or her pre-injury or illness duties. However, there may be circumstances in which this refusal is justified, such as if a doctor clears the employee for particular restricted duties and those duties are not available or suitable, or if the position is no longer available.

If your employer refuses you permission to return on the basis suggested by your doctor, try to explore the employer's reasons. For example, the employer may be genuinely concerned about your fitness to return to work. In some instances a doctor's certificate may not adequately address the specific job requirements or the doctor may not have fully understood the nature of duties available at your place of work.

What rights do I have when my employer cites occupational health and safety concerns as reason for why I cannot stay in my usual role e.g. I may injure myself or cause injury to others due to unsteadiness?

The employer may have not only the right but the responsibility to change your role if there are safety issues. You also have a responsibility to protect your safety and the safety of others, which may include changing your role or duties. However, employers should not use this type of argument as a pretext to discriminate against you. You may be able to show that there are no safety issues and resist the change.

What fitness for work assessments can my current employer ask of me? Can my employer make me see the company doctor or undergo other health assessments? Have I a right to refuse?

It will depend on your employment contract, the employer's policies, any legislation which applies to your employment, and the reason for the assessment. For example, a job-related health assessment may be justified and lawful, particularly (but not only) if it is also a requirement for employees in similar jobs.

It may also be lawful for your employer to ask you to see a doctor if your work is being affected by your MS, but you have refused to explain what is happening or are returning to work after an illness-related absence. However, unless there is a statutory obligation on you to go to a doctor, your employer can't force you to see their doctor.

Can I claim for work-related stress resulting in a relapse of MS?

Yes, it can be shown that your employment was a significant contributing factor to your MS-related stress. It is basically a medico-legal question, so speak to your doctor and a lawyer.

I had an accident at work and was subsequently diagnosed with MS. I am claiming for loss of income and medical expenses. Before the accident, I was healthy and had no sickness. Will I be covered under workers compensation?

If your employment was the significant contributing factor to the accident occurring then you will be paid workers compensation in respect of the injury sustained and the incapacity arising from that injury. However, you will not be paid any workers compensation in respect of MS or the incapacity or medical expenses that relate to the condition, if it wasn't work related.

I had an accident at work because I was having a relapse of MS. My supervisor says I am not covered by workers compensation because she had told me I should go home. Is she correct?

No, irrespective of whether or not you were told to go home, if you had an accident at work you are covered for workers compensation, even it was related to your MS symptoms.

Will I be covered by workers compensation if I don't disclose I have MS and have an accident whilst driving or operating machinery?

If you have an accident at work and suffer injuries, you are eligible for workers compensation benefits. However, if you fail to disclose a pre-existing condition, you may be ineligible to receive workers compensation benefits. It depends on the state or territory in which you work.

- **In Victoria, Western Australia, Tasmania and the Australian Capital Territory**, the legislation enables a claim to be declined if the Applicant wilfully and falsely represented at the time of commencing employment that he/she did not suffer from a pre-existing injury or illness. However, it would be up to the workers compensation insurer to prove that your injuries are related to your pre-existing MS.
- **In New South Wales, Queensland, South Australia and the Northern Territory**, the legislation does not contain any provisions specifically about the denial of liability in respect of an Applicant who has failed to disclose any pre-existing injury or illness at the time of commencing employment.

Financial and legal matters

If I undergo a medical assessment for superannuation purposes, can my superannuation provider disclose I have MS to my employer?

Not without your consent. An insurer or superannuation trustee can only disclose sensitive personal information about you (including information about your MS) to your employer, without your consent, if the disclosure is directly related to the primary purpose of the collection of that information. If the disclosure of MS to your employer is not for such a purpose, then the insurer and/or the superannuation trustee must generally obtain your consent before doing so.

The insurer may request you undergo a medical examination as part of your application for obtaining insurance cover or as part of making a claim through your superannuation fund. The reason is most likely to assist the insurer to determine if you are eligible for insurance cover or to assess a disability insurance claim made by you.

Can I apply for salary continuance (also known as income protection) insurance?

Yes, if you are covered for it, for example, through your employer or superannuation fund. Some policies exclude pre-existing conditions but not many. Get legal advice.

Am I covered for a disability lump sum?

Most employment super funds include lump sums for total and permanent disability (TPD). Some workers are also covered for insurance lump sums paid for by their employer.

To be eligible for the TPD lump sum you will usually have to be permanently unfit to do your normal job or any other suitable work (given your education, training or experience) because of your MS symptoms and any other health problems.

You don't have to be unfit for any work or part-time work, only suitable work that you have the skills to do.

If you have reached the point of having to stop work because of your MS symptoms, you may be a candidate. Get legal advice.

If I give up work, will I be able to get a disability pension?

Perhaps, depending on whether you could have continued working, your work capacity and your ability to meet Centrelink eligibility criteria, such as assets and income tests. You should speak to Centrelink or seek professional financial advice regarding this.

Can I access my superannuation if I leave work?

It depends on the terms of the particular superannuation scheme and factors including your age and your level of disability. You will need specialist advice and the first step will be to contact your superannuation fund.

I had to retire because of MS. I don't get my superannuation allowance for six years and we can't manage on my partner's part-time income. I am told by Centrelink that I can't get income support from the government because she works. What can I do?

Your superannuation fund's rules may allow you to access your superannuation early. You might also be eligible for disability insurance benefits from your super fund, either as a lump sum or monthly payments. It is really important to get legal advice about this before claiming your superannuation early.

If I am not a union member, what resources are available to advise me on employment matters?

Some law firms specialise in employment law and may give you free legal advice. Some community legal centres specialise in disability issues. There are also paid legal services you can access. Contact the law society or law institute in your state or territory for more information.

Can legal practitioners take on an employment dispute on a 'no win, no fee' basis? Are they able to charge a percentage of the amount won? Is there a schedule of recommended fees?

Some lawyers may charge on a 'no win, no fee' basis; however, they cannot charge a percentage of the amount won. Make sure you find out what they will charge before you agree.

Can I apply for legal aid and will I have to pay court costs if I lose or win?

Yes, anyone can apply for legal aid but not everyone will qualify and not for every type of claim – the public money available is very limited. In some situations, if you win you will have to reimburse the legal aid provider for their costs – meaning that some of the damages awarded to you will be paid to the provider. If you lose, you may have to pay court expenses.

Where can I get more information about employment matters?

- **MS Connect™ (1800 042 138)** is our telephone information and support service. Our team of MS professionals is available to answer questions, provide you with resources and refer you to a variety of employment and legal support agencies.
- **MS Australia – ACT/NSW/Vic** provides access to a range of online MS publications and information about our programs and services: www.msaustralia.org.au/actnswvic
- **Australian Taxation Office Superannuation Helpline: 13 10 20**
- **Maurice Blackburn Lawyers'** disability help line provides free legal advice for people with MS, their family and friends. Call 1800 196 050.
- **Human Rights and Equal Opportunity Commission (HREOC)** has responsibility for investigating alleged infringements under current legislation. Call 1300 369 711 or visit the website: www.hreoc.gov.au
- **CRS Australia** delivers vocational rehabilitation services for people who have an injury, disability or health condition. Call 1800 624 824 or visit the website: www.crsrehab.gov.au
- **Centrelink** is a government agency that delivers a range of employment and financial services. Call 13 10 21 or visit the website: www.centrelink.gov.au
- **The Association of Competitive Employment (ACE)** is the peak body for open employment services to people with disabilities across Australia: www.acenational.org.au
- **The National Welfare Rights Network (NWRN)** offers free and independent information, advice and representation about social security law and its administration: www.welfarerights.org.au/default.aspx

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For information about MS and MS Australia – ACT/NSW/VIC services:

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