



MULTIPLE SCLEROSIS & EMPLOYMENT: FREQUENTLY ASKED QUESTIONS.

*Seeking the Cure.
Providing the Care.*

DISCLAIMER

*The information presented in this document **does not constitute legal advice, but only general guidance** about issues that might arise. **You should consult a lawyer or union representative about your specific issue**, as each individual circumstance will have a different answer.*

Disclosure

1. Should I disclose MS to my employer and fellow staff members? What might be the implications if I do?

Deciding whether to disclose your diagnosis 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 whom you are telling. There is no single answer or strategy that is right for everyone. Take some time to consider the possible benefits and consequences of making your diagnosis public.

On the positive side, disclosing your condition 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' – eg explaining absences from work; and
- provide an opportunity to ask for adjustments to the workplace that can maintain or even improve your productivity. By demonstrating that (often small) changes can facilitate continued productive employment, your employer's fears, doubts or questions may be diminished.

The potentially negative consequences of disclosure may be equally compelling:

- employers and colleagues may have negative views or inaccurate stereotypes about MS. For example, they may assume that you will be unable to perform your job, thereby forcing them to do more work or causing the business to lose money;
- employers and colleagues may also be concerned that you will become unreliable and frequently need to take time off;
- your employer may assume that you will not want further training or promotions; and
- colleagues may react to you differently, focusing on your health status rather than your talents and abilities.

Be aware that you might have a legal obligation to disclose – see question 3 below.

2. When is the best time to disclose my MS?

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

Before you disclose, it may be worth taking time to consider the possible benefits and consequences of making your diagnosis public. Once you have given out the information, you cannot take it back. Talking with family, friends or your doctor may help you to evaluate how the information will affect your relationship with your employer and colleagues. The MS Society is available to discuss any employment issues with you, guide you through this process and refer you to appropriate resources in your local area. You may also find it helpful to talk through your decision to disclose with a health professional at the MS Society.

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 pre-occupied with other pressing matters.

Be aware that you might have a legal obligation to disclose – see question 3 below.

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

Whether you have a legal obligation to disclose depends on the circumstances.

You might have a legal obligation to disclose at least the symptoms of your condition, if not the name of the condition itself. This obligation may be based on statute law (for example occupational health and safety legislation or workers compensation legislation – see question 7 below) or contract law (for example the terms of your contract of employment). This obligation may arise if your symptoms mean that you are unable to perform the inherent requirements of your job or if your symptoms create a risk to your safety or the safety of others in the course of your work. There may also be other circumstances in which you have an obligation to disclose (for example, if it is a condition of your employment that you hold a driver's licence and you can no longer drive).

It is a good idea to obtain professional advice about whether, in your particular circumstances, you have an obligation to disclose your MS to your employer – because if you do have an obligation but fail to disclose, this may have serious consequences (such as termination of your employment).

4. Do I have to disclose at a job interview?

If your MS is visible or impacts 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 work and if you fail to disclose relevant information there may be serious consequences (including the termination of your employment – see question 7 below on the issue of workers compensation entitlements). You must not falsely answer any interview questions.

However, the aim of an interview is to match up an individual's abilities with the job requirements – that is, find the best applicant for the job. In some circumstances, your MS may be irrelevant. Alternatively, it may be something to disclose after the initial interview, once the employer is already interested in hiring you on the merits of your qualifications and experience.

5. Can an employer ask me to submit to a pre-employment medical assessment which might result in my MS being disclosed?

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.

If you are required to have a pre-employment medical assessment, you might be more likely to decide to disclose at an early stage.

6. 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: including the right not to be discriminated against or dismissed just because you are unwell and the responsibility not to endanger your own safety or that of others.

This situation may create a reason (or obligation) to disclose, if only to explain to your employer what is happening. Again, if you do have an obligation but fail to disclose, this may have serious consequences.

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

This is a complicated question. There are two main issues.

First, whether you will be covered by workers compensation will depend on a number of factors and the ultimate decision will be made by a court or tribunal. The key issue will be whether the employment was the significant contributing factor to the injury occurring.

Secondly, if you fail to disclose a pre-existing condition, this could make you ineligible to receive workers compensation benefits - depending on the State or Territory in which you are employed:

- (a) 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; but
- (b) in New South Wales, Queensland, South Australia and 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.

If this happens to you, you should get specialist advice.

8. Do I need to disclose to my employer if I have already disclosed to the Roads and Traffic Authority (or other State body regulating drivers licences)?

The RTA 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.

9. If I do disclose how do I know that my employer is not unlawfully discriminating against me?

You always need to analyse what is happening to you in order to determine whether you are the victim of unlawful discrimination. Remember that this involves either:

- less favourable treatment because of your disability (**direct disability discrimination**) - whether treatment is less favourable is determined by examining how a person without a disability is or would be treated in similar circumstances; or
- practices that appear to be neutral (and which may even be intended to be fair) but are unreasonable in the circumstances and have an unequal and adverse effect on people with a disability (**indirect disability discrimination**).

It is not unlawful, in some circumstances, for an employer to discriminate against you if you:

- are unable to carry out the inherent requirements of your position because of your disability; or
- would, in order to carry out those requirements, need services or facilities not required by people without a disability and providing these services or facilities would impose an unjustifiable hardship on your employer. Examples of factors that may be relevant in considering whether there is an 'unjustifiable hardship' are costs to the employer and technical difficulties with implementing the special services or facilities.

Adjustments to work and termination of employment

10. I work for a small business. What can I reasonably expect from my employers if I want to negotiate reduced hours? Can my employers force me to keep working full-time when I have given them a doctor's letter saying I should only work part-time?

The answers to these questions depend on the nature of the work you do and the nature and circumstances of the business.

Your employer is not obliged to accommodate you if doing so would cause the employer unjustifiable hardship. If the inherent requirements of the job genuinely include working full-time hours, then the employer can insist on this – and if you can't comply, can insist that your employment terminates. However, it is not always simple to decide what are the 'inherent requirements' (as opposed to the way the job has always been done).

Some employers will be willing to try a new approach, particularly if it means being able to keep a valuable employee. It really will be a 'negotiation' and is most likely to be successful if both you and your employer approach it with goodwill, openness and flexibility.

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

This will depend on your contract of employment and any applicable industrial instrument (such as an award). Generally, unless the employer has a right to do this under your contract or an industrial instrument, they will not be permitted to make this type of change without your permission.

However, in some circumstances, if your MS interferes with your ability to work full-time, then your employer might be able to insist that you change your hours if you want to keep working there.

12. Can I be fired if I am no longer able to work the same hours/duties that I did before my diagnosis?

This depends again on what the inherent requirements of your job are. Your employer can terminate your employment if you:

- can no longer perform those requirements; or
- can only do so if the employer makes adjustments to accommodate you in a way which would impose unjustifiable hardship on them.

These are not simple questions to answer; they depend on all the circumstances of the case.

Even if the employer can terminate your employment, you should be treated fairly in the way this is done and you may have the right to payments (for example in lieu of notice or for accrued but unused leave entitlements).

13. 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 either offer you an alternative position or terminate your employment. If your employment is terminated for redundancy, you may be entitled to a 'redundancy' or 'severance' payment. This depends on factors including the terms of your employment and whether your employment is regulated by an industrial instrument (such as an award or enterprise agreement).

If your employer selected you for redundancy unfairly, then in some circumstances you may have a claim such as for unfair dismissal or unlawful discrimination.

Depending on what you want to achieve, it may be useful to try to talk to your employer before any decisions are made.

Disability Discrimination

14. If I am already employed when diagnosed, what responsibilities does my employer have to assist me - eg modifications to workplace, time flexibility etc?

See questions 10 to 13 regarding adjustments to work and termination of employment. The answer will depend on factors including the nature of your work, the needs of the business and the impact of your MS on your work. You should get specialist advice about your particular circumstances.

15. Can they really terminate my employment just because I have MS?

No. This would be unlawful discrimination as well as unlawful termination.

Your employer can, however, terminate your employment if you can no longer perform the inherent 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 on the employer (see question 9).

16. What is considered 'unjustifiable hardship' on my employer in terms of concessions for my MS?

This depends on all the circumstances, including the effect of your MS, the impact of the adjustments made for you on everyone concerned and cost factors. Some adjustments would be an unjustifiable hardship for a small business but would be an ordinary and expected expenditure or rearrangement for a large one.

17. I can perform my duties but cannot access the building, which is rental property. What obligation do landowners have to make their building accessible?

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

18. What should I do if I feel I have been discriminated against due to my MS?

First, you should try to talk to your employer about the issue. If you feel you lack confidence to raise the issue, get some independent advice and then try to deal with the employer. Find out if your employer has a grievance or complaints procedure and if so, then (as a first step) use that procedure. This may enable the issue to be resolved and you and those around you can get back to working together.

If the issue cannot be resolved within your employer's organisation, you may wish to make a complaint to the Human Rights and Equal Opportunity Commission or the appropriate State/Territory discrimination body.

19. How can I distinguish between an industrial law issue and a discrimination law issue? Is it better to pursue one rather than the other if there seems to be a possible issue in both areas?

There is often an overlap between industrial and discrimination issues. In most cases, if you wish to make a complaint, you will have to choose which avenue you wish to pursue. Factors that might influence your choice could include the time it will take to get a result, the possible outcomes and the cost of bringing the claims.

You should get legal advice from a specialist industrial or discrimination lawyer about making this choice.

Fitness for work, absence from work and workers compensation

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

This depends on factors including the terms of your employment contract and any industrial instrument (for example, an enterprise agreement 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 – but what is ‘temporary’ will also depend on the circumstances.

21. I had an accident at work because I was having an exacerbation/episode. My supervisor said I am not covered by workers compensation because she had already told me I should go home. Is she right?

Whether or not you are covered by workers compensation will depend on whether the employment was the significant contributing factor to the injury occurring. If you had an injury at work because you were having an episode (unrelated to your work), then it is unlikely that you would be covered for workers compensation purposes - whether or not you had been directed to go home. The situation would be the same if you suffered some symptom at work of a disease or other health condition (eg a heart attack) which was not caused by work.

22. I had an accident at work and was subsequently diagnosed with MS. I am claiming for workers compensation (loss of income, medical related and pharmaceutical expenses). Before the accident, I was very healthy and had no sickness. Will I be paid 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. This is because it is not possible to say that your employment or an accident were the sole cause of you developing MS.

23. Can my employer make me see the company doctor or have other health assessments if I have not disclosed my MS? What assessments of fitness for work (both pre and post-employment) can the employer require of me? Do I have the right to refuse? Can the employer demand cognitive, medical or other rehabilitation assessment?

The answers to these questions depend on factors including 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 assessment may be justified and lawful, particularly (but not only) if other employees in similar jobs have the same assessment.

It may also be lawful for your employer to require you to see a doctor if your work is being affected by your MS, but you have refused to explain what is happening or if you are returning to work after an illness-related absence.

24. Can an employer refuse to accept an employee back into the workplace after a period of illness even if he/she has a clearance from the doctor 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 to perform all his or her pre-injury duties. However, there may be circumstances in which this refusal is justified, including if the doctor has cleared the employee for particular restricted duties and those duties are not available or suitable or in some circumstances if the position is no longer available.

If your employer seeks to refuse you permission to return on the basis suggested by your doctor, you should try to explore the employer's reasons. For example, they may be genuinely concerned about your fitness to return and/or it may be that the doctor's certificate you have provided does not adequately deal with particular job-specific issues or the doctor has not understood the types of duties that are available at your place of work.

25. Can I claim for work-related stresses exacerbating MS?

Perhaps - but establishing that the exacerbation really was caused by work is likely to be very difficult. Even if work was a significant contributing factor, you may not be paid workers compensation if your employer's actions were reasonable. Claims of this type are difficult to establish and you should definitely get legal advice about the options.

26. What rights do I have when my employer cites occupational health and safety concerns as a reason that I cannot stay in my usual role – eg I may injure myself or cause an injury to others due to unsteadiness of gait?

The employer may have not only the right but also the responsibility to require a change in your role if there are safety issues. You also have a responsibility to protect your own and others' safety. This 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.

Financial Issues - Social Security, Income Protection Insurance and Superannuation

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

Generally, 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.

In the event that you undergo a medical examination for the purposes of obtaining insurance cover through your superannuation fund, the primary purpose of collection of this information would most likely be to determine whether to provide you with insurance cover or possibly to assess the validity of a disablement insurance claim made by you.

If the disclosure to your employer of your MS is not for such a purpose, then the insurer and/or the superannuation trustee must generally obtain your consent before doing so.

28. Can I apply for salary loss (also known as income protection) insurance?

This may be difficult, depending on your current level of impairment and the rules of the insurance policy, particularly in relation to pre-existing conditions. Get legal/financial advice and help with any claim or appeal.

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

Perhaps. This depends on factors including whether you could have continued working, your work capacity and your ability to meet Centrelink eligibility criteria such as asset and income tests. You should speak to Centrelink and/or get professional financial advice about this.

30. I had to retire because of my MS. I don't get my superannuation allowance for another six years and we can't manage on my wife's part-time income. Centrelink have said I can't get income support from the government because she works. What should I do?

Get professional financial advice as soon as possible. Your superannuation fund's trust rules may allow you to access your superannuation early. You might also consider other ways you might earn money – eg casual work or work for friends.

31. Can I access my superannuation if I leave work?

This depends on the terms of the particular superannuation scheme and factors including your age and your level of disability. You will need to get advice about this. The first step will be to contact your super fund.

Other Legal Questions

32. Is there any difference between an executive on a contract and a wage earner employed under an award in terms of their access to resolution of industrial issues? Are the same legal forums available to both?

Yes, there are some differences. If unfairly dismissed due to having MS:

- the executive will almost certainly not be able to bring an unfair dismissal claim; however, depending on the circumstances, the award employee may be able to do so;
- both the executive and the award employee will probably be able to bring an unlawful termination claim – that is, a claim that they were dismissed for an invalid reason or without giving sufficient notice – or a discrimination claim;
- depending on the circumstances, if they are employed in NSW by certain very limited types of employers, both of them may be able to bring an unfair contract claim;
- the award employee may have access to dispute resolution procedures in an industrial tribunal such as the Australian Industrial Relations Commission;
- although unlikely, if the award employee is a union member, he or she may (depending on the circumstances) also become the subject of an industrial dispute between the union and the employer

Both the executive and the award employee will have access to workers compensation, if relevant.

An independent contractor is in a different situation from any type of employee. An independent contractor will not be able to claim unfair or unlawful dismissal, but might be able to claim discrimination, (in NSW) unfair contract or (sometimes) workers compensation.

A contractor will be able to make a complaint if there has been a breach of privacy standards; employees may not, depending on where they live.

All these people have access to the general courts to claim a breach of contract, but this is a difficult type of claim to pursue. Breach of contract claims are more expensive and complicated than the other claims described above, which are claims heard by specialist industrial tribunals.

The table summarises the different options generally available – but what a particular person is able to do will always depend on the particular circumstances of his/her case.

	Executive	Independent Contractor	Award Employee
Unfair dismissal	x	x	Perhaps
Unlawful termination	✓	x	✓
Discrimination	✓	✓	✓
Dispute resolution in industrial tribunal	x	x	Perhaps
Industrial dispute	x	x	✓
Unfair contract	Perhaps	Perhaps	Perhaps
Workers compensation	✓	Perhaps	✓
Privacy	Perhaps	✓	Perhaps
Breach of contract	✓	✓	✓

33. If I'm not a union member, what resources are available to advise me on these issues?

Possible resources include free legal services (some commercial firms have a pro bono department that might be able to help and some community legal centres specialise in disability issues) as well as the paid legal services. You should contact the Law Society or Law Institute in your State for more information.

34. Are there any standards for legal practitioners in terms of how they charge for representation in employment matters - for example, are they allowed to take on disputes on a 'no win, no fee' basis? Can they charge a percentage of the amount won? Are there recommended fees for different actions as there are for family law matters?

Lawyers can charge on a 'no win, no fee' basis, but cannot charge a percentage of the amount won. There are no 'recommended' fees for discrimination or unfair dismissal litigation.

35. 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 circumstances, if you win you will have to reimburse the legal aid provider for their costs. This might mean that some of the damages awarded to you will be paid to the provider. If you lose, you may have to pay court costs.

For more information on multiple sclerosis, resources available and upcoming programs please contact the MS Information Line on 1800 287 367

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