

*A Guide to **Mental Health** in the Workplace*

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One in five (20%) Australians aged 16-85 experience a mental illness in any year. The most common mental illnesses are depression, anxiety, bi-polar and substance use disorder.

With such a large portion of the population being affected by mental health issues, it's becoming increasingly important for employers and workplaces to recognise and deal with the impacts of poor mental health on their employees.

According to the 2014 State of Workplace Mental Health in Australia report by Beyond Blue, one in five Australian employees reported that they have taken time off from work due to feeling mentally unwell in the past 12 months.

Furthermore, it is estimated that untreated mental health conditions cost Australian workplaces approximately \$10.9 billion per year. This comprises \$4.7 billion in absenteeism, \$6.1 billion in presenteeism and \$146 million in compensation claims.

These statistics highlight the significant and increasing numbers of employees with mental illness and the impact on workplaces.

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A comprehensive understanding of mental illness as well as proactive processes for dealing with mental health in the workplace will help employers:

- Create a work environment where all employees feel safe, respected and protected
- Reduce absenteeism and increase employee happiness, productivity and engagement
- Meet employer obligations and due diligence
- Avoid potential adverse action or unfair dismissal claims

Topics covered in this eBook:

- Signs of Mental Health Issues to Look out for
- Mental Health Education in the Workplace
- Psychological Safety
- Legal Obligations for Dealing with Mental Health Issues in the Workplace
- Employee Disclosure Regarding Mental Health
- Case Law Example – Employee Disclosure
- Mental Health and Work Performance
- Case Law Examples – Unfair Dismissal and Adverse Action
- Key Takeaways

SIGNS OF MENTAL HEALTH ISSUES TO LOOK OUT FOR

It's important for employers and managers to be able to identify the initial signs and symptoms of underlying mental health issues amongst their employees.

Such signs can include:

- Poor productivity
- Significant mood changes
- Appearing tired, fatigued or agitated
- Noticeable decrease in personal care/grooming
- Withdrawal, avoiding colleagues
- Emotional responses to feedback
- Displaying negative thought patterns or bizarre thinking
- Evidence of heightened use of alcohol, prescription drugs or illicit drugs

In addition to recognising the signs of mental health issues, workplaces need to have initiatives in place to address these issues.

MENTAL HEALTH EDUCATION IN THE WORKPLACE

Educating employees, providing resources and assigning shared responsibilities around mental health helps to remove the stigma attached to mental health.

Employees who feel that mental health is understood and supported by management are more likely to come forward. This allows for early intervention, reduced absenteeism and increased productivity and engagement.

Examples of how to promote mental health awareness in the workplace:

- Running information sessions on mental health for employees and training sessions for managers
- Running events e.g. R U OK Day
- Formalising a mental health policy through HR

Education and awareness about mental health issues must come from the top down - if management understands and respects the importance of addressing mental health, so will employees.

TIPS FOR REACHING OUT TO AN EMPLOYEE

If you're concerned that an employee is struggling with mental health issues, the best place to start is by having an "R U OK?" conversation with the employee.

This follows 4 basic steps:

- Ask R U OK?
> "You don't seem to be your old self? Is there anything bothering you?"
- Listen without judgment
> "You're not alone."
- Encourage action
> "How can we help resolve the situation?"
- Check in
> "Let's catch up soon to see how you're going."

It's important to be non-confrontational in your approach. Be relaxed, open and friendly. Pick a place to have the conversation which is private and informal at a time that suits the employee.

Your employee may not want to open up to you. Don't take it personally. Instead, suggest they talk to someone they trust, like a family member or friend.

[Click here to learn more about starting a R U OK? conversation in the workplace](#)

PSYCHOLOGICAL SAFETY

The concept of **“psychological safety”** was first identified by Amy Edmondson, professor at Harvard Business School. She puts forth that employees who feel that they are able to work in a trusting workplace perform better and also have improved mental health.

Employers and managers need to work to develop a culture which encourages giving candid feedback, openly admitting mistakes and learning from each other.

Team leaders can build psychological safety in the workplace by:

Asking and encouraging reflective questions

- > Am I helping to create an environment where I feel safe?
- > Am I making myself available to my team to create that environment?

Establishing accountability

- > Does everyone in the team know how to recognise when they are on or off track and what to do when things aren't going according to plan

Practicing checking-in

- > Start every meeting or team arrangement by checking in to see how everyone is feeling. Go around the table ensuring everyone has the opportunity to speak, not just the loudest members or the extroverts.

Drawing up a team agreement

- > This is a social contract establishing how your team intends to communicate and behave. E.g. 'We're inclusive, we're open and direct, we speak to each other with respect.'

Encouraging experimentation

- > Think about mini experiments. E.g. try reporting to a stakeholder in a better or more engaging way by asking how we could provide this information differently.

Admitting fallibility

- > You shouldn't be seen as superhuman. You may be a role model but you're still human who sometimes makes mistakes. Admitting shortcomings makes it easier for employees to feel free to be their whole selves.

When employees can speak openly and directly in a respectful way, without fear of being judged or diminished for being who they are – that's psychological safety. Investing time and resources into developing psychological safety in your workplace will have significantly positive impacts on the mental wellbeing of employees.

LEGAL OBLIGATIONS FOR DEALING WITH MENTAL HEALTH ISSUES IN THE WORKPLACE

Employers do have a legal responsibility, as far as is reasonably practical, for the health and safety of their employees. This includes mental health and safety.

Workplaces must exercise due diligence in meeting their requirements.

What constitutes due diligence?

- Education of psychological risks
- Understanding operations and identifying hazards (work design, behaviour)
- Implementation of resources to minimise mental health risks
- Timely response to allegations
- Formalised processes to meet obligations i.e. consultation or committee

If mental health and safety due diligence has not been discussed at Board level, then employer obligations are not being met.

Other policies and procedures, which are relevant to developing a safe and healthy workplace, include policies that balance identification of risk and supporting workers in the following areas:

- Performance management
- Grievances
- Occupational aggression and violence
- Drugs and alcohol in the workplace
- Hazard identification and reporting systems
- Emergency incidents, such as how to deal with extreme events (e.g. armed robbery, death or serious accident in the workplace) including measures to support the mental health of workers.

HAZARDS IN THE WORKPLACE WHICH CAN CONTRIBUTE TO MENTAL HEALTH ISSUES CAN INCLUDE:

- > Too much/too little work
- > Poor change management
- > Pressure to perform
- > Poor communication
- > Poor relationships
- > Low role clarity
- > Environmental e.g. poor lighting, dirty surroundings
- > Bullying and harassment which can take the form of:
 - > Abusive behaviour or language
 - > Unfair or excessive criticism
 - > Purposely ignoring the worker's point of view
 - > Tactless remarks or actions which put down the person
 - > Malicious rumours.



EFFECTIVE CONTROL MEASURES TO ELIMINATE/DECREASE MENTAL HEALTH HAZARDS:

- > Evaluating work design and demands, putting controls in place to reduce stress, improve the working environment and increase work satisfaction
- > Proactive plans for change management
- > Ensuring there is no bullying or harassment in the workplace
- > Ensuring there are clear reporting lines/structure for dealing with mental health issues
- > Appointing a mental health first aider
- > Offering flexible working arrangements
- > Developing mentoring and peer support systems
- > Providing access to counselling services and/or specialist support group
- > Ensuring safe and healthy work conditions



IMPLEMENTING POLICIES AND PROCEDURES

It is important to have an effective foundation of policies and procedures to outline your commitment to providing a safe and healthy workplace.

Key policies to develop and review include:

- An overarching policy with a commitment to providing a safe and healthy workplace
- A policy which addresses managing mental illness issues in the workplace and deals with matters such as consultation, confidentiality and training
- Broad equity and non-discrimination policies, including disability and mental health
- a policy related to harassment and bullying (or include this in an OHS or equity policy)
- A policy to enable feedback
- Policies and procedures for providing reasonable adjustments so that requests are dealt with promptly, fairly and appropriately.



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MAKING REASONABLE ADJUSTMENTS

Employers are obligated to make reasonable adjustments to an employees' role or working conditions if they are experiencing mental health issues.

Marketing reasonable adjustments can involve:

- Considering the inherent requirements for the role and adjusting if at all possible or appropriate
- Considering the employees' mental fitness for the task
- Considering being open to a different way of doing the role i.e. flexible hours, reduced workload, gradual return, change of location etc.
- More breaks

Reasonable adjustment does not mean:

- Changing the inherent requirements of the role if not possible or appropriate
- Providing permanent alternative duties
- Adjustments which would incur unjustifiable hardship for the employer



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EMPLOYEE DISCLOSURE REGARDING MENTAL HEALTH

Current employees:

Current employees are only required to disclose any mental health issues to their employer if their mental health poses a health or safety risk to themselves or anyone else.

Employers can request an independent medical practitioner examination only when it is expressly required:

- By specific legislation that applies to the industry
- A written employment contract (with a consent form to address any Privacy Act barriers)
- Applicable enterprise agreement
- Policy or procedure implemented by the employer

The employer can direct an employee to attend an independent medical examination if it is reasonable and lawful; this will depend on the circumstances.

For example: if an employee is behaving in a manner that causes the employer to hold a reasonable belief that they may pose a health and safety risk to themselves or others in the workplace, it is more likely that it will be lawful and reasonable to direct them to attend a medical examination and provide medical evidence that they are fit to work.

The direction must relate to fitness for work - meeting the inherent requirements of the role.

Prospective employees:

Prospective employees can be required to disclose any mental health issues, provided the pre-conditions, such as a medical examination, do not have the effect of discrimination against a protected attribute.

Prospective employees can also be required to disclose information about an existing condition that may be aggravated by the nature of employment.

If the prospective employee fails to disclose their mental health issues, they may not be eligible for any claims down the track.

However, if a pre-existing condition is identified, the employer must not act in a discriminatory way. Employers have a legal obligation to consider reasonable adjustments to accommodate the prospective employees' mental health.

CASE LAW EXAMPLE – EMPLOYEE DISCLOSURE

GREEN V DEPARTMENT OF FAMILY AND COMMUNITY SERVICE

- > Employee was diagnosed with bi-polar disorder in 2000.
- > In 2010 she accepted a role with Ageing, Disability and Home Care (ADHC) as a resident support worker.
- > The role required her to work independently and unsupervised.
- > As part of the employment process she was required to fill a pre-placement health declaration where she disclosed her condition stating it was “managed” along with a certificate from her doctor stating she was fit for the role.
- > Employee was then required by ADHC to undergo a pre-employment medical assessment.
- > The independent medical practitioner stated that while she was fit for the role, she would require considerable supervision for the first 6 to 12 months as least.
- > ADHC withdrew the offer for employment.
- > The employee made a claim of discrimination based on her disability by ADHC both withdrawing the offer and requiring her to undergo an independent medical examination.
- > It was concluded that ADHC did not discriminate as they had a right to send Ms Green for the examination to ensure all their workers could perform their duties safely without risk to others.
- > Furthermore, the requirement for considerable supervision meant she could not perform the inherent requirements of the job and it would cause unjustifiable financial hardship on ADHC.



MENTAL HEALTH AND WORK PERFORMANCE

Employers need to be mindful of dismissing an employee due to poor work performance if there is an underlying mental health issue.

Dismissing an employee on a Performance Improvement Plan (PIP) whilst they are experiencing an underlying mental health issue may give rise to an adverse action or unfair dismissal claim.

IMPORTANT INFORMATION

If an employee is on a PIP and takes extended leave due to a mental health issue, ensure that the PIP is paused whilst they are on leave.

Also, do not put an employee on a PIP as a result of them taking an extended leave of absence due to mental health issues.



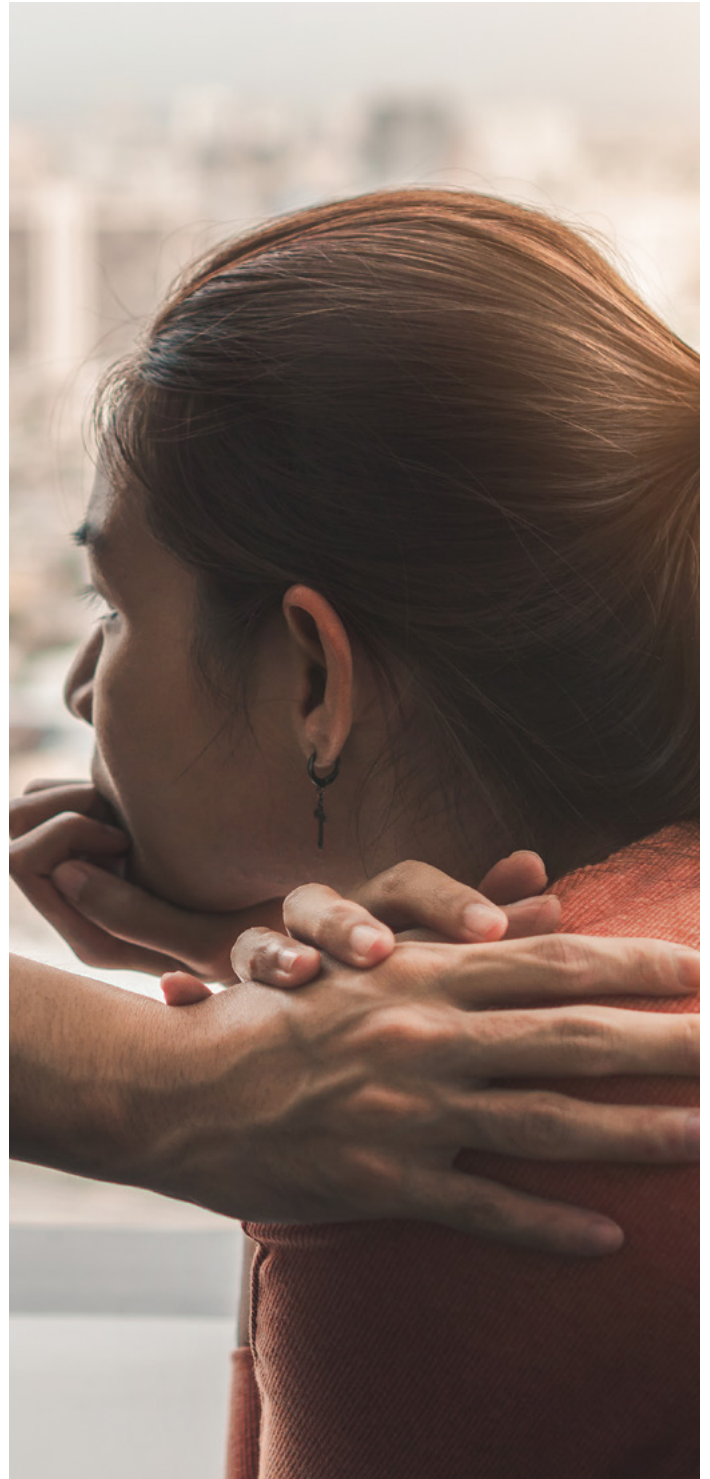
CASE LAW EXAMPLE – UNFAIR DISMISSAL AND ADVERSE ACTION

UNFAIR DISMISSAL - M BURKE VS SUNCORP INSURANCE

- > Employee had received a warning for underperformance and was placed on a PIP in June 2014.
- > Employee was later formally diagnosed with depression.
- > Employee did not directly raise his mental health as an explanation for unsatisfactory work performance until at a performance management meeting at which he was dismissed in August 2014.
- > The Fair Work Commission found that termination in this case was for a valid reason but otherwise unfair as the employer failed to consider the health issues which should have been reasonably obvious and take into consideration whether those issues impacted on the employees' work performance.
- > The employees' mental health issues were deemed to be reasonably obvious as:
 - > Employee had reduced hours of work to assist work life balance
 - > Employee had made various comments in the workplace about the deterioration of his mental health
 - > Employee had a high level of absenteeism and extended absences from work

The ruling highlights the importance of mental health issues in the workplace. In this instance, Suncorp had followed a rigorous disciplinary process. However, failing to investigate if there were any critical health issues that could have impacted the employees' ability to work was enough to make his termination unfair.

The Fair Work Commission ruled his dismissal to be unfair and he was awarded \$8,000 in damages.



CASE LAW EXAMPLE – UNFAIR DISMISSAL AND ADVERSE ACTION

UNFAIR DISMISSAL - VERNHAM VS JAYCO CORPORATION PTY LTD

- > Employee made a worker's compensation claim for psychological injury.
- > Claim was denied by insurer.
- > In response, the employee sent emails to the insurer threatening harm against the employer and other employees.
- > The insurer notified the employer.
- > The employee was summarily dismissed for serious misconduct. He then filed a claim for unfair dismissal.
- > The Fair Work Commission held that the dismissal was harsh for the following reasons:
 - > The causal link between mental illness and the employees' actions were not taken into account by the employer
 - > There was a lack of procedural fairness for the employee
 - > Period of time available when enquiries could have been made
 - > The employees' interactions should have given rise to a requirement to enquire about their mental health
 - > Reliance on an anonymous caller to corroborate misconduct

The Fair Work Commission held the employee was unfairly dismissed because he was not given the opportunity to explain his misconduct, finding there was a causal link between the time he sent the emails and his mental state.

Nevertheless, reinstatement was deemed inappropriate in the circumstances. The employer was ordered to pay \$42,600 in compensation, which was reduced by 40% to reflect the employee's serious misconduct.



CASE LAW EXAMPLE – UNFAIR DISMISSAL AND ADVERSE ACTION

ADVERSE ACTION - KUBAT VS NORTHERN HEALTH

- > Employee was an interpreter at Northern Health and diagnosed with depression.
- > Northern Health required a fitness for work assessment.
- > Medical evidence relied upon by employer indicated that the employee could not be exposed to stressful situations.
- > Employer advised the employee that they needed her to work at least one full day per week. Her doctor stated she could only do one half day per week.
- > Northern Health terminated the employee on the basis that the employee was unable to perform the inherent requirements as hospital interpreters are often exposed to deal with aggressive clients and she could not work a full day per week.
- > The Federal Circuit Court found that the employee failed to prove her termination constituted adverse action because of a mental disability. In this case, the medical evidence indicated that the employee needed a stress free environment and as this could not be guaranteed in the job role offered by Northern Health.



WHAT IF AN EMPLOYER IS NOT AWARE OF MENTAL ILLNESS DURING PERFORMANCE MANAGEMENT?

Unfair dismissal may be considered to be unfair if signs of mental illness were reasonably noticeable and no formal enquires were made into the health of the employee.

An adverse action claim may not be likely to be successful if the mental illness meant that the employee could not fulfil the inherent requirements of the job and reasonable adjustments could not be made.

WHEN IS IT APPROPRIATE TO CONSIDER TERMINATION?

Termination can only be made if, after making proper enquires, the employee is found to not be able to meet the inherent requirements of the role.

KEY TAKEAWAYS

Mental health is an ongoing and prevalent health concern within Australia and this is being reflected in our workplaces.

Employers have the power, and the responsibility, to help employees whose lives may be affected by a mental health condition in the following ways:

- Recognising the signs of mental health issues
- Implementing mental health awareness and training initiatives to remove stigma
- Initiating early intervention by reaching out
- Implementing frameworks and controls to support workers and managers
- Implementing an Employee Assistance Program (EAP), which provides confidential and free short-term counselling/psychological services to employees. The employer can direct an employee to attend an independent medical examination if it is reasonable and lawful; this will depend on the circumstances.

Employers also need to be very aware of their legal obligations in managing employees who are displaying behaviours associated with mental illness as well as the implications of performance management or dismissal.

With the right frameworks in place and attitudes in place, employers will be better equipped to deal with mental health issues early for the ultimate health and benefit of workers and the company.

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If you need some guidance on how to create a mentally healthy workplace and/or manage mental health issues in your workplace, talk to the team at Harrisons.

With our flexible HR Consulting and Outsourcing services, we are able to provide expert advice and assistance on a short or long term basis.

Simply click [here](#) to request your obligation-free phone consult today.

Or give us a call on **1300 001 447**

We'll lend an expert ear to your concerns and discuss some suggested steps and strategies for improving mental health outcomes for your employees and your workplace as a whole.

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We have provided expert HR advice and support to hundreds of businesses saving them time and money by developing and implementing systems that help better manage and motivate employees.

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