



Health Legal Report

August 2004

The Health Legal Report is published every 3 months and is edited by Suzie Linden, Senior Consultant.

At Health Legal, we are keen to ensure that we address the specific needs of the health Sector.

We welcome your feedback and suggestions regarding particular issues and topics that you would like canvassed in future issues.

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Welcome to the August 2004 issue of the Health Legal Report. In this issue we discuss a couple of recent court cases that have clarified some of the legal issues arising from employees working at home, focusing specifically on occupational health and safety and equal opportunity requirements. We also include a new section highlighting recent overseas health law developments. Finally, we introduce you to Kellie Dell'Oro and Candice Clay, the latest members of the Health Legal team.

Employees Working from Home - the Equal Opportunity and OH & S Realities by David Ruschena, Solicitor

Many employers will at some stage receive a request from an employee that the employee be allowed to work from home for some or all of their working hours. Unfortunately, many employers and employees are not aware of the full extent of their rights and responsibilities in relation to this area. Two recent court cases have helped to clarify these issues, (which are the same for all employers throughout Australia).

Can the inherent requirements of the job be performed at home?

When an employer receives such a request, the first thing to do is to assess whether it is appropriate that the employee's duties be done from home at all. Obvious examples include those jobs that require special equipment, or special procedures, that cannot be moved to or performed at home. However, it may be legitimate to consider whether some office duties also preclude the employee from working anywhere other than the employer's offices.

One matter of which employers will be aware is the possibility of a complaint alleging discrimination. If a work from home request is refused, the employee might allege indirect discrimination, which occurs if:

1. a person imposes a condition that someone cannot comply with (i.e. that the job be performed at the office, rather than at home)
2. the reason why the person cannot comply with the condition is because of the attribute that forms the claimed basis of discrimination (usually marital or parental status)



3. a higher proportion of people without that attribute, or with a different attribute, do or can comply with the condition; and
4. the condition is not reasonable.

The important issue for an employer to consider is whether the condition is reasonable. This depends on all the relevant circumstances, including:

- the consequences of failing to comply with the requirement, condition or practice;
- the cost of alternative requirements, conditions or practices;
- the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.

Essentially, the condition must have a logical and understandable basis that is appropriate to the inherent requirements of the employee's position. The basis need not be one of absolute necessity, but must be more than mere convenience.

The recent Victorian Supreme Court decision in *Schou v State of Victoria* held that, to determine whether it is reasonable to require the employee to work from home, the employer should examine the job that the employee does and reasons why the employee wishes to work from home, and determine whether the job can be performed equally well by an employee working from home. If working from home is not equally well suited to the requirements of the job, refusing to allow the employee to work from home does not constitute discrimination.

It is likely to be necessary to negotiate with the employee about how the job would be performed from home before this question can be answered conclusively. It may be helpful to look at the following issues:

- Does the job include a requirement that the employee supervises other staff members?
- What is the effect on the employer of an employee's lack of immediate availability? Will it put undue pressure on the other employees?
- To what degree is the office's output (or the part of output with which the employee deals) affected by the employee finishing their part of the job?

(i.e. if the employee's equipment fails, or the employee works other than normal office hours, will production be impaired?)

- Are there issues with the employee holding secure information?

Is the home office a suitable place for employment?

Employers should be aware that, under Occupational Health and Safety legislation, if they agree to allow an employee to work from home, they become responsible for the places *in the employee's home* where the employee moves in the course of performing the job. This will include, for example, the bathroom and kitchen. Essentially, the employer should consider these areas as simply another workplace where is conducts activities. If an employee sustains an injury in the course of his or her employment, even at home, the employer will be liable.

As such, the employer is responsible for ensuring that the place of employment is as safe as practicable. In terms of the actual room itself, there needs to be appropriate exits, lighting and wiring. Additionally, the employer must provide all necessary equipment, smoke detectors and first aid kits. The equipment will remain the employer's property, and may be removed upon completion of employment.

It will therefore be necessary to have the employee's proposed workplace assessed to ensure that it can be made suitable for employment. Appropriate costing of the provision of suitable equipment (including wiring, lighting etc) should be undertaken. The employer should then make a determination whether it is practical to make the home office compliant with OH&S legislation. If a suitable compromise (that does not involve the employee making do with sub-standard facilities) cannot be reached, the employer should not consent to the employee working from home.

As noted above, the employer may face a threat of indirect discrimination. However, the High Court has recently indicated in *Purvis v New South Wales* that determination of disability discrimination allegations requires analysis of all the conditions relevant to the claimed disability. For the purposes of this discussion, this means that, although the refusal to allow a person to work from home might ordinarily constitute discrimination, the particular fact that the person's proposed place of work could not practicably be made safe would negate the claim of discrimination.



Can agreements for performance and monitoring of the work be agreed?

Lastly, the employer should reach agreement (preferably in writing) with the employee regarding the times when the employee will be working, the means of communication, key performance indicators, and the appropriate means of giving feedback. The employer retains responsibility for the employee and needs to be able to monitor the employee's health, general capacity to cope with the altered conditions and overall performance, as well as to give feedback on an ongoing basis.

Recent Overseas Developments

Patient Safety

On 22 July 2004, the United States Senate approved legislation intended to improve patient safety by promoting medical error reporting. The "Patient Safety and Quality Improvement Act" would encourage voluntary error reporting by protecting patient safety data from disclosure so that healthcare providers could report medical errors without fear of being sued. The Senate Committee on Health, Education, Labour and Pensions unanimously approved S. 720 last year, while the House passed a similar bill in March 2003 (H.R. 663). The House and Senate versions must now be reconciled in conference. The legislation was prompted by a 1999 Institute of Medical Report that found as many as 98,000 people die each year as a result of preventable medical errors.

For more information on the patient medical bills, go to <http://thomas.loc.gov/> and search on S. 720 and H.R. 663

Health Information Technology Initiative – Electronic Health Records

On 21 July 2004, the United States Department of Health and Human Services (DHHS) Secretary released the report "Decade of Health Information Technology: Delivering Consumer-centric and Information-Rich Health Care," which outlines a ten-year plan for implementing the adoption of electronic health records for all Americans. The report cites four major goals in the initiative: (1) bringing information tools to clinical practice; (2) building a healthcare information infrastructure; (3) using health information technology to encourage people to be involved in their healthcare decisions; and (4) expanding public health monitoring, quality of care measurement, and bringing research





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advances more quickly into medical practice. The new initiative is designed to transform the delivery of healthcare by building a health information infrastructure that will include electronic health records for all Americans and a nationwide network to link health records.

To read DHHS' press release and the report, go to

<http://www.dhhs.gov/news/press/2004pres/20040721a.html>

To read DHHS' fact sheet about the report, go to

<http://www.dhhs.gov/news/press/2004pres/20040721.html>

New additions to Health Legal

We are pleased to announce the appointment of Kellie Dell'Oro as a Principal of Health Legal. Kellie will soon start with us and is a litigation expert who will be responsible for our personal injury, professional disciplinary and general litigation services. We will provide our clients with more information about Kellie's expertise and experience shortly after her commencement with us.

We also welcome Candice Clay to the Health Legal team as a Junior Legal Secretary.

Who is Health Legal?

Health Legal was established as a result of the Victorian health sector indicating it wanted a quality and competitively priced legal service that understood their environment and was able to focus exclusively on their unique needs.

Health Legal is able to meet the health sector's daily legal needs. The team provides contracting and medico-legal advisory services. We can be contacted by telephoning (03) 9861 4001. Our website is www.healthlegal.com.au

Your personal details

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At Health Legal we have developed a professional training program, designed to meet the needs of the Victorian Health Sector. The program for the second half of 2004 is now available.

Please contact Suzie Linden on (03) 9861 4029 or email: suzie.linden@healthlegal.com.au for further information

