



Weighing The Risks Of Not Hiring Obese Applicants

Insights

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While most supervisors intuitively recognize and grasp some fundamentals of non-discrimination laws, other questions are becoming increasingly complicated, even for seasoned human resources professionals. Setting aside the complexity of issues like "admissible evidence" or "disparate impact," it's easy to understand that employment decisions should not and cannot be based upon factors such as race, national origin, gender, age, pregnancy, or disability. Federal and state laws make this abundantly clear. On the other hand, emerging issues, some of which are arguably more related to lifestyle choices than immutable characteristics, continue to raise complicated questions.

"You're Too Heavy"

For example, a Texas hospital's policy disqualifying applicants for being too overweight presents such thorny issues. In deciding that it would not hire applicants with a body mass index (BMI) of 35 or higher, Citizens Medical Center (CMC) in Victoria asserted its rights to establish appearance standards for its employees. Thus, a person who stands 5-foot-10 and weighs 245 pounds would have a BMI of about 35 and be ineligible to work at the hospital.

No federal or Texas law prohibits discrimination on the basis of weight – only one state and a few cities in this country have adopted such laws. However, the EEOC has filed lawsuits on behalf of morbidly obese employees whom it contends were disabled and thus entitled to protection under the Americans with Disabilities Act (ADA).

Not far away, in Sealy, Texas, the EEOC filed suit on behalf of a morbidly obese employee allegedly terminated because of his weight. This was not the first time for the EEOC to take up this issue. It remains to be seen whether it will weigh in on CMC's policy, but such questions seem certain to spark more litigation.

Other Topics Also Lead To Controversy

Obesity is not the only issue generating controversy in the area of hiring policies. Prohibitions related to off-duty, off-premises use of tobacco can also be complicated. In some states, it is illegal to discriminate against an employee because of such activity. There is no such law in Texas, however, so Baylor Health System announced a blanket policy not to hire employees who use tobacco products. Many other employers have adopted such policies.

While questions regarding tobacco use appear to be more straightforward for employers, the answers to questions concerning other lifestyle or related issues are not. For example, an employee's transgendered status, or questions regarding an applicant's criminal background, can present not just practical, but legal dilemmas. Although neither category is expressly protected by law, the EEOC recently made clear that it considers employment discrimination based upon gender identity to be a violation of Title VII, and recently issued new guidelines allowing only very limited consideration of an applicant's history of criminal convictions.

The Commission even went so far as to opine that state laws *requiring* the use of criminal background checks may not save an employer from being found in violation of federal law. In each of these situations, the required analysis is very fact-specific and an error could lead to an inadvertent violation of the law.

More On Obesity

CMC's position regarding obese applicants illustrates the complexity of adopting and administering policies in these areas. Even though not expressly protected by law, morbid obesity may be protected if it rises to the level of a disability under the ADA or if it is the result of an underlying disability. If a condition significantly limits a person in the performance of one or more major life activities, it can trigger ADA coverage.

In such a case, regardless of what the employer's policy says, the employee or applicant would likely be entitled to a reasonable accommodation, if that accommodation would enable the person to perform the essential functions of the job in question. Because the ADA requires a fact-specific, individualized analysis of accommodation requests, blanket policies are inherently risky. Those involved in the analysis must proceed and document their evaluation appropriately.

Staying Safe

That means a blanket policy barring all morbidly obese applicants from consideration could easily violate the law with respect to at least some jobs. For example, even though no accommodation might be available to enable an obese maintenance worker to perform all the essential functions of a job, reasonable accommodations may permit a telephone or computer operator to do so. Failure to consider this and offer such accommodation requested by an eligible employee or applicant would violate the ADA.

The bottom line is that evolving lifestyle and similar issues continue to pose tricky questions for employers trying to attract and retain a qualified workforce while complying with the law. Traps and risks are not always apparent, so it's worthwhile to think through such policies carefully and consult legal counsel where the result may disqualify applicants or employees from jobs. Failure to take such precautions could prove costly.

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