



Current Trends In Combating Weight Discrimination In The Workplace

Insights

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Employers everywhere should be well-versed in the main federal civil rights laws, offering protection to your employees and applicants from workplace discrimination based on age, disability, sex, gender, religion, race, and national origin. However, these statutes are not all-inclusive. There are a few traits and attributes of the human race that are not expressly included, including the weight of an employee or applicant. However, things may be changing when it comes to the way that the law protects individuals based on their size. You should pay particular attention to this evolving state of the law, as it may soon (or may already) require you to change your policies and practices.

Current Legal Landscape

Currently, there are no federal laws protecting an individual from weight-based workplace discrimination. Throughout the entire country, in fact, only one state has a law protecting potential employees from bias based on weight. Michigan enacted the Elliott-Larsen Civil Rights Act in 1976, which prohibits all employers in the state, from large warehouse operations to locally owned coffee shops, from committing discrimination based on weight. It prohibits employers from refusing to hire, discharging, discriminating in compensation, or limiting or classifying an individual in a way that deprives them an employment opportunity because of this characteristic.

However, a handful of local municipalities and at least one court interpreting state disability law have been showing trends towards expanding the law to cover this area. This is likely in response to widespread national support from employees to include weight as a protected characteristic.

On a local level, several areas have enacted laws covering weight. For example, Binghamton, New York updated its municipal code to regarding discrimination to include “weight or height” as protected categories. Madison, Wisconsin also updated its municipal code regarding discrimination to include “physical appearance” as a protected category. In California, San Francisco’s Human Rights Commission added “height and weight” to its municipal code to ensure that the city’s programs, services, and facilities are accessible. Also in California, Santa Cruz updated its municipal code regarding discrimination to include “physical characteristics” as a protected category. Urbana, Illinois has also updated its municipal code to include “personal appearance, weight or height” as categories protected from discrimination. In our nation’s capital, Washington, D.C.’s Human Rights Law now includes “personal appearance” as a protected category.

On a state level, the Washington State Supreme Court recently held that the state's definition of disability in the Washington State Law Against Discrimination included individuals with obesity, thereby adding obesity as a protected characteristic in the state. Also, lawmakers in Massachusetts have once again introduced a bill that would make discrimination on the basis of weight unlawful (this is the second time this bill has been introduced).

Is Weight Covered Under Federal Disability Law?

You may be thinking that even though there is no federal law that explicitly protects employees from discrimination based on weight, wouldn't obesity be considered a medical condition that is considered a disability under the Americans with Disabilities Act (ADA)? Four federal appellate courts and at least one trial court have addressed the issue.

Circuit courts in the 2nd (covering cases arising out of New York, Connecticut, and Vermont), 6th (Michigan, Kentucky, Ohio, and Tennessee), Seventh (Illinois, Indiana, and Wisconsin), and Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) Circuits have addressed the issue and all four have held that even severe obesity – which has been defined as body weight more than twice the normal levels – is not a standalone disability unless the individual has an underlying physiological condition (such as Type 2 diabetes, hypertension, or a thyroid disorder).

Each court considered the “natural reading” of what appears to be the very clear language contained in the Equal Employment Opportunity Commission's (EEOC's) interpretive guidance on the subject. When discussing what is considered an “impairment” under the ADA, the guidance states in relevant part:

The definition of the term “impairment” **does not include physical characteristics such as** eye color, hair color, left-handedness, or height, **weight**, or muscle tone that are within “normal” range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease.

However, in spite of the “natural reading” of the EEOC's interpretive guidance, the agency has taken the position in court that obesity in and of itself is an impairment and an employee is not required to show that there is an underlying physiological condition that caused the obesity. Currently, only one federal court, the Eastern District of Louisiana, has sided with the EEOC's position that there is no need for an employee to present evidence of an underlying physiological condition in order to sue for disability discrimination based on the employee's obesity.

This inconsistency between the EEOC's own interpretive guidance and the position it has taken in court has created confusion regarding whether obesity should be considered a standalone disability under the ADA. Until the EEOC issues amended interpretive guidance in line with the position it has taken in court, you are likely safe to assume that most courts will continue to hold that obesity is not in and of itself a disability under the ADA.

Even if a court considers obesity as a disability under the ADA, however, that alone would not mean that you would be liable for a weight discrimination claim each time you made an employment decision based on an employee's size. Take, for example, the situation in 2008 when 22 waitresses at the Borgata Hotel Casino & Spa in Atlantic City sued the casino for weight discrimination. The casino had a policy in which it monitored its waitresses' weight and issued discipline, including suspension, if the waitress gained too much weight – specifically, if they gained more than 7% of their body weight from when they were first hired.

The case was thrown out by the judge because New Jersey's anti-discrimination law was silent on weight as a protected category. But again, even if obesity was considered a disability under the ADA, it is likely these waitresses could similarly not pursue a successful weight discrimination case under the federal statute because they would not be considered obese.

What Should Employers Do?

Given this somewhat uncertain nature of the law, you should always be cautious when making employment decisions based on physical characteristics such as height and weight. If an employee or applicant has an underlying condition that has resulted in obesity, they may be protected by law. The employee would have to show that not only do they have such impairment, but also that the impairment has substantially limited a major bodily function or life activity. Also, you should know that if you incorrectly perceive an employee or applicant as having a disability based on their obesity, that individual may be protected under the ADA.

You may also consider taking the following measures to help improve employee morale, reduce your chances of being hit with a legal claim for weight discrimination, and improve your chances of successfully defending such a claim if one were to be filed against your organization.

- Review job descriptions to make sure that any existing weight requirements reasonably relate to the essential duties and functions of the position.
- Be engaged and aware that some physical conditions may need reasonable accommodation if requested.
- Don't assume that an employee (or applicant) who is obese or overweight is unable to perform their job duties due to their weight. Further, don't assume that an individual's weight isn't necessarily related to a physiological condition. Many overweight individuals suffer from underlying conditions like hypertension, heart disease, and Type 2 diabetes. This means they would likely meet the ADA's definition of "impairment" because they affect "major bodily functions" under the ADA Amendments Act.
- Start an office-wide voluntary wellness program, offering weight management opportunities and other healthy lifestyle incentives.
- Practice what you preach and encourage your leadership team to model respectful attitudes and healthy behaviors.

Conclusion

The legal world is trending towards protecting overweight individuals from discrimination, and it wouldn't be surprising to see additional states, cities, and other municipalities – as well as courts – to expand their EEO laws to cover employee size. For this reason, now is the time for to be proactive and ensure your company is doing what they can to protect themselves from liability. The above steps will help you assess your current risk of liability, along with establishing measures to ensure a healthy work environment.

For more information, contact the authors [here](#) and [here](#).

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