

SIZING UP SIZE DISCRIMINATION: NEW YORK CITY COULD SOON PROHIBIT HEIGHT AND WEIGHT DISCRIMINATION IN THE WORKPLACE

Insights
May 15, 2023

The movement to expand legal protections against forms of appearance-based discrimination could soon gain a formidable ally. The New York City Council passed a bill on May 11 that would prohibit employers from discriminating against employees and applicants on the basis of their height or weight. Intro. No. 209-A now heads to the desk of Mayor Adams for consideration – and although he hasn't committed to signing it into effect, he has previously announced his support for appearance-based discrimination prohibitions. **[Ed. Note: the Mayor signed the bill into law on May 26.]** If enacted, New York City will become the second city in New York State, after Binghamton, to prohibit discrimination based on a person's height or weight. Here is what employers need to know.

The Local Law, Exceptions, and Affirmative Defense

Intro. No. 209-A would amend the New York City Human Rights Law (NYCHRL) to add "height" and "weight" to the list of protected characteristics upon which employers cannot discriminate. If signed by Mayor Adams, the law will take effect 180 days thereafter. **[Ed. Note: the law will take effect on November 22, 2023.]**

The legislation provides for exceptions allowing employers to take height or weight into consideration if it is related to performing the essential functions of the job. Specifically, the local law would not apply to employers' actions when:

- Required by federal, state, or local law or regulation; or

Related People



Amanda M. Blair

Associate

212.899.9989



Melissa Camire

Partner

212.899.9965

- Permitted by regulation adopted by the NYC Commission on Human Rights (CCHR) that:
 - Identifies particular jobs or categories of jobs for which (i) a person's height or weight could prevent performing the essential requisites of the job, and (ii) the Commission on Human Rights has not found alternative action that covered entities could reasonably take to allow persons who do not meet the height or weight criteria to perform the essential requisites of the job or category of jobs; or
 - Identifies particular jobs or categories of jobs for which consideration of height or weight criteria is reasonably necessary for the execution of the normal operations

Additionally, employers who do not qualify for an exception would still be able to use an affirmative defense. Where no exemption applies, an employer would be able to take action against a person because:

- A person's height or weight prevents the person from performing the essential requisites of the job, and there is no alternative action the covered entity could reasonably take that would allow the person to perform the essential requisites of the job; or
- The employer's decision based on height or weight criteria is reasonably necessary for the execution of normal operations

Employers concerned about the impact this law may have on workplace wellness programs and fitness challenges can rest easy. The local law explicitly states that it would not prevent employers from offering incentives that support weight management as a part of a voluntary wellness program. If enacted, however, employers should still be mindful of statements and actions surrounding such programs to avoid accusations of bias or discrimination.

Broader Trends on Appearance-Based Discrimination

Passage of this law marks a significant step by the New York City Council to explicitly provide protections against appearance-based discrimination. While the NYCHRL mandates its provisions be construed liberally to offer broad protections against discrimination, appearance-based

Service Focus

Employment Discrimination and Harassment

Related Offices

New York

discrimination has generally been protected only in conjunction with other protected characteristics.

For example, in 2019, the New York City Commission on Human Rights (the agency tasked with enforcing the NYCHRL) released legal enforcement guidance interpreting discrimination on the basis of a person's natural hair and hairstyle as discrimination, and particularly, racial discrimination. Similarly, accusations of religious discrimination have been supported by dress code and grooming mandates and workers have brought disability discrimination claims on the basis of obesity.

Recognizing advocate calls for protections against height and weight discrimination alone, New York City could join a small cohort of localities protecting workers against discrimination based solely on their height or weight. Some parts of the country are already familiar with such protections.

- Michigan, currently the only state with this protection on its books, passed its law in 1976.
- [Other cities](#) (Binghamton, San Francisco, Santa Cruz, Madison (WI), and Urbana (IL)) followed over the ensuing decades.
- In addition, Washington, D.C. protects against discrimination based on a person's personal appearance.

Read more about efforts to combat discrimination in the workplace in an article previously published by our firm [here](#).

Advocates have championed legislative action to combat studies that show overweight or obese people are hired less, promoted less, receive less compensation, and are subjected to greater disciplinary action in the workplace. However, it remains to be seen if New York City's proposed law will make a substantive impact against height and weight discrimination even if signed into effect.

Indeed, data from the Michigan Department of Civil Right (MDCR) shows that from October 1, 2021 through October 2, 2022, the agency received 29 [complaints](#) that included claims of weight discrimination in comparison with 1576 and 1539 alleging claims of disability or race discrimination, respectively. This is despite a population of over 10 million

with an estimated 34.4% of Michigan adults classified as obese and an additional 34.2% of Michigan adults classified as overweight in [2021](#). While MDCR's data is not inclusive of all possible legal complaints of weight discrimination, the disparity in the data is readily apparent. MDCR received only eight complaints alleging height discrimination over the same period.

What Should You Do?

We will continue to monitor developments and provide an update once Mayor Adams makes a decision about this proposed law, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information.

If enacted, the CCHR will likely introduce regulations detailing jobs or categories of jobs exempted from the local law. Such regulations will undergo public review, and potential revision, before adoption.

In preparation for the possible expansion of human right law protections to cover height and weight discrimination, you should evaluate if height or weight factors into any worker's job duties, if such considerations are necessary for the job position or normal operations of your business, and if there are any alternatives. In addition, you should prepare to update policies and employee handbooks and train staff with managerial authority and responsibility for employment decisions on the provisions of the amendments to the law.

If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [New York City](#) office.