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Employment Practices

Weight Discrimination on the Rise

The majority of American adults are overweight or obese, yet studies have found that weight discrimination is increasing. One recent study found it was as prevalent as racial discrimination. Is weight discrimination the new frontier in employment law?

The study mentioned above used a subjective measure, individuals' perceptions of being discriminated against for their weight. But studies using more concrete measures, such as pay and position, have found evidence of weight discrimination as well.

A 2010 study led by Timothy A. Judge of the University of Florida found a strong pay bias in favor of thinness in women. Women who weighed 25 pounds less than the norm

for their group earned an average of \$15,572 more per year. Those who weighed 25 pounds more than the norm earned \$13,847 less than average.

The University of Florida study found that, "Very thin men, conversely, are punished relative to their average weight peers, and men are rewarded for gaining weight until the point of obesity. For American men, gaining 25 lbs. produces a predicted increase in wages of roughly \$8,437 per year at below-average weights and a predicted increase of approximately \$7,775 per year at above-average weights."

Current Law

No federal laws prohibit discrimination on the basis of weight. However, individuals have used other nondiscrimination laws as the basis of weight discrimination claims. Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex or national origin, has been used in cases where weight standards are applied differently or have an adverse impact on a protected class.

Some individuals have used the Americans with Disabilities Act (ADA) in weight discrimination claims, claiming their weight

is a disability. However, barring an underlying physiological disorder, being overweight or obese generally does not qualify as an ADA-protected disability. The U.S. Equal Employment Opportunity Commission (EEOC) says:

Being overweight, in and of itself, generally is not an impairment...[if weight] is "within 'normal' range and not the result of a physiological disorder"...On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm,...is clearly an impairment...In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment.

The Americans with Disability Act Amendments Act of 2008 (ADAAA) broadened the ADA's definition of disability to cover individuals who are perceived to have a disability, even though they do not. Many experts thought that this would open the door to more weight discrimination cases. However, EEOC regulations implementing the ADAAA say: *When determining whether an individual is covered by this part of the definition of the term "disability,"...the record at*

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MANAGING RISK



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Property Insurance

Do You Have Flood Coverage?

Unless you have a separate flood policy, the answer is generally "no." You can buy a special flood policy to cover this risk. They generally have a 30-day waiting period, so plan ahead if you might need coverage.



Standard business property policies do NOT cover damage caused by "flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven

by wind or not; mudslide or mudflow; water that backs up from a sewer or drain; or water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces; basements,

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This Just In

Job bias charges hit a record high in fiscal year 2010, reported the U.S. Equal Employment Opportunity Commission (EEOC). All major categories of workplace discrimination charge filings in the private sector (which includes state and local governments) increased. These include discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; and the Genetic Information Nondiscrimination Act (GINA).

Historically, race had been the most frequently filed charge since the EEOC became operational in 1965. Last year, however, retaliation under all statutes surpassed race as the most frequently filed charge, while allegations based on religion, disability and age increased. In its first year of enforcement, the EEOC received 201 charges under GINA.

All laws enforced by the EEOC make it illegal to fire, demote, harass or otherwise "retaliate" against applicants or employees for filing a charge of discrimination, complaining about job discrimination, or for participating in an employment discrimination proceeding (such as an investigation or lawsuit). For example, an employer cannot refuse to promote an employee because she filed a discrimination complaint with the EEOC, even if the EEOC later determined no discrimination occurred.

Also in This Issue:

- Employer's Liability
- Weight Discrimination
- News from Addis

Employers' Liability: What Is It, and Why Do You Need It?

Workers' comp policies usually include a special section for employers' liability. What additional coverage does it provide and why do you need it?

Your workers' compensation policy covers the costs associated with an employee's work-related injury or occupational disease. It pays for the worker's medical costs, rehabilitation costs, lost wages and any settlement for permanent disability.

The fundamental premise of workers' comp is that employers agree to take responsibility for work-related injuries whether or not the injury was the employer's fault. In return, employees give up their right to sue for damages. Workers' comp is designed to be "no-fault" and the "exclusive remedy" for work-related illness and injury.

Nonetheless, some work-related claims fall outside of workers' comp coverage. The employers' liability section of the workers' comp policy adds coverage for these types of claims. Without this coverage, employers would have a significant coverage gap, because commercial general liability policies specifically exclude coverage for work-related injury and disease. Employers' liability is a common law or tort liability, and insurance companies handle those types of claims in the same way they adjust general liability claims, including managing and paying for defense.

Since states do not require employers' liability insurance, you do not have it unless your workers' compensation policy explicitly states it includes this coverage in a separate section. Unlike workers' comp, employers' liability has a defined limit of liability, starting at \$100,000 per injury.

When Coverage Applies

Insurance authority IRMI cites several examples of when employers' liability coverage applies:

Wrongful death: The family of a deceased worker may file a common-law claim seeking damages in addition to the death benefit paid by workers' comp.

Consequential bodily injury: A family member may file a lawsuit for his or her own

injury (for instance, a heart attack) that was caused by learning about or dealing with the injured employee.

Loss of consortium: The spouse of an injured worker may sue for loss of consortium, which means the spouse has lost the services — such as sexual relations or the ability to do household chores — of his or her spouse. Damages can be awarded even if the spouse is receiving disability payments.

Third-party liability: If an employee is injured while using equipment that malfunctioned, he or she may sue the manufacturer of the equipment for negligence. The manufacturer may in turn sue the employee's company to recover damages. Depending on the specifics of the claim, either the employers' liability or a general liability policy can provide coverage.

Employees excluded from workers' comp: In some states, seasonal and temporary workers can be excluded from workers' comp. In other states some small employers do not have to buy comp. In those situations, an employers' liability policy can provide protection from employee lawsuits for bodily injury and illness.

Monopolistic States

In states with monopolistic workers' comp funds (North Dakota, Ohio, Washing-

ton and Wyoming), employers need to purchase a separate employers' liability policy. Organizations headquartered in other states but that have offices in these states need to buy an endorsement to their employers' liability policy to avoid having a coverage gap for employees in those states.

Not Employment Practices Liability

Do not confuse employers' liability with employment practices liability (EPL) insurance, which protects employers from employee claims that their legal rights have been violated. EPL protects an organization when employees file claims for wrongful termination, sexual harassment and discrimination. It does not cover bodily injury.

Some employers that have not bought EPL insurance attempt to use their employers' liability to provide coverage for EPL claims. However, in most cases the insurance does not apply. Even when states define workers' comp "injury" to include mental injury, the broader workers' compensation definition does not necessarily transfer to the employers' liability portion of the policy. If you have any questions about your employers' liability coverage — and how it complements your workers' comp coverage — please call your account manager at The Addis Group. ■



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whether paved or not; or doors, windows or other openings." So unless you have flooding caused by sprinkler leakage, your policy won't pay. (The business property policy does cover "loss or damage by fire, explosion or sprinkler leakage.")

The National Flood Insurance Program (NFIP) offers flood insurance to individuals and businesses in "participating communities." These may be towns, cities, unincorporated county lands and tribal or native authorities that have chosen to participate in a floodplain management program.

Although mortgage lenders might not require you to carry flood insurance if your property is in a moderate-to-low risk area, nearly 25 percent of all NFIP flood claims occur in these areas. Most commercial buildings in a moderate-to-low risk area qualify for preferred rates. Preferred-rate premiums start as low as \$567 per year for both building and contents coverage, while contents-only coverage starts at \$162 per year. Businesses can buy up to \$500,000 of insurance to protect a building and up to \$500,000 to protect its contents.

High-Risk Properties

Federally regulated or insured lenders require mortgage holders in high-risk areas to buy flood insurance. In these areas, you can only buy standard rated policies, with separate building and contents coverage. You can also buy flood coverage through private insurers.

If you need flood coverage to meet the requirements of a federally insured loan, verify that the insurer is "admitted," or licensed to do business in your state. Make sure the policy guarantees coverage at least as broad as the Standard National Flood Policy and that the insurer will provide thirty days' notice to the insured and lender before canceling the policy.

A difference-in-conditions (DIC) policy may also provide flood coverage. Most DIC policies exclude coverage for floods, but these non-standard policies can often be tailored to cover unusual risks. DIC policies generally make most sense for larger insureds. We can help you find the flood coverage you need. Please contact your account manager at The Addis Group for more information. ■

Addis Academy of Risk Management

More organizations are using social media to market and advertise products and services as well as attract and retain high-performing employees. These benefits are accompanied by both known and evolving risk management risks.

On March 25, Carl Tannenbaum and Ned Dunham from the law firm of Kleinbard, Bell & Brecker, LLP presented an entertaining workshop on existing and potential employer liability scenarios involving the use of social media. The lively session, held at

Philadelphia Country Club, was attended by more than thirty clients and friends of The Addis Group.

Our next session will be held on April 21 and is titled "Mitigating IT Risk for Improved Profitability." Our speaker, Sassan Hejazi of Kreisler Miller, will discuss the management of IT-related enterprise risk and present ideas on how to develop an integrated, effective IT operation. Please contact Jamie Correale, jcorreale@theaddisgroup.com, to reserve your seat. ■

Natalie Clayton

Natalie serves as a technical coordinator in the Captive Division at The Addis Group. Her responsibilities include supporting the account managers and assistant account managers and handling the day-to-day needs of The Addis Group's captive clients.



Natalie attended East Stroudsburg University, majoring in sociology and criminal justice, and is currently working towards completing her bachelor's degree. Prior to working for The Addis Group, Natalie worked at Golden Living Center as a dietary supervisor and chef for more than four years.

Natalie lives in Roslyn, Penn. with her fiancé, David. She enjoys reading, painting, cooking and spending time with her family and friends. ■

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issue must be a record of an impairment that substantially limited a major life activity. Therefore, overweight or obesity does not put an individual into a protected class, unless the condition has resulted in a substantial limitation of a major life activity.

Among the states, only Michigan prohibits discrimination on the basis of weight. The cities of San Francisco and Santa Cruz, Calif. also specifically outlaw discrimination on the basis of weight, while the District of Columbia outlaws discrimination in employment based on "personal appearance," which could include weight.

Generally, employers can use employment criteria that would otherwise be discriminatory if they are bona fide occupational qualifications (BFOQs). To determine whether a personal characteristic is a BFOQ, ask yourself if an individual really needs it to perform the essential functions of the job. With jobs that require physical fitness or use of certain

equipment, you are safer asking an applicant to demonstrate his/her ability to perform that job function than to impose specific height or weight requirements.

What about the personal appearance of employees in the public eye? Can you discriminate in favor of slim employees, since most people find them more attractive? Employers can require employees to meet certain standards of grooming and dress, but requiring them to be a certain size could lead to charges of discrimination. Regardless of the current state of the law, in today's diversity-conscious society, wise employers avoid weeding out qualified individuals on the basis of weight or any other personal characteristic.

For more information on protecting your business from employment discrimination and other employment practices liability claims, please contact your account manager at The Addis Group. ■