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Is Weight Bias the Next Big Challenge in Discrimination Law?

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With 2008 and 2009 presenting the highest number of EEOC charges in American legal history, one might think that discrimination challenges soon must peak.

After all, Title VII was passed 46 years ago, and surely we have eliminated some discriminatory behavior. Indeed, we have improved since 1964, at least with traditional discrimination law classifications such as gender and race. However, new challenges are on their way.

Meaningful bias still exists in at least three areas that affect a significant number of people: sexual orientation, personal appearance, and weight. In fact, a few courts have already started to evaluate these claims under federal law even absent the passage of specific legislation prohibiting discrimination based on these categories.

Of these three, sexual orientation discrimination is prohibited in approximately half the U.S., through a hodgepodge of state laws and local ordinances. Further, passage of a proposed federal law, the Employment Non-Discrimination Act (ENDA), would expand such protection to most employees. While ENDA has been the subject of Congressional discussion for well over a decade, its chance of passage in 2010 looks better than in previous years.

By contrast, Congress has not yet focused on personal appearance and

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weight discrimination, but some states and cities have begun to consider those issues. The ramifications of such laws are vast and frightening to employers. Putting aside personal appearance questions as beyond the scope of this article, weight discrimination legislation will open a whole new world of complicated litigation, for several reasons.

First, studies suggest that weight discrimination is a current and significant issue. Anecdotal evidence regarding hiring and promotion decisions supports that conclusion as well.

Second, unlike most other discrimination areas, "weight" is difficult to define for purposes of discrimination law. Race, gender, national origin, and age certainly are easier characteristics to identify, making litigation over weight discrimination more complicated.

Third, most characteristics covered by discrimination law are not subjects of choice — genes decide race and gender for us, and age increases, for better or for worse, for everyone. By comparison, while some instances of obesity may be genetic, others are not.

Fourth, "weight" discrimination, taken to its ultimate maximum, can mean "too fat," "too thin," "too unattractive," or "too dangerous in certain jobs."

These types of complications may or may not be addressed in the legislation that is floating around various state legislatures and city councils. The laws being discussed (thus far, only Michigan and a few cities have actually passed laws) are not detailed.

That, of course, will leave courts to interpret when "weight" discrimination is unlawful and when it is not. Alternatively, the new laws may simply state that weight discrimination is unlawful irrespective of factors such as definitional obesity, so long as the decision-maker perceived the individual in question to be undesirable due to weight.

Worse yet, a state legislature or court may add that such discriminatory intent need only be a factor in the decision not to hire or promote, or to fire. One also can imagine an Americans with Disabilities Act-like direct threat defense arising where obesity creates a danger on the job, such as with firefighters or workers who climb ladders.

So what are the chances of weight

legislation passing? Although it is hard to predict, momentum is building in favor of such legislation. A meaningful number of states and municipalities looked at the issue in 2008 and 2009.

Further, a state need not pass a "weight discrimination law" to create coverage; if a "personal appearance" statute is passed, it may well include weight by natural implication. The likely starting places for such legislation include not only Michigan (where it already has passed), but other traditional trendsetters, such as California, Washington, and New Jersey. Federal action also is possible, but seems unlikely in 2010.

Also of note, the new amendments to the ADA, passed as the ADA Amendments Act of 2008 (ADAAA), could cover weight discrimination. The same was technically true under the original ADA, but those who tried to bring such a claim struggled to meet the ADA's definition of disabled, i.e., being a qualified individual with a physical or mental impairment that substantially limits a major life activity.

In passing the ADAAA, however, Congress lowered the height of the wall protecting that definition by at least several feet. Nevertheless, the ADA's new focus on reasonable accommodations still seems an unlikely fit for obesity issues. Further, much like gay and lesbian advocates in 1991, weight discrimination advocates would prefer a law that provides protection against discrimination without having to acknowledge that they are somehow "disabled."

All this leads to the question of what employers should do now to deal with the possibility of weight discrimination becoming a new litigation nightmare. The answers are not entirely clear, but they range across a number of areas. Some recommendations follow:

1. Get involved in the legislative process, either as an employer or as part of an employer organization. The cost to employers of making weight discrimination unlawful would be substantial. As a result, even if a state moves forward into this new legal space, legislative action by employer groups may help define the terms of the law and the defenses that are available under it.
2. Consider long-term plans to reduce the impact of obesity. Wellness programs have an impact in regard to cost savings in insurance and health. Eventually, they may make a difference in avoiding litigation.
3. Continue to push respect and diversity programs. At the highest and most admirable level, these programs urge respect for differences. Weight issues fall within that worthy goal.
4. Remember that bad facts create bad law. People tease people about weight (either directly or behind their backs), and letting an employment culture exist where such teasing is permitted will ultimately lead to a cry for change. One need not implement a policy against weight discrimination to avoid such situations — a "respect for others policy" should provide enough of a basis to discipline inappropriate behavior such as teasing someone about his or her weight.
5. Review possible workers' compensation concerns in states in which your organization operates. If an employee's injury leads to a medically suggested weight reduction surgery, a state workers' compensation proceeding may conclude with a decision that such surgery is compensable. Most states have not evaluated these issues yet, but the question of coverage for weight-related surgeries or programs may ultimately be unavoidable.
6. Ensure compliance with not just potential weight discrimination laws, but with the ADA and the Genetic Information Nondiscrimination Act (GINA). The ADA could, as discussed above, cover a case involving morbid obesity. The risk is perhaps greatest in the form of a "regarded as" claim, e.g., "he can't do that job; he's too big." With respect to GINA, that law affects more than DNA — it also precludes consideration of family medical history. In some cases, that history could include a pattern of obesity.

In conclusion, the day of weight discrimination as a legal matter is only dawning. Within five to seven years, this area of law will likely have grown to a meaningful number of state and municipal statutes and ordinances. The time for employers to consider their options is now.

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