

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

## *Weight Discrimination Claims under the Amended ADA*

America has a weight problem. According to a study conducted by researchers at the John Hopkins Bloomberg School of Public Health, most adults in the United States will be overweight by 2030, with related health care spending projected to be as much as \$956 billion. While Americans may view weight as a personal matter, their employers may view weight as a *personnel* matter. Rightfully or wrongfully, weight can affect how employers evaluate one's work ethic, aptitude, physical work performance, and leadership potential. Studies suggest a growing number of employers are guilty of this practice, known as "weight discrimination." In fact, the Obesity Action Coalition reports that between 1995 and 2005, weight discrimination increased by 66 percent.

Historically, the law has offered employees little protection against weight discrimination in the workplace, but this landscape may change under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Effective January 1, 2009, the ADAAA expanded the protections of the ADA by ordering courts to broadly construe the definition

of "disability." Courts typically have not recognized obesity as an ADA impairment unless the person is morbidly obese or proves that his or her obesity results from a physiological impairment. The ADAAA may require courts to reject such a narrow interpretation and recognize obesity-related health conditions, and possibly obesity itself, as protected disabilities. Time will tell, as courts and regulatory agencies apply the ADAAA's broader interpretation and give meaning to its provisions. In the meantime, employers must become familiar with the new meaning of "disability" and take precautionary measures to avoid potential weight discrimination claims.

### **Changes Under ADAAA**

Under the ADA, a person is disabled if that person either (1) has a physical or mental impairment substantially limiting a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. As we have explained in previous articles on the ADAAA, the amendments repealed a number of judicial decisions which narrowly interpreted the standard for determining whether

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a disability exists. Now, employers must ignore mitigating measures, such as medication and mobility devices, in determining whether a disability exists. Additionally, an impairment need only limit one major life activity to qualify as a disability.

As we reported in last month's *Labor and Employment Law Update*, the Equal Employment Opportunity Commission (EEOC) recently published proposed regulations and guidelines for implementing the ADAAA, including a non-exhaustive list of impairments that consistently meet the definition of disability. "Obesity" does not appear on the list. Nevertheless, employers must appreciate that a number of impairments appearing on the list, including cancer, diabetes, high blood pressure, and back or leg impairment can be weight-related. Thus, overweight employees suffering from serious weight-related health conditions may be eligible for ADA protections whether or not the ADA covers simple obesity.

### **Avoid Weight Discrimination Claims under the Amended ADA**

The ADAAA carries important implications for employee discrimination claims, health plan formatting, and wellness initiatives. To be clear, no court has interpreted "disability" under the ADA to include obesity. Nevertheless, proactive employers should reexamine and consider adjusting their policies, manuals, and procedures to include "weight sensitive" guidelines. Doing so may avoid potential liability relating to improperly denied accommodations or weight discrimination generally.

Human resource personnel may ensure compliance with the ADAAA by making sure workplace policies and protocols reflect the changes under the ADAAA; training management to comply with requirements

of the amended ADA and local law; revising job descriptions with weight requirements to ensure the requirements reasonably relate to the requirements of the corresponding job; documenting nondiscriminatory performance critiques in a timely manner; handling accommodation requests from obese employees with an eye toward possible protections under the ADA; and encouraging employees' participation in wellness initiative programming on a voluntary and private basis.

The future of ADA weight discrimination claims remains uncertain, but Congress has clearly opened the door to new disability discrimination claims under the ADAAA. As Americans grow heavier and reports reveal how obesity plagues our health, it becomes more likely that obesity now falls within the ambit of "disability" as defined by the ADAAA.

**Todd A. West**

*Overweight employees suffering from serious weight-related health conditions may be eligible for ADA protections whether or not the ADA covers simple obesity.*

## *Pandemic Preparedness and the ADA: EEOC Releases Guidance*

How do employers balance pandemic planning and the Americans with Disabilities Act (ADA)? This past week the Equal Employment Opportunity Commission (EEOC) issued guidance to assist employers with this difficult task. According to the EEOC's guidance, when the World Health Organization classifies

Pandemic influenza into six phases, it analyzes how widely spread an influenza is around the world rather than the severity of the influenza symptoms. Pandemic Phase 6 means that there is “sustained human-to-human transmission worldwide” and the virus is “no longer contained in a few geographic areas.” In order for employers to continue operations despite a pandemic outbreak, such as the 2009 H1N1 virus, and comply with the requirements of the ADA, employers must plan and be prepared. Once the pandemic influenza reaches an employer’s local community, the intricate interplay between the ADA and pandemic influenza may cause employers unnecessary legal complications.

### **Disability-Related Questions and Medical Examinations**

Employers are well aware that the ADA prohibits employers from making disability-related inquiries and requiring medical examinations of employees except under limited circumstances. One such circumstance is after an employer makes a conditional offer of employment but before an individual begins working. At this point, the ADA allows employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations. The information obtained from these disability-related inquiries and medical examination must be kept confidential.

After an employee begins working, the ADA prohibits employers from making disability-related inquiries or requiring medical examinations unless they are job-related and consistent with business necessity. This occurs when an employer has a reasonable belief, based upon objective evidence, that an “employee’s ability to perform essential job functions will be

impaired by a medical condition or an employee will pose a direct threat due to a medical condition.” In the context of pandemic influenza, whether the pandemic rises to the level of direct threat depends on the severity of the illness. To determine whether the pandemic rises to the level of a direct threat, employers should use information from public health authorities as “objective evidence,” which is needed for an employer to engage in disability-related inquiries and/or medical examination(s). According to the EEOC’s guidance, the 2009 spring/summer H1N1 influenza did not justify disability-related inquiries and medical examinations because the severity of the illness did not warrant such inquiries and examinations. In the guidance, the EEOC recognized that public health recommendations change during a crisis and differ by location but that “employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.”

### **Pre-Pandemic Guidelines**

The EEOC in its recent guidelines, which employers can find at [www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html), identified some approaches and best practices that employers should utilize to ensure consistency with the ADA when faced with preparing for pandemic influenza:

- Designate a team to address pre-pandemic concerns and create a response plan that includes an individual with knowledge of all equal employment opportunity laws;
- Make inquiries that are not disability-related to identify which employees are more likely to be unavailable for work in the event of a pandemic;
- Require all new entering employees of

*“Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.”*

the same job category to have a post-offer medical examination to determine their general health status;

- Do not rescind job offers to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts him at risk of complications from influenza unless the applicant would pose a direct threat within the meaning of the ADA; and
- Encourage employees to consider getting the influenza vaccine, but do not require or compel employees to take the influenza vaccine.

### **Pandemic Guidelines**

In addition to pre-pandemic best practices, the EEOC also identified the following permissible conduct under the ADA when an employer is faced with a pandemic influenza situation:

- Advise employees that they should go home if they display influenza-like symptoms during a pandemic because such advice is not a disability-related action if the illness is akin to seasonal flu or the 2009 spring/summer H1N1 virus;
- Require employees to wash their hands regularly, to utilize proper sanitary coughing and sneezing etiquette and tissue disposal, and, if necessary, to wear personal protective equipment, such as a face mask, gloves, or gowns, during a pandemic;
- Request from employees who are reporting that they are feeling ill or who call in sick whether they have influenza-like symptoms—fever/chills and a cough/sore throat—but maintain such information as a confidential medical record;
- Take the temperatures of employees *only if* the pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus

in the spring/summer of 2009 or if the pandemic becomes widespread in the community as assessed by public health authorities because taking the temperature of the employee is a medical examination;

- Ask why an employee has been absent from work if the employer suspects it is for a medical reason because such an inquiry is not a disability-related inquiry, but do not make disability-related inquiries about whether an employee has a medical condition that could make him especially vulnerable to influenza complications when the employee does not exhibit influenza symptoms;
- Consider allowing employees to work from an alternative location such as a home;
- Remember that an employer must continue to provide reasonable accommodations for employees with a known disability that is unrelated to the pandemic, barring undue hardship; and
- Require employees who have been away from work during a pandemic to provide a doctor's note certifying his fitness to return to work.

### **Conclusion**

Balancing pandemic planning and the ADA is not an easy task. With the help of the EEOC's guidance in this area, it has become a bit easier and clearer for employers.

**Quinn H. Vandenberg**

*Do not rescind job offers to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts him at risk of complications from influenza unless the applicant would pose a direct threat within the meaning of the ADA.*

# *Eighth Circuit Holds that Evidence of Other Complaints are Admissible in Harassment Case Even if Plaintiff was Unaware of Them*

The Eighth Circuit Court of Appeals held in *Sandoval v. American Building Maintenance Industries, Inc.* that a plaintiff-employee alleging sexual harassment may offer evidence of other complaints of harassment even if the plaintiff was unaware of such complaints. In *Sandoval*, several employees of a building maintenance company brought a Title VII action claiming they were subjected to sexual harassment by their on-site supervisors. The plaintiffs offered evidence of nearly 100 sexual harassment complaints the employer received while they worked for the company to show the employer was constructively aware of severity and pervasiveness of the hostile working environment. The district court refused to consider evidence based upon Eighth Circuit precedent holding that evidence in sexual harassment cases is limited to instances of harassment of which the plaintiff was aware.

The Eighth Circuit reversed the district court and clarified that plaintiffs may offer evidence of other complaints of

harassment *even if the plaintiffs were unaware of them* during the period of the alleged harassment. The court reasoned that while evidence of other harassment of which the plaintiff was unaware sheds no light on whether the plaintiff found his or her workplace subjectively hostile, “the evidence [of the other incidents] is highly probative of the type of workplace environment she was subject to, and whether a reasonable employer should have discovered the sexual harassment.” One judge dissented explaining that the majority ignored the fact that many of the unrelated complaints offered by the plaintiffs were made by different victims and employees who worked at different work locations. The dissent emphasized the untenable position employers face based upon the majority’s opinion and concluded that under this theory, “an employer could be held to have constructive notice of sexual harassment in a warehouse in Missouri based on complaints of sexual harassment in its headquarters in Florida” and should have anticipated harassment at its Missouri warehouse.

*Sandoval* raises serious concerns for employers with multiple work sites. Employers should ensure their harassment policies require that harassment complaints be promptly investigated and, if necessary, corrective action be swiftly taken. Harassment policies should also direct corporate human resources personnel to coordinate harassment investigations to ensure consistent enforcement across multiple work sites.

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