

Morgan Lewis

C O U N S E L O R S A T L A W



LABOR AND EMPLOYMENT LAW SEMINAR

**You Smoke, You're Fired
Lifestyle, Law and Hiring Policies:
Mapping Out Your Corporate Wellness Policy**

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Why Employers Want Wellness Programs



Addressing specific organizational problems


- To reduce healthcare costs associated with nonoccupational illness and injury
- To reduce workers' compensation costs
- To minimize lost productivity caused by absent workers
- To help workers achieve healthier lives and improve morale

Various Approaches to Wellness Programs



- Policy review and revision
- Inciting employees to live healthier lives
- Screening applicants/employees for physical and/or mental health conditions considered high risk

Wellness Programs That Encourage Employees to Live Healthier Lives



- Where voluntary in nature, low legal risk
- Consists of, for example:
 - Employer paying for annual physical
 - On-site exercise facilities or reimbursement for health-club memberships
 - On-site weight control/nutrition programs
 - Smoking cessation program and no smoking policies
 - Healthy-lifestyle counseling and food in the cafeteria/vending machines

Wellness Screening Programs

- Incorporating physical characteristics or abilities into hiring selection criteria
 - Weight/obesity as hiring criteria
 - Smoking as hiring criteria
 - Physical-testing programs
 - Genetic testing for predisposition
- Because these programs can result in exclusion from hire or termination, they raise significant legal issues

Weight Restriction Hiring Policies



- Conflicting laws on permissibility
 - Varying interpretations of federal law by different courts
 - Potential ADA Issues
 - Potential Title VII Issues
 - Varying state laws applicable to the issue
 - Weight discrimination only specifically prohibited in Michigan
 - Six states and the District of Columbia have broader definitions of disability and may provide greater protection to job applicants
 - Some local ordinances prohibit weight discrimination (e.g., San Francisco local ordinance)
 - Costly to litigate such policies

Weight Restriction Hiring Policies

- Potential ADA issues

- ADA Disability

- Usually weight as a disability is evaluated on a case-by-case basis by the court
 - Weight must rise to the level of a “disability” under the ADA
 - » More likely established where applicant is “morbidly obese” – weighing more than 100% over the norm for their recommended body weight
 - » More likely established where weight problem is caused by another medical condition (e.g., diabetes, thyroid disorder)
 - » Unsuccessful where applicant is only overweight or obese – i.e., more than 20% over the norm for their recommended body weight

Weight-Restriction Hiring Policies

- Potential ADA issues (cont'd)
 - ADA Disability
 - Employer risk minimized by:
 - » Evaluating applicants on a case-by-case basis
 - » Determining whether applicants can perform essential functions of the job
 - » Determining whether applicants' performance will pose a direct threat to health or safety of themselves or others

Weight Restriction Hiring Policies

- Potential Title VII/ADA disparate treatment issues
 - Courts may hold employers liable for disparate treatment where weight-restriction policies are administered in an uneven manner (e.g., United Airlines weight tables)
 - Weight-restriction policies are applicable only to one gender

Weight-Restriction Hiring Policies



- Potential Title VII/ADA disparate impact issues
 - ADA risk or Title VII risk for disparate impact because Hispanics and African-American females statistically more prone to being overweight or obese than white males and females
 - Courts generally apply the 4/5 Rule for Title VII disparate impact claims

Weight-Restriction Hiring Policies

- Potential ERISA issues
 - Slim chance of viability of Section 510 action by applicants for weight discrimination in denial of benefits
 - Also slim chance of Section 502(a) action by a plan “participant” or “beneficiary”

Weight Restriction Hiring Policies

- Guidelines for less-risky weight-restriction policies
 - Use a lower weight threshold for any weight-restriction policy
 - But be careful not to eliminate a sufficient applicant pool
 - Evaluate candidates with other physiological conditions
 - Be wary of potentially adverse publicity from such policies

Smoking-Restriction Hiring Policies

- Law on permissibility
 - Almost no federal law prohibition or cases
 - Very limited ADA issues – not a disability
 - Limited Title VII issues – smoking percentages are equal
 - State laws applicable to the issue – 30 prohibit
 - Smoking discrimination specifically prohibited by states
 - Discrimination based on legal off-duty conduct away from the place of employment prohibited
 - No specific state law, limited potential for disability and discrimination claims
- Policy legality is dependent on state law

Smoking-Restriction Hiring Policies




- Potential ADA issues
 - Nicotine addiction is not recognized as a disability
 - Careful handling avoids “regarded as” disability
- Potential Title VII/ADA Disparate treatment issues
 - So long as policy is evenly applied to all employees, no issue
- Potential Title VII/ADA Disparate impact issues
 - According to the American Lung Association, 23.6 percent of whites smoke, compared to 22.4 percent of African-Americans, 13.3 percent of Asians and 16.7 percent of Hispanics
 - Statistics survive 4/5 Rule
- Policy legality is dependent on state law

Smoking-Restriction Hiring Policies

- Guidelines for smoking-restriction policies
 - Check state law for legality
 - Implement universally for all employees and applicants
 - For current employees, providing a period of time to quit smoking and support efforts is advisable
 - Be wary of potentially adverse publicity from such policies – 20/20 stories and the like

Applicant Physical-Testing Programs




- As a general proposition, enforcement agencies do not like applicant-testing programs
- Critical threshold question: Does testing result in an adverse impact on a protected class?
 - If yes, validation required
 - If no, no validation required

Applicant Physical Testing Programs



- Determining adverse impact
 - Standard methods (80% test, Fisher's Exact test, etc.)
 - ADA issue: problem of “regarded as” disability creating inherent adverse impact

Current State of the Law Regarding Applicant Physical Testing



- Law is still in flux
- Cases for both sides
- Few cases decided on the merits

Implementing a Defensible Physical Testing Program



- Determine in a scientific manner what physical characteristic to test for:
 - Does presence of characteristic create a “direct threat” (e.g., severe median-nerve impairment in applicant for high-force/high-repetition job)
 - Does absence of characteristic (e.g., requisite strength) show:
 - Inability to perform job *adequately*
 - Inability to perform job *safely*
- Determine whether the characteristic(s) being tested for can be justified as required by business necessity

Implementing a Defensible Physical Testing Program



- Use of biomechanical job analysis to determine job's physical requirements
- Should be performed independently from test vendor's
- Should be performed by industrial engineer, ergonomist or other similarly qualified personnel

Implementing a Defensible Physical-Testing Program



- Once physical stressors of job identified, determine if they can be abated through ergonomic intervention instead of applicant screening
- If job cannot be reasonably adjusted, determine testing protocol to be used
 - “Off the shelf” product
 - Custom-designed testing protocol

Implementing a Defensible Physical-Testing Program



- If purchasing an “off the shelf” program, obtain from the vendor *in writing* answers to the following:
 - Has the vendor validated the test for adverse impact?
 - How did the vendor determine whether the test did or did not have adverse impact?
 - Is the adverse-impact analysis transferable to your workplace and why?
 - What is the test designed to show? (E.g., testing for actual job functions? A predictor of injury?)

Implementing a Defensible Physical-Testing Program



- Determining the appropriate validation method
- Validation where test replicates actual essential functions of the job is easiest
- Validation where test is a surrogate to show something else is more difficult
- Validation has to be job specific and generally employer specific
- *Uniform Guidelines on Employee Selection Procedure*

Implementing a Defensible Physical-Testing Program



- Validation is not the end of the analysis
 - Even if test validated, employer must determine if there is an alternative selection method that will have a less-adverse impact
 - Employer must ensure consistency of application
 - What about when shortage of workers?
 - What about incumbent-employee transfers?
 - Employer must ensure that medical personnel play decision-making role to comply with ADA

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