



European Employment Law ALERT

Obese Employees Gain Discrimination Protection

By Ming Henderson and Tessa Cranfield

As we come out of the holiday period and the season of over-indulgence, a recent decision of the European Court of Justice has opened the door to obesity being classed as a “disability”. This gives obese employees greater protection under Europe’s discrimination rules.

Disability discrimination in Europe

Employees across Europe are entitled to basic protection against discrimination on grounds of their “disability”, but the European rules do not define what is meant by a “disability”. Previous rulings of the European Court have however interpreted “disability” widely, as any type of impairment, whether physical or mental, which “may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”.

Obesity as a disability

The European Court was recently asked by the Danish Courts to decide whether obesity amounts to a disability. The case concerned a morbidly obese childminder in Denmark who was terminated as part of a reduction in force, and claimed his selection was linked to his size.

The Court ruled that there was no **general** principle protecting all obese employees against less favourable treatment. However, an employee who is severely obese **may** qualify for disability protection if his or her weight creates sufficient difficulties in carrying out work activities. The Court made clear that it is irrelevant whether the employee has contributed to their obesity by their behaviour, or whether it has a purely “medical” cause.

The Court gave only a couple of examples of where an obesity would be deemed to have this effect: for example, reduced mobility, or the onset of obesity-related medical conditions. They also implied that the employee would need to have been obese for a long period, rather than a recent or temporary condition. The European Advocate General’s opinion, which preceded the Court’s decision and is not binding, however gave a broad range of examples, such as problems in mobility, endurance and mood. The opinion also suggested that an employee is more likely to be disabled where they are obese with a BMI of 40 or more (obese class III). Employees’ lawyers are likely to refer to this opinion as creating a presumption that an employee is disabled where they are morbidly obese.

Where does this decision apply?

Courts in each European member state will now have to apply their local discrimination laws to comply with this ruling. That will mean considering on a case by case basis whether an obese employee’s circumstances qualify them for protection as a disabled employee.

What does this mean for us?

Employees will now find it much easier to argue that they are disabled, whether or not their obesity has given rise to a separate, clinically recognised disability such as diabetes or mobility issues. Where an employee is morbidly obese, employers should plan for the fact that they will likely be protected, as can be the case in the US.

Extra care will now be needed where an employer wants to **change an employee's duties or terminate** because the employee is not effective for reasons related to their weight (or related health issues). In practice however, the bigger issue is likely to be the need to proactively consider **reasonable accommodations** to adapt the workplace and work practices, so an obese employee who is disabled can continue working. Given the rise in obesity across Europe, it will be in employers' interests to promote healthy lifestyles - which could represent a cost saving in the long run.

If you would like further information please contact any member of our International Employment Law practice:

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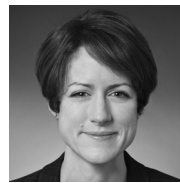
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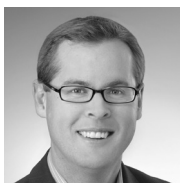
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