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## **Shape Up or Ship Out? Employment Discrimination Against the Overweight**

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*Increasing health care insurance costs have focused employer attention on health-related factors in employee recruitment and retention. One such factor is weight. Employers have argued that overweight employees are absent more often, are more susceptible to on-the-job injuries and illnesses, and are less productive than others. They have also contended that overweight employees present poor role models and may cause "negative reactions" by others. Although no federal law addresses employee obesity specifically, a number of laws prohibiting other forms of discrimination present potentially litigious situations. This article reviews the background and legal framework of discrimination against the overweight and offers some guidelines for avoiding such charges.*

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**KEY WORDS:** discrimination against the overweight; obesity as a disability; employer weight standards; weight as an employment handicap; obesity and job performance.

### **INTRODUCTION**

An increasing number of employees are asking courts to decide whether employers can refuse to hire—or can fire—they because they are overweight (i.e., 120% of ideal body weight) *McDermott v. Xerox Corporation* (1985). Court decisions have not clarified the issue. In general, employers have been successful in arguing their right to maintain weight limits, particularly in jobs such as police work and firefighting, where physical skills are important. Some employers have also justified decisions to dismiss or to refuse employment to overweight employees by claiming that the employee could not wear a uniform or fit between machines or units of equipment. Still others argue that they have a right to impose employee weight limits because of a claimed relationship between excess weight and higher health costs, worker's compensation claims, and absenteeism. Employers have even argued that overweight employees are poor role models, thus reflecting negatively on the company image and eliciting negative reactions from others.

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This article reviews the background and legal framework of discrimination against the overweight and offers some guidelines to help employers avoid this potential problem.

## BACKGROUND

No federal law prohibits employers from discriminating against employees on the basis of weight. However, some of those terminated because they exceeded company weight limits have won lawsuits by charging their employer under related discrimination laws. These laws offer potentially litigious options. Among the options are perceived handicap, sex and age discrimination (disparate impact) under Title VII of the Civil Rights Act, violations of federal and state disability laws (obesity may be considered a disability or medical condition over which the employee has no control and which requires reasonable accommodation). In fact the Equal Employment Opportunity Commission (EEOC) has declared obesity to be a protected category, opening the way for discrimination claims under the American's with Disabilities Act (Lambert, 1993). Another option includes violations of the Equal Pay Act, *Ross v. Beaumont Hospital* (1988); *Krein v. Marian Manor Nursing Home* (1987). An employer who imposes weight limits on employees may be charged with invasion of privacy, unjustified termination, "unjust" discharge under "termination-at-will" laws, and disparate treatment.

Federal and state courts have recognized that employment decisions cannot be based on merely stereotyped impressions about people. Myths and unfounded assumptions about an employee's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals or for paying them less. The burden of proof falls on the employer to prove that the employee or candidate for employment cannot perform the work or would constitute a hazard to other employees (Schneid, 1992). Since federal law also prohibits treatment of individuals simply as members of a class, it is illegal for employers to operate on the basis of generalizations, whether or not they are valid (Hemenway, 1988). Most employment discrimination rulings have focused on sex, race, color, religion, and age, but recent litigation indicates increased interest in discrimination against the overweight. For example, Michigan has an antidiscrimination law protecting fat people (Mich. Comp laws Ann, 1985 and Supp., 1988), and it has been suggested that the broadly written California Administrative code can be construed to protect obese people under the section discussing persons regarded as having a handicap (Cal. Admin. Cod, 1988). The California Supreme Court recently ruled that employers cannot discriminate against overweight people if their girth constitutes a physical handicap with medical origins (Dolan, 1993). In the *State Div. of Human Rights v. Xerox* a New York Court held that obesity alone was a physical or mental handicap as defined by law. An appeals court upheld the ruling (Xerox, 102 A.D. 2d at 548). However, most courts that have examined whether obesity is a handicap have found that it is not (Bierman, 1990). Before reviewing related discrimination laws, it is useful to discuss some popular beliefs about overweight people.

## THEORETICAL FOUNDATIONS

Since attribution and perception theories seek to explain and predict the behavior of others, they are relevant to understanding judgment processes (Kelley, 1967). Often managers' reactions seem based on their perceptions either of a dispositional quality of the subordinate (an internal disposition) or to factors in the environment (an external disposition). Although perceivers use a variety of values, attitudes, beliefs, and information in making decisions, internal dispositions are especially important. Such dispositions are especially important in evaluating overweight people, since excess weight is seen as a self-inflicted disorder. Other personal characteristics may influence the attribution and perception processes and thus subsequent decisions. Research has shown that overweight employees are often judged on the basis of faulty internal dispositions and perceptions and, as a consequence, are subject to employment discrimination such as hiring, pay, promotion, and denial of health and life insurance or are charged higher premiums (Kennedy & Homant, 1984; Bellizzi, Klassen & Belonax, 1989).

### BIAS AGAINST OVERWEIGHT PEOPLE

Bias against the overweight can be viewed from the perspective of a general bias against the physically unattractive or disfigured. (It should be noted that the District of Columbia prohibits discrimination based on personal appearance D.C. Code Ann & 1-2501, 1987.) Such biases may be due to a general aversion toward the unattractive (Berscheid & Walster, 1974). Remedying this problem would require modifying prejudice through attitude change and consciousness raising strategies. A second cause of bias against the overweight or unattractive may be due not to attractiveness per se but rather to the desirability of other factors assumed to be correlated with appearance. For example, physically attractive people are perceived to have better social skills than the unattractive (Dion, Berscheid, & Walster, 1972). In this case the bias can be viewed as a bias toward the attractive rather than against the unattractive. This is an example of halo error (perceiving a spuriously high intercorrelation among traits and behaviors) that can be reduced by education and training of interviewers (Latham, Wexley & Pursell, 1975).

A final cause of bias against the unattractive may be a belief that the attractive are, in fact, more successful managers and more productive co-workers. One's behavior is, to some degree, a function of others' responses (Greene, 1975). If physically attractive individuals are initially perceived as more competent, they may in turn behave more competently, in which case the bias may be an accurate assessment of reality. This complex phenomenon requires additional research. Biases often degenerate into beliefs concerning persons, things or events. Thus, overweight people, who may be considered unattractive, apply for and function in employment situations where they are perceived to be relatively undesirable.

In addition to the issue of physical attractiveness there are a number of studies that focus on discrimination against the overweight (MD Commission on Human Relations, 1980; Bray, 1986; Wolman, 1982). Although some of these studies are self-reporting surveys (Bierman, 1990), others employ more rigorous scientific methodology and present convincing arguments of employment discrimination against the obese. Such discrimination is often very difficult to prove and as viewed by most courts is not a violation of discrimination laws. Nevertheless obese people are probably discriminated against. The discrimination stems from common beliefs about the overweight.

### COMMON BELIEFS ABOUT OVERWEIGHT EMPLOYEES

Discrimination is often based on common beliefs and is normally focused on a less powerful or lower level group in a society (Kelley, 1967). Some of these beliefs follow.

*They move slowly and think slowly.* Slow movement is often equated with slow thinking (Klassen, 1987). Neither of these attributes is necessarily a characteristic of the overweight. Research shows no significant differences in reaction time between obese and normal subjects. In fact, overweight subjects had a significantly faster mean time on all levels of task complexity (Klassen, 1987). Thus, obese people react as quickly on simple tasks and have lower average times on complex tasks than do those of "normal" weight.

*They have more illnesses and poorer attendance records.* The high and increasing costs of medical insurance make this issue especially important to employers (*Green v. Union Pacific Railroad*, 1980; *Metropolitan Dade County v. Wolf*, 1973; *McDermott v. Xerox Corp.* 1985). A query of several Connecticut and Massachusetts insurance companies did not substantiate the belief that overweight employees have more illnesses than any other group (Hemenway, 1988). A review of New York City Police Department records revealed that "overweight" officers had better attendance records than "normal" weight officers (Gossett, 1988). These examples appear to indicate that higher incidences of illness and poorer attendance records of overweight employees are not substantiated by anecdotal evidence. However, a recent study (Parks, 1987) reported that relative weight does affect employee work behavior; specifically, overweight individuals have been found to have higher absenteeism than normal weight workers. While not investigated directly by Parks, higher absenteeism may be linked to higher overall rates of illness for overweight personnel (Bellizzi & Norvell, 1991). Thus health experts disagree that the overweight suffer more illnesses.

*They are unattractive and poor role models.* A significant body of research confirms that appearance affects how individuals and their work are regarded, and how rewards are allocated in work settings. The effect of attractiveness can be either positive or negative depending on the aspect of employment investigated (recruitment, training, etc.) (Heilman & Saruwatari, 1979), the type of job involved (managerial, clerical, etc.) (Beehr & Gilmore, 1982), the characteristics of the reviewer (age, sex, etc.) (Heilman & Stopeck, 1985), and candidate char-

acteristics (age, sex, etc.) (Morrow *et. al.*, 1990). Even though physical appearance may not be job relevant, especially when dealing with classifications of applicants (women, overweight, etc.), appearance has been shown to influence performance appraisals.

Overweight people are also seen as blameworthy, weak-willed, guilt ridden, untrustworthy, incompetent, and disgusting (Lerner, 1969; Staffieri, 1967). Other studies found them viewed as lazy, having poor relations with the opposite sex, and dependent (Weiss, 1980). Klassen (1987) found seven traits seen as characteristic of the overweight: lazy, unkempt, jolly, lacking in self-discipline, unhealthy, lacking in self-care, and insecure. These perceived traits are certainly not based on scientific analysis, so they may be refuted by other research. Even if traditional beliefs were correct for overweight personnel as a group, not all are insecure, lazy, or lacking in self-discipline. Furthermore, not all overweight conditions are necessarily self-inflicted (29 U.C.L.A. Law Rev. 1982). Because of these common beliefs, however, overweight employees are likely to suffer employment discrimination. Since many forms of employment discrimination are illegal, we should review the aspects of employment law that affect the overweight.

### SOME RESEARCH FINDINGS

Although many of the common beliefs about overweight employees are unfounded myths based on faulty perceptions and attributions, some of them are true. The results of many research studies, conducted both in the United States and in several European countries, suggest that overweight carries some risk to health (Gilbert, 1989).

One risk of overweight relates directly to the condition itself. Overweight people are more prone to joint troubles. More overweight women than normal weight women develop complications in pregnancy such as toxemia, high blood pressure, and longer labor (Bray, 1986). A second risk of being overweight relates to longevity. In general, research studies suggest that overweight people die at a younger age than normal weight people. The likelihood of a shorter life span increases with the degree of overweight. The increase in mortality rate is greater for people who have been overweight for longer periods of time and for those under the age of 50 (Burton *et. al.*, 1985). With extreme overweight, increased mortality is largely accounted for by death from coronary heart disease, diabetes mellitus, and digestive disease (particularly gallbladder disease and cancer).

A third risk of being overweight relates to the likelihood of becoming ill or developing a health problem such as high blood pressure. Overweight people are more prone to developing glucose intolerance, which predisposes diabetes. There is also very substantial evidence of a strong relationship between high blood pressure and overweight. Increases in body weight are also associated with increased concentrations of glucose and cholesterol in the blood, both of which predispose people to higher risk of coronary heart disease.

Most of this information is neither relevant to work performance nor a reasonable basis for employment decisions, and most courts do not consider obesity a handicap (Bierman, 1990). It may not apply to a given individual. Some overweight people feel healthy and enjoy a very long life span. Health statistics do, however, suggest that efforts to prevent illnesses by maintaining fitness through such programs as employee wellness programs could pay dividends. Although their benefits in terms of employee well-being or organizational performance are largely unknown, wellness programs send an important message about concern for employees.

### LEGAL CONSTRAINTS INVOLVED IN EMPLOYMENT OF THE OVERWEIGHT

Laws prohibiting other types of employment discrimination may also protect the overweight. Laws against discrimination have not been fully tested but do provide some guidelines.

*Age Discrimination.* Since many people gain weight as they get older, weight limits for certain jobs can result in disparate impact on older employees. The Age Discrimination in Employment Act protects employees who are 40 years of age or older from employment discrimination based on age (exceptions: bona fide occupational qualifications, factors other than age, and discharge or discipline for good cause). Although the individual must prove that he/she has been discriminated against, an employer might have difficulty defending an employment policy that impacts more severely on older employees.

*Sex Discrimination.* More women than men are overweight: 23% of women and 13% of men exceed 120% of ideal body weight (Herzeinger & Calkins, 1986). An employment policy imposing weight limits would have unequal impact on women. Unless an employer can show a bona fide occupational qualification (BFOQ), defense against a sex discrimination charge would be difficult. The BFOQ does not apply in situations involving preferences of co-workers, employers, clients or customers except where it is necessary for the purposes of authenticity or genuineness.

*Pay Discrimination.* It is often charged that the overweight are paid lower wages than are those of normal weight. Lower pay for equal work would violate a labor contract and be inconsistent with compensation policy. Since more women than men are overweight, pay discrimination against overweight employees would have a disparate impact on women. This equates to sex discrimination, and such disparate impact could violate either the Civil Rights Act or the Equal Pay Act, both of which require equal pay for equal work regardless of sex. Employers have several defenses, the most important of which is the difficulty of defining "equal" work.

*Disability Discrimination.* The Vocational Rehabilitation Act of 1973 requires federal contractors, subcontractors, and recipients of federal financial assistance to make reasonable accommodations in hiring qualified physically and mentally handicapped persons. It defines as handicapped any person who (1)

has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment. While the Act does not specify "weight," its language is broad enough to cover some of the mobility problems that the overweight may encounter. Federal legislation is still being interpreted for its relevance to weight discrimination issues, although to date most courts do not consider obesity a protected handicap. It remains to be seen whether courts will follow emerging EEOC guidelines declaring obesity a protected category under federal disability laws.

*The Americans with Disabilities Act of 1990.* This act applies to private employers, State and local governments, employment agencies, and labor unions. It went into effect July 26, 1992 for employers with 25 or more employees and covers employers with 15 or more employees as of July 26, 1994. The Act prohibits discrimination against the handicapped in all employment practices and defines "individual with a disability" in the same way that handicapped is defined under the Vocational Rehabilitation Act of 1973. The third part of the definition of handicapped protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such impairment. For example, this provision would protect a disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others. Such protection could protect overweight candidates and employees against discrimination as employers may consider them poor role models (overweight nurses in a hospital) or even disfigured.

The Americans with Disabilities Act is more stringent than Title VII because it specifically requires that selection criteria be both job-related and "consistent with business necessity" if they have an adverse impact on people with disabilities (Ledvinka & Scarpello, 1991). The Act also requires that employers make reasonable accommodations which are not an undue hardship so that any qualified individual can perform the essential functions of a job (Postol & Kadue, 1991). If an applicant is rejected because of a condition that would not prevent performing essential functions of the job with reasonable accommodations, the employer would be held liable for a violation of the ADA.

Some state and municipal laws are more specific. One state, Michigan, includes "weight" in its civil rights legislation (Mich Comp Laws Ann 37.2102, 1988). California's legislation regulating employment of the disabled specifies that obesity is included in its list of medical conditions that constitute a physical handicap (Cal. Admin. Code title 2 7293.6, 1988). In Rhode Island in 1980 the Providence Human Rights Commission interpreted obesity to be a handicap within the definition of local law.

*Invasion of Privacy.* Privacy legislation holds that any disclosure of personal information without the consent of the individual concerned is an invasion of privacy. The Privacy Act of 1974 gives employees the right to determine what information is kept on them by their employers, the right to review that information, the right to correct erroneous information, and the right to prevent the use of information for any purpose other than that for which it was collected. Several states regulate access to personal files.

More important than statute law concerning privacy is common law. The branch of common law most applicable to privacy is the law of torts. One form of tort with particular relevance to employee record keeping is defamation. In the context of employee privacy, defamation occurs when the employer discloses false information that tends to injure an employee's reputation. Appraisals of overweight employees based on biases or stereotypes if disclosed or publicized might constitute defamation.

*Wrongful Termination.* Courts have upheld management's traditional right to dismiss employees "at will." However, courts in several states have made exceptions to this "employment-at-will" doctrine by applying a comprehensive wrongful termination philosophy (Montana and the Virgin Islands have already enacted such statutes). Such statutes would permit any termination except those that (1) violate public policy, (2) violate the employer's written policies or oral assurances, (3) retaliate for certain whistle blowing activities on the part of the employee, and (4) constitute termination without just cause (Ledvinka & Scarpello, 1991). Terminating overweight employees would probably constitute wrongful termination under such laws. Terminated employees could sue to recover their jobs and lost pay.

*Promotion Discrimination.* The use of selection devices as a basis for promotion decisions is subject to the same limitations as use of tests in hiring. If the device is shown to discriminate against individuals protected by Title VII of the Civil Rights Act, it must be validated or discarded. Since women are more likely to be overweight than men, promotions denied on the basis of weight could be considered sex discrimination.

*Benefits Discrimination.* Companies may attempt to require overweight employees to pay higher premiums than normal weight employees in order to receive the same health or retirement benefits, or to pay the same premiums but receive smaller benefits than normal weight employees. Such plans constitute sex discrimination under Title VII of the Civil Rights Act, (*Los Angeles Dept. of Water v. Manhart*, 1978; *Arizona Governing Committee v. Norris*, 1983). The argument for such differences is that the overweight are ill more often and have shorter life expectancies. This is another example of possible sex discrimination, since more women than men are overweight. The Supreme Court has ruled that Title VII of the Civil Rights Act applies to individuals, not classes. Since it cannot be proved that an overweight individual will be ill more frequently and/or have a shorter life than a normal weight individual, differential payments or benefits discriminate against those who pay more for the same benefits or pay the same premium for smaller benefits.

*Negligent Hiring.* "Liability for negligent hiring arises only when a particular unfitness of an applicant creates a situation of danger or harm to a third person. Liability also requires that the employer knew or should have known of the potential danger when he/she hired and placed this applicant in employment where he/she could injure others" (*Fall v. Indian Trail School*, 1986). With regard to the overweight, the key issue is employee unfitness. To demonstrate negligent hiring, the plaintiff must also show that the employee was unfit. This issue is often disputed in negligent hiring cases. In the eyes of a court, fitness depends



upon the type of job the employee has and in particular the risk posed to those who would come into contact with him or her. An employer may avoid hiring or may assign overweight employees to menial tasks in an attempt to avoid charges of negligent hiring, should there be workplace injuries. This is simply disguised discrimination against overweight candidates and employees, using the logic of providing a safe place to work.

*The Civil Rights Act of 1991.* This most recent antidiscrimination law was aimed at restoring the burden of proof in disparate impact cases. The Supreme Court's ruling in *Wards Cove Packing Co., Inc. v. Antonio* (1989) made it more difficult for employees to prove direct job discrimination. Other court rulings on civil rights following the Wards Cove case further narrowed the scope and misconstrued the intent of antidiscrimination laws (Biskupic, 1991). The 1991 Civil Rights Act restored criteria from *Griggs v. Duke Power Co.* (1971), which removed unnecessary, non-job-related barriers to equal employment and restored 18 years of equal employment opportunities for the worker. For the obese worker the new law means that employment decisions must be based on job-related criteria that are necessary for normal operation. Myths and unfounded perceptions and attributions will not be accepted. The burden of proof is returned to the employer, who must also make reasonable accommodation.

In summary, since most legal constraints concerning employment of the overweight are included in laws covering other types of discrimination, the issue is interpretation. Claimants will have to bring charges under other discrimination protection laws and prove that he or she (individually) has been discriminated against. Such proof is becoming increasingly difficult. Recent Supreme Court rulings limit the use of class action suits in disparate impact situations, and individual cases are not lucrative enough to merit legal pursuit. From an employer perspective fair treatment of overweight candidates and employees requires no new employment practices. Practices and policies designed to prevent other types of discrimination also apply to the overweight. However, awareness, vigilance, and constant assessment are necessary even though courts have been reluctant to view obesity as a handicap protected under discrimination laws (McEvoy, 1992).

## EMPLOYING THE OVERWEIGHT—AVOIDING DISCRIMINATION

Application of sound human resources practices should protect employers against discrimination charges and provide adequate defenses in the event of suit. Such practices would include establishing and communicating organizational policy concerning discrimination, maintaining and analyzing employee medical and attendance records necessary to establish program evaluation baselines and to support legal defenses, analyzing and trying to preact laws and court rulings, training interviewers and performance raters to avoid all forms of employment bias, reviewing court dicta concerning interviewing and the design of employment tests, analyzing compensation practices, and designing jobs and work sites to accommodate employees.

A relatively new approach that holds promise for overweight employees is to establish employee wellness programs. The objective of employee wellness programs is health maintenance (preventive medicine). Voluntary diet and exercise programs can help employees control weight and, it is believed, achieve and maintain better health (Siegelman, 1991). Firms, desperate about mounting health care costs, are using punishment as well as rewards to encourage more healthful life styles. For example, Hershey Foods employees earn rewards and penalties based on their health habits, and Mesa Petroleum Chairman T. Boone Pickens has been known to grill top executives about their weight and cholesterol levels. Mesa also offers complimentary snacks and workout clothes to those who exercise. U-Haul in Phoenix, AZ, makes smokers and the seriously overweight pay a \$120-a-year insurance premium; fitter employees get their premiums waived. Adolph Coors Co. in Golden, CO will foot 90% of employee medical bills instead of 85% only if they are fit or swear to follow a health program. Foldcraft of Kenyon, MN, requires workers to pay at least a \$900 deductible unless they score well on a variety of tests, including blood-pressure readings and body-fat analyses. Liz Claiborn Inc. offers on-site weight-control instruction to employees who want to eat better and lose weight. Bethlehem Steel Corp. conducts an employee weight loss program at selected locations across the country. Apple Computer, Inc. and Hewlett-Packard Co. also have employee wellness programs (*Newsweek*, January, 1991; Sielegman, 1991).

There are many ways to design and implement an employee wellness program. Although there is no "one best" design for all situations, there are common features that are present in many well-designed programs. Among these are the following:

*Program Placement.* Careful thought should be given to who has authority over the program. The program must have top management and line management support if it is to succeed. Adequate funding is a must.

*Goal Planning.* The key at this step is very specific goals. They should be realistic, obtainable, measurable, and, most of all, based on individual and organizational needs. Employee participation is essential.

*Employee Medical Screening.* Tests should be voluntary and paid for by the company. They should be conducted for the stated purpose only and results should be kept confidential. The frequency of these tests should increase with the age of the employee.

*Orientation.* This step consists of communication between program designers and employees. Involving employees in every stage of the program will provide them with information and help to develop interest. Additional communication will also aid understanding.

*Program Implementation.* As at every stage, participation is important. It is also important to select a program supervisor very carefully. Perhaps most important of all is that management and employees jointly create a workplace climate that encourages the life style changes proposed.

*Program evaluation.* The basic questions at this stage involve whether employee wellness programs are effective, in terms of costs and benefits, to the organization and the employees. Answers to these questions require on-going

review and comparisons with objectives. Progress evaluation requires tracking accidents and analyzing long-run health data. A cost-benefit analysis, although difficult, is essential. Hewlett-Packard Co. has been tracking costs and benefits since 1991. Evidence is accumulating that employee wellness programs do pay off economically as well as psychologically.

## SUMMARY

Overweight employees are becoming increasingly aware and intolerant of differential treatment. They view it as discrimination and often seek legal relief. Although federal laws and most state laws do not consider obesity a protected handicap under discrimination laws, there are other laws that could, with interpretive license, cover the issue.

Many common beliefs and biases weigh against the overweight. Some beliefs are grounded in medical and industrial research and practice, but many are simply myths. Myths can provide a convenient basis for discrimination. Discrimination against the overweight has been challenged infrequently, but recent trends indicate potentially litigious situations, and the EEOC has presented guidelines that, if followed by the courts, would place obese employees under the protection of federal disability laws.

Well-managed organizations can reduce the incidence and impact of discrimination claims by overweight employees. Business firms' efforts should involve the sound, basic human resource management practices that have been in use for some time. These practices involve familiarity with legal interpretations and trends, establishing and communicating antidiscrimination policies, analyzing employee medical and attendance records, training interviewers and performance appraisers, analyzing compensation practices, designing jobs and work sites to accommodate, and instituting employee wellness programs. None of these is a new idea, and all can be modified for the overweight. Failure to anticipate may be costly.

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