

## IS OBESITY A DISABILITY? JURY'S STILL OUT, BUT IT'S A SERIOUS MATTER

*Even though there's no definitive rule on whether obesity is a disability under the amended, more employee-friendly Americans with Disabilities Act (ADA), you should be careful about how you treat overweight and obese employees. One in every three Americans age 20 and up was obese between 2007 and 2008, and about the same percentage was overweight, according to the Centers for Disease Control and Prevention. One state, Nevada, was considering legislation this year to outlaw discrimination based on physical characteristics, including weight, and survey research published in the journal Obesity and reported in the Orlando Sentinel indicated support for laws against discrimination based on weight.*

The U.S. District Court in New Orleans has been asked to rule

**...new ADA doesn't explicitly say obesity is a disability, but it relaxes the definition for an impairment...**

on a recent lawsuit by the Equal Employment Opportunity Commission claiming a woman was illegally fired because of obesity in violation of the ADA. The employer has denied liability, and a trial is set for March 2012. The

new ADA doesn't explicitly say obesity is a disability, but it relaxes the definition for an impairment that substantially affects a major life activity, the cornerstone of ADA protection. That makes it easier for an employee to establish she is disabled and entitled to the Act's protections – a reasonable accommodation to perform the essential functions of the job and protection from adverse workplace decisions based on bias.

### Get by with a little help

The courts are slowly reaching decisions based on the new ADA, but what's an employer to do in the meantime? Here are some quick guidelines.

First, remember that the purpose behind amending the ADA was to get employers to stop arguing about whether employees were truly disabled and start helping them do their jobs. In many cases, that will mean spending more time working with an employee to reach a reasonable accommodation so he can perform the essential functions of the job.

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Using Personal Autos**

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Second, the employee must let you know he has an impairment unless it is obvious. While it may be obvious that someone has a weight problem, it may not be obvious that it's an impairment, so don't jump to conclusions or assume anything. For example, if an obviously overweight person has a job performance problem, in the absence of anything more to guide you in your actions, deal with the performance issue as you would with any other employee. Document your actions in the usual way.

Third, once the same employee says his weight is making it hard to do his job, then you can talk with him about the situation. Ask if there's anything you can do to help him do the job. Talking about helping him get the job done, rather than about accommodating a disability, indicates you don't regard him as disabled but rather are trying to help. (Under the new ADA, however, it's easy for the employee to show a disability that entitles him to a reasonable accommodation, so the Act may very well apply anyway.) The help you give must relate to the job and the person's issues that make it hard to do the job. You don't have to give an employee whatever he wants. When you have talked with an employee about helping him get the job done, you have tried some approaches, and none has worked, you have fulfilled your duty under the ADA.

### **Don't assume; do be professional**

There are a few general "don'ts" to keep in mind. Don't make assumptions about what the person with a weight problem can or can't do in performing her job. Assuming someone can't do a job because of weight can lead to an ADA claim based on being regarded as having a disability.



Don't get drawn into discussions with other employees about why you don't give them the same "breaks" you may have given someone with a weight problem. That's between you and the person getting the help; it's not the others' concern.

Whatever happens, don't criticize an employee or treat her unkindly because of her weight. Don't bully her, make fun of her, make comments behind her back, or create a hostile environment. That behavior makes people angry – angry enough to sue and hope the judge throws the book at you. Your behavior toward your employees is fully within your control, and the days of fat jokes are over.

*Reprinted courtesy of North Dakota Employment Law Letter. For subscription information, please call 800-274-6774 or click to [www.HRhero.com](http://www.HRhero.com). ■*

## RISK SERVICES

### OFFICIALS, EMPLOYEES, VOLUNTEERS USING PERSONAL AUTOS

Over the years, we have received numerous queries about what coverage the NDIRF Automobile Memorandum of Coverage provides to cover officials, employees or volunteers while they use their personal auto on your business and are or are not paid a mileage reimbursement for such service. The answer is that no primary coverage is provided to those individuals. The NDIRF does provide excess liability coverage for those individuals that meet the North Dakota statutory liability requirements for automobile insurance.

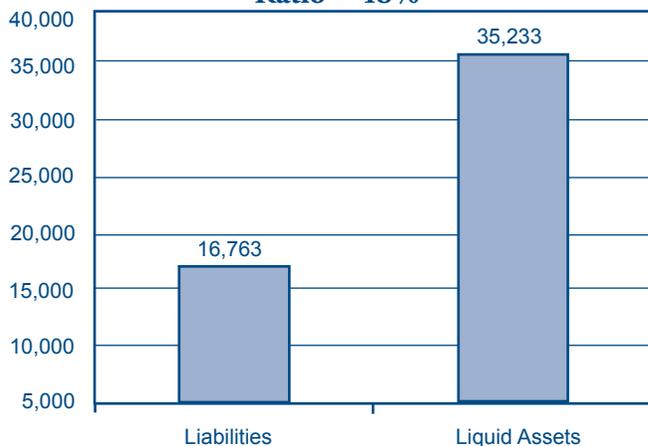
We have received anecdotal information that some companies marketing personal auto policies in North Dakota excluded coverage (liability and/or physical damage) if an individual (official, employee or volunteer) were in an accident while using their personal automobile on their employer's business for which they are reimbursed mileage. In an attempt to validate or debunk this report, we have surveyed a number of the major personal automobile insurance carriers writing business in North Dakota. We found no carrier that said they would exclude coverage (liability or physical damage) for a loss while their insured was using their personal auto on their employer's business and receiving a mileage reimbursement for such use.

There are approximately 100 companies that write personal automobile insurance in North Dakota, many of which write very few policies. Our contact was with a number of the largest personal automobile insurance providers in the

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## FINANCIAL INSIGHTS

### Liabilities to Liquid Assets Ratio (000 omitted) As of June 30, 2011 Ratio = 48%



This ratio is a measure of a company's ability to pay its financial obligations. The ratio is calculated by dividing liabilities (primarily loss reserves) by liquid assets (cash and marketable investments). A ratio less than 105% is desirable. As this graph indicates, NDIRF, with a 48% ratio, is in a very strong position to meet its obligations, with liquid assets more than twice as large as liabilities. ■

## FROM THE CEO

It is difficult to believe that, as August approaches, we are still talking about and dealing with real-time flood concerns across North Dakota beyond the Devils Lake basin. 2011 has been an absolutely unbelievable year – and it's not over. Bringing this home to NDIRF it means that, as usual when natural forces go to extremes, claim losses are running significantly higher than normal.

In observing an extraordinary series of disasters, a wide range of impressions have been made on me but, above it all, there's a full measure of civic pride in the common sense and determination shown by the vast majority of affected private citizens and by our public officials and employees. There has been a lot wrong with this year but we have been fortunate in one major way - to have the right people in the right places, from the Governor right on through the ranks, state and local, during an extended time of needing grace and effectiveness under pressure.

Without intending to diminish in any way the efforts of all involved, here's a nod to those public works employees, supervisors and portfolio-holders who were there before help arrived, are handling a heavy load and will be there to hold things together after the outside assistance is gone – this Bud's for you. ■

## RISK SERVICES

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state. The companies we contacted write slightly over 54% of the personal automobile premium dollars in North Dakota. They indicated they would not exclude the coverage purchased if an employee of a governmental entity were using their personal auto and receiving mileage reimbursement while on the governmental entity's business.

If the reimbursement of mileage creates a coverage issue with any of your officials', employees' or volunteers' personal automobile insurance carrier, we ask that you get the name of the company, name of the agent and the agent's phone number so we can contact them and hopefully clear up any coverage issue.

In the past, we have found the issue with mileage reimbursement was that the individual receiving the reimbursement felt it was not adequate and/or did not carry physical damage coverage on their vehicle. Explain clearly, to individuals using their personal auto on your business, that the mileage reimbursement is intended to cover the cost of operation of the vehicle including, but not limited to, fuel, wear and tear, maintenance, depreciation, and insurance costs.

If you have questions on this information or know of a personal automobile insurance carrier that excludes coverage when your official, employee, or volunteer is using their personal auto on your business, please contact Ross Warner at [ross.warner@ndirf.com](mailto:ross.warner@ndirf.com) or local phone 224-1988 and wats 1-800-421-1988. ■

## Mark CALENDAR

Sept

15: NDIRF Board of Directors Meeting  
NDIRF offices, Bismarck

20-22: ND Recreation and Parks Assoc.  
Annual Conference,  
Ramkota Inn, Bismarck

22-24: ND League of Cities  
Annual Conference,  
Ramkota Inn, Fargo

Oct

16-19: ND Association of Counties  
Annual Conference & Expo  
Ramkota Inn, Bismarck

28-29: ND School Board Association  
Annual Convention,  
Ramkota Inn, Bismarck

### North Dakota Insurance Reserve Fund Board of Directors

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