

# Insurance Buyers' News



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Liability

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## Personal Injury Claims: Beyond Slip-and-Fall Accidents

Although the legal definition of “personal injury” includes injury to the body, standard liability insurance policies have an entire section devoted to covering personal injury claims. And they don’t include injury to the body.

**N**early every business owner realizes the importance of protecting the organization from claims of bodily injury from other parties. But there’s another category of liability that can also lead to expensive claims. “Personal injuries,” as defined in the typical liability insurance policy, are wrongful acts, that result “in injury to another’s person, property, reputation, or the like, and for which the injured party is entitled to compensation,” according to Dictionary.com. They do not involve bodily injury but can



## This Just In

**O**besity does not equal disability, according to a recent court ruling. The Eighth District Court of Appeals held that a plaintiff could not sue for employment discrimination under the Americans with Disabilities Act (ADA) and amendments because his morbid obesity did not constitute a disability under the ADA.

BNSF Railway Company had a policy of not hiring people with a BMI higher than 40 for safety-sensitive positions. The company made a conditional offer of a machinist position to Melvin Morriss, but rescinded the offer after medical examinations showed Morriss’ BMI exceeded 40.

Morriss filed a lawsuit alleg-

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be just as damaging to a person or entity. They are considered torts, or non-criminal wrongful acts.

Victims of torts can sue for compensation if they can prove the tort led to a loss or harm. The standard commercial general liability policy covers these personal injury torts: claims of false arrest, detention, or imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy. Law enforcement agencies often deal with these sorts of claims.

What do each of these terms mean for a business?

**False arrest, detention or imprisonment:**

This means arrest, detention or imprisonment without just cause. In private industry, this sort of claim would most often occur against a private security firm.

**Malicious prosecution:** Malicious prosecution occurs when a party brings baseless and malicious litigation against another without probable cause. Sometimes individuals or companies will file lawsuits for the sole purpose of harassment or silencing opponents.

**Wrongful eviction:** Wrongful eviction occurs when a landlord evicts a tenant without following the legal requirements set by the state and city. Property managers or property owners that lease property, even if incidental to your main business, face the possibility of wrongful eviction claims.

**Slander and libel:** Slander and libel are both forms of defamation, or the making of false statements about another person or entity. These statements either harm a reputation or confidence or are disparaging or hostile.

When defamation is spoken or heard, it's called slander; when it's printed or broadcast in visual form, it's called libel. To prove defamation, the plaintiff must prove the statements were false, that they were "published" or heard by at least one other person besides the person or entity being defamed, and that the publisher acted negligently in publishing them. Any business with an active online presence must take care to avoid making defamatory statements against other people or entities.

**Invasion of privacy:** Invasion of privacy is the wrongful intrusion into another's private life. It can involve the intrusion of another's solitude, public disclosure of embarrassing private information, publicity that paints a false picture of that person to the public, or the appropriation of a person's name or likeness for commercial or personal advantage.

People who claim invasion of privacy must have a reasonable expectation of privacy for their claim to be valid. For example, a person who goes nude in public has no reasonable expectation of privacy, but someone who's caught nude by a peeping Tom or paparazzo in their own home does. Celebrities and other public figures have a diminished right to privacy, since they have placed themselves in the public arena.

The commercial general liability policy and business owner policy are designed to respond to a wide range of liability claims. However, some businesses might need additional or specialized coverage. For more information on what your policy covers or an analysis of your coverage needs, please contact us. ■

*This Just In*

**ing that BNSF discriminated against him on the basis of disability. The district court found in favor of BNSF. It found that Morriss would need to prove that he had a physical disorder or condition that caused his obesity if that condition were to be considered a disability.**

**On appeal, Morriss said that his obesity alone was a disability, but a panel of the court noted that Mr. Morriss' treatment records and pre-employment examinations did not reveal that Morriss had a physical impairment. In order to qualify as a physical impairment under the ADA, Morriss' obesity would have to result from a physiological disorder, said the court. Read more on this topic on P. 4.**



# Anatomy of an Insurance Policy

An insurance policy is a legal contract between an individual or organization (the insured) and an insurer. Although millions of dollars in claims payments can be at stake, too few insureds bother to read their policy. The following primer will help you understand the parts of a policy and some things to look for.

## All insurance contracts have these four basic parts:

- ✱ Declarations
- ✱ Insuring agreement
- ✱ Exclusions
- ✱ Conditions

Some also have additional sections: Definitions, endorsements and riders.

**Declarations:** The declarations introduce your coverage. They identify the insurer, the insured and policy number. They also identify the properties or risks the policy covers, and for how long (the policy period). They outline the financial considerations of the contract, including premiums you will pay, limits and deductibles.

Action items:

- ✱ Check that the name of the insured matches the entity's legal name, spelled correctly.
- ✱ Check that the policy lists the addresses of all the business premises you want to cover (for a business property policy).
- ✱ For an auto policy, verify information on make, model and VIN numbers for covered vehicles.
- ✱ For a liability policy, verify the declarations accurately describe the type of coverage you want.

- ✱ Check the policy start (inception) and termination dates. This is your coverage period. If you are replacing an existing policy, will this create any coverage gaps? Some claims-made liability policies provide coverage for accidents that occur before the current policy term, the retroactive period. Check the retroactive date—the date on a renewal claims-made liability policy should match the date on your first policy, otherwise you will have a coverage gap.

- ✱ Policy limits are the most the insurer will pay under the policy. Some policies also have separate, lower sublimits for specific types of claims. Will these limits provide enough coverage?

- ✱ The declarations page will also list the premiums you pay, along with any deductibles you will have to pay before the insurer begins to pay on a claim. To lower your premiums, can you afford higher deductibles?

- ✱ Some policies include separate schedules, or itemized lists of covered property. They might also include endorsements, which are separate documents that modify terms of coverage under a policy. The declarations should list these—check that they are correct.

**Insuring agreement:** This summarizes the insurer's agreement to pay covered claims. For



a property policy, it will state the property covered and types of perils, or causes of loss, the policy covers. In a liability policy, the insuring agreement describes the types of activities covered. For a commercial general liability policy, the insurer agrees to any money the insured is legally obligated to pay for bodily injury or property damage claims covered by the policy. The insurer also agrees to provide the insured's legal defense for liability claims that might be covered by the policy.

Action item: For a property policy, determine whether you have a "named perils" or "all-risk" policy. A named perils policy will list the specific perils that the policy covers. Any peril not named is not covered. The so-called

“all-risk” policy offers broader coverage, covering losses caused by any peril, except for those specifically excluded in the policy. If you have a named perils policy, do you have any significant risk exposures that are not covered?

**Exclusions:** Exclusions limit your coverage by stating the types of activities or losses the policy will not cover.

Action item: To avoid significant coverage gaps, list the exclusions included in all your liability policies. Most general liability policies exclude liability for pollution and design error, among other things. If you need coverage for these exposures, you will need to buy separate, specialized insurance.

Most businesses have a second layer of liability protection through an umbrella or excess policy. This pays claims that exceed the limits of the primary liability policies. Often an umbrella policy will provide broader coverage (that is, cover more perils) than your primary policies. If not, and you have significant risk exposures excluded in your primary policies, please contact us so we can tailor a coverage solution for you.

**Conditions:** The conditions describe the obligations of each party to the contract. Conditions can appear in the basic policy, the standard form and (if you have them) in your policy endorsements.

Conditions include the policy’s cancellation provision. They also describe how the insurer will proceed if other coverage applies to a loss, and reserve the insurer’s right to subrogate a claim, or seek recovery from another party after it has paid a claim on your behalf.

The conditions also outline your obligations to the insurer. They spell out when and how you must notify the insurer of an accident or claim that might be covered by a liability policy, your obligation to protect covered property after a loss, and your obligation to cooperate during the company’s investigation or defense of a liability lawsuit.

Action items: Read policy conditions carefully, because failure to fulfill your obligations to the insurer could nullify your coverage!

To ensure you have time to find other coverage, look for a cancellation provision that requires the insurer to provide at least 30 days’ notice before cancelling your policy for reasons other than non-payment. For difficult to place coverage, you may want as many as 90 days’ notice.

For assistance in reviewing a policy or understanding policy provisions, please contact us. ■

## Weight Discrimination on the Rise

The majority of American adults are overweight or obese, yet studies have found that weight discrimination is increasing. One recent study found it was as prevalent as racial discrimination.

The study mentioned above used a subjective measure, individuals’ perceptions of being discriminated against for their weight. But studies using more concrete measures, such as pay and position, have found evidence of weight discrimination as well. A 2010 study led by Timothy A. Judge of the University of Florida found a strong pay bias in favor of thinness in women. Women who weighed 25 pounds less than the norm for their group earned an average of \$15,572 more per year. Those who weighed 25 pounds more than the norm earned \$13,847 less than average.

Another study, “Weight Discrimination and the Glass Ceiling Effect Among Top U.S. CEOs,” found that weight had a glass ceiling effect for women. Using photographs of CEOs of Fortune-ranked companies, researchers estimated that overweight and obese women were significantly underrepresented in the group, with approximately 22 percent overweight and 5 percent obese.

The study found that being overweight did not have the same impact on career advancement for men. “Compared to the general population, overweight men are overrepresented among top CEOs [emphasis added]...” However, as with women, obese men were underrepresented at 5 percent of the CEO group. The authors concluded that “weight discrimination occurs at the highest levels of career advancement and...the threshold for weight discrimination is lower for women than for men.”

The University of Florida study found that, “Very thin men, conversely, are punished relative to their average weight peers, and men are rewarded for gaining weight until the point of obesity. For American men, gaining 25 lbs produces a predicted increase in wages of roughly \$8,437 per year at below average weights and a predicted increase of approximately \$7,775 per year at above average weights.”

## Current Law

No federal laws prohibit discrimination on the basis of weight. However, individuals have used other nondiscrimination laws as the basis of weight discrimination claims. Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex or national origin, has been used in cases where weight standards are applied differently or have an adverse impact on a protected class.

Some individuals have used the Americans with Disabilities Act (ADA) in weight discrimination claims. However, barring an underlying physiological disorder, being overweight or obese generally does not qualify as an ADA-protected disability. The U.S. Equal Employment Opportunity Commission (EEOC) says:

*Being overweight, in and of itself, generally is not an impairment...[if weight] is "within 'normal' range and not the result of a physiological disorder".... Thus, for example, a flight attendant who, because of avid body building (which resulted in a low percentage of body fat and a high percentage of muscle), exceeds the airline's weight guidelines does not have an impairment...Similarly, a mildly overweight flight attendant who has not been clinically diagnosed as having any medical anomaly does not have an impairment....*

On the other hand, severe obesity, which has been defined as body weight more than 100 percent over the norm, ...is clearly an impairment.... In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment.

The Americans with Disability Act Amendments Act of 2008 (ADAAA) broadened the ADA's definition of disability to cover individuals who are perceived to have a disability, even though they do not. Many experts thought that this would open the door to more weight discrimination cases. However, EEOC regulations implementing the ADAAA say:

*When determining whether an individual is covered by this part of the*

*definition of the term "disability," ...the record at issue must be a record of an impairment that substantially limited a major life activity. A record of a condition that is not an impairment, or of an impairment that was not substantially limiting, does not satisfy this part of the definition.*



Therefore, overweight or obesity does not put an individual into a protected class, unless the condition has resulted in a substantial limitation of a major life activity.

Among the states, only Michigan prohibits discrimination on the basis of weight. The Council on Size and Weight Discrimination reports that the cities of San Francisco and Santa Cruz, Calif. also specifically outlaw discrimination on the basis of weight, while the District of Columbia outlaws discrimination in employment based on "personal appearance," which could include weight.

Generally, employers can use employment criteria that would otherwise be discriminatory if they are bona fide occupational qualifications (BFOQs). To determine whether a personal characteristic is a BFOQ, ask yourself if an individual really needs it to perform the essential functions of the job. With jobs that require a certain level of physical fitness or use of certain equipment, you

are safer asking an applicant to demonstrate his/her ability to perform that job function than to impose specific height or weight requirements.

What about the personal appearance of employees in the public eye? Can you discriminate in favor of slim employees, since most people find them more attractive? Employers can legitimately require employees to meet certain standards of grooming and dress, but requiring them to be a certain size could lead to charges of discrimination. Regardless of the current state of the law, in today's diversity-conscious society, wise employers avoid weeding out qualified individuals on the basis of weight, or any other personal characteristic.

For more information on protecting your business from employment discrimination and other employment practices liability claims, please contact us. ■

## The Biggest Risks to Your Data

A white paper by Imperva, a company that offers cyber security services, identified the 10 biggest threats to data security in 2015. They were:

- 1 Excessive and Unused Privileges
- 2 Privilege Abuse
- 3 Input Injection (hackers injecting unauthorized or malicious unauthorized or malicious statements into input fields).
- 4 Malware
- 5 Weak Audit Trail
- 6 Storage Media Exposure
- 7 Exploitation of Vulnerabilities and Misconfigured Databases
- 8 Unmanaged Sensitive Data
- 9 Denial of Service
- 10 Limited Security Expertise and Education

So what will a data security breach cost? Plenty, particularly if you use or store individually identifiable personal information, such as Social Security numbers, private health information, credit card numbers and other financial information. If this information is breached, you can face liability for resulting losses or thefts.

At the very least, you might incur notification costs. Nearly

every state, plus the District of Columbia and Puerto Rico, has data breach laws. Laws vary from state to state, but require the holder of personal information to notify each individual whose data might have been lost or stolen if a data breach occurs. Some states also require the information holder to offer credit monitoring services for people whose information has been stolen.

At time of this printing, the only states without data breach laws were Alabama, New Mexico and South Dakota. For a regularly updated list of state security breach notification laws, see the website of law firm Perkins Coie, <https://www.perkinscoie.com/en/news-insights/security-breach-notification-chart.html>.

Earlier in the 2015-16 legislative session, the Senate introduced S. 177, a bill that would standardize data breach reporting requirements throughout the country. The bill would require the Federal Trade Commission (FTC) to promulgate regulations that would require entities that own or possess data containing personal information to implement security policies and procedures. It would also establish procedures to follow in the event of an information security breach. To date, no significant action has been taken on the bill, so businesses should be aware of the laws in all states in which they do business. ■

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