

# FLARE

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Rights, & Education

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## Best Practices Guide to Fighting Body Size and Weight Discrimination: Model Legislation and Common Pitfalls

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**Background:** Started in 2001, the Fat Legal Advocacy, Rights, and Education (FLARE) project is the United States' oldest legal project dedicated to fighting weight based discrimination. The project understands weight and height discrimination to be civil and human rights issues that are inherently tied to race, class, ethnicity, and disability in the US. This Best Practices Guide provides a reference for locations working on creating laws to protect people from this pernicious form of discrimination which has an unfair, disproportionate impact on Black and Brown people. The Guide provides an easy reference sheet with recommended legislative language options, including benefits, concerns and pitfalls for each.

**Option One: Add “weight, height” or “weight or height” or “weight and/or height” to the list of protected categories in an existing law.**

Benefits:

- Simple, easy to understand
- Takes advantage of existing legal framework
- Minimal legal drafting work required
- Narrowly tailored

Concerns:

- Only works in locations with robust existing civil rights protections
- Requires definition of weight and height to be carefully crafted and included in the law (**See below for Model Definitions**)
- Must be added to all lists of protected categories, not only select lists
- Less comprehensive than appearance-based language

Potential Pitfalls:

1. Protections must be comprehensive. Jurisdictions that limit protections, for example to only the workplace and/or places of public accommodation, may inadvertently disproportionately negatively impact people of color where weight-based discrimination commonly happens at all life stages and in all areas of life, including educational opportunities, healthcare settings (including emergency situations), family matters (such as dissolution, fostering, adoption, and planning), carceral settings (public and private), business and wealth building opportunities, and housing. Protections that focus only on

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employment tend to benefit people who are more privileged. Further, such limited laws may inadvertently make it harder for lawyers to fight weight discrimination in other fields because courts may interpret a law's silence in a particular area, such as healthcare or education, as proof that the legislature intended to allow discrimination in those settings. While lay people may, understandably, assume "some protections in employment are better than no protections in anything" that may not prove true for people facing the brunt of antifat attitudes.

2. Be careful if considering the phrasing "weight and height" - it can be misinterpreted to require both weight and height discrimination before the law applies.
3. Do not omit definitions; significant discrimination occurs based on various ratios of height to weight, or on other types of measurements of body size that may be articulated as separate from weight, such as waist-to-hip ratios. These nuances MUST be captured in the definition section of the law and should be reinforced in interpretation guidelines and other guidance regarding implementation of the law.
4. Some jurisdictions tend to include exceptions in their civil rights legislation related to particular protected categories, often in employment settings. If articulating exceptions, never defer to existing policies, or certification-specific, professional or government-imposed requirements; these requirements may have already codified antifat discrimination and may in fact be the core problem, such as blanket height or weight requirements. It is important that such blanket height or weight requirements are able to be challenged. Acceptable exception language is: "height or weight, except when the individual poses a direct threat due to their height or weight, or where required for compliance with a federal\* safety standard..." This type of exception puts the burden on the respondent/defendant to show that the individual poses a direct threat.
5. Do include compliance training requirements; without training requirements or suggestions, individuals and entities will not understand their rights and responsibilities.

## **Option Two: Add "weight, height, or body size" or "weight, height, and/or body size" to the list of protected categories in an existing law.**

### Benefits:

- Simple, easy to understand
- Good option when adding comprehensive definitions to the law is difficult
- Takes advantage of existing legal framework
- Minimal legal drafting work required
- Narrowly tailored

### Concerns:

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- Only works in locations with robust existing civil rights protections
- Must be added to all lists of protected categories, not only select lists
- Less comprehensive than appearance-based language

## Potential Pitfalls:

1. Protections must be comprehensive. Jurisdictions that limit protections, for example to only the workplace and/or places of public accommodation, may inadvertently disproportionately, negatively impact people of color where weight-based and body size discrimination commonly happens at all life stages and in all areas of life, including educational opportunities, healthcare settings (including emergency situations), family matters (such as dissolution, fostering, adoption, and planning), carceral settings (public and private), business and wealth building opportunities, and housing. Protections that focus only on employment tend to benefit people who are more privileged. Further, such limited laws may inadvertently make it harder for lawyers to fight weight discrimination in other fields because courts may interpret a law's silence in a particular area, such as healthcare or education, as proof that the legislature intended to allow discrimination in those settings. While lay people may, understandably, assume "some protections in employment are better than no protections in anything" that may not prove true for people facing the brunt of antifat attitudes.
2. Some jurisdictions tend to include exceptions in their civil rights legislation related to particular protected categories, often in employment settings. If articulating exceptions, never defer to existing policies, or certification-specific, professional or government-imposed requirements; these requirements may have already codified antifat discrimination and may in fact be the core problem, such as blanket height or weight requirements. It is important that such blanket height or weight requirements are able to be challenged. Acceptable exception language is: "height, weight, and/or body size, except when the individual poses a direct threat due to their height, weight, and/or body size, or where required for compliance with a federal\* safety standard..." This type of exception puts the burden on the respondent/defendant to show that the individual poses a direct threat.
3. Do include compliance training requirements; without training requirements or suggestions, individuals and entities will not understand their rights and responsibilities.
4. Definitions may still be helpful. **See below for Model Definitions that can be adapted for use in this situation.**

## Option Three: Add "appearance" to the list of protected categories in an existing law.

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## Benefits:

- Broad protection
- Takes advantage of existing legal framework
- Minimal legal drafting work required
- Is inclusive of hairstyle and grooming which helps eliminate loopholes for race and ethnicity based discrimination

## Concerns:

- Only works in locations with robust existing civil rights protections
- Should be accompanied by a definition of appearance that includes weight and/or height and any ratio or measurement involving weight and/or height. (**See below for Model Definitions**)
- Must be added to all lists of protected categories, not only select lists
- May face greater opposition due to potential inclusion of grooming choices, tattoos and other body modifications

## Potential Pitfalls:

1. Protections must be comprehensive. Jurisdictions that limit protections, for example to only the workplace and/or places of public accommodation, may inadvertently disproportionately, negatively impact people of color where appearance-based discrimination commonly happens at all life stages and in all areas of life, including educational opportunities, healthcare settings (including emergency situations), family matters (such as dissolution, fostering, adoption, and planning), carceral settings (public and private), business and wealth building opportunities, and housing. Protections that focus only on employment tend to benefit people who are more privileged. Further, such limited laws may inadvertently make it harder for lawyers to fight weight discrimination in other fields because courts may interpret a law's silence in a particular area, such as healthcare or education, as proof that the legislature intended to allow discrimination in those settings. While lay people may assume "some protections in employment are better than no protections in anything" that may not prove true for people facing the brunt of antifat attitudes.
2. Do not omit definitions; significant discrimination occurs based on various ratios of height to weight, or on other types of measurements of body size that may be articulated as part of appearance discrimination, such as waist-to-hip ratios. These nuances **MUST** be captured in the definition section of the law and should be reinforced in interpretation guidelines and other guidance regarding implementation of the law.
3. Some jurisdictions tend to include exceptions in their civil rights legislation related to particular protected categories, often in employment settings. If articulating exceptions, never defer to existing policies, or certification-specific, professional or

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government-imposed requirements; these requirements may have already codified antifat discrimination and may in fact be the core problem, such as blanket height or weight requirements. It is important that such blanket height or weight requirements are able to be challenged. Acceptable exception language is: “appearance, except when the individual poses a direct threat due to their appearance, or where required for compliance with a federal\* safety standard...” This type of exception puts the burden on the respondent/defendant to show that the individual poses a direct threat.

4. Do include compliance training requirements; without training requirements or suggestions, individuals and entities will not understand their rights and responsibilities.

**Option Four: Stand-alone comprehensive legislation outlawing appearance or stand-alone legislation outlawing discrimination based on weight, height, body size including body tone, shape, or proportions.** (The FLARE project is available to provide assistance in circumstances where stand-alone legislation is being considered.)

#### Benefits:

- Broad protection
- Simple to include training and posting requirements in the law
- Does not require a separate definition to be included in the law
- Is unlikely to exclude important areas such as healthcare and family rights

#### Concerns:

- Significant legal drafting required
- May be more difficult to pass; may create greater opposition due to potential inclusion of grooming choices, tattoos and other body modifications
- May be more vulnerable to carve outs, exceptions, and exclusions in committee and debate phases of lawmaking

#### Potential Pitfalls:

1. Protections must be comprehensive. Legislation should specifically articulate the comprehensive nature of the law.
2. Some jurisdictions tend to include exceptions in their civil rights legislation related to particular protected categories, often in employment settings. If articulating exceptions, never defer to existing policies, or certification-specific, professional or government-imposed requirements; these requirements may have already codified antifat discrimination and may in fact be the core problem, such as blanket height or weight requirements. It is important that such blanket height or weight requirements are

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able to be challenged. Acceptable exception language is: "... except when the individual poses a direct threat due to their weight, height, body size including body tone, shape, or proportions, or where required for compliance with a federal\* safety standard..." This type of exception puts the burden on the respondent/defendant to show that the individual poses a direct threat.

*[\*Please Note: The exception language in the Model Legislation options above presumes a state-level law. If working on a city or local law, exceptions may need to include not only federal safety standards, but also state safety standards. Advice should be sought from an attorney licensed to practice in the relevant state.]*

## **Model Legal Definition for use with Weight/Height Legislation:**

*Our model weight and height definitions are based on a revised and updated version of San Francisco, California's definitions.*

Weight is a numerical measurement of total body weight, the ratio of a person's weight in relation to height, the ratio of a person's weight in relation to any measurement(s), or an individual's unique physical composition of weight through body size, shape and proportions. Weight includes measurements of individual body components, such as waist, hip, height, or chest measurements and any ratio of such body measurements. Weight encompasses, but is not limited to, an impression of a person as fat or thin regardless of numerical measurement. An individual's body size, shape proportions, and composition may make them appear fat or thin regardless of numerical weight.

Height is a numerical measurement of total body height, the expression of a person's height in relation to weight, the ratio of a person's height in relation to any measurement(s), or an individual's unique physical composition of height through body size, shape, or proportions. Height includes measurements of individual body components, such as leg, torso, arm, foot, and neck measurements. Height encompasses, but is not limited to, an impression of a person as tall or short regardless of numerical measurement. The length of a person's limbs in proportion to the person's body may create the impression of the person as tall, short, or atypically proportioned, independent of numerical measurements of height.

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## **Exceptions, Including Model Exception Definition (Use If Exceptions Are Being Written Into the Legislation):**

***Health and Safety Exceptions [hereafter “Safety”]:*** Care should be taken if exceptions are being written into the law. If it is important to articulate exceptions, such exceptions should be extremely narrowly tailored. Exceptions should not differ significantly in size, type, or approach to exceptions crafted for other protected categories such as disability and pregnancy. In employment, bona fide occupational qualifications are usually the only acceptable exception, and the burden of proof should be on the employer or potential employer to show that there are no reasonable modifications or reasonable accommodations that could be made to avoid the discrimination. Whenever possible, actual tests of the ability to perform the job should be given; height and/or weight should not be used as a proxy for determining if a person can meet the physical, health, or safety needs of a job. Acceptable exception language includes: “height or weight, except when the individual poses a direct threat due to their height or weight, or where required for compliance with a federal safety standard...” This type of exception puts the burden on the respondent/defendant to show that the individual poses a direct threat. It also enables a complainant or plaintiff to challenge state or lower level certifications, policies, or occupational qualifications that unjustly include height or weight.

***[NOTE: The exception language above presumes a state-level law. If working on a city or local law, exceptions may need to include not only “federal safety standards, but also state safety standards. Advice should be sought from an attorney licensed to practice in the relevant state.]***

Safety exceptions should include a requirement that all reasonable efforts have been made to avoid the need for a safety exception and that there are no reasonable, less restrictive alternatives, except in rare circumstances where the wellbeing of the public is implicated. For example, wall-mounted fixtures such as toilets have weight maximums, but supports can be added underneath wall-mounted toilets to dramatically increase their weight capacity; such supports should be required, rather than allowing people to be excluded under a safety exception. Similarly, safety belts for vehicles or rides may limit the size of a rider or driver even though the ride or vehicle would otherwise be safe for a larger or smaller person. In such cases, reasonable modifications to the safety belts must be required, rather than allowing safety exceptions to exclude people based on body size. On the other hand, if a ride cannot be made safe for a person of a certain size, then a safety exception would be appropriate.

*Our model definition is based on Title II of the Americans with Disabilities Act as Amended by the ADA Amendments Act of 2008.*

**Direct threat** means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of

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auxiliary aids or services. In determining whether an individual poses a direct threat to the health or safety of others, the entity or person must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

***Health and Wellness Program Exceptions:*** At the time of the writing of this guidance, federal law allows certain types of discrimination in health and wellness programs under particular circumstances. State and local anti discrimination laws will not be able to override these federal allowances, however exceptions for discriminatory health and wellness programs should not be included in state and local laws. These discriminatory federal allowances are being challenged<sup>1</sup>; such discrimination should not be further codified in state and local law. To the extent allowable, state and local laws should require health and wellness programs to offer non-discriminatory, weight-and-height-neutral alternatives to any weight-focused bonuses or benefits. For example, a workplace wellness program that offers free gym memberships to people based on weight loss should also offer the same benefit based on weight-neutral metrics, such as time spent exercising per week.

## Resources

- [The City of San Francisco's Compliance Guidelines to Prohibit Weight and Height Discrimination](#)
- [Weight and Height Discrimination: U.S. Legal Protections](#)

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<sup>1</sup> For example, see: [https://benefitslink.com/src/ctop/AARP-v-EEOC\\_DDC\\_12202017.pdf](https://benefitslink.com/src/ctop/AARP-v-EEOC_DDC_12202017.pdf) and <https://www.policymed.com/2018/01/aarp-v-eeoc-motion-to-vacate-granted.html>.