

CHANGE IN SEASON MAY CAUSE HEADACHES FOR EMPLOYERS

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As warmer weather is now upon us, Spring manifests itself in a variety of ways; the smell of fresh mulch, green shoots breaking through winter-tired soil, and open sunroofs. For employers, however, the shift from the gray cold days of winter to the warmer, sunnier days of Spring can signal new headaches. As coats are left at home and employees break out their warm weather wardrobes, human resource professionals assume the additional responsibility of serving as workplace "fashion police" and dealing with disputes between managers and employees over what constitutes appropriate attire. Often, with the warm weather comes the appearance of more casual attire. Men often sport golf shirts and women will wear skirts and short sleeve blouses. In some workplaces, employees begin wearing t-shirts. While the notion of what is appropriate attire varies from company to company and job to job, most employers have some expectations of what is acceptable dress in their workplace. Thus, the emergence of tank tops and flip flops may be cause for distress for many employers.

While many employers maintain written appearance policies, many do not. However, regardless of whether an employer has a written policy in place, it usually has the right to establish what is appropriate workplace attire. For the most part, employers have wide latitude to dictate the type of clothing that their employees can wear. First and foremost, employers are responsible for assuring that clothing does not present a safety hazard and meets OSHA standards for any required personal protective equipment. Beyond safety, appearance rules can be based on concerns for business image, customer preference, or simply what the employer deems as professional.

An employer's right to promulgate appearance rules in the workplace, however, is not entirely unfettered. Under federal and state employment laws, employers are prohibited from implementing policies that discriminate against an individual on

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the basis of sex, race, color, national origin, religion, physical or mental disability, age, pregnancy, sexual orientation, marital status, or veteran status. What does this mean? In the context of dress code, employers must make sure that its policies do not discriminate or have a disparate or unequal impact on a protected class of employees. For example, while employers may generally set different dress codes for men and women that fall within social norms (e.g. requiring men to wear ties to work), employers should not establish different standards of dress for women than men, or otherwise draw some distinction not based on social norms (for example, requiring women to wear skirts/dresses, where it is a social norm for women to wear slacks) . Similarly, dress codes that prohibit certain kinds of ethnic dress, but otherwise allow employees to dress casually, could be viewed as discriminatory because it treats some employees less favorably because of their national origin or ancestry. Dress codes requiring all men to be clean shaven have also been found to discriminate against men with particular ethnic/racial backgrounds because of a painful skin condition - Pseudofolliculitis barbae - that is aggravated by shaving. However, some arguably discriminatory rules (such as a restriction on beards/mustaches) can be justified as a bona fide occupational qualification if legitimate safety concerns are implicated.

For employers, the greatest risk of violating federal and state discrimination laws is often not when a policy is established, but when the policy is enforced. Employers should ensure that supervisors and human resource professionals know what the rules are and enforce them consistently. Generally, it is expected that appearance policies will be consistently applied. If policy variations are allowed (for example, a different dress code for warehouse and office workers), they should be based on non-discriminatory factors, such as safety or the nature of the work performed. However, when a policy is applicable to a group of employees, it should be uniformly enforced. For example, only enforcing a prohibition on flip flops against men (and not women) could be viewed as discriminatory.

While employers should train their supervisors to apply rules consistently, they should also do so with common sense. In recent years, there have been several cases where employees have made claims for religious discrimination based on the enforcement of an employer's workplace appearance policy. In some cases, an employer may have the obligation to accommodate an employee's religious belief unless it would be an undue hardship for the employer to make the accommodation. Supervisors should be made aware that religious considerations may require an accommodation, and supervisors should be trained to bring any requested religious accommodation to the attention of human resources, so that the employer can engage in a dialog with the employee to determine what, if any, accommodation may be reasonable or necessary.

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Additionally, employers should communicate their expectations to employees so that everyone is aware of what is/is not acceptable ahead of time. This may avoid embarrassment and may encourage employees to raise concerns about a particular requirement with management before it becomes a problem. Finally, employers should tailor any appearance requirements to a legitimate business interest. In the event a workplace policy is challenged, an employer should be ready to proffer the legitimate and valid reason for the rule.

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