

Employment Law Counseling & Training

AUGUST 09

Published by Proskauer Rose, the "Employment Law Counseling & Training Tip of the Month" provides best practice tips to assist employers in meeting today's challenging workplace environment. Our Employment Law Counseling & Training Practice Group counsels employers with respect to the interplay of multiple federal, state, and local laws governing today's workplace, helping them avoid workplace problems, and improve employee satisfaction.

Tip of the Month

Tip: Is Your Company's Dress Code Policy "So Last Season?"

As the summer heats up, many employees dress down to beat the heat, and office dress codes are often stretched to their limits. During the summer months, some employers relax these standards or turn a blind eye to small deviations. Oftentimes, both sides prefer this arrangement: comfortable, happy employees generally make for more productive employees. But if one is not careful, these seemingly harmless morale boosters can quickly create legal exposure. Casual dress may lead to casual thinking and casual behavior. Don't let this become your office's latest summer trend. An office dress code may be this season's must-have accessory, but it must be created carefully and applied consistently. Before dusting off that old dress code policy to discipline the most egregious fashion offenses, take the time to ensure that your standards are tailored to suit current regulations and best practices.

Employment Discrimination

Employee dress codes may be subject to discrimination challenges, both in substance and in application. Generally, however, employers are given a great deal of discretion to design their own dress, grooming, and appearance requirements without violating the law. Employers have widespread discretion to impose dress code restrictions they feel are necessary to meet their businesses needs, so long as these requirements are applied consistently and do not unfairly impact a particular sex, race, religion, or national origin. For example, in *Burchette v. Abercrombie & Fitch Stores, Inc.*, 2009 U.S. Dist. LEXIS 26462 (S.D.N.Y. March 30, 2009), the Court sustained an action brought by an employee challenging the Abercrombie policy that selectively prohibited African American employees from dyeing their hair unnatural colors as racially discriminatory.

Sex Discrimination Claims

Similarly, dress codes that differentiate between men and women can also be subject to challenge if they have a disparate impact or unequally burden one sex over the other. For example, a New York court recently upheld a dress code permitting men but not women to wear jeans to work because it was a mere inconvenience and did not create materially adverse changes to the terms and conditions of employment. (*McKenzie v. Gibson*, 2008

U.S. Dist. LEXIS 64850 (S.D.N.Y. Aug. 25, 2008). Some courts have also upheld gender-specific dress codes that reflect community standards. For example, in *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), the Court of Appeals for the Ninth Circuit held that it was not unlawful gender-based discrimination for an employer to dismiss a female bartender for noncompliance with its dress and grooming standards that included a requirement that female bartenders wear makeup. Sex-neutral dress codes, too, may be discriminatory if they are unevenly applied or adversely burden one sex more than the other. An employer can universally require all employees to wear a uniform as a condition of employment. However, if the uniform is sexually provocative or revealing and the employer cannot provide a legitimate, nondiscriminatory justification for refusing to accommodate a more conservative outfit upon request, the dress code may be considered discriminatory.

Employers should be aware that state and local laws can impose additional limitations on employers' dress and grooming standards, and should be mindful of these regulations when crafting or revising their policies. California state law, for example, prohibits employers from forbidding pants in the workplace on the basis of sex alone. CAL GOV'T CODE § 12947.5 (2009). Still, employers may be able to avoid this kind of rule by universally requiring that employees wear uniforms or by demonstrating good cause for such restrictions. Similarly, accommodations in application of a policy may need to be made in some jurisdictions to allow transgendered employees to dress according to their gender identification.

As the weather heats up, there is a tendency for employees to show more skin at work. Others may take notice. Summer weather and corresponding summer attire may also create additional exposure to hostile work environment sexual harassment claims. Hostile environment sexual harassment is determined on a cumulative basis. Typically, the harassment must be severe, recurring over a series of days, months, or years, and pervasive. The employee must also reasonably believe that he or she must continue to endure the hostile conditions in order to keep their job. Employers have a duty to develop policies or programs preventing sexual harassment, and dress code policies that tend to create, rather than prevent, sexual harassment significantly expose employers to these claims.

Religious Discrimination Claims

In the summer months, religious needs may become more apparent and potentially more challenging for employers to accommodate, particularly where they conflict with dress and grooming policies -- and employers should be on heightened notice. Head coverings may conflict with summer uniforms or dress code policies. Religious adornments that go unnoticed under winter clothes may now be visible. As a general matter, if an employee indicates that he has a bona fide religious belief that conflicts with the dress code policy (such as hair length, facial hair, piercings, head or face coverings, religious adornments, jewelry, or length or type of clothing), an employer must be able to demonstrate that it could not reasonably accommodate the plaintiff's religious needs or that to do so, it would suffer undue hardship. This can be a difficult burden for employers to meet. While employers generally have broad discretion to create dress code policies, where an employee

makes a request for accommodation for religious reasons, an employer may need to make an exception to its dress policy to accommodate the employee.

Tattoos and Body Piercings

Tattoos, body piercings, and other forms of body modification have become increasingly prevalent in recent years, particularly among the Internet generation. While once considered a bold, rebellious statement, tattoos and body piercings are now commonplace. According to CareerBuilder.com and Vault.com, over fifty percent of employees under forty years of age have at least one tattoo or non-ear piercing. Nevertheless, tattoos and body piercings are often not welcome in the workplace. Many employers feel that these body modifications interfere with their desired organizational image. As a result, employers should note that unlike sex discrimination and religious discrimination, there is no federal law prohibiting tattoos and piercing discrimination in the workplace. In *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), the Court of Appeals for the First Circuit found that they had no duty to accommodate its sales employee's religious beliefs, a member of the Church of Body Modification, by exempting her completely from the company's dress code prohibiting all facial jewelry other than earrings, because to do so would impose an undue hardship on the employer.

Workers Compensation

Particularly during the summer, employers can also promote and create a safer, healthier workplace by regulating dress. When employees are injured at work, the employer may be liable for accidents and injuries and may face increased workers compensation premiums as a result. For example, closed-toed shoe requirements can protect feet from falling objects. Short sleeves may be less likely to get caught in machinery. Hair can get caught in equipment, catch on fire, or create unsanitary conditions if not pulled back. Employers can avoid or mitigate liability for workers compensation suits by requiring employees to observe these and other dress code policies that account for the nature of the employee's work.

Tips To Keep In Mind:

Office Dress Code DOs and DON'Ts -- It's More than "What Not to Wear"

Craft the Dress Code Carefully

Create dress, appearance, and grooming standards that are reasonably related to job performance and the Company's business goals. Provide business-based rationales for dress code decisions. Consider how the dress code will be applied and take steps to mitigate any foreseeable issues. The dress code should not favor one sex, religion, race, or national origin over another. Also, reasonable accommodations should be made, when appropriate, in respect of an employee's religious beliefs or gender identity.

Be Explicit

Eliminate any ambiguity. Explain the policy to all employees before they are hired. Take the time to explain the rationale behind the dress code. Provide an opportunity for employees to ask questions. Consider distributing handouts, booklets, or emails codifying

the dress code and include it in your employee handbook. Remind employees of these standards regularly. Explicitly state the repercussions for ignoring and violating the dress code.

Be Consistent

Employee morale may drop and tension may rise if dress code violations go unaddressed. Dress code observers will have little incentive to abide by the rules if flagrant offenses go unremedied. Employers can also expose themselves to a variety of discrimination suits if they are not cautious about what their policy says and how it is applied. Nonetheless, employers are well within their rights to regulate employee attire. Apply the dress code uniformly to all employees and enforce it consistently. Make sure that upper management sets a good example by dressing in compliance with these rules.

Be Reasonable

The dress code should be flexible enough to allow for minor deviations. Consider the nature of your business, the amount and kind of interaction that employees have with customers and clients, and current industry standards when creating a dress code. Employees who perform manual labor in the backroom, for example, might be permitted to wear jeans but should also be required to wear closed toed shoes. Sales employees who interact with customers, on the other hand, should dress more professionally, but may be permitted more flexibility in foot attire.

Put Your Best Foot Forward

Customers view an employee's appearance as a reflection of the corporation as a whole. Employers therefore should generally provide at least a few guidelines to employees who interact with customers and clients to make sure that they present a professional image. Some studies suggest that workers who dress professionally are more productive and behave more professionally. By asking employees to dress up for work, employers can improve both employee behavior and their bottom line.

Account for Summer Weather

If special dress code exceptions are made during summer months, they should be communicated ahead of time. So while an employer may wish that all its male employees wear collared shirts (e.g., Polo shirts) in the summer, that does not mean they want to see the chest hair that goes along with it. Reasonableness and communication can go a long way here. Remind employees in the summer months that dress code policies are crafted with employee health, safety, and job security in mind. By taking action now, employers can avoid a number of foreseeable dress code mishaps down the road.

* * *

Should you have any questions or would like assistance in reviewing your dress code policy, your Proskauer relationship attorney or any Proskauer attorney listed below can provide you with counsel.

Employment Law Counseling and Training Practice Group

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes

For more information about this practice group, [click here](#) or contact:

New York

Fredric C. Leffler
212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman
212.969.3113 – mmandelman@proskauer.com

Katharine Parker
212.969.3009 – kparker@proskauer.com

Ian C. Schaefer
212.969.3563 – ischaefer@proskauer.com

Los Angeles

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Harold M. Brody
310.284.5625 – hbrody@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Newark

Lawrence R. Sandak
973.274.3256 – lsandak@proskauer.com

Wanda L. Ellert
973.274.3285 – wellert@proskauer.com

New Orleans

Charles F. Seemann
504.310.4091 – cseemann@proskauer.com

Washington, D.C.

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

Special thanks to Summer Associate, Ilyse Fishman, for her contribution in drafting this Tip of the Month.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

BOCA RATON | BOSTON | CHICAGO | HONG KONG | LONDON | LOS ANGELES | NEWARK | NEW ORLEANS | NEW YORK | PARIS | SÃO PAULO | WASHINGTON, D.C.

www.proskauer.com

© 2009 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.