

“Skirting” Trouble When the Law is Anything but “Uniform”: Creating and Enforcing a Dress Code in a Changing Legal Landscape



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Unless you are a lawyer heading to court, you probably aren't wearing a suit today. In fact, most people probably weren't wearing formal work attire *even before the pandemic*. Across industries, jeans, flip flops, and “athleisure” apparel are becoming staples of both personal and work wardrobes. The casual workplace was on the rise well before stay-home orders, and now seems guaranteed to become a cultural fixture.

This trend sometimes finds itself at loggerheads with both traditional ideas of professionalism and health and safety requirements, made no less significant by current working conditions. Employers live in fear of the infamous video-conference-in-no-pants moment, or an employee wearing a t-shirt with an offensive slogan to an important virtual meeting. Workplaces operating in person must deal with not only standard professionalism and safety concerns, but also requirements for face coverings.

Employers often address these concerns by either requiring a company uniform, if applicable, or by implementing a dress code. Created and enforced appropriately, both uniforms and dress codes are reasonable solutions to workplace

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attire quandaries. Courts have regularly upheld the right to create and enforce such requirements so long as employers do not discriminate, either in language or in application, based on protected characteristics such as race, national origin, sex, religion, disability, or age, and so long as the requirements do not infringe upon other legal rights by, for example, preventing employees from wearing labor union insignia.

The limits to this general deference have become starker following recent legislative updates and the Supreme Court's landmark holding *Bostock v. Clayton County*, which clarified that Title VII extends protection to individuals based on sexual orientation and transgender status. Now, more than ever, employers must be attentive to the intersection of traditional norms and evolving legal and social standards.

Legal Trends

Even before *Bostock v. Clayton County*, gender-based dress codes were subject to increased scrutiny. The Equal Employment Opportunity Commission (EEOC) has long taken the position that a dress code that disproportionately burdens one gender over the other is discriminatory. Jurisdictions like New York, which often pave the way for legislative trends across the country, have implemented their own legislation on the same topic. New York City's Human Rights Law, for example, prohibits employers from imposing dress codes or grooming/appearance standards that impose different requirements based on gender. New York City's Commission on Human Rights issued corresponding guidance clarifying that differentiation based on gender "is sufficient for it to be considered discriminatory, even if perceived by some as harmless."

This clarification of the law means that a dress code with gender-specific limitations, like prohibiting male employees' use of makeup or earrings, is likely to land the company in hot water. By the same token, a dress code that disproportionately limits "female" clothing options by specifying skirt length, number of earrings, strap width on tank tops, height of high heels and other clothing items typically selected by women is likely problematic.

It is important to note that these trends are not limited to the context of gender. To the contrary, the legal landscape is indicative of a broader awareness of discrimination based on protected traits. For example, New York amended its anti-discrimination laws last year to explicitly protect "traits historically associated with race," which the law defines to include hair texture and "braids, locks, and twists." California passed a similar law. This type of legislation is another reminder that employers must be attentive to dress and grooming expectations that may disproportionately impact some groups over others.

Application

As with any other workplace policy, a dress code or uniform requirement that is neutral on its face may still be discriminatory in application. Employers should ensure that management and human resource departments receive appropriate training on consistent application of policies. Are people of color or women more frequently penalized for their apparel? Is a "professionalism" dress code explained with reference to clothing or hairstyles typically associated with a particular group of people?

Even employers with compliant dress codes must be prepared to accommodate applicants and employees who need exemptions to follow religious dress and grooming practices or because of a disability. A manufacturer's requirement that employees wear pants may have to be relaxed for an employee whose sincerely held religious beliefs require her to wear skirts or dresses; a restaurant that requires employees be "clean-shaven" may have to permit an employee with a skin condition to grow a beard.

In responding to requests for accommodation, employers must have meaningful dialogue with the applicant or employee in question. In general, accommodations should be granted unless they would present the employer with an undue hardship. A co-worker's jealousy of the employee's accommodation, or customers who prefer to interact with employees of a certain appearance would not constitute an undue hardship. Things like workplace safety, security, or health *could* constitute an undue hardship—if those concerns are actually relevant and not just assumed, and if there is no way to both accommodate the employee and address the workplace concern. For example, the manufacturer above should actively examine whether the employee can safely perform her job while wearing a skirt. Of course, if the skirt

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would actually present a significantly higher risk of injury, that would likely constitute undue hardship. The restaurant should examine whether any health and safety concerns around the beard could be addressed by, for example, a beard covering.

With respect to COVID-related face coverings, employers should ensure they are up to date on applicable legal requirements and be prepared to engage with employees who present medical or religious reasons for not wearing the required covering, balancing workplace safety concerns with the requested accommodation.

Recommendations

Ultimately, restrictions must be revised to comply with the evolving legal landscape. Dress codes based on outdated gender norms—particularly as more employees identify as gender fluid, transgender, or gender non-binary—or that disproportionately burden members of certain racial, ethnic, or religious minorities should be revisited and updated accordingly.

Some employers have opted to skirt (pun intended) these dichotomies by providing a consolidated list of expected apparel, for instance “professional clothing, such as suits, dresses, and blazers.” Alternatively, some use broader terms that ask employees to “dress professionally” or “dress for their day.” Others may prefer the added clarity that comes from listing specific items of clothing, but should draft that policy so that it does not single out people with protected traits.

No matter the wording of the policy, management should be trained to enforce dress code and grooming standards in a consistent and non-discriminatory fashion, and to recognize “flags” that suggest the company may need to take action to protect an applicant or employee’s legal rights. Employers should also be consistent about notifying applicants about dress code and uniform requirements during the interview process; if an applicant accepts the position with advance notice of the dress requirements, the employer will be in a better position when and if that employee challenges the validity of that dress code. Finally, employers should regularly review those policies to ensure compliance with current requirements.