



LABOR AND EMPLOYMENT

Dress Codes: Tips on Adopting and Enforcing Dress Policies

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EMPLOYER VS. EMPLOYEE PERSPECTIVES

Employers and employees may differ in what they consider appropriate attire, grooming and jewelry for work and, at times, their respective interests may clash, cause resentment, or result in litigation. Employees frequently view dress codes as infringing on their individual freedom. Employers may impose absolute dress requirements in the form of uniforms to further their business or governmental interests. Some work may require dress, grooming or jewelry restrictions for safety reasons. More generally, employers may expect employees to abide by a certain standard of dress, including the now commonplace but undefined “business casual attire,” with guidelines setting forth those expectations.

GENERAL CALIFORNIA RULE FOR DRESS CODES

Employers are not prohibited from requiring compliance with reasonable dress and grooming standards. However, neither employer nor employee has an absolute right to impose or wear the attire of its choice. Dress and grooming policies are generally lawful unless they: (1) discriminate on a basis that is protected under FEHA, and (2) significantly burden the employee in employment. [Fair Employment & Housing Commission regulations; 2 CCR § 7287.6(c); see also Gov’t. Code § 12949]

Dress codes may not infringe on religious beliefs, discriminate based on disability, encourage sexual harassment, or infringe on rights protected

under FEHA or Title VII. Common challenges include charges that the dress code discriminates on the basis of sex or gender, race, ethnicity and national origin, disability, and religion. Key distinctions have been drawn by the legislature and courts on these bases, although the law remains unclear in specific cases.

BUSINESS NEED AND SOCIAL CUSTOMS

California law has long permitted employers, including public employers, to adopt dress, appearance and grooming standards based on *business need*. Differences in business attire between men and women based on *widely accepted social norms or customs*, and the need to present a *professional image*, are permissible where there is a clear, non-discriminatory rationale. But how should the employer apply this value-laden rule in a given case? Some issues are settled while others are not:

- **Cross-dressing:** in 2004, FEHA added as a protected class an employee whose actual sex or the perception of the employee’s sex, identity, appearance or behavior, whether or not it is the same as that traditionally associated with the person’s birth sex. This amendment was intended to protect transgender employees and their right to appear or dress consistent with their identity. The law may apply more broadly and its full scope and application must await future court decisions.
- **Tattoos and Body Piercing:** it has long been accepted custom that female employees may wear pierced-ear jewelry as part of their work attire. It has now become more common to see ear jewelry for men as well as multiple earrings, visible body piercing, such as nose or





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tongue rings, and tattoos. These recent trends have given rise to questions as to the legally permissible scope of dress codes in this regard. Courts may provide future guidance if these trends continue and lead to conflicts. Until then, tattoos and body piercing, absent implication of a protected class, are not recognized as indications of religious or racial expression nor are they generally protected under discrimination laws. Thus, employers may regulate visible tattoos and body piercing in the workplace and, within reason, the standards may differ between men and women.

- **Skirts only:** employers generally cannot prohibit an employee from wearing pants because of sex (i.e. female employees cannot be forced to wear skirts).
- **Short hair and ties for men:** courts have upheld such rules against claims of gender discrimination.
- **Sexy uniforms:** requiring female employees to wear provocative uniforms (such as bar servers) that subject them to sexual harassment may be unlawful.
- **No beards:** some courts have held forbidding beards does not constitute sex discrimination. Other courts have generally allowed no beard policies when they are required for legitimate safety reasons. At the same time, some courts have held that what appear to be neutral grooming standards, especially “no-beard” policies, may discriminate on the basis of race or disability. For example, an otherwise permissible no-beard policy may have a disproportionate impact on African Americans who suffer from pseudofolliculitis barbae—a skin condition interfering with shaving—at a higher rate than other races. No-beard rules

may also infringe on religious beliefs and may be struck down because dress standards must be flexible enough to take into account religious practices. [29 CFR § 1606.7]

- **Head coverings:** prohibitions against wearing head coverings, such as veils, turbans, burkas, yarmulkes, and the like may be struck down as discriminating on the basis of, for example, religion. More general policies that would otherwise prohibit such head covering may require accommodation.

WHAT MUST THE EMPLOYER DO?

- **Accommodations and exceptions:** if a facially neutral dress and grooming standard infringes upon protected rights, the employer must generally evaluate the nature of the employee’s protected status and whether insisting upon compliance with the rule would significantly burden the employee in employment. Typically, the employer must make reasonable accommodations or exceptions unless there is a business necessity or adherence to the standard is required by safety regulations.
- **Disability:** if an employee contends complying with a dress or grooming rule would violate the ADA, FEHA or other laws protecting disabled employees, the employer must engage in an interactive process to determine if a reasonable accommodation can be made, including an exception to the dress code.

PRACTICAL SUGGESTIONS IN AN EVOLVING AREA:

- Employers should make sure they know whether they have a dress code policy already in place, as frequently such a policy may be little used and consequently forgotten.
- Whether re-examining an existing policy or





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adopting a new one, the dress code should be reasonable, nondiscriminatory, and founded on business needs and purposes. These may include: maintaining the employer's image, promoting a productive work environment, fostering respect, and compliance with health and safety standards. It may be prudent to consider including procedures for requesting accommodation or exception for appropriate reasons.

- Minimum standards and guidance may include a statement requiring employees to have an appropriate, well-groomed appearance. Specific requirements for selected activities should also be specified. Casual dress guidelines should describe acceptable and unacceptable attire.
- Communicate the dress code and policies to employees and applicants.
- Apply the dress code consistently and equally to all covered employees. Sometimes, problems may arise because the employer invokes a little used policy to address a new concern, and the employee accuses the employer of unfair and selective enforcement, or discrimination. Familiarity with the existing code, updating it to reflect current law and applying it across the board will help to alleviate these concerns. Exceptions and accommodations should be made as appropriate.
- Discipline, where unavoidable, for violating a dress code should also be applied consistently and uniformly. Initial warning or informal counseling may be most appropriate for a first violation, consistent with the principle of communication and to enhance voluntary compliance.

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