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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Summer Dress Codes: 5 Tips For Employers

By **Vin Gurrieri**

Law360 (May 18, 2018, 7:43 PM EDT) -- With summer just on the horizon, many employers will make it easier for workers to beat the heat by relaxing dress codes to allow for more casual attire. And while companies have ample legal leeway to loosen the reins on office garb, attorneys say there are still plenty of ways they can trip up.

"As it heats up, people wear less clothing, so it's important to remind people to keep it professional," said Brian Markovitz of Joseph Greenwald & Laake PA. "Have your human resources person just reiterate what the policy is as far as appropriate length of clothing, coverage of clothing and what is and isn't inappropriate clothing to wear."

Here, Law360 looks at five things employers should keep in mind when implementing summer dress codes.

Don't Wait 'Til Summer Arrives

Although most employers have plenty of things on their plate at any given time, they shouldn't wait until the summer's first heat wave to plan for what employees can wear to stay cool, attorneys say, noting it's never too soon for employers to circulate a summer dress code policy to workers.

"The summer is when I think you see the most deviation from the professional norms, and I think the key is make sure that your policy remains consistent with your goal of professionalism," said Michael Studenka, a partner at Newmeyer & Dillion LLP, while adding that "everything is about nondiscriminatory, consistent application."

Philippe Weiss, who leads Seyfarth Shaw LLP's compliance services and training subsidiary Seyfarth Shaw at Work, said businesses should first consider whether they even need a summer dress code to supplement the version they use for the rest of the year.

If they choose to have that more relaxed summer policy, Weiss said it should include examples of both attire that is appropriate for the workplace as well as attire that would be considered inappropriate.

For example, a business could decide that jeans or jean shorts are acceptable under a casual dress code, but jeans with purposeful tears or holes are not, according to Weiss, who said such examples can offer "good guidance" to employees.

"It's good [to be] talking about this in mid-May because it can be helpful to get this going, if you're going to do it, not in the summer but as soon as you reasonably can before the summer,"

Weiss said. "That's because you want people to acclimate to the concept of what a dress code for the summer would look like."

Remember to Give It a Test Drive

Instead of abruptly shifting from a winter dress policy to a wholly different summer version, employers can instead benefit by easing into any transition — and potentially stem any issues that arise from the changeover — by designating a day each week during spring as a casual dress day.

The benefit of such an approach is that it offers employers a practical way of spotting potential problems and addressing them as they arise, potentially avoiding a situation where employers are hit with a deluge of issues on the first day a lax dress code takes effect.

With an accompanying clear policy, the test period gives employers the ability to "discretely and appropriately check in with people" and potentially revise the policy if necessary, according to Weiss.

For a business that has summer interns, Weiss also noted it's possible those new members of the workforce have never had a chance to "visually check what they're wearing against others," noting that visual cues can often give people an idea of what is or isn't appropriate.

"By giving people that opportunity, you get a lot of morale benefit — people get the ability to express themselves — but you're also sort of testing the waters," Weiss said. "There's ways to get a read on what people will do ... without going full steam ahead."

Don't Leave Enforcement to Untrained Managers

With any dress code policy, particularly at companies that are instituting casual days for the first time, there is bound to be some confusion as well as individuals who lean too far in the direction of nonprofessional attire.

Adam Santucci of McNeese Wallace & Nurick LLC said that dress codes largely depend on the workplace culture and individuals' job duties, with some employers being perfectly comfortable having no dress code whatsoever while others require uniforms or business attire.

"Certainly, having a discussion about someone's attire could make an employee uncomfortable," Santucci said, adding that managers in those situations would be well-served by reaching out to human resources to create a game plan for approaching the issue.

"I would encourage managers not to go it alone if they're going to have those kinds of discussions, and if they do that, they're going to protect themselves and protect the organization and help the employee understand what's expected of them in a not strange or awkward or creepy kind of way," Santucci added.

To avoid awkward and potentially problematic interactions in which managers must speak to workers about specific aspects of their dress or appearance, Weiss said employers could consider having a point person — a dress code designee — who can discuss and explain a company's policy to workers.

Otherwise, managers who don't know exactly what to say run the risk of violating a company harassment policy by describing a person's body part, a physical feature or a person's appearance instead of talking about the policy itself.

"When it comes to a dress code policy, it is one of the most fraught and dangerous conversations to have if the people delivering the message are not fully trained, fully comfortable and fully conversive, because it's very easy to slip over that line to talk about the body parts and not the professionalism of the attire; talking about the individual as opposed to the expectation," Weiss said. "If we're not cognizant of how to do that and to explain that it applies to everybody, it can be a critically dangerous moment."

Be Careful With Tattoos

With fewer dress code restrictions and employees opting for summer-appropriate clothing, one side effect is that it will reveal tattoos and piercings that otherwise remain hidden during winter.

Even though some companies may frown upon employees displaying tattoos, employers need to be leery about whether any restrictions they put in place don't unduly discriminate against a person's religious beliefs, since some religions call for tattoos and even piercings and hair lengths.

Weiss said employers can protect themselves by crafting a policy that offers clear examples of what's acceptable, tying those examples to the realities of the work environment and making sure that any prohibitions don't adversely affect one particular group and don't cross any religious lines.

Studenka noted that companies can require that tattoos be covered up to a certain level or have a rule that no tattoos on certain parts of the body can be exposed.

"The only trouble you get into with that — and a company needs to know this if they're going to employ that type of policy — is you can have a religious basis for a tattoo," Studenka said. "That must be accommodated unless there is some sort of business necessity or health and safety issue ... [and] it's very hard to find one of those in this setting."

Be Mindful of Transgender Laws

In California, where Studenka's practice is based, he noted the state as well as certain others have implemented stringent protections for transgender workers that include their right to dress in accordance with their gender identity and gender expression unless an employer can demonstrate business necessity.

In the context of a dress code policy, Studenka said employers have to keep in mind the transgender rights laws they are subject to and make sure any policy they create is in compliance with those statutes.

So if a transgender woman dresses in female attire or vice versa, that must be allowed, and "there are no exceptions to that," Studenka said, adding that such scenarios are arising with more frequency.

"The companies that are prepared handle that the right way; the companies that aren't fumble it really bad right out of the gate," he said.

But even if a policy is written in an inclusive and gender-neutral manner, attorneys said it's important that it is enforced evenly for everyone, meaning it can't be enforced more rigidly against one gender than another or even within a gender by allowing one person more leeway than another.

Instead, Weiss said employers can simply rely on more general language to convey the same

points, such as saying that clothing shouldn't be too short or that employees should exercise good personal judgment.

"With respect to the actual dress code, what's really helpful is to be as equal and as consistent as we can, so not targeting specific genders, however we define those," Weiss said. "It's really important because if every one of your prohibited items seems to relate to one gender, it's a problem and it doesn't need to be."

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