

Dress-Code Policies Reconsidered in the Pandemic

By Allen Smith, J.D.

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Employers are contending with how to respond to telecommuters dressing down during the pandemic. Companies also are considering how to ensure dress codes don't unlawfully discriminate or violate National Labor Relations Act (NLRA) rights.

Nearly half of people working from home said they don't adhere to a defined dress code for remote working, according to a recent survey (<https://couponfollow.com/research/work-wardrobe-covid-compared>) of 1,000 remote workers by CouponFollow. But business-professional, business-casual and smart-casual dressers all reported higher levels of productivity than those who dressed in gym clothes and pajamas, the survey found.

Approximately 80 percent of the more formal dressers said they felt productive throughout the day, compared to just 70 percent of those in gym clothes and 50 percent of those in pajamas.

"Before COVID-19, a work-from-home dress-code policy would have seemed like a strange concept," said Megan Toth, an attorney with Seyfarth in Chicago. "But, with the recent increase of remote workers and videoconferences, this has become a real issue for some employers."

What's the Reason for a Dress Code?

"Deciding whether to enforce a dress code with a remote workforce is actually a great opportunity to pause and think about why you have a dress code in normal times," said Jessi Thaller-Moran, an attorney with Brooks Pierce in Raleigh, N.C. Is the dress code geared toward professionalism? Safety? Positive customer opinions?

"Getting to the root of that reasoning and figuring out which of those motivating factors remain a concern in remote workspaces can help employers figure out whether—and to what extent—to modify a remote-work dress code," she said.

For example, employees who usually work in a public-facing capacity and now are dealing with customers over the phone may not need to be dressed to the same standards as before.

In many cases, dress-code standards prohibiting blue jeans, gym shorts or T-shirts while at work have been relaxed or eliminated, agreed Mark Phillis, an attorney with Littler in Pittsburgh. "If employees are not participating in videoconferences, how will employers or customers even know what employees are wearing?"

More-casual dress codes can be a morale booster, said Thaller-Moran, who noted that's "part of the reason we were seeing more-casual workplaces even before the pandemic."

Shifting to a more casual dress code for telecommuters in current conditions could be an easy way to let employees feel appreciated, she said. Nonetheless, the modified dress code—like the regular dress code when individuals return to the workplace—should be enforced consistently and should provide guidelines that maintain professionalism and limit the risk of workplace harassment, she added, noting that "nobody wants a repeat of the infamous videoconference-in-no-pants moment."

For home-based employees who may be on video calls, Phillis added, employers may want to revisit their policies and provide simplified guidelines to remind employees that they should ensure their attire is suitable when they appear on video.

Gender-Neutral Dress Codes

"Employers should revisit dress codes to make sure they are not designed around gender-specific limitations," Thaller-Moran said, noting the Supreme Court's ruling on June 15 (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-title-vii-scope-of-protection.aspx) in *Bostock v. Clayton County, Ga.*, that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity.

Long before the Supreme Court's decision, courts found that dress codes and grooming standards that are not equally enforced against both sexes, or that impose greater burdens on employees of one sex, may be discriminatory under Title VII. An exception to this rule is if there is a "bona fide occupational qualification [BFOQ] that is reasonably necessary to the normal operation of the particular business or enterprise," noted Lindsay Ryan, an attorney with Polsinelli in Los Angeles. "However, in light of *Bostock*, sex-based standards that might previously have been justified as a BFOQ could run afoul of Title VII."

So, employers should have gender-neutral dress codes, said Timothy Downing, an attorney and chief diversity officer at Ulmer & Berne in Cleveland.

Training on this issue is important, said Sam Schwartz-Fenwick, an attorney with Seyfarth in Chicago.

Religious Accommodations

Employers also should make religious accommodations in attire.

In a Sept. 14 complaint, the Equal Employment Opportunity Commission (EEOC) claimed that a Kroger store in Conway, Ark., unlawfully failed to accommodate, disciplined and terminated two employees who declined to wear a new apron with a new logo, a rainbow heart, without some accommodation. The employees believed that the new logo represented support for the LGBTQ community, which was against their religious beliefs.

One employee asked to wear her name tag over the logo as an accommodation, but the employer allegedly refused to allow this. The other employee asked to wear another apron as an accommodation. Both were fired for violating the store's dress code, according to the EEOC.

Kroger does not comment on pending litigation, a company spokesperson said.

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NLRA Rights

Be mindful of NLRA rights, too, said John Richards, an attorney with Greenberg Traurig in Atlanta.

They may arise in the context of attire in favor of social justice movements (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/managing-social-and-political-expression.aspx), said Philip Shecter, an attorney with McDermott Will & Emery in San Francisco. "General social justice or political statements aren't necessarily protected under the NLRA," he said. "However, if

employees are wearing Black Lives Matter masks to protest perceived discrimination or injustice within the company, that's likely protected concerted activity," he said.

Moreover, if a company's policy prohibits the wearing of clothing and accessories that express political views, or commenting on social justice issues, the employer must enforce the rule consistently, Downing cautioned. "If a company does not already have a policy of this type, it should either adopt one or it must allow individuals to wear social justice or political-type clothing as long as it does not pose a safety risk," he said.

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