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Post-Pandemic Appearance Policies: An Opportunity for Inclusion Employment Practices Solutions – November 2021

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For real change to happen, we know that diversity, equity, and inclusion must be about more than *hiring* individuals who look and think differently. Cultivating and maintaining workplace diversity requires creating an expansive work community that seeks out our differences. Our return to the office post-pandemic presents an opportunity to revisit pre-pandemic dress and grooming policies and to consider whether they continue to benefit your workplace. While at home, employees were much less constricted by traditional professional norms. In a climate where employers are struggling to hold on to employees, people choose to stay where they feel valued and acknowledged. The policies regulating what we wear and how we look in the workplace impact whether individuals feel comfortable and included. In this article, we will review the evolution of workplace appearance, take into consideration the legal parameters, and then look at the potential impact appearance policies have on people of color and the LGBTQIA community. With that backdrop, employers can examine whether current policies are inclusive and consider changes to encourage inclusion.



An Overview of Dress and Grooming Codes

Sometime in the 18th century, men began wearing suits to work, creating a model for the current workplace. The suit represented “moral values of sobriety, thrift, and modesty” and “the civic virtues of industriousness and practicality.”¹ In the 1960s, women entered the workforce in greater numbers. Businesses required women to wear dresses or skirts, a requirement that aligned with the stereotype at the time of what it meant to be feminine.² As recently as the early 1990s, female lawyers had to wear skirts to federal court.

For employers, “appearance” policies have offered a means to ensure a certain level of professionalism in the workplace or to implement important safety limits. In the late 1990s, young tech professionals in Silicon Valley introduced the concept of “business casual.”³ These internet founders refused to wear suits, instead choosing comfortable clothes like jeans and cotton shirts. Many companies implemented

¹ Richard Thompson Ford, *A Brief History of Dress Codes in the Workplace*, Fortune (Feb. 9, 2021), <https://fortune.com/longform/office-dress-codes-casual-friday-history-book-excerpt-richard-thompson-ford>.

² California employers must allow all employees to wear pants. California Gov’t Code §12947.5

³ *Casual Business Attire*, Inc. (Feb. 6, 2020), <https://www.inc.com/encyclopedia/casual-business-attire.html>.

“casual Fridays” where employees could wear more comfortable casual clothes one day a week. Some business sectors continued to require suits, while others have allowed more casual dress routinely.

During the pandemic, employees working from home dressed as they pleased, needing only to look work-appropriate on top during video conferences. As the work world moves toward a post-pandemic life, companies have the opportunity for a refresh and to rethink assumptions about what it means to dress professionally.

The Legal Parameters of Appearance Policies in the Workplace

In deciding what to include in a workplace dress and grooming code, employers should be aware of the current legal parameters. Title VII prohibits discrimination based on race, color, religion, sex, and national origin. The U.S. Equal Opportunity Commission (EEOC) provides general guidance to employers on what the agency considers legal under Title VII. As a general practice, Title VII allows employers to establish dress and grooming codes that apply to all employees equally. Employers may adopt dress codes and grooming guidelines (“appearance policies”) to establish a professional atmosphere in the workplace. For example, employers may require employees to wear business attire, conceal tattoos, remove facial piercings, keep hair neat, avoid fragrances, limit facial hair, and maintain a neat appearance.⁴

The EEOC guidance permits employers to implement uniform dress codes that unintentionally conflict with a worker’s ethnic beliefs or practices. However, employers may not create a code that, while seemingly neutral, treats workers from other cultures less favorably. Employers are also obligated to accommodate conflicts between their appearance policies and an employee’s religious practices, except in cases of undue hardship. A similar requirement exists for accommodations needed for an employee’s disability.

The federal courts have held that different dress and grooming standards based on gender do not violate Title VII unless they impose an unequal burden on one gender. For example, dress codes and grooming codes that require short hair for men but not for women have been upheld. In 2006, the Ninth Circuit affirmed a Las Vegas hotel’s right to require women to wear facial makeup, including lip color “at all times” under Title VII. The policy also required women to wear hair that was “teased, curled or styled every day at work.” The court found no evidence that the hotel’s policies imposed an unequal burden on women.⁵ As discussed more below, it is unclear whether these gender-based differences continue to be legal following the Supreme Court’s decision in *Bostock v. Clayton County*.⁶

How Workplace Dress Codes Exclude Non-binary and Transgender Employees

While it has historically been legal for employers to have dress codes that differentiate based on gender, the current cultural landscape is shifting. Some individuals do not fit within binary gender definitions,

⁴ U.S. Equal Employment Opportunity Commission, *Prohibited Employment Policies/Practices*, <https://www.eeoc.gov/prohibited-employment-policiespractices>.

⁵ *Jespersion v. Harrah Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

⁶ 140 S. Ct. 1941 (2020).

while others find themselves biologically assigned a sex that does not match their gender identity.⁷ Employer dress codes do not always account for these individuals. Sex-based dress codes may be relying on outdated perceptions of what it means to be male or female. By limiting their choice of dress to traditional gender norms, these codes make transgender and non-binary employees feel excluded and unwelcome.

We do not yet know how courts will view gendered workplace dress codes in light of the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1730 (2020). In that decision, the Court determined that Title VII precludes discrimination based on sexual orientation and gender identity, including gender stereotyping. The Court has not addressed whether dress codes requiring different attire for men and women constitute discrimination based on gender identity or gender stereotyping.

Twelve states expressly protect transgender individuals from discrimination in employment including California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington as well as the District of Columbia. These state provisions may preclude gender-based dress codes. In addition, members of the LGBTQIA community are pushing back against gender-based policies. In June 2021, the American Civil Liberties Union (ACLU) sent a public letter on behalf of a non-binary flight attendant to Alaska Airlines regarding the company's dress code. The individual, Justin Wetherell, protested the requirement that they wear either a male or female uniform as that requirement forced them to be "misgendered at work."⁸ The ACLU asserted Alaska Airlines' policy violated Washington's anti-discrimination law.

To create an inclusive work environment, organizations should consider adopting appearance policies that allow individuals to present themselves in a way that aligns with their identities rather than culture-based stereotypes.

Impact of Dress Codes and Grooming Rules on People of Color

Grooming and appearance standards disproportionately impact individuals of color, particularly Black women. Employers with appearance standards often regulate facial hair, hair length, and hair color. These standards use words such as "neat," "well-groomed," not "distracting," and sometimes explicitly exclude dreadlocks and cornrows.⁹ Black men and women hear more often that their natural hair does not fit within these professional standards.¹⁰ One study showed that "Black women are 80 percent more likely to change their natural hair to meet social norms or expectations at work. Moreover, Black women

⁷ Gender identity is one's own internal sense of self and their gender, whether that is man, woman, neither, or both. Unlike gender expression, gender identity is not outwardly visible to others. Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq>.

⁸ *ACLU Tells Alaska Airlines To Stop Discriminating Against Non-Binary And Gender Non-Conforming Flight Attendants*, ACLU (June 4, 2021), <https://www.aclu.org/press-releases/aclu-tells-alaska-airlines-stop-discriminating-against-non-binary-and-gender-non>.

⁹ Joseline Jean-Louis Hardrick, *Are Dreadlocks Unprofessional*, *Above the Law* (Aug. 19, 2021), https://abovethelaw.com/2021/08/are-dreadlocks-unprofessional/?utm_source=elinfonet&rf=1.

¹⁰ *Id.*

are 1.5 times more likely to have reported being sent home or know of a Black woman sent home from the workplace because of her hair.”¹¹

Appearance policies that may disproportionately impact Black women and men have been upheld by the courts. Title VII protects employees from discrimination on race-based immutable characteristics. The courts have viewed hair as something individuals can change, thus many courts dismiss challenges to such policies. In 2016, an employer rescinded a job offer it made to a Black woman after she refused to cut her dreadlocks. The dreadlocks purportedly violated the company’s race-neutral policy language, which stated, “hairstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable.” Irrespective of the fact that dreadlocks are primarily associated with Black individuals, the Eleventh Circuit Court found that hairstyles are more like an example of individual expression rather than the physical attributes protected by Title VII.¹² This case helped spur a movement toward passing CROWN Acts (Creating a Respectful and Open World for Natural Hair) across the country.

In 2019, California became the first state to pass a CROWN Act. The law prohibits employers and public schools from banning natural black hairstyles including braids, cornrows, and dreadlocks. “The drafters of the CROWN Act took issue with the application of the ‘immutability’ doctrine and observed that such a characterization has a disparate impact on Black people and Black women in particular” who must use chemical processes to get “professional” hair.¹³ New York City implemented a similar ban in 2018. Versions of the CROWN Act have been enacted in thirteen states and 29 municipalities, with more localities considering similar acts.¹⁴

Ideas for Creating an Inclusive Dress Code

Dress codes that negatively impact people of color, transgender, and non-binary individuals cause anxiety and discomfort; they could cause employees to leave. Employers should consider whether the disadvantages of such policies are outweighed by the benefits in a post-pandemic world when there is limited evidence to support a positive impact on the wellbeing, productivity, or perceptions of an organization.¹⁵

¹¹ The Crown Act, *Dove and The Crown Coalition Land A Second Major Victory In The Push To End Hair Discrimination With The Enactment Of The Crown Act In The State Of New York/Governor Cuomo Signs Sb 6209, The Crown Act, Sponsored By Assembly Member Tremaine S. Wright And Senator Jamaal T. Bailey* (July 12, 2019), <https://www.thecrownact.com/new-york>.

¹² *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (11th Cir. 2017).

¹³ Corinn Jackson, *Dear Littler: Can We Still Maintain Hairstyle and Personal Grooming Policies?* (Dec. 9, 2019), <https://www.littler.com/publication-press/publication/dear-littler-can-we-still-maintain-hairstyle-and-personal-grooming>.

¹⁴ *National Crown Day: 13 states have passed laws to ban natural hair discrimination*, Good Morning America (July 2, 2021), <https://www.goodmorningamerica.com/style/story/national-crown-day-states-passed-laws-ban-natural-71574191>.

¹⁵ Shan Shutte, *The Impact of Dress Codes on Mental Health*, Real Business (Sept. 6, 2017), <https://realbusiness.co.uk/the-impact-of-dress-codes-on-mental-health>; Kelly S. Hughes, *Practical Questions for Employers Following the Bostock Decision, Part 2: Dress Codes and Grooming Standards*, The National Law Review (Jul. 1, 2020), <https://www.natlawreview.com/article/practical-questions-employers-following-bostock-decision-part-2-dress-codes-and>.

For organizations choosing to take a second look at their appearance policies or ready to create new policies, consider the following features.

- Draft a gender-neutral [policy](#). As mentioned above, federal law prohibits discrimination based on sexual orientation and gender identity. Removing gendered pronouns and making a single set of rules equally applicable to everyone increases inclusion.¹⁶
- Be aware of the possible legal exceptions to whatever policy you craft. For example, consider disability and religious issues. If you enforce a uniform policy, be prepared to accommodate employee needs and provide religious accommodations.
- Implement a consistent policy for all employees. Employees should be held to equal standards; employers should be wary if their dress code or grooming policies impose more of a burden on one gender than the other.¹⁷
- Consider keeping it simple. General Motors CEO Mary Barra changed the company’s extensive dress policy to “dress appropriately” as part of its effort to become more inclusive. Trusting your employees to pick appropriate clothing is inclusive and conveys that you trust and value your employees.
- Remove any unnecessary details and restrictions in appearance and dress policies. It allows employees the flexibility to select the clothes that align with their gender identities and expression, cultural and racial heritage, and religious beliefs.
- If your business does require appearance restrictions, construct those restrictions as narrowly as possible, backed up by strong work-based reasons.

Achieving the mission of [creating a more diverse, equitable, and inclusive organization](#) requires consideration of every element of the work-life experience. For many individuals, how they dress is a critical element of how they express themselves. Making even small thoughtful changes to appearance policies can help all employees feel respected and welcome.

¹⁶ Allen Smith, *Dress-Code Policies Reconsidered in the Pandemic*, SHRM (Sept. 29, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-dress-code-policies.aspx>.

¹⁷ *When Strict Dress Codes Went Out Of Style: The Modernization Of Workwear*, Fisher Phillips (Aug. 31, 2018), <https://www.fisherphillips.com/news-insights/when-strict-dress-codes-went-out-of-style-the-modernization-of-workwear.html>.

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