SAMPLE POLICY

from the *Personnel Policy Manual*, published by Personnel Policy Service, Inc.

PERSONAL APPEARANCE OF EMPLOYEES
(Dress Code Policy)

SECTION ONE: THE POLICY – Basic Policy Statement

Each policy features a Model Policy statement and comments written in plain English (not legalese!) addressing the chapter's topic. You can use the policy "as is" or adapt it to fit your organization's specific needs.

Policy:

It is the policy of the Company that each employee's dress, grooming, and personal hygiene should be appropriate to the work situation.

Footnote: Management Issues

Comment: Application of Policy

(1) Employees are expected at all times to present a professional, businesslike image[1] to customers, prospects, and the public. Acceptable personal appearance,[9] like proper maintenance of work areas, is an ongoing requirement of employment with the Company. (See MAINTENANCE OF WORK AREAS, Chapter 602.) Radical departures from conventional dress or personal grooming and hygiene standards are not permitted.

Cross References

Footnote: Legal Background

(2) Office workers and any employees who have regular contact with the public must comply with the following personal appearance standards:[10]

(a) Employees are expected to dress[2] in a manner[11] that is normally acceptable in similar business establishments. Employees should not wear suggestive attire, jeans, athletic clothing, shorts, sandals, T-shirts, novelty buttons,[3] baseball hats, and similar items of casual attire that do not present a businesslike appearance.[12]

(b) Hair[13] should be clean, combed, and neatly trimmed or arranged. Shaggy, unkempt hair is not permissible regardless of length.

(c) Sideburns, moustaches, and beards[14] should be neatly trimmed.

(d) Tattoos and body piercings (other than earrings) should not be visible.[4]

(3) Employees who do not regularly meet the public should follow basic requirements of safety and comfort, but should still be as neat and businesslike as working conditions permit.[5]

(4) Certain employees may be required to meet special[6] dress, grooming, and hygiene standards, such as wearing uniforms,[15] depending on the nature of their job.[16]

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(5) At its discretion, the Company may allow employees to dress in a more casual fashion[7] than is normally required. On these occasions, employees are still expected to present a neat appearance and are not permitted to wear ripped or disheveled clothing, athletic wear, or similarly inappropriate clothing.

(6) Any employee who does not meet the standards of this policy will be required to take corrective[8] action, which may include leaving the premises. Nonexempt employees (those employees subject to the minimum wage and overtime requirements of the Fair Labor Standards Act) will not be compensated[17] for any work time missed because of failure to comply with this policy. Violations of this policy also will result in disciplinary action. (See BEHAVIOR OF EMPLOYEES, Chapter 801; and DISCIPLINARY PROCEDURE, Chapter 808.)

SECTION TWO: MANAGEMENT RATIONALE

- Explains why certain policy language is used.
- Offers strategic logic and operating considerations behind each policy.
- Helps you confidently lead policy discussions in your organization.

Management Rationale

[1]APPEARANCE AND GROOMING STANDARDS: Most organizations have some sort of appearance standards or guidelines that explain to employees what dress and grooming practices are appropriate for the workplace. Generally, employers have three business-related reasons for implementing these types of standards: (1) to present or create a professional or identifiable appearance for customers, suppliers, and the public; (2) to promote a positive working environment and limit distractions caused by outrageous, provocative, or inappropriate dress; and (3) to ensure safety while working. Employers typically base their dress policy choices on the presumption that employees at all levels and job positions are representatives of the organization and, therefore, their dress, grooming, and personal hygiene affect both the public's impression of the business and internal morale.

The Model Policy approach. The Model Policy expresses a moderate approach to dress and hygiene codes and attempts to balance the employer's legitimate need to present a certain professional image with the employee's concerns with individual expression. To accomplish this goal, the Model Policy outlines general dress requirements without specifying exactly how employees must dress or present themselves and without distinguishing between male and female employees. The Model Policy also includes a casual day provision in Comment (5) for organizations that want to relax temporarily, or even replace, their professional dress policies. (For a discussion of casual day policies, see note 7, below.) Employers that have more stringent dress and appearance requirements as a result of business or safety considerations can modify the policy to include these specifications.

Legal considerations. As a general rule, organizations have a lot of discretion in setting appearance standards for employees. For example, employers typically may impose appearance standards that have a basis in social norms, such as prohibiting tattoos, body piercing, or earrings for men. (See notes 4 and 11, below.) However, certain dress and appearance restrictions relating to physical characteristics may be discriminatory if they adversely impact a particular group of employees (such as women, minorities, or disabled individuals) or interfere with employees' observances of religious practices. (See notes 9, 10, 11, and 14, below.) In addition, employers may not completely prohibit the wearing of union insignias. (See notes 3 and 12, below.) Therefore, to protect against charges of discrimination, employers should not impose standards that do not have some legitimate business justification.

Drafting and implementing a policy. The following six steps will help employers draft and implement their dress and appearance codes:

(1) Base the policy on business-related reasons, such as those discussed in the first paragraph above. Explain the organization's rationale in the policy so employees understand the reasons behind the restrictions.

(2) Require employees to have an appropriate, well-groomed appearance. Even casual dress policies should specify what clothing is inappropriate (such as athletic clothing) and any special requirements for employees who deal with the public. (See note 7, below.)

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(3) Communicate the policy. Use employee handbooks or memos to alert employees to a new policy, any revisions, and the penalties for noncompliance. In addition, explain the policy to job candidates.

(4) Apply the dress code policy uniformly to all employees to prevent claims that the policy adversely affects women, minorities, and other protected groups. However, be prepared to make exceptions if required by law. (See (5), below.)

(5) Make reasonable accommodation when the situation requires an exception. Be prepared to accommodate requests for religious practices and disabilities, such as head coverings and facial hair. (See notes 10, 11, and 14, below.)

(6) Apply consistent discipline for dress code violations. When disciplining violators, point out why their attire does not comply with the code and what they can do to comply. (See also note 8, below.)

[2]DRESS STANDARDS: Each organization must determine its own definition of acceptable dress and grooming standards. This process should weigh the organization's operating environment, industry norms, safety considerations, management's overall philosophy, the nature of the jobs being performed, and currently acceptable business dress standards. Many employers provide basic guidelines (as in the Model Policy) and rely on their employees' judgment and their supervisors' enforcement of the policy. Some organizations list specific acceptable and unacceptable clothing and grooming habits. Others establish committees to create standards and settle disputes. Whatever approach the employer chooses, it should attempt to set a dress code that conforms to the needs of the operation and is applied uniformly. (See notes 9 and 11, below.)

[3]NOVELTY BUTTONS, T-SHIRTS, AND UNION INSIGNIAS: To discourage union organizing, many organizations would like to completely prohibit union logos, emblems, and slogans on clothing in the workplace. However, employers, even in nonunion workplaces, generally may <u>not</u> completely ban the wearing of union insignia. (See note 12, below.) An employer may set neutral policies that, when uniformly enforced, prohibit employees from wearing certain items of clothing that may have union insignias on them, such as T-shirts, baseball hats, and athletic jackets. To help withstand a legal challenge, the policy also should have a business-related purpose, such as safety considerations or the creation of appropriate standards for employees who have contact with the public or who work in a more formal office setting.

Policies prohibiting the wearing of novelty buttons, however, are very difficult to enforce against employees who wear buttons with union insignias. According to decisions by the courts and the National Labor Relations Board, employees have the right to wear union buttons and pins to work, unless the wearing of these items creates a safety hazard or, in the case of workers with public contact, the employees are consistently required to wear uniforms without any ornamentation. This right extends even if the policy was adopted to prevent employees from wearing offensive or inappropriate buttons in the workplace or if it is uniformly enforced against employees who wear any type buttons. (See note 12, below.) The reasoning behind this position appears to be based on the premise that union buttons and pins are not disruptive to the workplace and are protected by the employees' right to self-organization under the National Labor Relations Act.

[4]TATTOOS AND BODY PIERCINGS: Many employers are concerned that visible tattoos and body piercings such as nose rings and tongue studs may offend some of their customers and employees. While tattoos and piercings may be examples of employee self-expression, they generally are not recognized as indications of religious or racial expression and, therefore, are not protected under federal discrimination laws. (See notes 9 and 11, below.) Accordingly, as with most personal appearance and grooming standards, employers have wide discretion in setting policy regarding tattoos and body piercings.

Whether an employer should specifically address tattoos and body piercings in its dress code policy generally depends on the nature of the employer's business, its customer contact, and its applicant and employee pool. While tattoos and piercings have gained acceptance in some business settings and areas of the country, they are less likely to be tolerated in more traditional workplaces like banks and professional firms. Most employers that have policies dealing with tattoos and body piercings limit restrictions to employees who have contact with the public, and only require that the tattoos and piercings not be visible. This is the approach taken in the Model Policy. Other employers limit tattoos and piercings to "tasteful" adornments. While this approach may seem more flexible, it also requires case-by-case interpretation, increasing the possibility for inconsistencies in its implementation. A few employers flatly refuse to hire people who have tattoos or piercings. This policy may be legal, but it also will be viewed as "out-of-touch" by many younger employees and applicants and may discourage them from seeking jobs with those organizations.

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[5]NO PUBLIC CONTACT: Many employers have more relaxed appearance standards for employees who do not deal with the public. However, these organizations still require their employees to present as neat an appearance as working conditions permit and to comply with any safety regulations or policies.

[6]SPECIAL REQUIREMENTS: Every dress and appearance policy should include a statement that certain employees may have to meet special dress, grooming, and hygiene standards. Normally, these special standards are invoked for health or safety reasons, product integrity concerns, customer and public contact, upper level management positions, or marketing considerations. Often, these requirements may include the wearing of uniforms, certain types of safety equipment, or general professional dress. If the employee is going to be required to wear a uniform or special equipment, then rules covering ownership and maintenance responsibility of these items should be carefully spelled out. (See also EMPLOYEE SAFETY, Comment (5), page 601:2.) Under federal wage and hour law, employers may require employees to pay for their own uniforms and may deduct the cost from their pay as long as the deduction does not take an employee below the minimum wage. However, some states require employers to pay the cost of providing and maintaining the uniforms or limit the deductions that can be made from an employee's pay. (See note 15, below.)

[7]CASUAL OR DRESS-DOWN DAYS AND POLICIES: Most employers allow employees to dress more casually at least on limited occasions. According to the Society for Human Resource Management's 2001 Benefits Survey, over 85% of the organizations that responded offered some form of casual dress. In fact, almost half of the responding employers (49%) indicated they allowed casual dress every day. Organizations that implement dress-down policies often find that they are inexpensive benefits that improve employee morale and, in some cases, increase productivity. The most common periods for casual dressing are Fridays and the summer months. Some employers also use casual dress days to reward employees for a job well done, such as upon the completion of a special project or in recognition of perfect attendance. Other employers, such as technology companies and organizations that do not have customer contact, have abandoned rigid professional dress codes and permit employees to dress casually every day.

Policy considerations. Employers who adopt dress-down policies should still set some parameters defining what is appropriate casual attire in order to prevent sloppy appearances. For example, policies should specify whether "casual" means dress slacks and jackets or jeans and sweat shirts. In addition, policies should identify what days will be designated as casual dress, what standards apply for employees who see customers or attend outside meetings, and who to consult for more information on what is appropriate dress under the policy. To help employees understand the policy, some employers display pictures of appropriate dress or even put on casual dress fashion shows.

Resources. Many retailers provide suggestions on casual day businesswear for employees and employers and some consultants specialize in helping organizations create policies and explain them to their staff. For example, the corporate sales division of the retailer Lands' End provides tips for creating casual dress policies and handouts for employees on its Web site at http://ocs.landsend.com/Business_Casual/frset.html. Similarly, the corporate sales division of the clothing company Brooks Brothers offers complimentary seminars and consultations on "How to Go Business Casual." For more information, visit the Brooks Brothers Web site at http://www.brooksbrothers.com/corporateSalesMain_frame.htm.

[8]ADDRESSING DRESS AND HYGIENE PROBLEMS: Enforcing an organization's appearance policy can present delicate challenges for even the most skilled human resources professional. Violations of the policy can range from inappropriate clothing items to offensive perfumes and body odor. If an employee comes to work in inappropriate dress, the typical response is to require the employee to go home, change, and return to work. (See also note 17, below, regarding pay for employees sent home.)

Problems with hygiene can be more difficult to address and remedy. If an employee's poor hygiene is at issue, supervisors should discuss the problem with the employee in private to prevent unnecessary embarrassment and should point out specific problems that should be addressed. The same procedures can be used when approaching an employee who wears too much perfume or cologne. Although excessive body odor by itself generally is not considered a disability under the Americans with Disabilities Act, employers should be prepared to deal with an employee whose body odor could be a symptom of a serious disease or health condition. (See SERIOUS DISEASES, Chapter 203A.) Most employers follow their normal disciplinary policy for repeated infringements of the policy, up to termination for repeated violations. (See DISCIPLINARY PROCEDURE, Chapter 808.)

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SECTION THREE: References for Legal Counsel

- Actual legal citations and explanations
- Clear insights into complex compliance issues
- Tools you need to build consensus for action

FEDERAL

Statutory Law

[9]PERSONAL APPEARANCE: Generally, employers may require employees to meet certain standards of grooming, dress, and personal appearance while on the job or in the workplace. However, these standards may violate federal and state antidiscrimination laws if the standards have a disparate impact on protected groups or if they are not uniformly enforced. For example, courts have determined that some employer dress codes discriminate on the basis of sex or religion. (See below; and notes 10 and 11, below.) Similarly, grooming standards have been found to discriminate on the basis of race or religion. (See below; and notes 13 and 14, below.) Moreover, appearance standards which adversely affect or screen out otherwise qualified disabled employees may be subject to scrutiny under the Americans with Disabilities Act, 42 U.S.C. §§12101, *et seq*. (See below.) To limit claims of discrimination, therefore, employers should have a business-related reason for any personal appearance standards. (See note 1, above.) As the cases discussed below demonstrate, personal appearance standards that are reasonably related to business needs are more likely to withstand a challenge that they are discriminatory or that they have a negative effect on a protected group, such as women or minorities.

Court Cases

Regulations

Sex discrimination. Standards for personal appearance that are unfairly applied to women so that they have a negative impact on employment may result in claims of sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). For example, appearance standards that target pregnant women have been found to violate Title VII. *See Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1977) (the court determined that a rule requiring female employees to wear makeup constituted disparate treatment discrimination based on pregnancy in violation of Title VII since the manager of a motor lodge unilaterally instituted the rule within days of an employee's notification that she was pregnant and because the manager believed the employee appeared less attractive when pregnant). Similarly, an employer may not refuse to hire a pregnant woman because of a preference for nonpregnant employees or the preferences of its clients or customers. *EEOC Guidelines on Discrimination Based on Sex*, 29 C.F.R. Part 1604, Appx. Q. 12.

Standards that are consistently applied to both men and women are less likely to be considered discriminatory. *See Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988) (the termination of a female juvenile center employee for not complying with warnings regarding wearing her hair down and too much makeup was not discriminatory, even though the grooming code in question was unwritten and vague, since the requirements were reasonably related to the employer's business needs of presenting a conservative, professional image and had been applied evenly among men and women); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) (a female reporter's discrimination claim did not succeed because the court found that the employer's appearance standards for its television news reporters were shaped by neutral professional and technical considerations and were not based on stereotypical notions of female roles).

Height and weight standards. Employers who implement height, weight, or other physical standards also may be in violation of the discrimination laws. For example, minimum height and weight requirements can disproportionately exclude women or persons of particular races or national origins. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for correctional officer positions were not job-related and consistent with business necessity and, therefore, were discriminatory since they disproportionately excluded women from the job). Courts have also found maximum weight requirements unlawful sex discrimination when applied only to women. *See Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000) (the airline's policy of applying more restrictive weight standards to women than to men was discriminatory; the employer did not provide any evidence that the standard was a bona fide occupational qualification); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (maximum weight requirements for

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female flight attendants were unlawful since there were no similar requirements for men). *But see Delta Airlines v. New York State Div. of Human Rights*, 689 N.E.2d 898 (N.Y. 1997) (an airline's weight restrictions containing different limits for men and women did not constitute disability, age, or sex discrimination).

Excluding applicants because of their extreme weight also may be considered disability discrimination in limited circumstances. The Equal Employment Opportunity Commission's ("EEOC") regulations implementing the Americans with Disabilities Act ("ADA") state that "except in rare circumstances, obesity is not considered a disabling impairment." *Interpretative Guidance to the ADA*, 29 C.F.R. 1630 Appx. at §1630.2(j). *See also Hazeldine v. Beverage Media, Inc.*, 954 F. Supp. 697 (S.D.N.Y. 1997) (the court cited the EEOC's guidance in determining that the employee's obesity was not a disability under the ADA; even though she weighed close to 300 pounds, she could carry out her daily life activities without the substantial or significant degree of limitation required to qualify her as disabled under the ADA). However, employers must consider obesity on a case-by-case basis, since the EEOC also has issued a guidance that severe obesity (defined as body weight more than 100% over the normal) is "clearly an impairment" and may be a disability under the ADA. EEOC Compliance Manual, §902.02(c)(5).

In addition, the ADA prohibits employers from discriminating against applicants and employees who are "regarded as having an impairment." 29 U.S.C. §12102(2)(C). Thus, if an employer treats a person's weight as a disability, a nondisabled overweight person may be protected from discrimination under the ADA. *See, e.g., Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993) (an employer's decision not to hire an otherwise qualified applicant because of her obesity would violate the Rehabilitation Act (prohibiting federal contractors from discriminating based on disability or perceived disability, like the ADA) since the employer perceived the obesity to be a disability); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996) (the employer violated the ADA because it regarded an obese applicant for bus driver as disabled when it refused to hire her based on a doctor's perceived belief that she could not move around fast enough in an accident, even though she was qualified according to her job experience, references, and driving record). *But see Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) (an employer that disciplined a firefighter for exceeding weight restrictions did not violate the ADA since the firefighter did not show that the employer perceived him as disabled).

<u>Other appearance standards</u>. Other appearance standards also may raise issues of discrimination. For example, requiring only women to adhere to certain standards, such as wearing contact lenses, may be considered sex discrimination. *See Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated in part*, 567 F.2d 429 (D.C. Cir. 1976) (a requirement that women wear contact lenses instead of glasses while men could wear either was held discriminatory because wearing contact lenses imposed a greater burden on women). Further, excluding applicants or employees from consideration for a job because of facial disfigurements, such as scars, could be considered disability discrimination. *See Van Sickle v. Automatic Data Processing, Inc.*, 952 F. Supp. 1213 (E.D. Mich. 1997), *aff'd without opinion*, 166 F.3d 126 (6th Cir. 1998) (the court found that a scar could be a disability if it substantially limits a major life function; however the employee, who had a six-inch scar on his chin, did not present sufficient evidence that the employer treated him as substantially limited in any way because of the scar).

<u>State discrimination laws</u>. Some states also have statutes which specifically limit an employer's regulation of personal appearance. For example, California prohibits employers from implementing a dress code that does not allow women to wear pants in the workplace. Cal. Govt. Code, §12947.5 (it is an unlawful employment practice for an employer to prohibit an employee from wearing pants because of the sex of the employee). The California law makes exceptions for requiring employees in a particular occupation to wear uniforms. Wisconsin requires employers to notify employees of any hair style, facial hair, or clothing requirements at the time of hiring. Wis. Stat. §103.14. A District of Columbia statute prohibits discrimination in hiring, promotion, discharge, compensation, and other terms and conditions of employment based on a person's outward bodily appearance, including manner or style of dress or personal grooming, not limited to hairstyle or beards. However, the D.C. law does not apply to standards of cleanliness, uniforms, or other prescribed standards that are uniformly applied to a class of employees for a reasonable business purpose. D.C. Code §§1-2502(22) and 1-2512(a)(1).

[10]PUBLIC EMPLOYEES AND FREE EXERCISE OF RELIGION: Public workers employed by state and federal governmental entities often object to dress codes imposed by their employers by claiming that these policies impinge on their free exercise of religion in violation of the Free Exercise clause of the First Amendment to the United States Constitution. The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. Amend. 1. (Note that employees of private organizations are not covered by these federal constitutional rights.) The Fourteenth Amendment, which prohibits states from denying "any person within its jurisdiction the equal protection of the laws" applies this clause to states. U.S. Const. Amend. 14. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). However, in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise clause is not violated where an otherwise valid law or policy of general applicability

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interferes with a religious practice, provided that the interference is not the intent of the law but merely an "incidental effect."

Relying on the Supreme Court's decision in *Smith*, many courts have since upheld neutral safety regulations imposed by governments that interfere with public employees' rights to exercise freely their religion if there is a nexus between the interest the regulation is intended to further and the limits imposed by the regulation. For example, in *Seabrook v. City of New York*, 80 FEP Cases 1453 (S.D.N.Y. 1999), *aff'd* 210 F.3d 355 (2d Cir. 2000) the court found that the employer's requirement that all corrections officers wear pants so protective gear could be worn effectively had a strong connection to security and safety interests and only incidentally burdened the religious rights of the female officers whose religion required them to wear skirts. *Compare Francis v. Keane*, 888 F. Supp. 568 (S.D.N.Y. 1995) (the court struck down a facially neutral dress code prohibiting corrections officers from wearing nontraditional hair styles when it was challenged by two Rastafarian officers who wore their hair in short dreadlocks pursuant to their religious beliefs; there was not a strong nexus between the requirement and the asserted interests of safety and security). If a public employer allows certain secular exemptions from its dress code, however, it will be very difficult to legally deny an employee an exemption for religious reasons unless the employer has a very compelling reason to do so. *See, e.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999) (the court held that a police department's no-beard policy violated the free exercise clause because the department could not offer any compelling reasons in defense of its decision to provide medical and undercover exemptions to its policy while refusing an exemption for religious reasons).

[11]DRESS CODES: Dress codes have been the subject of claims filed under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging sex discrimination, sexual harassment, and religious discrimination.

Sex discrimination. When an employer's dress regulations differentiate between male and female employees, the charge often is made that the requirement constitutes sex discrimination in violation of Title VII. However, dress standards that are applied equally to men and women generally are upheld. *See Batson v. Powell*, 21 F. Supp.2d 56 (D.D.C. 1998) (a dress code that applied the same standards to male and female employees did not have a disparate impact on female employees). In addition, dress requirements that reflect current social norms typically have been upheld, even when they affect only one sex. *See Carroll v. Talman Federal Savings & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (employers do not have to apply identical dress or grooming standards to men and women where the differences are justified by social norms). For example, in *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977), the court did not find a violation of Title VII because a grocery chain required that male employees wear a tie. Similarly, policies prohibiting male employees from wearing earrings, but allowing women to wear them, also generally are upheld. *See Kleinsorge v. Eyeland Corp.*, 81 FEP Cases 1601 (E.D. Pa.), *aff'd* 2000 U.S. App. Lexis 34426 (3d Cir. 2000) (minor differences in personal appearance codes that reflect customary modes of grooming do not constitute sex discrimination; therefore, the employer's request that a male employee not wear earrings when female employees were allowed to did not violate Title VII). *See also Rathert v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1990) (in the public sector, a federal court rejected a claim that a prohibition against male police officers wearing stud earrings on or off duty violated the officers' constitutional liberty right, reasoning that the prohibition was a rational means of achieving the police department's interest in discipline, uniformity, and public respect).

Dress codes that have no basis in social customs, that differentiate significantly between men and women, or that impose a greater burden on women usually are not upheld. For example, in *Carroll v. Talman Federal Savings & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980), the employer's policy requiring all female tellers, office workers, and managerial employees to wear a uniform was found to be discriminatory because male employees in the same positions only were required to wear customary business attire. In *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987), the employer discriminated by requiring female clerks to wear smocks, since male clerks were permitted to wear ordinary clothing. According to the court, the smocks were considered a uniform which was demeaning to the women because there is a natural tendency to assume that the women in uniform have a lesser professional status than their male counterparts in normal business clothing. *See also Dept. of Civil Rights v. Sparrow Hospital Association*, 377 N.W.2d 755 (Mich. 1985) (a rule requiring female laboratory technologists to wear lab coats over street clothing was not justified, in spite of the employer's assertion that "patients were used to seeing males dressed like doctors and females dressed like nurses").

Sexual harassment. Employers also have been held liable for the sexual harassment of employees required to wear provocative clothing. In *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D. N.Y. 1981), a female lobby attendant was required to wear a sexually provocative costume. The employer was held liable for the sexual harassment of the employee because it did not act on her complaint of sexual harassment by visitors who responded to her revealing outfit.

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See also EEOC Decision No. 81-17 (1981) (the employer was strictly liable for sexual harassment by nonemployees who reacted to the female employee's sexually revealing uniform).

Religious discrimination. An employer's dress code also may violate Title VII if it interferes with an employee's observance of religious practices since an employer must accommodate an employee's religious beliefs unless the accommodation creates an undue hardship. 42 U.S.C. §2000(j). For example, a rule requiring a nurse to wear a nurse's cap without a close-fitting scarf underneath violated Title VII where the nurse's religious beliefs required that she keep her head covered at all times. EEOC Decision No. 71-779 (1970). However, in *United States v. Philadelphia School Dist.*, 911 F.2d 882 (3d Cir. 1990), a public school was not required to accommodate a teacher by allowing her to wear a Muslim head scarf in violation of a state law which prohibited the wearing of religious garb while teaching in public school. The court determined it would be an undue hardship to require the school to violate the state law. Similarly, in *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992), a Presbyterian nursing home committed to creating a "Christian environment" did not violate Title VII by discharging an employee for wearing a Muslim head scarf because the nursing home was considered a religious organization and, therefore, exempt from the religious accommodation requirements of Title VII. Public employees also may claim that their employers' dress codes violate the Free Exercise clause of the First Amendment. (See note 10, above.) (For further information on religious discrimination and accommodation requirements, see EQUAL EMPLOYMENT OPPORTUNITY, page 201:10, note 12.)

[12]UNION INSIGNIA: Employers generally may restrict union solicitation in the workplace by instituting neutrally-applied no-solicitation rules (see SOLICITATION, Chapter 604). However, they may not interfere with an employee's right to wear union buttons or other insignia at work except in limited circumstances. This type of interference generally violates §8(a)(1) of the National Labor Relations Act ("NLRA"), which prohibits employers from coercing, restraining, or interfering with their employees' right to self-organize. 29 U.S.C. §158(a). In interpreting the NLRA, the National Labor Relations Board ("NLRB") generally allows employers to prohibit the wearing of certain types of clothing by consistently implementing dress codes that do not appear to single out union members or union apparel. Thus, an employer may restrict the wearing of T-shirts with union insignias by enforcing a general prohibition of the wearing of T-shirts, although it may not prohibit the wearing of union T-shirts only. *See Ideal Macaroni Co.*, 301 NLRB 507 (1991), *enforcement denied on other grounds*, 989 F.2d 880 (6th Cir. 1993) (the employer violated the Labor Management Relations Act by strictly enforcing a dress code during a union campaign to require employees to cover union T-shirts when it had not enforced the dress code prior to the campaign).

Buttons and pins with union insignias appear to be even more protected than clothing is under the NLRA. Generally, an employer may not prohibit the wearing of buttons and pins unless it can demonstrate that its public image, production, or discipline would be negatively affected. *See Meijer, Inc. v. NLRB*, 130 F.3d 1209 (6th Cir. 1997) (employees have the right to wear union buttons and insignia unless the employer can show that its public image, production, or discipline would be negatively impacted); *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996) (the court held that the employer's absolute ban on wearing "No Scab" buttons and other pro-union anti-agreement buttons, T-shirts, and decals was not justified to prevent derogatory messages to the public or to discipline and maintain order and therefore was unlawful). In addition, any policy must be enforced uniformly and cannot be used to target union insignia. *See, e.g., NLRB v. St. Francis Healthcare Center*, 212 F.3d 945 (6th Cir. 2000) (an employer cannot ban union pins and buttons if the employer regularly tolerated nonunion pins and buttons on employee uniforms that violated the employer's policy).

An employer may restrict the wearing of union insignia in very limited, special circumstances. For example, if the union insignia posed a threat to safety, machinery, or products, an employer could prohibit the insignia. *See Kendall Co.*, 267 NLRB 963 (1982) (an employer lawfully prohibited union insignia to prevent contamination of surgical products). Employee contact with the public or with customers is generally not a special circumstance sufficient to prohibit the wearing of union insignia, unless the public-contact employees are subject to a consistently enforced policy requiring the wearing of only authorized uniforms. *See, e.g., Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984) (the employer did not violate the NLRA since it consistently enforced a policy requiring the wearing of uniforms only with authorized name tags). Therefore, it is unlikely that an employer with a general dress code could enforce a no-button policy against a public-contact employee wearing a button or pin with a union insignia.

Further, an employer may not threaten employees who wear union insignia. *See, e.g., Southwire Co.*, 282 NLRB 916 (1987) (a supervisor told employees that employee records would be checked when time came for layoffs and removal of insignia could clear records). Further, an employer may not promise benefits to employees for not wearing union insignia. *See NLRB v. Styletek*, 520 F.2d 275 (1st Cir. 1975) (the employer promised wage increases if employees removed union insignia).

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[13]HAIR STYLES: Claims that policies prohibiting long hair for men only are discriminatory generally have not been successful. In fact, the Equal Employment Opportunity Commission ("EEOC") typically does not pursue charges that policies prohibiting long hair on men discriminate against men on the basis of sex. *EEOC Compliance Manual* §619.2. Most court decisions regarding employer rules regulating the hair length of men but not of women also have determined that these standards are not sex discrimination in violation of Title VII of the Civil Rights Act ("Title VII"). *See Harper v. Blockbuster Entertainment*, 139 F.3d 1385 (11th Cir.), *cert. denied* 525 U.S. 1000 (1998) (recognizing that the EEOC generally does not pursue these cases, the court found that the employer's policy prohibiting long hair for male employees did not violate Title VII); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2d Cir. 1996), *cert. denied* 520 U.S. 1229 (1997) (the court determined that although benefit policies that distinguish between men and women generally violate Title VII, the law does not apply to every trivial policy treating men and women differently; therefore, the employer's policy requiring male employees to have short hair, but not female employees, did not violate Title VII). *See also Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) ("grooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity;" therefore, the employer's refusal to hire a male applicant with long hair did not violate Title VII).

However, appearance policies that are implemented inconsistently against minorities or that single out minorities may violate Title VII. *See, e.g., Hollins v. Atlantic Company, Inc.*, 188 F.3d 652 (6th Cir. 1999) (a black employee who was required to have her hair styles "pre-approved" to make sure they were not "eye-catching" when other non-black females who came to work with the same hair styles were not required to do so could proceed with a discrimination claim). *Compare Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D. N.Y. 1981) (an airline policy prohibiting "cornrow" hairstyles was found not to violate Title VII because the rule applied to both male and female employees and because the "cornrow" hairstyle is not worn exclusively by blacks).

The EEOC as well as the courts recognize employers' needs to set standards to prevent safety hazards. Accordingly, an employer may require that hair be worn in such a way as to prevent a safety hazard, such as in a hair net or pulled back from the face.

[14]BEARDS, MOUSTACHES, AND SIDEBURNS: Employers may require male employees to keep their facial hair neatly groomed. However, completely prohibiting facial hair may result in discrimination claims based on race, disability, and religion.

Race discrimination. Challenges to employers' no-beard rules have been getting a closer look from the courts, largely as a result of medical evidence showing statistically that black males almost exclusively are afflicted with a skin disease know as pseudofolliculitis barbae ("PFB"), a condition that is aggravated by shaving. White males typically are not affected by PFB. Thus, for blacks affected by the disease, a no-beard rule can be a substantial obstacle to employment. Court decisions addressing the disparate impact of no-beard rules on black males have had mixed results. In *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 (3rd Cir. 1980), the court rejected an employee's argument that Greyhound's no-beard rule had a disparate impact on blacks in violation of Title VII because statistical evidence offered by Greyhound showed that the percentage of blacks hired by Greyhound was greater than the percentage of blacks in the available workforce. However, in *EEOC v. Trailways, Inc.*, 530 F. Supp. 54 (D.C. Colo. 1981), the court rejected the *Greyhound* rationale, explaining that there is more that one way to prove disparate impact, and, because a larger percentage of black applicants are eliminated by the no-beard rule, a violation of Title VII was established.

Employer arguments that a no-beard rule was justified by concerns for the organization's image and customer preference have not survived most court challenges involving PFB. For example, a convenience store violated Title VII when it terminated a black male who suffered from PFB for not shaving. In *Richardson v. Quick Trip Corp.*, 591 F. Supp. 1151 (S.D. Iowa 1984), the court rejected the employer's defense that its no-beard rule was a business necessity since it found that 45 to 83 percent of all black males who do not shave would be excluded from employment by the rule, compared with less than one percent of white males. The court reasoned that the possibility of customer dissatisfaction if employees were allowed to have beards could be minimized by making limited exceptions for employees with medical evidence of suffering from PFB. *See also Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993) (concerns for company image were insufficient to defend a no-beard rule).

Disability discrimination. No-beard rules also may violate disability discrimination laws. At least two state courts have ruled that PFB is a disabling condition requiring reasonable accommodation under state disability laws. *See Univ. of Maryland v. Boyd*, 612 A.2d 305 (Md. App. 1992) (PFB was found to be a handicap under Maryland's discrimination law since the severity of the terminated employee's PFB significantly impaired the major life activity of socializing); *Means v. Jowa Security Services*, 440 N.W.2d 23 (Mich. App. 1989) (a jury found overwhelming evidence that an applicant with PFB could perform the job duties of a security guard in spite of his skin condition). One federal Court of Appeals has stated, without actually ruling on the issue, that PFB probably qualifies as a disability under the

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Rehabilitation Act (prohibiting federal contractors from discriminating in employment based on disability). *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (8th Cir. 1993) (the city did not violate the Rehabilitation Act since it showed that facial hair interferes with the safety seals on respirators, and the firefighters with PFB did not show there was a reasonable accommodation that would make an adequate seal without shaving). Thus, it is possible that PFB also could be considered a disability under the Americans with Disabilities Act ("ADA") since the ADA contains similar provisions as the Rehabilitation Act.

Religious discrimination. No-beard rules also have been the subject of claims of religious discrimination but with less success for employees than the race discrimination claims. For example, in *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981), the employer successfully proved that a clean-shaven face is a business necessity in family restaurants, even though the employee claimed he was forbidden by his Sikh religion to shave his facial hair. In *Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, (9th Cir. 1984), an employer with a no-beard rule was held to have reasonably accommodated a Sikh machinist by transferring him to a janitorial position because the purpose of the rule was to allow the proper wearing of gas-tight respirators. *But see EEOC v. United Parcel Service, Inc.*, 94 F.3d 314 (7th Cir. 1996) (the court determined that the employer's blanket refusal to make exceptions for religious objections to its no-beard rule for employees in public contact positions may be considered religious discrimination). Public employees also may claim that their employers' no-beard codes violate the Free Exercise clause of the First Amendment. (See note 10, above.)

[15]UNIFORMS: Employers generally may require employees to wear uniforms on the job. However, the circumstances under which an employer may require employees to pay the cost of purchasing and laundering uniforms is the subject of both federal and state regulation. According to the federal Department of Labor ("DOL"), the term "uniform" includes clothing associated with a specific employer because of an emblem, logo, or distinctive color, and also may include any specific type and style of clothing that an employer requires its employees to wear at work, such as a tuxedo for a maitre d' or a blazer of a distinctive color for a salesperson. DOL Wage Hour Division Statement, WH Publication 1428, March 1984. In addition, some states have specific definitions for the term uniform. For example, Illinois regulations consider as a uniform any clothing which the employer requires the employee to purchase from the employer or from a designated third-party. Ill. Admin. Code tit. 56, §300.840.

As a general rule, the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* ("FLSA"), does not require an employer to pay the cost of purchasing and laundering employee uniforms. However, the FLSA allows the employer to require the employee to pay these expenses if the cost does not reduce the employee's wages below the minimum wage or cut into overtime compensation required by the FLSA. DOL Wage Hour Division Statement, WH Publication 1428, March 1984. *See also* 29 C.F.R. §§531.36 and 531.37. Thus, an employee who earns the minimum wage may not be required to pay the cost of purchasing or laundering a uniform required by the employer or by the nature of the work, because any deduction would reduce that employee's compensation below the minimum wage. However, the FLSA allows the employer to pay employees in excess of the minimum wage, with the understanding that the excess will be used to pay for the cost of the uniform. For example, an employee subject to the federal hourly minimum wage of $5.15 who works 40 hours per week at a rate of $5.40 per hour accumulates $10.00 per week toward the purchase of a uniform. Since the FLSA allows the employer to prorate the cost of the uniform, the employer may deduct, or require the employee to pay, $10.00 each week until the uniform is paid for without violating the FLSA. *See* DOL Wage Hour Division Statement, WH Publication 1428, March 1984.

Many state wage and hour laws also specify who should pay the cost of purchasing and maintaining employee uniforms. California law, for example, requires the employer to pay the entire cost of purchasing and maintaining uniforms, although the employee may be required to pay a reasonable deposit as security for the return of the uniform. *See* Cal. Indus. Comm. Wage Orders 1-2001, 2-2001, 4-2001, 7-2001. Similarly, Alaska permits an employer to deduct from an employee's wages a deposit to ensure that the uniform is returned in good repair, as long as the deduction is made according to a written agreement, the deposit does not exceed the cost of the uniform, and the deduction does not reduce the employee's compensation below that required by the minimum wage and overtime laws. 8 Alaska Admin. Code §15.160(g). In contrast, Illinois law allows an employer to require an employee to bear the cost of purchasing and laundering a uniform but prohibits the employer from deducting the cost from the employee's pay without the employee's written authorization at the time the deduction is made. Ill. Admin. Code tit. 56, §300.840. Employers should consult state law to determine coverage. (For further information on federal and state restrictions on deductions, see Chapter 305, PAY PROCEDURES, page 305:7, note 12.)

[16]PAY FOR TIME SPENT CHANGING INTO A UNIFORM: Whether an employer must pay an employee for changing into a uniform or other required clothing depends on whether the time spent changing is considered working time under the Fair Labor Standards Act ("FLSA"). According to the FLSA, time spent by employees engaging in "principal activities" generally is considered time worked. The term "principal activities" includes all activities which are an integral part of

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the principal activity. According to the FLSA regulations, "[a]mong the activities included as an integral part of a principal activity are those closely related activities which are indispensable to an employee's performance." The FLSA excludes from hours worked the time spent by employees performing mere "preliminary" or "postliminary" activities. 29 C.F.R. §785.24. Thus, for example, if an employee in a chemical plant cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the work day would be an integral part of the employee's principal activity and counted as working time. 29 C.F.R. §785.24; *see also Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (time spent by meat-cutting employees putting on, taking off, and cleaning numerous items of specialized safety gear is not a preliminary or postliminary activity and therefore is compensable work time under the FLSA). If, however, changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered a "preliminary" or "postliminary" activity rather than a principal part of the activity and, therefore, this type of activity would not be considered working time that must be paid. 29 C.F.R. §785.24.

[17]COMPENSATION FOR NONWORKING TIME: Under the Fair Labor Standards Act ("FLSA"), nonexempt employees must be compensated only for time actually worked. 29 U.S.C. §§201 *et seq.* Nonexempt employees are those employees subject to, and therefore not exempt from, the minimum wage and overtime requirements of the FLSA. Therefore, employers do not have to compensate nonexempt employees for time missed because they were sent home to change clothing. Exempt employees, however, generally must receive their full salary for any week in which they perform work, without regard to the number of days or hours worked. 29 C.F.R. §541.118(a). Therefore, they must be compensated for time missed during the work day, or the employer may appear to be treating the employee as an hourly, nonexempt employee and may jeopardize the employee's exempt status under the FLSA. Instead of docking the pay of exempt employees for time missed, most organizations will record the incidents, monitor the situation to spot abuses, and take other disciplinary action that does not involve pay. Nonexempt employees also should be subject to disciplinary action. (See note 8, above.) (For further information on the problems associated with exempt employees and pay docking, see HOURS OF WORK, page 207:19, note 28; and ATTENDANCE AND PUNCTUALITY, page 701:6, note 11.)

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