



# DELAWARE

## EMPLOYMENT LAW LETTER

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### **DRESS CODES**

## **Yes, you can regulate it, but should you?**

by Lauren E.M. Russell

*Recently, Starbucks has been in the news for controversial amendments to its dress code. The amendments include, among other things, a ban on engagement rings. Starbucks' new policy permits nose piercings and tattoos, but it prohibits "bright and unnatural" hair color. Employers frequently have questions about imposing policies like the one implemented by Starbucks. Generally, the response is yes, you can regulate employee conduct. But should you?*

### ***What are the restrictions?***

As a general rule, employment policies are considered "content-neutral." Therefore, employers have broad discretion to implement policies that serve their needs. However, there are some limitations. As all employers know, there are some policies you are legally required to have — for example, a policy governing the Family and Medical Leave Act (FMLA). There are some

policies that are highly recommended (e.g., antiharassment policies) because they provide legal cover in the event an employee complains about harassment but fails to report the alleged misconduct to the employer.

In addition, some policies are prohibited. For example, employers cannot ban employees from discussing their wages and salaries because that conduct is protected by the National Labor Relations Act (NLRA). Employers are also limited in their ability to impose policies that have a disparate impact on protected classes. For example, background check policies are frequently attacked as having a disparate impact on minorities and women. Therefore, background checks may be used in hiring and promotion decisions only if they are narrowly tailored to be "job-related and consistent with business necessity."

### ***Other considerations***

With some exceptions, policies on employee appearance generally do not have an adverse impact on minorities, and if they do, that is a topic for another article. The real question is whether employers truly benefit from imposing additional restrictions on employees' appearance. The answer, of course, depends on a variety of factors. Most employers consider a basic dress code necessary for the operation of the business; employees wearing skimpy clothing or shirts with offensive words are undoubtedly disruptive to the workplace.

But what happens when employers go a step further and restrict jewelry, hair color, and less-offensive methods of expression? In certain circumstances, those restrictions may be necessary. However, in many work environments, there is little to no customer contact or employees serve a broad cross-section of people, some of whom engage in the same methods of self-expression the employer is prohibiting. In those situations, restrictions can be unnecessary to the success of the business and may negatively affect employee morale. Employees may identify deeply with their hair color, clothing choices, and (particularly) engagement rings. Restricting those aspects of employees' appearance can alienate them and undermine workforce

cohesion.

***Bottom line***

Employers frequently consider the positive aspects of company dress codes, including a professional appearance. However, they frequently overlook the other effects of dress codes, including a loss of employee morale and workforce cohesion. Keep those considerations in mind, and think twice about imposing restrictive personnel policies that have no *demonstrated* relationship to the success of the business. While such policies are generally legal, they may have adverse effects on your workforce that you do not anticipate.

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