

KANE KESSLER, P.C.
1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: February 26, 2016
TO: All New York City Clients
FROM: Kane Kessler, P.C.
[Labor and Employment Practice Group](#)
RE: Generic Appearance and Grooming Policy

On January 19, 2016, we distributed a memo regarding the New York City Commission on Human Rights' (the "Commission's") guidance prohibiting discrimination based on gender identity and gender expression (the "Guidance"), which is attached here. Pursuant to the Guidance, employers with four (4) or more employees are prohibited from imposing on employees any uniform or grooming standards that are gender specific, regardless if the same are perceived as innocuous. For example, employers cannot require women to wear a skirt suit and men to wear a traditional suit. Employers are permitted to impose such uniform standards, but they cannot require an employee to wear one over the other. This strays drastically from current state and federal law, which permit the requirement of grooming standards and uniforms that are gender specific so long as the requirement does not impose an undue burden on the employee.

Under the Guidance, if instead, an employer permits women to wear skirts, for example, men must be permitted to do the same. In this instance, because the law allows an employer to impose grooming standards on both men and women, an employer can require that both men and women must shave their legs and wear stockings if they choose to wear a skirt to work.

In our view, this forces employers, particularly those in the hospitality industry, to reconsider grooming and dress code policies that presently can be perceived as having a significant level of detail and differentiation between genders. We provide here examples of gender specific policies, which under the Guidance are no longer lawful, against gender-neutral policies we believe are consistent with the Guidance:

Unlawful Policy Under the Guidance	Lawful Policy Under the Guidance
<p>Men: Hair must be short and is not to extend below the top of the collar.</p> <p>Women: Hair should be pulled back and securely fastened to keep from falling forward where the Associate's face is always visible.</p>	<p>Hair, if not short such that it does not extend below the top of the collar, should be pulled back and securely fastened to keep from falling forward where the Associate's face is always visible.</p>
<p>Men: Makeup is not permitted.</p> <p>Women: Makeup can be worn to enhance the natural features and create a natural appearance.</p>	<p>Makeup can be worn to enhance natural features and create a natural appearance. Makeup, <i>i.e.</i>, lipstick, blush, eye shadow, should not be extreme or dramatic in color or application and should be professionally and conservatively applied.</p>
<p>Men: Nails should be clean and neatly manicured at all times. All nails should be at the same and moderate length. Nail color is not permitted.</p> <p>Women: Nails are to be kept clean and neatly manicured at all times. Nail polish, if worn, must be conservative in color with no ornaments, designs or decals. The color selected must be the same that is painted on each fingernail with no chipping. Permitted colors: French, clear, cream, light pink, neutral browns or red. Nails are to be maintained and be no more than 3/8 inch in length.</p>	<p>Nails are to be kept clean and neatly manicured at all times. All nails should be at the same and short but no longer than 3/8 inch in length. Nail polish, if worn, must be conservative in color with no ornaments, designs or decals. The color selected must be the same that is painted on each fingernail with no chipping.</p> <p>Permitted colors: French, clear, cream, light pink, neutral browns or red.</p> <p><i>(Consider also keeping permitted colors to neutral or clear)</i></p>
<p>Hosiery must be worn by female associates during winter months. In summer months, hosiery is optional.</p>	<p>Hosiery must be worn by associates wearing dresses or skirts during winter months. In summer months, hosiery is optional.</p> <p><i>(Consider also requiring associates who wear a dress or skirt to shave their legs)</i></p>

Unlawful Policy Under the Guidance	Lawful Policy Under the Guidance
<p>Men: Men’s shoes should have at least a ½ inch heel and not be higher than 1 inch in height. Safety and comfort should be a consideration when selecting shoes.</p> <p>Women: Ladies’ shoes may be closed toe and closed back, or closed toe with a sling back. Shoes with a small peeptoe and closed back are permitted only in summer months. Shoes must have at least a 1 inch heel and not be higher than 3 inches in height.</p>	<p>Associates wearing dresses must wear shoes with at least a 1 inch heel but not higher than 3 inches in height. Associates wearing a suit with pants must wear shoes with at least a ½ inch heel but not higher than 1 inch in height.</p>
<p>Men:</p> <p>Suits - Matching suits in color and fabric are required for all non-uniformed associates. Suits should be in good business taste and clothes should be professionally coordinated. Blazers must be long sleeved and length with a standard lapel and must be buttoned in guest contact areas. Suit fabrics must be conservative in business style: i.e. wool, tweed, polyester, cotton blend, rayon etc. Suit textures such as pinstripes, herringbone etc. are permitted but should be subdued and not flashy. Suits must be either: black, navy, blue, charcoal, or grey color.</p> <p>Shirts - A business style collared dress shirt must be worn under all suits. Only white or pastel colors for dress shirts are permitted. Pinstripes and checkered patterns in the above mentioned colors are permitted.</p> <p>Neck Tie - A neck tie or bowtie must be worn and compliment the outfit in conservative design and style.</p> <p>Women:</p> <p>Blouses - Business style blouses with/without collars must be worn under all business suits and tucked into skirts or pants. Blouses without collars must have conservative neckline (only crew, v, square, scoop, boat or cowl). Dressy fabrics are required. Sheer blouses, low cut blouses/tops, polo/golf shirts, bareback/sun dresses or tight fitting clothes, t-shirts, spaghetti straps and halter tops are not</p>	<p>Blouses – Associates wearing a dress or skirt must wear a blouse. Blouses without collars must have conservative necklines (only crew, v, square, scoop, boat or cowl). Sheer blouses, low cut blouses/tops, polo/golf shirts, bareback/sun dresses or tight fitting clothes, t-shirts, spaghetti straps and halter tops are not permitted.</p> <p>Shirts – Associates wearing a pant suit must wear a business shirt at all times, <i>i.e.</i>, a business style collared dress shirt. Only white or pastel colors for dress shirts are permitted. Pinstripes and checkered patterns in the above mentioned colors are permitted. A necktie or bowtie must be worn and compliment the suit in conservative design and style.</p> <p>Dresses - A conservative business style dress may be worn. Sleeveless dresses must be accompanied by a blazer or business style cardigan.</p>

Unlawful Policy Under the Guidance	Lawful Policy Under the Guidance
permitted. Dresses - A conservative business style dress may be worn. Sleeveless dresses must be accompanied by a blazer or business style cardigan.	
<p>Men: Rings are limited to one per hand. Visible necklaces are not permitted.</p> <p>Women: Rings are limited to one per hand with a wedding set counting as one. Earrings are limited to one matched pair and must be worn at the bottom of the earlobe. Earrings must be simple and cannot exceed 1" in diameter and length. No more than one necklace and one bracelet may be worn at a time.</p>	Rings are limited to one per hand with a wedding set counting as one. Earrings are limited to one matched pair and must be worn at the bottom of the earlobe. Earrings must be simple and cannot exceed 1" in diameter and length. No more than one necklace and one bracelet may be worn at a time.

To further assist in your review, we attach here a sample generic Appearance and Grooming Policy that is gender neutral and thus, consistent with the Guidance.

New York City employers should consult with counsel to ensure that every component of its dress and grooming policy is gender neutral.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydakis](#), [Jaclyn Ruocco](#) or [Jennifer Schmalz](#).

This memo is provided for informational purposes only.

It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances

KANE KESSLER, P.C.
1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: January 19, 2016
TO: All New York City Clients
FROM: Kane Kessler, P.C.
[Labor and Employment Practice Group](#)
RE: NYC Commission on Human Rights Issues Guidance on Current Law Against Gender Discrimination

Introduction

On December 21, 2015, the New York City Commission on Human Rights (the “Commission”) issued guidance on the anti-discrimination provisions of the New York City Human Rights Law (“NYCHRL”) that are already in effect in New York City, specifically the laws prohibiting discrimination based on gender identity and gender expression (the “Guidance”), which cover employers with four (4) or more employees. The Guidance is an extremely broad approach to transgender protection in the workplace, in housing, and public accommodations. However, in our view, the Guidance fails to recognize the practical realities facing businesses, particularly hospitality businesses. We will first summarize the Guidance and then address some of our concerns. The Guidance prohibits:

- **Refusing to Use an Individual’s Preferred Name, Pronoun or Title:** It is unlawful for covered entities to prohibit an individual from using a preferred name, pronoun or title or to refuse to acknowledge the same, regardless if such preferred name, pronoun, or title conforms to general notions of that individual’s gender. The Guidance points out that some transgender and gender non-conforming individuals prefer pronouns such as they/them/their or ze/hir, which are popular gender-free pronouns. Employers are required to adhere to an individual’s preference and the Guidance clarifies that asking an employee their preferred pronoun or name is not a violation of the NYCHRL.
- **Refusing to Allow Individuals To Utilize Single-Sex Facilities and Programs Consistent with Their Preferred Gender:** The NYCHRL requires that individuals be permitted to use single-sex facilities, including bathrooms and locker rooms, and participate in single-sex programs consistent with their preferred gender, regardless of their sex assigned at birth. Objections by others are not a lawful reason to deny an individual access to such facilities or programs. For example, it is unlawful to deny a transgender woman the use of a women’s bathroom. It is also unlawful to require an individual to show proof of gender in order to utilize a facility or participate in a program.

- **Sex Stereotyping:** Sex stereotyping is broadly construed and includes, for example, using anti-gay epithets, overlooking a female for promotion because she does not conform to the employer's notion of how a female should behave at work, and enforcing a policy prohibiting men from wearing make-up or jewelry at work.
- **Imposing Different Uniforms or Grooming Standards Based on Sex or Gender:** The Guidance bans an employer from imposing on employees any uniform or grooming standards that are gender specific, regardless if the same are perceived as innocuous. For example, employers cannot require women to wear a skirt suit and men to wear a traditional suit. Employers are permitted to impose such uniform standards, but they cannot require an employee to wear one over the other. This strays drastically from current state and federal law, which permits the requirement of grooming standards and uniforms that are gender specific so long as the requirement does not impose an undue burden on the employee.
- **Providing Employee Benefits that Discriminate Based on Gender:** Employers are prohibited from providing health benefits that are discriminatory based on gender. Health benefits are, therefore, required to cover transgender care, including hormone replacement therapy, voice training, and surgery. Offering health benefits to opposite-sex spouses of employees, and not same-sex spouses, is violative of the law, as is offering a child care stipend to female, but not male, employees.

The Guidance also broadens the scope of what may constitute sexual harassment and retaliation. New York City defines gender discrimination as when an individual is treated "less well than others on account of their gender." Harassment based on gender may occur from an isolated incident depending on the circumstances, for example, the refusal to use an individual's preferred name or pronoun. This standard is much broader than current state and federal law, which require repeated and pervasive acts of disparate treatment in order to constitute harassment.

The Guidance imposes civil penalties of up to \$125,000 for unintentional violations and \$250,000 for willful violations. In considering penalties, the Commission will take into account the severity of the violation, any prior record of violations, the size of the employer, and the employer's actual or constructive knowledge of the law.

The Guidance is effective immediately.

Comments

The Guidance appears to fail to recognize the following situations:

- The Guidance directs that individuals – employees and patrons – must be permitted to use single area facilities such as bathrooms, but fails to take into account, or provide instruction, on how businesses are to police these areas from possible predators or perverts.
- The Guidance suggests that employees create a policy of asking every employee their preferred pronoun or name and to allow their human resources and payroll system to

permit individuals to self-identify their gender. We recognize, however, that in some situations it is better for the employer that it not know of an individual's protected status as a means to avoid welcoming discrimination or retaliation claims.

- It appears that under the law, employers can impose grooming and uniform standards, so long as such standards are imposed on all genders. For example, an employer cannot require women, but not men, to wear skirts. If, instead, an employer permits women to wear skirts, men must be permitted to do the same. In this instance, the law allows an employer to impose grooming standards on both men and women, for example, the requirement that both men and women must shave their legs and wear stockings if they choose to wear a skirt to work. In our view, this forces employers, particularly those in the hospitality industry, to reconsider grooming and dress code policies that presently can be perceived as having a significant level of detail and differentiation between genders.
- The Guidance requires that employers provide benefit plans that cover transgender care. Employers are advised to discuss with their insurance brokers the implication of the Guidance and ensure that health benefits comply with the law.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydak](#) or [Jaclyn Ruocco](#).

This memo is provided for informational purposes only.

It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

Kane Kessler, P.C.

APPEARANCE AND GROOMING POLICY

Personal Hygiene

Daily showers and antiperspirant or deodorant should be used to prevent body odor. Light or mild scents may be used sparingly; however excessive use is not acceptable. Food & Beverage Associates should refrain from using any perfume or cologne. After using the restroom Associates MUST always wash his/her hands before reporting back to work. A smile is extremely important, therefore dental hygiene is essential. Associates should brush his/her teeth, and use dental floss and mouthwash as required. Eating candy or chewing gum while on the job is not permitted.

Hair

May be stylish but must be professional and conservative, neatly combed or brushed, trimmed, and clean. Extreme or dramatic hairstyles, coloring, dyeing or bleaching are not permitted. Hair color must be a natural color. Unusual or distracting hairstyles, including shaven haircuts are not permitted. Hair accessories are limited to professional fasteners, basic, solid natural colors to match the Associate's hair color. Barrettes or hair clips in the hair must be inconspicuous. Hair, if not short such that it does not extend below the top of the collar, should be pulled back and securely fastened to keep from falling forward where the Associate's face is always visible. Braids, if worn must not exceed ¼ inch in width; must be close to the head, (unless it is a French braid or one single braid). If braids are longer than shoulder length, they must be pulled back neatly. Sideburns should be neatly trimmed and should not extend beyond half way down the ear. Flares or muttonchops sideburns are not permitted. Hair products should not be excessive in use and should only be used to neatly style hair. Associates working in Food & Beverage and Housekeeping departments may be required to adhere to more stringent standards to ensure sanitary conditions.

Makeup

Makeup can be worn to enhance natural features and create a fresh, natural appearance. Makeup, *i.e.*, (lipstick, blush, eye shadow) should not be extreme or dramatic in color or application, and should be professionally and conservatively applied.

Nails

Nails are to be kept clean and neatly manicured at all times. All nails should be at the same and short but no longer than moderate length. Nail polish, if worn, must be conservative in color with no ornaments, designs or decals. The color selected must be the same that is painted on each fingernail with no chipping. Permitted colors: French, clear, cream, light pink, neutral browns or red. Nails are to be maintained and be no more than 3/8 inch in length.

Comment [RJ1]: Consider only permitting clear polish.

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

Kane Kessler, P.C.

Tattoos

Tattoos that are visible are unacceptable and should be covered or concealed appropriately. For uniformed Associates, should the uniform expose a tattoo, the Human Resources Department will determine whether the uniform standard may be altered or modified.

Hosiery

Hosiery must be worn by associates wearing dresses during winter months. In summer months, hosiery is optional. For uniformed Associates, flesh tone hosiery is required unless otherwise specified by the uniform. For non-uniformed Associates, hosiery can be sheer and subdued in neutral shades that complement the outfit. Opaque black hosiery is permitted. Brightly colored, shimmering, large patterns, seamed, fishnet or lace hosiery are unacceptable. Hosiery must be in good repair at all times while working with no runs or holes.

Comment [RJ2]: Consider requiring all Associates that wear skirts or dresses to shave their legs.

Footwear

Uniformed Associates - Uniformed Associates are required to coordinate with the uniform and to adhere to safety standards. Approved footwear for uniformed Associates will be reviewed in Orientation and by Department Heads. All associates must wear a polishable shoe free of scuffs, stains, or debris at all times. If Associates are wearing either a dress or skirt, a shoe with at least a 1 inch heel but no higher than a 3 inch heel must be worn.

Non-uniformed Associates - Shoes for non-uniformed Associates are to be in good business taste, professional and classic in style. Polishable, black, brown or cordovan colored shoes are permitted and must coordinate with attire. Shoes may be closed toe and closed back, or closed toe with a sling back. Shoes with a small peep toe and closed back are permitted only in summer months. Associates wearing dresses must wear shoes with at least a 1 inch heel but not higher than 3 inches in height. Associates wearing a pant suit must wear shoes with at least a ½ inch heel but not higher than 1 inch in height. Wedges where the shoe and wedge are the same color and material are acceptable. Platform shoes and shoes with a wooden or jute wedge are not permitted. Shoes only in neutral colors are permitted and must coordinate with attire. Extreme, dramatic or bright colored shoes are not acceptable. Sandals, boots, thongs, tennis shoes, moccasins, or any other similar footwear including "mules" with a complete open back are not acceptable. Shoes must be kept in good repair and be polished at all times. Safety and comfort should be a consideration when selecting shoes.

Attire

Uniformed Associates – Uniformed Associates will be fitted for his/her uniform and will be provided for use while on shift. Associates are to be aware that uniforms are property of the hotel and must only be used for business purposes. Associates are to ensure that uniforms are never lent to anyone nor left unattended. Any discrepancies in uniforms should be immediately communicated to Department Heads and Uniform Room Attendants for assistance. Uniformed associates should wear white/black t-shirts with no colors or markings under their uniforms. T-shirts may be crew cut or v-neck depending on uniform style.

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

Kane Kessler, P.C.

Non-uniformed Associates

Suits - Matching suits in color and fabric are required for all non-uniformed associates. Suits should be in good business taste and clothes should be professionally coordinated. Suits with matching pants or knee length skirt (no shorter than 2" above the knee) are permitted. Blazers must have long sleeves and length of the blazer must be at least to the waist and not longer than 3/4 length and must be buttoned in guest contact areas. Bolero styled jacket is not permitted. Only simple necklines and lapels are permitted on blazers. Suit fabrics must be conservative in business style: i.e. wool, tweed, polyester, cotton blend, rayon etc. Suit textures such as pinstripes, herringbone etc. are permitted but should be subdued and not flashy. Suits must be either: black, navy, blue, charcoal, grey, red or brown in color. Beige and cream suits are permitted in the summer months.

Blouses – Associates wearing a dress or skirt must wear a blouse. Business style blouses with/without collars must be worn under all business suits and tucked into skirts or pants. Blouses without collars must have conservative neckline (only crew, v, square, scoop, boat or cowl). Sheer blouses, low cut blouses/tops, polo/golf shirts, bareback/sun dresses or tight fitting clothes, t-shirts, spaghetti straps and halter tops are not permitted.

Shirts – Associates wearing a pant suit must wear a business shirt at all times, i.e., a business style collared dress shirt. Only white or pastel colors for dress shirts are permitted. Pinstripes and checkered patterns in the above mentioned colors are permitted. A necktie or bowtie must be worn and compliment the outfit in conservative design and style.

Dresses - A conservative business style dress may be worn. Sleeveless dresses must be accompanied by a blazer or business style cardigan.

Jewelry & Accessories

Jewelry must be kept to a minimum and should be stylish and professional in nature and must complement your attire in color and design. Rings are limited to one per hand with a wedding set counting as one. Earrings are limited to one matched pair and must be worn at the bottom of the earlobe. Earrings must be simple and cannot exceed 1" in diameter and length. No more than one necklace and one bracelet may be worn at a time. A conservative metal or leather band (black or brown) watch may be worn. One tie pin, set of cufflinks and pocket square neatly folded are permitted for non-uniformed Associates. One brooch or pin and a professional silk scarf are permitted for non-uniformed Associates. Ankle bracelets are not permitted. No visible jewelry may be worn in body piercing other than the earlobes as noted above. If jewelry is required for the uniform, it will be provided by the uniform room. Associates in some departments such as, Food & Beverage, Housekeeping, Laundry and Engineering departments may be required to adhere to more stringent standards to ensure safe working conditions.

Facial Hair

Associates are permitted to have, a fully grown in, well-maintained moustache, goatee or beard. Facial hair must be neatly trimmed and may not present an unkempt appearance. Extreme styles are prohibited. All facial hair (moustaches, goatees and beards) must create an

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

Kane Kessler, P.C.

overall neat, polished and professional look with clean lines and no stray hair outside those lines. All facial hair must be fully grown in, neatly groomed and well maintained at no longer than a quarter of an inch in length. Moustaches, goatees and beards must be of a conservative style and natural color. Associates without a moustache, beard, or goatee are expected to be clean-shaven every day. No associate should have a 5 o'clock shadow, and will be asked to shave if present.

Moustaches - moustaches (without lower facial hair) must not extend onto or over the upper lip and must extend to the corners of the mouth, but not beyond or below the corners.

Goatees - Goatees must be an even and consistent length from the upper lip and chin. Goatee hair must be connected on the sides of the mouth.

Beards - Beards must have clean lines and may not extend onto the neck with no stray hair outside those lines. Beards must have a moustache. Chinstraps are not permitted.

Reminder: Associates may not grow facial hair while working. The only permissible time an Associate may grow facial hair is during extended time off, including vacation time, but in these instances, the Associate must return to work with a presentable, nice kept beard.

DRAFT