

# Ask the Attorney: Dress codes, PTO payout and no-call, no-show

Nancy Delogu of Littler Mendelson, the nation's largest employment law firm, tackles what you can and cannot tell employees to wear, PTO payout revisions and how to terminate a no-call, no-show employee.

## Can we require women to wear a bra?

Q: "Can we require women to wear a bra?" - Marcia, Ohio

A: No, but you can require all employees to dress appropriately. Dress codes are less common than they were before "business casual" became common parlance, but most employers still set minimum standards that may focus on workplace safety (for example, closed shoes, hair restrained), professionalism (no sleeveless shirts, no visible cleavage, business suits!), or service goals (matching shirts).

In any workplace, if someone's clothing is translucent, or cut too low to be office-appropriate, you can certainly ask that person to go home and change. You'll note that such a standard is also gender-neutral, which helps ensure such a policy is lawful.

## How do we revise our PTO payout policy in midstream?

Q: "Over the past few months we have had several employees voluntarily leave our employment. According to Oklahoma state law, we are not obligated to pay the employee for unused PTO hours; however, according to our employee handbook, the employee will be paid for unused PTO hours. Can we change our employee handbook, with proper notice to all employees, to state that the company is not obligated to pay resigned employees for unused PTO hours? Currently employees accumulate PTO hours on a yearly basis. Can we change our PTO policy to allow employees to accrue on a specified basis, i.e. hourly, daily, monthly instead?" - M., Oklahoma

A: As you note, Oklahoma's laws on vacation and other employee benefits permit a variety agreements or promises made by the employer to its employees, but regulate those promises as a form of promised wages pursuant to the state's wage payment laws. It's important to be aware (as you are) that vacation pay, once earned, is treated as wages, and so whatever is promised through policy, practice or contract will be treated as wages and subject to enforcement if you attempt to change your policy retroactively.

As you note, then, if you change your policy going forward, you nevertheless must make sure that each employee receives their current available PTO hours. If employees have already earned vacation pay or PTO that they haven't used, it will be difficult to provide now that unused time will not be paid out at termination, although that may be possible for PTO hours earned under a new policy going forward. Changing the policy to allow employees to accrue on a specified basis going forward seems more straightforward and less likely to encourage anniversary resignations.

Since you have been operating under the old policy for some time now, and want to change your policy going forward in a way that doesn't negatively impact the loyal workers who remain, it would be wise to consult with

experienced local employment counsel to ensure that your policy changes are both legally and operationally effective.

## **When is it safe to terminate a 'No-Call No-Show' if a workplace injury is involved?**

Q: "If an employee claims an injury and requests to see a doctor but then becomes a "No-Call No-Show," do I have a right to terminate this employee? He has been missing for about three weeks. I have reached out through phone and mail and have received no responses back." – Kat, Tennessee

A: If someone doesn't return calls or respond to mailed inquiries for three weeks, in most circumstances you can assume that he or she has decided not to work for your employer any longer. In this case, you don't say whether you opened a workers' compensation claim on his behalf after he asked, and that might be relevant. If someone tells you they have been hurt while at work, it is always best to open a claim. The insurer can decide whether any injury occurred, and if so, whether it is work-related. If not, the workers' compensation claim will be denied. If the employee felt that he was denied the opportunity to seek medical assistance, he already may have a claim against the company, and terminating his employment for no-call, no show at this point will not change that.

In any event, assuming he was hurt, and has sought assistance, it would be helpful to let him know in any communication you may send that you are ending his employment for no-call/no show, but that this termination will not affect his right to workers' compensation medical benefits if any.