



## Summer's Here And Dress Codes Are Feeling The Heat

By Steve Bernstein (Tampa)

Now that summer is upon us, you may be getting added pressure to relax your dress standards. Do you give in, or hold the line? Managers and H.R. practitioners are increasingly going with the latter approach, and here's why.

Dress codes and other employment policies are designed to provide employees with notice of reasonable workplace expectations. That means that for all intents and purposes, they are at their most effective when they provide clear standards for employee behavior. If employees are subsequently unable to conform to those standards, the thought is that they were on advance notice, and must live with the consequences. That's the challenge with summer casual policies in a nutshell. The law affords employers a great deal of latitude when it comes to crafting guidelines in this area, but how much detail can you cram into any policy, let alone one that may not last beyond the summer months?

Conventional wisdom tells us that some of the best dress code policies are those that keep it simple – and call upon the employee to exercise professional judgment when it comes to appropriate dress. That may well be true, but experience also tells us that when the temperature eclipses 95 degrees, the summer heat can get the better of employee judgment every time, especially when the latest fashions encourage even traditionally conservative employees to test the waters as if they were dressed to go clubbing or to the beach.

So as the temperature rises with the hemlines, do you trot out your existing policy, implement something new, or leave things as they are? The best answer may be to leave your more restrictive policy where it stands, and remind employees that they are there to service the customer, and not to free their innermost inhibitions. After all, a drastically relaxed dress code with vague standards may also cause employees to relax their approach to dealing with coworkers, customers and the public at large. That puts your public image at risk and exposes you to perceptions of discrimination and harassment that can tear at the morale of any workplace, not to mention your pocketbook. And if you presently lack a written dress code, then perhaps now is the time to put one in place.

So before you give in to the temptation to declare casual summer this year, be sure to consider the potential business impact, and be prepared to ask yourself the tough questions. Here are a few to start with:

1. What kind of working environment am I hoping to achieve, and how would relaxed standards impact our overall corporate culture?
2. What has been the practice within our area and industry, and how will this impact public perception within the local business community?



3. Have we relaxed standards on Fridays or on other occasions in the past? If so, have employees been willing to hold up their end of the bargain?
4. Is it sensible to apply an across-the-board approach, or are we better off holding the line with regard to those departments that have regular customer interaction?
5. What do you visualize when it comes to acceptable "business casual" attire? Do your employees share that view, or is the emphasis too often placed on "casual?"
6. Is there any risk of implementing a policy that alienates employees by treating them like children or singling them out on the basis of gender, race, religion or any other protected characteristic?
7. How big an issue is this among employees to begin with? Am I at risk of giving in simply to gratify a handful of employees at the expense of several others?
8. When it comes to revealing and inappropriate attire, where am I prepared to draw the line, and what steps am I prepared to take to enforce it? Can I say with a straight-face that this standard applies equally to all employees in the same group? What about forms of self-expression such as tattoos and body piercings?

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# Don't Let OSHA Spoil Your Summer Fun

By E. Jewelle Johnson (Atlanta)

As summer approaches, companies begin preparing for morale-building activities such as company-sponsored picnics, amusement park outings and other activities meant to build camaraderie and reduce stress. But employers should remember that any injuries sustained during such company-sponsored activities may need to be recorded on their Occupational Safety and Health Administration (OSHA) injury and illness logs.

Under OSHA's Recordkeeping Forms and Recording Criteria standard, an employer with more than 10 employees, and which is not otherwise exempt, must record each injury that is 1) work-related; 2) constitutes a new case; and 3) meets one or more of the general recording criteria, such as requiring medical treatment beyond first aid, resulting in restricted work activity, or requiring one or more days away from work. OSHA defines an injury as "work-related" if one or more employees are working or present at a location as a condition of employment.

Last year, in a letter signed by Keith Goddard, director of OSHA's Directorate of Evaluation and Analysis, OSHA said that an injury that occurred while an employee was go-cart racing following an off-site meeting and lunch was work-related. Although the employee was permitted to choose between go-cart racing, returning to work, or taking a half-day vacation day following the meeting and luncheon, OSHA determined that the employee in question would not have been at the go-cart facility absent his required attendance at the meeting and lunch earlier that day. As a result, the injury was reportable and had to be recorded in the injury and illness log.

A more recent interpretation letter reiterated that an injury sustained when an employee fell on his way out of the restroom during an unpaid lunch break was reportable.

The determination of work-relatedness does not take into consideration the nature of the activity in which the employee is engaged at the time of the event or exposure, the degree of employer control over the employee's activity, the preventability of the incident, or the concept of fault. For purposes of OSHA recordkeeping, a covered employer can only escape reporting an injury if the employee is not required to be present at the injury location as a condition of employment, or doing a personal task unrelated to employment outside of her assigned work hours. Consequently, injuries sustained during extracurricular activities scheduled at any time during the normal work-day, including unpaid lunch periods, are likely to be reportable.

To minimize the risk that an injury sustained during an offsite activity is reportable, you should consider:



- making participation in the activities completely voluntary;
- holding the activities at locations where the employees would not be expected to carry out any work-related duties or activities; and
- offering the activities on days when the employees are not normally scheduled to work, or either before or after the employees' normal working hours

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## 2010 National SHRM Conference

Fisher & Phillips is proud to be an active participant in the 2010 National SHRM conference to be held in San Diego on June 27-30. Jackie Greenbaum, Human Resources Paralegal, Irvine office, is one of the conference Co-Chairs and has been busy working on the conference all year.

Our firm will be hosting its 6th annual reception for conference attendees on the rooftop of the Andaz San Diego on June 28th, 5:30 p.m. – 8:00 p.m. Details will be posted on our website at [www.laborlawyers.com](http://www.laborlawyers.com).

Please visit us in Booth 1544 & 1546 where you can chat with several Fisher & Phillips attorneys free of charge! If you have any questions, please feel free to email Jackie Greenbaum at [jgreenbaum@laborlawyers.com](mailto:jgreenbaum@laborlawyers.com) or call 949.851.2424.

# “What’s Past Is Prologue.” But Is It Binding?

By John McLachlan (San Francisco)

In our representation of employers with unionized work forces, we have seen a number of issues come up which cause employers needless hardship and expense, and which in our view could have been avoided by some thoughtful advance planning. Of course every work place is different with different personalities on both sides of the table and different relationships, all of which are important and all of which preclude the imposition of very many firm “laws” of labor relations. But there are some themes which arise which we believe can be of use for unionized employers to consider.

It’s our goal to discuss some of these areas to bring them to management attention and to suggest ways to avoid future problems. We refer to the long term because in our experience very seldom does anything happen immediately in the labor relations area. We do not say this as a criticism of either management or of unions. When there are ongoing relationships in any area of life, immediate change is seldom possible. Usually change comes over time with advance planning and thoughtful implementation. Sometimes change can come all at once, but this typically only occurs during a time of contract negotiations which is a time when more significant changes can be introduced in a more compressed time frame.

The first area we want to consider is the topic of past practice.

## Why Is There Even Such A Concept?

No labor agreement ever written spells out *every* right that either party has or doesn’t have. And sometimes when all else fails (that is, there is nothing in the contract to support their argument), union reps have been known to rely on the existence of a “past practice” to support an argument that the company should or should not have taken some particular action. “We’ve always done it this way.” Or, “We can show you three instances where people performing this work have been paid at the higher rate” etc.

While the term “past practice” gets thrown around a lot, it’s important to understand what it is and how far it goes. We want to provide you with tools so that you can evaluate claims of past practice with a fair degree of certainty that you are right. (Of course, no definition yet written will result in absolute certainty in this or almost any other area of life.)

The term “past practice” generally refers to a way of doing things over time. A more precise definition was offered by Arbitrator Nathan in 1995: “Practice is a pattern of conduct which appears with such

frequency that the parties understand that it is the accepted way of doing something.” *Weyerhaeuser Co.*

No matter how much union stewards may claim past practice establishes that they are right, there are generally accepted limitations of past practice in labor relations. As an initial matter, past practice will not change or negate clear contract language. If the language in the parties’ agreement is clear and unambiguous on a particular point, no amount of past practice is likely to change that language.

Of course, as noted above, you can’t write everything down in a collective bargaining agreement. Labor relations, like the law, is never a static subject, and situations always come up which were not covered in the parties’ written agreements and likely which were not even thought of by those who negotiated the agreement.

Past practice is one of the ways of filling in the blanks. But in our experience, past practice is frequently used as a last fall back position when the union can’t think of anything else to justify a course of action it wishes to advocate or oppose. It is also usually the case that the union representatives have been at the company much longer than has the company labor relations representative and unions find this to be a strong advantage in wielding the past practice hammer.

## How To Show That It Really Exists

If past practice is a way of doing things over time, how many times does it have to happen and over how long a period does it have to be done that way to become a past practice? You’ll not be particularly comforted to know that *it varies*. There are no cut-and-dried guidelines or interpretations, nor are we familiar with any universally accepted formula to tell you precisely when you have a real binding past practice as opposed to a weak argument dressed up in past practice clothes.

Although the authorities are not exact, they do provide some guidance to the labor relations professional. As an initial matter it will be important to consult with historical sources to the extent you can do that to determine how a specific situation has been handled in the past. This may require checking with payroll to see whether this situation has occurred in the past; and, if it did, how it was handled. It may require a review of past grievance settlements or discussions with supervisors. Frequently this historical sleuthing will show that the company has handled the same situation in a number of different ways. How does that impact on the question of past practice?

There are some principles applied by respected arbitrators which can be helpful here. Arbitrators are often required to decide disputes between management and labor which turn on the applicability and interpretation of contract language in light of claims of “past practice.” Some arbitrators have applied standards which can be used to help in distinguishing a real past practice from a fervently-wished-for past practice. In arbitration there is no requirement that one arbitrator must follow another arbitrator’s reasoning, the way lower courts are required to apply the legal principles upheld in their circuit or the way all courts are required to follow United States Supreme Court holdings. However, well-reasoned arbitrator opinions are frequently followed or found persuasive by arbitrators dealing with similar situations.

One widely-applied articulation of the test for determining whether there is a binding past practice includes the following: 1) the practice is unequivocal (this is the way this particular situation is always or usually handled); 2) the practice is clearly enunciated and acted upon;

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9. What is the most effective way to communicate our standards to employees, new hires and candidates alike? Company-wide meetings, mass emails, circulation of a written document, or all of the above?
10. Are we prepared to live with any and all internal dress code guidelines, and have they been reviewed lately? If we are not prepared to enforce them to the letter, isn't it time to revisit them? If we are prepared, have we trained our supervisors to do so on a consistent basis, and are they willing to set the example?

Honest answers to these questions can save a good deal of heartache – and uncomfortable conversations with employees down the road. Look to maintain a policy that makes good sense for business reasons (such as upholding a positive public image), and be prepared to explain the business rationale behind it. If you can satisfy yourself in each of these areas, chances are you are well on your way to a successful summer – casual or not.

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## Real World HR

### "What's Past Is Prologue." But Is It Binding?

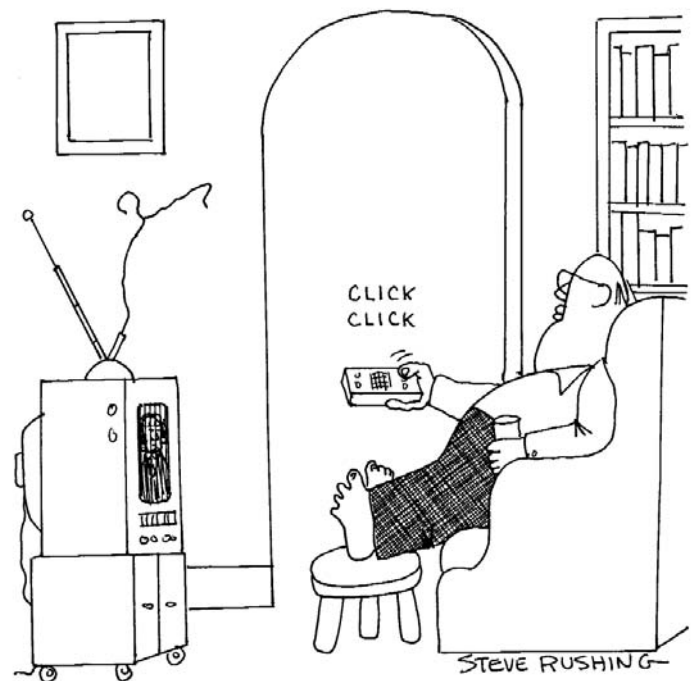
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3) the practice is readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

This test suggests that just because one foreman has done something a certain way, that does not necessarily constitute a binding past practice for the entire facility which has many foremen on many different shifts over several operating departments.

That's a quick look at the "what" and "why" of past practices. In our next issue, we'll explore how long they can last, and how to get rid of them.

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JUDGE JUDY GETS  
OVERRULED