

# The STink Over Ink

The  
Intersection  
of Tattoos,  
Free Speech  
and Employer  
Mandates

by Robin Benton and  
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**A**t Salem State College's freshman orientation last year, Professor Robin Benton asked students without tattoos or piercings to stand up. Of the 500 students present, only a handful moved from their seats.

No longer restricted to "I love Mom," spiritual symbols, cartoons and the like, tattoos of various shapes, sizes and symbols are now proudly displayed on nearly every body part. All demographic boundaries—athletes, co-workers and employees of all ages, classes, ethnic groups and genders—now tout what used to be the purview primarily of the rough-and-tumble set. Given the popularity of the practice, employers need to rethink potential prejudices about tattooing and focus on pertinent matters.

## Is Ink Speech?

Can employers restrict an employee's First Amendment right to freedom of expression by requiring employees to cover tattoos?

For private employers, the answer is a resounding "yes." Any tattoo that doesn't support the corporate image may be restricted, such as by requiring the employee to cover the tattoo. Private employers may also deny employment to tattooed applicants for the same reason.

For public employers, the test is much more stringent, as the government's ability to restrict the First Amendment rights of citizens is limit-

ed. Government employers may restrict freedom of speech or expression provided the regulation is narrowly tailored to meet an important government interest.

In such circumstances, narrowly drawn policies that restrict freedom of expression based upon the content of the message being sent by the tattoo may be permissible. A common example of a content-based restriction would be a policy requiring employees or program participants to cover tattoos of Nazi symbols or insignias. Such artwork may be offensive enough to elicit a significant emotional or physical response from those viewing the tattoo and could, therefore, be restricted.

Deliberately offensive or demeaning artwork that offends the general mores of the community can create a hostile work environment and can, therefore, be prohibited based upon state sexual harassment laws, anti-discrimination laws and the employer's sexual harassment policy.

## Ink Issues

Risk-management strategies need to look beyond prohibitions against tattoos that could be considered harassing. Employers also need to address specific risks associated with tattoos.

All fresh tattoos should be considered open wounds. They present the same health concerns as all other open wounds, including cuts and abrasions. (Once healed, the tattoo doesn't pre-



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sent a public health risk.) Because it can take up to three weeks for the skin to heal, athletes with fresh tattoos should take care to cover their wounds with an appropriate bandage during practice or play. Staff who work outside must keep tattoos covered until the skin heals, and should avoid harsh environments that utilize chemicals, such as fertilizer and lye. This practice will help prevent infection and minimize the inadvertent sharing of body fluids.

Tattoos—new and old—have been linked to increased risks of skin cancer. As such, employers should include language specific to tattoos in their policies regarding sun protection for all employees. Specifically, personnel manuals should require employees to take personal responsibility for applying

sun screen with a sun protection factor of at least 30 to all tattooed areas exposed to the sun.

No longer limited to urban areas, gang violence is a concern for nearly all recreation providers. Tattoos may be a sign of gang affiliation, past or present. Managers should familiarize themselves with the gang symbols in their area, and implement procedures that would minimize the impact of gang-associated tattoos at recreation facilities.

Further, because tattoos are often specific to a given individual, they make that person easily identifiable. Thus, for areas where gang activity is an issue, it is easy to target tattooed staff members “off-duty.”

Conservative employers should consider how they address employees with

other makeup items they, the employer, consider distasteful. How do you handle employees with purple eye shadow, green hair or breast implants? Are tattoos really any different?

It's important to distinguish between real risks and perceived risks when developing tattoo policies. Fresh tattoos, hostile work environments and gang tattoos require some type of intervention. Beyond that, tattoos are just another way that people express their individuality.

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## Who Can Tattoo?

Tattoos are created by embedding ink with metal residue into the dermis (skin tissue) through a series of rapid injections. These injections create an open wound that will have a tendency to bleed, seep and ooze as part of the healing process.

Because of the use of needles and presence of blood, most states regulate the art of tattooing under what is known as a “police power.” Police powers allow states to restrict certain constitutional protections provided there exists a rational relationship between the proposed regulation and an important government interest, such as protecting the public

health. Among the most common regulations of tattoos are those governing the use of sterile equipment, the ability of minors to receive tattoos and the sobriety level needed to get a tattoo.

Only two states, South Carolina and Oklahoma, still prohibit tattooing by anyone other than a licensed physician. Courts in these states have held that the process of tattooing is not protected by the First Amendment's protections of freedom of speech and expression.

According to the South Carolina Supreme Court, “the process of injecting dye to create the tattoo is not sufficiently communic-

ative to warrant protections and outweigh the risks to public safety.” The risks the court cited included concerns for disease transmission such as HIV and hepatitis.

Some organizations, such as the American Camping Association, have also taken positions regarding tattooing. The ACA expects that employers will provide the same safeguards for underage employees as they would for campers. That is, the employer is expected to provide adequate supervision to ensure that underage employees do not engage in illegal tattooing, which may have long-term health risks, such as hepatitis or HIV infection and allergic reaction.