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Dos and don’ts: rooting out hairstyle discrimination

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While New York City and New Jersey enforcement agencies have interpreted their laws as prohibiting employment discrimination based on hairstyles historically associated with race, California and New York have statutorily banned hairstyle discrimination in the workplace. With similar bills pending in six states, employers should reevaluate their grooming, appearance and other workplace policies or standards in light of this emerging trend.

Background

The NYC Human Rights Law (NYCHRL), Title 8 of the Administrative Code of the City of New York, prohibits discrimination in the workplace. Individuals are protected from employment discrimination based on nearly 20 protected classes, including a person’s actual or perceived race. Unlike other terms, the local law does not define “race.”

Both the California Fair Employment and Housing Act (FEHA) and the New York Human Rights Law (NYHRL) also make it unlawful for an employer to engage in discriminatory employment practices based on certain specified protected characteristics, including race. Until recently, the term “race” was not defined by either statute.

Hairstyle discrimination

Earlier this year, the New York City Commission on Human Rights (City Commission) issued legal enforcement guidance on race discrimination under the NYCHRL. Explaining that racial bias includes “discrimination based on characteristics and cultural practices associated with being Black,” the City Commission interpreted local law to prohibit employment discrimination based on natural hair or hairstyles most closely associated with race. This includes an employee’s “right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.”

While largely focused on the Black experience, the guidance affirmed that grooming or appearance policies that ban, limit, or otherwise restrict natural hair or hairstyles that are closely associated with any individual's racial, ethnic, or cultural identities generally violate the NYCHRL's antidiscrimination provisions. Employers with policies that restrict such hairstyles now face a $250,000 fine.

Last month, the New Jersey Division on Civil Rights (DCR) issued similar enforcement guidance under the state's Law Against Discrimination (LAD). The DCR interpreted the LAD's prohibition against raced-based discrimination to include discrimination on the basis of hairstyles, particularly those that are closely associated with Black racial, cultural, and ethnic identity such as twists, braids, corn rows, Afros, locs, Bantu knots, and fades. The DCR extended a similar analysis to discrimination based on hairstyles that are closely associated with other protected characteristics, such as those associated with a particular religion.

> **Buck comment.** Pending legislation (S.B. 3945) would effectively codify the DCR's interpretation. If enacted, the bill would expand the LAD's existing definition of "race" to include "traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles" such as braids, locks, and twists.

The DCR guidance provides the following examples of employer grooming or appearance policies that generally would violate the LAD's proscriptions. First, any policy that singles out natural hair or hairstyles closely associated with being Black would generally be unlawful race-based discrimination. Second, a facially neutral policy requiring employees to maintain a "professional" or "tidy" appearance would also be unlawful if disproportionately applied or enforced in a discriminatory manner. Third, an appearance policy that bans, limits, or restricts traditionally Black hairstyles to project a "corporate image," satisfy customers, or for purely speculative health or safety concerns could not be justified.

> **Buck comment.** Title VII's prohibition of race discrimination generally encompasses employment discrimination based on a person's physical or cultural characteristics linked to race or ethnicity. The EEOC acknowledges that federal law allows employers to "impose neutral hairstyle rules — e.g., that hair be neat, clean, and well-groomed — as long as the rules respect racial differences in hair textures and are applied even-handedly."

At the root of it

Since NYC issued guidelines, several states and localities have passed — or proposed — laws outlawing workplace discrimination based on hairstyles associated with race. California and New York were the first states to enact such laws, and the city of Cincinnati, Ohio recently followed suit.

California's CROWN Act

On July 3, 2019, California Governor Gavin Newsom signed S.B. 188 into law, making California the first state to ban discrimination against natural hair, including Afros and "protective hairstyles" such as braids, twists, and dreadlocks, both in the workplace and in California schools. Known as the CROWN (Creating a Respectful and Open Workplace for Natural Hair) Act, S.B. 188 maintains that hair is a proxy for race, and targeting hair or hairstyles associated with race is racial discrimination.

When the CROWN Act takes effect on January 1, 2020, it will amend Section 12926 of the Government Code (FEHA) and Section 212.1 of the Education Code to effectively render "race neutral" dress code and grooming policies that disproportionately impact persons of color unlawful. Employers may still maintain policies that require employees to secure their hair for health, safety, or hygienic reasons and enforce other "valid and non-discriminatory" dress and grooming policies, as long as they are consistently applied to all employees and do not have a disparate impact.

New York follows suit

Following New York City's lead, Governor Andrew Cuomo signed A07797 into law on July 12, 2019, making New York the second state to prohibit race discrimination based on natural hairstyles in the workplace and the classroom. The law amended Section 292 of the state's Human Rights Law and Section 11 of the Dignity for All Students Act to add "traits historically associated with race, including but not limited to hair texture and protective hairstyles" to the list of classifications protected from discrimination. For these purposes, the term "protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists. The law took effect immediately.

> **Buck comment.** In August, New York state further amended its laws to bar discrimination based on wearing any attire, clothing, or facial hair in accordance with religious requirements.

Cincinnati makes three

On October 9, the Cincinnati City Council passed an ordinance (No. 379-2019) making it unlawful for employers to discriminate against people based on natural hair types and natural hairstyles historically associated with race, including "hair textures and protective hairstyles commonly associated with African-Americans and their racial, ethnic and cultural identities" — the second major city in the country to outlaw hair-based discrimination. Under the ordinance, which takes effect January 1, 2020, employers face fines of $100 per day up to a total of $1,000 for substantial noncompliance.

An emerging trend

Largely modeled after California's CROWN Act, legislation aimed at protecting individuals that embrace their cultural identity through natural hairstyles has been proposed — and is currently pending — in New Jersey, Michigan, Tennessee, Illinois, Wisconsin, and Kentucky as well as Montgomery County, Maryland.

In closing

Employers in California, New York, and Cincinnati should evaluate existing grooming, appearance, or other workplace policies in light of this emerging trend to ensure they are inclusive of racial, ethnic, and cultural identities and practices. With similar bills now pending in a number of locales, employers should consider whether to make any policy changes as they continue to monitor pending legislation.

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