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PERSPECTIVE

New law targets discrimination based on hair style

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California is the first state to protect employees and students from discrimination based on natural hair and hairstyles associated with race. California Senate Bill 188, known as the CROWN Act, seeks to "Create a Respectful and Open Workplace for Natural hair." The bill unanimously passed the California State Senate on April 22 and the State Assembly on June 27. Gov. Gavin Newsom signed the bill into law July 3.

The California Fair Employment and Housing Act makes it unlawful for employers to engage in discriminatory practices based on certain protected characteristics, including race. The CROWN Act adds that the definition of "race" for the purposes of FEHA now includes "traits historically associated with race, including but not limited to, hair texture and protective hairstyles." The act defines "protective hairstyles" to include, but is not limited to, hairstyles frequently worn by African- Americans, such as "braids, locks, and twists." The act applies to public schools, private employers with five or more employees and public employers.

Grooming and Appearance Policies

Many employers maintain grooming and appearance policies which may include regulation of hairstyles, facial hair, jewelry, tattoos, piercings, makeup, nails, head coverings and clothing. While California law allows employers to regulate the appearance of employees in the workplace, employers may not implement policies that could be considered discriminatory with regard to an employee's race, religion, gender or any other category that is protected by law. Employers may also be required to accommodate an employee's religious beliefs concerning certain clothing items, including allowing the wearing of head coverings and other items, if this does not place an undue burden on the employer. Grooming and appearance policies have also been recently challenged by the Equal Employment Opportunity Commission for targeting certain hairstyles associated with race.

State vs. Federal Law

Employers in California and other states including New York and New Jersey need to be aware of developments in state laws that create potential liability even though there is no legal precedent in federal court for the protection of hair or hair styles. The leading federal circuit case concerning hairstyles is *EEOC v. Catastrophe Management Solutions*. The EEOC brought a Title VII claim against an insurance company alleging racial discrimination regarding a black woman whose job offer was withdrawn because she refused to cut her natural dreadlocks. According to court records, Chastity Jones applied to work as a customer service representative in 2010, interviewed for the position and was hired. Jones and several other future employees met in a room with a human resources manager who spoke about lab testing and scheduling. After the meeting, Jones met with the HR manager privately to discuss a scheduling conflict. Before leaving, the HR manager asked Jones if she had her hair in dreadlocks. Jones said yes and the HR manager replied that the company could not hire Jones with the dreadlocks. When Jones asked why, the HR manager replied that "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."

The federal district court dismissed the EEOC's claim on the ground that racial discrimination under Title VII must be based on immutable characteristics that a person cannot change, such as skin color, and the court found that hairstyles can be changed. After the 11th U.S. Circuit Court of Appeals affirmed this decision, the NAACP Legal Defense and Educational Fund filed a petition in 2018 for the U.S. Supreme Court to review the decision, but the Supreme Court declined to hear the case. Although EEOC v. Catastrophe Management Solutions is still applicable law, employers should remember that local antidiscrimination laws might differ from the federal circuit court's ruling.

Disparate Impact of Hairstyle Regulation

There are many reasons for introducing the CROWN Act, including that courts have refused to hold that a hairstyle which is not part of a religious belief or practice can be a protected racial characteristic under Title VII. Also, as SB 188 explains, societal stereotypes equate physical traits such as Afro- textured hair to perceptions of inferiority and unprofessional or inappropriate appearance. These stereotypes can be reflected in schools and workplaces through grooming and appearance policies. Negative stereotypes and perceptions of natural hair can also be reflected in connotations of what "professionalism" means. According to SB 188, "Professionalism was, and still is closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional." A study conducted by the CROWN Coalition found that in 2019 black women report receiving disciplinary actions based on violations of formal grooming policies at a rate significantly higher than white women and natural hairstyles frequently worn by black women are ranked the lowest for "job readiness."

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Best Practices for Employers

Employers may implement personnel policies addressing acceptable grooming and appearance standards for employees in the workplace, depending on business needs. However, employers should be mindful when drafting, reviewing and enforcing professional grooming and appearance policies because they must be non-discriminatory on their face and should not have a disparate impact on employees in a legally protected category, including regulation of natural hair and hair styles. Hair regulations should avoid explicitly prohibiting hairstyles that are historically associated with race, such as afros, cornrows, braids, locks or twists. Alternatives such as hair ties, hairs nets and safety equipment should be considered when addressing health and safety concerns instead of imposing a ban or restricting employees' hairstyles.

Employers should consider the following when creating a grooming and appearance policy:

- The policy should be driven by legitimate, objective business needs, not subjective personal preferences.
- The policy should state the reason for grooming or appearance standards, such as to protect the health and safety of employees.
- The policy should be equally and fairly implemented and should not disproportionately impact employees in a legally protected category.
- The policy must accommodate employees' religious beliefs, where appropriate.
- The policy should apply to the workplace only and should not attempt to regulate employees' off-duty appearance.

Takeaways

SB 188 extends the current legal standard that grooming and appearance policies should not disproportionately impact employees in any legally protected category, in this case based on natural hair or hairstyles worn predominantly by African-Americans. Grooming and appearance standards should always be justified by legitimate business needs, not standards that are irrelevant to employees' ability to perform their jobs.

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