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As Hair Discrimination Bans Grow, New York City Seeks Public Comment on Proposed Rule

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Background

July 3, 2020, marked the one-year anniversary of California becoming the first jurisdiction in the country to pass the Create a Respectful and Open Workplace for Natural Hair (CROWN) Act, prohibiting discrimination based on natural hairstyles and textures. One year later, many more jurisdictions have followed suit.

The CROWN Act is now law in seven states – California, New York, New Jersey, Virginia, Colorado, Washington and Maryland – and eight additional states have either pre-filed, filed or formally stated an intent to introduce their own bills outlawing hair discrimination, including Illinois, Massachusetts, Michigan, Minnesota, Ohio, Pennsylvania, Rhode Island and South Carolina. On August 11, Nebraska also passed a bill but was promptly vetoed by the governor. A further 15 states introduced bills that failed to move through the legislature before the end of the legislative session. Companion bills were also introduced in the U.S. Senate and House of Representatives in late 2019.

New York City Looks to Add Protections

New York City is the latest municipality to address hair discrimination, adding to the growing patchwork of legislation. Cincinnati, Montgomery County, Maryland, and Suffolk County, New York, already prohibit such discrimination.

The New York City Commission on Human Rights is proposing a new rule that would formalize its previous enforcement guidance banning hair-based discrimination. The commission first issued enforcement guidance in February 2019, stating that the New York City Human Rights Law (NYCHRL) “protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities” including “locks, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.” The proposed rule expands on this guidance, which focused solely on anti-Black discrimination. The proposed rule would clarify protections based on race, creed and religion, and explain covered entities’ obligations under the NYCHRL. The commission suggests that claims of hair-based

discrimination based on disability, gender, age or other protected status may be viable under the NYCHRL.

The proposed rule prohibits disparate treatment based on race and religion with respect to hair textures, hairstyles or hair length. Specifically, a covered entity engages in race discrimination if it "restricts or prohibits hair texture, hairstyles, including the use of headcoverings, or hair length associated with a racial or ethnic group." Unequal treatment, including harassment, based on an individual's hair texture, hairstyle (including the use of a headcovering) or hair length (associated with a racial or ethnic group) is also prohibited.

Examples of Discrimination Under the Proposed Rule

Some examples of race-based violations described in the proposed rule include:

- An employer's appearance and grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots or fades, which are commonly associated with Black people, or requiring employees to change their hair to conform to the company's appearance standards, including having to straighten or relax hair.
- A supervisor telling a Black employee that she cannot be promoted unless she straightens her natural hair.
- Co-workers taunting an Afro-Caribbean woman as being "unkempt" and "dirty" because she wears her hair in cornrows, and the employer failing to intervene to stop the harassment.
- Requiring a Native American employee to cut his long, braided hair, which he wears as part of his Navajo identity, or risk losing his job.
- Denying a Black employee with locs the opportunity to work in a customer-facing role unless he changes his hairstyle or hides his locs.
- Refusing to hire a Black applicant with box braids because her hairstyle does not fit the image the employer is trying to project.

Similarly, the proposal addresses religious discrimination on the basis of an "individual's hair texture, hairstyle, including headcoverings, or hair length associated with an individual's religious beliefs, observance, or practice[.]"

The commission also provides examples of religious-based hair discrimination, including:

- An employer refusing to retain an employee who converts to or adopts a different faith and begins to wear religious headwear, such as a turban, hijab or yarmulke, to partly cover or completely cover their hair.
- A landlord who refuses to rent to a tenant because her hair is styled into locs, worn as part of her Rastafarian religious beliefs.
- A school that rejects students who wear religious turbans, yarmulkes or hijabs.
- A customer service company that orders an employee to restrict, change or conceal their hairstyle or facial hair, in violation of their religious beliefs, to remain in a public-facing position.
- A health care provider that shaves a patient's religious beard without the patient's consent or the consent of the patient's designated representative, in nonemergency cases.

Failing to provide reasonable accommodations in employment for religious hair textures, hairstyles and hair length is also prohibited under the proposed rule unless doing so would constitute an undue hardship. Undue hardship is defined as constituting "a significant difficulty or expense to the

employer." "[T]rivial or minor losses of efficiency" or "speculative health or safety concerns" are insufficient. Additionally, employers must cover the cost of accommodations that do not impose "significant difficulty or expense." The difficulty or expense of an accommodation is not a basis for refusing to provide the accommodation. Instead, the employer must offer to share the cost or allow the employee to cover the cost if it still poses an undue hardship. Further, employers may not deny a religious accommodation because of "customer preference," concerns that the style is a "distraction or unprofessional" or the company's "image or reputation."

The proposed rule provides a narrow exception for an employer's hair-related grooming or appearance policy or practice that is justified by "a legitimate health or safety concern." The commission cautions against using "speculative health or safety concerns" as pretext for discrimination. Customer preference or a perception that a person's hair is "unprofessional," a "distraction" or "inconsistent with a covered entity's image" will not constitute a defense to a prohibited policy or practice.

The commission will consider the following non-exhaustive list of factors when determining whether a health or safety concern is "legitimate":

- Nature of the articulated health or safety concern.
- Whether the restriction or prohibition is narrowly tailored to address the concern.
- The availability of alternatives to the restriction or prohibition.
- Whether the restriction or prohibition has been applied in a discriminatory manner.

Employers are invited to submit written comments on the proposed rule on or before October 15, 2020. The commission will also hold a virtual public hearing on that date.

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