

California bans bias based on hairstyle

California has become the first state in the nation to ban discrimination on the basis of applicants' and employees' hairstyles.

On July 3, Gov. Gavin Newsom signed Senate Bill 188 into law, which broadens the definition of "race" in California's anti-discrimination law to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Employers should plan accordingly.

The EEOC has long considered race in terms beyond skin color. Color discrimination is itself a protected category, which can be defined as discrimination based on pigmentation, complexion or skin shade or tone. Race has a broader meaning and can include physical characteristics associated with race (such as a person's hair, facial features, height and weight), as well as cultural characteristics related to race, including a person's name, cultural dress and grooming practices, accent or manner of speech.

New York City set the stage

Recently, the New York City Commission on Human Rights released new guidance on how the City's human rights law applies to situations involving characteristics and cultural practices closely associated with race. In particular, it focused on discrimination against hair texture and hairstyles associated with being black because of the frequency of such discrimination.

The guidance states, "Race discrimination based on hair and hairstyles most closely associated with black people has caused significant physical and psychological harm to those who wish to maintain natural hair or specific hairstyles but are forced to choose between their livelihood or education and their cultural identity and/or hair health."

Bill: Hair bias is race bias

California's SB 188 further reflects this development in civil rights law.

The bill declares that discrimination against "'blackness,' and the associated physical traits" is pervasive in society and has "permeated societal understanding of professionalism." The bill states that this "Eurocentric image of professionalism . . . disparately impact black individuals."

Accordingly, the bill expressly includes protections of traits historically associated with race, including hairstyles such as braids, locks and twists.

How to respond

California employers may want to consider taking steps to ensure that their discrimination- and harassment-prevention programs, as well as their grooming policies, comply with this new standard. For example, companies could train management that the following policies and practices would likely violate the standards set forth in SB 188:

- Having a grooming policy that prohibits twists, locks, braids, cornrows, Afros, Bantu knots or fades—all of which are hairstyles commonly associated with black people
- Requiring employees to alter the state of their hair to conform to the company's appearance standards, including a policy that requires employees to straighten or relax hair, which involves the use of chemicals or heat
- Banning hair that extends a certain number of inches from the scalp, thereby limiting Afros
- Having a policy that requires "professional hair" or "clean and tidy hair," but is applied to mean that employees cannot wear Afros, locks, twists or braids
- Forcing black employees to obtain management approval prior to changing hairstyles, but not imposing the same requirement on others
- Requiring only black employees to alter or cut their hair or risk losing their jobs
- Telling black employees with locks that they cannot be in customer-facing roles unless they change their hairstyle
- Refusing to hire black applicants with cornrows because the hairstyle does not fit the image the company is trying to project to customers
- Mandating that black employees hide their hair or hairstyle with a hat or visor.

Policy adaptations

Instead, employers may want to consider taking these steps:

Adopt a grooming policy based on rules that are valid, nondiscriminatory, have no disparate impact and are uniformly applied. For example, the policy may include a race-neutral rule requiring employees to keep their hair neat and clean. Similarly, it is acceptable to adopt a rule requiring all employees to secure their hair for bona fide safety or hygienic reasons.

Revise discrimination and harassment prevention policies to broadly define race to include physical and cultural characteristics associated with race. Supplement harassment prevention training programs with hypotheticals that further illustrate the broad meaning of race-based harassment and discrimination. These examples may include, as the EEOC has explained, unfair height and weight standards that have an adverse impact on Asian Americans and hairstyling rules that have an adverse impact on black women.

Conduct harassment prevention training that emphasizes fostering a respectful workplace that does not condone teasing or joking about traits that have historically been associated with one's race or ethnic identity.