CLIENT ALERT: New York City Commission on Human Rights Releases Groundbreaking Enforcement Guidance Barring Hairstyle-Based Discrimination – By Ryan W. Jaziri

The New York City Commission on Human Rights (the "Commission") has released groundbreaking enforcement guidance defining discrimination based on hairstyle as a subset of race discrimination. Employers with employees in New York City should review their dress codes, appearance policies and grooming policies to ensure compliance with this new anti-discrimination guidance, which appears to be the first of its kind in the nation. While the law covers employers located in New York City, in the wake of intense recent media attention, other states and municipalities are likely to follow suit.

The Commission's February 18, 2019, guidance targets restrictions on natural hair or hairstyles associated with "Black people" – defined in the guidance as individuals that identify as African, African American, AfroCaribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry—noting that restrictive hair style policies are "often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional." Accordingly, the New York City Human Rights Law protects employees' rights to maintain natural hair or hairstyles that are closely associated with racial, ethnic or cultural identities. The Commission noted that "[f]or Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs [a hairstyle where the hair one would normally comb locks on itself, creating ropelike strands], cornrows [hair that is rolled or closely braided to the scalp], twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."

The Commission clarified that the City's law also protects against hair-based discrimination involving other protected classes, including religion, gender and ethnic or cultural identities. The Commission noted that "[w]hile grooming and appearance policies adversely impact many communities, this legal enforcement guidance focuses on policies addressing natural hair or hairstyles most commonly associated with Black people, who are frequent targets of race discrimination based on hair."

Employers "may not enact discriminatory policies that force Black employees to straighten, relax, or otherwise manipulate their hair to conform to employer expectations." The existence of such policies constitutes direct evidence of disparate treatment based on race and/or other relevant protected characteristics. The Commission cites specific examples of violations, which now include:

- Policies that prohibit hair or hairstyles "commonly associated with Black people;"
- Policies requiring employees to alter the state of their hair to conform to the employer's appearance standards, including having to straighten or relax hair (i.e., by using chemicals or heat);
- Policies banning hair that extends a certain number of inches from the scalp that would limit Afros.

Employers should be aware that seemingly neutral policies could violate the New York City law if employers enforce them in a discriminatory fashion. For example, an employer would violate the City's law if it enforced a grooming policy "banning the use of color/dye, extensions, and/or patterned or shaved hairstyles" against Black employees only.

The City's law also prohibits employers from harassing, imposing unfair conditions or otherwise discriminating against employees based on aspects of their appearance associated with their race. The Commission cites examples of practices that include the following:

- Forcing Black employees to obtain supervisory 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 a Black employee with locs that he or she cannot work in a customer-facing role unless he or she changes hairstyle;
- Refusing to hire a Black applicant with cornrows because his or her hairstyle does not fit the "image" the employer is trying to project; and
- Mandating that Black employees hide their hair or hairstyle with a hat or visor.

The Commission's new guidance addresses potential employer concerns regarding health and/or safety as well. The document indicates that where an employer has a legitimate health or safety concern, it must consider alternatives prior to imposing a ban or restriction on employees' hairstyles. Suggested options include "the use of hair ties, hair nets, head coverings, as well as alternative safety equipment that can accommodate various hair textures and hairstyles," but the guidance specifies that alternative options may not be offered or imposed to address concerns unrelated to actual and legitimate health or safety concerns.

In effect, the guidance provides a new avenue of legal recourse to individuals who have been discriminated against due to their natural hair or hairstyle. If the Commission finds that an unlawful discriminatory practice has occurred, it can levy civil penalties of up to $125,000, and, in situations involving willful, wanton or malicious conduct, those penalties may increase to $250,000.

New York City employers should work with their MBJ attorneys to review their dress codes and appearance and grooming policies to ensure compliance with the Commission's guidance.

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