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What Employers Must Know About California's CROWN ACT

By Philip I. Person and Tayanah C. Miller

On July 3, 2019, California Gov. Gavin Newsom signed Senate Bill 188, the Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, into law. The state then became the first to ban discrimination based on appearances traditionally associated with people of certain races, including natural hairstyles like braids, dreadlocks and twists. This article provides a brief overview of the law, explains the suggested steps employers should take to ensure compliance and discusses open issues.

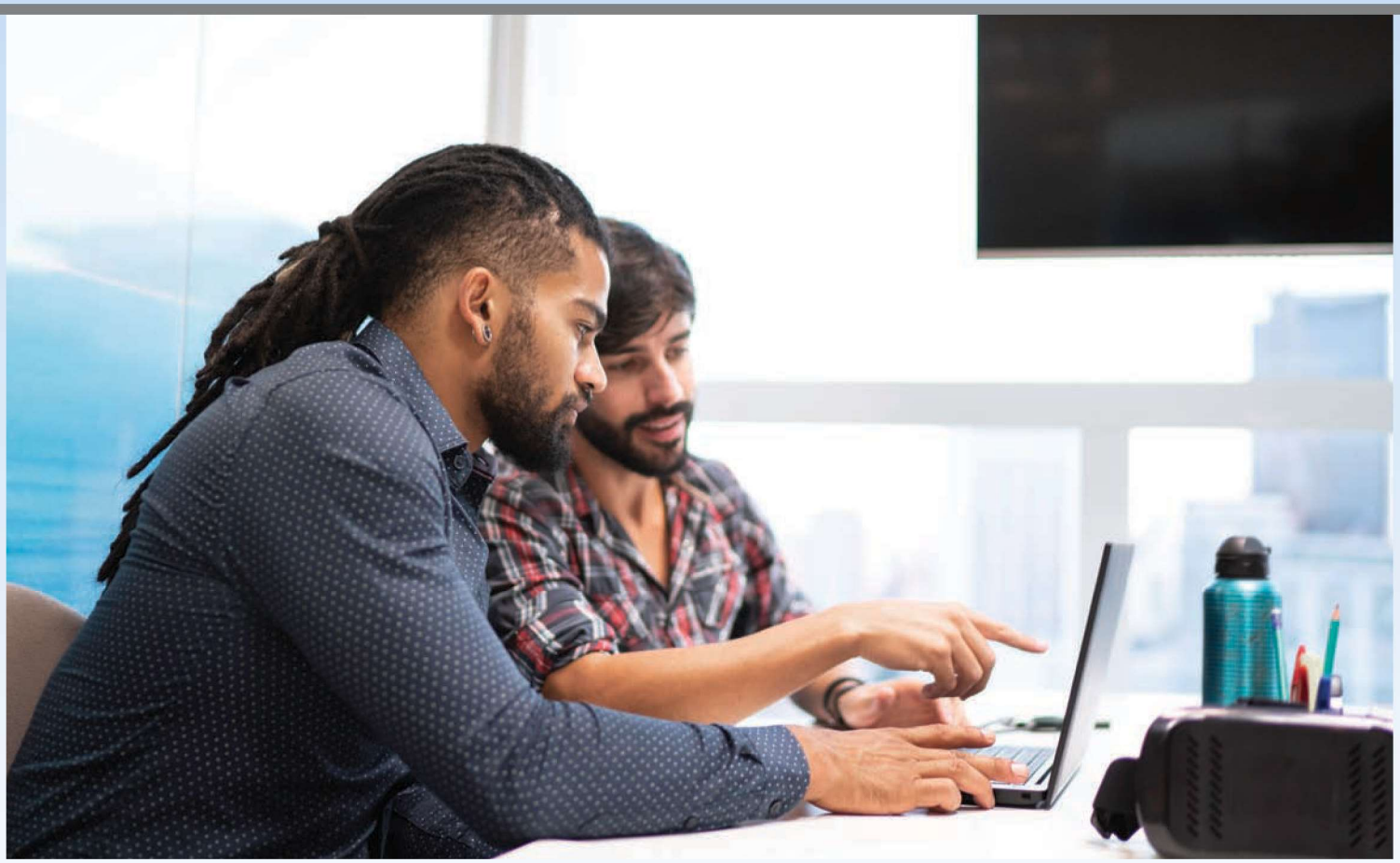
Summary of the CROWN Act

Before Newsom signed the CROWN Act into law, California did not include people who wear natural hairstyles as a category of persons who should be protected from discrimination. Rather, California prohibited discrimination in employment based on race and other characteristics. The definition of "race" used in state statutes was limited to "ancestry, color, ethnic group identification, and ethnic background." As there were no published court decisions in California regarding hairstyle discrimination, employees who wished to challenge grooming policies that impacted their natural hairstyles were relegated to relying on federal court interpretations of Title VII of the Civil Rights Act of 1964.

Federal courts consistently held that employers could prohibit natural hairstyles when their policies prohibited such hairstyles for everyone. While courts recognized workers' rights to challenge such policies on the grounds that they had a disparate impact on members of certain racial and ethnic groups, employers had a strong defense against such challenges when they could demonstrate that their policies were job-related and consistent with business necessity. What this meant in practice, then, was that California employers could create policies that prohibited hairstyles typically associated with members of particular races so long as the prohibitions applied to all employees equally.

Employers in California can no longer do that. The CROWN ACT amends the Fair Employment and Housing Act (FEHA) by expanding the definition of race to be "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The new law also defines "protective hairstyles" as including "such hairstyles as braids, locks, and twists." The CROWN Act, like other prohibitions against discrimination under the FEHA, applies to employers with five or more employees.

According to the CROWN ACT's author, the amendment will eliminate the confusion that exists in federal cases that have considered whether grooming policies that impact African Americans are discriminatory. Judges in federal discrimination cases make a distinction between mutable characteristics (like hairstyles) that are not protected characteristics and immutable characteristics (like skin color) that are protected. But California law prohibits discrimination against both immutable and mutable characteristics. For example, under the FEHA, employers cannot discriminate against marital status and military and veteran status even though those characteristics are mutable. For that reason, the author of the CROWN Act argued that the mutable-immutable distinction should not exist.



Practical Steps to Ensure Compliance

Changing the definition of race under the FEHA represents a significant change to the state of the law, especially for employers who set and enforce grooming standards. Employers should update their handbooks to ensure that their grooming policies do not prohibit natural hairstyles like braids, dreadlocks and twists.

Employers with employees outside of California should also anticipate similar laws or proposed legislation in other cities and states. For example, just nine days after Governor Newsom signed the CROWN Act, Gov. Andrew Cuomo of New York signed Senate Bill S6209A, which amended the New York Human Rights Law and the Dignity for All Students Act to make clear that discrimination based on race includes hairstyles or traits associated with race.

Open Issues

California's CROWN Act has the potential to impact industries where race-linked characteristics like beards for African American men are prohibited for safety reasons. Traditionally, policies requiring employees to be clean-shaven have been viewed as race-neutral because they apply to everyone equally. The CROWN Act may change that. To the extent that courts are inclined to see beards as a protective hairstyle, employers may be prohibited from adopting policies that prohibit beards.

This is significant. In the past, when facially-neutral policies were challenged as discriminatory, an employer could prevail if it could show that its policy was consistent with business necessity. But there is no business necessity defense where an employee shows that a policy on its face discriminates based on race. Further, the bona fide occupational qualification defense—which is typically used when job-related safety requirements distinguishing among members of protected classes are at issue—has not been applied to allow discrimination based on race. Title VII expressly limits that defense to sex, religion and national origin.

It is not at all clear that California lawmakers intended this result. The bill analysis of the CROWN ACT appears to suggest that employers would be able raise the defense of a bona fide occupational qualification where a person's employment requires hairstyles to be limited. But, as stated above, that defense has not been used in the race context and the California legislature chose to protect hairstyle by expanding the definition of race under the FEHA. Employers should consult with their legal counsel on the anticipated case law clarifying this issue.

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