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State laws extending discrimination protections to new classes of employees

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In 2022, a number of states enacted equal employment opportunity legislation, extending protections even further beyond the baselines set by federal law. Most notably, many cities and states have focused on prohibiting discrimination on the basis of hairstyle and hair texture, criminal background, marijuana use, and caste. These new areas of discrimination protection present fresh challenges for employers in terms of compliance.

Hair discrimination

In 2019, California became the first state to ban hair discrimination by passing the Create a Respectful and Open Workplace for Natural Hair (CROWN) Act,[1] which outlaws policies that prohibit natural, textured, or cultured hair or hairstyles typically associated with Black individuals in the workplace.

If an employer has a legitimate non-discriminatory reason relating to hair requirements, the employer may want to also consider alternatives to requiring certain hair styles, such as the use of hair nets or other protective equipment.

Since 2019, similar laws have passed in Colorado,[2] Connecticut,[3] Delaware,[4] Maine,[5] Maryland,[6] Nebraska,[7] Nevada,[8] New Jersey,[9] New Mexico,[10] New York,[11] Oregon,[12] Rhode Island,[13] Virginia,[14] Washington,[15] and 44 municipalities, which generally prevent employers from taking adverse actions against employees or applicants based on hairstyles or hair texture associated with a certain race.

Since 2022, Illinois,[16] Tennessee,[17] Massachusetts,[18] Louisiana,[19] and Minnesota[20] have become the latest states to enact CROWN Acts, expanding the states' definitions of race-based discrimination to similarly cover certain hairstyles and hair textures associated with a certain race. Some examples of protected hairstyles and hair texture identified in these laws include afros, dreadlocks, twists, locs, braids, cornrows, Bantu knots and other hair styled to protect texture or for cultural significance.

Many state laws still allow hair restrictions for legitimate nondiscriminatory reasons, such as health and safety. While a federal version of the CROWN Act[21] has been stalled in the Senate, there is EEOC guidance[22] and some case law suggesting that hair-based discrimination can constitute unlawful race discrimination under Title VII.[23]

Employers should review their policies and procedures related to employment determinations to ensure that criminal history is considered only where an offense may be related to the responsibilities of a job.

Employers should review their dress code, grooming and antidiscrimination policies to ensure they comply with state laws, and should train employees in managing roles not to consider appearance of hairstyles or texture historically associated with race in any employment related decisions.

If an employer has a legitimate non-discriminatory reason relating to hair requirements (such as concerns relating to health and safety), the employer may want to also consider alternatives to requiring certain hair styles, such as the use of hair nets or other protective equipment.

Criminal history discrimination

Nearly two-thirds of states have "ban-the-box" laws, which prohibit initial job applications from inquiring into an applicants' criminal background, and many other states prohibit consideration of convictions that have been sealed or expunged, juvenile records, and arrests.

The policy consideration upon which most of these laws is based is to "end the cycle" — meaning, that if individuals with criminal

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backgrounds are denied opportunities to gain and hold good jobs then, just to provide for themselves or their families, they may be more likely to return to activity that could have criminal implications.

California,[24] Hawaii,[25] Illinois,[26] New York,[27] Pennsylvania,[28] Washington D.C.,[29] and Wisconsin[30] all have laws that restrict the ability for private employers to make employment decisions based on criminal convictions. In 2022, Colorado and Atlanta joined these states by enacting laws providing employment discrimination protections for individuals with criminal records.

Colorado HB 1383[31] prohibits employers from making employment determinations concerning an applicant whose criminal offense has been sealed, expunged, or if the criminal offense occurred in a juvenile proceeding.

While employers may have arguments that these state laws are preempted by the federal Controlled Substances Act, ... they would be well advised to nevertheless re-evaluate their marijuana testing policies.

The city of Atlanta adopted an ordinance[32] that prevents employers from discriminating against individuals for any terms of employment based on criminal history. However, the Atlanta ordinance allows an adverse employment decision based on criminal history if the criminal history is related to the responsibilities of the job based on (1) whether the person committed the offense; (2) the nature and gravity of the offense; (3) the amount of time since the offense; and (4) the nature of the job.

Employers should review their policies and procedures related to employment determinations to ensure that criminal history is considered only where an offense may be related to the responsibilities of a job. In jurisdictions that require consideration of multiple factors before rendering a determination on whether a criminal history would impact an applicant's fitness for a particular job, employers should take steps to document the legitimacy and bona fide nature of any such evaluation, preempting allegations that such process was merely perfunctory.

Marijuana use discrimination

In recent years, a significant number of states have enacted discrimination protections for employees who medicinally use marijuana off-duty and off the employer's premises. In 2022, Louisiana,[33] Missouri,[34] and Utah[35] joined that trend.

Additionally, in recent years, six states (New Jersey,[36] New York,[37] Connecticut,[38] Nevada,[39] Rhode Island,[40] and Montana[41]) have enacted laws that prohibit employment discrimination against legal recreational marijuana. Please refer to a previous Weil article[42] for more details.

In 2022, California,[43] Rhode Island,[44] and Missouri[45] were the latest states to ban discrimination against employees or applicants for off the job recreational marijuana use. Employers in these states will still have to follow federal drug testing requirements for certain occupations (such as safety sensitive transportation industries).

However, while employers may restrict consumption or possession or marijuana in the workplace and may discipline employees who are under the influence at work, employers may face arguments from employees that because current drug testing is unable to identify current intoxication, employers cannot rely exclusively on the results of a positive drug test in disciplining employees.

While employers may have arguments that these state laws are preempted by the federal Controlled Substances Act, and can remind employees of restrictions on possession of and impairment by marijuana in the workplace, they would be well advised to nevertheless re-evaluate their marijuana testing policies.

Employers should also consider collecting additional documentation, such as visual indicia of impairment, to supplement a positive drug test as evidence of workplace intoxication. Employers may want to also consider training and certifying certain employees as impairment recognition experts to further enhance the record that any discipline is for workplace intoxication and not protected off-duty use.

Caste discrimination

In February 2023, Seattle[46] became the first U.S. jurisdiction to ban discrimination based on caste.

According to the statute, caste is "a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion." The Seattle law specifically cites a study which found that in the U.S. "two in three [caste oppressed people] face workplace discrimination."

While Seattle is the first jurisdiction to prohibit discrimination on the basis of caste, universities such as Brandeis University and California State University have added caste as a protected category in their anti-discrimination policies. More jurisdictions may be banning caste discrimination in the future, either through legislation, or through expansive interpretations of current anti-discrimination laws.

For example, in October 2022, the California Department of Fair Employment and Housing won an appeals court ruling to proceed with a lawsuit where an employee alleged he was denied a promotion due to caste discrimination in violation of California's Fair Employment and Housing Act's prohibition on race and ancestry discrimination.[47] This is also an area in which the Equal Employment Opportunity Commission may seek to regulate through guidance or other interpretive policy statements.

Employers should monitor legislative and judicial developments in the jurisdictions in which they operate to update their

antidiscrimination policies, procedures, and trainings to account for potential discrimination on the basis of caste.

Notes

[1] http://bit.ly/3UuX5Ad

[2] http://bit.ly/3ZZurbE

[3] https://bit.ly/3GyXuMl

[4] http://bit.ly/3MAeVjd

[5] https://bit.ly/3zNprfF

[6] http://bit.ly/408AwCQ

[7] http://bit.ly/43tsEia

[8] http://bit.ly/3mp4ioO

[9] http://bit.ly/3mtKLnl

[10] https://bit.ly/43mSyUy

[11] http://bit.ly/40287OH

[12] https://bit.ly/41lPiH4

[13] http://bit.ly/3nYTTAB

[14] http://bit.ly/3MA9912

[15] https://bit.ly/43ttyey

[16] http://bit.ly/3o6RNPv

[17] https://bit.ly/3o6yxBD

[18] https://bit.ly/3GAjpmr

[19] http://bit.ly/3KwMEYs

[20] https://bit.ly/3UrLBxg

[21] https://bit.ly/3o7IfU4

[22] http://bit.ly/3o3Zi9E

[23] See *Jenkins v. Blue Cross Mutual Hospital Insurance Inc.*, 538 F.2d 164 (7th Cir. 1976).

[24] https://bit.ly/3MAGfhj

[25] https://bit.ly/3UA7n2c

[26] http://bit.ly/3zPDAJ9

[27] http://bit.ly/43s9Bo8

[28] http://bit.ly/43mU6hk

[29] https://bit.ly/43B2g5Y

[30] http://bit.ly/3KRgKqM

[31] https://bit.ly/41fY9uB

[32] http://bit.ly/43mMyv4

[33] https://bit.ly/415I4HB

[34] https://bit.ly/41lRazA

[35] http://bit.ly/43qjC5b

[36] https://bit.ly/41lLohG

[37] http://bit.ly/416Zns0

[38] https://bit.ly/41lRxtY

[39] http://bit.ly/3nZIvEJ

[40] https://bit.ly/3zQNU3y

[41] https://bit.ly/3UvSVs4

[42] http://bit.ly/3GyPZEY

[43] https://bit.ly/3SoZkCU

[44] https://bit.ly/3UA9mDG

[45] https://bit.ly/41fZstv

[46] http://bit.ly/3GD08ki

[47] See *Department of Fair Employment & Housing v. Cisco Systems Inc.*, 82 Cal. App. 5th 93 (Cal. Ct. App. 2022).

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