

## **Amended Notice of Public Hearing and Opportunity to Comment on Proposed Rule**

**What are we proposing?** The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules governing race- and religion-based discrimination.

**When and where is the hearing?** The Commission will hold a public hearing on the proposed rule. The public hearing will take place at 3:00pm EST on October 15, 2020, and will be held online at <https://nyccchr.webex.com/webappng/sites/nyccchr/meeting/download/3d27edf1fb784823b36bd574b2cee32c?siteurl=nyccchr&MTID=m836dc5fc832debc704230509e04d6711>. (A hearing was previously scheduled for April 21, 2020, but was postponed due to the coronavirus pandemic.)

**How do I comment on the proposed rules?** Anyone can comment on the proposed rules through:

- **Website.** You can submit comments to the Commission through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [policy@cchr.nyc.gov](mailto:policy@cchr.nyc.gov). Please include a reference in the subject line to “Proposed Rules on Discrimination Based on Hair.”
- **Mail.** You can mail comments to Office of the Chair, New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007.
- **Fax.** You can fax comments to Zoey Chenitz, Senior Policy Counsel, (646) 500-7330.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by emailing [policy@cchr.nyc.gov](mailto:policy@cchr.nyc.gov). You can also sign up during the online hearing on October 15, 2020. You can speak for up to three minutes.

**Is there a deadline to submit comments?** You must submit written comments by October 15, 2020.

**What if I need assistance to participate in the hearing?** You must tell the Commission if you need a reasonable accommodation for a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by email at [policy@cchr.nyc.gov](mailto:policy@cchr.nyc.gov). You may also tell us by telephone at 212-416-0261. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by October 9, 2020.

**Can I review the comments made on the proposed rules?** You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of the hearing will be available to the public on the Commission’s website.

**What authorizes the Commission to make this rule?** Sections 905 and 1043 of the New York City Charter and section 8-107 of the Administrative Code of the City of New York authorize the Commission to make this proposed rule. This proposed rule was not included in the Commission’s regulatory agenda for this Fiscal Year because it was not contemplated when the Commission published the agenda.

**Where can I find the Commission’s rules?** The Commission’s rules are in title 47 of the Rules of the City of New York.

**What laws govern the rulemaking process?** The Commission must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

### **Statement of Basis and Purpose of Proposed Rule**

The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules to clarify protections on the basis of race, creed, and religion.

Race includes characteristics and traits commonly or historically associated with race or ethnicity, including but not limited to hair textures, hairstyles, including the use of head coverings and hair length. Similarly, hair textures, hairstyles, head coverings and hair length can be elements of individuals’ religious practices. Discrimination based on hair can function as a proxy for discrimination based on race or religion and constitute a form of unlawful stereotyping.

This rule is not intended to exclude claims for hair-based discrimination on the basis of disability, gender, age or other protected status under the New York City Human Rights Law.

These proposed rules would amend title 47 of the Rules of the City of New York to explain covered entities’ obligations under the City Human Rights Law.

The Commission’s authority for these rules is found in sections 905(e)(9) and 1043 of the New York City Charter and Administrative Code section 8-107.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used accordingly, unless otherwise specified or unless the context clearly indicates otherwise.

Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-09 to read as follows:

### **§ 2-09 Prohibition on Hair Discrimination Based on Race and Religion**

(a) Disparate Treatment Based on Race with Respect to Hair Textures, Hairstyles or Hair Length: (1) A covered entity that restricts or prohibits hair texture, hairstyles, including the use of headcoverings, or hair length associated with a racial or ethnic group or that engages in unequal treatment, including harassment, on the basis of an individual’s hair texture, hairstyle,

including the use of a headcovering, or hair length associated with a racial or ethnic group, is engaging in race discrimination in violation of § 8-107 of the Administrative Code, unless the restriction or prohibition addresses a legitimate health or safety concern. It is not a defense that a restriction or prohibition is based on customer preference or based on a perception that a person's hair is "unprofessional," a "distraction," or inconsistent with a covered entity's image.

Speculative health or safety concerns may not be used as a pretext for racial discrimination. In assessing whether a restriction or prohibition constitutes pretext for discrimination or is based on legitimate health or safety concerns, the Commission will consider, among other factors, the 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; and whether the restriction or prohibition has been applied in a discriminatory manner. Where a restriction or prohibition is premised on legitimate health or safety concerns, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair lengths.

(2) Examples of violations include:

- i. 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.
- ii. A supervisor telling a Black employee that she cannot be promoted unless she straightens her natural hair.
- iii. 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.
- iv. An appearance code at a school banning students' hair that extends a certain number of inches above the scalp, thereby negatively impacting students who wear hairstyles such as Afros.
- v. 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.
- vi. Denying a Black employee with locs the opportunity to work in a customer-facing role unless he changes his hairstyle or hides his locs.
- vii. Refusing to hire a Black applicant with box braids because her hairstyle does not fit the image the employer is trying to project.
- viii. A private school policy prohibiting braids, locs, and head wraps.
- ix. A public school athletic association prohibiting a Black student athlete with locs from participating in an athletic competition because his hair is below his shoulders, but allowing white student athletes with long hair to tie their hair up.
- x. A restaurant that refuses to seat a Black customer who wears a headscarf over her Afro because it violates the restaurant's dress code.

(b) Disparate Treatment Based on Religion With Respect to Hair Textures, Hairstyles, Hair, or Length: (1) A covered entity that restricts or prohibits hair textures, hairstyles, including the use of headcoverings, or hair length associated with an individual’s religious beliefs, observance, or practice or that engages in unequal treatment, including harassment, 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 is engaging in discrimination in violation of § 8-107 of the Administrative Code, unless the restriction or prohibition addresses a legitimate health or safety concern. It is not a defense that a restriction or prohibition is based on customer preference or based on a perception that a person’s hair is “unprofessional,” a “distraction,” or inconsistent with a covered entity’s image.

Speculative health or safety concerns may not be used as a pretext for religious discrimination. In assessing whether a restriction or prohibition constitutes pretext for discrimination or is based on legitimate health or safety concerns, the Commission will consider, among other factors, the 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; and whether the restriction or prohibition has been applied in a discriminatory manner. Where a restriction or prohibition is premised on legitimate health or safety concerns in employment, covered entities must engage in the cooperative dialogue process and provide reasonable religious accommodations, in accordance with subdivision (c). Where a restriction or prohibition is premised on legitimate health or safety concerns in housing or public accommodations, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair lengths.

- (2) Examples of violations include:
- i. 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.
  - ii. A landlord who refuses to rent to a tenant because her hair is styled into locs, worn as part of her Rastafarian religious beliefs.
  - iii. A school that rejects students who wear religious turbans, yarmulkes, or hijabs.
  - iv. 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.
  - v. A store that refuses to serve a customer who covers her hair with a religious head-covering such as a hijab or sheitel.
  - vi. A bouncer at a bar who tells a turban-wearing patron that he looks like a “terrorist” and denies him admission based on the bar’s “no headwear” policy.

- vii. A healthcare provider that shaves a patient's religious beard without the patient's consent or the consent of the patient's designated representative, in non-emergency cases.
- viii. A public school that fails to take adequate corrective action when a student who wears a turban over his uncut hair for religious reasons is bullied by other students for his religious appearance and repeatedly told that he looks like "Osama Bin Laden" and to "get out of this country."

(c) Failure to Provide Reasonable Accommodations in Employment for Religious Hair Textures, Hairstyles, and Hair Length. (1) It is religious discrimination in violation of § 8-107(3) of the Administrative Code for an employer to fail to provide a reasonable accommodation to an applicant or employee to maintain a particular hairstyle associated with the person's sincerely-held religious beliefs, observance, or practice, when doing so would not constitute an undue hardship. Pursuant to § 8-107(28) of the Administrative Code, an employer is required to engage in a cooperative dialogue with any applicant or employee who has requested a religious accommodation or who the employer has notice may require a religious accommodation, and to provide a written decision to the person at the conclusion of the cooperative dialogue process. As part of the cooperative dialogue process, where there are legitimate health or safety concerns, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair length.

(2) Undue Hardship:

Employers must accommodate employees' religious beliefs unless doing so constitutes a significant difficulty or expense to the employer, which includes an assessment of the identifiable cost of the accommodation, including costs of loss of productivity. Employers may not deny a religious accommodation for a particular hairstyle because of: customer preference; concerns that these styles are a distraction or unprofessional; concerns about company image or reputation; trivial or minor losses of efficiency; or speculative health or safety concerns.

The employer is responsible for covering the cost of the accommodation if that does not impose significant difficulty or expense. If the cost of the requested accommodation constitutes a significant difficulty or expense, the employer may not deny an employee the accommodation before offering the employee the option to share the cost, and if still an undue hardship to the employer, to cover the cost of the accommodation themselves.

(3) Examples of violations include:

- i. An employer refusing to grant an exception to the company's grooming policy to a job applicant who maintains uncut hair for religious reasons, despite the absence of an undue hardship.
- ii. An employer rejects a job applicant who wears a beard for religious reasons because the job requires use of a gas mask that does not provide adequate

protection for persons wearing beards. However, the employer, without incurring undue hardship, could have provided an effective alternative for the gas mask.

- iii. An employer failing to provide alternatives to a required hair-based drug test for employees who are unable to provide a live hair sample for religious reasons, despite the absence of an undue hardship.
- iv. An employer refusing to allow a Muslim employee to grow a beard during Ramadan, as an exception to a general grooming policy, despite the absence of an undue hardship.
- v. An employer conditioning permission for an employee to wear religious headwear at work on the employee adding the company logo to the religious headwear, despite the employee's religious objections and the absence of an undue hardship on the employer.

**NEW YORK CITY LAW DEPARTMENT**

**DIVISION OF LEGAL COUNSEL**

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**NEW YORK, NY 10007**

**212-356-4028**

**CERTIFICATION PURSUANT TO**

**CHARTER §1043(d)**

**RULE TITLE:** Hair Discrimination Rule

**REFERENCE NUMBER:** 2019 RG 086

**RULEMAKING AGENCY:** New York City Commission on Human Rights

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN

Date: February 12, 2020

Acting Corporation Counsel

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS**

**253 BROADWAY, 10<sup>th</sup> FLOOR**

**NEW YORK, NY 10007**

**212-788-1400**

**CERTIFICATION / ANALYSIS**

**PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE: Hair Discrimination Rule**

**REFERENCE NUMBER: CCHR-8**

**RULEMAKING AGENCY: New York City Commission on Human Rights**

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Violations of the human rights law are addressed by the complaint and investigation process and are not curable.

/s/ Ashley A. Pettaway

Mayor's Office of Operations

February 12, 2020

Date