

2024

BUSINESS IN 2023

WEEKLY WEBINAR SERIES

2022

2021

2020



BOND

SCHOENECK
& KING ATTORNEYS

Introduction



Kristen E. Smith

Member

ksmith@bsk.com

Syracuse, NY

TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction / Agenda

Jacqueline Giordano – (12:05PM-12:15PM)

- Caste Discrimination: The Next Protected Category?

Kseniya Premo – (12:15PM-12:25PM)

- DHS Ends Form I-9 Flexibilities

Laura Harshbarger – (12:25PM-12:35PM)

- What to Expect When You Receive an NYSDHR or EEOC Complaint

Lisa Feldman – (12:35PM – 12:45PM)

- OCR Dear Colleague Letter on Antisemitism

Caste: The Next Protected Category?



Jacqueline A. Giordano

Member

jgiordano@bsk.com

Garden City, NY

Seattle Passes Ordinance Adding Caste as a Protected Category

- On Feb. 21, 2023, Seattle became the first US jurisdiction to add caste as a protected class to its antidiscrimination law
- Defined caste as “a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion”
 - “Endogamy” – marriage within a specific group is required by custom or law
- Ordinance notes that caste discrimination is based on birth and descent, and can occur in the form of social segregation, physical and psychological abuse, and violence

Pending Law in California

- On May 11, 2023 legislation adding caste to the list of protected classes passed the State Senate
 - Passed by overwhelming majority 34-1
 - Although there was opposition from certain groups, including the Hindu American Foundation, which asked: “Absent a historical or current legal basis to regulate caste in the United States and the lack of an agreed-upon legal, academic or sociological definition, will administrators and the state be asked to rely on India’s law related to caste and impose foreign laws on those working or residing in California?”

Definition of Caste in Pending California Legislation

- An individual's perceived position in a system of social stratification on the basis of inherited status
 - A system of social stratification on the basis of inherited status may be characterized by factors such as: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation, and discrimination; and social exclusion on the basis of perceived status

Pending California Law

- “Caste discrimination is present across South Asia and the South Asian diaspora, as well as around the world. While caste systems are strongly associated with South Asia, similar systems exist in regions including, but not limited to, South America, Asia and Africa. Caste discrimination is also found across communities of religious practice.”
 - “This act shall not be construed to mean that caste discrimination is not already prohibited under existing law...”
 - California law currently prohibits discrimination based on ancestry
- Presently awaiting a vote in the Assembly, and if passed by the Assembly, signature by the Governor

DHS Ends Form I-9 Flexibilities



Kseniya Premo

Member

kpremo@bsk.com

Syracuse, NY

I-9 Employment Eligibility Verification (pre-COVID)

- U.S. Citizenship and Immigration Services (“UCIS”) requires that all U.S. employers must complete Form I-9 for each individual they hire for employment in the United States
- An employee must attest to their employment authorization and present their employer with acceptable documents as evidence of identity and employment authorization

Verification of Required Documents (pre-COVID)

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		6. Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI				

- Employer must physically examine these documents with the employee (in-person) to determine whether they reasonably appear to be genuine and relate to the employee

- Employer then records the document information on the employee's Form I-9

- Employer must retain Form I-9 for a designated period and make it available for inspection by authorized government officers

Form I-9 Compliance During COVID-19

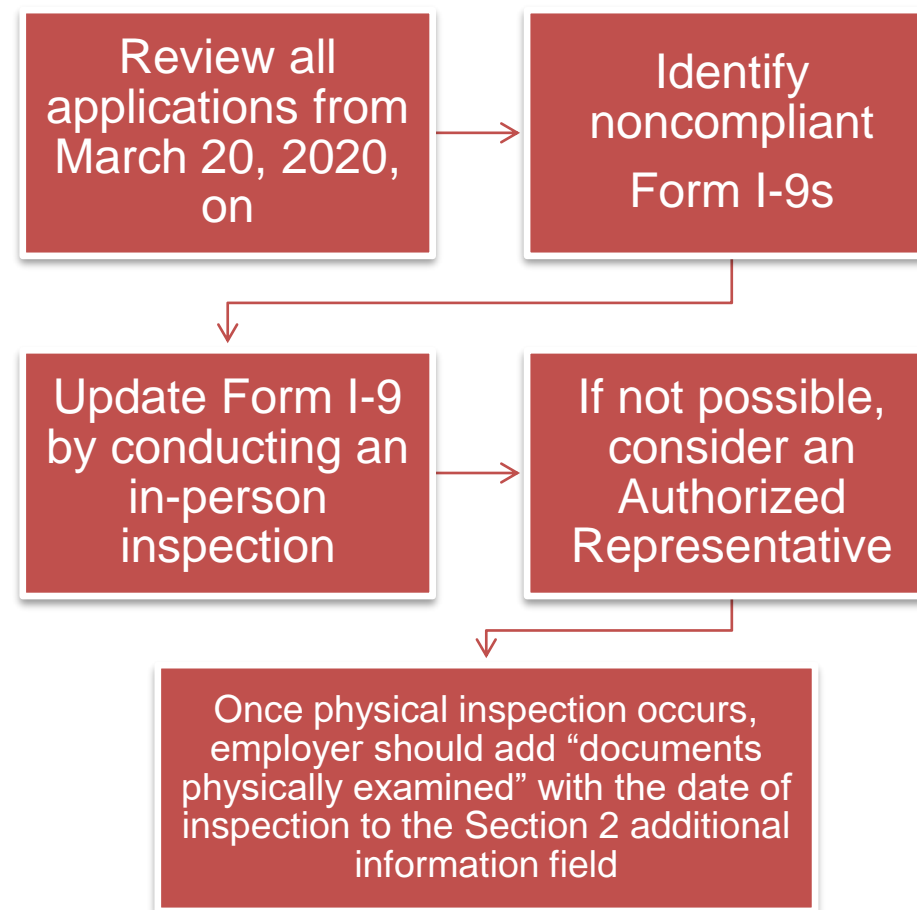
- In March 2020, the Department of Homeland Security (“DHS”) announced that employers that were operating remotely would not be required to review the employee’s identity and employment authorization documents in the employee’s physical presence
- Instead, employers could inspect the documents remotely and “obtain, inspect and retain copies of the documents” within 3 business days for purposes of completing Section 2
- Remote inspection could include video, fax or email verification
- Employers entered “COVID-19” as the reason for the physical inspection delay

COVID-19 Flexibilities End July 31, 2023

- The DHS and U.S. Immigration and Customs Enforcement (ICE) are ending COVID-19 flexibilities as of **July 31, 2023**
- Employers will have 30 days to reach compliance with Form I-9 requirements
- Employers using the temporary flexibilities must ensure that all required physical inspections of identity and employment eligibility documents are completed by **August 30, 2023**

Next Steps for Employers

- ALL employers will now be required to physically examine documents for employees who were hired on or after March 20, 2020, and for whom the employer has to date only conducted a remote inspection



Authorized Representative

- Employers may choose to use an Authorized Representative to fill out their portion of the Form I-9
- The Authorized Representative may complete the in-person inspection as needed
- An employer is still liable for any violations in connection with the form or the verification process

WHO CAN THIS BE?

An Authorized Representative can be ANY PERSON the employer designates to complete and sign Form I-9 on the employer's behalf besides the employee (e.g., a member of the employee's household, personnel officers, foremen, agents, or notary public)

WHAT MUST THEY DO?

The Authorized Representative must physically examine, in the employee's physical presence, the unexpired documents that the employee presents

Moving Forward - DHS Proposed Rule

- On August 18, 2022, DHS issued a proposed rule that would allow alternative procedures for examination of identity and employment eligibility documents
- Proposed rule would include language stating that “an alternative procedure may be authorized by the Secretary for examining the documentation presented by individuals to establish identity and/or employment authorization when completing Form I-9”
- DHS is also proposing changes to the Form I-9 and its accompanying instructions that would allow an employer to indicate that alternate procedures were used
- Stay tuned → DHS is currently reviewing comments and plans to issue a final rule later this year

What to Expect When You Receive an NYSDHR or EEOC Complaint



Laura H. Harshbarger

Member

lharsbarger@bsk.com

Syracuse, NY

New York State Human Rights Law

- Protected categories: “age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence”

New York State Human Rights Law

- Enforcement options:
 - File a Complaint directly in court
 - Three year statute of limitations
 - File a Complaint with the New York State Division of Human Rights
 - Three year statute of limitations for sexual harassment
 - One year statute of limitations for all other violations

New York State Division of Human Rights

- No fee to file a Complaint
- Complaint will be forwarded to the employer with demand for a response within 15 days
 - Extensions of time are available
- Employer's response ("position statement") will be forwarded to complainant
 - Request for confidentiality must be made to Investigator
- Complainant will have the opportunity to respond ("rebuttal")
- Complainant's rebuttal is not automatically sent to employer
 - Rebuttal available upon request

New York State Division of Human Rights

- In most cases, a Division Investigator will hold interviews with complainant, employer and witnesses (“investigative conference”)
 - Downstate vs. Upstate regions
- Important to prepare for an investigative conference
 - Not sworn testimony
 - Limited role during the conference for party’s attorneys
 - BUT employees/witnesses will be making statements on the record

New York State Division of Human Rights

- Outcomes:
 - Dismissal for Administrative Convenience
 - If complainant wishes to file directly in court
 - No Probable Cause.
 - Case dismissed from the Division
 - Likelihood of this outcome varies by region
 - Right of appeal to court – very high standard for appeal to be granted
 - Probable Cause.
 - Very limited right to seek “reconsideration”
 - Case will be referred to an Administrative Law Judge for a formal hearing and case is assigned a Division Attorney to prosecute the case against employer
 - Pre-hearing settlement conference will be scheduled
 - Formal Answer and other documents must be filed pre-hearing

Equal Employment Opportunity Commission

- Enforces federal non-discrimination statutes, including Title VII, ADEA, ADA, etc.
- Filing a Charge with the EEOC is a mandatory prerequisite to filing a Title VII or ADA claim in court
 - A complaint filed with NYSDHR or other state or local fair employment practices agency may be dual-filed to satisfy the EEOC filing requirement
 - A plaintiff must obtain a Notice of Right to Sue
 - Notice of Right to Sue provides the Charging Party 90 days to commence court action

Equal Employment Opportunity Commission

- No fee to file a Complaint
- Complaint will be forwarded to the employer with demand for a response, usually within 30 days
 - Extensions of time are available
- EEOC uses an electronic portal system
- Employer's response ("position statement") will be forwarded to complainant if complainant so requests
 - Portal has an option to submit exhibits confidentially
- Employer will not be provided with complainant's response
- Interviews may be held or further information demanded but in a minority of cases

Equal Employment Opportunity Commission

- Mediation
 - Often offered
 - Can be requested even if not offered
 - Will delay the need to file a response to the Complaint

Equal Employment Opportunity Commission

- Outcomes:
 - Dismissal for upon Complainant's Request
 - If complainant wishes to file directly in court
 - Dismissal and Notice of Right to Sue
 - EEOC takes no further action
 - 90 days to file court action
 - Letter of Determination (adverse finding)
 - EEOC will offer conciliation – often very heavy financial and other demands on employer
 - EEOC may prosecute the case itself in court (EEOC vs. Employer)
 - EEOC may decline prosecution and issue Notice of Rights giving complainant 90 days to file court action

Equal Employment Opportunity Commission

- Filing with the EEOC may only be a mechanical step for the complainant
 - It's required by statute
 - “Free discovery” for complainant's attorney
- Employer should demonstrate that this is not the kind of case worthy of the EEOC's resources
 - Factors the EEOC considers in deciding whether to prosecute a case: the seriousness of the violation, the type of legal issues in the case, the wider impact the lawsuit could have on the agency's efforts to combat workplace discrimination, and the resources available to litigate the case effectively.
 - EEOC sues in about 8% of cases where it has found reasonable cause

New York City Human Rights Law

- A Complaint may be filed with NYC's Commission on Human Rights
 - Three year statute of limitations for gender-based claims
 - One year statute of limitations for all other types of claims
- Also option to proceed directly into court
 - Three year statute of limitations
- The City Commission on Human Rights has a more formal, rigid process for complaints, investigations and adjudications
- Employer must respond with a Verified Answer to the Verified Complaint
 - Certain defenses must be raised in the Answer or they are waived

Considerations and Strategies

- Each administrative agency has its own operating procedures
- An employer should tailor its response and strategy
- An employer's written response is important to the long-term outcome of the case
 - Accuracy of the employer's explanation is paramount
 - Comparator information will be sought by the agency
- There may or may not be a signal as to a complainant's litigation goals based on which administrative agency with which they file their Complaint
 - Work-sharing agreement between EEOC, NYSDHR and NYCCHR

Other Requirements

- Document preservation
- Individuals may be named in the Complaint or Charge
 - May present a conflict of interest

OCR Dear Colleague Letter on Antisemitism



Lisa R. Feldman

Associate

lfeldman@bsk.com

New York, NY

OCR Dear Colleague Letter on Antisemitism

- Issued May 25, 2023
- Notes the “nationwide rise in reports of antisemitic harassment, including in schools”
- Same date as U.S. National Strategy to Counter Antisemitism
- Part of the Department’s launch of an Antisemitism Awareness Campaign referenced in National Strategy

Title VI Protections for Jewish Students

- Reiterates applicability of Title VI in this context
 - Title VI “prohibits discrimination based on race, color, or national origin by programs or activities of recipients of federal financial assistance”
 - Protection extends to students who experience discrimination, including harassment, based upon actual or perceived:
 - shared ancestry or ethnic characteristics; or
 - citizenship or residency in a country with a dominant religion or distinct religious identity
 - Students who are or are perceived to be Jewish are protected under this basis

Legal Standards

- [DCL](#) cautions that IHEs and K-12 “[s]chools must take immediate and appropriate action to respond to harassment that creates a hostile environment for these students.”
- Department may find a hostile environment when “there is harassing conduct that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a school.”

Legal Standards, continued

- Further, schools must take “prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent harassment from recurring” whenever it “knew or should have known of the hostile environment.”
- Specifically, “a school violates Title VI when it fails to take adequate steps to address discriminatory harassment, such as antisemitic harassment.”

Examples OCR May Investigate

- OCR also includes examples of complaints it may investigate in this context, including when students have been:
 - “[S]ubjected to ethnic or ancestral slurs;
 - [H]arassed for how they look, dress, or speak in ways linked to ethnicity or ancestry (e.g., skin color, religious attire, language spoken); or
 - [S]tereotyped based on perceived shared ancestral or ethnic characteristics.”

Other Related Documents

- This DCL follows OCR's release of a related [Fact Sheet](#) earlier in the year.
- The [Biden-Harris National Strategy](#) described earlier also contains directives for institutions “to treat antisemitism with the same seriousness as other forms of hate,” and “to ensure efforts to prevent and address antisemitism are integrated into their DEIA programs, including into mandatory trainings on discrimination and harassment.”

Education Institutions – Consider:

- Revisiting your anti-discrimination and harassment policies to ensure Jewish students are included
- Incorporate antisemitism into their campus training

Your Questions



Kristen E. Smith

Member

ksmith@bsk.com

Syracuse, NY

Caste: The Next Protected Category?

Jacqueline Giordano, jgiordano@bsk.com

DHS Ends Form I-9 Flexibilities

Kseniya Premo, kpremo@bsk.com

What to Expect When You Receive an NYSDHR or EEOC Complaint

Laura Harshbarger, lharsbarger@bsk.com

OCR Dear Colleague Letter on Antisemitism

Lisa Feldman, lfeldman@bsk.com

New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

All rights reserved.

This presentation may not be reprinted or duplicated in any form without the express written authorization of Bond, Schoeneck & King PLLC.