

Bond

Executive Order on Diversity, Equity and Inclusion

Laura H. Harshbarger Esq.
Sarah A. Luke, Esq.
Philip J. Zaccheo, Esq.

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Presenters



Laura H. Harshbarger

Member
lharshbarger@bsk.com
Syracuse, NY



Sarah A. Luke

Senior Counsel
sluke@bsk.com
New York, NY



Philip J. Zaccheo

Member
pzaccheo@bsk.com
Syracuse, NY



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EXECUTIVE ORDER 13950 COVERAGE

- *“Executive Order on Combating Race and Sex Stereotyping”*
- Issued September 22, 2020
- Covered entities
 - Federal agencies
 - Armed Services (including ROTC)
 - Federal contractors and sub-contractors
 - Federal grantees

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EXECUTIVE ORDER 13950 PROHIBITIONS

- Covered Topics
 - “Divisive Concepts”
 - Race or Sex Stereotyping
 - Race or Sex Scapegoating
- Focus: Federal Government Contractors
 - Workplace Training
 - Notice Requirements
- Focus: Federal Grant Recipients
 - Promotion of Prohibited Concepts through Use of Federal Funds
- Acknowledgement of Academic Freedom

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EXECUTIVE ORDER 13950 IMPLEMENTATION AND ENFORCEMENT

- Implementation
 - Government Contracts: November 21, 2020
 - Potential Impact of Executive Order 11246
 - Federal Grant Programs: Identification of subject programs and subsequent implementation
- OFFCP Request for Information (10/22/20)
- Hotline
- Attorney General Title VII Analysis

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EXECUTIVE ORDER 13950 IMPLEMENTATION AND ENFORCEMENT

- Penalties
- The Future
 - Tomorrow
 - Beyond

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NYS Minimum Sexual Harassment Annual Training Requirements

- be interactive
- include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
- include examples of conduct that would constitute unlawful sexual harassment
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
- include information concerning employees' rights of redress and all available forums for adjudicating complaints
- include information addressing conduct by supervisors and any additional responsibilities for such supervisors

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New York State Human Rights Law

Unlawful harassment is any inferior term, condition or privilege of employment based on any protected characteristic

- Need not be severe or pervasive
- Employer may raise an affirmative defense that the conduct did not rise above the level of petty slights or trivial inconveniences
- Employer may have liability even though the harassed employee did not report the situation to the employer

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“Divisive Concepts”

(1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual’s moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

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EO's Impact on Workplace Training

- No conflict with NYS mandatory annual sexual harassment training requirement
- Anti-harassment and anti-discrimination training may need critical review

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Focus on the Academy



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Concern Over Conformity of Viewpoint

“[T]raining like that discussed above... can use *subtle coercive pressure to ensure conformity of viewpoint*. Such ideas *may be fashionable in the academy*, but they have no place in programs and activities supported by Federal taxpayer dollars.”

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Academic Freedom



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Scope



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Scope

“Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed...*in an objective manner and without endorsement*”

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Chilling Effect?



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Two things to watch:



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