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Questionable Enforceability of DEI Conditions to Governmental Economic Development Assistance

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Practices: Real Estate

On January 21, 2025, an executive order was issued by the president making unlawful most governmental requirements for preferential use or hiring of, or contracting with, minorities or women in government funded or assisted economic development projects.

Before issuance of this order, federal courts had held for decades that preferences, quotas, conditions and mandates in government funded or assisted projects or contracts based on race, national origin or sex were unlawful absent a compelling, governmental interest supporting narrowly tailored conditions and requirements. The one consistent exception to this evolution was with respect to preferences for veterans by contractors in federal projects.

Effectively, the rationale for the court decisions and the presidential order has been to allow developers, users and contractors to hire the best qualified employees, vendors and sub-contractors without the need to satisfy mandates benefiting protected classifications. In reliance on the Executive Order, litigation has already begun to challenge the legality of preferential treatment provisions in government projects, or projects assisted or funded in whole or in part by government, where such preferences are established for the exclusive benefit of minorities, women and other protected classifications.

While preferential treatment requirements tied to economic development assistance will likely continue as elements of the loans, grants, contracts, and other forms of governmental assistance, it can also be anticipated that individuals believing they were aggrieved by the subject preferential treatment requirements may also continue to initiate litigation to reverse the perceived any negative effects of such preferential treatment.

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