

A stylized illustration of a lantern on a pedestal. The lantern is orange and yellow, with a flame inside. It is mounted on a white pedestal. The background is a solid green color. The lantern is positioned on the left side of the image, and the pedestal is at the bottom left. The text is on the right side of the image.

# 2019 Boston

ANNUAL CONFERENCE  
& SHOWPLACE

## Litigation and Regulatory Hot Topics

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# Fair Housing Act

- Fair Housing Act Prohibits Discrimination in Housing
  - The federal “Fair Housing Act” prohibits discrimination based on race, color, religion, national origin, sex, handicap and familial status. Some state and local fair housing laws prohibit discrimination based on additional classification, for example source of income or sexual orientation.
- What is the difference between Disparate Impact vs. Disparate Treatment



# Disparate Impact Rule

*Texas Dep't of Housing and Cmty. v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015)

“Much progress remains to be made in our Nation’s continuing struggle against racial isolation and that the Fair Housing Act has an important “continuing role in moving the Nation toward a more integrated society” by helping to combat, among other things, “discriminatory ordinances barring the construction of certain types of housing units”. Thus, recognizing disparate impact liability enables “plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment,” and “prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”

# Disparate Impact Rule Con't

*Texas Dep't of Housing and Cmty. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015)

“The disparate impact standard has been and remains properly limited “to give housing authorities and private developers leeway to state and explain the valid interest served by their policies...[H]ousing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest...The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.”

# Disparate Impact Rule Ensuing Litigation

- *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019)
- *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018), *cert. denied sub nom. Waples Mobile Home Park, Ltd. P'ship v. de Reyes*, 139 S. Ct. 2026 (2019)
- *Oviedo Town Center II, L.L.P. v. City of Oviedo, Fla.*, 759 F. App'x 828 (11th Cir. 2018)
- *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017)



# Disparate Impact Rule

- “There is a lack of affordable housing in America today,” said HUD Secretary Ben Carson. “This proposed rule is intended to increase legal clarity and promote the production and availability of housing in all areas while making sure every person is treated fairly under the law. As we have shown time and again, we will challenge any practice that discriminates against people that the law protects. At the end of the day, this rule not only increases Americans’ access to fair and affordable housing, but also permits businesses and local governments to make valid policy choices.”
- The HUD proposed disparate impact rule provides a framework for establishing legal liability for facially neutral practices that have unintended discriminatory effects on classes of persons protected under the Fair Housing Act. The rule has no impact on determinations of intentional discrimination. In its 2015 decision, the Supreme Court upheld the use of a 'disparate impact' theory to establish liability under the Fair Housing Act for business policies and local ordinances even if the policy or ordinance is neutral - in intent and application - if it disproportionately affects a protected class without a legally sufficient justification.



# Disparate Impact Rule

- Comments Were Due on October 18, 2019
- Comments to Date – 1100 comments as of the morning of October 18<sup>th</sup>.
- What happens next???????????????



# The PBCA Solicitation

- PBCA services must be acquired in compliance with “federal procurement laws, including CICA and the FAR”. *CMS Contract Management Services v. Massachusetts Housing Finance Agency*, 745 F.3d 1379, 1381 (Fed.Cir. 2014)
- New Solicitation(s) Due Any Time Now
- Protests will undoubtedly occur for several reasons -
  - RFP(s) not limited to PHAs
  - RFP(s) limited to PHAs
  - More than one RFP - tasks divided on a National and Regional Basis
  - Other inequitable/ambiguous terms.



# Protest Forums



# The Federal Acquisition Regulation (FAR)

- Compilation of regulations and contract clauses *generally* applicable to federal procurement
- Covers contract formation and administration
- FAR Parts 1 – 51, Descriptive and Prescriptive
- FAR Part 52, Contract Clauses, Correspond to FAR Parts 2 – 51

# PBCA Solicitation – Key Compliance Concerns

## ❖ Service Contract Labor Standards (FAR 52.222-41)

- Exceptions for professional, managerial and administrative – but be careful to read the definitions (salary requirement)
- Wage Determinations – vary by location

## ❖ Basic Safeguarding of Covered Contractor Information Systems (FAR 52.204-21)

- Protect covered contractor information systems
- Basically all systems are covered.

# PBCA Solicitation – Key Compliance Concerns

## ❖ Paid Sick Leave (FAR 52.222-62)

- Up to seven days of paid sick leave annually
- No conflict with State laws

## ❖ Small Business Subcontracting Plans (FAR 52.219-9)

- Requirement to track and report dollars spent on subcontractors including, small, large, WOSB, VOSB, SDVOSB, HUBZone and SDBs.
- Goals, not Quotas

# Government Contracts Mitigate Risks and Stay Compliant

- Know The Requirements – READ!
- Implement policies and audit them
- Flow down requirements to subcontractors

# Hot Topics for HFAs

## Recent Issues and Cases Impacting HFAs

- False Claims Act
- Employment Litigation
- Data and Security Breaches
- Agency and HUD Enforcement Proceedings
- Defaults and Bankruptcy
- Construction Funding and Ensuing Litigation

# QUESTIONS?

# Thank you!



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