

Insights, News & Events

AFFIRMATIVE ACTION BOMBHELL: FAQs ABOUT THE JUSTICE DEPARTMENT'S NEW COLLEGE ADMISSIONS PROJECT

Insights
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Higher education institutions felt seismic shockwaves yesterday as [the New York Times reported](#) that the Trump administration would soon redirect Justice Department resources toward investigating – and possibly suing – colleges and universities over their affirmative action admissions policies. Although the state of affirmative action policies has evolved over the past several decades, never before has such a stark and dramatic shift in the landscape been proposed.

What do you need to know about this development? Here are answers to some of the most frequently asked questions about this news.

WHAT HAS BEEN ANNOUNCED?

Although nothing has (yet) been formally announced by the government, the New York Times obtained an internal Department of Justice (DOJ) document, subsequently confirmed as accurate by several government officials, revealing an internal announcement seeking current lawyers in the civil rights division to help with a “new project.” That project: recruiting lawyers for “investigations and possible litigation related to intentional race-based discrimination in college and university admissions.”

Industry Focus

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The document does not explicitly use the words “affirmative action” to describe the actions the project will target, but it seems obvious that the DOJ will be aiming its resources at those admissions policies that purportedly disfavor white and Asian applicants and provide a boost to diverse minority candidates.

[Ed. note: Since publication of this alert, [a DOJ spokesperson has denied](#) that the internal solicitation signals any sort of attack on affirmative action programs. Sarah Flores indicated the solicitation was simply a call for volunteers to assist on a single complaint filed in May 2015 by a collection of 64 Asian-American groups accusing Harvard University of racial bias in admissions that the previous administration left unresolved. “This Department of Justice has not received or issued any directive, memorandum, initiative, or policy related to university admissions in general,” the DOJ statement concluded. “The Department of Justice is committed to protecting all Americans from all forms of illegal race-based discrimination.”]

WHO WILL LEAD THIS EFFORT?

One of the clues that points to this conclusion is the fact that the document suggests that project would be handled by the DOJ civil rights division’s front office, which is staffed by Trump administration political appointees. Typically, work involving schools and universities is run by the Educational Opportunities Section, filled with career civil servants. [The Washington Post reported](#) that career staffers who typically handle educational issues refused to work on the project, which led to the internal solicitation seeking attorneys to assist in their place.

WHAT DOES THE ADMINISTRATION THINK ABOUT AFFIRMATIVE ACTION?

To this point, President Trump has not spoken at length about this topic, nor has he provided a definitive

position about how he plans to address the issue. However, two of the leaders of his administration have made their positions quite clear: they are troubled by the concept.

According to [the Chronicle of Higher Education](#), Attorney General Jeff Sessions – who leads the DOJ – spoke about the subject to Congress in 1997. “We certainly want to reach out and make sure that every minority individual has full chances and rights in America,” Sessions told the Senate Judiciary Committee. “But when we make that a part of a legal requirement of this nation, that the benefits and privileges of belonging to each American should be dispensed because of what group you belong to, and according to certain complex formulas of race and gender and those kind of things, we get into very troubling issues. I think it has, in fact, been a cause of irritation and perhaps has delayed the kind of movement to racial harmony we ought to be going forward with today. I think it makes people unhappy if they lost a contract or a right to go to a school or a privilege to attend a university simply because of their race.”

More recently, the acting head of the Education Department’s Office for Civil Rights, Candice Jackson, said in 2005 that affirmative action policies dismiss “the very real prices paid by individual people who end up injured.”

HOW SOON WILL THIS PROJECT UNFOLD?

Although there is no set timetable on when we might see the fruits of this labor, the internal solicitation requests interested parties to submit their resumes for consideration by August 9. It does not appear the administration is wasting any time in proceeding with this project.

WHAT HAS THE SUPREME COURT SAID ABOUT AFFIRMATIVE ACTION?

The DOJ's actions will be guided by the standards established by the Supreme Court in the five opinions it has issued on affirmative action. Most recently, in [the 2016 decision involving the University of Texas](#), the Court held by a 4 to 3 vote that the University's use of racial preferences in undergraduate admissions did not violate the Equal Protection Clause of the Fourteenth Amendment. In this most recent decision, the Court said that affirmative action programs would pass muster so long as they did not violate "the constitutional promise of equal treatment and dignity." The following case-specific facts allowed the plan to survive the Court's "strict scrutiny" review:

- In creating a holistic admissions plan, "the University articulated concrete and precise goals," including the educational value of diversity in "the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society"
- The University only resorted to using race "as a factor of a factor of a factor" following an extensive study which concluded that race-neutral policies had not been successful in meeting the goals in the preceding bullet point. This study included "retreats, interviews, and review of data" and concluded that sufficient racial diversity to effectuate those goals had been achieved.

It remains to be seen how the DOJ's project will establish standards to comply with the guideposts established by the Supreme Court, although many critics of affirmative action believe the Court's opinions have left openings to challenge such policies. In fact, current legal challenges are pending against Harvard University and the University of North Carolina, which could end up further defining the issue. Because the issues are open to interpretation, it seems almost certain that any actions taken by the DOJ will end up in contentious litigation that could, once again, end up in front of the Supreme Court.

WHAT SHOULD UNIVERSITIES DO NOW?

Though yesterday's announcement is big news, there are not yet immediate plans from the DOJ that would necessitate abrupt action by higher education institutions. Instead, this development should serve as a stark reminder that you must have your affirmative action policies thoroughly vetted by counsel to ensure you are meeting current and evolving legal standards. There is now a greater chance than ever that your policy will come under scrutiny from disaffected applicants or the government, so you must proceed with extreme caution. If your affirmative action plan has not been reviewed in the past year, we encourage you to reach out to any member of our [Higher Education Practice Group](#) to begin this important work as soon as possible.

HOW CAN WE LEARN MORE?

We will host a complimentary webinar on August 21, 2017, from 1:00 p.m. to 2:30 p.m. to discuss the DOJ's decision to begin scrutinizing the use of race-conscious practices in the college admissions process. This 90-minute webinar will discuss:

- The latest from the Department of Justice and Department of Education on the use of race by higher education institutions;
- The status of litigation challenging the use of race both in private and public colleges and universities;
- A summary of Title VI and 14th Amendment case law with respect to the use of race in admissions, the award of financial aid, etc.; and
- Suggestions on practical steps institutions can take to assess their current state of compliance and potential risk areas.

[Click here to register](#) for this event.

For more information, visit our website at www.fisherphillips.com, or contact any member of our [Higher Education Practice Group](#) or your regular Fisher Phillips attorney.

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