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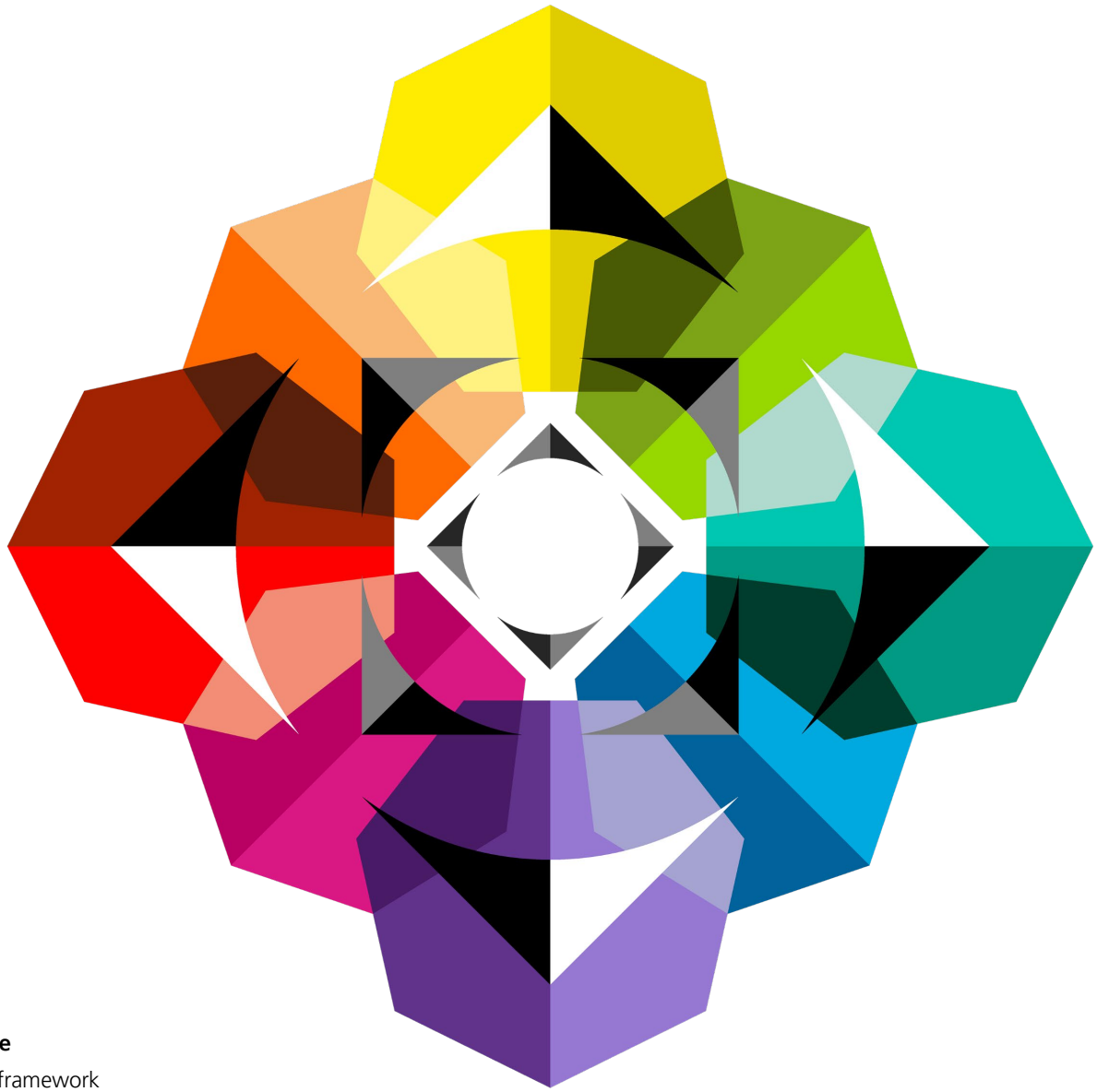
Positive action in the workplace



Inside

Positive action (called affirmative action in the US) involves taking steps to favour or encourage people from protected groups to make up for historic barriers or lack of opportunity. This Inbrief looks at the scope for taking lawful positive action in the workplace under British employment law.

The legal framework

Positive action in the workplace involves taking targeted steps to address underrepresentation or disadvantage experienced by people with characteristics protected by the Equality Act 2010 (EqA) - race, sex, age and so on. It is about achieving equality for people in protected groups. See our Inbrief on equality at work for more information on equality law.

Positive action is not the same as positive discrimination, which is unlawful in Great Britain (apart from in relation to disabled people and, to some extent, women who are pregnant or who have given birth).

The starting point is Section 158 of the EqA, which applies in Great Britain where an employer reasonably thinks that a protected group:

- suffers a disadvantage (including legal, social or economic barriers to accessing employment opportunities);
- has particular needs (e.g. IT training needs or needs in relation to the English language); or
- does not participate enough in an activity (including employment and training). The EqA uses the word "participation" but this provision is generally understood to apply when protected groups are underrepresented in the workforce, either generally or in certain roles or levels such as senior management.

Section 158 allows proportionate steps or action to meet the relevant needs, reduce the disadvantage or increase participation of the target group. Measures that favour or benefit the target group will be lawful if they fall within the scope of section 158, meaning that people outside the target group cannot complain that the measures are discriminatory.

Section 159 of the EqA (known as the "tie-breaker" provision) allows employers to go one step further and give preferential treatment to certain candidates in recruitment decisions. This provision is narrowly drafted, however, as we explain below.

Establishing underrepresentation or disadvantage

Positive action which seeks to benefit people from protected groups over others can only be done if you, as the employer, reasonably believe that a protected group suffers a disadvantage, has specific needs or does not participate enough in an activity.

For example, your gender pay gap data may demonstrate that women are underrepresented in senior management positions. Data about your local region may reveal that certain ethnic groups are not applying for vacancies in your organisation in the numbers you would expect.

You need to have some kind of evidence that the underrepresentation, disadvantage or special need exists, but you do not need sophisticated data or detailed research.

Lawful positive action

Positive action is lawful when: it is designed to put underrepresented or disadvantaged groups into a position of equal opportunity; there is sufficient evidence of underrepresentation disadvantage or need; and your steps are proportionate.

Examples of lawful positive action measures include:

- sponsorship, mentoring or accelerator programmes;
- work experience opportunities;
- setting targets;
- outreach work in selected schools; and
- holding open days for particular cohorts.

You can reserve opportunities for the underrepresented group, or potentially even target your measures exclusively at that group where that is a necessary and proportionate means of achieving your objectives.

You should be careful not to go so far as to reserve jobs or promotion opportunities for an underrepresented group. Apart from in the narrow tie-breaker scenario (see below) this would result in unlawful discrimination against other candidates. Positive action involves putting people onto an equal footing to get access to employment or promotion and helping them to overcome barriers. It does not mean that you can positively discriminate in favour of target groups.

Shortlisting for vacancies is a difficult area. Employers often want to improve the diversity of their shortlists to help improve diversity in the ultimate recruitment or promotion decision. The Equality and Human Rights Commission (EHRC) has said, however, that places cannot be reserved on shortlists for people from protected groups. Operating targets, as opposed to hard quotas, is different. A target-based approach is legally safer, as long as it does not lead to candidates from underrepresented groups being preferred over other better qualified candidates.

To demonstrate that your positive action programme is proportionate, you will need to make sure that it is time-limited, targeted, and takes account of the extent of the problem and the impact of any other diversity measures or commitments. The EHRC also recommends that you consider drawing up an action plan setting out the outcomes you are aiming to achieve and how you will review your progress.

The legal framework for positive action is therefore quite restrictive and does not necessarily allow employers to go as far as they might like in addressing historic barriers and lack of opportunity.

The tie-breaker provision

Section 159 of the EqA, known as the "tie-breaker" provision, allows employers to go one step further in recruitment and promotion decisions when there is a stalemate between two candidates. It allows employers to give preferential treatment to a candidate from an underrepresented group, provided that:

- both candidates are "as qualified" to be recruited or promoted;
- granting the preference is proportionate; and
- there is no policy of automatically granting a preference (i.e. there must be some individual case-by-case assessment).

The EHRC gives the example of a counselling service for teenagers that has no Muslim employees, but is in an area with a high Muslim population. Where a vacancy arises, two candidates of equal merit are in a tie-break situation with the employer having to find some way to choose between them. One candidate is Muslim, and the other candidate is not. The service manager could choose to offer the job to the Muslim candidate, assuming this is proportionate, and the employer does not have a policy of treating that group more favourably in connection with recruitment or promotion. This would mean that the non-Muslim candidate could not claim discrimination.

In our experience, most employers are reluctant to use the tie-breaker provision. This is mainly because of the need to conclude that two candidates could do a job equally well, and the fact that an unsuccessful candidate is likely to challenge that conclusion.

Measures that don't count as positive action

Tactics intended to benefit a particular protected group are always lawful if they have no negative impact on other groups. Such measures can be very effective even though they are not actually positive action. Examples include:

- using skills-based assessment tasks in recruitment;
- auditing your job advertisements and job descriptions to remove language which is stereotypical or off-putting to certain groups;
- working with charities who will help identify and put forward candidates from particular groups or backgrounds (as long as all your other recruitment channels remain open and you are not restricting applications from other groups);
- appointing a diversity taskforce;
- assembling diverse interview panels; and
- reworking your recruitment processes to improve transparency about what is expected and what "good" performance looks like.

Everyone stands to benefit from these measures, so they are lawful without having to meet the criteria set out in the EqA.

This Inbrief explains the law in Great Britain. The position is different in Northern Ireland.

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