



Positive action

Separating fact from fiction

Equality and diversity are matters which are key to the success of organisations which provide services. An inclusive workforce which embraces diversity leads to staff who perform well which in turn improves the experience of the service user.

Positive action was introduced by the Equality Act 2010 but employers have been cautious about relying on it, worried that they will face discrimination claims – there can be a fine line between positive action and positive discrimination. Positive discrimination occurs where an individual is treated more favourably because of a protected characteristic and the treatment does not comply with the positive action provisions set out in the Equality Act and discussed in this article. Positive discrimination is generally prohibited but employers should be aware of two exceptions under the Equality Act: where there is an occupational requirement that a person has a protected characteristic; and the duty to make reasonable adjustments in relation to disabled employees.

With an increased focus on diversity in the workplace recently we have received a number of queries about how employers can utilise positive action.

Within this document we look at some common misconceptions:

Compared to national statistics we seem to be doing well with our workforce as a whole so we don't need to think about positive action.

We need to improve diversity and want to target groups which are under-represented to raise awareness of career opportunities but isn't that unlawful?

We want to set a quota that 60% of new hires must be women.

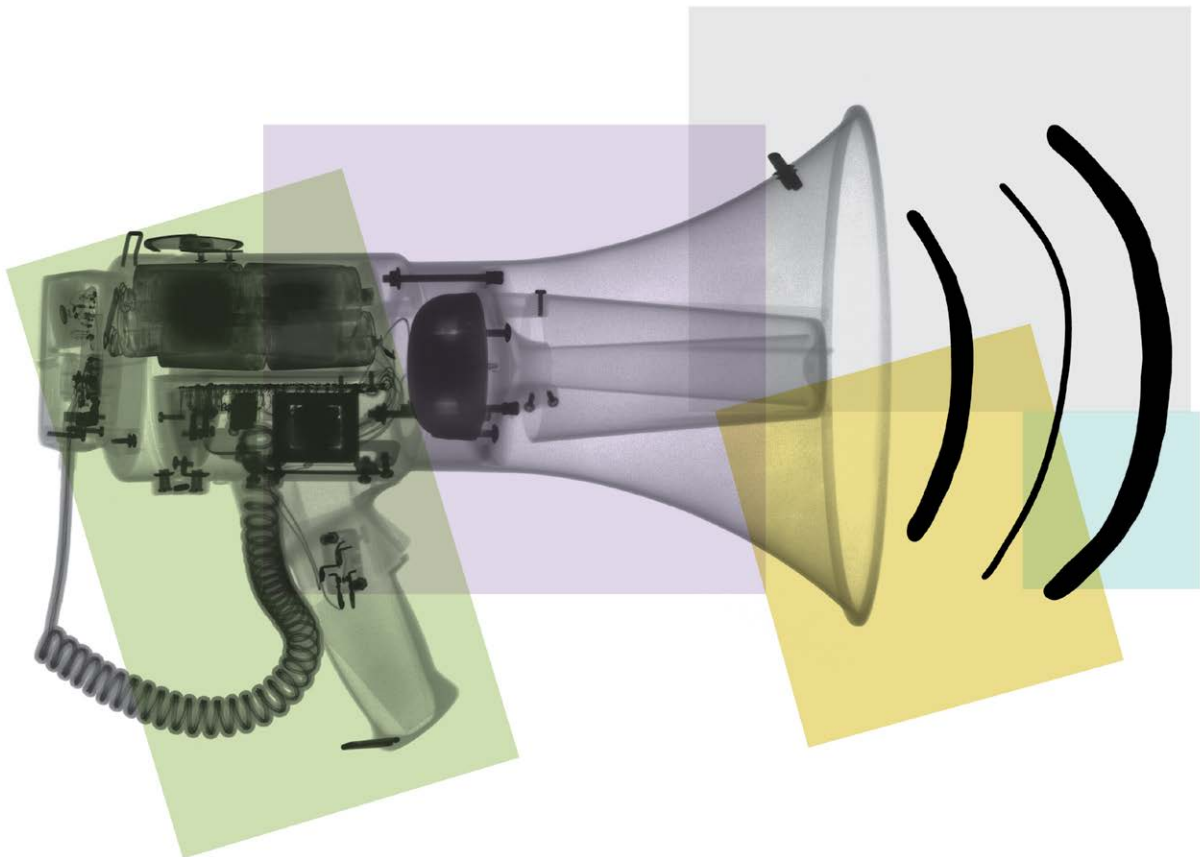
BAME individuals do not seem to be performing as well as other candidates at interview but offering training would surely be more favourable treatment and positive discrimination?

Compared to national statistics we seem to be doing well with our workforce as a whole so we don't need to think about positive action.

Whilst looking at the diversity of your entire workforce is important, this isn't the only statistic to consider. The most recent census data from 2011 revealed that the proportion of the population of England and Wales identifying with a white ethnic group was 86% and 14% as black, asian or minority ethnic (BAME). Your workforce as a whole may be in line with these figures and national statistics regarding other groups with protected characteristics, but it is also important to look at the career progression of those with protected characteristics and to consider whether your workforce represents the community it serves.

One tool which is available to NHS employers can [be found here](#) and allows employers to compare workforce data to the local population in order to identify groups that might be underrepresented in the workforce:

The introduction of gender pay gap reporting earlier this year and the calculation of quartile data has focussed employers' attention on the gender split throughout organisations. What employers tend to find is that where they carry out the same analysis for BAME staff or those from other groups with protected characteristics, just as with women, representation of those groups at senior levels is disproportionately low when compared to the entire workforce. This has caused many employers to question why this is the case and consider whether positive action could be used to address this issue.



We need to improve diversity and want to target groups which are under-represented to raise awareness of career opportunities but isn't that unlawful?

There are two strands to positive action under the Equality Act: section 158 (positive action generally) and section 159 (positive action in recruitment and promotion). Section 159 permits the selection of a candidate with a protected characteristic for recruitment or promotion in a tie-break scenario if certain conditions are met and we will look at this further below.

Positive action generally, under section 158, is permitted where it is reasonable for an employer to think that:

- those with a protected characteristic suffer a disadvantage connected to the characteristic;
- those with a protected characteristic have needs which are different to those who do not share it; or
- that participation in an activity by persons with the characteristic is disproportionately low.

Employers don't need sophisticated statistics to justify their use of positive action under section 158; they simply need to have a reasonable belief that there is a disadvantage, that needs differ or that participation in an activity is low. If your diversity figures tell you that your workforce does not represent the population of your locality, in our view this would be enough to start an outreach programme targeting underrepresented groups. The Equality and Human Rights Commission (EHRC) code of practice on the Equality Act confirms that positive action includes:

- targeting advertising at specific disadvantaged groups, for example advertising jobs in media outlets which are likely to be accessed by the target group;
- providing opportunities exclusively to the target group to learn more about particular types of work opportunities with the employer, for example internships or open days.

It would be good practice to encourage internal and external recruiters to extend the traditional pool for recruitment to see how this impacts on applications from underrepresented groups.

Positive action in practice

London Fire Brigade recently re-established an outreach team that went into BAME and LGBT communities to run roadshows and training, as well as sharing the recruitment story targeted at improving diversity in the workforce.

West Yorkshire Fire and Rescue Service launched an advertising campaign to coincide with International Women's Day this year aimed at recruiting more women into operational roles.

NHS Leadership Academy's Stepping Up programme supports the development of aspiring BAME leaders in the NHS.

In June 2018 a number of Greater Manchester's public sector employers announced that they would be working together to tackle race inequality in the workplace, after leaders signed a collective commitment. The aim is to build on the work each employer is already doing including improving diversity from the board room to the front line. A draft action plan is due to be released later in the year.

The explanatory notes to the Equality Act also point out that positive action under section 158 includes training to enable disadvantaged groups to gain employment. Last year West Yorkshire Fire and Rescue Service reported that out of over 700 women who applied for an operational role, only 45 made it through to the physical testing stage of the process, of which only four passed. These figures suggest that a disadvantage is suffered by women in the recruitment process and particularly in the physical testing phase. These figures could be used as the basis on which to offer physical training as positive action aimed at removing the disadvantage experienced by women.

An important point to note is that any steps taken must be proportionate to the employer's aim of improving diversity. An employer needs to consider whether the proposed action is reasonably necessary to achieve the aim, or would it be possible by other means that are less likely to result in less favourable treatment of others? Provided the employer can demonstrate it is reasonable to think that one of the section 158 conditions exists and the steps taken to address the condition are proportionate, an employer will be able to rely on positive action.

We want to set a quota that 60% of new hires must be women.

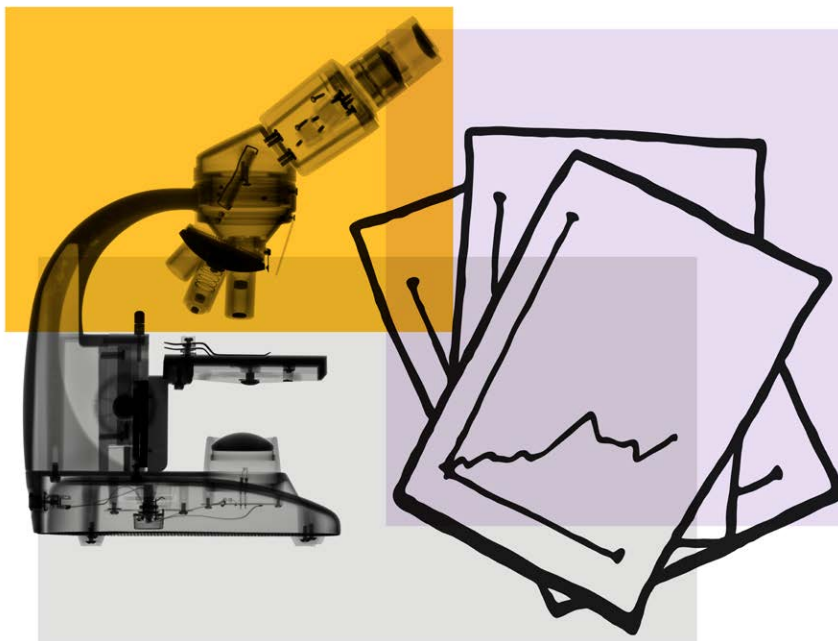
Section 159 enables employers to use positive action in a recruitment and promotion context, but employers need to tread carefully. Whilst an employer could set a target that 60% of new hires will be women (that it may not achieve), quotas are not permitted. Under Section 159, an employer can only select a candidate with a protected characteristic over a candidate who does not have that characteristic where:

- candidates are as qualified as each other;
- the employer does not have a policy of treating people with a protected characteristic more favourably; and
- taking action is a proportionate means of achieving a legitimate aim.

Positive action in recruitment, therefore, has a limited use. An employer cannot set recruitment quotas it will fulfil in terms of gender, BAME or disability diversity under the guise of positive action. This would amount to having a policy of treating those with a protected characteristic more favourably and be positive discrimination. Similarly, an employer cannot select a lesser qualified candidate with a protected characteristic over a superior candidate. Positive action in recruitment is, put simply, the decision maker in a tie-breaker, i.e. where you have candidates who are equally qualified, the protected characteristic can tip the balance.

Positive action in practice

Assessing qualification for the role will involve looking at a number of different aspects. The EHRC's supplement to the code of practice suggests that employers establish a set of criteria against which candidates will be assessed which could include competence and professional experience together with any relevant formal or academic qualifications, qualities required to carry out the particular job. Whether the candidates are as qualified as each other will depend on the role – the EHRC supplement to the code of practice highlights that higher academic qualifications will not necessarily mean that candidate is better qualified for the particular role.



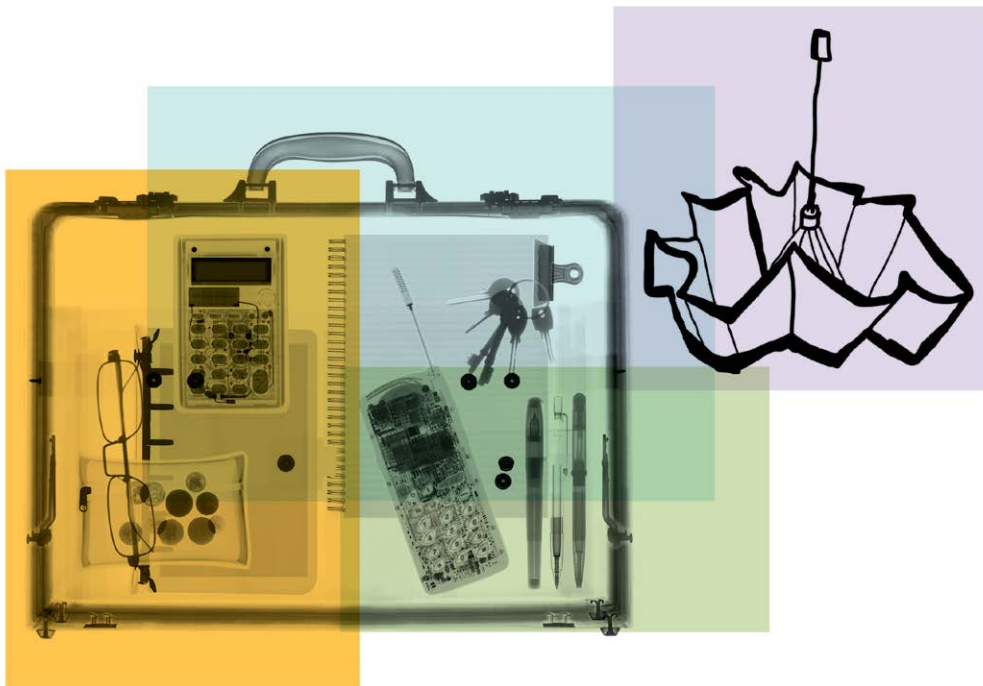
BAME individuals do not seem to be performing as well as other candidates at interview but offering training would surely be more favourable treatment and positive discrimination?

The first step to approaching positive action generally under section 158 is to identify what condition applies (i.e. disadvantage, different needs or disproportionately low participation). In this scenario it appears to be disadvantage but we need to know more. Is it reasonable for the employer to think that BAME candidates are suffering from a disadvantage or have particular needs? We would advise looking at the data you have about the recruitment process, drop-out rates for example, and interview results so you can demonstrate that it is reasonable for you to think that a disadvantage is suffered or certain groups' needs are different. Section 158 allows for training which will enable groups to gain employment and so this training could form part of an outreach programme.

It is then necessary to think about whether interview training is a proportionate means of achieving the aim of helping BAME candidates to perform better and this will require consideration of any other options which might address the problem.

One point which has caused some debate recently is ensuring that there is a BAME interview panel member where possible. The argument for diverse interview panels (and this would apply to other protected groups) is that candidates do not perform as well in the interview process when they are faced with a panel that does not reflect a diverse workforce or the candidate. But could the requirement to have a diverse panel in itself be discriminatory?

The requirement will not mean that a BAME candidate will be treated more favourably and selected; it is separate from the question of whether you use positive action to select a candidate under section 159. In our view, diverse interview panels should be regarded as inherently a good thing even if all of the candidates being interviewed were, for example, white males. Having a diverse panel which also represents the local community would bring different perspectives to bear when reaching decisions about appointment and promotion. In our view, this is unlikely to be discriminatory action.



Summary

With the introduction of gender pay gap reporting have come calls for ethnicity, disability and sexual orientation pay gap reporting and whilst this is a long way from becoming a legal requirement, it raises the question of what employers are currently doing to address diversity in their workforce. For public bodies which must consider the public sector equality duty and the need to advance equality of opportunity, we suggest that positive action should be given greater consideration. Whilst its use appears to have been limited to date, we anticipate a greater reliance on positive action moving forward to address the lack of diversity which exists in many organisations particularly at senior levels.

For examples of how positive action has been used in the NHS, please see the case studies below:

Barts Health NHS Trust

Engaging with project search:



Dudley and Walsall mental health partnership NHS trust

Positive action in recruitment workshops



Sandwell and West Birmingham Hospitals trust

Hospitals trust recruiting locally for the future



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