

Key legislation.

AbbeyLegal

Legal Protection Insurance

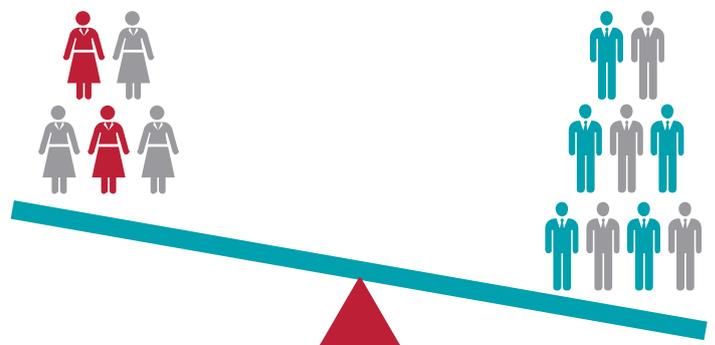


Is it lawful to address gender imbalance in the workplace?

The Equality Act 2010 (EQA) introduced new legal powers which allowed employers to take 'positive action', to address disadvantages and imbalances faced by under-represented genders in the workplace. At the onset of its introduction these new powers attracted much debate and were shrouded in controversy, as it was considered that men would be removed from their roles in favour of women. However, almost 10 years on and the forewarned injustices have not materialised. Where we are at present is that across many industries in the UK, the right to take positive action appears to have been used very sparingly.

In comparison to the rest of Europe, the UK has a higher representation of women in managerial and leadership roles. However, there is always room for improvement. Until we can say it is the norm rather than the exception to see women in executive or autonomous roles within the workplace, then work is still needed to address the gender imbalances that exist. In recognition of this issue, the Association of British Insurers, became the first UK industry to sign up to the UN Women's global initiative for gender equality. In joining this initiative, many leading professionals from the insurance industry have committed to ensure that by the end of June 2019, at least 45% of management positions in the insurance industry, should be filled by women. The accomplishment of this pledge will greatly improve the balance of gender diversity within the industry.

During the summer of 2017, the issue of gender inequality at work received large volumes of press as the impact of gender pay reporting started to bite. The disparity in pay between men and women which the reporting highlighted, triggered more debate on the use of positive action in the workplace to address the positioning of women and the resulting pay gap.



Abbey Legal Protection

20 Fenchurch Street, London EC3M 3AZ Tel: 0345 350 1099
sales@abbeylegal.com
www.abbeylegal.com

This content is provided by LHS Solicitors LLP (LHS) a division of Abbey Protection Group Limited and can advise on general UK law. LHS is regulated and authorised by the Solicitors Regulation Authority.





What does the law say about positive action?

The provisions of the EQA can be read more widely to cover eight other protected characteristics. In the context of gender imbalance, the EQA allows for voluntary positive action to be taken at two key points:

- before recruitment or promotion (s.158 EQA)
- during recruitment and promotion process (s.159 EQA)

For illustration purposes only, we will refer to a hypothetical female as the person needing the positive action. However, it should be noted that the law applies equally to both men and women.

Before recruitment or promotion

The application of section 158 of the EQA can be summarised as applying in circumstances where an employer holds a reasonable belief that:

- women are being placed at a disadvantage because of their gender, or
- that women had different needs from male co-workers which were not met, or
- participation of women in an activity such as managerial or executive roles is disproportionately low.

The employer would be permitted under section 158 to take proportionate positive action to overcome or minimise the identified disadvantage, or take action to meet the person's needs. The EQA also permits employers to enable or encourage women to participate in an activity where there has been a lack of female involvement. This could be achieved by the employer offering support or training to enable women to have the necessary skills in advance of the recruitment process.

During recruitment and promotion process

Section 159 EQA has similar provisions to section 158 but these concentrate on the use of positive action by employers in the manner in which they recruit and promote staff. The application of section 159 of the EQA would permit positive action where:

- you have a tie-break situation in that a woman and a man are equally matched to perform a role, and
- the employer does not have a recruitment policy of treating women more favourably, and
- taking the action is a proportionate way of addressing the gender disparity.

An example of where positive action could be used in favour of a man can be illustrated in the context of a care home. If a care home had service users of both genders but had

100% female staff, it may be desirable to address the disproportionate under-representation of men. Remembering there is no requirement to put in place positive action, it's an optional right that can be exercised if appropriate. If, the care home owner chooses to recruit a new carer and following the recruitment process, they identify that the two candidates for the role are a male and female of equal standing in terms of skills and experience. In this situation the employer could take positive action to employ the male. The justification in doing this would be that men are under-represented in the care home and by offering him the role, they will address this issue. Also, employment of the man will give the service users the option of personal care from someone of their own gender.

In summary, the cumulative effect of sections 158 and 159 EQA are that employers can encourage or enable both disadvantaged and under-represented gender groups to apply for roles. Employers can provide training to assist the affected gender group to gain the skills required for a role but ultimately the role should be offered on the person's merit. The only exception to this rule would be where a male and female candidate, each are equally qualified to perform a role. In this scenario, section 159 would afford the employer the opportunity to take positive action and employ whichever of the two were deemed in the particular case to be the disadvantaged or under-represented group.



Positive action in practice

An example of positive action in practice is demonstrated by Sky, the media broadcaster who put in place a programme to actively recruit women into senior roles. However, it should be noted that Sky and any other business could not positively discriminate against male candidates. They can only take positive action in favour of women where s.159 applies. The police also often rely on the provisions of s.158 and 159 when they actively recruit women to fill posts where they are historically under-represented or disadvantaged. However, again it should be noted that the positive action taken should never be applied as a blanket response to fixing gender imbalances.



What are the benefits of positive action?

One of the main benefits of balanced gender diversity advocated by academics both in the UK and globally, is that it creates innovative thinking in the workplace. Bringing together different genders can help businesses to draw from a wider pool of life and work experiences from which to make executive decisions as to how to meet the needs

and expectations of the business customers/clients. The Government supports the idea of having work environments with a level playing field and balanced representation of genders. Margot James whilst in office as Business Minister, was noted as saying, “When we draw on men and women, from a variety of ethnic and social backgrounds, it makes a difference. We all benefit from more diverse perspectives – not only encouraging better dialogue, but better decisions and better leadership.”



Taking steps to take positive action

Businesses must carry out a careful analysis of their own circumstances and the imbalance or disadvantage they are seeking to address. Answering the following questions with reasonable responses is always a good starting point before any action is taken: Would the positive action withstand close scrutiny? What is the proportionate aim you are hoping to achieve by taking positive action? Have you taken legal advice about what you propose to do?



Are there any risks?

Taking positive action which is unjustified and disproportionate is not advisable, as your actions may result in a complaint of positive discrimination. Unlike positive action, positive discrimination in favour of a particular gender is unlawful. The employee adversely affected by the positive discrimination could then bring a claim against the employer for their actions. In short, if you are faced with a situation where no particular gender group is either disadvantaged or under-represented and you simply have a tie breaker situation at recruitment stage, you need to find an objective and non-discriminatory method of selecting the best person for the role.

More information

LHS Solicitors' team of experienced lawyers can support your employment law needs with its fee-paying consultancy services. Our aim is to quote fees that are competitive, fixed and transparent. Contact us for assistance: enquiries@lhs-solicitors.com