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## Positive Discrimination

### What is Positive Discrimination?

Positive discrimination, otherwise known as Positive Action, is almost the opposite to what most people think of when they hear the word "discrimination". Instead of an employer treating an employee less favourably because of a protected characteristic, an employer would treat the employee more favourably. This is still a form of discrimination and therefore has limitations against its use. It is also not a legal requirement, many employers choose to never partake in Positive Action because they believe it to be complicated and not worthy of the potential risks.

### The Correct Way to Take Positive Action

Two sections of the Equality Act 2010 set out provisions for how employers can conduct Positive Discrimination on employees.

- General Provisions (section 158) and
- Positive Action Provisions Relating Specifically to Recruitment and Promotion (section 159).

Section 158 permits positive action to enable or encourage people with a protected characteristic to overcome or minimise a

disadvantage e.g. offering extra training to an employee who requires it due to their disability, but not providing this training for other employees. This is not permitted with recruitment or promotions. Section 159 is similar to Section 158, but it is aimed towards recruitment and promotions. Section 159 enables employers to take into account the under-representation of disadvantaged groups when selecting between two equally qualified job candidates. In other words, if an employer of a company dominated by men is recruiting for a new role and decides that both a male and female candidate are just as good for the role as each other, positive discrimination would have the employer choose the female candidate because she is in possession of a protected characteristic which is under-represented in the company. It must be noted, however, that each case must be considered on its own merits and any action taken must be a proportionate means of addressing a legitimate aim.

## The Problem Areas of Positive Discrimination

Positive Discrimination or action can be somewhat problematic for many employers. One of the main problems is born out of the decision as to whether candidates are equal, how can we really know? How is this measured? The candidate not chosen for the position could always argue that the employer was *looking* for positive action and therefore chose to consider the candidates equal when they were not. Another problem is how do we really assess whether or not groups are under-represented or disadvantaged? In some circumstances this can be easy to see, if you are working in a company which is composed of 90% men and 10% women then women are obviously under represented, but what if the percentages are not as different as that? Would 60% men and 40% women still count as an under-representation? Or would that just be considered normal because not every company can be 50/50 all the time? And the final problem often encountered with Positive Discrimination is that the candidate who was not chosen may consider themselves entitled to raise an employment tribunal claim against your company. If an unsuccessful applicant was to go on and raise a claim for discrimination on the grounds of sex etc. this could be a financial burden as well as problematic for the company.

Sources: CIPD and Acas.

For clarification of any of the above updates or for advice and guidance on any HR and/or Health and Safety Concerns contact us by emailing [hradvice@hasslefreehr.co.uk](mailto:hradvice@hasslefreehr.co.uk) or by calling 02476 664092.

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