



USING POSITIVE ACTION TO CLOSE THE GENDER PAY GAP

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The requirement to publish their gender pay gap means many organisations are now focusing on the need for a better balance between men and women in their better paid and more senior roles. But how do they achieve this without falling into the trap of discriminating against men?

XpertHR provides practical guidance on using positive action to address a gender pay gap, including the difference between positive action and positive discrimination and how to develop a positive action plan.

The guide covers:

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About XpertHR

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Using positive action to close the gender pay gap

Introduction

The first round of gender pay gap reports, published in 2017/2018, made information about employers' gender pay gaps widely available for the first time and allowed comparisons to be drawn across different industry sectors. Subsequent reporting rounds will highlight whether or not employers are making progress in closing their gender pay gaps.

Certain trends are clear. Many organisations have significantly more men than women in their highest pay quartile. Pay gaps are particularly pronounced in certain industry sectors, such as construction, finance and insurance. The aviation sector also reports significant pay differentials, reflecting the fact that men tend to work in highly paid pilot and engineering roles, while women are typically employed in less well-paid cabin crew, retail and office-based positions.

This new transparency has encouraged employers to focus on steps they can take to reduce their gender pay gap.

Systemic issues influencing the gender pay gap, such as low levels of women studying for advanced qualifications in STEM subjects (science, technology, engineering and mathematics), will not be corrected overnight. Other factors, such as low levels of turnover in senior and/or highly paid roles, may also make it difficult for employers to improve their gender pay gaps quickly.

There is general recognition that more women need to enter senior and/or highly paid roles for the gender pay gap to be addressed. However, employers do not always know what additional support they can offer women to help achieve this without falling into the trap of discriminating against men.

This guide looks at when positive action is permitted in the context of sex discrimination.

The difference between positive action and positive discrimination

Before considering the steps an employer might want to take to tackle its gender pay gap, it is important to distinguish between positive action and positive discrimination.

Positive action involves giving additional assistance to people who share a protected characteristic (such as sex), to help them overcome a disadvantage connected with that characteristic. For example, in an effort to attract female candidates, an investment bank might invite female students to a women-only open day as part of a graduate recruitment campaign. If the general positive action provision contained in s.158 of the Equality Act 2010 is met, this would be lawful (see **General positive action**).

Positive discrimination involves giving someone preferential treatment solely because of a protected characteristic, in a way that disadvantages someone else. Positive discrimination is generally unlawful. For example, it would be unlawful for an engineering company to set a fixed quota to recruit or promote a specific number of female engineers.

That said, there are limited circumstances in which an employer can take a candidate's sex into account as part of a recruitment or promotion exercise. These are set out in s.159 of the Equality Act 2010 (see **Positive action in recruitment and promotion - "the tie-breaker"**).

Employers can choose whether or not to adopt positive action measures. There is no obligation to do so. In practice, employers are more likely to take general positive action steps than they are to rely on the exemption for positive action in recruitment and promotion.

General positive action

Section 158 of the Equality Act 2010 allows positive action if an employer reasonably thinks that:

- women suffer a disadvantage connected to their sex;
- women have needs that are different from the needs of men; or
- participation by women in an activity is disproportionately low.

If one or more of those statutory conditions is met, the employer can take action that is a proportionate means of:

- enabling or encouraging women to overcome or minimise that disadvantage;
- meeting the different needs of women; or
- enabling or encouraging women to participate in that activity.

These provisions do not apply to more favourable treatment taken **in connection with recruitment or promotion**, which is dealt with in s.159 of the Equality Act 2010. Nor do they permit an employer to take action that would breach another piece of legislation.

Positive action will typically involve measures to help women enter or progress into male dominated roles. Steps an employer could take include:

- targeted recruitment advertising in publications that are likely to be accessed by women;
- asking external recruitment specialists or internal managers to provide gender diverse candidate shortlists;
- providing training, mentoring or shadowing opportunities for women;
- holding women-only recruitment open days; and
- setting up formal women's networking programmes for sharing career advice.

There are various measures that employers could adopt to help address their gender pay gap. Not all of these will amount to positive action in the legal sense. For example, one cause of the gender pay gap is the unequal division of caring responsibilities. Employers could introduce more generous family leave policies to encourage fathers as well as mothers to take leave, or advertise all jobs as capable of being done on a flexible, job-share or part-time basis. Reviewing recruitment and promotion processes to ensure that they are not discriminatory is another example of something that would not amount to positive action.

Developing a general positive action plan

Before introducing a positive action measure, an employer should prepare a positive action plan to show that the measure is a proportionate way of meeting its objective.

Identifying the disadvantage, differing need and/or disproportionately low participation

The first step for the employer is to show that positive action is permitted by identifying the relevant disadvantage, differing need and/or disproportionately low participation by women in an activity. The situation within the employer's business will often provide the necessary evidence but local or national data may also be relevant.

The Equality and Human Rights Commission (EHRC) [Statutory code of practice on employment](#) makes it clear that employers do not need to have detailed statistical data to show that one of the statutory conditions applies. However, there does need to be some evidence before it will be reasonable for the employer to think that this is the case.

Example:

Company A is considering offering targeted mentoring to women at mid-management level in order to encourage more qualified female employees to apply for senior management roles.

Company A could use its gender pay gap reporting statistics, together with other internal data, to show that women occupy nearly 50% of mid-management positions, but only 15% of senior management roles. This would help it to demonstrate that women's participation at a senior level is disproportionately low.

More than one positive action condition may be satisfied. For example, Company A's internal data may also show that women tend to have been in mid-management posts for significantly longer than male candidates before they apply for promotion, and that fewer women than men typically apply for promotion. This may indicate that women have different needs from men.

Setting out the desired outcome

The next step for the employer is to set out the outcome that it wants to achieve.

Example:

Company A might decide that it wants to:

- increase the number of women in senior management positions to at least 25% over a specified time period;*
- increase the proportion of women applying for promotion; and/or*
- reduce the period of time that qualified female mid-level executives are typically in post before they apply for promotion.*

Identifying possible action to achieve those outcomes

Once the employer has identified its objectives, it should set out how those objectives could be met.

Example:

For Company A, measures to achieve those objectives could include the creation of a mentoring scheme aimed at giving women in mid-level positions access to a mentor for support and career guidance.

Company A could also, for example, provide support for internal networking groups aimed at women, and take other measures that do not amount to positive action, such as ensuring that managers responsible for recruitment have appropriate training.

Establishing proportionality

When it has identified a positive action measure it wants to adopt, the employer needs to consider whether the measure is proportionate. This involves balancing the need for action against the impact on other groups (in this case, men). The proposed measure must be an appropriate way to meet the objective. If it is possible to meet the objective equally effectively by adopting another measure that would not involve less favourable treatment of others, the proposed measure will not be proportionate.

The greater the impact of the positive action measure on other groups, the more evidence the employer will need to show that the measure is proportionate. For example, establishing proportionality in relation to reserving places for women on a training course may be more difficult than for setting up a women's networking group. The employer's size may also be relevant to what is proportionate.

Example:

Whether or not it is proportionate for Company A to set up a mentoring programme aimed at women will depend on the extent of the disadvantage, different need and/or low participation by women in an activity.

Company A has established a significant difference between the proportion of women in mid-level and senior roles. It has also established that qualified women are less likely than comparable men to apply for promotion or take longer to do so. Company A has taken some positive action measures already (for example, a women's networking group already exists), but this has not made a significant difference to the number of women applying for senior roles.

These factors would help Company A show that its decision to create a mentoring programme is proportionate.

The employer should keep a record of: the steps that it proposes to take to address the issues it has identified; the evidence that it has taken into account; and its reasons for concluding that these steps are proportionate.

Consulting staff

The EHRC code recommends that employers consult staff about positive action. It would be sensible for the employer to discuss planned measures with affected groups in advance, to get their views. This could be done through existing diversity networks, consultation bodies and/or recognised trade unions.

The code recognises that qualitative evidence obtained from consultation with workers and/or trade unions is relevant to the employer's reasonable belief that one of the statutory conditions applies. It may also help the employer demonstrate that positive action is proportionate.

Example:

Company A discusses introducing a mentoring programme with its women's network and trade union and receives feedback that such a scheme could encourage women to apply for senior roles for which they are qualified. This information is likely to be relevant to the issue of proportionality as it would help Company A show that the proposed measure is an appropriate way to achieve its objective.

Once the employer has decided to implement a positive action programme it needs to inform its staff about it. The employer could use the organisation's existing diversity networks to inform and encourage affected staff to participate in the programme. It should also inform the wider workforce through its normal communication channels.

Measuring progress

The employer should consider how to assess whether or not a positive action programme is effective and how long it is likely to take to achieve its objective. The employer should also keep the programme under

review to ensure that the statutory conditions for taking positive action continue to apply and that the relevant action is still proportionate.

The action plan should include a time frame for review. What is appropriate will depend on the size of the organisation. In larger organisations, job vacancies at a senior level may arise more frequently and the success of a programme can be measured over a shorter period. In contrast, smaller organisations, or those with low levels of staff turnover, may decide to measure progress over a longer time frame.

Example:

Company A should assess the success of its mentoring programme by monitoring progress towards meeting [its objectives](#) over a specified period.

Positive action in recruitment and promotion - “the tie-breaker”

Positive action in connection with recruitment and promotion is permitted under s.159 of the Equality Act 2010, if an employer reasonably thinks that:

- women suffer a disadvantage connected to their sex; or
- participation by women in an activity is disproportionately low.

If one or both of those statutory conditions is met, the employer can take “specified action” with the aim of enabling or encouraging women to overcome or minimise that disadvantage or participate in that activity.

The “specified action” is treating a woman more favourably than a man in connection with a recruitment or promotion decision because of their sex, provided that:

- the woman is as qualified to be recruited or promoted as the man;
- the employer does not have a policy of treating women more favourably in connection with recruitment or promotion than men; and
- taking the action is a proportionate means of achieving the relevant aim.

In essence, this provision allows employers to take sex into account in a recruitment or promotion decision, but only as a way of deciding between two candidates who are of equal merit. This provision could be used during the shortlisting process, but is more likely to be applied when making a job offer.

Developing an action plan for using positive action in promotion and recruitment

There are various steps that an employer should take if it wants to use positive action in recruitment and promotion.

Identifying the disadvantage and/or disproportionately low participation

First, the employer must have a reasonable belief that one of the statutory conditions applies. This is very similar to the position under the general positive action provision (see [Identifying the disadvantage, differing need and/or disproportionately low participation](#)).

Employers should use their own workforce statistics and/or local or national statistics to establish whether or not women are disadvantaged or have disproportionately low levels of participation in certain roles or at certain levels.

Example:

Company B identifies that only 8% of its graduate recruits are female. It also takes into account national statistics that show that only 10% of engineers in the UK are women.

On this basis, it would be reasonable for Company B to think that women's participation in the workforce as engineers is disproportionately low.

Establishing what "as qualified" means

An employer can rely on the tie-breaker provision only if a female candidate is "as qualified" as a male candidate. If a male candidate is better qualified, appointing a female candidate will amount to direct sex discrimination against the male candidate, even if the female candidate meets the basic requirements for the role.

Employers need to decide how they will assess whether or not one candidate is "as qualified" as another. The [supplement to the EHRC code](#) suggests that employers should establish a set of criteria against which candidates will be assessed when applying for a job. These are likely to include the candidate's professional experience, academic qualifications, overall ability and other relevant qualities required to carry out the role, as well as their performance at interview or as part of any recruitment exercise.

The relevant factors should also be job specific and no single criteria should be determinative of the issue. For example, the supplement to the code recognises that just because one candidate has a degree, it does not necessarily follow that they will be better qualified for a particular job.

Example:

Company B should set out the factors that it will take into account in its recruitment exercise in advance. It should keep a record of how each candidate has been assessed against each of the relevant criteria, and the reasons for that assessment. This will help Company B demonstrate that the candidates were genuinely "as qualified" as each other.

These records will be especially important where an unsuccessful male candidate claims that they have been discriminated against unlawfully.

It will be risky for an employer to deem all employees who have passed an assessment to be "as qualified" as each other in order to apply the positive action measures contained in s.159 of the Equality Act 2010.

In [Furlong v Chief Constable of Cheshire Police ET/2405577/2018](#), the employment tribunal held that the employer discriminated against a white male candidate when it rejected him after applying the positive action provisions to candidates who passed the interview stage. The tribunal did not accept that all 127 candidates were equally suitable for the post for which they had applied. It found that the employer's use of a pass/fail mechanism created an artificially low threshold for the recruitment exercise and that it had not taken qualitative evidence into account in deciding whether or not the candidates were genuinely as qualified as each other.

No general policy

The employer must not have a general policy of treating women more favourably than men in connection with recruitment and promotion.

This means that it would not be possible for the employer to have a policy of inviting all female candidates who met its minimum recruitment standards for interview. In contrast, asking managers or recruitment consultants to provide gender diverse shortlists would not amount to a general policy of treating women more favourably.

Example:

Company B could decide as a matter of policy to rely on s.159 of the Equality Act 2010 when recruiting engineers, where it is appropriate to do so. However, it should decide on a case-by-case basis, having conducted an objective assessment of all the candidates, whether or not it can rely on the tie-breaker provision to offer a graduate position to a female candidate in preference to an equally well qualified male candidate.

Establishing proportionality

Finally, before relying on the tie-breaker provision, the employer must consider whether or not this is a proportionate way of addressing the disadvantage or low participation of women.

Deciding to offer a woman a position in preference to a man because of their sex gives rise to a relatively significant disadvantage for the equally well qualified male candidate. Therefore, the employer must have clear evidence of the disadvantage and/or low participation before it can rely on the tie-breaker provision. The employer should also consider if using positive action is the only way to address this effectively.

Example:

As Company B can show that there are very low numbers of women working as engineers both within its own organisation and nationally, it will be in a relatively strong position to show that the use of the tie-breaker provision is proportionate to the extent of the disadvantage.

Consulting and reviewing

As with general positive action, it would be sensible for employers to discuss in advance with any existing diversity networks, consultation bodies and/or trade unions whether or not they should seek to rely on the tie-breaker provision. This will also help to show that any subsequent action is proportionate.

In the interests of transparency, the employer could decide to inform candidates that it may rely on the tie-breaker provision when making a decision.

Any decision to consider relying on the tie-breaker provision should be kept under review, at least annually, to ensure that the statutory conditions still apply and that any positive action is still proportionate.

The employer should keep a record of the number of appointments it makes in reliance of the positive action provision, and of its decision-making process, to help demonstrate that it is being used lawfully.

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