

Diversity in practice: Positive action



Danielle Mawer

Associate

d.mawer@bateswells.co.uk

020 7551 7756

The Equality Act 2010 (EA) sets out broad principles to protect individuals against unfair discriminatory behaviour. But what if you want to do something proactive to improve diversity? Well, there is good news here. The EA also sets up a framework that permits organisations to take ‘positive action’. These are measures to improve equality for people who share a protected characteristic under the EA (see the list of protected characteristics in the article on page 7). This action is only lawful if it meets the tests under the EA.

What are the tests for general positive action under the EA?

We’re focusing here on the tests for ‘general’ positive action, rather than those for positive action in paid ‘recruitment and promotion’.

To take general positive action, you must answer a threshold question:

1. Does your organisation reasonably think that individuals who share a protected characteristic:

- experience a disadvantage connected to that characteristic;
- have needs that are different from the needs of persons who do not share that characteristic; and/or

- have disproportionately low participation in an activity compared to others who do not share that protected characteristic?

You will need to be able to point to some indication or evidence to support your view.

If the answer is yes, you must then ask:

2. Is the proposed action a proportionate means to achieve the aim of:

- remedying the disadvantage;
- meeting those needs; and/or
- enabling or encouraging participation in the activity?

This will involve a balancing act. You will need to ask: is this action appropriate for this aim? Is it reasonably necessary? Would it be possible to achieve this aim in another way that would be less likely to result in unfavourable treatment for others?

If you can justify the action using these tests, then you will be protected under the EA. If not, you leave yourself open to being sued for positive discrimination, which is unlawful.

We suggest that you keep the tests front-of-mind and be prepared to justify your actions within this framework.

What might qualify as positive action?

Measures that could qualify as positive action under these tests include:

- Setting participation targets
- Offering internships or open days
- Providing bursaries or scholarships
- Reserving places on training courses, for example, in management
- Organising targeted networking opportunities
- Providing mentoring.

These steps could help to boost participation by, or remedy a need or disadvantage suffered by, individuals who come into contact with your organisation.
(Please remember that different tests apply in promotion or recruitment contexts.)

Putting in place an action plan

There is no legal requirement to take positive action. But, if you do, we suggest you draw up an action plan that reflects the requirements of the EA and keep good records of your reasoning.

We would be delighted to help you in drawing up an action plan for positive action – **please get in touch**.

