Positive Action in Employment at Birkbeck

Guidance for Managers

1. What is positive action?

Positive action is a term that is used to describe activities that employers may take, within the law, to seek to reduce the disadvantage experienced by, or the under-representation of, people with particular characteristics. The ‘protected characteristics’ are legally defined as: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity.

2. What are the advantages to Birkbeck of using positive action?

Birkbeck’s equality and diversity statement highlights its commitment to a diverse staff and student population and inclusive working and learning environment so that all may develop to their potential. Positive action can help the College to bring this commitment to life, helping to attract, recruit and develop a wider pool of talented, skilled and experienced staff members.

3. In what circumstances might we use positive action?

For positive action to be lawful the College must have a reasonable belief, underpinned by evidence, that people with the protected characteristic:

- are under-represented within a particular activity; and/or
- suffer particular disadvantage, compared to those without the characteristic; and/or
- have particular needs that are different from the needs of people who do not share the protected characteristic.

Then the purpose of the action must be a proportionate measure designed to:

- reduce the under-representation; and/or
- alleviate the disadvantage; and/or
- meet the particular needs.

More than one group with a particular protected characteristic may be targeted, provided that for each group the College has evidence of disadvantage, different needs or disproportionately low participation.

In recruitment and promotion, a specific legal provision allows employers to select an applicant with a particular protected characteristic explicitly in favour of another applicant who does not share the particular characteristic, to reduce under-representation or alleviate disadvantage, but only if the
person it is applied to is as equally qualified as the person who loses out on the recruitment or promotion activity i.e. in a "tie-breaker" situation (see question 4, below). Whilst this may be applied at any point in the recruitment process (e.g. shortlisting), we would only expect it to apply when making the decision who to appoint, because this is when the College is likely to have sufficient information to establish that the two applicants are equally qualified.

4. **What evidence do we need to justify using positive action?**

There is nothing specified in law to say what constitutes sufficient evidence. However, clear records to show that the circumstances justified positive action and that the action was a proportionate means of addressing those circumstances, must be retained.

The Equality and Human Rights Commission (EHRC) Statutory code of practice on employment states that:

> It does not...... need to be sophisticated statistical data or research. It may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector. Additionally, it could involve looking at national data such as labour force surveys for a national or local picture of the work situation for particular groups who share a protected characteristic.

Evidence from survey or monitoring data will be required; for example, where there is a lower representation of staff from a particular characteristic, background, or community in your department or at different grades.

Evidence to back up a “tie-breaker” situation in recruitment and promotion is essential, to ensure there is no positive discrimination, which is unlawful (see question 6, below), and counter any claim of such from the rejected candidate. When considering whether two candidates are as qualified, it is important to assess this on the basis of the whole range of criteria used to assess applicants for the job, based on the person specification, not just qualifications.

Once a manager has identified a situation in which positive action may be appropriate, and has evidence to support this view, they should consult with their HR Business Partner to determine whether it is an appropriate course of action in the circumstances.

5. **Is there a time limit on using positive action?**

There is no time limit on the use of positive action, but it should be subject to periodic review, to determine its impact, whether it is still required, and, if so, whether it remains the most proportionate means of achieving the particular aim.
6. Isn’t it unlawful to discriminate in favour of particular groups?

Positive action is lawful, positive discrimination is not (in most cases).

A blanket policy of treating people who share a protected characteristic more favourably than those who do not, is likely to constitute unlawful positive discrimination, as is treating one individual more favourably than another because they have a protected characteristic.

Examples of unlawful positive discrimination include:

- setting quotas (as opposed to targets, which are lawful) to recruit or promote a specific number or proportion of people with a particular protected characteristic;
- recruiting, or promoting, someone because they have a protected characteristic, rather than because they are the best candidate; and
- a policy of excluding job candidates with particular characteristics e.g. all women shortlists.

Exceptions are where the positive discrimination is in favour of disabled people, or where there is a genuine occupational requirement (GOR). A GOR is where the protected characteristic is crucial to the post; is not merely one of several important factors; is not a sham or pretext; and where applying it is proportionate so as to achieve a legitimate aim. For example, an organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL. However, these circumstances are rare.

7. Is it compulsory to take positive action where a protected group is under-represented, suffers particular disadvantage, or has particular needs?

There is no legal requirement to take positive action, it is entirely voluntary. However, the College encourages managers to consider positive action where they have evidence to show that it is justified in the circumstances. More information on the circumstances where positive action may be appropriate, and the evidence required, can be found above.

8. Are the rules different for disabled people?

Yes. It is lawful for an employer to treat a disabled person more favourably in comparison to a non-disabled person, because of their disability.

In a ‘tie-break’ situation between one or more disabled people at the recruitment stage (i.e. where they are the best candidates for the job and equally qualified to do it), the employer can use positive action to select the candidate with the disability that is the most under-represented within the organisation. It would be unlawful to choose on the basis of the particular disability if the candidates were not equally qualified for the role.
9. What are some examples of positive action?

- Stating in an advert and in job packs that applications from, for example, women, or people from ethnic minorities, are particularly welcome. For example, “We particularly welcome applications from black and minority ethnic candidates as they are under-represented within Birkbeck at this level”.
- Placing a job advertisement in a magazine with a largely lesbian and gay readership, or using types of media that are likely to be seen by members of a particular racial or religious group, as well as placing it in jobs.ac.uk.
- Stating in a job advertisement that mentoring will be available to job applicants (and existing staff) from an under-represented group.
- Offering special training during the induction period, to under-represented or disadvantaged groups (e.g. language training to people of a particular racial group).
- Running a management training course targeted at employees from a particular racial group, where the College has records to show its employees from that group are under-represented at management level.
- Awareness days and workshops for people from groups that are under-represented groups, or suffer disadvantage e.g. disabled people, to help them to take part in the selection process on an equal footing.
- Where two candidates, one male and one female, are as qualified as each other for the role, offering it to the female candidate because women are underrepresented at that level or in that type of role within the College.
- Advertising for positions internally and externally at the same time, rather than advertising internally first.
- Promoting employment opportunities at job-fairs and open days and events attracting diverse communities (e.g. Pride, public lectures on campus)
- Excluding disabled people from the requirement to undertake a selection test, which all non-disabled candidates are required to take.

Resources

Equality and Human Rights Commission: Statutory code of practice on employment

Government Equality Office: A quick start guide to using positive action in recruitment and promotion