Büro zur Umsetzung von Gleichbehandlung e.V.

Dossier
on the Topic of Positive Action

October 2021

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Content

Dossier on the topic of Positive Action

1. Positive Action

The following dossier may offer you information about the so-called Positive Action which is a method of combating unequal treatment. The dossier elaborates how Positive Action is defined and implemented. You may find examples and information about the legal situation regarding Positive Action in Germany and in other countries. You may find further information and links here.

"*It is not about levelling down but about equal opportunities for unequally positioned persons*." Quote (translated from German) from the article "Positive Action – an Introduction" by Sybille Raasch (in German)

1.1.Introduction

Experience has shown that purely formal equality before the law and a legal ban on discrimination are not sufficient to achieve de facto equality of treatment for certain groups. Here, proactive measures are one way of achieving the objective of de facto equality.

Positive Action is an active promoting measure with the aim of achieving actual equality. It goes beyond a mere prohibition of discrimination by regulating existing structures and societal mechanisms actively.

As the term "Positive Action" is not incorporated in legal wording, there are different definitions and understandings of it, which will be presented in this dossier.

Positive Action evolved over a longer period of time. This dossier will provide an overview of this development.

Besides that, the legal basis of Positive Action within the meaning of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) is discussed and relevant judgments of the German Constitutional Court (Bundesverfassungsgericht) and the European Court of Justice are presented.

1.1.1. Definitions

The objective of Positive Action is to achieve actual equality through proactive group specific promoting measures. It targets a specific group of persons that was discriminated against in the past, based on a common feature, and presently still experiences disadvantages. In order to balance out the factual inequality, Positive Action directly promotes individuals that belong to these groups.

> Positive Action is "any implemented activity that guarantees a complete and effective equal opportunity for all members of the society that are disadvantaged or have to suffer from the effects of past or present discrimination in some way." – translated extract from the dossier "Positive Action for Prevention or Compensation of Existing Inequalities Within the Meaning of § 5 AGG" (in German), p. 5, Klose/Merx.

The group of persons that is not targeted by Positive Action is treated unequally. This this is done in order to balance out the unequal treatment experienced by the target group before the Positive Action was taken. In general, a legal basis that regulates the framework for a justified and proportionate measure for this purpose is needed.

Occasionally, Positive Action is called positive discrimination. Positive discrimination equally aims to balance out the unequal treatment of two groups by treating one group more favourably compared to the other group, which had previously been disadvantaged. However, in contradiction to Positive Action, positive discrimination is not proportionate and justified.

Positive Action must be differentiated from Diversity-Management or Diversity-Mainstreaming. These are often practised in the private sector. They aim at the broadly conceived promotion of diversity and tolerance, as well as an integration of disadvantaged and underrepresented groups. Usually, there is no legal basis required for this purpose. Positive Action may, however, be utilised within the framework of Diversity-Management or Diversity-Mainstreaming.

1.1.2. Historical Development of Positive Action

The history of Positive Action is much younger than the one of the formal amendments of the equality principle. The latter is stipulated, for example, in Article 3 German Basic Law, Art. 1 (1) Universal Declaration of Human rights, 14th Amendment of the Constitution of the United States, and Article 1 sentence 2 of the Constitution of the French Republic.

The fundamental principle, that for achieving actual equality of groups mere equal treatment is not enough, but active measures are required instead, has its origins in the United States during the 1960s. After a long time of structural discrimination and exclusion of people of colour, active measures (Affirmative Action) were demanded for an equal participation of people of colour.

The first international agreement that included Positive Action was Art. 1(4) of the Convention on Elimination of All Forms of Racial Discrimination (CERD) of the United Nations in 1965.

During the 1970s, the understanding of equality between men and women began to change in Western Europe. Women were already formally equal, but actual equality was now focused on. In 1976, for the first time, the European Economic Community issued a Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards to Access to Employment (Directive No. 76/207/EEC), which permitted in "measures to promote equal opportunity for men and women" in Art. 2(4).

In 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Further, this Convention recognises in its Art. 4 "temporary special measures aimed at accelerating de facto equality".

Finally, in 2000, the European Union issued further Directives that strengthened the position of disadvantaged groups. The Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, as well as the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation explicitly allow the Member States to introduce Positive Action in order to promote equality.

In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities. In Art. 5, the Convention allows Positive Action ("reasonable accommodation") in order to achieve actual equality.

1.1.3. Positive Action in the AGG

§ 5 AGG permits unequal treatment under certain circumstances if by doing so, existing factual or structural disadvantages concerning groups of people with features referred to under § 1 AGG are prevented or compensated for. This provision is thus a ground for justification.

In general, this means that the measure taken must always refer to one of the grounds listed in § 1 AGG.

Positive Action can be distinguished between so-called "weak" and "strong", as well as "soft" and "hard" measures. These differences will be illustrated by examples from the employment field.

The model "weak/strong" differentiates between the purposes of the measure. Weak measures aim to achieve more equal opportunities. However, they do not aim for actual equality. Strong measures, in contrast, do aim for actual equality of results. A recruiting campaign that targets juveniles with a migration background is, for instance, a weak measure. Preferably hiring women instead of men with the same qualifications can though be viewed as a strong measure.

The model "soft/hard" differentiates along the lines of the intensity of the measure. Weak measures do not restrict the rights of members of privileged groups. By granting scholarships for women only, for example, this weak measure aims to change the framework and to oppose the underrepresentation of disadvantaged groups. Hard measures, by contrast, have a direct effect on the rights of members of privileged groups. Measures that prefer female applicants over male applicants are permissible according to the European Court of Justice. Noteworthy examples are the "gender quota" as well as filling educational training spots with only persons with disabilities – disability being a criterion instead of a disadvantage.

The scope of § 5 AGG is not limited to certain fields but is applicable to all fields referred to under § 2 AGG. This dossier may further inform you about the situation (Tatbestand) (and the relevant case law for § 5 AGG.

The AGG implements the anti-discrimination directives of the EU. These are Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC and the Directive 2006/54/EC.

1.1.3.1. The situation

Positive Action within the meaning of § 5 AGG can be implemented by all legal person referred to under § 2 AGG (e.g. employers, contracting parties). § 5 AGG permits Positive Action; however, it has no obligation to do so. This instrument's implementation is up to the economic sector and the society, the assessment of the measures is up to the German and European courts.

AGG - § 5 Positive measures

Notwithstanding the grounds referred to under §§ 8 to 10 and 20, unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising from any of the grounds referred to under § 1

The phrase "to prevent or compensate for disadvantages" describes the aim of this measure. The wording "suitable and appropriate measures" clarifies the requirements of proportionality. The aim and the proportionality are thereby permissibility requirements that are themselves dependent on other prerequisites.

1.1.3.1.1. Disadvantages

§ 5 AGG refers to "disadvantages". In this context, "disadvantage" means certain circumstances that lead to a person having unequal opportunities based on grounds listed in § 1 AGG. This disadvantage must still be present when the measure is taken. Therefore, it cannot only relate to previous generations. However, preventive measures against future disadvantages are possible. The circumstances may be objective characteristics like the fact that women can become pregnant. They may also be based on generalisations and resentments, for example on the assumption that women have no leadership abilities or persons of certain ethnic origins are generally less willing to work than other.

The features referred to in § 1 AGG are ethnic origin, gender, religion or belief, disability, age, and sexual identity. These features are of equal rank. An employer can therefore decide freely, which disadvantaged group should be promoted, or whether only a partial group should receive particular support.

1.1.3.1.2. Suitable and Appropriate Measures

The wording "suitable and appropriate measures" stresses the necessity of proportionality. In order to be proportionate, the measure must be suitable, necessary, and appropriate.

Suitability

The probability that the aim will be achieved by the measure taken must be objective. This means that the measures must not be obviously unsuitable. In its judgment of the case Lommers, the European Court of Justice draws attention to the fact that the measures may lack suitability if they would only strengthen the traditional role of women and men. This is, for example, the case where the childcare centre with limited capacities, provided by a ministry, is only, and without exceptions, available for female officials. By doing so, the lacking equal opportunity for men and women in employment is barely being ameliorated, but rather strengthened.

Also unsuitable are measures with the stated purpose of protecting a specific group, but that in fact disadvantage this specific group instead of integrating its members into the labour market. An example would be the ban on night work for women, which was in force until 28.01.1992.

Necessity

As measures to achieve equality can interfere in the rights of third parties, the measure taken must be the least severe one that is also suitable to achieve the aim. This means that, in order to solve or limit a discrimination issue, softer methods must be tried in the first place.

Appropriateness

A balance must be struck between the extent to which beneficiaries are disadvantaged and the adverse effects on non-beneficiaries. The Positive Action must not, under any circumstances, have a disproportionate burden on the latter.

A disproportionate measure is not legal anymore and is therefore discrimination. This is called "positive discrimination" or "reverse discrimination". You may find further information (in German) here on page 79.

In the case of the so-called hard measures, the degree of preference is decisive for an assessment of appropriateness. When, for example, two groups are in a competitive relation with each other regarding the selection for certain positions, the European Court of Justice distinguishes, for the permissibility of measures, between those that provide direct access to the labour market and those concerning vocational training positions. For the latter, the limitations, in light of appropriateness, may be wider since these positions establish conditions for disadvantage-free access to the labour market only at a later time. Generally, the measure lacks appropriateness if a certain group is absolutely and automatically preferred through this measure. This is called "positive discrimination".

1.1.3.2. Case Law

Although the AGG has been in force since 2006, there is little jurisprudence regarding § 5 AGG. In the following, two judgments shall be discussed, of which the former is from 2008 and the latter from 2014. These cases are both about the preferable recruitment of women and can thereby be compared well. By doing so, it can be demonstrated under which circumstances a measure is justified according to § 5 AGG or not.

<u>Regional Labour Court Düsseldorf, 12.11.2008 (Az. 12 Sa 1102/08 – in German)</u>

The Düsseldorf Regional Labour Court clarified in its guiding principle: "Does the public sector employer point out in an – otherwise gender neutral – job advertisement that "there is a particular interest in applications by women", male applicants are not disadvantaged by this within the meaning of the AGG, if women are underrepresented in the reference group relevant for the vacancy". translated from German)

The State (Bundesland) of North Rhine-Westphalia used the wording "Sportlehrer*in im öffentlichen Dienst" (sports teacher in a public servant relationship) in the job advertisement. (The German language distinguishes between male and female forms of the same term, in this case sports teacher: a male sports teacher is called "Sportlehrer", a female one "Sportlehrerin". The enclosure of "*in" shall include the female form as well since in the mainstream language usage, normally only the male form is common.)

The male plaintiff applied for this job vacancy and was rejected. Instead, a female applicant was hired. She was evidently best able to convince with her aptitude in the job interview and was hired based on this result. The assessment standards were equal and were applied equally. The Court examined the legality of the job advertisement's wording and focused thereby on Art

33 (2) German Basic Law that stipulates the principle of best selection in the public sector. Gender specific job advertisements are not to be objected if this is done in the course of Positive Action. With the passage in the advertisement "There is a particular interest in applications from women and severely disabled persons", the public employer wishes to point out the legal duty to promote women in underrepresented fields. This was also recognisable to applicants. The Court further stated, "The note aims to promote women within the framework of legal order and permission. The principle of best selection is not questioned by either directly addressing qualified female applicants or indirectly selecting them from the larger number of female applicants in light of the aim to increase women's underrepresentation. The wording does neither implicate an anticipated selection decision, nor provide a well-grounded assumption of male applicants that the principle of best selection will not be considered." (translated from German) The wording was therefore qualified as permissible within the meaning of § 5 AGG.

Labour Court Berlin, 05.06.2014 (Az. 42 Ca 1530/14 – in German)

The Berlin Labour Court had to decide whether a preferred recruitment of women for internships was an appropriate and suitable measure to balance out the underrepresentation of women in leadership positions in the journalism sector.

A newspaper that excluded men from applying for a traineeship - regardless of the individual circumstances – in their advertisement was sued. The Court decided that this may be a Positive Action within the meaning of § 5 AGG. However, this measure was deemed inappropriate and therefore violated the principle of proportionality. Furthermore, the Court doubted the suitability of this measure. Regarding the suitability, the Court considered that filling a traineeship vacancy affects the lowest position within the journalist professional career. By granting traineeship positions exclusively to women, the number of women in leadership positions can barely increase. In the meantime, the proportion of women in traineeships and occupational trainee positions is larger than men, therefore it can be expected that women will increasingly be considered in leadership positions in the future.

Regardless of the suitability, the Court had significant doubts concerning the appropriateness of this measure. A measure is appropriate, if it does not put a burden on the non-beneficiary group disproportionately. However, this is not the case when there is an obligatory, unconditional preference. Instead, a decision on a case-to-case basis is necessary. If the advertisement alone made clear that an individual decision will not be made, the measure can barely be appropriate. For this reason, the measure was deemed disproportionate and thus unjustifiable. Regarding the compensation payment to the plaintiff, in cases of such advertisements, the Court took the severity of the § 5 AGG violations into account.

§ 5 Positive Action

Notwithstanding the grounds referred to under §§ 8 to 10 and 20, unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on any of the grounds referred to under § 1.

1.2. Positive Action in Germany

The legal basis for Positive Action is § 5 AGG. This norm permits Positive Action for certain groups of persons. Following, you may find further information about Positive Action for specific groups.

Several companies in Germany have agreed on the Charter to emphasise their will for measures for equal opportunity.

1.2.1. Positive Action for Specific Groups

Positive Action for specific groups will be elaborated here which shall combat the disadvantages of these groups. Measures concerning gender equality and measures concerning persons with disabilities are introduced.

§ 1 AGG – Purpose

The purpose of this Act is to prevent or stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation.

1.2.1.1. Positive Action on the Ground of Gender

In European Economic Community law, Positive Action played a role, especially when it came to equality between men and women. The Directive 76/207/EEC "on the implementation of the principle of equal treatment for men and women as regards to access to employment, vocational training and promotion, and working conditions" from 1976 already stipulated in Art 2 (2) a possible exemption in favour of Positive Action. This Directive ceased to be in force due to the founding of today's European Union. Its purpose, however, was stipulated and expanded in Art 157 (1) Treaty on the Functioning of the European Union in view of "ensuring full equality".

In light of equality between men and women, the concept of Positive Action is directly stipulated in European Union primary law.

Because men are the traditionally dominant gender, they are typically rather preferred than disadvantaged in the employment field. For this reasons, Positive Action is applied in favour of women. But that does not mean that Positive Action cannot be taken in favour of men. This is especially relevant in professional groups with an underrepresentation of men and in which there are indicators that men really do have less opportunities. They can benefit from Positive Action.

In the following, the historical development of equality of women will be summarised and the case law development will be demonstrated. Furthermore, the Federal Gender Equality Act and the Act on Equal Participation of Women and Men in Leadership Positions will be presented.

An extensive overview of the equality of women can be provided in the handbook "Frauen verändern EUROPA verändert Frauen" (in German) by the Ministry of Integration in North Rhine-Westphalia.

1.2.1.1.1. Legal Development of the Equality of women

With the foundation of the European Economic Community in 1957, the prohibition of gender discrimination in payment was stipulated in Art. 119 of the Treaty. Nearly 20 years later, the first EU Directive on gender equality No. 76/207/EEC followed on 09.02.1976. Art 2 (4) of this Directive already foresaw Positive Action as an exemption to the equal treatment principle.

In Germany, Positive Action measures in favour of women were taken starting in the late 1970s, initially summarised under the name of "promotion of women". In substance, this was about programmes like "women in male professions". Thus, following those long-term programmes, promoting women was also initiated in universities and States' administration. Due to this process, the term "equality policy" was created.

In 1984, the Council of the European Community published a recommendation for the then ten Member States to incorporate Positive Action as a policy. The Council emphasised the

importance of proactive actions and elaborated the necessity of Positive Action. Also, the recommendation included aspects which were supposed to be considered by the Member States when taking Positive Action measures. However, this recommendation did not have any noticeable impact.

It was only in 1994 that the aim of promoting women was legally enshrined in the Federal Women's Promotion Act in Germany. This Act was still solely focusing on the promotion of women. Due to the lack of implementation, this Act was later replaced by the Federal Gender Equality Act (Bundesgleichstellungsgesetz – BgleiG).

Also in 1994, the Federal Advisory Bodies Act (BGremBG) was passed in Germany which has been amended profoundly since then. The Act aimed to improve the equal participation of women and men in federal public bodies. In 2001, the Federal Gender Equality Act (BGleiG) replaced the Federal Women's Promotion Act of 1994.

Despite these Acts and the unilaterally binding agreement between politics and economy to increase the proportion of women in higher positions from 2001, women are still not treated equally and are underrepresented in many fields of the Federal public service. This is the case particularly in leadership positions. The still ongoing structural disadvantages of women are the main reason for this.

Finally, in 2015, the Act on Equal Participation of Women and Men in Leadership Positions was passed, which has amended several existing Acts as well as the BGleiG and the BGremBG.

1.2.1.1.2. Case-law development

Perhaps the most famous Positive Action measure relating to gender may be the quota regulation for women. The issue of preferring women over men provided high potential for discussion, and the European Court of Justice (ECJ) had several occasions to interpret Directives and decide in preliminary rulings in order to clarify which regulations are lawful and which are not. In its different decisions, the ECJ repeatedly listed and specified the criteria for the legality of preferring female applicants over male applicants. The ECJ differentiates between lawful measures, which promote an actual equal opportunity, and unlawful measures, which rule an absolute preference of a certain disadvantaged group.

Generally, decision quotas and result quotas must be distinguished. Decision quotas mean that women with an equal qualification must be considered when it comes to recruitment or promotion. The focus of the quota is the moment of decision making. Result quotas, in contrast, mean the achievement of target objectives. Here, quotas are a means of allocating a specific proportion of jobs to women.

<u>Decision quotas</u>:

Criteria for the permissibility of quota regulations are that:

- Female applicants in public service must have equal qualification within the meaning of Art. 33 (2) German Basic Law or close to equal qualification as male applicants

- There is no absolute and unconditional preference of female applicants. Instead, there must be an objective assessment on a case-to-case basis. The type of position, goods or services, and the question whether these are accessible on the free market, must be taken into consideration in the reasoning. A categorical preference is precluded. Moreover,

the Positive Action must be limited in time, so different rights are not permanently created for specific groups.

- The recruitment process is transparent and verifiable and is based on objective criteria. The criteria must not be discriminatory themselves. (Beneficiary criteria are usually not problematic.)

Result quotas:

Concerning the filling of vocational training positions in professions where women are underrepresented, so-called rigid result quotas are also permissible if the vocational training provider does not have a monopoly position. These are quotas which allocate a specific percentage of posts to female applicants if there are a sufficient number of applications. In the field of universities for instance, these quotas are also permissible regarding fixed term training posts if they correspond to the proportion of women as students, graduates or doctorates in the faculty (depending on the respective training post).

The Federal Labour Court specified in its judgment (in German): "The circumstances of the individual case must be taken into account while also taking promotional or compensatory measures. This can be done by assessing cases of hardship."

Concerning invitations to job interviews, quotas are also permissible in a broad scope. This is justified by the fact that qualified women would merely be offered additional opportunities without this having any direct influence on the selection. The corresponding judgment of the European Court of Justice can be found here.

Based on this judgment, it can be summarised: rigid quota regulations and an unconditional preference are normally not permissible. However, if women are significantly underrepresented in specific professions, an exception is permissible. But even then, this absolute, rigid quota regulation must include an opening clause.

The European Commission deals with the topic of quota regulations as well and considers these to be lawful. In December 2012, it released a proposal for the "Directive on improving the gender balance among of companies listed on stock exchanges and related measures". This proposal suggests a quota of 40 percent.

1.2.1.1.3. Federal Gender Equality Act

The Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts (Federal Gender Equality Act) entered into force in 2001 but was amended significantly in 2015 due to the passing of the Act on Equal Participation of Women and Men in Leadership Positions (FürsPosG). You may find information about the target group of this Act here, the content of this Act, the current relevant case law and the implementation. Furthermore, you may find the respective Equality Acts of the federal States in a table.

1.2.1.1.3.1. Target Group

This Act does not address men and women equally in all of its regulations and norms. Instead, it focuses on women because of the ongoing structural disadvantages they face.

An example of this would be the rule that only women are entitled to elect treatment officers and can become equal treatment officers themselves. Men, in contrast, are encouraged to take opportunities that enable better compatibility between family and work.

The scope of BGleiG is regulated in § 2 in conjunction with § 3 No. 5, No. 9 BGleiG. This Act applies directly to public offices. Federal enter-prises shall ensure the application of this Act accordingly.

This Act does not apply to the private sector and public offices of the Länder. The respective Land shall pass its own Equality Acts for its administration and courts.

BGleiG - § 3

For the purposes of this Act

(…)

5. “agencies” are

a) federal courts

b) authorities and administration offices of the direct federal administration, including those within the remit of the armed forces and

c) federal corporations, institutions and foundations under public law;

(...)

9. “enterprises” are

a) establishments and organisations of the indirect federal administration, with the exception of corporations, institutions and foundations and

b) enterprises of the direct federal administration which will in the future be transformed into enterprises under private law, with the exception of subsidiaries

(...)

1.2.1.1.3.2. Content

The Act is composed of six parts. Part 2 (§§ 5 through 11) is especially relevant in regards to Positive Action. This Part regulates equality measures, for example the quota regulation on an individual basis in § 8, regulations regarding qualification and prohibition of disadvantaging in § 9, and the equality plan in § 11.

§ 6 (1) requires a stronger encouragement of members of the underrepresented gender in the respective group to apply for jobs.

According to § 10 BGleiG, public employees with family responsibilities shall be enabled to participate in professional training courses, for example by guaranteeing childcare facilities. These measures can be conceived as Positive Action within the meaning of § 5 AGG too.

The BGleiG is a basis and opportunity for various Positive Action measures that could be taken. The amendment allowed bureaucratic simplifications in many areas. Men are strongly encouraged to take opportunities balancing out family and work. Also, the situation of equal treatment officers was improved by allowing up to three vice-officers and clarifying regulations on participation rights.

In order to combat the gender pay gap, which should be countered by the BGleiG, the Bundestag (German Parliament) passed the Act to Promote Transparency in Wage Structures among Women and Men on 30.06.2017. Here, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth gives some information about justice in wage payments (in German).

1.2.1.1.3.3. Implementation

Unfortunately, the third report from the German Government on the Federal Gender Equality Report, which is expected to be published at the end of 2020/beginning of 2021, is still pending. The first report (in German) was published in 2006, the second report (in German) in 2010. The following figures therefore only refer to the period including up to the end of 2015.

In § 4 (1) BGleiG, namely achieving gender equality, eliminating existing discrimination on the basis of gender, in particular discrimination against women, preventing discrimination in the future and improving the family-friendliness and reconciliation of family-life, care work, and employment for women and men, is outlined as the guiding principle for all bodies referred to under BGleiG in their working and decision-making process. Accordingly, the duty of these bodies is to counteract inequality by taking measures.

The percentage of women in all leadership positions throughout the whole federal public service amounts 33% in 2015. In 2009, it amounted to 30%. Regarding the Federal administration, the percentage increased in all hierarchy levels. However, an underrepresentation is still observable. In summary, one can state that women are still underrepresented in all areas of public administration. In many public offices, the higher the hierarchy position, the (significantly) lower the percentage of women. Further information can be found in the table in the red box.

In its report on the Act on Equal Participation of Women and Men in Leadership Positions (FüPosG), the Government published answers of the highest public offices to the question, to what extent they believe in compliance with the respective rules of Part 2 (§§ 5 through 10). According to this self-evaluation, the offices qualified their implementation of § 6 (1) and § 7 (1) BGleiG to be good or excellent.

In the course of training within the meaning of § 10 (1) BGleiG, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth initiated a project on the topic of equality implementation before the BGleiG was amended. The project aimed to further incorporate the topic of equality into professional training courses for public administration employees. To achieve this aim, the professional training courses curricula of the Federal Academy for Public Service was analysed and guidelines for professional training courses that consider equal treatment principles were elaborated and published. In this publication (in German), you may find several approaches to implementing equality:

- Professional input (preferably with support from external competence)
- Internal and external transparency and public relations work regarding the results
- Clear regulation of the responsibility in the role and function of a person serving as gender equality officer
- Participatory design, meaning the inclusion of all employees throughout all hierarchy levels and in all functions

Oberste Bundesbehörde	Beschäftigte insgesamt	Frauenanteil in %							
		an Beschäftigung	im höheren Dienst	am beruflichen Aufstieg [1]	an allen Leitungsfunktionen				
					insgesamt	davon			
						an Staatssekretären/-innen	an Abteilungsleitungen [2]	an Unterabteilungsleitungen	an Referatsleitungen
AA	2 876	52,5	38,1	45,3	25,2	0,0	10,0	14,3	30,3
BKAmt	580	55,5	45,4	61,3	30,6	0,0	14,3	30,0	33,3
BKM	233	51,5	46,5	79,2	38,7	-	0,0	25,0	42,3
BMAS	1 103	55,7	45,4	55,6	35,0	0,0	28,6	36,8	35,7
BMBF	1 006	59,2	52,8	59,5	44,0	50,0	25,0	31,3	47,5
BMEL	941	54,8	44,3	51,6	27,5	0,0	16,7	13,3	30,6
BMF	1 920	51,5	36,2	54,6	19,2	0,0	10,0	25,9	19,0
BMFSFJ	651	69,9	69,5	74,3	54,9	0,0	50,0	50,0	56,6
BMG	629	62,3	59,6	60,6	39,8	0,0	33,3	25,0	42,7
BMI	1 501	50,4	41,8	64,0	28,8	100	8,3	5,6	32,8
BMJV	787	60,2	46,8	61,1	38,7	50,0	42,9	7,7	41,7
BMUB	1 154	55,0	47,9	61,8	34,9	0,0	33,3	23,8	37,1
BMVI	1 316	50,6	38,9	46,6	25,6	0,0	22,2	21,4	26,9
BMVg	1 489	47,1	31,0	32,9	23,1	50,0	25,0	13,6	24,7
BMWi	1 659	51,1	43,1	54,6	30,2	0,0	20,0	24,0	32,3
BMZ	1 010	54,4	53,2	43,2	43,0	0,0	50,0	36,8	44,1
BPA	473	57,3	51,2	60,7	34,8	0,0	33,3	11,1	43,3
BPrA	189	58,2	45,2	50,0	33,3	0,0	33,3	50,0	33,3
BR	194	57,2	48,7	73,1	50,0	100	25,0	-	53,3
BRH	747	41,6	33,6	42,0	18,4	0,0	27,3	-	17,2
BT	2 994	51,8	40,3	47,8	37,2	0,0	50,0	21,4	39,2
BVerfG	185	67,6	47,8	60,0	50,0	-	0,0	-	55,6
Gesamt	23 637	53,4	44,0	53,3	32,6	18,2	24,8	23,4	34,9
nachrichtlich: BBk	5 271	44,2	43,9 [3]	43,6	22,9 [3]	/	/	/	/

1 Beförderungen, Höhergruppierungen und Übertragung von Vorgesetzten- oder Leitungsaufgaben im Zeitraum vom 1.7.2014 bis 30.6.2015.
2 Einschließlich Direktorinnen und Direktoren.
3 Für die BBk werden aufgrund abweichender Strukturen in den Leitungsfunktionen neben dem höheren Dienst auch der gehobene und der mittlere Dienst mit einbezogen. Daher erfolgt bei den Leitungsfunktionen keine weitere Differenzierung.

1.2.1.1.3.4. Equality Acts of the Federal States

The Länder have transposed the BGleiG into State law and issued their own Equality Acts. In the following, you may find a list of the respective Equality Acts, including a link to the legal documents as well as data of their entry into force and their last amendments (in German).

BGleiG - § 6

(...)

(3) Job announcements must specify the requirements of the vacancy to be filled and, with a view to applicants' possible future functions, must also indicate the required profile and qualifications for the career or functional area.

Federal State **Name of the Act** **Date of Entry into Force & Last Amendment**

Baden-Wuerttemberg

Gesetz zur Verwirklichung der Chancengleichheit von Frauen und Männern im öffentlichen Dienst in Baden-Württemberg (Chancengleichheitsgesetz – ChancenG)

11. Oktober 2005

06. März 2018

Bavaria

Bayerisches Gesetz zur Gleichstellung von Frauen und Männern – BayGlG

Mai 1996

23. Mai 2006

Berlin

Landesgleichstellungsgesetz von Berlin – LGG

13. Januar 1991

30. Mai 2016

Brandenburg

Gesetz zur Gleichstellung von Frauen und Männern im öffentlichen Dienst im Land Brandenburg – LGG

04. Juli 1994

08. Mai 2018

Bremen

Gesetz zur Gleichstellung von Frau und Mann im öffentlichen Dienst des Landes Bremen – LGG

29. November 1990

16. Mai 2017

Hamburg

Hamburgisches Gesetz zur Gleichstellung von Frauen und Männern im öffentlichen Dienst - HmbGleiG

19. März 1991

2. Dezember 2014

Hessia

Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung – HGlG

21. Dezember 1993

20. Dezember 2015

Mecklenburg-Western-Pomerania

Gesetz zur Gleichberechtigung von Frau und Mann im öffentlichen Dienst des Landes Mecklenburg-Vorpommern – GlG M-V

27. Juli 1998

11. Juli 2016

Lower Saxony

Niedersächsisches Gleichberechtigungsgesetz – NGG

1. Juli 1994

9. Dezember 2010

North-Rhine Westphalia

Gesetz zur Gleichstellung von Frauen und Männern für das Land Nordrhein-Westfalen – LGG

20. November 1999

02.02.2018

Rhineland-Palatinate

Landesgleichstellungsgesetz – LGG

11. Juli 1995

19.12.2018

Saarland

Landesgleichstellungsgesetz des Saarlandes

24. April 1996

20.09.2017

Saxony

Sächsisches Frauenförderungsgesetz – SächsFFG

31. März 1994

18. Dezember 2013

Saxony-Anhalt
Frauenfördergesetz – FrFG

27. Mai 1997

19. Dezember 2005

Schleswig-Holstein

Gesetz zur Gleichstellung der Frauen im öffentlichen Dienst – GstG

13. Dezember 1994

16.01.2019

Thuringia

Thüringer Gleichstellungsgesetz - GleichstG TH

3. November 1998

7. Oktober 2016

1.2.1.1.4. Act on Equal Participation of Women and Men in Leadership Positions

The Act on Equal Participation of Women and Men in Leadership Positions (FüPoG) entered into force on May 1st 2015, with the purpose of increasing the proportion of women in leadership positions in both the private and public sector and to promote the principle of equality of women and men within the meaning of Art 3 (2) German Basic Law. Accompanied by this Act, the Federal Act on Appointment to Bodies (BGremBG) and the Federal Gender Equality Act (BGleiG) were amended fundamentally. This Act aims for actual equality and is therefore a Positive Action. As a so-called "Mantelgesetz" (German for "umbrella Act"), this Act includes many norms and amendments of norms. Among other changes, this Act stipulates comprehensive changes of the BGleiG and the BGremBG.

Here you may find information about the target group of this Act, its content, questions regarding compatibility with constitutional and European law and its implementation.

1.2.1.1.4.1. Target Group

On the one hand, this Act binds the private sector, meaning market-listed companies and companies with codetermination duties, and on the other hand, it binds the public sector.

In March 2017, the Federal Government published the annual monitoring report (in German) on the development of the proportion of women and men in leadership positions.

Despite several appeals, calls, and companies' voluntary agreements to increase the number of women in leadership positions, this number has stagnated throughout years, even though the percentage of qualified women in Germany has steadily increased in past years. Consequently, the Federal Government took the responsibility of regulating and improving upon this issue

through this Act. This Act was passed with the purpose of significantly increasing the proportion of women in leadership positions significantly.

1.2.1.1.4.2. Content

This Act is composed of three pillars. Two of these concern the private sector and the third focuses on the public service.

Firstly, this Act establishes a binding minimum quota of 30% female and 30% male members in the supervisory board of market-listed companies. At the same time, companies are obligated to codetermination.

The second pillar consists of rigid, non-binding targets for members of the supervisory board, executive board and especially the two hierarchy levels below the executive board in market-listed or codetermination-obligated companies.

Equal codetermination means that the supervisory board is composed halfway of employees' delegates and shareholders' delegates. You may find further information about the different types of bodies in the reasoning of the Federal Act on Appointment to Bodies (in German) beginning on page 69.

Through the amendment, the already existing reporting duties were supplemented. Since then, companies must provide information on whether they have fulfilled the minimum quota or not. If not, reasons must be given in the reports. These reports are accessible in the company register.

The third pillar are the amendments to the Federal Gender Equality Act (BGleiG) as well as of the Federal Advisory Bodies Act (BGremBG) which has already been in force for 20 years. Stricter legal regulations were created to ensure faster progress regarding leadership positions and clarification of the purpose of these Acts. Instead of regulating the selection process in filling leadership position posts, these Acts now require result targets. In case of supervisory bodies, for which the Federal Government may elect at least three members, the quota of 30% applies regarding all new replacements of members that the Federal Government can elect.

1.2.1.1.4.3. Compatibility with constitutional and European law

During the first considerations and the later published draft laws, the project for a legally based quota was criticised by legal scholars for being unconstitutional and incompatible with European law. This referred, above all, to the conformity of the rigid quota laid down in the law, which the European Court of Justice (ECJ) classified as inadmissible. However, a distinction must be made between a rigid quota exclusively for women and one for women as well as for men. The fact that the Act is formulated with both genders in mind speaks for constitutional conformity. Even though the Act is commonly known in society as "the women's quota", it takes account of both men and women, as it also requires a quota of 30% for men. The fact that the latter is not necessary in most companies does not affect the constitutional conformity of the Act. There were also discussions about the suitability of the law, i.e. if less intense/milder measures than a rigid quota would suffice or not.

So far, there is no jurisprudence on the 30% quota either from German courts or from the European Court of Justice.

To increase the proportion of women in leadership positions through self-imposed quota regulations might be a milder measure. However, as observations over many years and the regularly published reports on the state of affairs have shown, this in particular, has not proved suitable in significantly increasing the proportion of women.

In its judgment on the Badeck case, the ECJ considered a binding quota of women for the appointment of supervisory boards by the federal government to be permissible. However, a judgment on a "rigid quota" for this type of appointment has not yet been made. For an assessment in this regard, it should be noted that a quota on the proportion of women on supervisory boards does not relate to access to jobs, but only to representation on an electoral body for a limited period. It is also suitable for influencing equal opportunities for women in leadership positions at different levels in companies. Such a quota system would therefore be permissible under European law because it is justified according to Article 3 of the Equal Treatment Directive 2006/54/EC in conjunction with Art. 157 (4) Treaty on Functioning of the European Union.

1.2.1.1.4.4. (Case law)

The first criterion for a selection decision in the Federal Public Services must be the applicant's qualifications. The principle of so-called best selection is laid down in Art. 33 (2) of the Basic Law. According to this article, aptitude, qualification, and professional performance are decisive for access to a public office. These criteria implement the principle of merit as binding admission requirements. Only if applicants of different sexes have the same qualifications may gender be used as a further selection criterion. No case law has yet been passed on the rigid 30% quota.

1.2.1.1.4.5. Implementation

More than 3,500 companies in Germany need to deal with the issue as a result of the requirements laid down in the law. The binding quota has been in force since January 1st 2016 and currently applies to 104 companies. Since the law entered into force, specifically the quota regulation, the proportion of women in leadership positions has risen from 21.7% to 28.1%.

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth provides an interactive overview of the development since the enforcement of the law here (in German).

1.2.1.2. Positive Action for Persons with Disabilities

In 1994, the formal equality of people with disabilities in Germany was explicitly enshrined in

the Basic Law. Article 3 (3) sentence 2 of the Basic Law prohibits discrimination on the grounds of disability. The active promotion of people with disabilities beyond this was primarily introduced in Germany by international and European law.

Art. 7 (2) of the EU Directive 2000/78/EC has enabled the EU Member States to take Positive Action in favour of people with disabilities.

The UN Disability Rights Convention was passed by the UN General Assembly in 2006. This Act became legally binding in Germany after its ratification in 2007 and is legally equal to a formally adopted law. You may find further information on the information portal of the Convention (in German).

The UN Disability Rights Convention, which has been legally binding in Germany since March 2009, obliges the states in Art. 27 to take Positive Action to achieve equality of rights for people with disabilities and to promote the adoption of Positive Action in the private sector.

The general legal basis in Germany for Positive Action is § 5 AGG. Other Acts which contain more concrete Positive Action measures for people with disabilities are the Social Code IX and the Federal Equality Act for People with Disabilities.

1.2.1.2.1. Social Code

The Social Code IX (SGB IX) for the rehabilitation and participation of people with disabilities entered into force on July 1st, 2001 and aims to promote the self-determination and social participation of people with disabilities. It is divided into two parts. The first part (§§ 1 - 67) applies to all people with disabilities. The second part (§§ 68 - 160) regulates participation of people with severe disabilities. According to § 2 (2) SGB IX), a severe disability is defined as a degree of disability of at least 50%.

A quota system for people with severe disabilities has been in force in Germany since 1974. Since the number of unemployed people with severe disabilities increased dramatically in the 1990s, a revision of the existing legal basis became necessary. These revisions resulted in the SGB IX.

In 2016, the SGB IX was supplemented by the ´Bundesteilhabegesetz´ (BTHG). The changes will be implemented in stages until 2023.

Here, you may find further information about the target group and the content, respective case law and the implementation of this Act

1.2.1.2.1.1. Target Group

The SGB IX protects, according to § 1, people with disabilities and people who are at risk of disabilities. Disability is defined in § 2 as a "deviation of physical function, mental ability, or mental health from the state typical for the age", which impairs equal participation in society.

Positive Action measures are regulated in the second part of SGB IX and are only applicable to people with severe disabilities, i.e. a degree of disability of at least 50%. The scope of application can also be extended to people who are treated equally to people with severe disabilities. This is possible with a degree of disability of less than 50%, but more than 30% if the disability entails severe limitations which are to be compensated by Positive Action.

1.2.1.2.1.2. Content

The SGB IX obliges private and public employers with over 20 employees to take Positive Action in the form of a hiring quota.

The Federal Employment and Social Affairs Agency provides counselling, information and support for people with disabilities on its homepage.

According to § 71 SGB IX, companies with more than 60 employees have to fill 5% of the workplaces with people with disabilities. Special consideration must be given to women with severe disabilities. The obligations are scaled for employers with fewer jobs on average: Employers with more than 20 and less than 40 employees must employ at least one severely disabled person per month on average per year. A company with more than 40 and less than 60 employees must employ at least two severely disabled persons per month on an annual average.

In the event of non-compliance with the obligation to employ, employers are obliged to pay a compensatory fee in accordance with § 77 (1) SGB IX. The amount is based on the obligation quota.

In addition, § 72 (2) SGB IX stipulates that employees with severe disabilities must receive an appropriate share of the training opportunities offered by their employers.

When advertising a job, employers are obliged to examine whether the job is suitable for a severely disabled person according to § 81 (1) SGB IX.

A special duty is imposed on public employers. They must report any new vacancies to the Federal Employment and Social Affairs Agency in accordance with § 82 SGB IX. In addition, they must invite every severely disabled candidate for an interview, provided that he/she has sufficient qualifications.

1.2.1.2.1.3. Case Law

The relevant case law on Positive Action under SGB IX refers primarily to the duty of employment under § 71 SGB IX and the special obligations of public employers under § 82 SGB IX.

The Federal Labour Court has made it clear that an applicant with a severe disability can only invoke the Positive Action of SGB IX if the employer has been informed of the severe disability (file number 8 AZR 650/12). This disclosure is necessary for every new application, a reference to a previous disclosure is not sufficient (file number 5 SA 1346/13).

According to the Federal Administrative Court (file number 5 C20. 12), transfer companies, which provide training and further placement for employees threatened by unemployment, are also subject to the employment obligation under the SGB IX. If they do not fulfil the employment obligation, they are obliged to pay the corresponding compensatory fee. The Regional Social Court of North Rhine-Westphalia also confirmed this obligation for companies that were founded under German law but work mainly abroad (file number L 16 (1) AL 21/09).

Public employers' special obligation is interpreted very narrowly by the Federal Labour Court. Public employers are generally obliged to examine if the job advertised is suitable for people with severe disabilities and, if so, they are obliged to invite them to an interview. This invitation is not necessary only if the applicant has no objectively suitable qualification. The qualification must be assessed according to the criteria in the job advertisement (9 AZR 431/08).

If an applicant with the appropriate qualification is not invited, this can already be considered discriminatory in line with the AGG (8 AZR 608/10).

In principle, private and public employers must justify the rejection of an applicant with a severe disability. If this obligation to provide reasons for the rejection is violated, discrimination can be assumed on this basis alone. This presumption can only be refuted if the employer has complied with the obligatory quota (8 AZR 180/12).

The departments of public employers notify the employment agencies in advance of vacancies, new posts to be filled, as well as new posts (§ 73) after an unsuccessful search to fill the post internally. If severely disabled persons have applied for such a job, or if they have been proposed by the Federal Employment Agency or by an integration service commissioned by the Agency, they will be invited for an interview. An invitation is dispensable if there is an obvious lack of professional aptitude. An inclusion agreement pursuant to § 83 is not required if regulations corresponding to § 83 already exist and are being implemented by the employer.

1.2.1.2.1.4. Implementation

The implementation of Positive Action from Social Code Book IX can best be understood by considering the implementation of the employment obligation.

According to the Federal Statistical Office, at the end of 2015 a total of 7.6 million people with a severe disability within the meaning of SGB IX were living in Germany, which is about 9.3% of the population.

The SGB IX aims to ensure that 5% of all jobs are held by people with severe disabilities. The employment statistics of the Federal Employment and Social Affairs Agency from 2015 show that a total of 4.7% of all jobs (of the obligated employers with more than 20 jobs) are filled by people with severe disabilities. At 6.6%, the proportion in the public sector was higher than in the private sector (4.1%).

Further information may be found on the websites of the Federal Statistical Office and the Federal Employment and Social Affairs Agency.

In 2010, 4.5 % of all jobs were occupied by people with disabilities. In 2003, in the first survey after the SGB IX entered into force, the figure was only 4 %. As such, the overall trend is positive.

1.2.1.2.2. Act on Equality of People with Disabilities

The Act on Equality of People with Disabilities (BGG) entered into force on May 1st 2002 with the aim of reducing disadvantages for people with disabilities in the public sector and enabling them to participate in social life.

Learn more about the target group and the content as well as relevant case law and the implementation of this Act. In addition, you will find here an overview of the relevant State Equality Acts.

§ 1 BGG

(1) The purpose of this Act is to eliminate and prevent discrimination against persons with disabilities and to ensure their equal participation in society and enable them to lead a self-determined life. In doing so, their special needs shall be considered.

1.2.1.2.2.1. Target Group

The Act on Equality of People with Disabilities (BGG) contains various requirements for people with disabilities. According to § 3 BGG, this includes all people who have long-term physical, mental, psychological, or sensory impairments which, in interaction with attitudinal and environmental barriers, prevent them from participating equally. According to § 2 BGG, women with disabilities are under special protection.

The BGG is the legal basis for the mandate of the Federal Government Commissioner for the Affairs of Persons with Disabilities, who regularly publishes the latest information.

1.2.1.2.2.2. Content

The BGG aims to eliminate disadvantages and to ensure equal participation in society for people with disabilities. It obliges the public authorities.

The BGG aims to eliminate disadvantages and to ensure equal participation in society for people with disabilities. It obliges the public authorities. According to § 1 (2) BGG these are the departments and institutions of the Federal Administration, including direct federal corporations, institutions and foundations under public law as well as other federal bodies, insofar as they perform public administrative tasks.

The BGG creates the legal basis for the establishment of the Federal Office for Accessibility, which, among other tasks, offers support in the implementation of accessibility.

With regard to Positive Action, the Act primarily creates a legal basis for the promotion of women with disabilities. § 2 (2) BGG permits specific measures to promote the actual implementation of equal rights for women with disabilities and to eliminate existing disadvantages.

In addition, this Act is to be understood as an active promotion. The obligation under § 7 (3) BGG is intended to enable special measures to reduce and eliminate discrimination against people with disabilities. The obligations in §§ 8-11 BGG on accessibility in public spaces are also intended to actively promote the participation of people with disabilities.

The Federal Government deliberately formulated the aim of the Act as the elimination of existing discrimination and the compensation of disadvantages through Positive Action. Consequently, the BGG, in its entirety, forms the legal basis for equal treatment measures.

1.2.1.2.2.3. Case Law

There is relatively little case law on the BGG. Most judgments relate to the obligation to provide accessibility.

The Federal Administrative Court has ruled that the necessary degree of accessibility in the planning of railway stations is sufficiently specified by § 2 (3) of the Railway Construction and Operating. According to this, railway stations with an average of less than 1,000 passengers per day must only be equipped with barrier-free access in acute cases of need (file number 9 C 1.05).

According to a decision by the Berlin-Brandenburg State Social Court, authorities must deliver documents barrier-free, in order for visually impaired people to read them independently (file number L 18 AS 2413/12 B ER). By contrast, the Higher Administrative Court of Rhineland-Palatinate considers a notice to be announced and thus valid if it has been delivered to visually impaired persons in the usual written form, especially if it can be assumed that another person can read the notice to the visually impaired person (file number 7 A 10286/12).

§ 2 Railway Construction and Operating Regulation

(...)

3. The provisions of this Regulation shall be applied in such a way as to enable disabled persons, the elderly, children and other persons with reduced mobility to use the railway installations and rolling stock without particular difficulty. To this end the railways should be obliged to draw up programmes for the planning of railway installations and rolling stock with the aim of achieving the greatest possible accessibility for their use […] the competent supervisory authorities may allow exceptions to sentences 2 and 3.

(…)

1.2.1.2.2.4. Implementation

The implementation of the BGG is difficult to measure. The most obvious measure of its implementation is the progressing barrier-free accessibility in society.

In autumn 2016, for example, the Deutsche Bahn stated that 77% of the 5,400 railway stations

operated by DB in Germany could be reached without stairs. 59% of the stations have an optimised platform height so that people with walking disabilities can board trains without assistance. 51% of the stations also have a guidance system for people with visual or hearing impairments.

However, a study by the University of Kassel, commissioned by the Federal Ministry of Labour and Social Affairs, found that the real weakness of the BGG is its lack of implementation and the fact that it is unknown to people with disabilities.

"In principle, the BGG is suitable for ensuring the equality of people with disabilities in the area of public law and the federal administration. In practice, however, there are sometimes uncertainties in the interpretation of the law and problems in its application, although the law as a whole is still too little applied and has too little effect; in some cases there are gaps in the regulations." Draft law for the further development of the BGG, 09 March 2016.

1.2.1.2.2.5. State Equality Acts

The Länder have transposed the BGG into Länder law. In the following, you may find a list of respective Acts on Equality of People with Disabilities, including a linking to the legal documents as well as data of their entry into force and eventually their last changes in German.

Federal State Name of the Act Date

Baden – Wuerttemberg

Landesgesetz zur Gleichstellung von Menschen mit Behinderungen (L-BGG) 01.06.2005

Novellierung: 01.01.2015

Latest Amendment: 17. Dezember 2014

Bavaria

Bayerisches Gesetz zur Gleichstellung, Integration und Teilhabe von Menschen mit Behinderung (BayBGG)

09.07.2003

Latest Amendment: 26.03.2019

Next to the UN Convention on the Rights of Persons with Disabilities (CRPD), a monitoring body has been established. Its functions are exercised by the German Institute for Human Rights. Among other things, the Institute supports the Federal States in implementing actual equal treatment of people with disabilities. For example, an expertise to the Land Berlin provided advice on how the UN Convention could be better incorporated into Länder law and into the Federal Equality Act.

Berlin

Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung (LGBG) 17.05.1999

Novellierung: 28.09.2006

Latest Amendment: 29.12.2010

Brandenburg

Gesetz des Landes Brandenburg zur Gleichstellung von Menschen mit Behinderung (BbgBGG) 20.03.2003

Novellierung on 13.02.2013

Latest Amendment: 18.12.2018

Bremen

Bremisches Gesetz zur Gleichstellung von Menschen mit Behinderung (BREMBGG) 24.12.2003.

Zuletzt geändert: 02.08.2016

Hamburg

Hamburgisches Gesetz zur Gleichstellung behinderter Menschen (HmbGGbM)

21.03.2005

Latest Amendment: 21.02.2019

Hessia

Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen (HesBGG) 24.12.2004

Latest Amendment: 13.12.2012

Mecklenburg – Western Pomerania

Gesetz zur Gleichstellung, gleichberechtigten Teilhabe und Integration von Menschen mit Behinderungen (LBGG M-V) 01.08.2006

Latest Amendment: 07.02.2019

Lower Saxony

Niedersächsisches Behindertengleichstellungsgesetz (NBGG) 01.01.2008

Latest Amendment: 25.10.2018

North Rhine- Westphalia

Gesetz des Landes Nordrhein-Westfalen zur Gleichstellung von Menschen mit Behinderung (BGG NRW) 01.01.2004

Latest Amendment: 01.09.2018

Rhineland – Palatinate

Landesgesetz zur Gleichstellung behinderter Menschen (LGGBehM)

01.01.2003

Saarland

Gesetz Nr. 1541 zur Gleichstellung von Menschen mit Behinderungen im Saarland (SBGG) 19.12.2003

Latest Amendment: 15.07.2015

Saxony

Gesetz zur Verbesserung der Integration von Menschen mit Behinderungen im Freistaat Sachsen (SächsIntegrG) im Gesetz zur Verbesserung des selbstbestimmten Handelns von Menschen mit Behinderung im Freistaat Sachsen 26.06.2004

Latest Amendment: 14.07.2005

Gesetz des Landes Sachsen-Anhalt zur Gleichstellung von Menschen mit Behinderungen (BGG LSA) 20.11.2001

Neufassung 28.12.2010

Latest Amendment: 06.05.2019

Schleswig – Holstein

Gesetz zur Gleichstellung von Menschen mit Behinderung in Schleswig – Holstein (LBGG) 21.12.2002

Latest Amendment: 02.04.2019

Thuringia

Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen (ThürGIG) 24.12.2005

Latest Amendment: 18.11.2010

1.2.1.3. Participation Acts of the Federal States

Three Federal States have already passed their own Participation Acts in order to strengthen the social participation and integration of people with a migration background. These include Berlin, North Rhine-Westphalia and Baden-Wuerttemberg. The following provides an overview of the individual Participation Acts and their content and examines whether Positive Action measures play a role in the Acts or whether the Acts themselves rather represent Positive Action.

1.2.1.3.1. Participation and Integration Act of the Land Berlin

The "Working Group on Participation", set up by the Berlin Advisory Council for Integration, presented a report in 2009, on the basis of which the Advisory Council recommended the drafting of a Participation Act. The Act was developed and entered into force in December 2010, thus pioneering the field of State Participation Acts. According to § 1, the purpose of the law is to strengthen equal rights for people with migrant background and to eliminate discrimination. In order to make integration successful, it should "offer the people with a migration background an opportunity to participate". The second major objective was to put the institutions of integration policy on a legal basis.

In Berlin, the amount of people with migrant background was about 28% in 2016. In total, almost 991,000 people with a migration background live in Berlin. About 427,000 of those have the German citizenship. More information can be found in the report "Population and Employment: Population with Migration Background" published by the Federal Statistical Office from 2016.

The Act obliges the Berlin administration, including all authorities, corporations, institutions, foundations, and state-owned companies. It also applies if the state holds or establishes legal entities under private law.

Positive Action is not explicitly mentioned in the Act. § 4 (4) formulates the goal of increasing the proportion of people with a migration background in public service. However, the wording used there does not justify a concrete practice of preferential employment on the basis of a migration background. The Migration Council therefore demanded the formulation: "Positive Action under the AGG must be implemented here."

The Senate's statement on the Act reads that "The establishment of a quota and the inclusion of regulations on Positive Action under the AGG have already been extensively discussed during the drafting phase of the Act and have been rejected on the basis of legal and fundamental considerations".

Nevertheless, § 4 (4) and (5) aim at strengthening the employment of people with a migration background. Subsection 4 aims at increasing the proportion of employees with a migration background according to their proportion in society. This wording indicates a "soft" target and thus represents a form of Positive Action. Subsection 5 states that "the Senate shall set targets for increasing the proportion (...)".

Each district office is free to decide whether it wants to apply Positive Action measures and to which extent they should be applied. In its statement on the implementation of the PartIntG, the Tempelhof-Schöneberg District Office states: "[The overall strategy for intercultural opening] comprises a kind of catalogue of measures which the individual offices and departments can use to promote their own intercultural opening in accordance with individual needs and prerequisites and also to set different priorities."

1.2.1.3.2. Act on the Promotion of Participation in Society and Integration of North Rhine-Westphalia

The Participation and Integration Act by the State of North Rhine-Westphalia entered into force in the beginning of 2012, after the first application for such an Act was brought in 2004. The Act provides a binding basis for promoting participation and integration and is intended to secure and improve the integration policy infrastructure in North Rhine-Westphalia. In § 1, it mentions nine goals, such as combating racism and discrimination against individual groups and further intercultural opening of the state administration.

The Act enabled the creation of municipal integration centres in all 54 independent towns and districts in the state and provided the municipalities with financial resources, in the form of the integration allowance, to strengthen their integration work.

The Act does not name any Positive Action measures, nor does the explanatory memorandum to the Act contain any reference to considering or including Positive Action measures. The same applies to the report published in 2016. There is also no reference to the AGG.

The Landtag (State parliament) declared in the explanatory memorandum to § 1 of the law: "The aim is to increase the proportion of people with a migration background in public service and to promote the intercultural competence of state employees. The public service is to be further developed with a corresponding catalogue of measures. It should reflect the changed social reality in North Rhine-Westphalia" (quoted from the report, p. 41). However, the draft does not provide more detailed information on the aforementioned catalogue of measures, on the procedure, the planning of the measures, or a more precise presentation of possible measures.

In 2016, the number of people with a migration background in North Rhine-Westphalia was about 4.8 million, which is about 27.2% of the State population. Slightly more than half of them have the German citizenship. More information is available on the Federal Statistical Office's homepage.

1.2.1.3.3. Participation and Integration Act of Baden- Wuerttemberg

The Participation and Integration Act of Baden-Wuerttemberg (PartIntG) was passed by the Landtag in Baden-Wuerttemberg on November 25th 2015. It was drafted as part of several laws in order to improve equal opportunities and the participation of people with a migration background in Baden-Wuerttemberg.

Purpose of the PartIntG is therefore to enable the equal participation of people with and without a migration background in all areas of social life, both across ethnic and social borders, and to realise the peaceful cohabitation of different cultures.

In Baden-Wuerttemberg, the proportion of people with a migration background was 29.7 % in 2016. A total of almost 3 million people with a migration background live there, 1.7 million of who are German citizens. According to the statistics, Baden-Wuerttemberg thus has the largest number of people with a migration background.

The authorities, universities and courts as well as all corporations, institutions and foundations under public law in the state of Baden-Württemberg are bound by the Act. In addition, private employers are also obliged to comply with § 8 PartIntG.

Positive Action is not explicitly mentioned in the Act itself. A legal opinion, which was intended to assess the legal framework in advance, concluded that Positive Action measures in the form of quotas were even unconstitutional.

The regional government concluded that the formal legal equality of people with a migrant background in Baden-Wuerttemberg is not sufficient to create actual equal opportunities. Therefore, this Act aims at increasing the employment proportion of people with a migration background.

In this sense § 6 PartIntG states that the proportion of people with a migrant background in the state administration should reflect the proportion of people with a migration background in the country's total population. This constitutes a target quota.

Also § 7 PartIntG pursues such a target quota. Bodies in which the State has a right of nomination should also be staffed to an appropriate extent by people with a migration background. This means that committees should proportionately reflect the diversity of the population and may only neglect this obligation in exceptional cases.

Apart from these targets, the Act does not contain any further measures to specifically promote the participation of people with a migration background.

1.3. Positive Action in Other Countries

Depending on the respective country and national experiences, the target group and implementation of Positive Action can differentiate.

Following, you may find information on the concept of "Affirmative Action" in the United States, as well as information on the application of Positive Action in selected EU countries.

The PAMECUS study, which was initiated by the EU Commission, provides information on the international view of Positive Action. In addition to other EU countries, it also describes the situation in the USA, Canada and South Africa.

Affirmative Action in the United States

1. Affirmative Action in the United States

The American society was constructed on a foundation of social inequality. Naturally, this inequality lent itself to a social hierarchy predicated on perceptions of race. At its most extreme, this social system created race-based slavery. The abolition of slavery, however, did not solve racial discrimination.

Persisting to this day, discriminatory practices are still present in education, employment, law enforcement and many private interactions. For this reason, Affirmative Action has been utilized in an attempt to remedy discriminatory practices that have prevented equal opportunities from being made available to historically marginalized communities (such as Native Americans, black Americans, Latinas and women).

This dossier will provide an overview of how Affirmative Action has been implemented, how it has developed, and how it might change in the future. It proceeds by providing historical context, then an overview of important legislation passed by congress or created by executive order, and then describes how Affirmative Action functions in practice.

Affirmative Action in the US is an active effort to improve opportunities for minorities and women, especially in employment and education.

1.1. Historical Context: Segregation and Inequality

Affirmative action attempts to remedy the institutionalized hurdles that many non-white Americans encounter. It was introduced to create legal standards to help circumvent discriminatory or preferential practices. Starting in the 1880's, segregation separated white from black Americans. Institutions such as schools, jails, hospitals, transportation and neighbourhoods all suffered from segregation. Many states reached this end by enacting Jim Crow laws, which formally established segregation.

As mentioned above, the most prevalent form of discrimination against People of Color were Jim Crow laws, which segregated white Americans from black Americans. The National Association for the Advancement of Colored People (NAACP) campaigned to eliminate this legal discrimination. It was not until Brown v. Board of Education that segregation was deemed unconstitutional by the Supreme Court. In this case, the court declared that "separate but equal" is fundamentally unequal, meaning that it is a violation of Fourteenth Amendment rights. This provided the foundation for legislation to be passed, creating formal, legal equality. Unfortunately, competing ideologies have given rise to much debate about how affirmative action should be implemented going forward.

1.1.1. Formal Equality and the Civil Rights Act of 1964

In a series of speeches over the summer of 1963, President Kennedy laid the groundwork for a civil rights bill following mass protests in African American communities and subsequent violent responses. In November of 1963, shortly after committing to push the civil rights act through, he was assassinated. While Kennedy had consistently championed equal rights, little was known about the commitment of his successor, Lyndon B. Johnson. Despite this uncertainty, any turmoil within the Civil Rights Movement caused by Kennedy's assassination was brief. On November 27th, Johnson called for the passage of the civil rights act as a monument to Kennedy.

Finally, in 1964 Congress passed the respective Public Law. The provisions of this civil rights act forbade discrimination on the basis of sex as well as race in hiring, promoting and dismissals. In the final legislation, Section 703 (a) made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin." The final bill also allowed sex to be a consideration when sex is a bona fide occupational qualification for the job. Title VII of the Act created the Equal Employment Opportunity Commission (EEOC) to implement the law.

It outlawed segregation in all publicly supported facilities and certain establishments serving the general public. It strengthened protections of equality in voting and in education. It required policies of racial equity in every institution that accepted even a dollar of federal assistance.

1.1.2. Current Debate

Affirmative action in the United States began during the 1960s. It was supposed to be a temporary measure to make up for widespread discrimination against African Americans and other minorities, but since the measure is still in place, many people have started to wonder when it will end. The chronology of affirmative action can be framed in three phases: 1st the pre-emergence phase that ended with the adoption of legislative action in 1964 and 1965, 2nd the emergence phase of affirmative action as public policy with the adoption of executive orders

in 1964, and 3rd the destabilization and reform period that ensued in 1978. Due to the clear assault on affirmative action in university admissions dating back to the Regents of the University of California v. Bakke decision in 1978, the emergence phase was weakened and coexisted with Bakke to the period of destabilization and reform.

The reform stage of affirmative action started with Fisher v. University of Texas case in 2013. Many have raised complaints that the current systems of affirmative action are doing a disservice to society. Supporters of affirmative action often hope for an expansion and strengthening of affirmative action policies, while opponents want to eradicate it altogether.

The concept of affirmative action has become a political issue between right and left, with Republicans generally calling for its repeal and Democrats supporting its improvement and implementation.

Affirmative action nowadays is more than a simple measure. It is a topic of debate in politics creating opponents and supporters.

1.1.2.1.Opponents of Affirmative Action

Affirmative action detractors believe that affirmative action may be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Likewise, the programs may be illegal under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, colour or national origin by recipients of federal financial assistance. They also claim that affirmative action policies lower standards and make students less accountable. If standards for test scores, grade point averages, etc. are lowered for underrepresented groups, it is argued that these students will only strive to meet the lower requirements. Another argument made is that affirmative action policies do not necessarily help economically disadvantaged students. A study by the Hoover Institution found that affirmative action tends to benefit middle- and upper-class minorities.

After empowering Republicans, the Trump administration is preparing to redirect the resources of the Justice Department's civil rights division toward investigating and suing universities over affirmative action admissions policies deemed to discriminate against white applicants, according to a document obtained by The New York Times. The document, an internal announcement to the civil rights division, seeks current lawyers interested in working for a new project on "investigations and possible litigation related to intentional race-based discrimination in college and university admissions."

1.1.2.2. Supporters of Affirmative Action

Supporters of affirmative action argue that these measures create more equal opportunities for minority groups than would otherwise be available. Systemic racism has affected the everyday lives of many People of Color. This makes the playing field unequal and can add challenges to academic or work lives of non-white citizens. For example, it has been discovered that many teachers will grade the work of non-white students more harshly than white students. Thus, supporters of affirmative action argue for its necessity so that such discrepancies can be accounted for.

The American Civil Liberties Union provides an overview of supporters of Affirmative Action, including the Fortune 500 companies, the U.S. military and many more.

1.2.Legislation

In the workplace, employers who contract with the government or who otherwise receive federal funds are required to document their affirmative action practices and metrics. Affirmative action is also a remedy, under the Civil Rights Act of 1964, where a court finds that an employer has intentionally engaged in discriminatory practices. The Equal Employment Opportunity Commission, created by Title VII of the Civil Rights Act of 1964 enforces the following employment anti-discrimination laws: Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 (race, colour, religion, national origin), Age Discrimination in Employment Act of 1967 (ADEA) (people of a certain age), Rehabilitation Act of 1973, Sections 501 and 505 (people with disabilities), Titles I and V of the Americans with Disabilities Act of 1990 (ADA), and the Civil Rights Act of 1991.

Affirmative action required by court order is authorized by the 1964 Civil Rights Act, although the act does not specifically describe the kinds of preferential programs that have often been developed, and it requires that a finding of discrimination be made before a court may order an affirmative action remedy. Standards for the review of court-ordered preferential affirmative action were articulated by the Supreme Court in 1984 and 1987 respectively in Firefighters Local v. Stotts and United States v. Paradise. Guidelines for permissible preferential affirmative action embodied in consent decrees are quite similar to those for voluntary affirmative action and were outlined in 1986 in Firefighters v. City of Cleveland. Affirmative action can also be adopted voluntarily, circumventing the need for legal action.

Educational institutions which have acted discriminatorily in the past must take affirmative action as a remedy. The Office of Civil Rights enforces the following education anti-discrimination laws: Title VI of the Civil Rights Act of 1964, Age Discrimination Act of 1975 (people of a certain age), Title IX of the Educational Amendments of 1972 (gender), Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act Section 9525 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, equal access for outside community groups to school facilities during non-school hours). These examples have played a part in the development of law and precedent.

1.2.1. The Development of Law and Precedence

The evolution of affirmative action as case law is as follows:

Plessy v. Ferguson (1896)

In 1896, the U.S. Supreme Court handed down a decision that ultimately gave validation to a separate but equal system, which was basically a legal form of segregation. In the minds of many legal scholars, black and white, this doctrine went right to the heart of institutionalized racism in the United States. In the landmark case Plessy v. Ferguson, the court upheld the Louisiana Separate Car Law, which required separate but equal railroad car facilities for blacks and whites.

Regents of University of California v. Bakke (1978)

In 1978, the first affirmative action case that properly came before the U.S. Supreme Court was the Bakke case, which led to the landmark decision that prohibited fixed quota in college admissions but affirmed the constitutionality of considering race as a plus factor. Allan

Bakke, whose application for admission was twice rejected, sued the Medical School of the University of California at Davis on the basis of the Equal Protection Clause of the Fourteenth Amendment and 601 of Title VI of the Civil Rights Act of 1964, which provides that "no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance". The university had a special admission program under which 16 of 100 positions in the class were reserved for disadvantaged minority students. Bakke, a Caucasian student, sued the medical school for discrimination when he was twice denied admission, despite entrance scores significantly higher than those of other applicants accepted into the second pool. Most significantly, the court upheld the general right of schools to consider race as one factor in their admission process. The basic principle of the Bakke decision was that, while schools cannot outright exclude anyone on the basis of race, they can use race as a "plus" factor that can be weighed in an individual's admission along with other salient factors. Academics and universities "may not set aside a fixed quota of seats in each class for minority group members." (Blake, 2012 and Savage cited in O.Moen, 2008)

Martin v. Wilks (1989)

This case involved a group of white firefighters that sued the city of Birmingham, Alabama, claiming that a consent decree which the city entered into with African American firefighters resulted in discrimination in the promotions procedure. The Supreme Court decided that the white firefighters could challenge the consent decree even though they knew about the earlier lawsuit and could have gotten involved then.

Grutter v. Bollinger (2003)

Twenty-five years later, the Supreme Court again upheld the general right of schools to consider race in their admissions policies. In Grutter, the University of Michigan Law School used race as a "plus" factor in its admission process, to ensure the enrollment of a "critical mass" of students of minority groups to achieve the educational benefits of a diverse student body. A Caucasian student sued the school, arguing racial discrimination played a role in her being denied admission, but the Supreme Court upheld Michigan's admissions policy. The law school was found to use race as a "plus" factor only, as one of a variety of positive admissions qualities. Such efforts did not violate the Equal Protection Clause because they narrowly considered race based on a compelling need to obtain educational benefit from diversity and, unlike in Bakke, the policy did not outright exclude any group or "preserve" a certain number of positions—the defamed "quota" system—on the basis of race alone.

Parents v. Seattle (2007) and Meredith v. Jefferson (2007)

The court decided by a 5-4 margin that public school systems cannot seek to maintain integration through measures that consider a student's race, on constitutional grounds. The opinion from Chief Justice John Roberts invalidated moves in Seattle and Louisville that ensured racial diversity. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Roberts said. Justice Anthony Kennedy did not join with Roberts and three other justices in parts of the opinion. "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue," Kennedy said.

Fisher v. University of Texas (2013)

These pivotal Supreme Court cases have given rise to legislation on affirmative action from both the federal and state governments. Naturally, the Supreme Court's position on this subject has changed with time.

1.2.1.1. Federal Statutory Prohibition of Discrimination

The most important provisions prohibiting certain forms of discrimination are as follows:

Equal Pay Act of 1963 – This act, part of the Fair Labor Standards Act, requires that men and women performing equal work must receive equal pay.

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, colour, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations. It forbids discrimination in any aspect of employment, including hiring and firing, compensation, assignment, or classification of employees, transfer, promotion, layoff, or recall, job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits, pay, retirement plans, and disability leave and other terms and conditions of employment.

There is a range of federal provisions prohibiting discrimination, such as Title VII of the Civil Rights Act of 1964.

Executive Order 11246, signed in 1965, not only bans discrimination, but requires affirmative action on the part of federal government contractors and requires contractors to submit a written affirmative action plan. Executive Order 11141 prohibits discrimination on the basis of age by government contractors. Executive Order 11914 bars discrimination against the handicapped in federally assisted programs.

Age Discrimination in Employment Act of 1967– This act prohibits discrimination against individuals 40 years of age and over and applies to employers of 25 or more.

Title IX Sex Discrimination – Title IX of the Education Act amendments of 1972 prohibits discrimination against students on the basis of sex in educational programs receiving federal funds.

Rehabilitation Act – The Rehabilitation Act of 1973, sections 503 and 504, applies to government contractors and subcontractors as well as to those receiving government grants. The Act prohibits discrimination based on physical and mental handicaps and mandates affirmative action to employ qualified handicapped persons. Alcoholism, drug addiction, and mental illness are included under the Act's definition of handicap.

Vietnam Era Veterans Readjustment Assistance Act of 1974 (– This federal statute, effective December 3, 1974, requires organizations holding federal contracts of $10,000 or more to take "affirmative action to hire and advance in employment disabled and Vietnam-era veterans."

In 1978, the Pregnancy Discrimination Act amended Title VII and clarified that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work.

Older Workers Benefit Protection Act – This federal statute, effective April 14, 1991, or June 1, 1992 if covered by a collective bargaining agreement, or October 16, 1992 for local governmental entities requiring ordinance changes, prohibits age-based discrimination in the structure and administration of employee benefit plans unless justified by costs incurred.

The 1991 Civil Rights Act – This federal statute, signed into law on November 21, 1991, provided technical corrections to court precedent in the area of civil rights. It capped damages at $300,000 and expanded the applicability of compensatory and punitive damages to areas

previously excluded. It allowed jury trials in these cases. It prohibits race norming of test scores and requires employers.) to "demonstrate" challenged practices as job related.

Americans with Disabilities Act of 1990 – This federal statute, effective July 26, 1992, prohibits discrimination against a qualified individual with a disability in regard to job application procedures, hiring, advancement or discharge, compensation, training and other terms, conditions and privileges of employment.

1.2.1.2. States Restricting Affirmative Action

Criticism of affirmative action has been constant since the Supreme Court first articulated its scope. By the 1990s, opponents began to press the court to reverse its precedents both in employment and in higher education admission policies. Supporters of affirmative action openly worried that the court would place severe restrictions on its implementation. For example, in 1997, the court was scheduled to hear an appeal involving a New Jersey schoolteacher who claimed she had suffered discrimination because of an improper affirmative action plan (Taxman v. Piscataway Township Bd. of Educ). Weeks before oral arguments, supporters of affirmative action made the schoolteacher a financial settlement in return for her dismissing the case. They admitted that this was hardly a victory, but supporters pointed to troubling developments in the court's stance.

At the moment, a number of states have already banned race and ethnicity based affirmative action or ended the practice at leading public universities. Eight states (California, Washington, Florida, Michigan, Nebraska, Arizona, New Hampshire, and Oklahoma) currently ban consideration of race or ethnicity in admissions at all public institutions, and two others (Georgia and Texas) have restrictions on the practice at leading public universities. Together, the eight states with complete bans, educate 29 percent of all high school students in the United States.

In certain states of the US, there is a lot of criticism towards affirmative action. As a result, some public institutions stop implementing these measures.

1.2.1.2.1. Examples of Affirmative Action being Restricted

Illinois Human Rights Act of 1980

This state law broadens federal law to prevent discrimination based upon marital status, unfavourable discharge from military service, and ancestry.

Oklahoma - State Question 759 (2012)

Voters approved legislative referendum prohibiting the state from granting preferential treatment to or discriminating against any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education, or public contracting.

New Hampshire - House Bill 0623 (2011)

In 2011, New Hampshire's state legislature passed House Bill 623, prohibiting "preferences in recruiting, hiring, promotion, or admission by state agencies, the university system, the community college system and the postsecondary education system" on the basis of "race, sex, national origin, religion, or sexual orientation."

Arizona - Proposition 107 (2010)

Voters approved a measure that the Legislature referred to the ballot, prohibiting the state from granting preferential treatment to or discriminating against any individual or group on the basis of race, sex, colour, ethnicity or national origin in public employment, education and contracting. The initiative is similar to those seen previously in California, Colorado, Michigan, Nebraska and Washington, but this is the first time a state legislature has put this question on the ballot. In the other instances, the ballot measure was a citizen initiative.

Nebraska - Initiative 424 (2008)

Nebraska's ballot measure, Initiative 424, was passed by voters. The initiative eliminates affirmative action programs at state colleges and universities.

Washington - Initiative 200 (1998); California - Proposition 209 (1996)

California and Washington passed similar laws that prohibit state and local agencies from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in public education, public employment or public contracting. These state initiatives have eliminated affirmative action programs at all public colleges and universities in California and Washington.

California - "Four Percent Plan" (1999)

This plan guarantees that students who graduate in the top four percent state-wide or in the top four percent of their high school class, and who meet various subject and testing requirements, will be admitted to at least one school in the University of California system. The students are not guaranteed admission to the institution of their choice. Beginning in the fall of 2012, the plan is expanding to include graduates in the top nine percent of their class, or in the top nine percent state-wide.

Florida - Executive Order 99-281, “One Florida" (1999)

In 1999, Florida Governor, Jeb Bush, issued Executive Order 99-281, known as the “One Florida” initiative. The Executive Order prohibits the use of affirmative action in state schools' admissions policies, as well as in government employment and state contracting. The One Florida initiative was designed to replace race-based admissions with a set of reforms in the P-12 system that will better prepare all students, regardless of race or ethnicity, for college success. These reforms include the creation of the Talented Twenty program, which guarantees all high school students who finish in the top 20 percent of their class acceptance to one of Florida's 11 public colleges and universities. At the same time, One Florida significantly increased funding for needs-based financial aid. The One Florida initiative also created a partnership between Florida and the College Board to improve college readiness. The partnership has increased the number of students, particularly low-income and minority students, enrolling in and passing Advanced Placement (AP) classes.

Texas - HB 588, “10 Percent Plan” (1997)

In response to a federal appeals court's ruling in Hopwood vs. Texas that ended affirmative action policies at Texas public colleges and universities, legislators passed House Bill 588. Popularly referred to as the "10 Percent Plan," the legislation requires the Texas higher education system to admit all students who finish in the top 10 percent of their high school graduating class to the public institution of their choice. The law delineates 18 academic and socioeconomic criteria that state colleges and universities can consider when making admission decisions for students who do not fall within the top ten percent of their class. In 2009, the legislature passed Senate Bill 175, limiting the percentage of students accepted under the 10 Percent Plan to 75 percent of an institution’s incoming first year resident class. The University

of Texas-Austin was projected to have to fill 100 percent of its 2013 class with students from the 10 Percent Plan. SB 175 places a cap on the percent plan to allow some institutional flexibility in admission decisions.

California - SP-1 (1995)

In July 1995, the Regents of the University of California (UC) voted to pass resolution SP-1, a policy eliminating the consideration of race, ethnicity and gender in admission decisions for schools in the UC system. In the years immediately following the passage of SP-1, the numbers of underrepresented minorities (African Americans, American Indians, and Latinx) admitted to and enrolling in the UC system dropped. Since 1998, however, the number of underrepresented minorities on all UC campuses, including the most selective campuses, has been steadily increasing. This resolution was later rescinded in 2001 by the Regents.

Michigan - Proposal 2 (2006)

Proposal 2 prohibits state and local agencies from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in public education, public employment or public contracting. In 2011, a three-panel federal appeals court ruled that Michigan's Proposal 2 is unconstitutional, thus overturning the ban on affirmative action in college admissions in Michigan. In 2012, this ruling was upheld by the full 6th U.S. Circuit Court of Appeals. In October 2013, the U.S. Supreme Court heard arguments on Proposition 2 and in April 2014 ruled in a 6-2 decision that voters may prohibit affirmative action in public universities, thus overturning the lower court's decision and upholding Proposition 2.

1.2.1.3. The Changing Position of the U.S. Supreme Court

The changing attitude of the U.S. Supreme Court toward affirmative action began with the Fisher case. In 1997, the Texas legislature enacted a law requiring the University of Texas to admit all high school seniors who ranked in the top ten percent of their high school classes. After finding differences between the racial and ethnic makeup of the university's undergraduate population and the state's population, the University of Texas decided to modify its race-neutral admissions policy. The new policy continued to admit all in-state students who graduated in the top ten percent of their high school classes. For the remainder of the in-state freshman class, the university would consider race as a factor in admission. Transpiring soon after Fisher v. Texas were Hopwood v. Texas and Grutter v. Bollinger, which both assessed the constitutionality of race as a factor in college admissions.

1.2.1.3.1. Fisher v. Texas

Abigail N. Fisher, a Caucasian female, applied for undergraduate admission to the University of Texas in 2008. Fisher was not in the top ten percent of her class, so she competed for admission with other non-top ten percent in-state applicants. The University of Texas denied Fisher's application.

In the very important Fisher case, the court ruled that the race-conscious admission program of the University of Texas was admissible.

Fisher filed suit against the university and other related defendants, claiming that the University of Texas's use of race as a consideration in admission decisions was in violation of the Equal Protection Clause of the Fourteenth Amendment. The university argued that its use of race was

a narrowly tailored means of pursuing greater diversity. The district court decided in favour of the University of Texas, and the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Fisher appealed the appellate court's decision.

Justice Anthony M. Kennedy delivered the opinion for the 4-3 majority that the University of Texas's use of race as a consideration in the admissions process did not violate the Equal Protection Clause of the Fourteenth Amendment. The court held that the University of Texas's use of race as a factor in the holistic review used to fill the spots remaining after the Top Ten Percent Plan was narrowly tailored to serve a compelling state interest. Previous precedent had established that educational diversity is a compelling interest as long as it is expressed as a concrete and precise goal that is neither a quota of minority students nor an amorphous idea of diversity.

1.2.1.3.2. Constitutionality of Race Aware Practices

In 1995, Jennifer Gratz was denied admission to the University of Michigan undergraduate program, and a year later Barbara Grutter was rejected from the University of Michigan Law School. Both plaintiffs argued that their academic credentials and extracurricular activities should have awarded them a spot at the University. They claimed they were subjected to a form of reverse discrimination due to the university's affirmative action policies.

Over mechanized systems trying to include race in the admission decision were ruled unconstitutional.

This decision among others points out, that affirmative action sometimes occurs in grey areas and must be handled with caution.

In 2003, the U.S. Supreme Court ruled in Gratz v. Bollinger link: that the point system used by the University of Michigan for undergraduate ad (external missions was unconstitutional. The admissions policy was based on 150 points, and it awarded points based on items such as race (20 points), athletic ability (20 points), depth of essay (up to 3 points), leadership and service (up to 5 points) and personal achievement (up to 5 points). In the majority decision, Chief Justice Rehnquist stated that the University of Michigan had violated the Equal Protection Clause of the Fourteenth Amendment by using an overly mechanized system as a way to include race in admission decisions.

Grutter v. Bollinger was also decided in 2003. In a 5-4 vote, the U.S. Supreme Court narrowly upheld the decision to allow colleges and universities to use race as a component in their admissions policies by ruling in favour of the University of Michigan's law school admissions policy.

The Gratz v. Bollinger and Grutter v. Bollinger rulings are regarded as the most important since the Bakke decision. Most colleges and universities had previously followed the guidelines set forth by Bakke, stating that diversity is an integral component to a successful institution. The Supreme Court's decisions in the landmark University of Michigan cases clarified this grey area and provided definitive guidance for affirmative action policies. The 2003 rulings also abrogated the Hopwood v. Texas ruling, thus permitting colleges in Texas and other states under the Fifth Circuit jurisdiction to reinstate affirmative action policies.

1.2.1.3.3. Hopwood v. Texas

In a direct challenge to the Bakke decision, the U.S. Court of Appeals ruled in 1996 in Hopwood v. Texas that race could not be a factor in admission decisions. In 1992, Cheryl Hopwood

applied for admission to the University of Texas School of Law. She possessed an undergraduate GPA of 3.8 and achieved a score of 160 on the LSAT. When these accomplishments were combined, Hopwood's scores placed her in the university's 'presumptive admit' category of applicants. Despite these qualifications, her application was denied. She brought suit against the state of Texas because of the 61 students of color who were accepted that same year. She held a better GPA or LSAT score than all but 9 of them. Similarly, in 2001 in Johnson v. University of Georgia, the U.S. Court of Appeals held that the university's admission policy, which used race as a factor in admission decisions, violated the Equal Protection Clause. The court ruled that adding a fixed number of points to the admission score of every non-white applicant is not an appropriate mechanism for achieving diversity.

1.2.1.3.4. The Grutter Decision

In the Grutter decision which upheld the University of Michigan Law School's consideration of an applicant's race in order to achieve a "critical mass" of underrepresented minorities, the Supreme Court also noted: "government use of race must have a logical end point." The court further predicted, "we expect that 25 years from now, the use of racial preferences will no longer be necessary.

1.3. Affirmative Action in Practice

In its tumultuous 56-year history, affirmative action has been both praised and criticized as an answer to racial inequality. The term "affirmative action" was first introduced by President Kennedy in 1961 as a method of redressing discrimination that had persisted in spite of civil rights laws and constitutional guarantees. It was developed and enforced for the first time by President Johnson. "This is the next and more profound stage of the battle for civil rights," Johnson asserted. "We seek… not just equality as a right and a theory, but equality as a fact and as a result."

Affirmative action involves treating a group of people differently to account for the obstacles that discriminatory practices present. According to John Skrentny, affirmative action involves particular practices, policies and laws which abide by 4 general rules: (1) a requirement that employers see in their everyday hiring and promoting practices group differences and specifically race as real (rather than unreal or irrelevant), (2) an emphasis on hiring large percentages of minorities (rather than believing that hiring individual minorities is sufficient), (3) de-emphasis or re-evaluation of the previously accepted standards of merit, and (4) an overriding concern with representation, utilization, or employment of minorities, rather than stopping harmful or bigoted acts of discrimination.

Affirmative action was understood to comprise of positive steps to insure genuinely equal protection. By identifying discriminatory preferences long entrenched, by eliminating them, and where feasible, by redressing them, those seeking the non-discriminatory treatment of all persons of all races should proudly raise the banner of affirmative action. Affirmative action required multiple executive orders and other legislation to be successfully implemented.

1.3.1. Implementation of Affirmative Action

Initially, the Civil Rights Act did not provide criminal penalties for employers that discriminated, nor did the civil remedies established by the act include compensation for pain

and suffering or punitive damages. Rather, the Act sought to establish a conciliation process by which victims would be restored to the situation they would have had in the absence of discrimination. Likewise, after 1965, federal contractors had been subject to President Lyndon Johnson's Executive Order 11246, requiring them to take affirmative action, ensuring they were not engaging in discriminatory practices. This executive order assigned to the Secretary of Labor the job of specifying rules of implementation. Simultaneously, as the federal courts were enforcing the Civil Rights Act against discriminatory companies, unions, and other institutions, the Department of Labor mounted an ad hoc attack on the construction industry by cajoling, threatening, negotiating, and generally strong-arming reluctant construction firms into a series of region-wide plans in which they committed themselves to numerical hiring goals. Through these contractor commitments, the Department of Labor could indirectly pressure recalcitrant labor unions who supplied the employees at job site.

While the occasional court case and government initiative made the news and stirred some controversy, affirmative action was pretty far down the list of public excitements until the autumn of 1972, when the Secretary of Labor's Revised Order No. 4, fully implementing Executive Order 11246, landed on campus by way of directives from the Department of Health, Education, and Welfare. By extending to all contractors the basic apparatus of the construction industry plans, the order imposed a one-size-fits-all system of “underutilization analyses,” goals, and timetables onto hospitals, banks, trucking companies, steel mills, printers, airlines, and on all the institutions that did business with the government.

Affirmative action typically applies to either systems of education or employment. The methods used to achieve these goals generally overlap.

1.3.1.1. Affirmative Action in Universities

In the 1978 case, Regents of the University of California v. Bakke, the U.S. Supreme Court ruled that using racial quotas in college admission decisions violated the Equal Protection Clause. The Equal Protection Clause, included in the Fourteenth Amendment to the U.S. Constitution, affirms that "no state shall deny to any person within its jurisdiction the equal protection of the laws." While this landmark decision eliminated racial quotas it did allow race to be considered as one of many admission factors for the purpose of achieving a diverse student body.

The New York Times summarized what, in their opinion, went wrong and what went right in 50 years of Affirmative Action.

Affirmative action had to be extended to apply to more groups who faced hurdles that others did not systemically encounter. Still, it was at times insufficient. Thankfully, many university systems have set positive examples by taking proactive measures to diversify their campuses.

1.3.1.1.1. Extensions and Applicability

The Fifth and Fourteenth Amendments of the U.S. Constitution have provided shelter for many cases defending against discrimination. These amendments limit the power of state and federal governments to discriminate against their employees, since their Due Process and Equal Protection Clauses require that the state treats all citizens equally. Discrimination in the private sector

The protection of discrimination under the Fifth and Fourteenth Amendment of the U.S. constitution has been extended. Currently, discrimination against sex, age and disabilities in employment is also prohibited.

was not prohibited by the Constitution, but a growing number of federal and state statutes have sought to limit it. In 1963, the Equal Pay Act amended the Fair Labor Standards Act. The Equal Pay Act does not prohibit discrimination in hiring, but it does outlaw unequal payment of wages based on sex. It also holds that if workers perform equal work in jobs requiring "equal skill, effort, and responsibility and performed under similar working conditions," they must receive equal pay. The Fair Labor Standards Act protects employees of businesses engaged in interstate commerce. The Equal Employment Opportunity Act of 1972 extended the EEOC's jurisdiction to employers with more than 15 employees, unions with more than 15 members, and federal employment activity at all levels. The new act also made it easier to bring a class-action suit. The Age Discrimination in Employment Act (ADEA) of 1967 bans discrimination on the basis of age, using language nearly identical to Title VII. Employees are protected from age discrimination once they reach the age of 40. The ADEA also contains explicit guidelines for benefit, pension, and retirement plans. The goal of the Rehabilitation Act of 1973 is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals" through antidiscrimination practices and some forms of affirmative action. The act covers federal government agencies and employers receiving more than $2,500 in federal funds. The Americans with Disabilities Act (ADA) of 1990 also bans discrimination against the disabled by state governments and employers engaged in interstate commerce. The Black Lung Act of 1969 prohibits discrimination against miners who suffer from pneumoconiosis, known as "black lung." Various nineteenth-century civil rights acts, amended in 1993, guarantee all people equal rights under the law and outline the damages available to those who bring lawsuits under the Civil Rights Act of 1964, Title VII; the Americans with Disabilities Act of 1990; and the Rehabilitation Act of 1973.

According to EEOC (Equal Employment Opportunity Commission) laws, the only companies that are required to have a written, up-to-date affirmative action plan in place are federal contractors or subcontractors who have fifty or more employees and a contract of $50,000 or more; have government bills of lading which, in any 12-month period, total $50,000 or more; serve as a depository of government funds in any amount; and is a financial institution which is an issuing and paying agent for US savings bonds and savings notes in any amount.

To remedy discriminatory actions, specific criteria must be met.

1.3.1.1.1.1. Remedying Discriminatory Practices

The current legal answer to discrimination in the United States is that remedial affirmative action is justified when the following two criteria are met:

1. The past discrimination that is to be remedied must be proven to be discrimination by the institution that is engaging in the affirmative action in question. Thus, using race-based affirmative action to remedy unproven discrimination, usually referred to as "societal discrimination," or even to remedy proven discrimination that cannot be attributed to the institution engaged in the affirmative action in question, cannot be justified. This approach was first endorsed in Bakke in 1978 and later in Wygant in 1986.

2. Racial classifications must be regarded as presumptively suspect. It does not matter whether the classifications are intended to remedy the results of prior racial discrimination or whether they are intended to foster or maintain racial discrimination. Accordingly, any use of racial classifications must satisfy a strict scrutiny analysis. It must be narrowly tailored to meet a compelling government interest, where the

presumption is that only seldom will such use of racial classifications be justified. This concept, first endorsed in Bakke in 1978, was later reaffirmed in Croson in 1987. Although the U.S. Supreme Court defends these two requirements as being either necessitated by or compatible with the Civil Rights Act of 1964 and/or the U.S. Constitution, particularly the Fourteenth Amendment, most of the arguments for these two requirements are found within the Supreme Court decisions themselves, beginning with the Bakke decision in 1978.

1.3.1.1.2. Insufficiency of Affirmative Action

Compliance with affirmative action was often insufficient.

Expectations were sometimes incredulously low, such as one project in Harlem that required only 3% black employment. Moreover, racist employers, trade unions, and city and state officials often ignored the non-discriminatory rules announced in Washington D.C.

This was particularly true in the South. In many southern cities black carpenters were hired to conform to regulations, only to be fired after the funding appeared. In other cities, they were given temporary union memberships, good for one job only. In Georgia, the governor refused to follow federal guidelines on equal relief for whites and blacks: Atlanta gave out monthly checks of more than $32 to whites, and only $19 to black recipients.

There are cases where affirmative action is simply ignored or used as a tool to receive funding. It is observable that this measure is not flawless.

1.3.1.1.3. Proactivity

Perhaps the most encouraging trend among public universities where race and ethnicity are no longer factors in admission is that, in nearly all cases, universities have been proactive in pursuing diversity on campus. As restrictions on the use of race and ethnicity in admissions are likely to spread, and as achievement gaps in higher education persist, colleges must be more active and creative in encouraging diverse enrollment. The strategies developed by universities which have been forced to end affirmative action programs offer a useful roadmap for other institutions looking to expand the set of tools used to recruit, admit, and enroll students of all backgrounds.

There are many universities that are creating “their own diversity” and are trying to overcome injustices. Click here to read an extensive article about this topic.

1.3.1.1.4. Examples in University Systems

While access to American colleges and universities was historically reserved for white middle- to upper-class males, things changed in 1965 when Executive Order No. 11246 ratified affirmative action.

The Executive Order No.11246, Section 101 was implemented

“to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency”

At the core of the debate, remains the age-old question of who should have access to college. Both Indiana University East and the University of British Colombia have implemented affirmative action policies.

1.3.1.1.4.1. Indiana University East

Because the IU East campus receives a portion of Indiana University's more than $138 million in federal contracts, it is required by federal law to develop a written affirmative action program. Federal guidelines define an affirmative action program as "a set of specific and result-oriented procedures to which a contractor commits [itself] to apply every good faith effort . . . to achieve prompt and full utilization of minorities and women, at all levels and all segments of [its] workforce where deficiencies exist." This process requires an analysis of the present quantity and quality of employment of women and minorities within the university to see if there are areas where women and minorities are considered to be under-utilized when compared to the

number of possible women and minority employment candidates in the recruitment area. If under-utilization is found, the university must use its best efforts in good faith to develop and implement procedures designed to increase the number of qualified women and minority employment candidates in the applicant pool. The principles of affirmative action require that aggressive efforts be utilized to employ and advance women and minorities in areas where they are employed in fewer numbers than is consistent with their availability in the relevant labor market. Such efforts may include specialized advertising efforts, recruitment funds, mentoring programs or other programs designed to promote the achievement of affirmative action placement goals.

1.3.1.1.4.2. University of British Columbia

Affirmative action target groups for UBC are, for the foreseeable future: members of visible or ethnic minorities; aboriginal persons; and persons with disabilities. The Department of Curriculum and Pedagogy UBC is committed to actively recruiting and hiring members of these groups to enrich the full and part-time staffing complement, and to the retention of individuals who live and work at the intersections of such diversity. In practical terms, this means that, where two or more candidates are deemed to be substantially equal, a candidate from one of the target groups takes priority over a candidate from a non-target group. While our objective, currently is to increase the employment of specific groups, there is also a desire to view diversity holistically, and, when possible, encourage hiring and retention. Positive recruiting practices should also extend to other equity-seeking groups (gay, lesbian, bisexual, transgender, queer) beyond target groups identified. Search committees ought to use LGBTQI+-positive language in ads, post ads in places likely to be seen by members of these and other communities, and exercise non-discriminatory language and procedures in interviews.

1.3.1.2. Developments in Employment

Diversity in the workforce is important. Employers have found that a diverse workforce results in benefits for businesses. Recognizing the importance of diversity for success, employers prefer to recruit at colleges with diverse student bodies. Achieving diversity on campus satisfies the twin goals of better employment opportunities for all students and directly meets businesses' demand for well-qualified, diverse workers. Diversity can increase revenue, market shares, number of customers, and ultimately, profits. It also increases employee satisfaction and productivity which results in decreased lawsuits, and increased interest in hiring.

The concept of disparate impact is essential to deciding if affirmative action policies are acceptable. Still, there are accusations of reverse discrimination. Government supported organizations are held to a higher standard in their implementation of affirmative action than private organizations without federal funding. Still, most large companies provide good examples of affirmative action.

1.3.1.2.1. Disparate Impact

The U.S. Supreme Court rendered a crucial decision in Griggs v. Duke Power Co., an early employment discrimination case in which the court ruled unanimously that under Title VII of the 1964 Civil Rights Act, any screening device that produced unequal consequences for different races (i.e., what in employment law came to be known as "disparate impact" in the sense of disproportionate group harm) would be held to constitute individual employment discrimination unless the screening devices were shown to be clearly job related. Four years after Griggs, the court reaffirmed its support for the "disparate impact" approach in Albemarle Paper Company v. Moody, a case in which employers sought to protect themselves against discrimination charges by hiring enough minorities to counteract any statistical charges of racial imbalance.

Nevertheless, a year later in Washington v. Davis, the court refused to extend the theory of disparate impact developed in Title VII cases to discrimination cases brought under the Equal Protection provisions of the U.S. Constitution. The court held that to establish a constitutional claim of unequal treatment (as opposed to a statutory claim of discrimination under Title VII), there had to be a showing of intent to discriminate, not simply a showing of disparate impact. At the time, the case was brought before the federal courts, Title VII, which would later be expanded in scope, did not cover municipal employees.

The burden of proving disparate impact has shifted in accordance with the political inclinations of those on the Supreme Court.

1.3.1.2.1.1. Burden of Proof

In 1989, the court, reflecting the more politically conservative influence of justices appointed by President Ronald Reagan, shifted the burden of proof in disparate impact cases from businesses to plaintiffs, making it more difficult to sustain an employment discrimination claim under Title VII. The switch occurred in the Court's ruling in Ward's Cove Packing Co. v. Atonio and Price Waterhouse v. Hopkins.

Employment at Ward's Cove Jobs at Petitioners' Alaskan salmon canneries consisted of two general types: unskilled cannery jobs on the cannery lines, which are filled predominantly by nonwhites; and non-cannery jobs, most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at Petitioners' facilities, filed suit in the district court under Title VII of the Civil Rights Act of 1964 and the court ruled that "a simple statistical comparison of racial percentages between skilled and unskilled jobs was insufficient to make a prima facie case" of employment discrimination.

In Price Waterhouse the court shifted the burden of proof even further by requiring the plaintiff to prove that "employment practices substantially depended on illegitimate criteria."

1.3.1.2.2. "Reverse Discrimination"

Charges of reverse discrimination became common during the 1970s, as more and more corporations and private businesses, often under pressure from federal enforcement agencies, began more aggressive hiring of minorities and women. The question of whether Title VII of the Civil Rights Act also protected whites against discrimination arose in McDonald v. Sante Fe Transportation Company. The case involved a company which fired two white employees who had been charged with theft, but retained a black employee similarly charged. The court ruled unanimously that whites as well as blacks are protected from racial discrimination under the antidiscrimination provisions of Title VII. Despite this ruling, a number of subsequent court decisions would hold that Title VII permitted the preferential treatment of minorities and women in hiring and promotion decisions (but not in decisions affecting layoffs) if such treatment were part of an affirmative action plan designed to increase the employment of previously excluded or underrepresented groups.

Perhaps the most important of these decisions came in United Steelworkers of America v. Weber. The Weber case involved a white, blue-collar worker (Brian F. Weber) who was refused admission to an on-the-job training program at the Kaiser Aluminum Company plant at which he worked, although he had higher seniority than some of the minority workers who were accepted. In an attempt to increase minority representation in its workforce, Kaiser Aluminum developed two seniority lists, one for whites and one for blacks, and filled its vacancies by selecting persons from the top of each list. Weber filed suit, claiming that the 1964 Civil Rights Act specifically prohibited this use of racial quotas. Although winning at the district court level, Weber lost in the Supreme Court, which claimed that Title VII, though not requiring race-conscious affirmative-action preferences in employment, nevertheless permitted them if the purpose was to increase the employment of groups previously discriminated against.

1.3.1.2.3. Government Supported Organizations

In 1983, the Richmond City Council, in the state of Virginia, adopted the Minority Business Utilization Plan, which required government supported construction contractors to set-aside 30% of its subcontracts to one or more Minority Business Enterprises. However, in Richmond City v. J.A.Croson Co, the court, again reflecting the influence of the Reagan-era appointees, held that racial classifications within state and local Set-Aside programs were inherently suspect and were to be subject to the most searching standard of constitutional review (strict scrutiny) under the Equal Protection provisions of the Fourteenth Amendment. By a six-to-three vote, the court invalidated the Richmond City Council's set-aside plan that had required contractors to subcontract at least 30 percent of the dollar value of contracts to minority-owned businesses.

The following year, the Federal Communications Commission (FCC) adopted two minority preference policies. Firstly, the FCC awards an enhancement for minority ownership and participation in management, which is weighed together with all other relevant factors in comparing mutually exclusive applications for licenses for new radio or television broadcast stations. Secondly, the FCC's so-called "distress sale" policy allows a radio or television broadcaster whose qualifications to hold a license have come into question, to transfer that license before the FCC resolves the matter in a non-comparative hearing, but only if the transferee is a minority enterprise that meets certain requirements. The court ruled constitutional a policy developed by the FCC that granted preferences in the purchase of broadcast licenses to minority-controlled firms. In this case, the court majority declared that the state's objective of enhancing broadcast diversity was important enough to validate its use of an otherwise suspect racial classification.

Racial classifications, as outlined by affirmative action policies, are subject to strict scrutiny.

1.3.1.2.3.1. Strict Scrutiny

Five years later in 1995, however, in Adarand Contractors Inc. v. Pena, the court ruled that however benign in intent, affirmative-action programs that draw racial classifications even those at the federal level, are subject to strict scrutiny. To critics, at least, it seemed that the court had abruptly turned its back on settled law, particularly in regard to its earlier decisions affirming racial preferences at the federal level in Metro Broadcasting and Fullilove.

1.3.1.2.4. Examples in Employment

While the federal government and employers funded by the federal government are required to observe Affirmative Action in the workplace, corporate affirmative action programs are a strictly voluntary effort to improve diversity in the workplace. Corporate endeavours often take a different form, such as assertive outreach to identified minority groups, as well as mentoring and targeted recruitment.

The court often applies the strict scrutiny test to determine whether a law is constitutional. The court will use this specific test when a law might endanger fundamental rights or discriminates, for instance, based on race or religion.

Coca-Cola and Microsoft each have their own respective policies of affirmative action which are considered exemplars.

1.3.1.2.4.1. Coca Cola

The Coca-Cola Company and one or more of its subsidiaries are federal contractors subject to Executive Order 11246, Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (“Section 4212”) and Section 503 of the Rehabilitation Act of 1973, as amended (“Section 503”). As such, the company is committed to taking positive steps to implement the Company's Equal Opportunity Policy. It is the company's policy to take affirmative action to employ, advance in employment, and otherwise treat qualified minorities, women, protected veterans, and individuals with disabilities without regard to their race/ethnicity, sex, veteran status, or physical or mental disability. The Company will also provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee or applicant for employment unless the accommodation would impose undue hardship on the operation of the Company's business.

1.3.1.2.4.2. Microsoft

This affirmative action plan (has been developed in accordance with Executive Order 11246, pertaining to the hiring of racial minorities and women. Their goals include providing deep focus on key development areas to enable individuals and managers to

address and identify needs in relation to the careers of women and minorities through the ‘Women's & Minority Career Framework’ and the ‘Wired for Success’ series for women & minorities. Additionally, Microsoft is offering flexible work arrangements, programs, resources, and tools to help employees achieve greater work life balance. These resources range from extensive resource and referral services to generous maternity and paternity leave policies.

Another important intention is the supporting of LGBT Equality: For more than 25 years, Microsoft has supported gay, lesbian, bisexual, and transgender employees and policies. They were one of the first Fortune 500 companies in the world to offer domestic partner benefits for Microsoft LGBT employees. Since 2005, Microsoft achieved a 100 percent score on the Human Rights Campaign Foundation (HRC) 2014 Corporate Equality Index (CEI). The CEI provides an in-depth analysis and rating of corporate policies and practices related to lesbian, gay, bisexual, and transgender employees. Their final goal is the advancing of women through global outreach and advertising.

1.3.1.3. Methods of Affirmative Action

The 1991 Civil Rights Act, which was passed by a Democratic congress and, with some reluctance, signed into law by President Bush, overturned Ward's Cove. This has had the effect of limiting the ability of employers to use "business necessity" as a defence against discrimination claims under Title VII. It also overruled the court's decision in Patterson v. McLean Credit Union, where the court had invalidated a black woman's attempt to seek relief from racial harassment under the 1866 Civil Rights Act.

Affirmative action has most commonly manifested in one of three forms: the quota-system, the set-asides one program, and the target system. Each of these systems have undergone assessment by the Supreme Court, leading to the addition of qualifications to ensure their constitutional implementation.

1.3.1.3.1. Quota System

Quota-like employment practices were upheld by the court in Local 28 Sheet Metal Workers International Association v. Equal Employment Opportunity, where in a five-to-four decision a lower court ruling was allowed to stand that imposed a race-based quota requirement on a labor union. Similarly, in United States v. Paradise, in another five-to-four decision, the court affirmed the constitutionality of a quota system involving the hiring of state police. Gender-based preferences would also be upheld under Title VII in the important case of Johnson v. Transportation Agency, Santa Clara County. In these cases, the court acknowledged that affirmative action is a prospective policy based on the idea of group rights that aims at achieving racial and gender balance, under the idea of proportional representation that is inherent in the disparate impact theory.

Restrictions were placed on affirmative action programs in several areas. In Firefighters Local Union No. 1794 v. Stotts, respondent Stotts, a black member of petitioner Memphis, Tenn., Fire Department, filed a class action suit in Federal District Court charging that the department and certain city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of, inter alia, Title VII of the Civil Rights Act of 1964. A similar action occurred in Wygant v. Jackson Board of Education. The collective bargaining agreement between the Jackson Board of Education and a teachers' union provided that, if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. After this layoff provision was upheld in litigation arising from the Board's noncompliance with the provision, the Board adhered to it, with the result that, during certain school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. Petitioners, displaced nonminority teachers, brought suit in federal district court, alleging violations of the Equal

Protection Clause and certain federal and state statutes. The court ruled that an affirmative-action plan that protected black teachers while white teachers with more seniority were being laid off violated Title VII.

1.3.1.3.2. Set-Asides One

Set-Aside programs normally designate a certain percentage of government contracts or funds for minority-owned businesses. Set-Asides programs are controversial and have raised constitutional challenges.

The Set-Asides One form of affirmative action that became popular among state and municipal governments in the mid-1970s was the minority contracting set-aside. Set-Aside programs usually involve the reservation of a fixed proportion of public contracting dollars, that by law must be spent on the purchase of goods and services provided by minority-owned businesses. The Supreme Court first took up set-asides in the case of Fullilove v. Klutznick which challenged a provision of a federal law passed during the Carter administration. That provision required that 10 percent of federal funds allocated to state and local governments for public works projects, be used to purchase goods and services from companies owned by members of six specified minority groups. Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in federal district court, alleging that they had sustained economic injury due to enforcement of the MBE requirement, and that the Minority Business Enterprises provision, on its face, violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment. The court held in this case, the federal Set-Aside law did not violate the Equal Protection provisions of the federal Constitution on the grounds that, the Set-Aside provision was a legitimate remedy for present competitive disadvantages resulting from past illegal discrimination.

1.3.1.3.3. Target System

The most well-known and the most controversial type of affirmative action program is the target system.

The so-called target system is the most controversial type of affirmative action programs. Those targets must be defined as goals, not as quotas since quotas are often illegal.

For instance, if a company has a history of not promoting women to upper management, it may implement an affirmative action program to recruit and hire more women for top roles. The company can set goals such as, employing a 50% female staff within five years.

Courts have ruled that this type of program is legal if the targets are goals and not quotas. If the company chooses a qualified woman over a qualified man to help it meet its goal, that decision would be legal. It would be illegal to choose an unqualified woman solely to meet a fixed quota. Another common type of affirmative action program is to change the way the company recruits new employees. For example, a company seeking to hire more women might send representatives to a job fair at an all-female college or might send advertisements for new job openings to a woman's organization. A company seeking to recruit more minority applicants would use a similar strategy to reach out to minority groups. Instead of blindly placed advertisements for job openings, companies intending to diversify can target their advertising to particular groups.

Another common affirmative action program is to review the company's hiring and promotion policies for any unfair barriers to women or minorities. For instance, if the company tends to promote those who never take sick days or use vacation time or maternity leave, some women may be placed in a position where they must choose between family responsibilities and career goals. The one standard that must be followed with any affirmative action program is flexibility. It is legal to consider gender as a factor for the purpose of promoting diversity. It is not legal to base decisions solely or primarily on gender.