

## A woman's place is in... the Board Room?

There has been equality legislation in England and Wales for over 40 years. However, discrimination remains a significant issue for employers. Gender diversity and, in particular, the under representation of women on boards of UK companies has been under the spotlight lately.

At the EU level, the European Commission launched an equality strategy in 2010. As part of this strategy, all companies were asked to pledge to have at least 30% female board members by 2015 and 40% by 2020. Progress on this will be reviewed in early 2012 to decide whether more formal action is needed. The Commission also issued a Green Paper earlier this year which asked whether listed companies should disclose whether they have a diversity policy and report on their progress against that policy.

In February this year, Lord Davies published a report in response to the Government's concerns as to the low percentage of women holding executive positions. The report makes a number of recommendations to help address the imbalance. Perhaps most noteworthy of the recommendations are:

1. By September 2011, Chairmen of all FTSE 350 should announce targets for the percentage of female directors by 2013 and 2015 (for FTSE 100 companies it is suggested this figure be 25% by 2015, with one-third of new appointments being women);
2. listed companies should disclose annually the number of women on their boards, in senior positions and the overall proportion of women in the workforce; and
3. the UK Corporate Governance Code should be amended to require listed companies to establish a boardroom diversity policy and objectives for implementing it. Companies should disclose a summary of that policy annually and report on their progress towards achieving the objectives.

The Financial Reporting Counsel (FRC) has recently consulted on Lord Davies' proposed changes to the Code. The consultation closed at the end of July and the outcome is expected later this year. The FRC has concerns about the effect low percentages of women directors has on boards. In 2010 the FRC revised the Code to add reference to the benefits of board diversity in general, with specific reference to gender diversity. The consultation will determine whether the Code should go further.

The initial six-month deadline set for FTSE 100 Chairmen to announce their aspirational target, and the steps they intend to take to achieve that, has now passed. Early analysis suggests that the number of women recruited to boards over the past six months has increased. 14% of FTSE 100 board positions are now occupied by women, up from 12.5%. However, despite the increase, Lord Davies' target of 25% representation by 2015 is still some way off.

The focus of discussions has been on what measures are needed to encourage and improve the number of women on boards in UK companies. The legal risks associated with these proposed measures have not been as widely discussed. There is a fine line between positive action (which is lawful) and positive discrimination (which is not). Employers need to tread carefully if they want to stay on the right side of that line.

### Legal Risks

#### Positive action vs positive discrimination

The aim of the Equality Act 2010 was essentially to prohibit less favourable treatment, rather than allow more favourable treatment. Positive discrimination e.g. appointing a woman to a board purely because of her gender remains unlawful. There is scope within the Act to allow positive action in relation to recruitment and promotion. The aim being to counter-act disadvantages

affecting under-represented groups. However, these positions are narrow in scope. They allow employers to select a candidate from an under-represented or disadvantaged group where there are two equally qualified candidates. This is known as a “tie-breaker” situation. In practice, it is rare that candidates would be so evenly matched, particularly for senior positions.

The positive action provisions can therefore be relied upon to appoint a female candidate over a male candidate, if they are judged equal in merit. Their merit should be assessed following an objective and thorough assessment of abilities, skills and experiences. If businesses seek to appoint women solely to reach set targets, they run the risk of falling foul of the legislation by discriminating against men. Men can bring claims of sex discrimination as well as women.

Taking steps which amount to positive discrimination increases the risk of claims from men, unless that falls within the limited scope of the Equality Act.

Greater public awareness of diversity generally could result in increased claims from women in senior positions, given the evidence available showing a disparity at boardroom level. Not only are employees more aware of their rights, but requiring listed companies to disclose statistical data relating to the gender balance in the workforce could cause employers problems. Statistics read in isolation can be misleading but could be used to support a claim or enable a Tribunal to draw an inference of discrimination.

## Recommendations

Currently, the obligation to report on diversity and impose targets to get more women onto boards is voluntary. As such, companies are not required to take any active steps. However, companies may feel the pressure to do so if market competitors are taking steps to bridge the gap. Equally, employers may welcome the recommendations and want to take action to address any imbalance. In such cases, we would advise employers to consider the following steps to ensure they comply with discrimination legislation:

- **Review the structure of the board recruitment process:**

Many executive positions are not filled through structured recruitment processes. Often recruitment for board level positions stems from word of mouth, personal connections and networks. In these cases, it can be difficult to avoid hiring the same “type and fit” for the organisation. The Davies report suggests a more formalised and transparent process be used which in turn would assist with diversity.

- **Encourage women to apply for board vacancies:**

Advertisements for board positions can expressly welcome applications from female candidates without falling foul of discrimination provisions. However, they should also state that the employer is an equal opportunities employer, to help address any suggestion of unlawful discrimination.

- **Consider a mentoring scheme for women at senior levels:**

Employers can implement mentoring, training or other initiatives which have the aim of encouraging women to overcome or minimise disadvantage and under-representation. This is permitted under the legislation and will not be considered discriminatory against men provided the initiative is a proportionate way of enabling women to overcome a disadvantage.

## The Future

Although the Davies report stopped short of recommending quotas to force change, it did not rule them out as a possibility if companies fail to address the problem voluntarily. Quota systems have been introduced in some European countries such as Norway and the European Commission will consider whether quotas should be imposed throughout the EU. This would require an amendment to current legislation in order to be lawful.

If you have any questions or require specific advice on any matter discussed in this Alert, please contact:

***Bernadette Daley***

Partner, Employment

Tel: +44 20 3130 3667

***Katherine Fox***

Associate, Employment

Tel: +44 20 3130 3169

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