

Guidance on the use of positive action in employment

The Equality Act allows service providers to take action that may involve treating one group more favourably where this is a proportionate way to help members of that group overcome a disadvantage or participate more fully, or in order to meet needs they have that are different from the population as a whole. This is called 'positive action'.

The Equality Act protects people from being treated less favourably because they have a protected characteristic. The relevant protected characteristics in employment are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race (including ethnic or national origins, colour and nationality)
- religion or belief (including lack of belief)
- sex
- sexual orientation

Positive action applies to all these protected characteristics. Positive action provisions mean that it is not unlawful discrimination to take special measures aimed at alleviating disadvantage or under-representation experienced by those with any of these characteristics.

Further positive action provisions introduced under the Equality Act mean that it is not unlawful to recruit or promote a candidate who is of equal merit to another candidate, if the employer reasonably thinks the candidate:

- has a protected characteristic that is underrepresented in the workforce; or
- that people with that characteristic suffer a disadvantage connected to that characteristic.

However, positive action does not allow an employer to appoint a less suitable candidate just because that candidate has a protected characteristic that is under-represented or disadvantaged. This would constitute positive discrimination and it is unlawful.

Positive action for encouragement and development

The Equality Act (in section 158) allows positive action in certain circumstances and can apply under one or more of the following statutory conditions where it is reasonably thought that people who share a protected characteristic:

- experience a disadvantage connected to that characteristic; or
- have needs that are different from the needs of persons who do not share that characteristic;
or
- have disproportionately low participation in an activity compared to others who do not share that protected characteristic.

To take positive action, you must **reasonably think** that one of the above conditions applies; that is disadvantage, different needs or disproportionately low participation. You can then take any action which is a proportionate means of achieving the aim of:

- Enabling or encouraging persons who share the protected characteristic to overcome or minimise the disadvantage identified;
- Meeting the needs identified; or
- Enabling or encouraging persons who share the protected characteristic to participate in that activity.

There is no limit on the sort of action that can be taken, so long as it is outside the recruitment or promotion process, and provided it is reasonable to think that the protected group is underrepresented or disadvantaged, and the action is proportionate. 'Proportionate', in this context, means that the need for the action must be balanced against its impact on other protected groups, taking into account factors like:

- how long the underrepresentation has persisted
- the type of barriers experienced by the underrepresented group
- the success or failure of other remedial measures
- whether there are any alternative ways to address the underrepresentation which are less likely to disadvantage other protected groups

Some information or evidence will be required to indicate that one of those conditions exists – but it does not need to be sophisticated statistical data or research. It may simply involve reviewing the profiles of your workforce and/or making enquiries of other comparable employers in the area or sector as a whole. You can target your measures primarily at the underrepresented group, or potentially even exclusively at that group where that is a necessary and proportionate means of achieving your objectives. Where a positive action measure continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been a precondition for the positive action. This could make it unlawful to continue to take the action.

Using positive action statements in recruitment adverts is a way of encouraging applications from a wider range of candidates, provided that any statements are supported by evidence. For example:

- *We particularly welcome female applicants and those from an ethnic minority, as they are under-represented at these levels.*
- *We particularly welcome applications from Black, Asian and minority ethnic candidates as they are under-represented within the [University/school/department] at this level.*

Adopting inclusive recruitment practices such as reviewing the job description and associated selection criteria and targeted promotion of your vacancy are also ways to support you in attracting the best possible talent from the broadest range of backgrounds. More detailed guidance is available on the University's [Diversify](#) webpages.

Example

An employer has very few women in its senior management team. Under the general positive action provisions, it offers a development programme which is only open to women to help female staff compete for management positions. This is not unlawful discrimination against male staff, because it is allowed by the positive action provisions.

Positive action is about attracting a diverse range of candidates, not bypassing or interfering in any way with the legitimate selection process. Employers must **not** adopt policies or practices designed to routinely favour candidates with a certain protected characteristic, even where there is evidence of under-representation or disadvantage. All suitably qualified candidates must be considered on their individual merits for the post in question. Ultimately, UK law does not allow candidates from underrepresented groups to be preferred over other better qualified candidates. Recruitment and selection outcomes need to be merit-based, except in the narrow and uncertain tie-breaker situation explained below.

Positive action in recruitment and promotion – the ‘tie-break provision’

Section 159 of the Equality Act permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are **as qualified as each other**.

The question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence, and professional performance. The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its own merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.

Examples

A University has a vacancy for one of its senior leadership roles. All the other senior roles at that level are occupied by men. The University conducts a recruitment exercise and at the end of a stringent and objective process finds that two applicants – a man and a woman – could do the job equally well. The University could decide to take positive action and give the job to the woman. But the University couldn't give the job to the woman if the man was clearly the better candidate – that would be unlawful direct discrimination against the man.

A University offers a job to a woman on the basis that women are under-represented in the University's workforce when there was a male candidate who was more qualified. This would be unlawful direct discrimination.

A faculty which employs disproportionately low numbers of people from an ethnic minority background identifies a number of candidates who are as qualified as each other following interviews for a post, including a candidate from an under-represented ethnic minority background. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration.

For further advice on specific positive action measures please contact the Employability and Opportunities Manager (Rebecca Scott) or the Head of Staff Inclusion (Tracy Brunnock) based in HR.

Sources:

<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

<https://www.legislation.gov.uk/ukpga/2010/15/contents>

<https://www.equalityhumanrights.com/sites/default/files/thinking-outside-the-box-increasing-diversity-television-broadcasting-industry.pdf>