

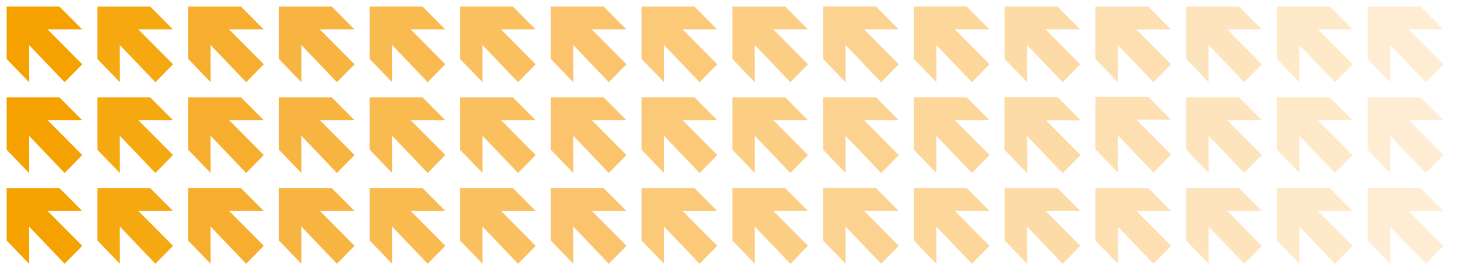


Government
Equalities Office

Putting equality at the heart of government

EQUALITY ACT 2010: WHAT DO I NEED TO KNOW? A QUICK START GUIDE TO USING POSITIVE ACTION IN RECRUITMENT AND PROMOTION

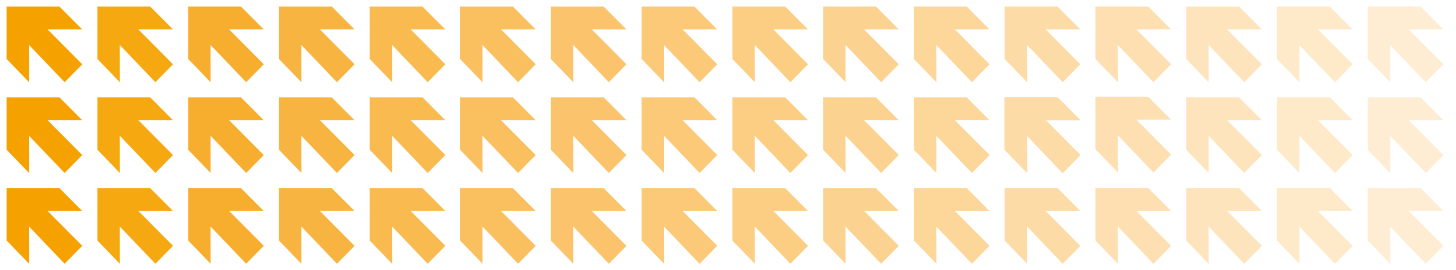




Foreword

The Equality Act 2010 replaces the previous anti-discrimination laws with a single Act. It simplifies the law, removing inconsistencies and making it easier for people to understand and comply with it. It also strengthens the law in important ways to help tackle discrimination and inequality.

This quick start guide is intended to help employers understand how they can use new positive action provisions to improve diversity in their workforce when recruiting and promoting candidates. The new provisions come into force on 6 April 2011.



Introduction

The Equality Act 2010 brings together, harmonises and, in some respects, extends existing equality law. It aims to make the law more consistent, clearer and easier to follow in order to make society fairer.

On 1 October 2010, general positive action provisions came into force. These replicate provisions in earlier legislation and allow employers to target measures such as dedicated training to groups, such as women or people from ethnic minorities, who are under-represented or disadvantaged in the workplace, or to meet their particular needs. Guidance is available at: http://www.equalities.gov.uk/staimm6geo/pdf/401727_EqualityAct2010_PositiveAction_acc.pdf

The remaining positive action provisions, relating specifically to recruitment and promotion in employment, come into force on 6 April 2011.

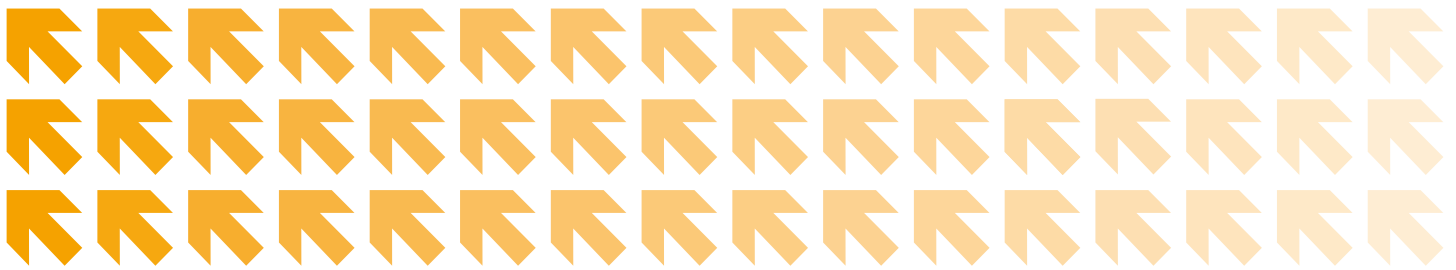
This quick start guide will help employers understand when and how they can use the new positive action provisions when recruiting and promoting candidates.

Who is affected?

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

- age
- disability (see page 10)
- 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.



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 entirely voluntary – there is no requirement for an employer to use either the general provisions or those relating to recruitment and promotion.

What is positive action when it applies to recruitment and promotion?

The new positive action provisions 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 under-represented 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.

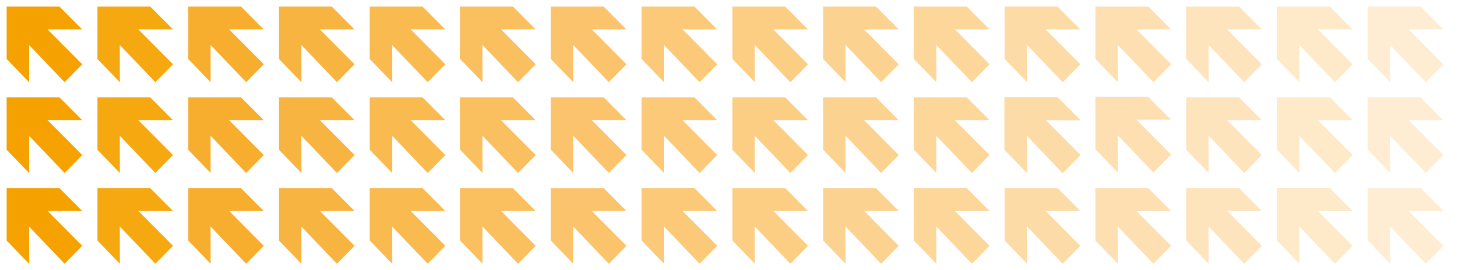
Example

A bank has a vacancy for one of its senior jobs. All the other senior jobs at that level are done by men. The bank 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 bank could decide to take positive action and give the job to the woman. But the bank couldn't give the job to the woman if the man would be able to do the job better than her – that would be unlawful direct discrimination against the man.

What has changed?

Current positive action provisions in employment relate to training or encouragement – such as mentoring schemes for ethnic minority staff where they are under-represented in senior roles, or open days to encourage women applicants in male-dominated sectors. The existing forms of positive action cannot be used as part of the actual appointment process.

The Act contains new provisions to allow positive action specifically in the process of recruitment and promotion, in limited circumstances.



How do the new positive action provisions in recruitment and promotion work?

Positive action in recruitment and promotion can be used where an employer **reasonably thinks** that people with a protected characteristic are under-represented in the workforce, or suffer a disadvantage connected to that protected characteristic. (see page 7)

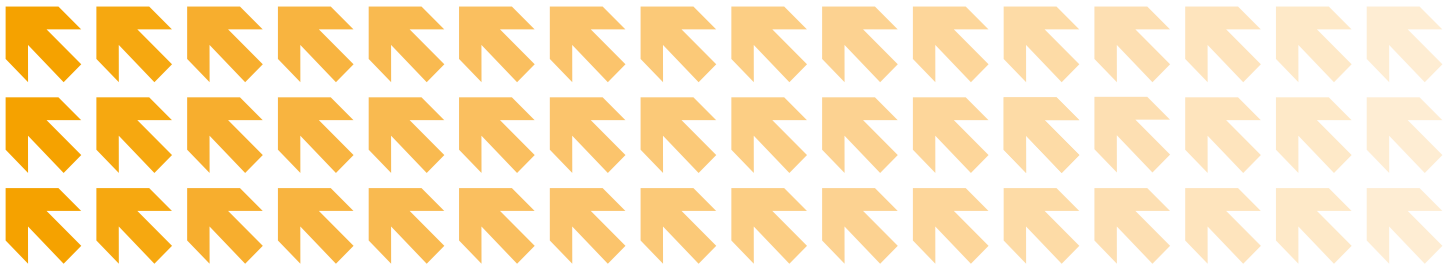
In practice it allows an employer faced with making a choice between two or more candidates who are of **equal merit** to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce. (see page 6)

This is sometimes called either a 'tie-breaker' or the 'tipping point'.

But this kind of positive action is only allowed where it is a **proportionate** way of addressing the under-representation or disadvantage. (see page 8)

Example

A counselling service for teenagers has no employees who are Muslim, despite being located in an area of high Muslim population. When a vacancy arises, two candidates of equal merit are in a tie-breaker situation with the employer having to find some way to choose between them. One candidate is Muslim and the other candidate is not. The service manager could choose to offer the job to the Muslim candidate. This would be allowed under the positive action provisions, so the non-Muslim candidate could not claim unlawful religious discrimination.



Positive action can be used at any time in the recruitment or promotion process.

Example

An accountancy firm is recruiting for its graduate training scheme. After the first round of assessment the firm decides to shortlist 20 candidates. There is a tie-breaker situation for the 20th place on the shortlist as there are a number of candidates of equal merit. The firm decides to use the positive action provisions to advance a candidate from a BME background to the next round of recruitment, because people from BME backgrounds are under-represented in the firm. This would mean that the non-BME candidates could not claim unlawful race discrimination for not being put on the shortlist.

However, it is expected that, in the vast majority of cases, any use of positive action as a 'tie-breaker' between candidates who are of equal merit for a particular post will be at the end of the recruitment process, at the actual point of appointment. At that stage all of the relevant factors that the employer will need to know in order to determine whether or not the candidates are truly as qualified as each other should have been established.

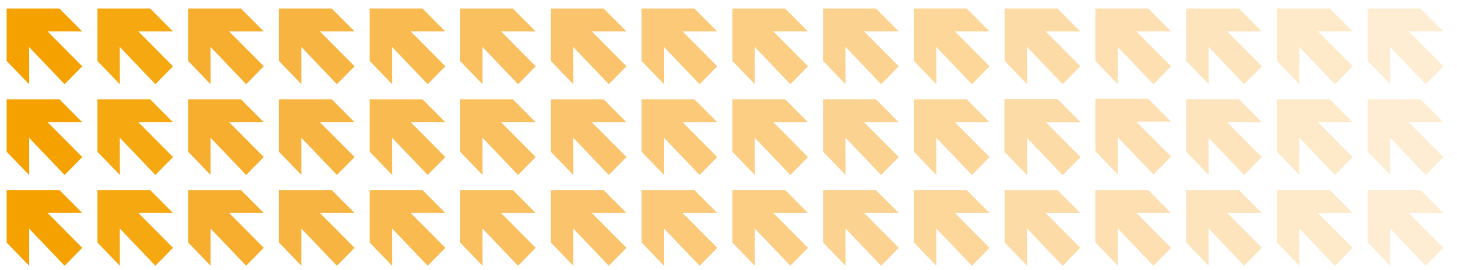
What does 'equal merit' mean?

In order to use positive action provisions in a tie-breaker situation, the employer must first establish that the candidates are of equal merit.

Employers should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job.

However, employers should ensure that any criteria do not indirectly discriminate against people who share a protected characteristic – for example, a requirement that staff must work shift patterns that mean they have to be on-call at certain fixed times might put women, who are more likely to be responsible for childcare issues, at a disproportionate disadvantage. This would be unlawful indirect discrimination unless it could be shown that the need for these work patterns could be objectively justified.

Employers must consider whether candidates are of equal merit in relation to the **specific job or position** they are applying for. While two candidates may be considered to be of equal merit for one particular post, the same two candidates might not be equally suitable for another job.



Example

A health and fitness club is faced with making a choice between two applicants for a job as the manager of a leisure facility. One, a woman, has recently completed a Leisure Management Foundation Degree course but has little practical experience. The other candidate is a man who has no formal qualifications but has several years experience of working in leisure centres. Having interviewed both candidates, the employer decides that both could do the job to the same standard but in different ways as each would bring a different set of skills and experiences to the job. Therefore, because the candidates are of equal merit the manager could voluntarily use the positive action provisions when choosing between the candidates and opt to employ the man because all of the other senior positions at the leisure complex were held by women.

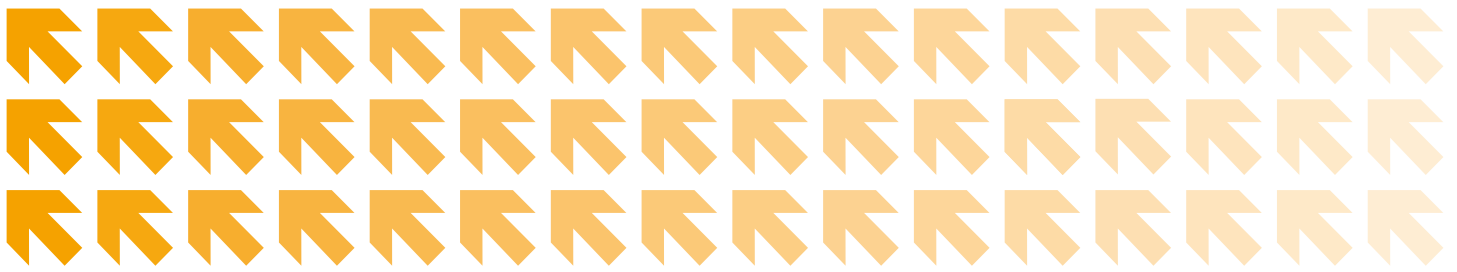
Example

A retailer advertises for a trainee fashion buyer. Among the applicants is a person who has a degree in French. None of the other applicants has a degree in any subject. The fact that one candidate has higher academic qualifications than the others does not automatically make that person better qualified for this particular job. The employer will need to decide if that qualification is a relevant factor in assessing who might do the job as a fashion buyer best.

What does 'reasonably thinks' mean?

Positive action in recruitment and promotion can be used where an employer **reasonably thinks** that people with a protected characteristic are under-represented in the workforce, or suffer a disadvantage connected to that protected characteristic.

Some information or evidence will be required to indicate to the employer that one of those conditions exists – but it does not need to be sophisticated statistical data or research. It may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector as a whole. Additionally, it could involve looking at national data such as labour force surveys for



a national or local picture of the work situation for particular groups who share a protected characteristic. A decision could be based on qualitative evidence which may be obtained in various ways, for instance through discussion with workers or their representatives.

Example

A DIY chain begins planning a new recruitment programme. In considering how to create a more diverse workforce the company realises that it does not keep detailed records on the personal details of its employees. However, the Area Manager is able to demonstrate that it is reasonable for him to think that there are a disproportionately low number of women in the workforce from his knowledge of who works for him and by consulting with his local branch managers. The employer could decide to use positive action in aiming to address the number of women in the workforce. Taking positive action based on that information would usually be lawful.

However, it should be acknowledged that some protected characteristics are more readily identifiable than others – for instance, a person's gender may be easier to establish than their religion or belief or their sexual orientation – and so it may be more difficult to determine if there is any under-representation of those with certain protected characteristics.

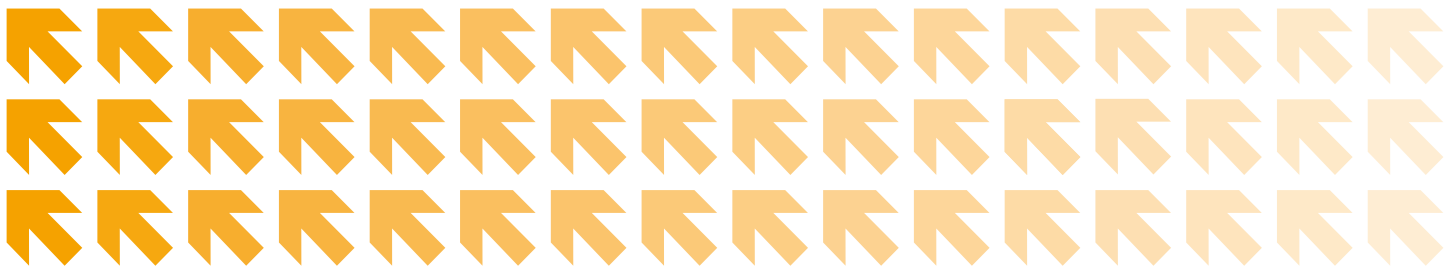
What does 'proportionate' mean?

'Proportionate' refers to the balancing of all the relevant factors. In considering using the positive action provisions, an employer will need to balance the seriousness of the disadvantage suffered or the extent to which people with a protected characteristic are under-represented against the impact that the proposed action may have on other people.

When thinking about proportionality, an employer may find it helpful to consider if the proposed action is the only way to address the under-representation or disadvantage effectively, or if it would be possible to achieve the same effect by other actions that are less likely to result in the less favourable treatment of other people.

Example

A small voluntary organisation has five employees, who are all women. The organisation acknowledges that it would prefer to have a gender-balanced workforce but feels that, because of its size, it would not be proportionate to use positive action provisions in recruitment to address this, especially as men are well represented in similar organisations throughout the sector.



Routinely favouring people with protected characteristics

The new positive action provisions make it clear that 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. Where one candidate is clearly superior or better qualified for the job than the others, then an employer should offer the position to that candidate.

However, this does not prevent an employer having a routine policy of being prepared to use positive action where it is appropriate for it to do so. An employer may go into an appointment exercise prepared to use the 'tie-breaker' provisions, only to identify a clearly superior candidate – any notion of using the 'tie-breaker' would then become irrelevant.

Artificially low thresholds

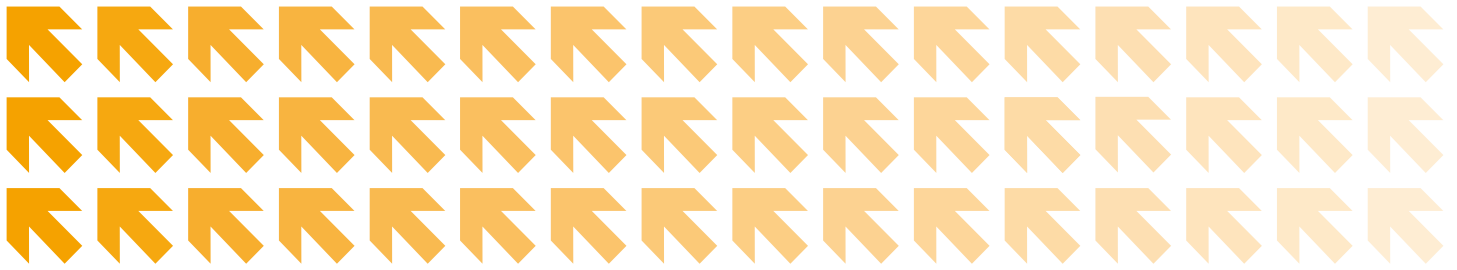
Appointments should always be made on merit. If one candidate is superior to another the position should be offered to that candidate. If the pass mark in an assessment is set at 70% and one candidate scores 71% and another score 91%, it would generally be wrong to consider that just because both passed the minimum success threshold the two candidates are of equal merit.

Example

A local authority wishes to diversify its workforce and undertakes a large recruitment exercise. In an attempt to create a large pool of 'qualified' people from which it can cherry-pick those with the relevant protected characteristics to make its workforce more diverse, it sets a very low pass mark for the assessment to make sure that a lot of people pass. Picking someone with a particular protected characteristic from the pool in preference to someone who achieved a higher score and was clearly better qualified for the job but didn't have a targeted protected characteristic would not be allowed by the positive action provisions and would be likely to be unlawful discrimination.

How is what the new positive action provisions allow different from positive discrimination?

Positive discrimination is recruiting or promoting a person solely because they have a relevant protected characteristic. Setting quotas to recruit or promote a particular number or proportion of people with protected characteristics is also positive discrimination. Positive discrimination is unlawful in Great Britain. However, it is important to note that it is **not unlawful** for an employer to treat a disabled person more favourably in comparison to a non-disabled person (please see 'Disability' on page 10).



Example

A department store employs nine senior managers but only two of them are women. When a vacancy arises it seeks to address this under-representation by only interviewing women applicants, regardless of whether they meet the criteria for the post. This would be positive discrimination so would be unlawful.

Example

A supermarket reviews its workforce data and finds that 80% of its employees are under the age of 35. When next recruiting, the supermarket manager sets a quota for 50% of new recruits to be over the age of 35, regardless of whether they are of equal merit to other applicants under the age of 35. This would be positive discrimination so would be unlawful.

Example

A call centre wishes to diversify the ethnicity of its workforce as it is aware that it is currently predominantly white despite being based in an area with a large Indian population. After interview the top two candidates are both white – but in a bid to create greater diversity the company appoints the third placed candidate because he is Indian. This would be positive discrimination so would be unlawful.

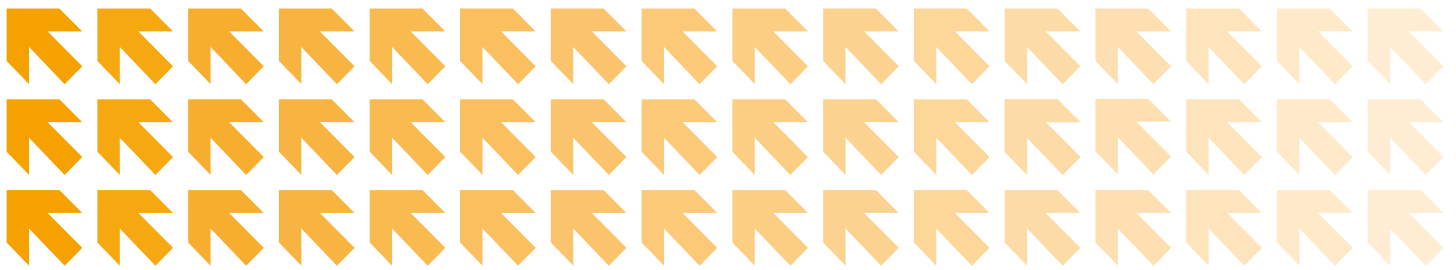
Disability

Positive action applies to all protected characteristics including disability – but it is important to note that it is not unlawful for an employer to treat a disabled person more favourably than a non-disabled person.

Example

The ‘two-ticks’ guaranteed interview scheme means that an employer will interview **all** disabled applicants who meet the minimum criteria for a job vacancy.

However, employers can opt to use the positive action provisions to overcome disadvantage or increase the participation of people with a particular form of impairment.



Example

An employer is faced with having to choose between three candidates of equal merit for a post. One candidate has a mobility impairment, another has a learning disability and the third has no form of disability. In order to address the under-representation of people with learning disabilities within the organisation and in the local area, the employer selects the candidate with the learning disability. This would not be unlawful discrimination against either of the other candidates.

Further sources of information

Government Equalities Office has also published a Step-by-step Guide to using Positive Action in Recruitment and Promotion. This can be found at:

http://www.equalities.gov.uk/equality_act_2010/equality_act_2010_what_do_i_n.aspx

A series of Frequently Asked Questions on the provisions can be found at:

http://www.equalities.gov.uk/equality_act_2010/faqs_on_commencement_of_the_eq/positive_action.aspx

The Equality and Human Rights Commission is the statutory body established to help eliminate discrimination and reduce inequality. It has issued a statutory Code of Practice explaining in more detail the law in relation to employment and discrimination. It also produces a range of material providing practical guidance on how to comply with the law. **www.equalityhumanrights.com**
0845 604 6610

Citizens Advice **www.citizensadvice.org.uk**

Government Equalities Office
www.equalities.gov.uk

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