

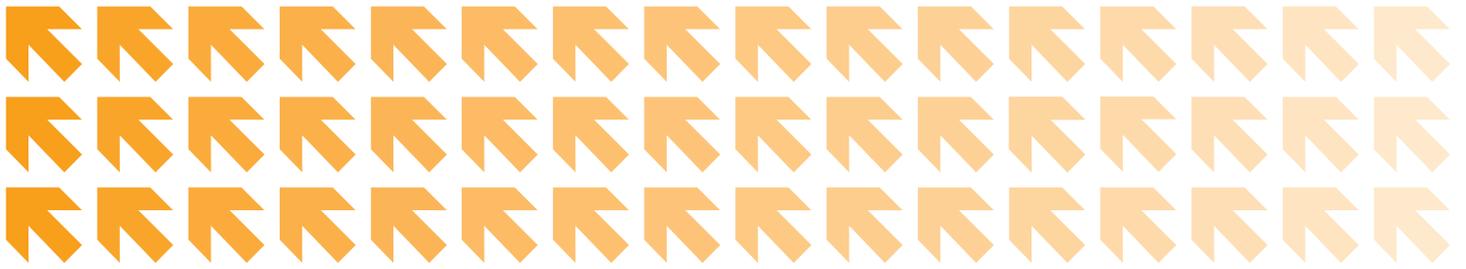


Government  
**Equalities** Office

Putting equality at the heart of government

# **EQUALITY ACT 2010: A STEP-BY-STEP PRACTICAL GUIDE TO USING POSITIVE ACTION WHEN MAKING APPOINTMENTS**





## Introduction

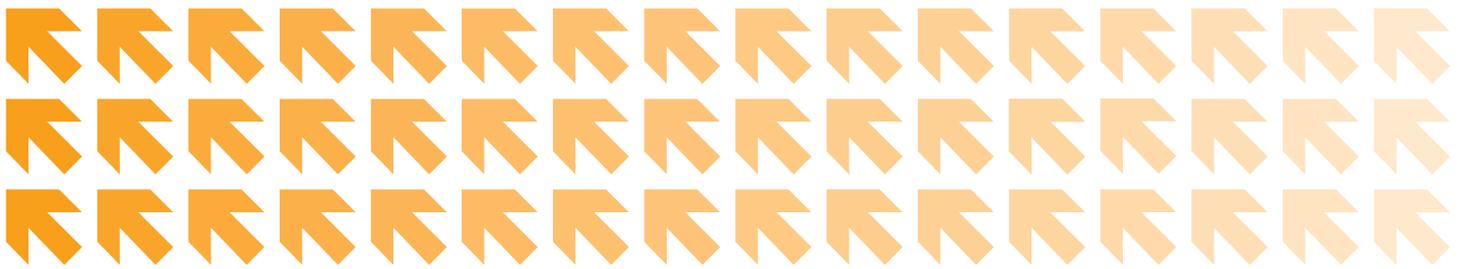
This step-by-step practical guide is intended as an aid for employers who wish to use positive action when making appointments. For more detailed guidance on how the law works, please see the Government Equalities Office quick start guide on positive action in recruitment and promotion which can be found at: <http://www.equalities.gov.uk/pdf/Positive%20Action%20in%20Recruitment%20and%20Promotion%20Guide.pdf>

The information contained in this guide is not exhaustive, and does not preclude other action permitted under the Equality Act 2010. For more information about other aspects of the Act, please see the “Further sources of information” listed at the end of this guide.

## Principles of using positive action when making appointments

Positive action can be used in the appointment process as a **tie-breaker between candidates of equal merit**. Any use of positive action will only be lawful if:

- The candidate is appointed on merit – the candidate must be as qualified as any other candidate to be appointed. A candidate cannot be appointed just because he or she has a particular protected characteristic, such as being from an ethnic minority
- The employer does not have a general policy of always favouring people with certain protected characteristics
- Any action taken by the employer is a proportionate means of achieving the aim of addressing disadvantage or under-representation in the workforce



## Do I want to take some form of positive action as part of the appointment process?

### *Is there a benefit for me to do so?*

Having a diverse workforce can deliver a number of practical benefits for organisations. Recruiting from the widest possible pool of people will give employers access to more talented candidates and a wider range of skills. Having a more diverse workforce can also bring better insight into the needs of a broader range of customers and can help to identify and open up new markets and opportunities. Evidence from 2007 research<sup>1</sup> showed that companies with greater representation of women among board directors reaped significant commercial and business benefits.

Because positive action is **entirely voluntary**, each individual employer can decide on whether to use it and, if it does so, the best way to approach using it for that organisation. Some employers may already be using – or thinking about using – the more general positive action provisions in relation to targeted advertising or providing dedicated training for those from under-represented or disadvantaged groups. The ability to use positive action when making appointments provides employers with an additional tool they can use to improve the diversity of their workforce, if they wish.

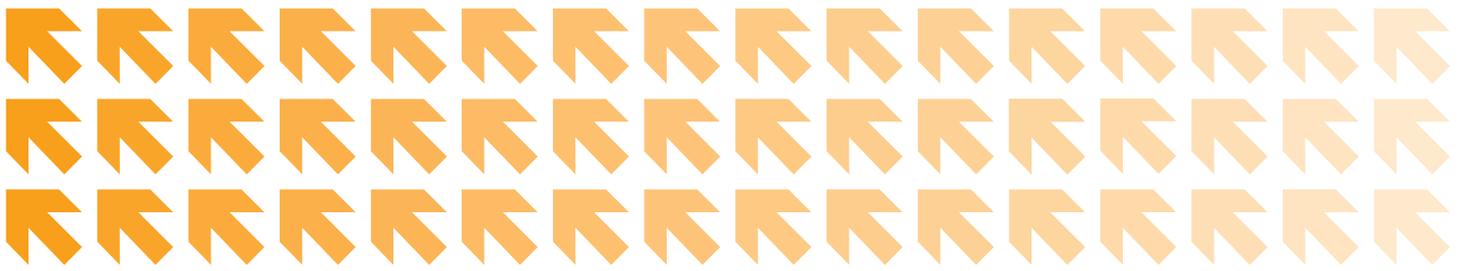
## Does one of the criteria for taking positive action exist?

### *Are people with a certain protected characteristic disadvantaged or under-represented in my workforce? How can I tell?*

You do not always have to have statistical evidence to show that people with a particular protected characteristic are under-represented, but you will need to demonstrate that you have reliable information or evidence to back up your decision to use positive action when making appointments.

You may have some personnel records about your workforce that might help you identify whether people with a specific protected characteristic are under-represented within your workforce or in particular roles. Alternatively, you may be able to identify whether certain protected groups are under-represented by talking to managers, supervisors or any administrative staff in your organisation.

<sup>1</sup>The Bottom Line: Corporate Performance and Women's Representation on Boards, Catalyst Inc, October 2007  
<http://www.catalyst.org/file/139/bottom%20line%202.pdf>



## Is what I'm planning to do proportionate?

### *Could I achieve the same effect by other means?*

You should consider if taking positive action this way is a reasonable way of addressing the under-representation or disadvantage in your workforce, taking into account all the circumstances. In thinking about whether positive action is proportionate, consider the seriousness of the under-representation or disadvantage and whether positive action in making appointments is the only way to address it effectively or if it would be possible to achieve the same result by other actions that are less likely to have a detrimental impact on other candidates.

## How do I prepare to use the positive action provisions?

### *Have I established that one of the criteria for using positive action exists?*

You should not attempt to use positive action when making appointments until you are sure that you can meet the criteria for its use – that you can show that people with a particular protected characteristic are under-represented or otherwise disadvantaged – otherwise you will be risking acting unlawfully.

### *Do I also want to consider using the general positive action provisions as well?*

The two different types of positive action provisions can either be used separately or together. If you want to increase representation of those with a particular protected characteristic you may also want to think about taking some form of targeted advertising or other types of encouragement.

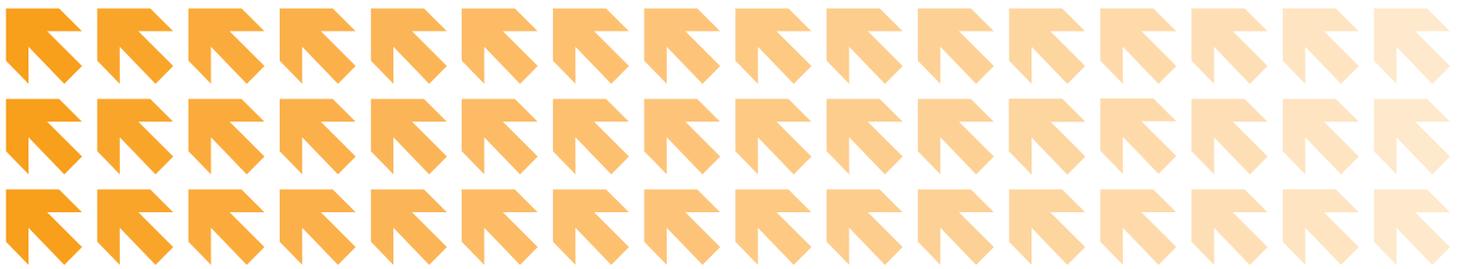
### *Do I have an assessment process that will help me judge candidates on a truly objective basis?*

If you do not have objective criteria to judge candidates against, it may be difficult for you to prove that the candidate you select is as qualified as any other candidate to perform that job.

### *Do I need to tell candidates that I'm thinking of using positive action as part of this appointment process?*

You are not required to advertise that you are considering using positive action as part of the appointment process. However, it may be good practice to inform candidates that you **may** use the positive action provisions, as part of having an open and transparent appointment process.

If you are considering using positive action as a form of 'tie-breaker' at the end of the appointment process, you must avoid pre-judging candidates. Candidates should be evaluated through the assessment process before you can determine if you are faced with candidates of equal merit that you need to choose between.



## How do I determine if the candidates are of equal merit?

### *How should I judge the candidates? Can I rank them?*

Check that you have an objective scoring system or criteria that you are judging candidates against. It will always be easier to show that candidates are of equal merit if you can show what system you have used to assess them in reaching that decision.

If you want to use positive action, you may want to consider making changes to your appointment process to make it easier for you to evaluate candidates objectively – but these provisions do not require you to have any particular form of appointment procedure. However, to use these provisions you must make sure that you are judging between candidates of equal merit so you will need to have some objective way to evaluate the candidates.

You should consider the candidates' overall ability, competence, professional experience and any other qualities required to carry out the job, as well as any more formal qualifications that may be relevant to the position, before deciding if the candidates are of equal merit.

### *What can I do if a candidate from the target group doesn't come out on top?*

The post should always be offered to the best candidate – offering a position to someone who is less suitable than other candidates just because they have a targeted protected characteristic would be positive discrimination and so be unlawful.

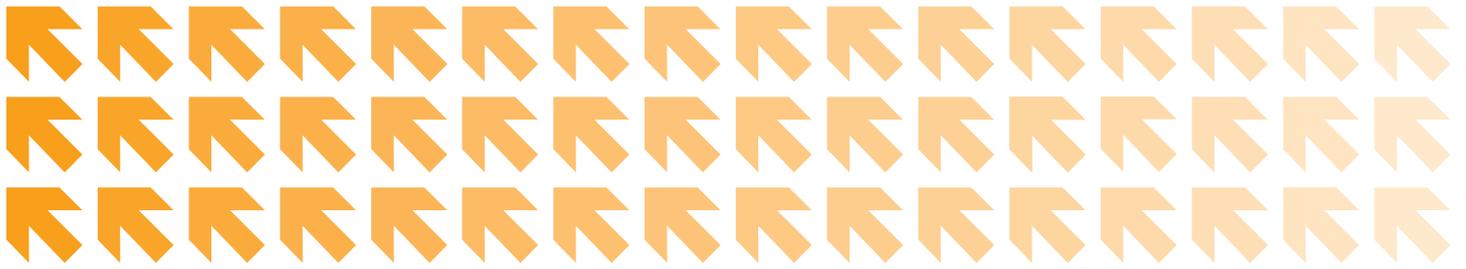
## How do I use the 'tie-breaker'?

Once you are faced between making a choice between candidates that you have identified as being of equal merit for the vacancy you are filling, you may then choose to use positive action as a form of tie-breaker.

If one of the candidates under consideration has a protected characteristic that is under-represented in the workforce then, with all other considerations being equal, you can choose to offer the position to that person. It may be that both candidates have the same protected characteristic, for instance they are both women in an organisation primarily staffed by men, in which case you will need to identify another practical way to choose between them.

Alternatively, you may be faced with two candidates of equal merit who each have a different under-represented characteristic within that workforce, for instance a white woman and a black man. It is legitimate for you to decide to target one characteristic over another – for instance because the level of under-representation for those with one of the characteristics is greater than for the other.

However, you should not offer a position to a less-suitable person just because that person has a protected characteristic that is more under-represented in the workforce than another protected characteristic. This would amount to unlawful direct discrimination.



## How can I be confident that I'm acting lawfully if I'm ever challenged about using positive action?

Having a transparent appointment process assessment will make employers less open to successful challenge. The following steps should help ensure that you can show that you are using the positive action provisions correctly.

You will need to be able to show that:

- There is sufficient justification for you to have concluded that a particular group is under-represented or otherwise disadvantaged in the workforce
- Your appointment process has objectively assessed the merits, skills, abilities and qualifications of each of the candidates
- The action that you are taking is a proportionate way of addressing any under-representation or tackling disadvantage
- The candidate you appoint is as qualified as any of the other candidates to do this particular job;
- You haven't appointed someone just because they have a targeted characteristic
- You don't have a policy of routinely favouring people with certain protected characteristics

## Further sources of information

The Government Equalities Office has also published a Quick Start Guide on 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](http://www.equalities.gov.uk/equality_act_2010/equality_act_2010_what_do_i_n.aspx)

A series of Frequently Asked Questions on positive action can be found at: [http://www.equalities.gov.uk/equality\\_act\\_2010/faqs\\_on\\_commencement\\_of\\_the\\_eq/positive\\_action.aspx](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. The Commission produces a range of material providing practical guidance on how to comply with the law. [www.equalityhumanrights.com](http://www.equalityhumanrights.com) 0845 604 6610

Citizens Advice [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)

Government Equalities Office [www.equalities.gov.uk](http://www.equalities.gov.uk)

Acas (Advisory, Conciliation and Arbitration Service) [www.acas.org.uk](http://www.acas.org.uk)