

Positive Action

Much press attention has been devoted to the new provision allowing employers to take positive action in recruitment and promotion decisions under the Equality Act 2010. The relevant provision provides an exception to the general rule that it is unlawful discrimination to treat one individual less favourably than another because they do or don't have a protected characteristic. The protected characteristics under the Equality Act are sex (gender) race, including colour and nationality, disability, age, religion and belief, sexual orientation, gender reassignment, marriage and civil partnership and pregnancy and maternity. Positive action will be lawful if an employer reasonably believes a group of employees suffers disadvantage or under-representation in the workplace. However in order to prefer one candidate to another in recruitment or promotion, the candidates must be of "equal merit" under the Act. Most commentators believe that the requirement of equal merit will present a stumbling block as there will always be a difference between two candidates in overall ability, competence and experience and ultimately only a Tribunal can determine whether an employer's actions are justified. With this difficulty in mind we would advise caution in considering exercising positive action though many in the sector will welcome the change as an addition to an employer's ability to promote equality of opportunity.

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