

Using protected characteristics to make decisions

1 . What the law says

Under the law (Equality Act 2010), in certain circumstances employers can:

- take action based on a particular protected characteristic
- justify a business decision that affects people with a particular protected characteristic

This can help:

- someone or a group of people who are disadvantaged or underrepresented in the organisation
- the organisation's diversity and inclusion
- to fulfil a specific need for the employer

Employers can do this through either:

- [positive action](#)
- [objective justification](#)

The protected characteristics under the law are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

Contact the Acas helpline

If you have any questions about using protected characteristics to make a decision at work, [contact the Acas helpline](#).

2. Positive action

Positive action is where an employer does something with the aim of helping an employee or job applicant because of a protected characteristic.

Taking positive action when recruiting

When recruiting, in some circumstances an employer can use protected characteristics to help a disadvantaged or an underrepresented group.

This can also help their organisation to be more diverse and representative, as well as widening the talent pool they recruit from.

It's important to know what is possible and what could be against the law.

[Find out more about using protected characteristics in recruitment](#)

Taking positive action to remove discrimination at work

An employer might be able to help an employee because of a protected characteristic, if any of the following apply:

- they're at a disadvantage
- they're underrepresented in the organisation
- they have particular needs

The employer must be able to prove this action does not discriminate against others.

Example of taking positive action for people at a disadvantage

A construction company believes that employees with disabilities are disadvantaged in their industry.

To help overcome this disadvantage, they decide to offer a mentoring scheme for disabled employees only.

Example of taking positive action for underrepresented people

An employer finds that although half of all their employees are women, more than three-quarters of their managers are men. They decide to offer some 'Women into Management' courses to give women more confidence to apply for management jobs.

Their aim is that this will help correct the balance at management level and that it becomes more representative of the business as a whole.

This would be legitimate positive action because the employer can show that women are underrepresented in management.

However, when filling management vacancies the employer must treat men and women equally. Promoting someone only because they are a woman is likely to be discrimination.

Example of taking positive action for people with particular needs

An employer is reviewing their disciplinary policy. It says that employees can be accompanied at disciplinary hearings only by someone they work with or a trade union representative.

However, in their company there are many employees from eastern Europe who have limited English language skills. They believe these employees could be at a disadvantage under this policy.

The employer decides to change their policy to add that anyone whose first language is not English can also be accompanied by a friend or family member to translate for them.

3. Objective justification

An employer might need to make certain decisions that lead to discrimination. This might be legal if there is 'objective justification'.

Under the law, there can be objective justification if the employer can prove both of the following:

- there's a 'legitimate aim', such as a genuine business need or a health and safety need
- the discrimination is 'proportionate, appropriate and necessary' – this means the legitimate aim is more important than any discriminatory effect

Only the following types of discrimination can be justified in this way:

- [indirect discrimination](#)
- [discrimination arising from disability](#)
- ordinary direct discrimination because of age – [find out more about age discrimination](#)

Financial reasons alone are unlikely to justify discrimination.

The more the action discriminates, the more difficult it is for an employer to prove it's within the law.

Employers should always check whether there's another way that either:

- does not discriminate
- discriminates less

Before making a decision that relates to a protected characteristic, employers should consider [getting legal advice](#).

[Find out about using objective justification in recruitment](#)

Example when there's indirect discrimination

A manufacturer that does much of its business with suppliers in India needs to make some redundancies in its buying team.

The employer decides they need to keep at least 1 team member who speaks Hindi. This might discriminate against people not of Indian heritage. However, it could be legal if there's a genuine business need that cannot be resolved with a less discriminatory approach.

The employer considers whether training others to learn Hindi could be an option. They decide it would take too long for them to speak the language fluently.

Example when there's discrimination arising from disability

A surgeon employed at a private hospital has been diagnosed with a medical condition that means they're losing their eyesight and it will get worse. For this reason, their employer reviews the situation and decides they need to stop them performing operations.

The employer can justify this because patient safety is a legitimate aim. However, they should make their best efforts to find the surgeon an alternative role in the hospital.

Example when there's direct discrimination because of age

A 17-year-old working a day shift applies to work a night shift.

Their employer checks the law and has to turn their application down because the legal minimum age for night work is 18 years old.

The employer can justify this decision based on age because they must follow the law.