Your guide to Positive Action
**Introduction**

Positive Action is the term used to describe the special activities that employers may take within the law aimed at reducing the disadvantage or under-representation experienced by those with any of the protected characteristics below:

- 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

*Equality Act 2010.*

Positive Action has been enshrined in the Equality Act and is an option for employers wishing to address an imbalance in their workplace. Many employers find by studying their statistics that particular groups face disadvantage in accessing or progressing through their organisation. It is often conscious, or more often unconscious, actions or behaviours within the organisation that lead to this disadvantage. It is first vital to understand and work to remove these barriers before attempting to introduce positive action to redress the balance. Sometimes the only way to correct a historic imbalance is to provide extra help for some groups. Inclusive employers should assess the need for positive action in their organisation and if necessary implement a positive action policy.
Positive actions can be:

**TRAINING**
for example, offering a leadership development course to women where the organisation has identified that women are under-represented in senior leadership roles.

**ENCOURAGEMENT**
for example, offering open days to ethnic minority individuals if they are under-represented in the workforce to publicise the organisation’s values, nature of the work, the recruitment process and so on.

**RECRUITMENT AND PROMOTION**
for example, where two candidates for a job or promotion are of equal merit (in a ‘tie-breaker’ situation), but one of the two has a protected characteristic that is under-represented in the workforce or suffers a disadvantage because of that characteristic, the one with the protected characteristic may be lawfully offered the job or promotion.

**LEGAL CONSIDERATIONS**
The provision of training and/or encouragement for under-represented groups has been legal for some time; however, the recruitment and promotion provisions were first introduced in the Equality Act 2010. There are certain legal issues that employers must be aware of if they are considering operating positive action in relation to recruitment and promotion. A failure to consider and address these legal issues could lead to discrimination claims at an employment tribunal.

Points to consider:

1. The employer must reasonably think that people with a protected characteristic are under-represented in the workforce or suffer a disadvantage because of that characteristic. This judgement as to what is reasonable could be based on workforce data, which shows the under-representation for example, of a particular group, or it could be qualitative data based on discussions with staff or their representatives. Remember that some protected characteristics are not easily identifiable – for example one of the two candidates may be an under-represented woman whereas the other may be an under-represented gay man, but he may have chosen not to disclose his sexual orientation.
2. In order to apply positive action in recruitment or promotion, the employer must first establish that candidates are of equal merit, using justifiable assessment criteria based on the person specification for the specific job in question.

3. Recruitment and Promotion positive action is only legal where it is a proportionate way of addressing the under-representation or disadvantage. This means that the seriousness of the under-representation or disadvantage needs to be balanced against the impact that the proposed action may have on other people. Employers should consider if the proposed action is the only way to address the under-representation or disadvantage or if there are other steps that could be taken that would be less likely to result in the less favourable treatment of other people.

4. Employers must not routinely favour candidates with a certain protected characteristic, but it is acceptable to routinely consider positive action where a tie-break situation occurs.

5. Although it would be positive discrimination and unlawful to recruit or promote a person solely because they have a protected characteristic, regardless of merit, it is not unlawful for an employer to treat a disabled person more favourably than a non-disabled person. The ‘Two Ticks’ guaranteed interview scheme means that an employer will interview all disabled applicants if they meet the minimum criteria for the job. However, the person with the disability would need to obtain the job on merit or equal merit and through the application of positive action.
Links
www.equalities.gov.uk
www.equalityhumanrights.com
www.citizensadvice.org.uk