

## When an employer may make a decision based on age, race or another protected characteristic

According to the law, discrimination is when someone is treated unfairly because of sex, race, age or any other 'protected characteristic'.

Protected characteristics are covered by the Equality Act 2010. [Find out more about protected characteristics and discrimination law.](#)

In some cases it might be legal for an employer to make a decision that's based on a protected characteristic, if at least one of these points apply:

- a decision they take helps a disadvantaged or under-represented group ('[positive action](#)')
- they have a good business reason to discriminate ('[objective justification](#)')
- the protected characteristic is essential for the job (an '[occupational requirement](#)')
- they're asking if they need to make their workplace more accessible ('[reasonable adjustments](#)') – they must remember [not to ask about disability except in limited circumstances](#) (PDF, 618KB, 49 pages)
- they want to [find out about the diversity of their workforce](#) to help make it as inclusive as possible – they should still follow specific rules, including making sure the information is provided voluntarily and anonymously

It's a good idea to [get legal advice](#) before making a decision based on a protected characteristic.

In some cases, an employer might be able to help someone because of a protected characteristic (such as sex or race). This is known as 'positive action'.

There are 2 types of positive action:

- making the workplace fairer for a disadvantaged or under-represented group
- taking action when hiring

## 2. Taking positive action to make the workplace fairer for a disadvantaged or under-represented group

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 under-represented in the organisation
- they have specific needs

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

For example, an employer could encourage their female employees to take up management training, if nearly all the existing managers in the firm are men and the customers are mainly female.

This would be to:

- increase women's confidence in applying for management positions
- make the balance between the sexes fairer

## Taking positive action when hiring

In very rare cases, it might be legal to use a protected characteristic to decide who gets a job.

The employer must be able to prove they're taking this action (known as a 'tie-breaker') because either:

- an applicant with the protected characteristic is disadvantaged because of it
- people with the protected characteristic are under-represented in that job

A tie-breaker can only be used by an employer when both of the following apply:

- they're deciding who gets an individual job
- they're deciding between applicants who are otherwise equally able to do that job

### When hiring in future

If an employer does use a tie-breaker, it may not be legal to automatically make the same decision again when hiring in the future. The employer must make sure each hiring decision they take is based on the circumstances of each case.

#### Example

A school has many pupils from ethnic minority backgrounds, including a large number of black pupils. No heads of department are from ethnic minority backgrounds.

The school advertises for a new head of maths. The advert says they welcome qualified applicants from ethnic minorities, as they're under-represented in this kind of senior job.

In the hiring process, the two best candidates are rated as equally suitable for the job based on their qualifications and experience. One of the candidates is black and the other is white.

At the end of the process the headmaster decides to hire the black candidate, to improve diversity in the school.

It can be a good idea to [get legal advice](#) before taking action that relates to a protected characteristic.

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An employer might be able discriminate and stay within the law, if they can prove a good business reason ('objective justification').

It's a good idea to [get legal advice](#) before making a decision that relates to a protected characteristic.

Under the law, objective justification might only be legal in the following circumstances:

- [indirect discrimination](#)
- [discrimination arising from disability](#) (PDF, 618KB, 50 pages)
- [ordinary direct discrimination because of age](#) (PDF, 522KB, 27 pages)

The employer must be able to prove both of the following:

- there's a good business reason behind the discrimination
- the discrimination is 'proportionate, appropriate and necessary' – this means their business need is more important than any discriminatory impact on affected employees

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.

An employer should always check whether there's an alternative they can take that does not discriminate, or discriminates less.

### 3. Examples of objective justification

#### Example 1

A surgeon has a medical condition that means they're already losing their eyesight and it will not return. Because of this, their employer will no longer allow them to do operations.

#### Example 2

A job advert for a firefighter says applicants need to be at least 18 years old, so they're physically mature enough to train for the work required.

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In rare cases an employer might be able to prove an applicant needs a certain protected characteristic (such as a person's sex or religion) to do a particular job. This is known as an 'occupational requirement'.

For it to be an occupational requirement, both of the following must also apply:

- the protected characteristic is essential for and relates to the main tasks of the job
- the employer can prove it has a good business reason ('objective justification')

[Find out more about objective justification.](#)

Examples could include:

- a refuge for women who've experienced domestic violence advertises for a female support worker, as the residents would feel safer if the worker is female
- the Catholic church advertises for a priest who's Catholic

If the employer believes there's an occupational requirement and advertises the job again later, they must check the requirement is still within the law. For example, they could take legal advice.

## 4. When the protected characteristic is religion or belief

The law on discrimination can be complex. [Find out more about religion or belief discrimination](#) (PDF, 492KB, 26 pages).

It's a good idea to [get legal advice](#) before making a decision that relates to a protected characteristic.

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Employers can ask employees and job applicants to give information about their protected characteristics (such as their sex or race) on an equality monitoring form.

If an employer does this, they should only use the information to:

- understand how many people in the workforce have a certain protected characteristic, for example what percentage are women
- make the workplace fair

So that they do not break the law, the employer should:

- make clear to the employee or job applicant that this information is voluntary (they do not have to provide it if they do not want

to)

- make sure the information they get is anonymous
- make sure this process is completely separate and confidential, for example by making sure the information is not seen by anyone involved in hiring the person

Employers can [download our equality and diversity monitoring form template](#).

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