

1. What equality law means for you as an employer: when you recruit someone to work for you.

Equality Act 2010 Guidance for employers.
Vol. 1 of 7.

Contents

Introduction	1
Other guides and alternative formats.....	1
The legal status of this guidance	3
1. What equality law means for you as an employer: when you recruit someone to work for you	4
What's in this guide.....	4
What else is in this guide	5
Making sure you know what equality law says you must do as an employer.....	5
Are you an employer?	5
Protected characteristics.....	6
What is unlawful discrimination?	6
Questions about health or disability	9
Situations where equality law is different	12
What's next in this guide	16
Thinking about what the job involves and what skills, qualities and experience a person will need to do it.....	17
Avoid direct discrimination	17
Avoid requirements you cannot objectively justify.....	17
Recruiting disabled people.....	18
Job adverts	20
Recruiting disabled people.....	21
Application forms and CVs.....	22
Recruiting disabled people.....	24
Asking about health or disability.....	24
Shortlisting applicants to meet or interview.....	28
Recruiting disabled people.....	29

Interviews, meetings and tests.....	29
Recruiting disabled people.....	30
Being flexible about dates and times	31
What mustn't I ask an applicant?	32
Tests.....	33
Social gatherings as part of the assessment	34
Recruiting women who are pregnant or on maternity leave	36
Equality good practice: using positive action to recruit a wider range of people	37
What is 'positive action'?.....	38
Do I have to take positive action?	38
When can I use positive action?	38
Explaining why you are using positive action.....	39
Treating disabled people better than non-disabled people	39
The sort of positive action steps you can take during recruitment.....	40
Tie-break situations.....	40
More about when you are allowed to use positive action and what you have to do to show it is needed	42
Equality good practice: using monitoring forms	45
Can I ask about health or disability on the monitoring form?	45
What happens if someone's protected characteristics are relevant to the recruitment?	46
2. When you are responsible for what other people do.....	48
When you can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation	49
How you can reduce the risk that you will be held legally responsible.....	50
How you can make sure your workers and agents know how equality law applies to what they are doing.....	51
Using written terms of employment for employees	52

When your workers or agents may be personally liable.....	53
What happens if a person instructs someone else to do something that is against equality law	54
What happens if a person helps someone else to do something that is against equality law	54
What happens if you try to stop equality law applying to a situation	55
3. The duty to make reasonable adjustments for disabled people.....	56
Which disabled people does the duty apply to?.....	58
Finding out if someone is a disabled person.....	58
The three requirements of the duty.....	61
Are disabled people at a substantial disadvantage?	62
Changes to policies and the way your organisation usually does things.....	62
Dealing with physical barriers	63
Providing extra equipment or aids.....	64
Making sure an adjustment is effective	64
Who pays for reasonable adjustments?.....	65
What is meant by 'reasonable'	65
Reasonable adjustments in practice	68
Specific situations	73
Employment services.....	73
Occupational pensions.....	74
Questions about health or disability	74
4. What to do if someone says they've been discriminated against	75
If a job applicant complains to you.....	77
Dealing with the complaint	78
What you can do if you find that there has been unlawful discrimination	78
Monitoring the outcome	78
The questions procedure	78

Key points about discrimination cases in a work situation	79
Where claims are brought.....	79
Time limits for bringing a claim.....	80
The standard and burden of proof.....	81
What the Employment Tribunal can order you to do	82
Settling a dispute	83
More information about defending an Employment Tribunal case	84
5. Further sources of information and advice	85
6. Glossary	94

Introduction

This guide is one of a series written by the Equality and Human Rights Commission to explain what you must do to meet the requirements of equality law. These guides will support the introduction of the Equality Act 2010. This Act brings together lots of different equality laws, many of which we have had for a long time. By doing this, the Act makes equality law simpler and easier to understand.

There are seven guides giving advice on your responsibilities under equality law as someone who has other people working for you whether they are employees or in another legal relationship to you. The guides look at the following work situations:

1. When you recruit someone to work for you
2. Working hours and time off
3. Pay and benefits
4. Career development – training, development, promotion and transfer
5. Managing people
6. Dismissal, redundancy, retirement and after someone's left
7. Good practice: equality policies, equality training and monitoring

Other guides and alternative formats

We have also produced:

- A separate series of guides which explain what equality law means for you if you are providing services, carrying out public functions or running an association.
- Different guides for individual people who are working or using services and who want to know their rights to equality.

If you require this guide in an alternative format and/or language please contact the relevant helpline to discuss your needs.

England

Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, Arndale Centre, Manchester M4 3AQ

Telephone: 0845 604 6610

Textphone: 0845 604 6620

Fax: 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Telephone: 0845 604 5510

Textphone: 0845 604 5520

Fax: 0845 604 5530

Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Telephone: 0845 604 8810

Textphone: 0845 604 8820

Fax: 0845 604 8830

www.equalityhumanrights.com

The legal status of this guidance

This guidance applies to England, Scotland and Wales. It has been aligned with the Codes of Practice on Employment and on Equal Pay. Following this guidance should have the same effect as following the Codes. In other words, if a person or an organisation who has duties under the Equality Act 2010's provisions on employment and other work situations does what this guidance says they must do, it may help them to avoid an adverse decision by a court in proceedings brought under the Equality Act 2010.

This guide is based on equality law as it is at 1 October 2010. Any future changes in the law will be reflected in further editions.

This guide was last updated in July 2011. You should check with the Equality and Human Rights Commission if it has been replaced by a more recent version.

1. What equality law means for you as an employer: when you recruit someone to work for you

What's in this guide

If you are recruiting someone to work for you, equality law applies to you.

Equality law applies:

- whatever the size of your organisation
- whatever sector you work in
- whether you are taking on your first worker or your hundred and first
- whether or not you use any formal processes like application forms, shortlisting or interviewing.

This guide tells you how you can avoid all the different types of unlawful discrimination. It recognises that smaller and larger employers may operate with different levels of formality, but makes it clear how equality law applies to everyone, and what this means for the way you (and anyone who already works for you) must do things.

It covers the following situations and subjects (we tell you what any unusual words mean as we go along):

- Thinking about what the job involves and what skills, qualities and experience a person will need to do it
- Job adverts
- Application forms and CVs
- Shortlisting applicants to meet or interview
- Interviews, meetings and tests
- Recruiting women who are pregnant or on maternity leave
- Equality good practice.

What else is in this guide

This guide also contains the following sections, which are similar in each guide in the series, and contain information you are likely to need to understand what we tell you about recruitment:

- Information about when you are responsible for what other people do, such as your employees.
- Information about making reasonable adjustments to remove barriers for disabled people who work for you or apply for a job with you.
- Advice on what to do if someone says they've been discriminated against.
- A Glossary containing a list of words and key ideas you need to understand this guide – all words highlighted in **bold** are in this list. They are highlighted the first time they are used in each section and sometimes on subsequent occasions.
- Information on where to find more advice and support.

Throughout the text, we give you some ideas on what you can do if you want to follow equality good practice. While good practice may mean doing more than equality law says you must do, many employers find it useful in recruiting talented people to their workforce and managing them well so they want to stay, which can save you money in the long run. Sometimes equality law itself doesn't tell you exactly how to do what it says you must do, and you can use our good practice tips to help you.

Making sure you know what equality law says you must do as an employer

Are you an employer?

This guide calls you an **employer** if you are the person making decisions about what happens in a work situation. Most situations are covered, even if you don't give your worker a written **contract of employment** or if they are a **contract worker** rather than a **worker** directly employed by you. Recruiting people to other positions like trainees, apprentices and business partners is also covered. Sometimes, equality law only applies to particular types of worker, such as employees, and we make it clear if this is the case.

Protected characteristics

Make sure you know what is meant by:

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

These are known as protected characteristics.

What is unlawful discrimination?

Unlawful discrimination can take a number of different forms:

- You must not treat a job applicant worse than another job applicant because of a protected characteristic (this is called **direct discrimination**).

For example:

- An employer does not interview a job applicant because of the applicant's ethnic background.
- An employer says in a job advert 'this job is unsuitable for disabled people'.

- You must not do something which has (or would have) a worse impact on a job applicant and on other people who share a particular protected characteristic than on people who do not have that characteristic. Unless you can show that what you have done, or intend to do, is **objectively justified**, this will be **indirect discrimination**. 'Doing something' can include making a decision, or applying a rule or way of doing things.

For example:

A job involves travelling to lots of different places to see clients. An employer says that, to get the job, the successful applicant has to be able to drive. This may stop some disabled people applying if they cannot drive. But there may be other perfectly good ways of getting from one appointment to another, which disabled people who cannot themselves drive could use. So the employer needs to show that a requirement to be able to drive is objectively justified, or they may be discriminating unlawfully against people who cannot drive because of their disability.

- You must not treat a disabled job applicant **unfavourably** because of something connected to their disability where you cannot show that what you are doing is **objectively justified**. This only applies if you know or could reasonably have been expected to know that the applicant is a disabled person. This is called **discrimination arising from disability**.

For example:

An employer tells a visually impaired person who uses an assistance dog that they are unsuitable for a job because the employer is nervous of dogs and would not allow it in the office. Unless the employer can objectively justify what they have done, this is likely to be discrimination arising from disability. The refusal to consider the visually impaired person for the job is unfavourable treatment which is because of something connected to their disability (their use of an assistance dog). It may also be a failure to make a reasonable adjustment.

- You must not treat a job applicant worse than another job applicant because they are **associated with** a person who has a protected characteristic.

For example:

An employer does not give someone the job, even though they are the best-qualified person, just because the applicant tells the employer they have a disabled partner. This is probably direct discrimination because of disability

by association. Direct discrimination cannot be justified, whatever the employer's motive.

- You must not treat a job applicant worse than another job applicant because you incorrectly think they have a protected characteristic (**perception**).

For example:

An employer does not give an applicant the job, even though they are the best-qualified person, because the employer incorrectly thinks the applicant is gay. This is still direct discrimination because of sexual orientation.

- You must not treat a job applicant badly or **victimise** them because they have complained about discrimination or helped someone else complain or have done anything to uphold their own or someone else's equality law rights.

For example:

An employer does not shortlist a person for interview, even though they are well-qualified for the job, because last year the job applicant said they thought the employer had discriminated against them in not shortlisting them for another job.

- You must not **harass** a job applicant.

For example:

An employer makes a job applicant feel humiliated by telling jokes about their religion or belief during the interview. This may amount to harassment.

In addition, to make sure that a disabled person has the same access, as far as is reasonable, to everything that is involved in getting and doing a job as a non-disabled person, you must make **reasonable adjustments**.

If an applicant asks for information about the job and the application form (if there is one) in an **alternative format** which they require because they are a disabled person then you must provide this, so long as it is a reasonable adjustment – and it is likely to be.

If an applicant needs reasonable adjustments to participate in any interview or assessment process, then you must make them.

When you assess a disabled job applicant's suitability for the job, you must take account of any reasonable adjustments which are needed to enable them to do the job.

If, after taking reasonable adjustments into account, the disabled applicant would not be the best person for the job, you do not have to offer it to them.

But if they would be the best person with the reasonable adjustments in place, you must offer them the job. In any event, it would make sense for you to do this, as you want the best person for the job.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

We also highlight particular issues in each section of this guide that you may need to think about when you are recruiting disabled people.

Questions about health or disability

Except in very restricted circumstances or for very restricted purposes, you are not allowed to ask any job applicant about their health or any disability until the person has been:

- offered a job either outright or on a conditional basis, or
- included in a pool of successful candidates to be offered a job when a position becomes available (for example, if an employer is opening a new workplace or expects to have multiple vacancies for the same role but doesn't want to recruit separately for each one).

This includes asking such a question as part of the application process or during an interview. It also includes sending them a questionnaire about their health for them to fill in before you have offered them a job. Questions relating to previous sickness absence count as questions that relate to health or disability.

No-one else can ask these questions on your behalf either. So you cannot refer an applicant to an **occupational health practitioner** or ask an applicant to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made (or before inclusion in a pool of successful applicants) except in very limited circumstances, which are explained next.

The point of stopping employers asking questions about health or disability is to make sure that all job applicants are looked at properly to see if they can do the job in question, and not ruled out just because of issues related to or arising from their health or disability, such as sickness absence, which may well say nothing about whether they can do the job now.

You can ask questions once you have made a job offer or included someone in a group of successful candidates. At that stage, you could make sure that someone's health or disability would not prevent them from doing the job. But you must consider whether there are reasonable adjustments that would enable them to do the job.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

What happens if I ask questions about health or disability?

The Equality and Human Rights Commission can take legal action against you if you ask job applicants any health- or disability-related questions that are not allowed by equality law.

Also, a disabled job applicant can bring a claim against you if:

- you asked health- or disability-related questions of a kind that are not allowed, and
- they believe there has been unlawful discrimination as a result of the information that they gave (or failed to give) when answering such questions.

In such a claim, the fact that you asked these questions will shift the burden of proof, so that it will be for you to prove that you did not discriminate against the worker when, for example, you did not offer them the job.

When you are allowed to ask questions about health or disability

You can ask questions about health or disability when:

- You are asking the questions to find out if any applicant needs reasonable adjustments for the recruitment process, such as for an assessment or an interview.

For example:

An application form states: 'Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview'. This is allowed.

You can read more about reasonable adjustments during the application process later in this guide.

- You are asking the questions to find out if a person (whether they are a disabled person or not) can take part in an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose.

For example:

An employer is recruiting play workers for an outdoor activity centre and wants to hold a practical test for applicants as part of the recruitment process. It asks a question about health in order to ensure that applicants who are not able to undertake the test (for example, because they are pregnant or have an injury) are not required to take the test. This is allowed.

- You are asking the questions for **monitoring** purposes to check the diversity of applicants. You can read more about monitoring later in this guide.
- You want to make sure that an applicant who is a disabled person can benefit from any measures aimed at improving disabled people's employment rates. For example, the **guaranteed interview scheme**. Make it clear to job applicants that this is why you are asking the question.
- You are asking the question because having a specific impairment is an **occupational requirement** for a particular job.

For example:

An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states this. The employer can ask on the application form or at interview about the applicant's disability.

- Where the questions relate to a requirement to vet applicants for the purposes of **national security**.
- Where the question relates to a person's ability to carry out a function that is intrinsic (or absolutely fundamental) to that job. Where a health- or disability-related question would mean you would know if a person can carry out that function with reasonable adjustments in place, then you can ask the question.

For example:

A construction company is recruiting scaffolders. The company can ask about health or disability on the application form or at interview if the questions relate specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is a function that is intrinsic or fundamental to the job.

In practice, even if a function is intrinsic to the job, you should ask a question about a disabled person's ability to do the job with reasonable adjustments in place. There will

therefore be very few situations where a question about a person's health or disability needs to be asked.

Most of the time, whether on an application form or during an interview, you can ask a question about whether someone has the relevant skills, qualities or experience to do the job, not about their health or about any disability they may have.

For example:

An employer is recruiting a person as a cycle courier. They ask applicants to send in a CV setting out their relevant experience and a covering letter saying why they would be suitable for the job. The employer will score candidates on their experience of and enthusiasm for cycling. It is not necessary to ask applicants questions about health or disability. If the employer considers a health check is necessary, for example, for insurance purposes, this can be carried out once an applicant has been offered the job, and the job offer can be made conditional on the health check.

If a disabled job applicant voluntarily discloses information about their health or disability before you have made any job offer, do not get drawn into a conversation which is outside the exceptions set out above. For example, you could ask a follow-up question to find out what reasonable adjustments were necessary to enable the candidate to carry out an intrinsic function of the job. You should explain to the candidate that it is not appropriate or permitted for you to get into a general conversation about their disability or health record, but you can discuss this particular aspect.

Situations where equality law is different

Sometimes there are situations where equality law applies differently. This guide refers to these as **exceptions**.

There are several exceptions which relate to recruitment and which apply to all employers.

There are others that only apply to particular types of employer.

We only list the exceptions that apply to the situations covered in this guide. There are more exceptions which apply in other situations, for example, when you are selecting someone for redundancy. These are explained in the relevant guide in the series.

In addition to these exceptions, equality law allows you to:

- Treat disabled people better than non-disabled people.
- Use voluntary **positive action**. You can read more about positive action during recruitment later in this guide.

Age

Age is different from other protected characteristics. If you can show that it is **objectively justified**, you can make a decision based on someone's age, even if this would otherwise be direct discrimination.

However, it is very unusual to be able to objectively justify direct age discrimination of this kind. Be careful not to use stereotypes about a person's age to make a judgement about their fitness or ability to do a job.

For example:

- An employer rejects an applicant for a management job because they are 25 years old and much younger than the people they would be managing.
- An employer only makes people over 50 do an aptitude test, because the employer believes that people over 50 do not have the mental agility to learn to do a job.

These are both examples of age discrimination which an employer would find it very difficult to objectively justify.

Occupational requirements

If you can show that a particular protected characteristic is central to a particular job, you can insist that only someone who has that particular protected characteristic is suitable for the job. This would be an 'occupational requirement'.

For example:

A women's refuge may want to say that it should be able to employ only women as counsellors. Its client base is only women who are experiencing domestic violence committed by men. This would probably be a genuine occupational requirement.

Obeying another law

You can take into account a protected characteristic where not doing this would mean you broke another law.

For example:

A driving school must reject a 19-year-old who applies for a job as a driving instructor because to offer them a job – even if they are otherwise the best candidate – would involve breaking the law because a driving instructor must be aged at least 21.

National security

You can take a person's protected characteristic into account if there is a need to safeguard national security, and the discrimination is **proportionate**.

Exceptions that only apply to some employers

There are also exceptions that only apply to some employers:

- If you are a **religion or belief organisation**, you may be able to say that a job requires a person doing the job to hold a particular religion or belief if, having regard to the nature or context of the job, this is an occupational requirement and it is **objectively justified**.

For example:

A Humanist organisation which promotes Humanist philosophy and principles would probably be able to apply an occupational requirement for its chief executive to be a Humanist.

- If the job is for the purposes of an organised religion, you may be able to say that a job or role requires a person to have or not have a particular protected characteristic or to behave or not behave in a particular way.

If:

- a job or role exists for the purposes of an organised religion, such as being a Minister or otherwise promoting or representing the religion, and
- because of the nature or context of the employment, it is necessary to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers or to conform to the doctrines of the religion by applying a requirement to the job or role,

you may be able to refuse to employ a person because:

- they are male or female
- they are a transsexual person
- they are married or in a civil partnership, including taking into account who they are married to or in a civil partnership with (such as someone who marries a divorced person whose former spouse is still alive)
- they manifest a particular sexual orientation, for example, a gay or lesbian or bisexual person who is in a relationship with a same-sex partner.

This exception should only be used for a limited number of posts, eg ministers of religion, and a small number of posts outside the clergy, eg those which exist to promote or represent the religion. The requirement must be a **proportionate** way of meeting the aims stated above.

- If you are an **employment service provider**, you may be able to say that a person must have a particular protected characteristic to do **vocational training**, if the training leads to work for which having that characteristic is an occupational requirement.
- If you are an **educational establishment** like a school or college, you may be able to say that someone has to be of a particular religion or belief, or must be a woman.
- If you are recruiting to the civil, diplomatic, armed or security and intelligence services and some other public bodies, you can specify what nationality a person has to be.
- If you are recruiting for service in the armed forces, you may be able to exclude women and transsexual people if this is a proportionate way to ensure the combat effectiveness of the armed forces. In addition, age and disability are, in effect, not protected characteristics in relation to service in the armed forces. Disability can also be a reason to refuse someone work experience in the armed forces.

There are more details of these exceptions in the Glossary.

Good practice tips: using exceptions

If someone disagrees with you and brings an Employment Tribunal claim, you may need to show why you thought an exception applied. When you're making the decision:

- Look at the exceptions to see if they might apply to your situation or organisation.
- If you decide an exception does apply, keep a note of why you decided this.
- Tell people which exception you are using, for example, through the job advert if you use one to tell people about the recruitment.

What's next in this guide

The next part of this guide tells you more about how you can avoid all the different types of unlawful discrimination in the following situations:

- Thinking about what the job involves and what skills, qualities and experience a person will need to do it
- Job adverts
- Application forms and CVs
- Shortlisting applicants to meet or interview
- Interviews, meetings and tests
- Recruiting women who are pregnant or on maternity leave
- Equality good practice
 - Using positive action to recruit a wider range of people
 - Using monitoring forms during recruitment.

Thinking about what the job involves and what skills, qualities and experience a person will need to do it

Before you recruit a new worker or someone to replace a person who is leaving or has left, you will be thinking about what the job involves and the skills, qualities and experience a person will need to do it.

Avoid direct discrimination

You must avoid direct discrimination against people because of their protected characteristics in what you say or write about the job.

For example:

An employer tells a female applicant on the phone that they are unsuitable for a driving job because the job has always been done by a man before and that is what they are looking for this time.

Direct discrimination cannot be **objectively justified** for any protected characteristic except age. But don't take this as meaning that equality law generally allows age discrimination or stereotyping.

For example:

An employer says in a person specification that the successful candidate 'must have youthful enthusiasm'. This would probably be direct discrimination because of age which the employer could not show to be **objectively justified**. What is actually needed is enthusiasm, which can be just as present in someone who the employer does not see as young, so the employer should not include the stereotype in the person specification.

Avoid requirements you cannot objectively justify

Of course, you will need the successful applicant to have particular skills, experience or qualifications to do the job.

If requirements like these are **objectively justified**, you can include them in what you say or write about the job and the person you are looking for, even if they exclude some people (for example, because people with a particular protected characteristic are less likely to be able to meet the requirements).

But if the requirements are *not* objectively justified to do the job, then using them might be unlawful indirect discrimination.

For example:

An employer specifies that a job must be done on a full-time basis without having looked at whether it might be suitable for part-time work or jobsharing. The requirement to work full-time would put women at a disadvantage compared to men because more women work flexibly because of childcare responsibilities. Unless the employer can objectively justify the requirement to work full-time, this is likely to be indirect discrimination because of sex.

Recruiting disabled people

Any requirements about what the job involves, or about the person who you want to recruit, should be related to and needed as part of the job. The inclusion of unnecessary or minor requirements could discriminate against disabled people, for example, by stopping them applying.

For example:

An employer states that they want to recruit someone who is 'active and energetic' but in fact the job needs someone to work at a desk. This might stop some disabled people from applying if, for example, they have a mobility impairment (although, of course, many people with a mobility impairment are very active and energetic). This would be the wrong approach for an employer to take.

You should also think about whether specific qualifications are actually required or whether what is really needed is a particular skill level or task.

For example:

An employer specifies that a driving licence is required for a job which involves limited travel. An applicant for the job has no driving licence because of the effects of cerebral palsy. They are otherwise the best applicant for that job, they could easily and cheaply do the travelling involved other than by driving and it is likely to be a reasonable adjustment for the employer to let them do so. It would probably be discriminatory to insist on the specification and reject their application only because they have no driving licence.

Good practice tip for avoiding discrimination

Stick to making a list of what the job is designed to get done. Try not to make assumptions about who will be able to do it. Making assumptions might mean you exclude people just because of their protected characteristics, which would be the wrong approach.

Remember that you must make reasonable adjustments for disabled applicants during the recruitment process and must provide and accept information in alternative formats, where this would be a reasonable adjustment.

Equality good practice: what you can do if you want to do more than equality law requires

- Use a job description and person specification – and other more ‘formal’ processes like an application form, because:
 - this can make it easier for you to make sure you are not discriminating against people
 - they help you to focus on what the job involves and the skills, experience and qualifications someone needs to do the job well
 - you are less likely to get distracted by irrelevant factors, such as someone’s protected characteristics
 - this makes it more likely you’ll get the right person for the job – the person who can do it best – and also help you avoid tribunal claims.
- If you decide to use a job description and person specification, make it clear what the job involves and the skills, qualities and experience the employer is looking for. Write in plain language.
- In the job description (which says what the person who gets the job will be doing), avoid unnecessary tasks or overstated responsibilities or jargon, acronyms and abbreviations, which may exclude people who don’t understand what they mean – unless understanding special words is a necessary part of the job.

- If a disabled person applies for the job, the law requires you to make **reasonable adjustments** to remove barriers that non-disabled people would not face in being able to do the job. This will be easier if you:
 - write the job description in a way that lists what the job is for and the results which the person doing it should produce
 - try not to focus on how the job will be done, as reasonable adjustments might enable a disabled person to do the job in a different way, but producing just as good results.
- In the person specification (which lists the skills, qualities and experience the person who gets the job should ideally have), don't overstate the skills, qualities or experience someone needs to do the job, and make it clear whether the skills, qualities and experience needed for the job are essential or just desirable.

Job adverts

You do not have to advertise a job vacancy in a particular way or at all.

But if you don't advertise at all or you advertise in a way that won't reach people with a particular protected characteristic, this might in some situations lead to indirect discrimination, unless you can **objectively justify** your approach.

For example:

A large employer recruits workers to driving jobs through word of mouth. This results in everyone who has a driving job being a member of the same few families or a friend of these families. All the family members and their friends are white, despite the workplace being in an area of high ethnic minority population. Unless the employer can objectively justify the way drivers are recruited, this is likely to be indirect discrimination because of race.

If you do advertise, whether that's on a notice board, in a shop window, in a newspaper or on a website, or by using a recruitment agency, you must not give the impression you intend to discriminate.

For example:

An employer advertises for a 'waitress'; to avoid direct discrimination because of sex, they should advertise for 'waiting staff' or 'waiter or waitress'.

This does not apply if any of the exceptions listed at pages 12–16 apply in which case you could mention a particular protected characteristic in the job advertisement.

Recruiting disabled people

If you do advertise a job, you must not state or imply that a job is unsuitable for disabled people generally or a disabled person with a particular type of impairment.

For example:

An employer is advertising for somebody to deliver parcels on their own; the advertisement states that the successful applicant will have to drive and be able to lift the parcels. The need to drive is clearly required for the job. Although it may exclude some disabled people, eg those with a sight impairment, it would not exclude all disabled people. It would therefore be wrong – and discriminatory – to put ‘unsuitable for disabled people’ in the job advert.

You must not state or imply that reasonable adjustments will not be made for a disabled person.

For example:

When a school is advertising for a teacher to work in a building on two floors which does not have a lift, they must not state that because of this the job would not be suitable ‘for a disabled person’. Instead, if they wish to address this issue in the advert, they could point out that the school is on two floors but that they would welcome applications from disabled people whatever their impairment and would make reasonable adjustments both at interview and on appointment for applicants with a mobility impairment. If the school interviews an applicant with a mobility impairment, it would be a reasonable adjustment to hold the interview somewhere with level access. If the successful applicant has a mobility impairment, a reasonable adjustment could be made to allow them to do their teaching on the ground floor and, if necessary, level access to the ground floor could be provided through the installation of a ramp if this did not already exist, provided these are reasonable adjustments.

If you want to, you can advertise a job as being open to disabled applicants only or you can say in an advert that you are encouraging disabled people to apply for a job. This is not unlawful discrimination against a non-disabled person. Equality law allows you to treat a disabled person better – or **more favourably** – than a non-disabled person. This can be done even if the disabled person is not at a specific disadvantage because of their disability in the particular situation. The reason the law was designed this way is to

recognise that generally disabled people face a lot of barriers to participating in work and other activities.

Equality good practice: if you want to do more than equality law requires

- If you want to address under-representation or disadvantage in your workforce through 'positive action', you can use an advertisement to encourage applications from people with a particular characteristic. But you cannot specify that you only want someone with a particular characteristic or that only people with that characteristic need apply (unless you are applying an occupational requirement, which is different from positive action). When using positive action, you must still choose the successful applicant because they are the best person for the job, not just because of a protected characteristic. You can read more about **positive action** later in this guide.
- You could use a logo to show that you encourage applications from people with a particular protected characteristic, for example, if you are authorised to use the '**Two Ticks**' symbol to show that you want to encourage applications from disabled people.
- Or you could use a statement to show that you want to encourage anyone who has the necessary skills, qualities and experience to apply such as:
 - 'We welcome enquiries from everyone and value diversity in our workforce.'
 - 'We are willing to consider flexible working arrangements.'
- If you have an **equality policy**, you could mention this to tell people that your organisation wants to operate in a particular way.

Application forms and CVs

You don't have to ask job applicants to fill in an application form or even to give you a CV or job history. But you're likely to want to find out what skills, qualities and experience they have which would make them the best person to do the job.

Regardless of how you get the information about someone, you must not use what they say to discriminate unlawfully against them. For example, do not reject applications because of a person's sex, race or another protected characteristic, which you have found out from the information given. This would be direct discrimination.

If you reject an application because of someone's age, you must be able to **objectively justify** this.

You are also not allowed to make **pre-employment enquiries** about a job applicant's disability or health record except in specific circumstances.

If you reject applications because you apply a requirement which has a worse impact on people with a particular protected characteristic, then unless you can **objectively justify** the requirement, this may be **indirect discrimination**.

For example:

An employer decides to reject applications from anyone who has had a career break. This would have a worse impact on some people who share a particular protected characteristic, such as women, who are more likely to have taken a break to have a family, and transsexual people, who have taken a break to undergo gender reassignment. Unless the employer can objectively justify the requirement for the successful applicant not to have had a career break, this is likely to be unlawful indirect discrimination.

If the applicant who is rejected for this reason is a disabled person, it may be **discrimination arising from disability**.

If you know, or could reasonably be expected to know that an applicant is disabled, and reject their application because of something connected with the person's disability, this will be unlawful **discrimination arising from disability** unless you can **objectively justify** your decision.

Good practice tip for avoiding discrimination

Do not ask for personal details which you will not use to make a decision and which could allow for discrimination to take place – or may just make someone think that you're asking for it so you can discriminate, which puts you at risk of a tribunal claim. You are very unlikely to need this sort of information to decide who can do the job best.

For example:

- Questions on marital status or childcare arrangements.

But also, equality law places restrictions on the sorts of health- and disability-related questions you can ask before the point at which you offer a person a job.

Name and contact details are usually all you need by way of personal information at this stage (as opposed to information about someone's skills, qualities and experience). Other personal information, for example, date of birth or marital status for a pension scheme, can be asked in confidence once someone gets the job.

Recruiting disabled people

If an applicant asks for information about the job and the application form (if you're using one) to be given to them in an alternative format which they require because they are a disabled person then you must provide this, so long as it is a reasonable adjustment – and it is likely to be. This could be information in large print, electronically or as an audio file. Everyone in your organisation who is involved in the recruitment should be told what they have to do.

For example:

A person applies for a job and asks for information in large print format because they have a visual impairment. An administrator dealing with this does not understand what they are being asked to do and is not aware of their own or their employer's duty to avoid discriminating against disabled people. She ignores the applicant's request and the applicant is unable to apply for the vacancy. This is a failure to comply with the duty to make reasonable adjustments.

If it is a reasonable adjustment to do so, you must be prepared to accept an application in an alternative format. However, the applicant will probably want to submit an application in a format which suits you as the employer. For example, they may usually use Braille to read and type but could send their application to you as a word processed document electronically.

Asking about health or disability

In general, you must not ask a job applicant questions relating to health or disability. So don't ask on the application form or ask someone to say anything in a covering letter with a CV or in a letter of application or on a separate questionnaire (unless this is a **monitoring form**) about their health or disability.

Instead, ask whether someone has the relevant skills, qualities and experience to do the job, not about their health or about any disability they may have.

One of the exceptions to this rule is that you can ask a question to find out if a disabled person needs a **reasonable adjustment** during the recruitment process itself.

But don't ask for this information on the application form. Ask applicants to tell you this on a separate document or using a covering letter that does not contain any information relevant to deciding whether to take their application further.

Keep this information separate from the rest of the information an applicant gives you about themselves, whether this is on an application form or not. This will make sure that the information is not used to discriminate unlawfully against them, and that you will be able to show that it hasn't.

The easiest way to make sure the information about reasonable adjustments is not used in the wrong way – to exclude a disabled person from the application process – is to make sure the person or people deciding which applicants to take through to the next stage of the process don't see the information about reasonable adjustments before making their decision.

If you are making this decision by yourself (for example, if your organisation is very small), then you must be careful not to let your knowledge of the fact an applicant needs reasonable adjustments influence your decision whether to take them through to the next stage.

You only have to make adjustments if you know, or could be reasonably expected to know, that a disabled person has applied or may apply for the job. But you must do all that can reasonably be expected to find out whether this is the case and what, if any, adjustments an applicant requires.

For example:

When inviting job applicants for interview, an employer asks applicants to say if they have any disability-related requirements for interview and states that the employer will make reasonable adjustments. This is the right approach, so long as the employer does not then use any information the applicants give to discriminate against them.

Don't ask in a way that might be intrusive or that violates the disabled person's privacy or dignity.

Do not ask anything that is not about making reasonable adjustments to the application process, unless one of the exceptions listed at pages 12–16 applies.

Do not use what the person says about reasonable adjustments to make any other decisions that are part of the application process.

For example:

An employer asks a specific question when they invite job applicants for interview: 'Do you require any adjustments because of a disability?' and offers to answer any questions applicants have about the interview process to help them work out if they need to ask the employer for anything. The employer is also clear whether or not the interview will take place in a building with level access (i.e. if there are stairs, there are ramps or a lift) and if a hearing loop is available. This is the right sort of approach.

However, applicants do not have to respond to this request and, unless you could otherwise reasonably be expected to know that a job applicant is a disabled person, you will not be under a duty to make adjustments. However, if an applicant discloses at a later stage that they are a disabled person, or you could reasonably be expected to know that they are, you must then consider whether they need reasonable adjustments.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

Equality good practice: what you can do if you want to do more than equality law requires

- Using an application form which asks people to say how they can meet the requirements of the job will help you to focus on whether people can do the job or not, rather than their protected characteristics, and makes unlawful discrimination less likely. This will help you avoid tribunal claims.
- If you have drawn up a job description and person specification, use these to work out what you want to ask on the application form.
- Only ask for information that is relevant to the job. For example, unless it is really necessary for the job, do not ask for applicants' date of birth or for other dates – although you'll probably want to ask how long someone was in a particular job, and this is all right. But someone's age very rarely tells you whether they are the right person for the job or not.
- Consider asking applicants to put on a separate sheet all personal information from which you may be able to tell if they have a protected characteristic.
 - This is so that this information is not shown to the people choosing applicants. They can then focus completely on what each applicant says about how they meet the requirements of the job, rather than (even accidentally or subconsciously) taking account of irrelevant considerations such as someone's age, sex or ethnicity.
 - An exception to this would be if an employer had decided to use **positive action** in the recruitment for that job; if this is the reason for asking for particular information, this should be made clear on the form. Or you should ask applicants' permission to allow the people making the recruitment decisions to see their **monitoring form**.

- Consider allowing people to give information on experiences outside paid employment, or make it clear they can use these in answering the questions. This can help people whose protected characteristics have influenced their work history to show they have gained the skills you need in other ways.

For example:

- A woman who has taken several years out of paid employment while her children were very young has been the secretary of her local tenants' and residents' association. This has given her valuable skills in administration and co-ordination, and has meant she has kept her IT knowledge up-to-date. An employer does not take account of her unpaid experience but only focuses on her last paid job some years before. They do not gain an accurate picture of her skills, qualities and experience and miss out on recruiting a good employee.
- A disabled person applies for a job working at a community centre. The applicant does not have any formal qualifications or experience of paid work. However, the volunteering they have done for local charities means they have experience of organising meetings and contacting people to encourage them to take part in activities. An application form that asks about 'relevant experience, paid or unpaid' would highlight this in a way that a form that only asked about 'previous employment' would not.

Shortlisting applicants to meet or interview

Shortlisting is when you decide who to meet or interview to discuss their job application. The meeting or interview could be face to face or by phone.

Equality law does not say that you have to meet someone or interview them before offering them a job.

But if you do decide to have a meeting or interview with one or more job applicants, then you must not unlawfully discriminate against a job applicant when you decide who to meet or interview.

Use the information earlier in this guide to make sure you know what equality law says you must do as an employer.

Even if you are using **positive action** measures during the recruitment process, you must not shortlist applicants who do not meet the standard you have set for deciding who to shortlist just because they have a particular protected characteristic if there are better qualified applicants without that protected characteristic. The only exception to this is if you are recruiting disabled people. This is explained below.

Recruiting disabled people

Your organisation may have a **guaranteed interview scheme** for disabled people. In this case, if someone meets the minimum criteria for the job then you should shortlist them for interview.

Equality law does not say you have to have a guaranteed interview scheme. If you do not, you must still take account of how reasonable adjustments could enable the person to participate in the recruitment process if you know or could reasonably be expected to know that they are a disabled person.

Interviews, meetings and tests

An interview, meeting or test can help you work out if someone is the best person for the job. But it will be harder to work this out if you do not assess everyone in a way that helps you:

- find out if they have the skills, qualities and experience to make them the best person for the job, and
- assess each applicant in the same way.

Equality law does not say that you have to meet someone or interview them before offering them a job.

If you decide to interview job applicants, whether that is face to face or over the phone, or to give them a test, then you must not unlawfully discriminate against a job applicant in the way you carry out the meeting, interview or test.

Use the information earlier in this guide to make sure you know what equality law says you must do as an employer.

Examples of what to avoid include:

- Asking questions which make assumptions about people based on their protected characteristics.

For example:

An employer asks a woman if she is going to need time off for family responsibilities, when they do not ask a man.

- Harassing an applicant.

For example:

An employer makes a series of unpleasant 'jokes' about an applicant's race, which create an offensive atmosphere for them.

Recruiting disabled people

If an applicant is a disabled person and has said that they need adjustments for the interview, meeting or test, and those adjustments are **reasonable adjustments**, then you must make them.

For example:

An applicant for a job with an employer has a hearing impairment which means that they use a textphone. The employer has asked applicants to take part in a telephone interview. The applicant tells the employer in advance that they will be using a textphone and the **UK Text Relay Service**, and the employer interviews them in this way. The employer has made a reasonable adjustment.

You only need to make adjustments if you know, or could reasonably be expected to know, that a disabled person is or may be applying for the job. Once you know that or should have known it, you must take steps to find out whether the job applicant needs any adjustments and what those adjustments are. This means you will need to make sure that all of the interview arrangements allow the person to attend and participate effectively, provided these are reasonable adjustments.

For example:

An applicant with a hearing impairment informs the employer that they use a combination of hearing aids and lip reading but will need to be able to see the interviewer's face clearly. The interviewer makes sure that their face is well lit, that they face the applicant when speaking, that they speak clearly and are prepared to repeat questions if the applicant does not understand them. These are likely to be reasonable adjustments for the employer to have to make.

If you have not asked whether an applicant needs an adjustment or if an applicant has not told you in advance, you must still make any adjustment that the applicant needs when they arrive. This is provided you know they are disabled and need an adjustment and that it is reasonable for you to make the adjustment. However, what is reasonable for you to do

if you were not warned in advance, despite having asked the applicant, may be different from what would have been reasonable with more notice.

For example:

An applicant did not tell an employer they need level access because of a mobility impairment. When they arrive, there are steps to the interview room and no lift. The employer is unable to move rooms at short notice but asks them to attend another day when a room with level access will be available. This is likely to be a reasonable adjustment.

You must not change the decision to interview an applicant because when they arrive you discover they are a disabled person. Nor should you change the way you interview them, for example, by cutting the interview short or not testing them in the same way as other applicants (unless the change to the interview is a reasonable adjustment).

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

Being flexible about dates and times

You may need to be flexible or to make changes to the dates or times of interviews to avoid unlawful discrimination, particularly indirect discrimination if you cannot **objectively justify** what you are doing, or a failure to make reasonable adjustments.

For example:

- An employer only offers applicants for a job one time for interviews. A disabled person with a mobility impairment is told to attend at 9am, even though they have asked for a time which allows them to travel on public transport outside the rush hour and explained why. This is likely to be a failure by the employer to make a reasonable adjustment.
- An employer only offers applicants for a job one time for interview. One applicant is an observant Muslim who cannot attend at midday on Friday. Unfortunately, this is the only time they are offered for their interview. Unless the employer can **objectively justify** the lack of flexibility, this may be indirect discrimination because of religion or belief.

What mustn't I ask an applicant?

You must not ask questions about someone's protected characteristics unless these are very clearly related to the job (for example, because one of the exceptions applies).

If you decide not to employ someone just because of a protected characteristic, unless it comes within the exceptions, this would be direct discrimination.

- In particular, you must not ask questions about health or disability, including about someone's sickness absence record. There are some very limited exceptions to this which you can read about at pages 12–16. One exception is if the answer to the question would mean you would know if a person can carry out an intrinsic or absolutely fundamental function of the job with reasonable adjustments in place. You have a duty to consider reasonable adjustments if the answer reveals that these are necessary.

Instead, ask questions about whether the applicant has the relevant skills, qualities and experience to do the job, not about their health or about any disability they may have.

Tip for avoiding discrimination

Don't ask questions which may suggest that you have already decided they are the wrong person for the job because of their protected characteristics. For example, saying 'Don't you think you're a bit young for this job?'

Ask questions which relate to the job.

It is a myth that equality law says you must ask everyone exactly the same questions. There is no reason for you not to ask about things that are different for a particular candidate, or follow up an applicant's answers with questions that relate to what they have just said. However, you should be focusing on the same broad subject areas with each applicant. This is because otherwise you may be applying different standards to different applicants based on their protected characteristics, and this might lead to unlawful discrimination.

Tests

If you ask applicants to do a test of some sort to help you decide who the best person for the job is, you should not use a test to discriminate unlawfully against an applicant.

For example:

- An employer sets a test for applicants for jobs which tests their ability to use a computer. This is directly related to the job. However, they decide only to put people through the test after they have seen them in interview. The employer decides that people who appear over 40 will not be asked to take the test. This is direct discrimination because of age and will be unlawful unless the employer can **objectively justify** it.
- An employer decides to make applicants for jobs take a test of their written English, even though the job does not require a person to have good written English. This test is harder for some people to pass because of their protected characteristics, for example, some people for whom English is not their first language. An applicant was born outside the UK and is fluent in spoken English but less confident in written English. Unless the employer can **objectively justify** making them take this test (which is unlikely if it does not relate to the job), it may be indirect discrimination because of race; it disadvantages that applicant and other people who share their protected characteristic, in this case, having a different national origin.

If you do set a test and it is only available for applicants to carry out at a set time on a set day, you should avoid religious festivals or holy days or times of religious observance as far as you can. Unless you can **objectively justify** the requirement for all applicants to take the test at that particular time, this may be indirect discrimination because of religion or belief. This is because it has a worse impact on people who are followers of the affected religion or belief than on those who are not, because they may not be able to take the test at all, ruling them out from consideration for the job.

Recruiting disabled people

When application forms are sent out, or at the shortlisting stage, tell applicants if they will be expected to take a test. Give them an outline of what will be involved and ask whether they require any reasonable adjustments. This is because, if an applicant is a disabled person and is *not* told in advance about a test, this may disadvantage them because it does not give them a chance to ask for reasonable adjustments. Even if the applicant does not tell you they are disabled or ask for any adjustments, if this becomes clear once they arrive for the test, you still need to make any adjustments which are reasonable. Otherwise they may be prevented from being able to compete on the same terms as other applicants.

Applicants should not be disadvantaged because of their disability by the content and timing of a test.

For example:

An employer allows an applicant extra time for a written test because they have severe dyslexia. They also provide them with a computer, having checked with them what adjustments they need and accepted that they are reasonable adjustments.

However, you do not have to adapt a test to the point where it no longer tests whether someone would be able to do the job or not (taking into account any reasonable adjustments that would enable the disabled person to do the job).

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

Social gatherings as part of the assessment

If the interview process or assessment includes a social gathering where only alcohol is available, this may disadvantage someone whose religion forbids association with alcohol, for example, members of some Christian denominations and Muslims or people who for a reason related to their disability cannot drink alcohol.

If you are providing food, the same is true of applicants with specific dietary needs based on religion or belief or disability.

Ask in advance and make sure that soft drinks or an alternative meal can be provided. If you do not do this, it puts these applicants at a disadvantage – because they cannot join in the same way as other applicants and this may lead to them being regarded as unfriendly or not willing to mix – which may be indirect discrimination because of religion or belief or disability unless you can **objectively justify** it.

Equality good practice: what you can do if you want to do more than equality law requires

- The interview or meeting is probably the first time you have seen the applicant or heard them over the phone. Be careful not to make instant, personal and sometimes unfair judgements about someone's suitability because of a **protected characteristic**. Focus on finding out if they have the skills, qualities and experience needed to do the job.
- Don't ask questions either directly or indirectly related to applicants' protected characteristics. This is because this information is highly unlikely to be relevant to whether someone has the skills to do the job or not and may suggest to an applicant that you intend to discriminate, putting you at risk of a tribunal claim.
- Have more than one person to do the interviewing, as this can help avoid unintentional bias against people with particular protected characteristics.
- Whether or not it is not necessary to avoid unlawful discrimination, be flexible over the date and time of the interview or test and give adequate notice; this will help applicants who may have particular family responsibilities or requirements of religious observance. It will also be helpful to some disabled candidates who may need reasonable adjustments in relation to the timing of the interview or test.
- Keep a record of the interview, and keep the notes for 12 months. If an applicant wants to complain, they are entitled to see the notes. This could be important evidence to show that you have not discriminated.
- Ask similar job-related questions of all the applicants, although this does not stop you asking an applicant about a particular aspect of their past experience or about a gap in their work record.
- If you set a test, make sure that the test relates to the requirements of the job. Tests should test an applicant's ability to do the job or to be trained for it, taking into account any **reasonable adjustments** which would enable a disabled person to do the job. If you test anything else, then there is a risk that you will be basing your decision on information which unnecessarily disadvantages people with particular protected characteristics.

Your questions answered

Q. What happens if a job applicant mentions something that relates to a protected characteristic, for example, asking about flexibility or telling me how they would do the job if they have a disability and need reasonable adjustments?

A. Job applicants may feel that they should explain how they can do the job flexibly or with reasonable adjustments. Provided you have asked the right question – in other words, one that is designed to test their ability to do what the job requires, not one that might make the applicant think you will discriminate against them – it does not matter if their answer gives you information you did not ask for. You should, however, be careful not to use the information to rule them out of consideration, but instead consider them objectively against all the other candidates to decide if they are the best person for the job. If they ask you a question, then you can, of course, answer it.

Recruiting women who are pregnant or on maternity leave

You must not refuse to employ a woman because she is pregnant, on maternity leave or because she has (or has had) an illness related to her pregnancy.

Equality law does not say that a woman applying for a job with you has to tell you that she is pregnant. This is because you must not base your decision about whether or not to employ her on whether she is pregnant but on whether she has the skills to do the job. If a woman does not tell you that she is pregnant and you give her the job, you must not dismiss her when she tells you about her pregnancy.

For example:

A woman applies for a job as a training instructor. On the basis of her application form and her interview, the employer decides she is the best person for the job and offers the job to her. She has just discovered she is pregnant and tells the employer this when she accepts the job offer. If the employer changes their mind and withdraws the job offer, this would be direct discrimination because of pregnancy and cannot be justified.

You can find more help with this situation in the Equality and Human Rights Commission's *New and expectant parents toolkit*.

Nor should you ask a woman whether she intends to have children, whatever her age or marital status or even if you think she might be pregnant. This is not something that you should take into account in deciding whether a person has the skills needed for a particular job.

If you ask these questions, the woman you are asking may think the only reason you want to know is so that you can discriminate against her. If you do not offer her the job after asking these questions, you put yourself at risk of a claim for sex discrimination.

Equality good practice: using positive action to recruit a wider range of people

- What is 'positive action'?
- Do I have to take positive action?
- When can I use positive action?
- Explaining why you are using positive action
- Treating disabled people better than non-disabled people
- The sort of positive action steps you can take during recruitment
- Tie-break situations
- More about when you are allowed to use positive action and what you have to do to show it is needed
 - What you have to show to be able to use positive action
 - The sort of evidence you can use
 - What 'disadvantage' means
 - What 'different needs' means
 - What 'disproportionately low' means
 - Exceptions where a particular protected characteristic can be looked at during recruitment but which are not the same as positive action.

What is 'positive action'?

'Positive action' means the steps that you can take as an employer to encourage people from groups with different needs or with a past track record of disadvantage or low participation to apply for jobs.

In recruitment, equality law allows positive action before or at the application stage. At this stage, the steps could include encouraging particular groups to apply, or helping people with particular protected characteristics to perform to the best of their ability (for example, by giving them training or support not available to other applicants).

An example of when an employer might decide to take positive action is if they find that the make up of their workforce is different to the make up of the local population, so they decide to encourage people who share particular under-represented protected characteristics to apply for vacancies.

This is not the same as '**positive discrimination**' or '**affirmative action**' which equality law does not allow.

Do I have to take positive action?

Taking positive action is voluntary. You do not have to take positive action. However:

- Meeting the different needs of your workforce can help make your staff more productive.
- Recruiting from a wider range of people, in terms of their protected characteristics, can help your organisation to understand its customers, clients or service users better.
- If you are a **public authority**, positive action may help you meet the **public sector equality duty**.

When can I use positive action?

Equality law says that you have to go through a number of tests to show that positive action is needed.

The tests say that the steps you are allowed to take as part of positive action must:

- be related to the level of disadvantage that exists
- not be simply for the purposes of favouring one group of people over another where there is no disadvantage or under-representation in the workforce.

For example:

An education employer could not use positive action to attract women applicants for an entry level primary teaching post where women already made up 70 per cent of the teaching workforce. Since the steps would not be being taken to overcome a disadvantage or under-representation this would be unlawful direct discrimination.

However, the employer could use positive action to recruit more men as they are under-represented in this workplace.

You must not have a blanket policy or practice of automatically treating people who share a protected characteristic better than those who do not have it. You must still appoint the best person for the job, even if the best person does not have the particular protected characteristic you are targeting.

For example:

A local fire service identifies from its monitoring data that women are under-represented as firefighters. The service makes clear in its next recruitment exercise that applications from women are welcome and holds an open day for potential women applicants at which they can meet women firefighters. However, the fire service must not guarantee that all women will get through the initial stages of the application process, regardless of their suitability.

Explaining why you are using positive action

Positive action may make people who do not have the particular protected characteristic feel they have not been given the same chance to apply for a job. It is a good idea for you to explain why you have decided to use positive action. This involves showing specific disadvantage or under-representation and that you are not doing more than is needed and proportionate to tackle those problems.

Treating disabled people better than non-disabled people

As well as these exceptions, equality law allows you to treat a disabled person better – or **more favourably** – than a non-disabled person. This recognises that disabled people generally face a lot of barriers to participating in work and other activities. You can choose to treat a disabled job applicant more favourably even if they are not at a disadvantage due to their disability in the particular situation.

For example:

An employer has a policy of shortlisting and interviewing all disabled applicants who meet the minimum requirements for their jobs. The law would allow this. It would not be unlawful discrimination against a non-disabled applicant who also meets the minimum requirements but is not shortlisted.

The sort of positive action steps you can take during recruitment

Examples of what you might do (depending on the protected characteristic you are targeting), which would count as positive action, include:

- Encouraging applications from under-represented groups, such as through targeted advertising.

For example:

A nursery with an all-female staff includes a statement in its job adverts to say 'We welcome applications from men as they are currently under-represented in our workforce'. However, if a man applies for a job who is less well-qualified than a woman who applies (in terms of meeting the requirements of the person specification), the nursery must appoint the better qualified woman.

- Offering pre-application training to particular groups where this meets a need. For example, updating people's skills ahead of the recruitment process.
- Offering work shadowing opportunities to people from a particular group to encourage individuals from this group to apply for the job, because they know what's involved.
- Holding open days or 'taster days' which are held exclusively for the targeted group.
- Offering bursaries to obtain qualifications in a profession such as journalism.
- Making it clear that childcare facilities or vouchers are available.

Remember you will need to consider if such measures are needed and are proportionate. You should regularly review what you are doing to make sure positive action is still appropriate.

Tie-break situations

The other positive action step you can take is to decide to appoint an applicant from a group sharing a protected characteristic if you reasonably believe this group to be

disadvantaged or under-represented in the workforce or if their participation in an activity is disproportionately low. You should be able to show there is some information or evidence to support your belief, but it does not need to be sophisticated data or research. You could just review the profile of your own workforce or the sector as a whole. National labour force surveys may be a useful resource.

You can only use these 'tie-break' provisions when faced with a choice between two candidates who are as qualified as each other. It is also possible, though it would be unusual, that a tie-break situation could arise where more than two candidates were equally qualified for the post.

Although it is most likely that you would use the tie-break provisions at the end of the recruitment process, you can also treat an applicant more favourably at any earlier stage of the process. But remember you can only use these provisions if it is a proportionate way of enabling or encouraging people from the disadvantaged or under-represented group to overcome or minimise the disadvantage of that group.

For example:

A housing advice service has no Muslim employees, even though it is located in an area where there is a high Muslim population. When a vacancy arises, there are two candidates of equal merit. One candidate is Muslim and the other is not. The advice service could choose to offer the job to the Muslim candidate under the positive action provisions, so that the non-Muslim candidate could not claim religious discrimination.

The phrase 'as qualified as' is not defined by the law, but you should give it a broad meaning. You should do a full and objective assessment of each applicant's suitability, skills, qualifications (professional and academic), competence and professional performance, matched against a set of objective criteria for the job.

You must not have a general policy of treating people with the relevant protected characteristic more favourably in connection with recruitment.

More about when you are allowed to use positive action and what you have to do to show it is needed

What you have to show to be able to use positive action

You can use positive action where you reasonably think (in other words, on the basis of some evidence) that:

- people who share a protected characteristic suffer a *disadvantage* connected to that characteristic
- people who share a protected characteristic have *needs that are different* from the needs of people who do not share it, or
- participation in an activity by people who share a protected characteristic is *disproportionately low*.

Sometimes the reasons for taking action will overlap. For example, people sharing a protected characteristic may be at a disadvantage and that disadvantage may also give rise to a different need or may be reflected in their low level of participation in particular activities.

To deal with the three situations, you can take **proportionate** action to:

- enable or encourage people to overcome or minimise disadvantage
- meet different needs, or
- enable or encourage participation.

The sort of evidence you can use

You can only decide to use positive action if you reasonably think that a group of people who share a particular protected characteristic is under-represented or disadvantaged or has different needs.

You will need to have some evidence to show that your belief is reasonable, but it does not need to be sophisticated statistical data or research. For example, you could look at the profile of your workforce and compare it to several comparable employers in your area or sector.

Tip for finding out about your workforce

It won't always be obvious that people in a workforce have a particular characteristic, so the best way for you to gather evidence is through **monitoring**.

Other information can be used as well – it does not have to be information you have gathered for yourself.

For example:

National research shows that disabled people are under-represented in working in the hotel and hospitality industry. A hotel chain decides to tackle this under-representation by holding an open day targeted at disabled people.

You can target more than one group with a particular protected characteristic provided that for each group you have reason to believe there is disadvantage, different need or low participation.

What 'disadvantage' means

The law does not define 'disadvantage' but it is generally understood to relate to barriers or obstacles which make it difficult for a person to enter into, or make progress in, a trade, sector or workplace.

For example:

A requirement to work full-time may act as a barrier for women to apply for a job because they need flexible working so that they can combine paid work with family responsibilities. An employer therefore adopts flexible working policies for jobs where these have not usually been offered, to encourage more women to apply for such jobs.

What 'different needs' means

Certain groups with protected characteristics may have needs which differ from those persons who do not have the protected characteristic. A need is something required because it is essential or important, rather than merely desirable to those with a particular characteristic. A need does not have to be unique to those with that particular characteristic, but it must be something that the employer reasonably believes relates to the characteristic.

For example:

An employer is conscious that women are under-represented in a particular job which requires a knowledge of the latest IT packages. They work with the local Jobcentre to offer IT refresher courses to women, especially those who have taken time out of the workforce for family responsibilities. These women are then in a better position to apply for the vacancies.

What 'disproportionately low' means

Low participation may or may not be disproportionate. For you to use positive action to overcome it, participation must be low compared with the level of participation that could reasonably be expected. This might be evidenced by means of statistics, or, where these are not available, by qualitative evidence based on monitoring or consultation.

For example:

An employer with a factory in a major city that has an ethnically varied population employs 150 people but only one Asian worker. They will be able to show low participation of Asian workers by looking at their workforce profile in comparison to the size of the Asian population in the city. But if the factory were located in an area which did not have an ethnically diverse population, where the Asian population is significantly smaller, the participation of Asian workers in the factory may not be low when compared to the Asian population of that area.

Exceptions where a particular protected characteristic can be looked at during recruitment but which are not the same as positive action

There are a few **exceptions** where employers can target applicants with a particular protected characteristic without this being unlawful discrimination. These are not the same as positive action.

For example:

- In some situations, it may be possible to specify that someone must be over or under a certain age, if this can be **objectively justified**.
- If an '**occupational requirement**' exists for the job, for example, when a personal assistant is being recruited to support a disabled person in bathing, toileting and dressing, it is possible to recruit someone of the same sex as the

person being supported, and the applicant's sex would be an occupational requirement.

The difference between an occupational requirement and positive action is that:

- An employer using an occupational requirement says that only people with a particular protected characteristic can do the job.
- An employer who wants to use positive action says that anyone who has the right skills, knowledge and experience is able to do the job, but they want to look especially hard for someone with a particular protected characteristic.

You can read more about exceptions at pages 12–16.

Equality good practice: using monitoring forms

Giving job applicants a monitoring form will help you to see who has applied for the job and who has been selected, in terms of their protected characteristics. You could then compare who has applied for jobs against the profile of jobseekers in the local community, nationally, in your sector and the profile of employees already in the organisation. This highlights any groups who are not applying or not getting further on in the recruitment. If this is happening, then look again at your assessment processes: are you excluding good applicants unnecessarily?

Equality law does not say that you have to use a monitoring form to find out individual personal information about your job applicants and their protected characteristics as part of the recruitment process.

But if you do use a monitoring form and this tells you about a person's protected characteristics, then you must not use this information to discriminate against them. You must not base decisions about who to take further into the application process on the information people give on the monitoring form.

Can I ask about health or disability on the monitoring form?

In general, you must not ask a job applicant questions relating to health or disability. One of the exceptions to this rule applies to monitoring. You are allowed to ask questions about health or disability if the point of this is to find out how many job applicants are disabled people and whether they are shortlisted or appointed.

Answers to monitoring questions about health or disability should be dealt with in the same way as the answers to other monitoring questions, in other words, they should be kept

separately from the main application form. The person or people shortlisting and appointing should not see the information before deciding who to interview or appoint.

What happens if someone's protected characteristics are relevant to the recruitment?

If, exceptionally, someone's protected characteristics are playing a part in the decision-making, for example:

- if you are signed up to the **guaranteed interview scheme**, or
- if **positive action** is being used in recruitment for a particular job, or
- if you have applied an **occupational requirement**, or
- if it is either a legal requirement or otherwise **objectively justifiable** that someone has to be a particular age to do a job, or
- if you are a **religion or belief organisation** and the job is one where someone has to be of a particular religion or belief or you are an **organised religion**, or the job is for the purposes of an organised religion, and the job is one where it is necessary to have or not have a particular characteristic or behave in a particular way

then you should make this clear when you ask people to apply for the job and ask them separately from the monitoring form if they have the relevant protected characteristic. This makes sure that the person or people making the decision about who to interview or employ only see the information about protected characteristics that is relevant and do not need to see the monitoring form itself.

If you do use a monitoring form, then the information that is on it is likely to be personal and you should make sure that it is kept safely so that people's confidentiality or **data protection** rights are not broken. This may be particularly important for some protected characteristics, such as gender reassignment, and some disabilities, such as HIV status and mental health conditions.

Equality good practice: what you can do if you want to do more than equality law requires

- Giving every applicant for a job with you a monitoring form will help you to see who has applied for the job and who has been selected, in terms of their protected characteristics. You could then compare who has applied for jobs against the profile of jobseekers in the local community, in your sector and nationally and the profile of employees already in the organisation. This highlights any groups who are not applying or not getting further on in the recruitment. If this is happening, then look again at your assessment processes: are you excluding good applicants unnecessarily?
- A job applicant does not have to fill out a monitoring form if they don't want to. However, you can say to them that this information can be very helpful in making sure you have a diverse workforce, and this is why you are asking for it.
- There is no point in collecting information unless you intend to use what people tell you to:
 - check who is applying for jobs
 - see if people with protected characteristics are under-represented, for example, compared with your local area and sector, and
 - think about what you could do to address this.
- You should tell people why you are collecting this information and what you will do with it. You should also reassure them that the data will be treated confidentially and not be used for shortlisting. You should give applicants the choice to opt out of the process by including the option to tick 'prefer not to say' within each category. If someone refuses to give you the information you ask for, do not hold this against them.
- If your organisation is very small and you do not have a Human Resources department, for example, who can make sure the monitoring forms are kept separate, then consider asking each applicant to put their monitoring form in a separate envelope or attach it in a document to a separate email and only look at it after you have decided who to recruit.

You can read more about monitoring in the Equality and Human Rights Commission guide: *Good equality practice for employers: equality policies, equality training and monitoring*.

2. When you are responsible for what other people do

As an **employer** or in another work situation, it is not just how you personally behave that matters.

If another person who is:

- employed by you, or
- carrying out your instructions to do something (who the law calls your agent)

does something that is unlawful discrimination, **harassment** or **victimisation**, you can be held legally responsible for what they have done.

This part of the guide explains:

- When you can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation
- How you can reduce the risk that you will be held legally responsible
- How you can make sure your employees and agents know how equality law applies to what they are doing
- When workers employed by you or your agents may be personally liable
- What happens if a person instructs someone else to do something that is against equality law
- What happens if a person helps someone else to do something that is against equality law
- What happens if you try to stop equality law applying to a situation.

When you can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation

As an employer, you are legally responsible for acts of discrimination, harassment and victimisation carried out by workers who are employed by you in the course of their employment.

You are also legally responsible as the 'principal' for the acts of your **agents** done with your authority. Your agent is someone you have instructed to do something on your behalf, but who is not employed by you. It does not matter whether you have a formal contract with them.

As long as:

- the worker was acting in the course of their employment – in other words, while they were doing their job, or
- your agent was acting within the general scope of your authority – in other words, while they were carrying out your instructions

it does not matter whether or not you:

- knew about or
- approved of

what the worker or agent did.

For example:

- .An employer tells their receptionist to send out application forms to anyone telephoning in to ask about a recently advertised job. The receptionist hears that a caller has a strong African accent and, instead of sending out a form, tells them the job has gone. The employer will be responsible for the receptionist's actions.
- An employer engages a head-hunter to work in-house to recruit a team of senior management. The head-hunter weeds out applications from women of child bearing age. This is almost certainly unlawful sex discrimination. Both the employer and the head-hunter (who is the employer's agent) would be legally responsible for the discrimination, except that the employer can show that they told the head-hunter to comply with equality law. This means that the authority given to the head-hunter as agent did not extend to acting in a discriminatory way, the agent acted outside the scope of the employer's authority and only the agent is liable for the discrimination.

However, you will not be held legally responsible if you can show that:

- you took all reasonable steps to prevent a worker employed by you acting unlawfully.
- an agent acted outside the scope of your authority (in other words, that they did something so different from what you asked them to do that they could no longer be thought of as acting on your behalf).

How you can reduce the risk that you will be held legally responsible

You can reduce the risk that you will be held legally responsible for the behaviour of the people who work for you if you tell them how to behave so that they avoid unlawful discrimination, harassment or victimisation.

This does not just apply to situations where you and your staff are dealing face-to-face with other people in a work situation, but also to how you plan what happens.

When you or your workers or agents are planning what happens to job applicants, you need to make sure that your decisions, rules or ways of doing things are not:

- **Direct discrimination**, or
- **Indirect discrimination** that you cannot **objectively justify**, or
- **Discrimination arising from disability** that you cannot **objectively justify**, or
- **Harassment**

and that you have made **reasonable adjustments** for any disabled people who are applying for a job with you.

So it is important to make sure that your workers and agents know how equality law applies to what they are doing.

How you can make sure your workers and agents know how equality law applies to what they are doing

Tell your workers and agents what equality law says about how they must and must not behave while they are working for you.

Below are some examples of reasonable steps you can take to prevent unlawful discrimination or harassment happening in your workplace:

- telling your workers and agents when they start working for you – and checking from time to time that they remember what you told them, for example, by seeing if/how it has made a difference to how they behave. This could be a very simple checklist you talk them through, or you could give them this guide, or you could arrange for them to have **equality training**
- writing down the standards of behaviour you expect in an **equality policy**
- including a requirement about behaving in line with equality law in every worker's **terms of employment** or other contract, and making it clear that breaches of equality law will be treated as disciplinary matters or breaches of contract.

You can read more about equality training and equality policies in the Equality and Human Rights Commission guide: *Good equality practice for employers: equality policies, equality training and monitoring*.

Using written terms of employment for employees

Employment law says you must, as an employer, give every **employee** a written statement of the main terms of their employment. So you could include a sentence in these written terms that tells the person working for you they must meet the requirements of equality law, making it clear that a failure to do so will be a disciplinary offence.

Obviously, if you do this, it is important that you also tell the employee what it means. You could use an equality policy to do this, or you could just discuss it with them, or you could give them this guide to read. But it is important that they are clear on what equality law says they must and must not do, or you may be held legally responsible for what they do.

Remember, if the employee is a disabled person, it may be a reasonable adjustment to give them the information in a way that they can understand.

If you receive a complaint claiming unlawful discrimination by one of your employees or someone else in a work situation you are in charge of, you can use the written terms to show that you have taken a reasonable step to prevent unlawful discrimination and harassment occurring. However, you will have to do more than this to actively prevent discrimination.

If someone does complain, you should investigate what has taken place and, if appropriate, you may need to discipline the person who has unlawfully discriminated against or harassed someone else, give them an informal or formal warning, provide training or even dismiss them; the action you take will obviously vary according to the nature of the breach and how serious it was.

If you do find that a worker employed by you has unlawfully discriminated against someone else in a work situation, then look again at what you are telling your staff to make sure they know what equality law means for how they behave towards the people they are working with.

You can read more about what to do if someone says they've been discriminated against in Chapter 4.

Good practice tip for how you and your staff should behave

Ideally, you want anyone who works for you to treat everyone they come across with dignity and respect. This will help you provide a good working environment (not just without discriminating but more generally) and can make your workers more productive.

If your staff do unlawfully discriminate against their fellow workers or others in a work situation, your reputation may suffer even if the person on the receiving end does not bring a legal case against you.

When your workers or agents may be personally liable

A worker employed by you or your agent may be personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment or while acting with your authority. This applies where either:

- you are also liable as their employer or principal, or
- you would be responsible but you show that:
 - you took all reasonable steps to prevent your worker discriminating against, harassing or victimising someone, or
 - that your agent acted outside the scope of your authority.

For example:

A security guard employed by a bank makes offensive remarks to a Muslim job applicant when he arrives for a job interview with the bank. The employer would be liable for the security guard's actions, but is able to show that they took all reasonable steps to prevent any harassment of this kind. They had given extensive training to all their security guards about avoiding harassment and had warned them of disciplinary consequences if they did so. Even if the employer is able to avoid legal responsibility for the harassment because they took all reasonable preventative steps, the job applicant can still claim compensation against the security guard in an Employment Tribunal.

But there is an exception to this. An worker or agent will *not* be responsible if their employer or principal has told them that there is nothing wrong with what they are doing and the employee or agent **reasonably** believes this to be true.

It is a criminal offence, punishable by a fine, for an employer or principal to make a false statement which a worker employed by them or their agent relies upon to carry out an unlawful act.

What happens if a person instructs someone else to do something that is against equality law

An employer or principal must not instruct, cause or induce a worker employed by them or their agent to discriminate against, harass or victimise a job applicant, or to attempt to do so.

'Causing' or 'inducing' someone to do something can include situations where someone is made to do something or persuaded to do it, even if they were not directly instructed to do it.

Both:

- the person who receives the instruction or is caused or induced to discriminate against, harass or victimise, and
- the person who is on the receiving end of the discrimination, harassment or victimisation

have a claim against the person giving the instructions if they suffer loss or harm as a result of the instructing or causing or inducing of the discrimination, harassment or victimisation.

This applies whether or not the instruction is actually carried out.

What happens if a person helps someone else to do something that is against equality law

A person must not help someone else carry out an act which the person helping knows is unlawful under equality law.

However, if the person helping has been told by the person they help that the act is lawful and they **reasonably** believe this to be true, they will not be legally responsible.

It is a criminal offence, punishable by a fine, to make a false statement which another person relies on to help to carry out an unlawful act.

What happens if you try to stop equality law applying to a situation

You cannot stop equality law applying to a situation if it does in fact apply. For example, there is no point in making a statement in a contract of employment that equality law does not apply. The statement will not have any legal effect. That is, it will not be possible to enforce or rely on a term in a contract that tries to do this. This is the case even if the other person has stated they have understood the term and/or they have agreed to it.

For example:

- A worker's contract includes a term saying that they cannot bring a claim in an Employment Tribunal. Their employer sexually harasses them. The term in their contract does not stop them bringing a claim for sexual harassment in the Employment Tribunal.
- A business partner's partnership agreement contains a term that says 'equality law does not apply to this agreement'. The partner develops a visual impairment and needs reasonable adjustments to remove barriers to their continuing to do their job. The other partners instead ask them to resign from the partnership. The partner can still bring a claim in the Employment Tribunal for a failure to make reasonable adjustments and unlawful disability discrimination.
- An applicant for a job is told 'equality law does not apply to this business, it is too small'. She still agrees to go to work there. When she becomes pregnant, she is dismissed. She can still bring a claim in the Employment Tribunal for pregnancy discrimination.

3. The duty to make reasonable adjustments for disabled people

Equality law recognises that bringing about equality for disabled people may mean changing the way in which employment is structured, the removal of physical barriers and/or providing extra support for a disabled worker.

This is the **duty to make reasonable adjustments**.

The duty to make reasonable adjustments aims to make sure that, as far as is reasonable, a disabled person has the same access to everything that is involved in getting and doing a job as a non-disabled person.

When the duty arises, you are under a positive and proactive duty to take steps to remove or reduce or prevent the obstacles a disabled job applicant faces. It is not only a matter of making adjustments to the recruitment process, but of bearing in mind that adjustments may be necessary for the job itself.

Many of the adjustments you can make will not be particularly expensive, and you are not required to do more than what is reasonable for you to do. What is reasonable for you to do depends, among other factors, on the size and nature of your organisation.

You only have to make adjustments where you are aware – or should reasonably be aware – that a job applicant has a disability.

If, however, you do nothing, and a disabled job applicant can show that there were barriers you should have identified and reasonable adjustments you could have made, they can bring a claim against you in the Employment Tribunal, and you may be ordered to pay them compensation as well as make the reasonable adjustments.

In particular, the need to make adjustments for an individual job applicant:

- must not be a reason not to appoint someone to a job or promote them if they are the best person for the job with the adjustments in place
- must be considered in relation to every aspect of a person's job

provided the adjustments are reasonable for you to make.

Many factors will be involved in deciding what adjustments to make and they will depend on individual circumstances. Different people will need different changes, even if they appear to have similar impairments.

It is advisable for you to discuss the adjustments with the disabled person, otherwise the adjustments may not be effective. However, except in specific circumstances, you cannot have this discussion before you have made a disabled job applicant a job offer, conditional if necessary. The rules on pre-employment health or disability enquiries are set out in more detail earlier at page 9.

The rest of this section looks at the detail of the duty and gives examples of the sorts of adjustments you could make. It looks at:

- Which disabled people does the duty apply to?
- Finding out if someone is a disabled person
- The three requirements of the duty
- Are disabled people at a substantial disadvantage?
- Changes to policies and the way your organisation usually does things
- Dealing with physical barriers
- Providing extra equipment or aids
- Making sure an adjustment is effective
- Who pays for reasonable adjustments?
- What is meant by 'reasonable'
- Reasonable adjustments in practice
- Specific situations
 - Employment services
 - Occupational pensions
- Questions about health or disability.

Which disabled people does the duty apply to?

The duty applies to any disabled person who:

- works for you, or
- applies for a job with you, or
- tells you they are thinking of applying for a job with you.

It applies to all stages and aspects of employment. It does not matter if the worker was a disabled person when they began working for you, or if they have become a disabled person while working for you.

The duty may also apply after employment has ended.

The duty also applies in relation to **employment services**, with some differences which are explained later in this chapter.

Reasonable adjustments may also be required in relation to occupational pension schemes. This is explained later in this chapter.

Finding out if someone is a disabled person

You only have to make these changes where you know or could reasonably be expected to know that a disabled person is or may be a job applicant. This means doing everything you can reasonably be expected to do to find out.

For example:

A job applicant arrives for an interview on a dark wintry day wearing sunglasses. This should suggest to the employer that the applicant may have a disability, eg a visual impairment or form of epilepsy. The employer should ask the applicant whether they need any adjustments to the location or interview arrangements.

This does not, however, mean asking intrusive questions or ones that violate someone's dignity. Think about privacy and confidentiality in what you ask and how you ask.

Be aware that there are restrictions on when you can ask health- or disability-related questions before making a job offer or accepting a job applicant into a pool of applicants to be offered a job when one is available. This is to make sure that job applicants are not discriminated against because of issues related to health or disability. The exceptions to the restriction are set out earlier in this guide at page 10.

You can ask questions to find out if a job applicant needs reasonable adjustments for the recruitment process. But you must use their answers only for working out the adjustments they need and whether these are reasonable.

If you used the fact that the person needed reasonable adjustments as a reason not to take them further into the recruitment process, this would be unlawful discrimination.

If a job applicant does not ask for adjustments in advance but turns out to need them, you must still make them, although what is reasonable in these circumstances may be different from what would be reasonable with more notice. You must not hold the fact that you have to make last minute adjustments against the applicant.

For example:

A job applicant does not tell an employer in advance that they use a wheelchair and the employer does not know about this. On arriving for the interview the applicant discovers that the room is not accessible. Although the employer could not have been expected to make the necessary changes in advance, it would be a reasonable adjustment to hold the interview in an alternative, accessible room if one was available without too much disruption or cost. Alternatively, it might be a reasonable adjustment to reschedule the interview if this was practicable.

Good practice tip: be prepared for making reasonable adjustments

Equality law says that you must make reasonable adjustments if you know that a worker or job applicant is a disabled person, that they need adjustments and that those adjustments are reasonable.

You don't have to put reasonable adjustments in place just in case a disabled person applies for a job.

But you may want to be prepared:

- Think in advance about what the core tasks of a particular job are and what adjustments might be possible (before starting a recruitment or promotion exercise, for example).
- Ask job applicants if they need reasonable adjustments to take part in the recruitment process. Do bear in mind the restriction on asking health- or disability-related questions and make it clear to applicants that the only reason you are asking is to make sure that you remove any barriers during the recruitment process, so far as is reasonable (or if one of the other exceptions applies).
- Put in place a process for working out reasonable adjustments in the event of a disabled person starting work with the organisation, before being faced with an individual situation.
- Make sure you know in advance what support is available to disabled people from Access to Work.
- If you are making renovations or alterations to your building, thinking about how you can make the new parts of your building more accessible for disabled people will help you if you later employ a disabled person and will allow you to attract more potential employees.

As well as avoiding a possible Employment Tribunal claim, being open to making reasonable adjustments will mean you have a wider choice of workers. A disabled applicant may be the best person for the job.

The three requirements of the duty

The duty contains three requirements that apply in situations where a disabled person would otherwise be placed at a **substantial disadvantage** compared with people who are not disabled.

- The first requirement involves changing the way things are done (equality law talks about where the disabled job applicant is put at a substantial disadvantage by a **provision, criterion or practice** of their employer).

For example:

An employer has a policy that designated car parking spaces are used only by existing workers and not by visitors. A job applicant who has a mobility impairment and needs to park very close to the interview location, is given a designated car parking space for their interview. This is likely to be a reasonable adjustment to the employer's car parking policy.

- The second requirement involves making changes to overcome barriers created by the **physical features** of your workplace.

For example:

Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired job applicant or worker. Adding stick-on signs or other indicators to the doors so that they become more visible is likely to be a reasonable adjustment for the employer to make.

- The third requirement involves providing extra equipment (which equality law calls an **auxiliary aid**) or getting someone to do something to assist the disabled person (which equality law calls an **auxiliary service**).

For example:

A blind job applicant attends the workplace for an interview. The employer arranges for a member of staff to meet them and generally accompany them, so they can be shown to the toilets, the cloakroom and the interview room as and when necessary.

Each of these requirements is looked at in more detail later in this part of the guide.

Are disabled people at a substantial disadvantage?

The question you need to ask yourself is whether:

- the way you do things
- any **physical feature** of your workplace
- the absence of an auxiliary aid or service

puts a disabled worker or job applicant at a **substantial** disadvantage compared with a person who is not disabled.

Anything that is more than minor or trivial is a substantial disadvantage.

If a substantial disadvantage does exist, then you must make reasonable adjustments.

The aim of the adjustments you make is to remove or reduce the substantial disadvantage.

But you only have to make adjustments that are reasonable for you to make. There is more information about how to work out what is reasonable a bit later in this part of the guide.

Changes to policies and the way your organisation usually does things

The first requirement involves changing the way things are done (equality law talks about where the disabled job applicant/worker is put at a substantial disadvantage by a **provision, criterion or practice** of their employer).

This means looking at whether you need to change some written or unwritten policies, and/or some of the ways you usually do things, to remove or reduce barriers that would place a disabled person at a substantial disadvantage, for example, by preventing them from being able to work for you or applying for a job with you or stopping them being fully involved at work.

This includes your processes for deciding who is offered employment, criteria for promotion or training, benefits, working conditions and contractual arrangements.

For example:

- Supervisors in an organisation are usually employed on a full-time basis. The employer agrees to a disabled person whose impairment causes severe fatigue working on a part-time or job share basis. By doing this, the employer is making a reasonable adjustment.
- The design of a particular workplace makes it difficult for a disabled person with a hearing impairment to hear, because the main office is open plan and has hard flooring, so there is a lot of background noise. Their employer agrees that staff meetings should be held in a quieter place that allows that person to fully participate in the meeting. By doing this, the employer is making a reasonable adjustment.

Dealing with physical barriers

The second requirement involves making changes to overcome barriers created by the **physical features** of your workplace.

This means you may need to make some changes to your building or premises for a disabled person who works for you, or applies for a job with you.

Exactly what kind of change you make will depend on the kind of barriers your premises present. You will need to consider the whole of your premises. You may have to make more than one change.

Physical features include: steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer scale of premises (for example, the size of a building). This is not an exhaustive list.

- A physical feature could be something to do with the structure of the actual building itself like steps, changes of level, emergency exits or narrow doorways.
- Or it could be something about the way the building or premises have been fitted out, things like heavy doors, inaccessible toilets or inappropriate lighting.
- It could even be the way things are arranged inside the premises such as fixtures and fittings like shelf heights in storage areas or fixed seating in canteens.

For example:

An employer has recruited a worker who is a wheelchair user and who would have difficulty negotiating her way around the office. In consultation with the new worker, the employer rearranges the layout of furniture in the office. The employer has made reasonable adjustments.

Providing extra equipment or aids

The third requirement of the duty involves providing extra equipment – which equality law calls **auxiliary aids** – and **auxiliary services**, where someone else is used to assist the disabled person, such as a reader, a sign language interpreter or a support worker.

An auxiliary aid or service may make it easier for a disabled person to do their job or to participate in an interview or selection process. So you should consider whether it is reasonable to provide this.

The kind of equipment or aid or service will depend very much on the individual disabled person and the job they are or will be doing or what is involved in the recruitment process. The disabled person themselves may have experience of what they need, or you may be able to get expert advice from some of the organisations listed in *Further sources of information and advice*.

Making sure an adjustment is effective

It may be that several adjustments are required in order to remove or reduce a range of disadvantages and sometimes these will not be obvious to you. So you should work, as much as possible, with the disabled person to identify the kind of disadvantages or problems that they face and also the potential solutions in terms of adjustments.

But even if the disabled person does not know what to suggest, you must still consider what adjustments may be needed.

You may be able to get expert advice from some of the organisations listed in *Further sources of information and advice*.

Who pays for reasonable adjustments?

If something is a reasonable adjustment, you must pay for it as the prospective employer or, once a new worker has started, as the employer. The cost of an adjustment can be taken into account in deciding if it is reasonable or not.

However, there is a government scheme called Access to Work which can help a person whose health or disability affects their work by giving them advice and support. Access to Work can help with extra costs which would not be reasonable for an employer or prospective employer to pay.

For example, Access to Work might pay towards the cost of getting to work if the disabled person cannot use public transport, or for assistance with communication at job interviews.

A person may be able to get advice and support from Access to Work if they are:

- in a paid job, or
- unemployed and about to start a job, or
- unemployed and about to start a Work Trial, or
- self-employed

and

- their disability or health condition stops them from being able to do parts of their job.

Make sure your job applicant knows about Access to Work. Although the advice and support are given to the job applicant themselves, you will obviously benefit too. Information about Access to Work is in *Further sources of information and advice*.

What is meant by 'reasonable'

You only have to do what is reasonable.

Various factors influence whether a particular adjustment is considered reasonable. The test of what is reasonable is ultimately an objective test and not simply a matter of what you may personally think is reasonable.

When deciding whether an adjustment is reasonable you can consider:

- how effective the change will be in avoiding the disadvantage the disabled person would otherwise experience
- its practicality
- the cost
- your organisation's resources and size
- the availability of financial support.

Your overall aim should be, as far as possible, to remove or reduce any disadvantage faced by a disabled worker or job applicant.

Issues to consider:

- You can treat disabled people better or '**more favourably**' than non-disabled people and sometimes this may be part of the solution.
- The adjustment must be effective in helping to remove or reduce any disadvantage the disabled person is facing. If it doesn't have any impact then there is no point.
- In reality it may take several different adjustments to deal with that disadvantage but each change must contribute towards this.
- You can consider whether an adjustment is practical. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn't mean it can't also be reasonable. You need to balance this against other factors.
- If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.
- Your size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for you to make it if you have large financial resources. Your resources must be looked at across your whole organisation, not just for the branch or section where the disabled person is or would be working. This is an issue which you have to balance against the other factors.
- In changing policies, criteria or practices, you do not have to change the basic nature of the job, where this would go beyond what is reasonable.

- What is reasonable in one situation may be different from what is reasonable in another situation, such as where someone is already working for you and faces losing their job without an adjustment, or where someone is a job applicant. Where someone is already working for you, or about to start a long-term job with you, you would probably be expected to make more permanent changes (and, if necessary, spend more money) than you would to make adjustments for someone who is attending a job interview for an hour.
- If you are a larger rather than a smaller employer you are also more likely to have to make certain adjustments such as redeployment or flexible working patterns which may be easier for an organisation with more staff.
- If advice or support is available, for example, from Access to Work or from another organisation (sometimes charities will help with costs of adjustments), then this is more likely to make the adjustment reasonable.
- If making a particular adjustment would increase the risks to the health and safety of anybody, including the disabled person concerned, then you can consider this when making a decision about whether that particular adjustment or solution is reasonable. But your decision must be based on a proper assessment of the potential health and safety risks. You should not make assumptions about risks which may face certain disabled workers.

If, having taken all of the relevant issues into account, you decide that an adjustment is reasonable then you must make it happen.

If there is a disagreement about whether an adjustment is reasonable or not, in the end, only an Employment Tribunal can decide this.

Providing information in an alternative format

Equality law says that where providing information is involved, the steps which it is reasonable for the employer to take include steps to make sure that the information is provided in an accessible format.

For example:

- A job applicant asks for information about the job to be read onto an audio CD and sent to them. This is likely to be a reasonable adjustment that the employer must make.

Reasonable adjustments in practice

Examples of steps it might be reasonable for you to have to take include:

- Making adjustments to premises.

For example:

An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user; relocates light switches, door handles, or shelves for someone who has difficulty in reaching; or provides appropriate contrast in decor to help the safe mobility of a visually impaired person.

- Allocating some of the disabled person's duties to another person.

For example:

An employer reallocates minor or subsidiary duties to another employee as a disabled person has difficulty doing them because of their disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from an employee whose disability involves severe vertigo.

- Transferring the person to fill an existing vacancy.

For example:

An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. This might also involve retraining or other reasonable adjustments such as equipment for the new post or a transfer to a position on a higher grade.

- Altering the person's hours of working or training.

For example:

An employer advertises a job with hours of 9am–5pm each day. When offered the job, a disabled worker explains that they find it difficult to travel in rush hour as, because of their disability, they need to be able to sit down on the train. As a reasonable adjustment, the employer agrees that they can work from 10am–6pm to avoid the rush hour.

- Assigning the person to a different place of work or training.

For example:

An employer relocates the intended work station of a newly recruited disabled worker (who uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor.

- Allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment.

For example:

An employer allows a disabled person who has recently developed a condition to have more time off work than would be allowed to non-disabled workers to enable them to have rehabilitation. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

- Giving, or arranging for, training or mentoring (whether for the disabled person or any other person). This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard employee training to make sure it is accessible for the disabled employee.

For example:

- All workers are trained in the use of a particular machine but an employer provides slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that they can use a computer with speech output.
- An employer provides training for employees on conducting meetings in a way that enables a Deaf staff member to participate effectively.

- Acquiring or modifying equipment.

For example:

An employer obtains special equipment (such as an adapted keyboard for a new recruit with arthritis or a large screen for a visually impaired person), an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine). The employer makes sure they have the necessary equipment in place before the disabled worker starts. The employer makes the arrangements to get the equipment and does not ask the worker to obtain it.

You do not have to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. This is because the disadvantages do not flow from things you have control over.

- Modifying instructions or reference manuals.

For example:

The format of instructions and manuals might need to be modified for some disabled people (such as being produced in Braille or on audio CD) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read.

- Modifying procedures for testing or assessment.

For example:

A job applicant with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

- Providing a reader or interpreter.

For example:

An employer arranges for an interpreter to be present for the interview of a deaf job applicant.

- Providing supervision or other support.

For example:

An employer provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence.

- Allowing a disabled worker to take a period of disability leave.

For example:

A worker who has cancer needs to undergo treatment and rehabilitation. Their employer allows a period of disability leave and permits them to return to their job at the end of this period.

- Participating in supported employment schemes, such as **WORKSTEP**.

For example:

A person applies for a job as an office assistant after several years of not working because of depression. They have been participating in a supported employment scheme where they saw the job advertised. As a reasonable adjustment the person asks the employer to let them make private phone calls during the working day to a support worker at the scheme.

- Employing a support worker to assist a disabled worker.

For example:

An adviser with a visual impairment is sometimes required to make home visits to clients. The employer employs a support worker to assist them on these visits.

- Modifying performance-related pay arrangements.

For example:

A disabled person who is paid purely on their output needs frequent short additional breaks during their working day – something their employer agrees to as a reasonable adjustment. It is likely to be a reasonable adjustment for their employer to pay them at an agreed rate (e.g. their average hourly rate) for these breaks.

It may sometimes be necessary for an employer to take a combination of steps.

For example:

A woman who is blind is given a new job with her employer in an unfamiliar part of the building. The employer:

- arranges facilities for her assistance dog in the new area
- arranges for her new instructions to be in Braille, and
- provides disability equality training to all staff.

In some situations, a reasonable adjustment will not work without the co-operation of other workers. Your other staff may therefore have an important role in helping make sure that a reasonable adjustment is carried out in practice. You must make sure that this happens. It

is unlikely to be a valid 'defence' to a claim under equality law for a failure to make reasonable adjustments to argue that an adjustment was unreasonable because your other staff were obstructive or unhelpful when you tried to make an adjustment happen. You would at least need to be able to show that you took all reasonable steps to try and resolve the problem of the attitude of your other staff.

For example:

An employer makes sure that a worker with autism has a structured working day as a reasonable adjustment. As part of the reasonable adjustment, it is the responsibility of the employer to make sure that other workers co-operate with this arrangement.

If the worker does not agree to your involving other workers, you must not breach their confidentiality by telling the other workers about the disabled person's situation.

If a worker is reluctant for other staff to know, and you believe that a reasonable adjustment requires the co-operation of the worker's colleagues, explain that you cannot make the adjustment unless they are prepared for some information to be shared. It does not have to be detailed information about their condition, just enough to explain to other staff what they need to do.

Specific situations

Employment services

An employment service provider must not unlawfully discriminate against people who are using or want to use its services. There is more information about what this means in the Glossary.

In addition, an employment service provider has a duty to make reasonable adjustments, except when providing a **vocational service**.

For employment service providers, unlike for employers, the duty is 'anticipatory'. If you are an employment service provider, this means you cannot wait until a disabled person wants to use your services, but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need, such as people who have a visual impairment, a hearing impairment, a mobility impairment, or a learning disability.

For example:

An employment agency makes sure its website is accessible to disabled people and that it can provide information about job opportunities in a range of alternative

formats. It also makes sure its staff are trained to assist disabled people who approach it to find out about job opportunities.

Occupational pensions

Occupational pension schemes must not unlawfully discriminate against people. There is more information about what this means in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*.

In addition, an occupational pension scheme must make reasonable adjustments to any provision, criterion or practice in relation to the scheme which puts a disabled person at a **substantial** disadvantage in comparison with people who are not disabled.

For example:

The rules of an employer's final salary scheme provide that the maximum pension receivable is based on the member's salary in the last year of work. Having worked full-time for 20 years, a worker develops a condition which leads them to reduce their working hours two years before their pension age. The scheme's rules put them at a disadvantage as a result of their disability, because their pension will only be calculated on their part-time salary. The trustees decide to convert the worker's part-time salary to its full-time equivalent and make a corresponding reduction in the period of their part-time employment which counts as pensionable. In this way, their full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make.

Questions about health or disability

Except in very restricted circumstances or for very restricted purposes, you are not allowed to ask any job applicant about their health or any disability until the person has been:

- offered a job either outright or on conditions, or
- included in a pool of successful candidates to be offered a job when a position becomes available (for example, if an employer is opening a new workplace or expects to have multiple vacancies for the same role but doesn't want to recruit separately for each one).

This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence count as questions that relate to health or disability.

Further details of these rules are set out in Chapter 1 of the guide, 'What equality law means for you as an employer: when you recruit someone to work for you'.

4. What to do if someone says they've been discriminated against

If a **worker** says that you or another worker employed by you or your **agent** have **unlawfully discriminated** against them in a recruitment situation, your responsibility is to deal with the complaint in a way that finds out if there has been unlawful discrimination and, if there has been, to put the situation right.

A worker may:

- complain to you
- make a claim in the Employment Tribunal.

These are not alternatives, since the person complaining still has a right to make a claim in the Employment Tribunal even if they first complained to you.

This part of this guide covers:

- If a worker complains to you
- What you can do if you find that there has been unlawful discrimination
- Monitoring the outcome
- The questions procedure, which someone can use to find out more information from you if they think they may have been unlawfully discriminated against, harassed or victimised.

- Key points about discrimination cases in a recruitment situation
 - Where claims are brought
 - Time limits for bringing a claim
 - The standard and burden of proof
 - What the Employment Tribunal can order you to do
- More information about defending an Employment Tribunal case.

Good practice tips for avoiding and sorting out claims about discrimination by a job applicant

A job applicant who believes they have experienced unlawful discrimination has a right to make an Employment Tribunal claim.

Defending an Employment Tribunal claim can be lengthy, expensive and draining, and it can have a damaging impact on the reputation of your organisation.

It is likely to be in everyone's interest to try to put things right before a claim is made to an Employment Tribunal.

If you have good procedures for sorting out complaints about discrimination, you may be able to avoid the person feeling it is necessary to bring a claim against you.

An important factor will be for all your workers to be sure that complaints about unlawful discrimination will be taken seriously, and that something will happen to put the situation right if someone has discriminated unlawfully.

Make it clear what will happen if, after investigating, you find out that someone has discriminated unlawfully against someone else:

- that if necessary you will take any disciplinary action you decide is appropriate
- that if necessary you will change the way you do things so the same thing does not happen again, then make sure you do this.

Also:

- consider **equality training** for yourself and/or people working for you
- think about having an **equality policy**.

If a job applicant complains to you

If a job applicant complains to you that your selection methods or recruitment decision were discriminatory or failed to make reasonable adjustments, you need to investigate.

Make sure that in the way you respond to a complaint, you do not unlawfully discriminate against anyone.

For example:

A disabled job applicant with learning difficulties complains to an employer about comments made to them during the recruitment process. The employer takes what the disabled person says less seriously than what the person complained about says in response. If the employer's attitude is because of the disabled person's learning disability, this is likely to be unlawful discrimination.

If anyone involved in a complaint is a disabled person who needs **reasonable adjustments** to remove **barriers** they would otherwise face in taking part in the complaints process, you must make these. You can read more about reasonable adjustments in Chapter 3.

Dealing with the complaint

If the complaint is about the way you or your organisation does something, think about getting it changed.

Make sure you tell the job applicant what the result of their complaint is, otherwise they may bring an Employment Tribunal claim.

What you can do if you find that there has been unlawful discrimination

The action you take will depend on the specific details of the case and its seriousness. You should take into consideration any underlying circumstances and the outcome of previous similar cases. Actions you take could be:

- **Equality training** for the person who discriminated.
- Appropriate disciplinary action (you can find out more about disciplinary procedures from Acas) against the person who discriminated.

Monitoring the outcome

Whether you decide that there had been unlawful discrimination or not, make sure that you do not treat the person who complained badly. For example, making sure the person is not shortlisted on any future job applications would amount to **victimisation**.

If the job applicant is not satisfied with what has happened, they may decide to bring a claim in the Employment Tribunal.

The questions procedure

If a job applicant thinks they may have been unlawfully discriminated against, harassed or victimised against equality law, then they can obtain information from you to help them decide if they have a valid claim or not.

There is a set form to help them do this which you can access at:

http://www.equalities.gov.uk/news/equality_act_2010_forms_for_ob.aspx,

but their questions will still count even if they do not use the form, so long as they use the same questions. The form is sometimes called a 'questionnaire'.

If you receive questions from a job applicant, you are not legally required to reply to the request, or to answer the questions, but it may harm your case if you do not.

The questions and the answers can form part of the evidence in a case brought under the Equality Act 2010.

A job applicant can send you the questions before a claim is made to the Employment Tribunal, or at the same time, or after the claim has been sent.

If it is before, then you must receive the questions within three months of what the person complaining says happened that was unlawful discrimination. If a claim has already been made to the Employment Tribunal, then you must receive the questions within 28 days of the claim being sent to the Employment Tribunal.

If you do not respond to the questions within eight weeks of them being sent to you, the Employment Tribunal can take that into account when making its decision. The Employment Tribunal can also take into account answers which are evasive or unclear.

- There is an exception to this. The Employment Tribunal cannot take the failure to answer into account if a person or organisation states that to give an answer could prejudice criminal proceedings and this is reasonable. Most of the time, breaking equality law only leads to a claim in a civil tribunal or court. Occasionally, breaking equality law can be punished by the criminal courts. In that situation, the person or organisation may be able to refuse to answer the questions, if in answering they might incriminate themselves and it is reasonable for them not to answer. If you think this might apply to you, you should get more advice on what to do.

If someone sends you questions, you must not treat them badly, eg in respect of future job applications, because they have done this. If you did, it would be **victimisation**.

Key points about discrimination cases in a work situation

The key points this guide explains are:

- Where claims are brought
- Time limits for bringing a claim
- The standard and burden of proof
- What the Employment Tribunal can order you to do.
- Settling a dispute

Where claims are brought

An Employment Tribunal can decide a complaint involving unlawful discrimination in a work situation.

Employment Tribunals can also decide cases about:

- Collective agreements, which can cover any terms of employment, such as pay or other benefits or working conditions.
- Equal pay and occupational pensions cases, which you can read more about in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*.
- Requirements an employer places on someone to discriminate against people as part of their job, for example, if someone works in a shop, telling them not to serve customers with a particular protected characteristic.

If the complaint is about a health- or disability-related enquiry during recruitment, the Employment Tribunal cannot hear a case just because an enquiry was made. Only the Equality and Human Rights Commission can take up this sort of case.

But a job applicant who believes they were discriminated against because of disability, or for a reason connected with their disability, can bring a claim in the Employment Tribunal.

For example:

A job applicant who is a disabled person is asked questions about their health and disability during their interview. They do not get the job. They believe this is because of the answers they gave to the questions. They can bring a claim in the Employment Tribunal. However, only the Equality and Human Rights Commission could take up the wider case (in the County Court in England or Wales, and the Sheriff Court in Scotland) to challenge the employer just for asking the questions if no individual was personally affected.

An Employment Tribunal can only hear a case from a member of the armed forces if their **service complaint** has been decided.

Time limits for bringing a claim

A person must bring their claim within three months (less one day) of the claimed unlawful discrimination taking place.

There are two situations where this is slightly different:

- in equal pay cases, different time limits apply – see the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*, and
- for cases involving the armed forces, the time limit is six months (less one day).

If a person brings a claim after this, it is up to the Employment Tribunal to decide whether it is fair to everyone concerned, including both the employer and the employee, to allow a claim to be brought later than this.

When a claim concerns behaviour over a length of time, the time limit starts when the behaviour has ended.

If the person is complaining about a failure to do something, for example, a failure to make **reasonable adjustments**, then the three months begins when the decision was made not to do it. If there is no solid evidence of a decision, then the decision is assumed to have been made either:

- when the person who failed to do the thing does something else which shows they don't intend to do it, or
- at the end of the time when they might reasonably have been expected to do the thing.

For example:

A visually impaired job applicant hears about a job and asks the employer to send the application pack recorded on an audio tape. The employer does not refuse to do this, but just doesn't get around to doing it. Once the closing date for applications has passed, the employer clearly does not intend to send the tape. The applicant should probably count the three months from the day before the closing date, which is the past day when the employer could have ensured the tape got to the applicant in time to apply.

A tribunal can hear a claim if it is brought outside the time limit if the tribunal thinks that it would be 'just and equitable' (fair to both sides) for it to do this.

The standard and burden of proof

The standard of proof in discrimination cases is the usual one in civil (non-criminal) cases. Each side must try to prove the facts of their case are true on the balance of probabilities, in other words, that it is more likely than not in the view of the tribunal that their version of events is true.

If a job applicant is claiming unlawful discrimination, harassment or victimisation against you, then the **burden of proof** begins with them. There are two situations in which the burden of proof will shift onto you:

1. If they prove enough facts from which the tribunal can decide, without any other explanation, that the discrimination, harassment or victimisation has taken place, or

2. If their complaint is that they have not been offered a job because you found out about their disability having asked questions which you were not allowed to ask under the rules against **pre-employment health or disability enquiries**.

In either of these situations, the burden then shifts onto you to show that you or someone whose actions or omissions you were responsible for did not discriminate, harass or victimise the person making the claim.

What the Employment Tribunal can order you to do

If the job applicant wins their case, the tribunal can order what is called a remedy.

The main remedies available to the Employment Tribunal are to:

- Make a declaration that you have discriminated.
- Award compensation to be paid for the financial loss the claimant has suffered (for example, loss of earnings), and damages for injury to the claimant's feelings. There is no legal upper limit on the amount of compensation.
- Make a recommendation, requiring the employer to do something specific within a certain time to remove or reduce the bad effects which the claim has shown to exist on the individual.

For example:

Providing a reference or reinstating the person to their job, if the tribunal thinks this would work despite the previous history.

The Employment Tribunal can also make a recommendation requiring the employer to do something specific within a certain time to remove or reduce the bad effects which the claim has shown to exist on the wider workforce (although not in equal pay cases). This might be particularly applicable where the claimant has already left that employer so any individual recommendation would be pointless.

For example:

- introducing an equal opportunities policy
- ensuring its harassment policy is more effectively implemented
- setting up a review panel to deal with equal opportunities and harassment/grievance procedures
- re-training staff, or

- making public the selection criteria used for transfer or promotion of staff.

If the recommendation relates to an individual and if an employer does not do what they have been told to do, the tribunal may order them to pay compensation, or an increased amount of compensation, to the claimant instead.

In cases of **indirect discrimination**, if you can prove that you did not intend what you did to be discriminatory, the tribunal must consider all of the remedies before looking at damages.

The tribunal can also order you to pay the legal costs and expenses of the person bringing the claim on top of your own legal costs and expenses, although this does not often happen in Employment Tribunal cases.

Settling a dispute

Taking legal proceedings can be a stressful and time consuming experience. It may be in the best interest of everyone to try to settle a dispute i.e. reach an agreement with your worker where possible to avoid going to an employment tribunal hearing (or the court where the case relates to an occupational pension scheme). There are three ways in which a dispute can be settled:

- Agreement between you and the worker
- Acas conciliation service
- Qualifying compromise agreement

Agreement between you and the worker

Before a claim is issued by your worker in the employment tribunal, you can agree to settle a dispute directly with them. An agreement to settle a dispute can include any terms that you agree with the worker and can cover compensation, future actions by you and the worker and other lawful matters.

Example

A worker raises a grievance with her employers alleging a failure to make reasonable adjustments. The employer investigates the worker's complaint and upholds her grievance. The employer agrees with the worker to put the reasonable adjustments in place and offers her a written apology, which she accepts.

Acas

You may also seek assistance from Acas which offers a conciliation service for parties in dispute, whether or not a claim has been made to an employment tribunal.

Example

A worker raises a grievance with her employer alleging sex discrimination. The employer dismisses her grievance. She makes a claim to the tribunal but before the hearing she seeks assistance from Acas to conciliate in the dispute. As a result of the conciliation, the worker and her employer agree to settle the claim on terms which are agreeable to both of them.

Qualifying compromise agreement

You and the worker can also settle a claim or potential claim to the Employment Tribunal by way of a 'qualifying compromise contract'. There are specific conditions which must be satisfied if a claim is settled in this way:

- the agreement must be in writing
- the conditions in the agreement must be tailored to the circumstances of the claim
- the worker must have received legal advice about the terms of the agreement from an independent advisor who is insured against the risk of a claim arising from that advice
- the person who provides the worker with independent legal advice on the compromise agreement must be a lawyer; a trade union representative with written authority from the trade union or an advice centre worker with written authority from the centre to give this advice.

More information about defending an Employment Tribunal case

You can find out more about what to do if someone brings an Employment Tribunal case against you from:

- In England and Wales: Business Link – see in *Further sources of information and advice* for contact details.
- In Scotland: Business Gateway Scotland – see in *Further sources of information and advice* for contact details.

5. Further sources of information and advice

Equality and Human Rights Commission:

The Equality and Human Rights Commission is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. The Equality and Human Rights Commission helplines advise both individuals and organisations such as employers and service providers.

Website: www.equalityhumanrights.com

Helpline – England

Email: info@equalityhumanrights.com

Telephone: 0845 604 6610

Textphone: 0845 604 6620

Fax: 0845 604 6630

08:00–18:00 Monday to Friday

Helpline – Wales

Email: wales@equalityhumanrights.com

Telephone: 0845 604 8810

Textphone: 0845 604 8820

Fax: 0845 604 8830

08:00–18:00 Monday to Friday

Helpline – Scotland

Email: scotland@equalityhumanrights.com

Telephone: 0845 604 5510

Textphone: 0845 604 5520

Fax: 0845 604 5530

08:00–18:00 Monday to Friday

Acas – The Independent Advisory, Conciliation and Arbitration Service:

Acas aims to improve organisations and working life through better employment relations. It provides impartial advice, training, information and a range of problem resolution services.

Website: www.acas.org.uk

Telephone: 08457 47 47 47 (Monday–Friday: 08:00–20:00; Saturday: 09:00–13:00)

Access to Work:

Access to Work can help disabled people or their employers if their condition or disability affects the ease by which they can carry out their job or gain employment. It gives advice and support with extra costs which may arise because of certain needs.

Website:

www.direct.gov.uk/en/disabledpeople/employmentsupport/workschemesandprogrammes

London, East England and South East England:

Telephone: 020 8426 3110

Email: atwosu.london@jobcentreplus.gsi.gov.uk

Wales, South West England, West Midlands and East Midlands:

Telephone: 02920 423 29

Email: atwosu.cardiff@jobcentreplus.gsi.gov.uk

Scotland, North West England, North East England and Yorkshire and Humberside:

Telephone: 0141 950 5327

Email: atwosu.glasgow@jobcentreplus.gsi.gov.uk

Association of Disabled Professionals (ADP):

The ADP website offers advice, support, resources and general information for disabled professionals, entrepreneurs and employers.

Website: www.adp.org.uk

Telephone: 01204 431638 (answerphone only service)

Fax: 01204 431638

Email: info@adp.org.uk

British Chambers of Commerce (BCC):

The BCC is the national body for a network of accredited Chambers of Commerce across the UK; each Chamber provides representation, services, information and guidance to its members.

Website: www.britishchambers.org.uk

Telephone: 020 7654 5800

Fax: 020 7654 5819

Email: info@britishchambers.org.uk

British Retail Consortium (BRC):

The BRC is a trade association representing a broad range of retailers. It provides advice and information for its members.

Website: www.brc.org.uk
Telephone: 020 7854 8900
Fax: 020 7854 8901

Department for Business, Innovation and Skills (BIS):

BIS is the UK government department with responsibility for trade, business growth, employment and company law and regional economic development.

Website: www.bis.gov.uk
Telephone: 020 7215 5000

Business Gateway:

Business Gateway provides practical help, advice and support for new and growing businesses in Scotland.

Website: www.bgateway.com
Telephone: 0845 609 6611

Business in the Community:

Business in the Community mobilises businesses for good, working to improve businesses in terms of their responsibilities to both the local and global community, helping to work towards a sustainable future.

Website: www.bitc.org.uk
Telephone: 020 7566 8650
Email: information@bitc.org.uk
Twitter: @BITC1

Business Link:

Business Link is a free business advice and support service, available online and through local advisers.

Website: www.businesslink.gov.uk
Telephone: 0845 600 9 006
Minicom: 0845 606 2666

Chartered Institute of Personnel and Development (CIPD):

The CIPD is Europe's largest human resources development professional body, with over 135,000 members. It supports and develops those responsible for the management and development of people within organisations.

Website: www.cipd.co.uk

Telephone: 020 8612 6208

ChildcareLink:

ChildcareLink provides details of local childcare providers for employees and employers, as well as general information about childcare.

Website: www.childcarelink.gov.uk

Telephone: 0800 2346 346

Close the Gap Scotland:

Close the Gap Scotland works to close the gender pay gap by working with companies and trade unions as well as carrying out research to illustrate the gender pay gap.

Website: www.closethegap.org.uk

Telephone: 0141 337 8131

The Confederation of British Industry (CBI):

The CBI is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce.

Website: www.cbi.org.uk

Telephone: 020 7379 7400

Directgov:

Directgov is the UK government's digital service for people in England and Wales. It delivers information and practical advice about public services, bringing them all together in one place.

Website: www.direct.gov.uk

EEF:

EEF is a membership organisation which provides business services to help members manage people, processes, environment and more, so that members can meet their regulatory commitments.

Website: www.eef.org.uk
Telephone: 020 7222 7777
Fax: 020 7222 2782

Employers Forum on Age (EFA):

EFA is an independent network of leading employers who recognise the value of an age diverse workforce. In addition to supporting employers, the EFA influences Government, business and trade unions, campaigning for real practical change in preventing age discrimination at work and in the job market.

Website: www.efa.org.uk
Telephone: 0845 456 2495
Email: efa@efa.org.uk

Employers Forum on Belief (EFB):

EFB offers employers practical guidance and shares good practice around issues such as dress codes, religious holidays, the inter-relationship between religious belief and other diversity strands and conflict in the workplace. The forum is not affiliated to any religious group or philosophical belief.

Website: www.efbelief.org.uk
Telephone: 0207785 6533
Email: info@efbelief.org.uk

Employers Forum on Disability (EFD):

EFD is the world's leading employers' organisation focused on disability as it affects business.

Website: www.efd.org.uk
Telephone: 020 7403 3020
Email: enquiries@staging.efd.org.uk

Equality Britain:

Equality Britain aims to promote opportunities in employment, education, housing and sport to people from ethnic minorities.

Website: www.equalitybritain.co.uk
Telephone: 0151 707 6688

Federation of Small Businesses (FSB):

The FSB works to protect, promote, and further the interests of the self-employed and small business sector. It provides a range of member services.

Website: www.fsb.org.uk
Telephone: 01253 336 000
Fax: 01253 348 046

Flexible Support for Business:

Flexible Support for Business provides information and advice for businesses in Wales across all areas of commerce, working with specialists within the Government to help businesses expand, save time and money with instant access to clear, simple and trustworthy advice.

Website: www.business-support-wales.gov.uk
Telephone: 03000 6 03000
Email: businesssupport@wales.gsi.gov.uk

Gender Identity Research and Education Society (GIRES):

GIRES provides a wide range of information and training for Trans people, their families and professionals who care for them.

Website: www.gires.org.uk
Telephone: 01372 801 554
Fax: 01372 272 297
Email: info@gires.org.uk

The Gender Trust:

The Gender Trust is the UK's largest charity working to support Transsexual, Gender Dysphoric and Transgender people or those who are affected by gender identity issues. It has a helpline and provides training and information for employers and organisations.

Website: www.gendertrust.org.uk
Telephone: 0845 231 0505

Government Equalities Office (GEO):

The GEO is the Government department responsible for equalities legislation and policy in the UK.

Website: www.equalities.gov.uk
Telephone: 0303 444 0000

Health and Safety Executive (HSE):

The HSE provides information and guidance on health and safety.

Website: www.hse.gov.uk
Telephone: 08701 545 500
Email: hseinformationsservices@natbrit.com

Healthy Minds at Work:

Healthy Minds at Work is a Wales-based initiative to help prevent absence from work due to stress-related illnesses through improving the welfare of employees.

Website: www.healthymindsatwork.org.uk
Email: info@healthymindsatwork.org.uk

Investors in People (IiP):

IiP offers a business improvement tool designed to help all kinds of organisations develop performance through their people. It provides tailored assessments designed to support organisations in planning, implementing and evaluating effective strategies and is relevant for organisations of all sizes and sectors.

Website: www.investorsinpeople.co.uk
Telephone: 020 7467 1900
Email: info@investorsinpeople.co.uk

Mindful Employer:

Mindful Employer provides information, advice and practical support for people whose mental health affects their ability to find or remain in employment, training, education and voluntary work.

Website: www.mindfulemployer.net
Telephone: 01392 208 833
Email: info@mindfulemployer.net

Opportunity Now:

Opportunity Now is a membership organisation representing employers who want to ensure inclusiveness for women, supporting their potential to be as economically active as men. Opportunity Now is part of Business in the Community.

Website: www.opportunity.org.uk
Telephone: 0207 566 8650

Press for Change (PfC):

PfC is a political lobbying and educational organisation. It campaigns to achieve equality and human rights for all Trans people in the UK through legislation and social change. It provides legal advice, training and consultancy for employers and organisations as well as undertaking commissioned research.

Website: www.transequality.co.uk / www.pfc.org.uk

Telephone: 0161 432 1915 (10:00–17:00, Thursdays only until further notice)

Email: transequality@pfc.org.uk

Race for Opportunity (RfO):

RfO is a network of private and public sector organisations working across the UK to promote the business case for race and diversity. It is part of Business in the Community.

Website: www.raceforopportunity.org.uk

Telephone: 0207 566 8716

Sainsbury Centre for Mental Health:

The Sainsbury Centre for Mental Health works to improve the quality of life for people with mental health conditions. It carries out research, policy work and analysis to improve practice and influence policy in mental health as well as public services.

Website: www.scmh.org.uk

Telephone: 020 7827 8300

Email: contact@scmh.org.uk

Small Business UK:

Small Business UK provides resources, products and services for small business owners and start-ups. It offers free online advice in the form of news articles, guides, tips and features to help people set up and run small businesses.

Website: www.smallbusiness.co.uk

Telephone: 020 7250 7010

Stonewall:

Stonewall is the UK's leading lesbian, gay and bisexual charity and carries out campaigning, lobbying and research work as well as providing a free information service for individuals, organisations and employers.

Website: www.stonewall.org.uk

Telephone: 08000 50 20 20

Email: info@stonewall.org.uk

The Age and Employment Network (TAEN):

An independent charity whose mission is to promote an effective job market that serves the needs of people in mid- and later life, employers and the economy.

Website: www.taen.org.uk

Telephone: 020 7843 1590

TUC – the Trades Union Congress (England and Wales):

With 59 member unions representing over six and a half million working people, the TUC campaigns for a fair deal at work and for social justice at home and abroad.

Website: www.tuc.org.uk

Telephone: 020 7636 4030

Scottish Trades Union Congress (STUC):

Website: www.stuc.org.uk

Telephone: 0141 337 8100

Email: info@stuc.org.uk

Train to Gain:

Advice and resources for businesses looking for support in training their staff.

Website: www.traintogain.gov.uk

Telephone: 0845 600 9006

Working Families:

Working Families is a work–life balance organisation, helping children, working parents and carers and their employers find a better balance between responsibilities at home and work.

Website: www.workingfamilies.org.uk

Telephone: 0800 013 0313

Email: office@workingfamilies.org.uk

Workwise:

Workwise aims to make the UK one of the most progressive economies in the world by encouraging the widespread adoption of smarter working practices in order to gain better productivity and to balance work–life pressures.

Website: www.workwiseuk.org

Telephone: 01252 311 557

Email: enquiries@workwiseuk.org

6. Glossary

accessible venue	A building designed and/or altered to ensure that people, including disabled people, can enter and move round freely and access its events and facilities.
Act	A law or piece of legislation passed by both Houses of Parliament and agreed to by the Crown, which then becomes part of statutory law (ie is <i>enacted</i>).
affirmative action	Positive steps taken to increase the participation of under-represented groups in the workplace. It may encompass such terms as positive action and positive discrimination. The term, which originates from the United States of America, is not used in the Equality Act.
age	This refers to a person belonging to a particular age group, which can mean people of the same age (e.g. 32-year-olds) or range of ages (e.g. 18–30-year-olds, ‘middle-aged people’ or people over 50).
agent	A person who has authority to act on behalf of another ('the principal') but who is not an employee or worker employed by the employer.
alternative format	Media formats which are accessible to disabled people with specific impairments, for example Braille, audio description, subtitles and Easy Read.
armed forces	Refers to military service personnel.
associated with	This is used in a situation where the reason a job applicant or worker is discriminated against is not because they have a particular protected characteristic, but because they are ‘associated with’ another person who has that protected characteristic, eg the other person is their friend or relative. For example, an employer decides not to recruit a non-disabled worker because they have a disabled child. This is sometimes referred to as discrimination ‘by association’.

association, by	As in 'discrimination by association'. See associated with .
auxiliary aid	Usually a special piece of equipment to improve accessibility.
auxiliary service	A service to improve access to something often involving the provision of a helper/assistant.
barriers	In this guide, this term refers to obstacles which get in the way of equality for disabled workers and other workers put at a disadvantage because of their protected characteristics. Unless explicitly stated, 'barriers' does not exclusively mean physical barriers. For more on barriers in relation to disabled workers, see duty to make reasonable adjustments .
Bill	A draft Act, not passed by Parliament.
burden of proof	This refers to whether, in an Employment Tribunal, it is for the worker to prove that discrimination occurred or it is for the employer to disprove it. Broadly speaking, a worker must prove facts which, if unexplained, indicate discrimination. The burden of proof then shifts to the employer to prove there was no discrimination. If the employer cannot then prove that no discrimination was involved, the worker will win their case.
charity	A body (whether corporate or not) which is for a statutory charitable purpose that provides a benefit to the public.
Code of Practice	A statutory guidance document which must be taken into account by courts and tribunals when applying the law and which may assist people to understand and comply with the law.
comparator	Direct discrimination occurs when an employer treats a job applicant or worker less favourably than they treat or would treat another worker in similar circumstances because of a protected characteristic. The worker with whom the job applicant or worker compares their treatment is called a 'comparator'. Sometimes there is no actual comparator, but the worker can still claim that another worker without their protected characteristic

would have been treated better by the employer. This is a 'hypothetical' comparator.

contract worker

Under the Equality Act, this has a special meaning. It means a person who is sent by their employer to do work for someone else (the 'principal'), under a contract between the employer and the principal. For example, a person employed by an agency to work for someone else ('an end-user') or a person employed by a privatised company to work on contracted out services for a public authority, may be a contract worker. The Equality Act makes it unlawful for the principal to discriminate against the contract worker.

data protection

Safeguards concerning personal data are provided for by statute, mainly the Data Protection Act 1998.

direct discrimination

Less favourable treatment of a person compared with another person because of a protected characteristic. This may be their own protected characteristic, or a protected characteristic of someone else, eg someone with whom they are **associated**. It is also direct discrimination to treat someone less favourably because the employer wrongly perceives them to have a protected characteristic.

disability

A person has a disability if they have a physical or mental impairment which has a **substantial** and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

disabled person

Someone who has a physical or mental impairment that has a **substantial** and long-term adverse effect on their ability to carry out normal day-to-day activities.

disadvantage

A detriment or impediment – something that the individual affected might reasonably consider changes their position for the worse.

discrimination arising from disability

When a person is treated unfavourably because of something arising in consequence of their disability, eg an employer dismisses a worker because of the length of time they have been on sick leave. The reason the worker has been off sick is because of their disability. If it is **objectively justifiable** to treat a person

unfavourably because of something arising from their disability, then the treatment will not be unlawful. It is unlikely to be justifiable if the employer has not first made any **reasonable adjustments**.

disproportionately low

Refers to situations where people with a protected characteristic are under-represented compared to their numbers in the population or in the relevant workplace.

diversity

This tends to be used to refer to a group of people with many different types of protected characteristic, eg people of all ages, religions, ethnic background etc.

duty to make reasonable adjustments

This duty arises where
(1) a physical feature of the workplace or
(2) a provision, criterion or practice applied by an employer puts a disabled worker or job applicant at a **substantial** disadvantage in comparison with people who are not disabled. It also applies where a worker or job applicant would be put at a substantial disadvantage but for the provision of an auxiliary aid. The employer has a duty to take reasonable steps to avoid that disadvantage by (i) changing provisions, criteria or practices, (ii) altering, removing or providing a reasonable alternative means of avoiding physical features, and (iii) providing auxiliary aids. In many situations, an employer must treat the disabled worker or job applicant more favourably than others as part of the reasonable adjustment. More detail of the law and examples of reasonable adjustments are set out in sub-section 3 of this guide.

educational establishments

Schools, colleges and higher educational institutions.

employee

In this guide, the word 'employee' is used only to refer to the definition in the Employment Rights Act 1996, ie a person who works under a contract of employment. This definition is fairly limited. It is only employees in this sense who have certain rights, eg to have a written statement of employment particulars; to use the formal procedure to request flexible working; and to claim unfair dismissal.

The Equality Act uses the word 'employee' more widely,

to include a person working on a contract of employment or a contract of apprenticeship or a contract personally to do work; or a person who carries out work for the Crown or a relevant member of the Houses of Parliament staff. To avoid confusion with the narrower definition of 'employee' applicable under the Employment Rights Act, this guide refers to someone in this wider category of workers covered by equality law as a 'worker'. See **worker**.

employer

A person who makes work available under a contract of employment, a contract of service, a contract of apprenticeship, the Crown or a relevant member of the Houses of Parliament staff.

employment service provider

A person who provides vocational training and guidance, careers services and may supply employers with workers.

employment services

Vocational training and guidance, finding employment for people, supplying employers with workers.

Employment Tribunal

Cases of discrimination in work situations (as well as unfair dismissal and most other employment law claims) are heard by Employment Tribunals. A full Hearing is usually handled by a three person panel – a Judge and two non-legal members.

equal pay audit

An exercise to compare the pay of women and men who are doing equal work in an organisation, and investigate the causes of any pay gaps identified; also known as an 'equal pay review'. The provisions in the Equality Act directly relating to equal pay refer to sex equality but an equal pay audit could be applied to other protected characteristics to help an employer equality proof their business.

equal work

A woman's work is equal to a man's in the same employment (and vice versa) if it is the same or broadly similar (like work); rated as equivalent to his work under a job evaluation scheme or if she can show that her work is of equal value to his in terms of the demands made of her.

equality clause	A sex equality clause is read into a person's contract of employment so that where there is a term which is less favourable than that enjoyed by someone of the opposite sex doing equal work, that term will be modified to provide equal terms.
equality policy	A statement of an organisation's commitment to the principle of equality of opportunity in the workplace.
equality training	Training on equality law and effective equality practice.
ET	Abbreviation for Employment Tribunal .
exceptions	Where, in specified circumstances, a provision of the Act does not apply.
flexible working	Alternative work patterns, such as working different hours or at home, including to accommodate disability or childcare commitments. See also right to request flexible working .
gender reassignment	The process of changing or transitioning from one gender to another. The Equality Act prohibits discrimination against a person who is proposing to undergo, is undergoing or has undergone a process, or part of a process, for the purpose of reassigning their sex. See also transsexual person.
gender recognition certificate	A certificate issued under the Gender Recognition Act to a transsexual person who has, or has had gender dysphoria, has lived in the acquired gender throughout the preceding two years, and intends to continue to live in the acquired gender until death.
guaranteed interview scheme	This is a scheme for disabled people which means that an applicant will be invited for interview if they meet the essential specified requirements of the job.
harass	To behave towards someone in a way that violates their dignity, or creates a degrading, humiliating, hostile, intimidating or offensive environment for them.
harassment	Unwanted behaviour that has the purpose or effect of violating a person's dignity or creates a degrading,

	humiliating, hostile, intimidating or offensive environment for them. <i>See also</i> sexual harassment .
impairment	A functional limitation which may lead to a person being defined as disabled according to the definition under the Act. <i>See also</i> disability .
indirect discrimination	Where an employer applies (or would apply) an apparently neutral practice, provision or criterion which puts people with a particular protected characteristic at a disadvantage compared with others who do not share that characteristic, unless applying the practice, provision or criterion can be objectively justified by the employer.
instruction to discriminate	When someone who is in a position to do so instructs another to discriminate against a third party. For example, if a GP instructed their receptionist not to register anyone who might need help from an interpreter, this would amount to an instruction to discriminate.
job evaluation scheme	See job evaluation study
job evaluation study	This is a study undertaken to assess the relative value of different jobs in an organisation, using factors such as effort, skill and decision-making. This can establish whether the work done by a woman and a man is equal, for equal pay purposes. <i>See also</i> equal work .
judicial review	A procedure by which the High Court supervises the exercise of public authority power to ensure that it remains within the bounds of what is lawful.
less favourably	Worse – so ‘less favourable treatment’ means the same as ‘worse treatment’.
liability	Legal responsibility. An employer is legally responsible for discrimination carried out by workers employed by you or by your agents, unless you have taken all reasonable preventative steps.
like work	See equal work .
marriage and civil partnership	Marriage is defined as a 'union between a man and a woman'. Same-sex couples can have their relationships

legally recognised as 'civil partnerships'. Civil partners must not be treated less favourably than married couples.

maternity

See **pregnancy and maternity**.

maternity leave

Leave which a woman can take whilst she is pregnant and after the birth of her child. Statutory maternity leave is divided into compulsory, ordinary and additional maternity leave. How much leave a woman is entitled to, and how much of it is paid, will vary, but all women employees are entitled to 52 weeks.

monitoring

Monitoring for equality data to check if people with protected characteristics are participating and being treated equally. For example, monitoring the representation of women, or disabled people, in the workforce or at senior levels within organisations.

monitoring form

A form which organisations use to collect equality monitoring data – from, for example, job applicants or service users. It records information about a person's sex, age, disability, race, religion, or sexual orientation. It is kept separately from any identifying information about the person.

more favourably

To treat somebody better than someone else. This is unlawful under the Act if it is because of a protected characteristic except in very limited circumstances. The law requires an employer to make reasonable adjustments for a disabled person to remove any disadvantage caused by their disability, and this often *requires* treating them more favourably. An employer can also *chose* to treat a disabled worker more favourably in other ways, eg by automatically shortlisting them for a job, even if they are not at a particular disadvantage on the relevant occasion. The law can also require pregnant workers to be treated more favourably in some circumstances.

national security

The security of the nation and its protection from external and internal threats, particularly from activities such as terrorism and threats from other nations.

normal retirement age	This is the retirement age at which, in practice, employees in a particular job and workplace would normally expect to retire. Normal retirement age can differ from the contractual retirement age. If it is under 65, it must be objectively justified.
objective justification	See objectively justified .
objectively justified	This phrase is a shorthand way of referring to the legal test of objective justification, ie that the employer's treatment of the worker must be a proportionate means of achieving a legitimate aim. The Act uses this test in several situations. For example, once a worker has proved that the employer has treated them unfavourably because of something arising from their disability, or that the employer has indirectly discriminated against them or that the employer has directly discriminated against them because of age, the employer can defend the claim by proving their treatment (i) is in order to achieve a legitimate aim, and (ii) is proportionate, ie appropriate and necessary. If there is a less discriminatory way of achieving the same aim, it should be adopted. See also proportionate .
occupational health	Occupational health has no legal meaning in the context of the Equality Act, but it can be used to refer to the ongoing maintenance and promotion of physical, mental and social wellbeing for all workers. The phrase is often used as a shorthand way of referring to occupational health services provided by the employer.
occupational health practitioner	A health professional providing occupational health services.
occupational health service	This usually refers to doctors or nurses employed in-house by an employer or through an external provider who the employer may ask to see workers and give medical advice on their health when workplace issues arise.
occupational pension	A pension which an employee may receive after retirement as a contractual benefit.

occupational requirement	An employer can discriminate against a worker in very limited circumstances where it is an 'occupational requirement' to have a particular protected characteristic and the application of the requirement is objectively justified . There are two particular occupational requirement exceptions where employment is for the purposes of an organised religion or the employer has an ethos based on religion or belief, but very specific requirements need to be fulfilled.
office-holders	There are personal and public offices. A personal office is a remunerated office or post to which a person is appointed personally under the direction of someone else. A person is appointed to a public office by a member of the government, or the appointment is recommended by them, or the appointment can be made on the recommendation or with the approval of both Houses of Parliament, the Scottish Parliament or the National Assembly for Wales.
palantypist	Also known as 'Speech to Text Reporter'. A palantypist reproduces speech into a text format onto a computer screen at verbatim speeds for Deaf or hard of hearing people to read.
past disability	A person who has had a disability as defined by the Equality Act.
perception	This refers to a belief that someone has a protected characteristic, whether or not they do have it. Discrimination because of a perceived protected characteristic is unlawful. The idea of discrimination because of perception is not explicitly referred to in the Equality Act, but it is incorporated because of the way the definition of direct discrimination is worded.
physical barriers	A physical feature of a building or premises which places disabled people at a substantial disadvantage compared to non-disabled people when accessing goods, facilities and services or employment. See <i>also</i> physical features .
physical features	Anything that forms part of the design or construction of a place of work, including any fixtures, such as doors,

stairs etc. Physical features do not include furniture, furnishings, materials, equipment or other chattels in or on the premises.

positive action

If an employer reasonably thinks that people sharing a certain protected characteristic suffer a disadvantage connected to that characteristic or have different needs, or if their participation in work or other activity is disproportionately low, an employer can take any action (which would otherwise be discrimination against other people) which is a proportionate means of enabling or encouraging those people to overcome or minimise their disadvantage or to participate in work or other activities or meeting their needs. For example, an employer can put on training courses exclusively for workers with a particular protected characteristic. An employer is not allowed to give preference to a worker in recruitment or promotion because they have a protected characteristic.

positive discrimination

Treating someone with a protected characteristic more favourably to counteract the effects of past discrimination. It is generally not lawful, although more favourable treatment of workers because of their disability is permitted if the employer so wishes. Moreover, the duty to make reasonable adjustments may require an employer to treat a worker more favourably if that is needed to avoid a disadvantage.

pre-employment disability and health enquiries

Generally, an employer must not ask about disabilities or the health of a job applicant before they have been offered the job. If the employer does ask such questions and then fails to offer the applicant the job, the fact that the employer made such enquiries will shift the **burden of proof** if the applicant brings a claim for disability discrimination. The Equality and Human Rights Commission can also take legal action against the employer if such enquiries are wrongly made. More detail is set out in the guide, 'What equality law means for you as an employer: when you recruit someone to work for you'.

pregnancy and maternity

Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after

the birth, and is linked to maternity leave in the employment context where special protections apply.

principal

In the context of a **contract worker**, this is someone who makes work available for a worker who is employed by someone else and supplied by that employer under a contract between the employer and the principal. See **contract worker**.

procurement

The term used in relation to the range of goods and services a public body or authority commissions and delivers. It includes sourcing and appointment of a service provider and the subsequent management of the goods and services being provided.

proportionate

This refers to measures or actions that are appropriate and necessary. Whether something is proportionate in the circumstances will be a question of fact and will involve weighing up the discriminatory impact of the action against the reasons for it, and asking if there is any other way of achieving the aim.

protected characteristics

These are the grounds upon which discrimination is unlawful. The characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

protected period

This refers to the time in a work context when the specific prohibition against unfavourable treatment of expectant and new mothers applies. The period begins at the start of a woman's pregnancy and continues until the end of her maternity leave.

provision, criterion or practice

Identifying a provision, criterion or practice is key to establishing **indirect discrimination**. It can include, for example, any formal or informal policies, decisions, rules, practices, arrangements, criteria, conditions, prerequisites or qualifications.

public authority

For the purposes of this Guidance a 'public authority' means: government departments, local authorities, courts and tribunals, health authorities and hospitals, schools, prisons, and police.

Note that only those public authorities listed in Schedule 19 to the Equality Act 2010 are subject to the public sector equality duty.

public bodies

For the purpose of this Guidance 'public bodies' includes public authorities (as above) as well as organisations which have a role in the processes of national governments but are not a government department or part of one. They operate to a greater or lesser extent at arm's length from Ministers.- departmental government body or an inspectorate. This is not an exhaustive list.

public functions

A 'public function' for the purposes of this Guidance is any act or activities of a public nature carried out by a public authority or public body or by the private or voluntary sectors which is not already covered by the other sections of the Act dealing with services, housing, education and employment. Specifically, in relation to the private and voluntary sectors it is any act or activities carried out on behalf of the state.

Examples of public functions include: determining frameworks for entitlement to benefits or services; law enforcement; receiving someone into prison or immigration detention facility; planning control; licensing; parking controls; trading standards; environmental health; regulatory functions; investigation of complaints; child protection. This is not an exhaustive list.

Any act or activity undertaken by a public authority in relation to delivery of a public service or carrying out duties or functions of a public nature e.g. the provision of policing and prison services, including, government policy-making or local authority planning services.

public sector equality duty

The duty on a public authority when carrying out its functions to have due regard to the need to eliminate unlawful discrimination and harassment, foster good relations and advance equality of opportunity.

qualifications bodies

An authority or body which can confer qualifications.

questionnaire

See **questions procedure**.

questions procedure	A discrimination law procedure whereby written pre-action questions are issued to the respondent, i.e. the person or organisation against whom a discrimination claim may be made. The questions are usually put onto a standard written form which is often called a 'questionnaire'.
race	Refers to the protected characteristic of race. It refers to a group of people defined by their colour, nationality (including citizenship), ethnic or national origins.
rated as equivalent	An equal pay concept – see equal work .
reasonable adjustment	See the duty to make reasonable adjustments .
regulations	Secondary legislation made under an Act of Parliament (or European legislation) setting out subsidiary matters which assist in the Act's implementation.
religion or belief	Religion has the meaning usually given to it but belief includes religious and philosophical beliefs including lack of belief (e.g. atheism). Generally, a belief should affect your life choices or the way you live for it to be included in the definition.
religion or belief organisations	An organisation founded on an ethos based on a religion or belief. Faith schools are one example of a religion or belief organisation. See also religion or belief .
religious organisation	See religion or belief organisations .
retirement age	The age at which an employee retires or is expected to retire. This may be the default retirement age of 65 (until abolished on 1 October 2011), or an age which is set in the employee's contract of employment or the normal retirement age in that employment. The employer may also impose a retirement age on workers who are not employees, but this must be objectively justified even if it is 65 or above.
right to request flexible working	Employees with at least 26 weeks' service have the right to request flexible working under a formal procedure in order to care for children or certain adult relatives. This is simply an entitlement to go through a formal procedure to have the request considered in a

meeting and to receive written reasons for any refusal. The substantive right to be allowed to work flexibly for care reasons applies more widely to workers and is covered by indirect sex discrimination law under the Equality Act.

same employment

An equal pay concept (see **equal work**). Generally, women and men can compare their pay and other conditions with those employed by the same or an associated employer.

service complaint

Where the discrimination occurred while the worker was serving as a member of the armed forces, an employment tribunal cannot decide the claim unless the worker has made a service complaint about the matter which has not been withdrawn.

service provider

Someone (including an organisation) who provides services, goods or facilities to the general public or a section of it.

sex

This is a protected characteristic. It refers to whether a person is a man or a woman (of any age).

sexual harassment

Any conduct of a sexual nature that is unwanted by the recipient, including verbal, non-verbal and physical behaviour, and which violates the victim's dignity or creates an intimidating, hostile, degrading or offensive environment for them.

sexual orientation

Whether a person's sexual attraction is towards their own sex, the opposite sex or to both sexes.

single-sex facilities

Facilities which are only available to men or to women, the provision of which may be lawful under the Equality Act.

stakeholders

People with an interest in a subject or issue who are likely to be affected by any decision relating to it and/or have responsibilities relating to it.

substantial

This word tends to come up most in connection with the definition of disability and the duty to make reasonable adjustments for disabled workers. The Equality Act says only that 'substantial' means more than minor or trivial. This means that disabled workers do not need to be put

at a huge disadvantage before an employer's equality duties are triggered.

terms of employment

The provisions of a person's contract of employment, whether provided for expressly in the contract itself or incorporated by statute, custom and practice or common law etc.

textphone

A type of telephone for Deaf or hard of hearing people which is attached to a keyboard and a screen on which the messages sent and received are displayed.

third party harassment

This is where workers are harassed by members of the public (such as customers) or by other people who the employer does not employ (such as suppliers). If an employer is aware that one of their workers has been subjected to harassment by third parties on at least two occasions, the employer will be legally responsible for any further third party harassment unless the employer takes all reasonable steps to prevent it.

trade unions

These are organisations formed to represent workers' rights and interests to their employers, for example in order to improve working conditions, wages or benefits. They also advocate more widely on behalf of their members' interests and make recommendations to government, industry bodies and other policy makers.

transsexual person

Refers to a person who has the protected characteristic of **gender reassignment**. This may be a woman who has transitioned or is transitioning to be a man, or a man who has transitioned or is transitioning to be a woman. The law does not require a person to undergo a medical procedure to be recognised as a transsexual person. Once a transsexual person has acquired a **gender recognition certificate**, it is probably the case that they should be treated entirely as their acquired gender.

tribunal

See **Employment Tribunal**

two ticks symbol

A sign awarded by Jobcentre Plus to employers who are positive about employing disabled people and are committed to employing, keeping and developing disabled staff.

UK Text Relay Service	Text Relay is a national telephone relay service for deaf, deafened, hard of hearing, deafblind and speech-impaired people. It lets them use a textphone to access any services that are available on standard telephone systems.
unfavourably	The term is used (instead of less favourable) where a comparator is not required to show that someone has been subjected to a detriment or disadvantage because of a protected characteristic – for example in relation to pregnancy and maternity discrimination, or discrimination arising from disability.
vicarious liability	This term is sometimes used to describe the fact that an employer is legally responsible for discrimination carried out by its employees. See also liability .
victimisation	Subjecting a person to a detriment because they have done a protected act or there is a belief that they have done a protected act i.e. bringing proceedings under the Equality Act; giving evidence or information in connection with proceedings under the Act; doing any other thing for the purposes or in connection with the Act; making an allegation that a person has contravened the Act; or making a relevant pay disclosure.
victimise	The act of victimisation.
vocational service	A range of services to enable people to retain and gain paid employment and mainstream education.
vocational training	Training to do a particular job or task.
work of equal value	See equal work .
WORKSTEP	The WORKSTEP employment programme provides support to disabled people facing complex barriers to getting and keeping a job. It also offers practical assistance to employers.
worker	In this guide, ‘worker’ is used to refer to any person working for an employer, whether they are employed on a contract of employment (ie an ‘ employee ’) or on a contract personally to do work, or more generally as a

contract worker. In employment law, the term 'worker' has a similar meaning to those people covered by the Equality Act. However, it is not quite identical to that and has its own definition; the term is used, for example, to people covered by the Working Time Regulations and the law on the minimum wage.

Contact us

The Equality and Human Rights Commission aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.

You can find out more or get in touch with us via our website at www.equalityhumanrights.com or by contacting one of our helplines below. If you require this publication in an alternative format and/or language please contact the relevant helpline to discuss your needs.

Equality and Human Rights Commission helpline – England

Telephone: 08456 046 610

Textphone: 08456 046 620

Fax: 08456 046 630

8am–6pm, Monday to Friday

Equality and Human Rights Commission helpline – Scotland

Telephone: 08456 045 510

Textphone: 08456 045 520

Fax: 08456 045 530

8am–6pm, Monday to Friday

Equality and Human Rights Commission helpline – Wales

Telephone: 08456 048 810

Textphone: 08456 048 820

Fax: 08456 048 830

8am–6pm, Monday to Friday

www.equalityhumanrights.com

This guide is one of a series written by the Equality and Human Rights Commission to explain your responsibilities under equality law if you are a person or organisation employing people to work for you.

There are 7 guides:

1. What equality law means for you as an employer: when you recruit someone to work for you
2. What equality law means for you as an employer: working hours, flexible working and time off
3. What equality law means for you as an employer: pay and benefits
4. What equality law means for you as an employer: training, development, promotion and transfer
5. What equality law means for you as an employer: managing workers
6. What equality law means for you as an employer: dismissal, redundancy, retirement and after a worker has left
7. Good equality practice for employers: equality policies, equality training and monitoring

We have also produced:

- A separate series of guides explaining the responsibilities people and organisations have if they are providing services, carrying out public functions or running an association
- Different guides which explain people's rights at work and in relation to people and organisations providing services, carrying out public functions or running an association

If you would like a copy of any of these guides or require this guide in an alternative format, please call our helpline on **0845 6046610** Monday to Friday 8am to 6pm or see our website **www.equalityhumanrights.com**.