

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT  
2.21.4002, 2.21.4005, 2.21.4008, )  
2.21.4013, 2.21.4020, and 2.21.4028 )  
pertaining to equal employment )  
opportunity, nondiscrimination, and )  
harassment prevention )

TO: All Concerned Persons

1. On April 22, 2016, the Department of Administration published MAR Notice No. 2-21-545 regarding a public hearing on the proposed amendment of the above-stated rules at page 617 of the 2016 Montana Administrative Register, Issue Number 8.

2. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: The department received a recommendation to expand the statement of reasonable necessity for ARM 2.21.4005. The commenter suggested the department provide specific examples of LGBT-related claims that the Equal Employment Opportunity Commission (EEOC) views as unlawful sex discrimination. Examples included firing an employee because the employee is planning or has made a gender transition; denying an employee equal access to a common restroom corresponding to the employee's gender identity; or harassing an employee by intentionally or persistently failing to use the name and gender pronoun that correspond to the employee's gender identity.

RESPONSE #1: While the comment does not address the content of the rule, the department will include these and other examples of LGBT-related discrimination in fact sheets, training materials, and other department resources.

COMMENT #2: The department received comments concerning the requirement for agency EO officers to update agency EEO action plans under ARM 2.21.4008(2)(a)(v). Commenters indicated the wording of the proposed rule caused confusion and implied agencies did not need to update their annual EEO action plans or affirmative action plans unless required by a federal department.

RESPONSE #2: The department has modified the rule to clarify the department's expectation that agencies shall update annual EEO action plans unless they have a federal requirement to develop an affirmative action plan. Agencies are not required to have an EEO action plan if they have a federal requirement to develop an affirmative action plan that extends to the entire department.

COMMENT #3: The department received comments concerning the reliability of demographic data used to update agency EEO action plans under ARM 2.21.4008(2)(a)(v). Commenters had concerns about using this data to develop strategies, goals, and objectives for evaluating the effectiveness of the agency's EEO action plan under ARM 2.21.4008(2)(a)(vi). Commenters also expressed concerns that the demographic data has not been reliable in the past and requested the department not impose these requirements until the department can provide reliable demographic data.

RESPONSE #3: The department has implemented new procedures for collecting employee demographic data. The new procedures, described in the following paragraphs, will enhance the accuracy and reliability of demographic data collected.

The department has updated demographic categories in the Statewide Accounting, Budgeting, and Human Resource System (SABHRS) to reflect the Hispanic and Latino designation and five race categories the department must report to the EEOC beginning in 2017. Federal laws and regulations require the department to collect and report the demographic data of all state employees to the EEOC on a biennial basis.

In October 2016, the department began requesting current employees review their Hispanic and Latino designation and race selections for accuracy and make corrections, as needed, using the employee self-service function in SABHRS. Employees may select from one or more of the categories provided. New employees have the opportunity to make a selection upon hire.

Since the EEOC expects employers to report data on all employees, agency human resource staffs may use a visual determination to make a selection in SABHRS if an employee chooses not to self-identify. Employees have the opportunity to review and update their demographic in self-service at any time.

The department will use the updated demographic data to create agency utilization analysis reports by January 2017, with the expectation that agencies will update EEO action plans, if required, by March 31 of each year.

Utilization analysis reports consist of agency demographic data collected by the department and external demographic data from the U.S. Census Bureau's [EEO Tabulation](#). The EEO Tabulation serves as the primary external benchmark U.S. employers use to compare the demographic makeup of their internal workforce with the relevant labor market by race, ethnicity, gender, geographic region, and occupation.

The department will assist agency representatives with interpreting internal and external demographic data and provide tools and resources for developing robust and sustainable EEO action plans to fulfill this requirement.

The department has also modified ARM 2.21.4008(2)(a)(vi) to clarify that agencies shall develop strategies, goals, and objectives for evaluating the effectiveness of the agency's EEO action plan or affirmative action plan, if an affirmative action plan is required.

COMMENT #4: The department received comments concerning the requirement in ARM 2.21.4008(3)(c) for managers to provide reasonable

accommodations, upon request, for pregnancy-related disabilities and the interaction of pregnancy with an underlying impairment. Commenters indicated the rule did not afford managers the ability to deny an accommodation request if the requested accommodation would create an undue hardship. Commenters indicated by not including an exception for undue hardship, the rule suggested a different standard than applied to disability-related accommodations under the state's Reasonable Accommodation and Equal Access Policy (ARM Title 2, chapter 21, subchapter 41). Commenters also questioned the need to address accommodations for pregnancy-related disabilities under this policy and indicated the rule may imply preferential treatment toward women who are pregnant.

RESPONSE #4: The department believes this rule is important to promote compliance with federal law because it aligns the state's policy with the EEOC's enforcement guidance, [Pregnancy Discrimination and Related Issues](#), released on June 25, 2015. The department has, however, modified the rule to include an exception for undue hardship. Including this exception makes the rule consistent with reasonable accommodation requirements under ARM 2.21.4008(3)(b), which requires managers to provide reasonable accommodations to qualified individuals with disabilities and employees based on their religious practices, unless doing so would create an undue hardship. The revision also aligns the rule with requirements under the Reasonable Accommodation and Equal Access Policy. The department does not believe the rule implies preferential treatment toward pregnant women.

COMMENT #5: The department received comments concerning the proposed requirement in ARM 2.21.4008(3)(d) for agency managers to develop internal procedures for providing meaningful access (interpreters, translators, etc.) to programs, services, and activities for customers with limited English proficiency. Commenters questioned whether the department's intent was to require all agencies to develop such procedures or only those with a federal requirement.

RESPONSE #5: The department's intent is for all state agencies to provide limited English proficiency (LEP) individuals with meaningful access to programs, services, and activities provided.

The department has modified the rule to require managers to ensure employees provide meaningful access to LEP individuals and moved the proposed requirement to develop internal procedures under EO officer responsibilities to ARM 2.21.4008(2)(a)(viii).

The extent to which EO officers develop internal procedures will vary from agency to agency based on the programs, services, and activities provided, customers served, and whether the agency has a federal requirement.

Employees must respond to the unique language needs of customers and provide meaningful access to all programs and services the agency offers. This may include providing documents and forms in a language other than English or contracting with an interpreter to engage in meaningful communication with a customer who speaks limited English.

Including this requirement promotes consistency across all agencies, whether or not they have a federal requirement, and promotes compliance with federal and

state law.

Many state agencies receive federal funding and have a requirement to provide meaningful access to LEP individuals under Title VI of the Civil Rights Act of 1964. When a state agency is a recipient of federal funds, it must provide meaningful access to all programs and services within the agency, even if only one program receives federal funding. See Question 4, [Commonly Asked Questions and Answers Regarding Limited English Proficient \(LEP\) Individuals](#), and [Memorandum of Agreement, The United States of America and the Washington State Department of Labor and Industries](#).

Including this requirement not only supports agencies with Title VI obligations, but promotes compliance with 49-3-205, MCA, which prohibits discrimination in services, including discrimination based on national origin.

COMMENT #6: The department received a comment recommending ARM 2.21.4008(3)(e), prohibiting discrimination in state contracts and subcontracts, include language clarifying that the state prohibits discrimination "in all aspects of employment and in programs, services, and activities offered to the public."

RESPONSE #6: The department does not have the authority to address violations outside the scope of a contract or subcontract. The department may only address violations related to work performed on the state's behalf. For example, a contractor may not use an illegal hiring practice (based on a protected class) to employ individuals under that contract, and a subcontractor may not deny access (based on a protected class) to a program, service, or activity they perform on the state's behalf. The department has modified this rule to include language that more closely aligns with the Governor's executive order prohibiting discrimination in state employment and contracts. The amendment specifically addresses discrimination and harassment in hiring and programs, services, and activities performed on the state's behalf.

COMMENT #7: The department received comments concerning responsibilities of agency managers under ARM 2.21.4008(3), suggesting the requirements under ARM 2.21.4008(3)(d), (i), (j), and (l) should fall on the agency human resource staff and not management.

RESPONSE #7: The department has amended the rule to state that managers are responsible for ensuring employees provide meaningful access to LEP individuals under ARM 2.21.4008(3)(d) and receive new employee and refresher training under ARM 2.21.4008(3)(i). The department has moved the requirement to report the number of employees trained to EO officer responsibilities under ARM 2.21.4008(2)(a).

COMMENT #8: The department received comments concerning the proposed amendments to ARM 2.21.4008(3)(i) and (j) respectively requiring agency managers to provide diversity and inclusion and EO and harassment prevention training to all new employees within 90 days of hire and refresher training to all employees every three years according to guidelines established by the department.

Commenters requested the department not impose this requirement until the department develops the minimum standards for such training.

RESPONSE #8: The department agrees and has amended the rule to extend the requirement to six months from the effective date of the amendment, which will be April 15, 2017. The department will collaborate with agency EO officers and HR staffs to develop viable training to fulfill this requirement. The department has also changed this rule to clarify that agency managers are responsible for ensuring their employees receive training and are not required to provide the training.

COMMENT #9: The department received comments concerning ARM 2.21.4008(3)(l) requiring agency managers to report the number of trainings provided--by new employee and refresher training and number of people trained--to the department each quarter. Commenters indicated that reporting the numbers of employees trained on a quarterly basis would create a burden for agency HR staffs who would need to manually track this information.

RESPONSE #9: The department has amended the rule to extend the reporting requirement to an annual basis. The department has also moved this requirement to ARM 2.21.4008(2)(a)(ix) to clarify that agency EO officers are responsible for fulfilling this requirement.

COMMENT #10: The department received a recommendation to include additional language under ARM 2.21.4008(3) that would require agency managers to implement and comply with the department's policy on gender identity and expression protections in the workplace.

RESPONSE #10: The department has not amended the rule to include the recommended language to minimize redundancy. The department believes the policy addresses management's responsibility to implement and comply with these provisions throughout the policy as provided in ARM 2.21.4005, 2.21.4008, 2.21.4013, 2.21.4019 through 2.21.4022, and 2.21.4029.

COMMENT #11: The department received comments concerning ARM 2.21.4013(3) prohibiting any behavior or pattern of behavior that intentionally or unintentionally degrades or demeans an individual or group of individuals, whether based on a legally protected class or not. Commenters felt the rule extended beyond the scope of the EEO, Nondiscrimination, and Harassment Prevention Policy and would be difficult to administer. They indicated this particular policy should focus on "harassment" as narrowly defined under civil rights legislation. Commenters understood the department's intent, which is to oppose disrespectful or inappropriate behavior in any form, and supported a separate policy to address such behavior.

RESPONSE #11: The department agrees and will not amend this rule, but will draft a separate policy to promote respectful behavior.

COMMENT #12: The department received one comment recommending the department include new language in ARM 2.21.4029, Rule Violations, to address violations by contractors through corrective action or sanctions.

RESPONSE #12: ARM 2.21.4029 was not noticed for amendment and is, therefore, beyond the scope of this rulemaking, pursuant to 2-4-305(7), MCA. The Department of Administration does not intend to pursue a new rulemaking to make this change as all state contracts will include language prohibiting discrimination based on protected classes identified in this policy, and a violation of the contract provision may result in a breach of the contract. Any other penalties must be within the terms of the contract.

3. The department has amended ARM 2.21.4002, 2.21.4005, and 2.21.4020 as proposed.

4. The department has amended ARM 2.21.4008 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

2.21.4008 RESPONSIBILITIES (1) through (2)(a)(iv) remain as proposed.

(v) updating the department's annual EEO action plan ~~or affirmative action plan if required by a federal department,~~ unless the department has a federal requirement to develop an affirmative action plan that extends to the entire department;

(vi) developing strategies, ~~and measurable goals,~~ and objectives for evaluating the effectiveness of the agency's EEO action plan or affirmative action plan;

(vii) reporting the agency's progress toward minimizing underutilization of women and minorities to the department by March 31 of each year; ~~and~~

(viii) developing internal procedures for providing meaningful access (interpreters, translators, etc.) to programs, services, and activities for customers with limited English proficiency by March 31, 2017;

(ix) report to the department each year:

(A) the number of diversity and inclusion and EO and harassment prevention trainings provided; and

(B) the number of employees trained, by new employee and refresher training; and

(b) through (3)(b) remain as proposed.

(c) provide reasonable accommodations, upon request, for limitations resulting from pregnancy-related disabilities and the interaction of pregnancy with an underlying impairment, unless doing so would create an undue hardship for the agency;

(d) ~~develop internal procedures to ensure employees~~ provide meaningful access (interpreters, translators, etc.) to programs, services, and activities for customers with limited English proficiency (LEP);

(e) include provisions in all contracts and subcontracts for construction of public buildings, other public works, and goods and services, that prohibit discrimination or harassment based on race, color, national origin, age, physical or

mental disability, marital status, religion, creed, sex, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth, sexual orientation, gender identity or expression, political beliefs, genetic information, military service or veteran's status, culture, social origin or condition, or ancestry in hiring and accessing programs, services, and activities performed on the state's behalf;

(f) through (h) remain as proposed.

(i) ~~provide~~ ensure all new employees receive diversity and inclusion and EO and harassment prevention training ~~to all new employees~~ within 90 days of hire, beginning April 15, 2017, according to guidelines established by the department;

(j) ~~provide~~ ensure all employees receive diversity and inclusion and EO and harassment prevention refresher training ~~for all employees~~ every three years or more frequently as needed, beginning April 15, 2017, according to guidelines established by the department; and

(k) document all training in the employee's personnel file; ~~and~~

~~(l) report the number of trainings provided, by new employee and refresher training and number of people trained, to the department each quarter.~~

5. The department is not amending ARM 2.21.4013 (see Comment and Response #11).

6. The department recognized the need to include external complaint procedures for service members and veterans who believe they have been discriminated against based on their current or past military service.

7. The department has amended ARM 2.21.4028 as proposed, but with the following changes, new matter underlined:

2.21.4028 INITIATING AN EXTERNAL COMPLAINT (1) through (1)(b) remain as proposed.

(2) Jurisdiction may vary based on the nature of the complaint. For example, neither the Human Rights Bureau nor the EEOC considers complaints based on culture, social origin or condition, ~~or~~ ancestry, or military or veteran status.

(3) and (4) remain as proposed.

(5) Service members and veterans who believe they have been discriminated against in employment based on military service or veteran status may contact:

(a) the Employer Support of the Guard and Reserve at (800) 336-4590; or

(b) the Veterans' Employment and Training Service (VETS) at (866)-487-2365. Service members and veterans may submit a formal, online complaint with VETS at <http://webapps.dol.gov/elaws/vets/userra/1010.asp>.

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