

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of)
ARM 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)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

TO: All Concerned Persons

1. On May 12, 2016, at 9:30 a.m., the Department of Administration will hold a public hearing in Room 136 of the Mitchell Building, at 125 N. Roberts Street, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on May 6, 2016, to advise us of the nature of the accommodation needed. Please contact John Pavao, Department of Administration, P.O. Box 200127, 125 N. Roberts Street, Helena, MT 59620-0127; telephone (406) 444-3984; Montana Relay Service 711; fax (406) 444-0703; or e-mail jpavao@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.21.4002 POLICY AND OBJECTIVES (1) through (1)(c) remain the same.
(d) ~~and the Governor's Executive Order 41-2008, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention No. 04-2016, Executive Order Prohibiting Discrimination in State Employment and Contracts.~~
(2) through (3)(e) remain the same.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to update these rules to reflect Executive Order No. 04-2016, issued by Governor Steve Bullock on January 18, 2016.

These amended rules and the other rules making up this policy establish the minimum standards for complying with federal and state laws, regulations, and executive orders prohibiting illegal discrimination, including harassment. Agency managers have the flexibility to impose stricter standards as needed. Citing the federal and state laws and executive order provides readers with background information and references for finding additional information.

These rules do not apply to entities beyond the executive branch. Other state entities may adopt these rules or develop their own internal policies and procedures for preventing and addressing discrimination and harassment.

2.21.4005 EQUAL EMPLOYMENT OPPORTUNITY (EEO) AND NONDISCRIMINATION (1) remains the same.

(2) Agency managers, as defined by the agency in policy or rule to promote consistency with internal policies and procedures, may not tolerate discrimination or harassment based on an individual's 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. Likewise, agency management may not tolerate discrimination or harassment because of a person's marriage to or association with individuals in one of the previously mentioned protected classes.

(3) through (5) remain the same.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: This rule emphasizes the state's commitment to promoting diversity, inclusion, equal employment opportunity, and equal access to programs, services, and activities offered to the public.

The department, like other state and local governments and corporations around the world, recognizes the value of a diverse and inclusive workplace. Diversity and inclusion promote innovation and problem solving by exploring different experiences and perspectives. Embracing and capitalizing on individual differences can help state agencies discover more efficient ways of doing business and better meet the needs of our diverse citizens.

This rule aligns the state's policy with the Montana Constitution, which recognizes the inalienable rights and dignity of an individual, and federal and state laws, regulations, and executive orders prohibiting discrimination and harassment.

This policy expands protections to include pregnancy itself, the birth of a child, and medical conditions resulting from pregnancy or childbirth. The policy requires amendment to align with enforcement guidance released by the Equal Employment Opportunity Commission (EEOC). The EEOC is the federal agency charged with enforcing many of the employment statutes prohibiting employment discrimination. See the EEOC's [Enforcement Guidance: Pregnancy Discrimination and Related Issues](#) and associated [Questions and Answers](#) for additional information.

This policy also must be amended to expressly prohibit discrimination and harassment based on gender identity and gender expression. The U.S. Supreme Court and many lower courts have found that discrimination based on sex or gender stereotypes is a violation of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964. Sex or gender stereotypes may include, but are not limited to, assumptions and/or expectations about how persons of a certain sex should dress

or behave. See [Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII](#). The EEOC demonstrated its commitment by including LGBT coverage in its [Strategic Enforcement Plan](#), releasing a fact sheet, [What You Should Know about EEOC and the Enforcement Protections for LGBT Workers](#), and [litigating LGBT cases](#).

In a March 1, 2016, press release, the EEOC announced it has filed its first two sex discrimination lawsuits against employers based on sexual orientation. See [EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination](#) for more information.

The department also proposes to include military service as a protected class, thus aligning this rule with federal and state laws, regulations, and executive orders prohibiting discrimination against current service members, whether active duty, Guard, Reserves, or veterans.

2.21.4008 RESPONSIBILITIES (1) through (1)(c) remain the same.

(d) create and maintain an annual report summarizing state government's efforts toward achieving diversity and inclusion;

(e) provide EEO analyses, reports, and technical assistance to agencies;

~~(e)(f)~~ recommend strategies to promote diversity and overcome potential barriers to employment; and

~~(f)(g)~~ design and develop diversity and inclusion and equal opportunity training that includes minimum standards for new employee orientation and refresher training; and

(h) submit the biennial State and Local Government EEO-4 Report to the Equal Employment Opportunity Commission by the reporting deadline on odd-numbered years.

(2) Executive branch department heads shall:

(a) appoint an EEO officer responsible for:

(i) managing the agency's EEO program;

(ii) training employees on EO;

(iii) assisting employees and managers with resolving EO issues;

(iv) conducting internal investigations; and

~~(v) developing written EEO action plans; and~~ updating the department's annual EEO action plan or affirmative action plan if required by a federal department;

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

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

(b) through (b)(iii) remain the same.

(3) Agency managers shall:

(a) and (b) remain the same.

(c) provide reasonable accommodations, upon request, for limitations resulting from pregnancy-related disabilities and the interaction of pregnancy with an underlying impairment;

(d) develop internal procedures to 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 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;

~~(e)~~(f) post the state's EO policy poster and complaint-resolution procedures, including contact information for the agency EEO officer and ADA coordinator, in areas frequented by employees and the public;

~~(d)~~(g) provide a copy of these rules to all employees;

(h) have employees sign a statement acknowledging their understanding and acceptance of the standards set forth in these rules and file a copy in their personnel file;

~~(e)~~(i) provide diversity and inclusion and EO and harassment prevention training to all new employees within 90 days of hire according to guidelines established by the department; or within six months of August 26, 2011, for current employees who have not yet received training;

(f)(j) provide diversity and inclusion and EO and harassment prevention refresher training for all employees every three years or more frequently as needed according to guidelines established by the department; and

~~(g)~~(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.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: This rule promotes consistent enforcement of the policy across executive branch agencies and aims to minimize duplication of effort. The department oversees the state's equal opportunity program and provides technical assistance, tools, and resources to help agencies effectively implement the state's equal opportunity rules. Since department heads are ultimately responsible for fair and equitable treatment of applicants, employees, and customers of their respective agencies, agency EO officers and ADA coordinators are critical to successful implementation of the agency's equal opportunity program.

The department proposes an annual requirement for submitting EEO action plans to closely monitor the state's progress toward increasing the representation of women and minorities in occupations where they are currently underrepresented, thereby promoting diversity and inclusion and minimizing the potential risk of litigation. Providing annual EEO action plans affords agencies the opportunity to evaluate their progress and revise strategies as needed.

The Governmental Code of Fair Practices, 49-3-201, MCA, requires state agencies to regularly review employment practices to ensure compliance and

requires appointing authorities to "exercise care to ensure utilization of minority group persons." Federal laws prohibit employers from using selection procedures that adversely impact employment, to include hiring, promotion, or other employment opportunities, based on race, sex, or ethnicity, unless those procedures were validated in accordance with the [Uniform Guidelines on Employee Selection Procedures](#).

Several federal agencies require state agencies to track and report employee demographics based on gender, ethnicity, and race or to develop Affirmative Action plans when receiving federal funding.

The department also proposes EEO plans include strategies, as well as measurable goals and objectives, to assess the state's efforts to attract and retain diverse talent. Incorporating strategies tied to the unique needs of each agency, and developing measurable goals and objectives, will assist agency managers as well as the department, in evaluating the effectiveness of equal opportunity and diversity and inclusion initiatives and identifying successful practices within state government. The department will assist agency HR staffs with plan development and offer tools and resources for developing comprehensive EEO action plans.

The rule addresses responsibilities of agency EO officers, ADA coordinators, and managers in implementing the agency's equal opportunity program. EO officers and ADA coordinators have insight into the unique needs and challenges of their respective agencies and serve as subject matter experts to employees and managers. These rules outline the minimum responsibilities to promote effective program implementation.

Managers have the important responsibility of preventing discrimination and harassment from occurring. Likewise, managers must take swift and decisive action to stop discrimination, harassment, and inappropriate behavior when it occurs. As previously stated, employers may be liable for harassment if management knew or should have known of the misconduct and failed to take immediate and appropriate corrective action.

Managers and employees must understand and abide by the standards set forth in this policy. Violations of this policy may result in discipline up to and including termination.

Providing a copy of these rules and subsequent training increases individual awareness and promotes accountability. Maintaining training records demonstrates a good-faith effort to prevent discrimination and harassment and promotes compliance with 49-3-201, MCA. The statute requires state agencies to provide orientation and training programs with emphasis on human relations and fair employment practices.

Managers must also recognize and respond to accommodation requests from employees, as well as responding to the needs of diverse customers.

The department proposes a requirement to provide reasonable accommodations, upon request, to employees for pregnancy-related disabilities and limitations resulting from pregnancy and an underlying impairment. The proposed change emphasizes the state's commitment to promoting an inclusive work environment for women and aligns with the U.S. Supreme Court decision in [Young v. United Parcel Serv., Inc.](#) and EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues.

The department proposes a requirement for agency managers to develop internal processes and procedures for providing access to programs, services, and activities for customers who speak limited English. Agency managers must respond to the unique language needs of their customers and provide meaningful access to the programs and services they offer. 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 a consistent approach, since state agencies that receive federal funding already have this requirement under [Title VI of the Civil Rights Act of 1964](#). The U.S. Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), interpreted Title VI to prohibit conduct that would disproportionately affect LEP persons because such conduct constitutes discrimination based on national origin. 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.

The department proposes language that prohibits discrimination by contractors and subcontractors who perform work on behalf of state government. The department proposes this language to comply with Executive Order No. 04-2016, which requires all agencies, managers, supervisors, and employees to include language in contracts and subcontracts that prohibits discrimination consistent with guidelines established in the executive order.

The department proposes minimum requirements for training. The department believes minimum requirements will send a consistent message across state government and reinforce the state's commitment to equal opportunity, diversity, and inclusion. Employees and managers must know their rights and responsibilities under various federal and state equal opportunity laws, regulations, executive orders, policies, and procedures. Employees must know they can request reasonable accommodations because of a disability and their religious beliefs, and how to make a request. Employees and managers must know what actions to take if a customer requests a modification to a workplace policy or procedure or an auxiliary aid or service because of a disability.

Likewise, employees and managers must understand what behaviors may be inappropriate in the workplace or lead to discrimination or harassment. Employees must know that they can oppose discrimination or harassment and free from retaliation. Managers must know how to respond to, report, and correct these behaviors and the tools and resources available to them.

The EEOC emphasizes the importance of training, particularly for supervisors, in their [Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors](#). Comprehensive, thought-out training is critical to promoting mutual understanding and respect, promoting diversity and inclusion, and preventing discrimination and harassment from occurring. It demonstrates a good-faith effort and sends a message that we value our employees and customers.

2.21.4013 HARASSMENT (1) through (2)(c) remain the same.

(3) Agency managers may not tolerate any behavior that negatively focuses on a protected class. Although a behavior or pattern of behavior might not constitute

illegal discrimination, it might still violate this rule. 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.

(4) remains the same.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes this rule to promote a safe, healthy, and respectful environment for employees and citizens. The department believes it is important to include language that prohibits all forms of harassment to promote a culture of individual dignity and respect. While some forms of harassment may not be illegal, they may be disruptive and threatening in the work environment and increase the risk of litigation. Behaviors that demean or degrade individuals for any reason, whether intentional or unintentional, may impact morale, productivity, communication, and the health, safety, and wellbeing of an individual or team, and result in higher turnover, complaints, and litigation. Therefore, agency managers shall not tolerate inappropriate behavior or harassment in any form. Any behavior that constitutes harassment is a violation of this policy.

2.21.4020 INVESTIGATING A COMPLAINT (1) and (2) remain the same.

(a) the investigation process and anticipated timelines; and

(b) what retaliation is and that it is illegal, unacceptable behavior; and

~~(c) expectations and consequences of discussing the complaint with anyone other than the investigator, management, union representative, or legal counsel.~~

(3) through (4)(c) remain the same.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes replacing "unacceptable behavior" with "illegal." Federal and state laws, regulations, executive orders, and policies that prohibit discrimination based on race, color, sex (to include sexual orientation and gender identity), pregnancy, childbirth, and medical conditions related to pregnancy or childbirth, religion, national origin, age, disability, military service, creed, marital status, and political beliefs, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding. Therefore, retaliation is illegal.

Retaliation claims are the most frequently filed charges of discrimination with EEOC, making up 45 percent of all charges filed, and the EEOC is currently proposing new enforcement guidance to curb this growing trend. See [EEOC Seeks Public Input on Draft Proposed Enforcement Guidance on Retaliation and Related Issues](#) for more information.

The department proposes removing (2)(c) to promote consistency with a July 30, 2012, National Labor Relations Board (NLRB) decision, *Banner Health System d/b/a/ Banner Estrella Medical Center and James A. Navarro*, 358 NLRB No. 93. The NLRB held that an employer violated employees' right to engage in concerted

activities for their mutual aid and protection under the National Labor Relations Act (NLRA) by asking employees who make complaints not to discuss the matter with coworkers while the investigation is pending. The NLRA and the Montana Collective Bargaining for Public Employees Act (39-31-201, MCA) give employees the right to organize, form, join, or assist a labor union, to bargain collectively, or to engage in other concerted activities for mutual aid or protection. The NLRB concluded, before prohibiting an employee from discussing a pending investigation, an employer must conduct an individualized assessment and be able to demonstrate that a legitimate business reason outweighs the employee's rights under the Act. The employer must consider whether (1) there are witnesses in need of protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up. Employers cannot make blanket rules and must consider these factors before suggesting that employees refrain from discussing the complaint or pending investigation.

2.21.4028 INITIATING AN EXTERNAL COMPLAINT (1) In addition to the internal complaint process, complaints may be filed with the following agencies:

(a) Montana Human Rights Bureau, ~~4625 11th Avenue~~ 33 S. Last Chance Gulch, Suite 2, P.O. Box 1728, Helena, MT 59624-1728, (406) 444-~~2884~~ 4356, (800) 542-0807, TTY ~~(406) 444-0532~~ Montana Relay Service 711; or

(b) United States Equal Employment Opportunity Commission (EEOC) ~~San Francisco District Office, 350 The Embarcadero, Suite 500, San Francisco, CA 94105-1260,~~ Seattle Field Office, 909 First Avenue, Suite 400, Seattle, WA 98104-1061, (800) 669-4000, TTY (800) 669-6820, ASL Video (844) 234-5122.

(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 ~~sexual orientation~~, culture, social origin or condition, or ancestry.

(3) and (4) remain the same.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes removing sexual orientation from the example under (2)(b). As previously stated, the EEOC, U.S. Supreme Court, and many lower courts have sent a clear message that employment discrimination and harassment based on sexual orientation may violate the sex discrimination provisions of Title VII of the Civil Rights Act of 1964. Therefore, the EEOC and Montana Human Rights Bureau are pursuing employment discrimination complaints alleging discrimination based on sexual orientation.

OVERALL STATEMENT OF REASONABLE NECESSITY FOR ALL RULES: Section 49-3-201, MCA, addresses employment of state and local government personnel. Section 49-3-205, MCA, addresses equal access to governmental services. These sections are necessary to emphasize state and local governments' responsibilities to make employment decisions and to provide equal access to governmental services without regard to an individual's 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.

As part of its required biennial review of rules, the Department of Administration proposes to update the policy to include prohibition of discrimination based on pregnancy, childbirth, or a medical condition related to pregnancy or childbirth, sexual orientation, gender identity or expression, and military service in compliance with new federal laws and regulations and the Governor's executive order; clarify and address agency and management responsibilities; and update relevant contact information. This guidance is lacking in the current rules.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to John Pavao, Department of Administration, P.O. Box 200127, Helena, MT 59620; telephone (406) 444-3984; Montana Relay Service 711; fax (406) 444-0703; or e-mail jpavao@mt.gov, and must be received no later than 5:00 p.m., May 20, 2016.

5. John Pavao, Department of Administration, has been designated to preside over and conduct this hearing.

6. The State Human Resources Division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this department. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the department's web site at <http://doa.mt.gov/administrativerules>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. The department has determined that under 2-4-111, MCA, the proposed amendment of the above-stated rules will not significantly and directly affect small businesses.

By: /s/ Sheila Hogan
Sheila Hogan, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State April 11, 2016.