

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT AND
2.21.3703, 2.21.3707, 2.21.3708,) REPEAL
2.21.3711, 2.21.3719, 2.21.3721,)
2.21.3723, and 2.21.3726, and the)
repeal of ARM 2.21.3709 pertaining to)
the Recruitment and Selection Policy)

TO: All Concerned Persons

1. On August 18, 2017, the Department of Administration published MAR Notice No. 2-21-557 regarding a public hearing on the proposed amendment and repeal of the above-stated rules at page 1309 of the 2017 Montana Administrative Register, Issue No. 16.

2. The department has amended ARM 2.21.3703, 2.21.3707, 2.21.3708, 2.21.3711, 2.21.3719, 2.21.3721, and 2.21.3726 as proposed.

3. The department has repealed ARM 2.21.3709 as proposed.

4. The department has amended ARM 2.21.3723 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.21.3723 INTENTIONAL MISREPRESENTATION (1) The employment process (online and traditional application) includes a notice that information applicants provide is subject to verification. ~~Willful misstatements of qualifications~~ Intentional misrepresentation of facts about an applicant's qualifications, employment history, or other application information may:

- (a) exclude an applicant from further consideration for a position; ~~or may~~
- (b) result in discharge from employment.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

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

COMMENT #1: MEA-MFT provided the following comment:

The "Statement of Reasonable Necessity" for ARM 2.21.3723 states that the proposed new language "changes are to make the rule more concise." The proposed language for ARM 2.21.3723 does the exact opposite. The proposal will eliminate the clearly established and legally-defined words

"intentionally misrepresented facts" and replace this language with the vague and ambiguous words, "willful misstatement of qualifications." This proposal, if implemented, will dramatically lower the bar for terminating employees on the basis of their statements made during the application process.

An "intentional misrepresentation" (the current language) is an established and well-defined legal concept. In general, the elements of an intentional misrepresentation are similar to the elements of fraud and require proof of: (1) someone intentionally misrepresenting, (2) a fact, (3) that is material, (4) that was intended to induce reliance and (5) that does induce reasonable reliance, and (6) that causes proximate harm.

What might constitute a "willful misstatement" (the proposed language) is ambiguous. A "willful misstatement" is not a well-defined legal concept, particularly under Montana law. Without a clear, unambiguous definition of a "willful misstatement of qualifications," this policy is vague and open to a wide-variety of interpretations. In practice, this policy will be impossible to exercise in a fair and uniform manner.

The typical amplification, elaboration, or occasional exaggerations by applicants in the job application process will rarely rise to the level of an "intentional misrepresentation." Under this proposal, that same sort of amplification, exaggeration or elaboration, however, could easily be deemed a "willful misstatement" by management and could form the basis for an employee's termination at any point in their career. Please reject this proposal as this new language will give management an unfair and unlimited latitude for terminating employees on the basis of any misstatement, however slight, made during the application process.

RESPONSE #1: While the department does not fully agree with MEA-MFT's and MPEA's comments regarding the phrase "willful misstatement," it will finalize the rule using the phrase "intentional misrepresentation" rather than "willful misstatement."

COMMENT #2: The department received a comment from the Montana Public Employees Association to advise the association concurs with MEA-MFT's comment.

RESPONSE #2: The department thanks the Montana Public Employees Association for its comment and has revised the rule as shown above.

By: /s/ John Lewis
John Lewis, Director
Department of Administration

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

Certified to the Secretary of State January 2, 2018.