



## **2019 EEO Action Plan**

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## 1. PLAN PURPOSE

The department's Equal Employment Opportunity (EEO) Plan reaffirms the department's commitment to fair and equitable treatment of applicants and employees without regard to 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 unless based on a bona fide occupational qualification (BFOQ).

The Department complies with, and strictly enforces, the State of Montana's EEO, Nondiscrimination, and Harassment Prevention policy (ARM, 2.21.4001-4029), which serves as the basis of this policy and plan.

In addition to the state policy, the department is responsible for ensuring adherence to the federal and state laws, rules, and regulations, including:

Title 49, Chapter 3, Part 2, MCA, Governmental Code of Fair Practices, specifically:

49-3-201, Employment of state and local government personnel.

(1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to ensure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall ensure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to ensure utilization of minority group persons.

The department strives to achieve and maintain a qualified workforce that includes a representation of women and minorities that approximates their availability in the Montana labor market. This plan identifies areas for improvement and proposes goals and strategies for increasing representation of women and minorities where underrepresentation is identified.

The plan assigns key duties and responsibilities of managers and employees within the department and identifies actions the department will take to identify, analyze, and, if necessary, resolve potential barriers to employment.

## 2. EEO, NONDISCRIMINATION, AND HARASSMENT POLICY STATEMENT

The department provides equal access to employment, programs, services, and activities without regard to 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 with the exception of special programs established by law. Likewise, the department will not tolerate discrimination or harassment because of a person's marriage to or association with individuals in one of the previously mentioned protected classes. All employees have a right to work in an environment free from all forms of discrimination and harassment, including sexual harassment.

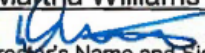
The department provides reasonable accommodations, upon request, to enable qualified individuals with disabilities to perform the essential functions of their job, enjoy equal benefits and privileges of employment, and promote equal opportunity in hiring, unless doing so would create an undue hardship on the department. The department will also, upon request, make reasonable modifications to policies and procedures and provide effective communication to enable individuals with disabilities to participate in programs, services, or activities provided through the department, unless doing so would create an undue burden or fundamental alteration to a program.

The department does not retaliate or allow, condone, or encourage others to retaliate against any customer, applicant, or current or former employee for opposing unlawful discriminatory practices, filing a discrimination complaint or participating in a discrimination proceeding, including testifying in court.

The department makes good faith efforts to equalize employment opportunities at all levels of department where there is evidence of barriers to employment for those classes of people who have traditionally been denied equal employment opportunity.

Implementation of this department's equal employment opportunity plan is the responsibility of each division administrator and supervisor.

Contact Kimberly Worthy, Department EEO Officer, at 406-444-1289, [kworthy@mt.gov](mailto:kworthy@mt.gov), or by mail at PO Box 200701, Helena, MT 59620, for additional information.

*for* Martha Williams  
  
Director's Name and Signature

7/30/19  
Date

### **3. RESPONSIBILITIES**

#### **A. Department Head**

- Designate an EEO officer and ADA coordinator for the department
- Direct agency managers to carry out the goals and objectives of the EEO action plan and support efforts to implement the plan

#### **B. Managers and Supervisors**

- Implement and adhere to the department's EEO action plan
- Treat individuals with dignity and respect and promote an inclusive work environment where individuals are afforded every opportunity to reach their fullest potential
- Make hiring decisions based on individual competencies and qualifications
- Recognize individual differences as a key element of organizational and team success
- Value the rights of all Montanans to benefit from equal access to employment and programs, services, and activities offered to the public
- Identify problem areas and eliminate barriers that impede EEO within their respective area
- Promptly notify the department's EO officer or HR staff of allegations of discrimination or harassment
- Communicate the department's EO policy to employees assigned to their work unit and hold staff accountable for violations
- Assist the EO officer and HR staff with conducting periodic audits of employment processes to promote EEO action plan goals and objectives
- Communicate the department's action plan to assigned staff

### **C. EEO Officer**

- Implement and maintain the department's EO program
- Train employees on diversity and inclusion and EEO, nondiscrimination, and harassment prevention
- Post the Executive Branch and department EEO, Nondiscrimination, and Harassment Policy, poster, and related materials in areas visible to employees and the public
- Post the department's EEO action plan to the department's website
- Assist employees and managers with resolving EO issues
- Investigate allegations of discrimination and harassment as needed
- Update the department's annual EEO action plan, unless the department has a federal requirement to develop an affirmative action plan that extends to the entire department
- Develop strategies, goals, and objectives for evaluating the effectiveness of the agency's EEO action plan or affirmative action plan
- Report the agency's progress toward minimizing underutilization of women and minorities to the department by March 31 of each year
- Develop internal procedures for providing meaningful access (interpreters, translators, etc.) to programs, services, and activities for customers with limited English proficiency
- Report to the number of diversity and inclusion and EO and harassment prevention training provided, and number of employees trained to the Department of Administration each year
- Advise the director and agency managers on the progress of the EEO action plan and report potential concerns
- Review and recommend changes in policies, procedures, programs and physical accommodations to facilitate EEO action plan implementation

### **D. Human Resources Staff**

- Review the department's EEO action plan with managers and update the plan as needed
- Implement and maintain utilization reporting and recordkeeping systems to measure effectiveness of the plan
- Document changes in goals and objectives



- Evaluate compensation to ensure internal practices are based on individual merit and qualifications
- Update the EEO action plan and provide a summary report to managers
- Assist managers in identifying potential causes of underutilization (employment barriers) and recommend appropriate action
- Inform management of the latest developments in the area of utilization of women, minorities, and disabled persons
- Train managers and supervisors on their duties and responsibilities under the EO program
- Review of the EEO action plan prior to beginning the recruiting/hiring process
- Ensures the EEO Policy Statement and Complaint Resolution Procedure is posted on official DEQ bulletin boards
- Evaluate internal recruitment, selection, and promotion processes for effectiveness

#### **E. Employees**

- Comply with the standards set forth in the EEO, Nondiscrimination, and Harassment Prevention Policy
- Treat employees with dignity and respect 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

#### **4. UTILIZATION ANALYSIS**

The utilization analysis report compares the department's workforce to Montana's labor force using weighted availability. If the department's workforce in a particular job group is less than the labor force, then the job group will be defined as underutilized.

The department uses the 2006-2010 American Community Survey (ACS) Equal Employment Opportunity (EEO) Tabulation, State and Local Government Job Categories, to compile metrics and categorize the department's workforce. The tabulation is based on the ACS 2006-2010 five-year data, which the Census Bureau released in March of 2013. These job categories include:

- 1 – Officials and Administrators,
- 2 – Professionals,
- 3 – Technicians,
- 4 – Protective Services,
- 5 – Paraprofessionals,
- 6 – Office/Clerical,
- 7 – Skilled Craft, and
- 8 – Service-Maintenance

Each state job title is assigned an occupational code that links to the census counts for that occupational area by sex, race and ethnicity (Hispanic origin), EEO Occupational Group, and State and Local Government Job Categories. These categories are similar, if not identical, to the job categories used by State and Local governments in reporting EEO-4 survey data.

Underutilization occurs when the percentage of employees in a protected group (women or minorities) is less than their labor force availability. The EEO Tabulation serves as the primary external benchmark for analyzing the race, ethnicity, and sex composition of an organization's internal workforce, and the equivalent external labor market, within a specified geography and job category. Montana is used for the relevant labor market in the utilization analysis. If there is a negative number in the field indicates underutilization. If there is no underutilization, a zero will be in the field.

The weighted availability takes into account the proportional relevance of each job code total (employee count), rather than treating each job code total equally. This weighted average is used in calculating the availability

(labor force) at the occupational group level and at the EEO category level for females and minorities. For example, when calculating the occupational group availability, a job code with 15 employees will carry more weight than a job code with only two employees for the weighted availability.

**Figure 1 – Utilization of Women**

Job Categories	Total Employees in	Total of Women	% of Women	Availability of Women %	2019 Underutilized	2017 Underutilized	Improved, Not Improved, or Same	Numerical Difference in the Two Plans
Officials/Administrators	64	16	25.00%	20.64%	0	0	Same	0
Professionals	334	117	35.03%	39.08%	-14	-24	Improved	10
Technicians	152	37	24.34%	68.52%	-67	-144	Improved	77
Protective Service Workers	131	16	12.21%	25.22%	-17	-17	Same	0
Paraprofessional	0	0	0%	0%	0	0	0	0
Office/Clerical	58	55	94.83%	90.84%	0	0	Same	0
Skilled Craft	75	0	0.00%	6.41%	-5	-2	Not Improved	-3
Service Maintenance	23	1	4.35%	16.08%	-3	0	Not Improved	-3
<b>Totals</b>	<b>837</b>	<b>242</b>	<b>29%</b>					

**Figure 2 – Utilization of Minorities**

Job Categories	Total Employees in	Total American Indians/Alaskan Natives	Total Other Minorities	% Minorities	Availability %	2019 Number Underutilized	2017 Underutilized	Improved, Not Improved, or Same	Numerical Difference in the Two Plans
Officials/Administrators	65	1	0	1.56%	4.13%	-2	0	Not Improved	-2
Professionals	334	3	7	2.99%	7.66%	-16	-15	Not Improved	-1
Technicians	152	2	5	4.61%	13.65%	-14	-28	Improved	14
Protective Service Workers	131	5	1	4.58%	12.24%	-10	-9	Not Improved	-1
Paraprofessional	0	0	0	0%	0	0	0	0	0
Office/Clerical	58	1	3	6.90%	8.40%	-1	-3	Improved	2
Skilled Craft	75	5	1	8.00%	5.94%	0	0	Same	0
Service Maintenance	23	0	1	4.35%	10.86%	-1	-2	Improved	1
<b>Totals</b>	<b>837</b>	<b>17</b>	<b>18</b>						

## **A. Detailed Analysis**

### **i. Women:**

FWP has improved the representation of women in the higher paid category of professionals, and technicians. We have maintained our utilization rate of women in the categories of officials/administrators, protected service workers and office/clerical. This department continues to improve in upward mobility/promotion of women within the department, as well as being more successful in recruiting externally for higher level occupations since 2014. Regarding women in EEO category 2 Professionals, while the department is not utilizing the percentage of women available in the labor force, there has been a significant improvement in the percentage of women in our workforce from 2014. FWP will continue recruiting efforts in this category. The areas with the greatest opportunity for hiring among professionals would be specifically occupations of Park Management Specialists, Biology Research Specialists, Fish Culture Specialists, Water Conservation Specialists, Engineers, and Warden Sergeants and Captains. These occupations fall under STEM fields and the Enforcement field which both are historically difficult to recruit women and require extra focus.

For women in EEO Categories of Skilled Craft and Service Maintenance, FWP saw a decline in utilization. Protective Services continues to remain a high priority within the department. The greatest room for improvement would be within the skilled craft and service maintenance categories, more specifically the maintenance worker and groundskeeper positions in function groups 499 and 373 respectively. The underutilization of women in these categories may be a result of a historical cultural practice that steered women away from these types of positions.

### **ii. Minorities:**

FWP has improved representation of minorities among Service Maintenance, Office/Clerical and Technicians. It has not seen any underutilization of minorities in the skilled craft category. This suggests FWP has had success in reaching minorities groups for recruitment. The department will continue recruitment efforts in these categories. The area with the greatest opportunity for continued improvement is among the technician's occupational

group, specifically among the Life Physical Social Tech function group.

The department saw a decline in minorities among the categories of Officials/Administrators, Professionals and Protective Service Workers. The department will continue to encourage minorities to apply for these categories. Montana has a low level of racial minorities and falls below the labor force average of Professional, Protective Service and Official/Administrators and will also continue to encourage more minorities to apply in these categories as well.

## 5. Goals, Objectives, Action Steps and Strategies

### A. Goals

FWP’s goal is to make its workforce more closely reflect the labor force in Montana. The department will make specific good faith efforts to identify the underutilization of women and minorities and make the necessary changes to remove any existing barriers to their employment.

The department has used the utilization analysis report to determine which job categories are underutilized for women and minorities and has set the following hiring goals for the next year.

The second and third columns of this chart show underutilization. The fourth and fifth columns show the agency’s hiring goals for each group in each category.

**Figure 3 – 2019 Underutilization of Women and Minorities and Goals**

Job Categories	Underutilization of Women	Underutilization of Racial/Ethnic Minorities	Goal for 2019 Women	Goal for 2019 Racial/Ethnic Minorities
Officials/Administrators	0	-2	0	1
Professionals	-14	-16	6	7
Technicians	-67	-14	26	6
Protective Service Workers	-17	-10	7	4
Paraprofessional	0	0	0	0
Office/Clerical	0	-1	0	1
Skilled Craft	-5	0	2	0
Service Maintenance	-3	-1	1	1

Placement goals established in the department's EEO Action Plan are not rigid and inflexible quotas that must be met. The department's goals do not imply preferential treatment or lower standards and should not be interpreted as imposed quotas. Quotas are expressly forbidden by this plan. The department's hiring practices comply with [49-3-201\(1\), MCA](#), Employment of State and Local Government Personnel, which states, "State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin."

## **B. Objectives and Action Steps/Strategies**

The department's hiring officials will strive to determine the cause of underutilization (e.g., potential employment barriers) and take appropriate action to remove barriers if found. Employment barriers may be caused by:

- Not attracting qualified women and/or minority applicants in numbers proportionate to their external availability.
- The selection rate for women and/or minorities may be significantly less than the selection rate for the other remaining applicants.
- Not advancing qualified women and minorities.

### **Objective #1: Hiring**

#### **Action Steps/Strategies to Achieve this Objective:**

Hiring officials must provide the Human Resource Office with a recruitment/selection plan that requires a job description review to make sure the position requirements are job-related and consistent with business necessity and provide for safe performance of the position. Any hiring requirement that does not meet these criteria will be removed to avoid screening out qualified applicants.

The department will make reasonable accommodations to applicants with physical and mental limitations unless such an accommodation would create an undue hardship on the department.

## **Evaluation:**

A similar hiring objective was set in the department's last EEO Action Plan from 2017. The Human Resource Office (HR) approval of the hiring process has been implemented throughout the department. HR has since increased oversight of hiring processes. HR will continue to approve the recruitment/selection plan for each position prior to the recruiting process. Prior to interview offers and final job offers, the process is reviewed by HR to ensure the criteria is applied appropriately along with any preferences that may apply.

## **Objective #2: Recruitment**

### **Action Steps/Strategies to Achieve this Objective:**

The department's recruitment goal will be to increase women and minority representation in underutilized positions by attracting qualified candidates to apply for the underutilized positions. Applicant's qualifications will be reviewed to be sure qualified individuals are treated in a nondiscriminatory manner. Vacancy announcements for underutilized positions will include the statement:

"Women (and/or) minorities are under-represented in this position and are encouraged to apply."

The department will send vacancy announcements to Native American Recruitment sources and Disability Rehabilitation Centers across the State for all positions. The Human Resource office aims to attend the Tribal Career Fair Circuit as allowable by budget and staff time.

The department will post all external vacancy announcements on State of Montana Employment website: <https://statecareers.mt.gov/>, and will notify department employees of these opportunities through the e-mail or other communication system.

The department will continue to partner with the Montana Job Service Workforce Centers in its recruitment efforts.

The department will encourage the employment of women, minorities, and people with disabilities who are not currently in the workforce, by offering temporary part-time employment, internships, or summer employment when possible.

**Evaluation:**

This objective of improving recruitment of women and minorities in underutilized categories was set in the department's last EEO Action Plan. The department has improved the utilization of women and minorities in 5 categories, but has also not improved in 5 categories. The Detailed Analysis above outlines some of the possibilities as to why certain categories did not see improvement. The department will continue to research best practices, review recruitment processes and identify areas for improvements.

**Objective #3: Compensation****Action Steps/Strategies to Achieve this Objective:**

The department's compensation goal is to eliminate gender, race, or ethnicity pay disparity. HR will review reports to determine if a gender, race, or ethnicity disparity exists in employees' pay. If a disparity is identified, Division Administrators and the Director will be notified to take appropriate action along with the Human Resources Manager.

**Evaluation:**

FWP utilizes a "one rate" pay structure where each occupation and band level are set at a single rate of pay. This structure aids in eliminating pay disparity among women and minorities. The department has continued to see progress in eliminating pay disparities among all employees.

**Objective #4: Promotion****Action Steps/Strategies to Achieve this Objective:**

The department will strive to ensure all employees are given equal opportunity for promotion by:

1. Posting promotional opportunities through the State's e-mail system;
2. Assisting employees in identifying promotional opportunities;
3. Offering training assignments, educational programs and opportunities for job mentoring to enhance promotions.

The department will strive to promote and retain qualified individuals with disabilities in all levels of its workforce.



**Evaluation:**

Progress has been made since the last EEO Action Plan as demonstrated by the number of women and minorities being hired into higher level positions in the Professional and Officials/Administrators EEO categories. The department will continue its efforts in ensuring all employees are given equal opportunity for promotion.

**Objective #5: Training Programs****Action Steps/Strategies to Achieve this Objective:**

Managers involved in the recruitment and selection process will be trained by a Human Resource staff member to be sure they understand the EEO Program Action Plan and are committed to its implementation

**Evaluation:**

HR ensures all employees comply with the standards set forth in the EEO, Nondiscrimination, and Harassment Prevention Policy.

**Objective #6: Harassment and Discrimination Prevention****Action Steps/Strategies to Achieve this Objective:**

The Department has adopted the State of Montana's EEO Policy (Appendix 3) prohibiting against harassment or discrimination of any employee because of any characteristic protected under civil rights laws. Any person who believes he, she or another person has been subjected to discrimination is encouraged to report the incident or action. The complaint resolution procedure is explained in Appendix 5. This complaint resolution procedure may not cover members of a collective bargaining unless it is stipulated in the bargaining agreement. The department will add the EEO Policy directly to the FWP intranet policy page. The department is continually developing training options to address harassment and discrimination. These programs are mandatory for employees and must be completed every three (3) years.

**Evaluation:**

Harassment and discrimination prevention are objectives set on the last EEO Action Plan. The department provides training and copies of the policy to new employees and volunteers. The department has continued

to encourage employees who believe they have been subjected to discrimination to report the incident.

## **6. EEO ACTION PLAN DISTRIBUTION**

### **A. Internal**

The department will:

- i. Review the EO policy, EEO action plan, and complaint resolution procedures during new employee orientation and other trainings as required
- ii. Provide periodic updates to director and agency managers as needed
- iii. Post the EEO action plan to the department's intranet

### **B. External**

- i. Post the EEO action plan to the department's public-facing website

## **Appendix 1 - Description of EEO Categories**

### **(1) Officials and Administrators:**

Occupations in which employees set broad policies, exercise overall responsibility for execution of these policies, exercise overall responsibility for execution of these policies, or direct individual departments or special phases of the agency's operations, or provide specialized consultation on a regional, district or area basis. Includes: department heads, bureau chiefs, division chiefs, directors, deputy directors, controllers, wardens, superintendents, sheriffs, police and fire chiefs and inspectors, examiners (bank, hearing motor vehicle, warehouse), inspectors (construction, building, safety, rent-and-housing, fire, A.B.C. Board, license, dairy, livestock, transportation), assessors, tax appraisers and investigators, coroners, farm managers, and kindred workers.

### **(2) Professionals:**

Occupations which require specialized and theoretical knowledge which is usually acquired through college training or through work experience and other training which provides comparable knowledge. Includes: personnel and labor relations workers, social workers, doctors, psychologists, registered nurses, economists, dieticians, lawyers, systems analysts, accountants, engineers, employment and vocational rehabilitation counselors, teachers or instructors, police and fire captains and lieutenants, librarians, management analysts, airplane pilots and navigators, surveyors and mapping scientists, and kindred workers.

### **(3) Technicians:**

Occupations which require a combination of basic scientific or technical knowledge and manual skill which can be obtained through specialized post-secondary school education or through equivalent on-the-job training. Includes: computer programmers, drafters, survey and mapping technicians, licensed practical nurses, photographers, radio operators, technical illustrators, highway technicians, technicians (medical, dental, electronic, physical sciences), police and fire sergeants, inspectors (production or processing inspectors, testers and weighers), and kindred workers.

### **(4) Protective Service Workers:**

Occupations in which workers are entrusted with public safety, security and protection from destructive forces. Includes: police patrol officers, fire fighters, guards, deputy sheriffs, bailiffs, correctional officers, detectives,

marshals, harbor patrol officers, game and fish wardens, park rangers (except maintenance), and kindred workers.

**(5) Paraprofessionals:**

Occupations in which workers perform some of the duties of a professional or technician in a supportive role, which usually require less formal training and/or experience normally required for professional or technical status. Such positions may fall within an identified pattern of staff development and promotion under a "New Careers" concept. Included: research assistants, medical aids, child support workers, policy auxiliary welfare service aids, recreation assistants, homemakers aides, home health aides, library assistants and clerks, ambulance drivers and attendants, and kindred workers.

**(6) Office/Clerical:**

Occupations in which workers are responsible for internal and external communication, recording and retrieval of data and/or information and other paperwork required in an office. Includes: bookkeepers, messengers, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks, office machine and computer operators, telephone operators, legal assistants, sales workers, cashiers, toll collectors, and kindred workers.

**(7) Skilled Craft Workers:**

Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairers electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters, power plant operators, water and sewage treatment plant operators, and kindred workers.

**(8) Service-Maintenance:**

Occupations in which workers perform duties which result in or contribute to the comfort, convenience, hygiene or safety of the general public or which contribute to the upkeep and care of buildings, facilities or grounds of public property. Workers in this group may operate machinery. Includes: chauffeurs, laundry and dry cleaning operatives, truck drivers, bus drivers, garage laborers, custodial employees, gardeners and groundkeepers, refuse collectors, construction laborers, park rangers (maintenance), farm workers (except managers), craft apprentices/trainees/helpers, and kindred workers.

## **Appendix 2 – EEO, Nondiscrimination, and Harassment Prevention Policy**

Resource: Administrative Rules of the State of Montana (ARM)

Human Resources/ Employee Benefits

*State Human Resources includes policies in administrative rules (ARM) when the policy may affect the public or be used by persons who are not currently employees. The policies that only affect state employees are not included in ARM. This policy is in ARM. This is a reproduction created for your convenience, but it is not the official version. You may find the official ARM website at <http://www.mtrules.org>.*

### **2-21-4001 SHORT TITLE**

(1) This subchapter may be cited as the Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention Policy.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), MCA; NEW, 2000 MAR p. 3515, Eff. 12/22/00; AMD, 2011 MAR p. 1672, Eff. 8/26/11.

### **2-21-4002 POLICY AND OBJECTIVES**

(9) These rules establish the minimum requirements for implementing and maintaining an equal opportunity program that promotes compliance with:

(a) federal laws and regulations prohibiting illegal discrimination including the Genetic Information Nondiscrimination Act of 2008 (GINA);

(b) the Montana Human Rights Act, Title 49, MCA;

(c) the Governmental Code of Fair Practices, Title 49, chapter 3, MCA; and

(d) the Governor's Executive Order No. 04-2016, Executive Order Prohibiting Discrimination in State Employment and Contracts.

(10) These rules establish complaint procedures to promote prompt and equitable resolution of discrimination complaints.

(11) These rules cover all agencies in Montana's executive branch except:

(a) the Montana University System;

(b) the Montana State Fund;

(c) elected officials;

(d) personal appointed staff of elected officials; and

(e) any other position specifically excluded under 2-18-103 and 2-18-104, MCA.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2000 MAR p. 3515, Eff. 12/22/00; AMD, 2011 MAR p. 1672, Eff. 8/26/11; AMD, 2016 MAR p. 1838, Eff. 10/15/16.

## **2-21-4005 EQUAL EMPLOYMENT OPPORTUNITY (EEO) AND NONDISCRIMINATION**

(1) The executive branch is committed to equal opportunity, nondiscrimination, and harassment prevention in all aspects of employment and in programs, services, and activities offered to the public.

(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) Agency managers may use a bona fide occupational qualification (BFOQ) where the reasonable demands of a position require a distinction based on age, physical or mental disability, marital status, sex, religion, or national origin. A BFOQ is a legal exception to an otherwise discriminatory hiring practice. Exceptions are strictly construed, as provided in 49-2-303, MCA, and the burden rests with the agency to demonstrate the exemption should be granted. Federal and state laws prohibit BFOQs based on race or color.

(4) To promote a work and customer service environment free from discrimination, agency managers shall:

- (a) base hiring decisions on individual competencies and qualifications;
- (b) promote an inclusive work environment where individuals are afforded every opportunity to reach their fullest potential;
- (c) recognize individual differences as a key element of organizational and team success;
- (d) treat individuals with dignity and respect; and
- (e) value the rights of all Montanans to benefit from equal access to employment and programs, services, and activities offered to the public.

(5) Agency managers who observe behaviors that may be viewed as discriminatory shall stop the behavior and notify their agency's EEO officer, Americans with Disabilities Act (ADA) coordinator, or human resources manager.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2000 MAR p. 3515, Eff. 12/22/00; AMD, 2011 MAR p. 1672, Eff. 8/26/11; AMD, 2016 MAR p. 1838, Eff. 10/15/16.

## **2-21-4008 RESPONSIBILITIES**

(1) The Department of Administration shall:

(a) periodically review and update equal opportunity (EO) standards, guidelines, and administrative processes and procedures;

(b) assist agencies in maintaining an effective EO program;

(c) provide annual utilization analysis reports to agencies;

(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;

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

(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 EO officer responsible for:

(i) managing the agency's EO program;

(ii) training employees on EO;

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

(iv) conducting internal investigations;

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

(vi) developing strategies, 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;
- (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 training provided; and
  - (B) the number of employees trained, by new employee and refresher training; and
- (b) appoint an ADA coordinator responsible for:
  - (i) training employees on the ADA, disability awareness, and reasonable accommodations;
  - (ii) conducting self-evaluations to assess accessibility of programs, services, and activities; and
  - (iii) assisting with reasonable accommodation requests.
- (3) Agency managers shall:
  - (a) retain electronic records for all jobs recording the sex, race, and ethnic group of employees and applicants as provided in [49-2-102](#), MCA, and the Uniform Guidelines on Employee Selection Procedures (1978); 43 FR 38295 (August 25, 1978);
  - (b) provide reasonable accommodations, upon request, for qualified individuals with disabilities and for applicants and employees based on their religious practices, unless doing so would create an undue hardship;
  - (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) ensure employees provide meaningful access to programs, services, and activities for customers with limited English proficiency;
  - (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) post the state's EO policy poster and complaint-resolution procedures, including contact information for the agency EO officer and ADA coordinator, in areas frequented by employees and the public;

(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;

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

(j) ensure all employees receive diversity and inclusion and EO and harassment prevention refresher training 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.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11; AMD, 2016 MAR p. 1838, Eff. 10/15/16.

#### **[2-21-4009](#) COMPLIANCE WITH THE FEDERAL GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA)**

(1) To comply with GINA, which prohibits discrimination based on genetic information with respect to employment or state-sponsored group health plans, agency managers may not:

(a) request, require, or purchase genetic information about employees or their family members; or

(b) use genetic information to:

(i) discriminate against an individual in hiring, discharge, compensation, terms, conditions, or privileges of employment;

(ii) make decisions about admission to apprenticeship and training programs, including on-the-job training;

(iii) limit, segregate, or classify an individual;

(iv) fail or refuse to refer an individual for employment;

(v) deprive an individual of employment opportunities; or

(vi) acquire health insurance or set premiums under the group health plan.

(2) Requests for genetic information include, but are not limited to:

(a) conducting Internet searches on individuals in a way that is likely to result in obtaining genetic information;

(b) knowingly or purposefully listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and

(c) requesting information about an individual's current health status in a way that is likely to result in obtaining genetic information.

(3) To avoid inadvertently receiving genetic information, agency representatives who request medical information as part of an employment-related medical exam or a medical certification in response to a request for sick leave, leave qualifying under the Family Medical Leave Act, or a reasonable accommodation request under the Americans with Disabilities Act, shall include the following statements verbatim in their written request for medical information:

(a) "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. To comply with this law, we ask you not to provide any genetic information when responding to this request for medical information."

(b) "Genetic information, as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

(c) "Genetic test means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes."

(4) Agency managers may not ask probing questions of an individual if they inadvertently learn of a health condition of an applicant, employee, or the health condition of a family member.

(a) Probing questions include, but are not limited to, asking the individual whether other family members have the condition or whether the individual has been tested for the condition. These questions are likely to result in the acquisition of genetic information.

(5) Agency representatives possessing genetic information about an employee shall maintain the information as confidential in compliance with [ARM Title 2, chapter 21, subchapter 66](#), Employee Records Management Policy.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11.

### **2-21-4013 HARASSMENT**

(1) Harassment, including sexual harassment, consists of, but is not limited to, oral, written, or electronic communications (for example, voice mails, e-mails, text messages, or other social networking tools) in the form of repeated and unwelcomed jokes, slurs, comments, visual images, or innuendos based on a protected class. Even mutually agreeable behavior, or behavior accepted between two or more people, can be offensive to others; for this reason it is prohibited in the workplace.

(2) Sexual harassment is a form of discrimination that includes unwelcome verbal or physical conduct of a sexual nature when:

(a) submission to the conduct is implicitly or explicitly made a term or condition of employment;

(b) submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual; or

(c) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(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.

(4) Agency managers who observe behaviors that could be viewed as discrimination or harassment shall stop the behavior and notify their agency's EEO officer, ADA coordinator, or human resources manager.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2000 MAR p. 3515, Eff. 12/22/00; AMD, 2011 MAR p. 1672, Eff. 8/26/11.

### **2-21-4014 RETALIATION**

(1) Agency managers may not retaliate or allow, condone, or encourage others to retaliate against any customer, applicant, or current or former employee for opposing unlawful discriminatory practices, filing a discrimination complaint or participating in a discrimination proceeding, including testifying in court.

(2) Agency managers who become aware of retaliation shall inform the agency's human resource manager, human resource staff, EEO officer, or ADA coordinator. The human resource manager, human resource staff, EEO

officer, or ADA coordinator shall advise management on the appropriate course of action.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2000 MAR p. 3515, Eff. 12/22/00; AMD, 2011 MAR p. 1672, Eff. 8/26/11.

## **2-21-4019 INITIATING AN INTERNAL COMPLAINT**

(1) Agency managers shall encourage employees, applicants, clients, and customers who believe they have been discriminated against or harassed to contact their supervisor, another manager, or the agency's EEO officer, ADA coordinator, or human resources staff.

(2) Complaints may be oral or in writing; however, complainants are encouraged to use the Department of Administration's complaint form found at <http://hr.mt.gov/hrpp/policies.mcp>.

(3) For complaints not submitted on a complaint form, the agency representative receiving the complaint shall obtain and document the following information:

- (a) name, address, and phone number(s) of the complainant(s);
- (b) date(s), time(s), and location(s) of the alleged discriminatory behavior or conduct;
- (c) name(s), if known, of the accused(s);
- (d) description of the behavior or conduct that resulted in an alleged violation;
- (e) whether the alleged discrimination was based on a protected class; and
- (f) names of potential witnesses who may have heard or observed the alleged discriminatory conduct or behavior.

(4) Agency representatives who receive a complaint or become aware of allegations of discrimination or harassment shall promptly notify the human resource manager, EEO officer, or ADA coordinator, regardless of their perception of the validity of the complaint.

(5) The human resource manager, EEO officer or ADA coordinator, legal counsel, and appropriate manager shall meet to discuss the appropriate course of action. If the complaint is against any of these individuals, that individual is excluded from the meeting. The discussion must focus on measures to stop the alleged behavior, a review of the investigative process, and management's role in the process.

(6) If management determines an internal investigation would not be appropriate because of a potential conflict, they may request assistance from the State Human Resources Division or other outside source.

(7) The human resource manager or human resource staff, as appropriate, shall coordinate with the investigator and advise management throughout the course of the investigation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11.

### **2-21-4020** INVESTIGATING A COMPLAINT

(1) The EEO officer, ADA coordinator, or another representative chosen by management shall begin an investigation upon receiving a complaint.

(2) Before the investigation begins, the appropriate manager shall separately explain the following to the complainant and accused:

(a) the investigation process and anticipated timelines; and

(b) what retaliation is and that it is illegal.

(3) Agency managers shall provide:

(a) periodic updates to the complainant and the accused; and

(b) documentation of their initial meeting and all subsequent follow-up action to the investigator.

(4) The investigator shall:

(a) gather evidence to determine a "cause" or "no-cause" finding;

(b) coordinate with the agency's legal counsel before conducting interviews and throughout the investigation; and

(c) provide periodic updates to the agency's human resource manager.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11; AMD, 2016 MAR p. 1838, Eff. 10/15/16.

### **2-21-4021** POST-INVESTIGATION ACTIONS

(1) After receiving the final report, the appropriate manager shall promptly inform the complainant and accused of the outcome of the investigation in writing.

(2) In the case of a cause finding, the appropriate agency manager shall:

(a) take appropriate disciplinary action, if necessary, according to the [ARM Title 2, chapter 21, subchapter 65](#), Discipline Policy;

(b) advise the complainant corrective action to stop the behavior has been taken, but not disclose the details or nature of disciplinary action;

(c) reemphasize that retaliation is unacceptable behavior; and

(d) contact the complainant within 30 days to ensure the behavior has stopped and no retaliation has occurred.

(3) In the case of a no-cause finding, the appropriate agency manager shall contact the complainant within 30 days to ensure the complainant has not experienced retaliation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11.

## **2-21-4022** CONFIDENTIALITY REQUIREMENTS

(1) Agency managers shall make every attempt to protect the privacy of individuals involved in the complaint process; however, individual privacy cannot be guaranteed.

(2) Agency managers may not prohibit employees from discussing a complaint or ongoing investigation with coworkers unless management conducts an individualized assessment and demonstrates that one of the following factors exists:

- (a) there are witnesses in need of protection;
- (b) evidence is in danger of being destroyed;
- (c) testimony is in danger of being fabricated; or
- (d) there is a need to prevent a cover-up.

(3) Agency managers shall document their rationale for requiring that employees refrain from discussing a complaint or ongoing investigation.

(4) The human resource staff shall maintain the investigative report and supporting documents in a secure, confidential case file separate from the regular employee file.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11; AMD, MAR p. 110, Eff. 2/1/13.)

## **2-21-4027** TRACKING AND REPORTING INTERNAL COMPLAINTS

(1) Agency EEO officers shall track internal complaints using the Complaint Tracking Sheet located on the State Human Resources Division website: <http://hr.mt.gov/hrpp/policies.mcp>. EEO officers shall provide quarterly summaries of internal complaints to the State Human Resources Division no later than the fifteenth day of each quarter.

(2) The report must include:

- (a) the total number of complaints;

- (b) whether the complainant and accused was an employee, customer, or client;
- (c) the protected class or basis of the complaint;
- (d) the reason for complaint (for example, employment-related, denied access to a program or service, or inappropriate comment); and
- (e) the outcome of the complaint.

(3) The report is for tracking purposes only and may not include confidential information such as names of individuals involved.

(4) The State Human Resources Division shall collect and analyze the data to:

- (a) assess program effectiveness;
- (b) develop or modify existing policies, procedures, and guides; and
- (c) promote compliance with applicable laws, regulations, and policies.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11.

## **[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, 33 S. Last Chance Gulch, Suite 2, P.O. Box 1728, Helena, MT 59624-1728, (406) 444-4356, (800) 542-0807, Montana Relay Service 711; or

(b) United States Equal Employment Opportunity Commission (EEOC) 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 culture, social origin or condition, ancestry, or military or veteran status.

(3) The Human Rights Bureau must receive the complaint within 180 days of when the alleged discriminatory practice occurred or was discovered unless the person has filed an internal complaint. A person who files an internal complaint under these rules has 180 days from the conclusion of the internal investigation to file a complaint with the Human Rights Bureau if management completes the investigation within 120 days of when the alleged discriminatory practice occurred or was discovered. If management does not complete the investigation within 120 days, the person must file a

complaint with the Human Rights Bureau within 300 days of when the alleged discriminatory practice occurred or was discovered.

(4) The EEOC must receive the complaint within 300 calendar days from the date the discrimination took place if the Human Rights Bureau enforces a law prohibiting employment discrimination against the same protected class. Otherwise, the complaint must be filed with the EEOC in 180 days.

(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>.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11; AMD, MAR p. 110, Eff. 2/1/13; AMD, 2016 MAR p. 1838, Eff. 10/15/16.

## **2-21-4029 RULE VIOLATIONS**

(1) Employees who violate these rules are subject to discipline, up to and including discharge under [ARM Title 2, chapter 21, subchapter 65](#), Discipline Policy. A rule violation includes managers who allow discrimination to occur or fail to take appropriate action to correct inappropriate behavior, including discrimination or harassment.

(2) Failure to conduct an investigation in a proper and timely manner, interference with an investigation, failure to cooperate with an investigator, or making a false statement to an investigator may result in disciplinary action, up to and including discharge.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1672, Eff. 8/26/11.



## **Appendix 3 – Nondiscrimination and Equal Employment Opportunity Complaint Resolution Procedure**

### **Complaint Resolution Procedure**

Montana state government is committed to providing equal access to employment, programs, services, and activities, and prohibits discrimination and 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 unless based on a bona fide occupational qualification (BFOQ).

State agencies are committed to resolving complaints of discrimination and harassment in a fair, timely, and impartial manner. Employees, applicants, clients, and customers may file a complaint under the state's complaint resolution procedures if they believe they have experienced discrimination, harassment, or retaliation. Complainants are encouraged to use the Department of Administration's complaint form found at <http://hr.mt.gov/newresources>.

Montana state government prohibits retaliation against employees, applicants, clients, and customers who opposes unlawful discriminatory practices, files a discrimination complaint, or participates in a discrimination proceeding, including testifying in court.

### **Reporting a Complaint:**

Montana state government encourages employees, applicants, clients, and customers who believe they have been discriminated against or harassed to contact agency management or the agency's equal opportunity (EO) officer, American's with Disabilities Act (ADA) Coordinator, or human resources (HR) staff.

### **Agency Responsibilities:**

1. Employees and manager who receive a report of alleged discrimination or harassment shall immediately notify the agency EO officer, ADA Coordinator, or HR staff.
2. Upon receiving a complaint, agency management, with guidance from the agency EO officer, ADA Coordinator, or HR staff, shall take appropriate steps to prevent the alleged conduct from continuing, pending completion of the investigation.

3. The agency EO officer, ADA Coordinator, HR staff, or appropriate management representative will promptly initiate an investigation upon receiving a complaint.
4. The investigator shall submit the results of the investigation to the human resource manager. The factual report shall remain confidential and may not be disseminated, except to persons having a need or right to know, which outweighs the privacy rights of persons involved.
5. Upon completion of the investigation, the appropriate manager shall promptly inform the complainant and accused, in writing, of the outcome of the investigation.
6. Agency management shall take appropriate corrective action if the investigation establishes that an employee has violated the state's EEO, Nondiscrimination, and Harassment Prevention Policy. Agency managers may only inform the complainant that appropriate action has been taken and not the details of any disciplinary action taken.
7. If the investigator finds insufficient evidence to conclude that a policy violation occurred, agency management may inform all parties that no action will be taken, and the complainant's right to file an external complaint.
8. Neither agency management nor any employee will retaliate against any employee for filing a complaint or for participating in any way in a complaint procedure.

### **OTHER COMPLAINT FILING OPTION**

An applicant, client, customer, or employee may concurrently file a complaint of unlawful discrimination with:

1. the Human Rights Bureau, 33 S. Last Chance Gulch, Suite 2, P.O. Box 1728, Helena, MT 59624-1728, (406) 444-4356, (800) 542-0807, Montana Relay Service 711, or
2. the United States Equal Employment Opportunity Commission (EEOC) Seattle Field Office, 909 First Avenue, Suite 400, Seattle, WA 98104-1061, (800) 669-4000, TTY (800)-669-6820, ASL Video (844) 234-5122. The complaint must be filed either:
  - a. within 180 days of the alleged incident; or

- b. if the employee initiates action to resolve the alleged discrimination in accordance with this procedure or contract grievance procedure, within 300 days of the alleged incident.
3. 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>.

## **Appendix 4 – Reasonable Accommodation and Equal Access Policy**

Resource: Administrative Rules of the State of Montana (ARM)

Human Resources/ Employee Benefits

*State Human Resources includes policies in administrative rules (ARM) when the policy may affect the public or be used by persons who are not currently employees. The policies that only affect state employees are not included in ARM. This policy is in ARM. This is a reproduction created for your convenience, but it is not the official version. Links to the ARM and Montana Code Annotated (MCA) are embedded throughout the document. You may also find the official ARM website at <http://www.mtrules.org>.*

### **2-21-4101 SHORT TITLE**

(1) This subchapter may be cited as Reasonable Accommodations and Equal Access Policy.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

### **2-21-4102 POLICY AND OBJECTIVES**

(1) The rules in this subchapter establish the minimum requirements for providing reasonable accommodations, reasonable modifications, and equally effective communication for persons with disabilities as for person without disabilities consistent with:

- (a) the Americans with Disabilities Act of 1990 (ADA);
- (b) ADA Amendments Act of 2008;
- (c) Genetic Information Nondiscrimination Act of 2008 (GINA);
- (d) Montana Human Rights Act, Title 49, MCA;
- (e) Governmental Code of Fair Practices provided in Title 49, chapter 3, MCA; and
- (f) Rights of Persons with Disabilities provided in Title 49, chapter 4, MCA.

(2) This subchapter covers all agencies in Montana's executive branch except:

- (a) the Montana University System;
- (b) the Montana State Fund;
- (c) elected officials;

- (d) personal staff of elected officials; and
- (e) any other position specifically excluded under 2-18-103 and 2-18-104, MCA.

History: 2-18-102, MCA; IMP, 2-18-102, 49-2-101, 49-2-303, 49-3-101, 49-3-201, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

### **2-21-4103** DEFINITIONS

(1) The department adopts and incorporates the definitions in Title I and Title II of the ADA, as amended by the ADA Amendments Act of 2008 (P.L. 110-325), effective January 1, 2009, 42 USC 12102, 12103, 12111, and 12131, which set forth all definitions applicable to the law, except those defined under this rule. A copy of these definitions may be obtained by contacting the department at the address provided in ARM 2.21.4121 or at <http://www.ada.gov/pubs/adastatute08.htm>.

(2) The following definitions also apply to this subchapter:

(a) "Designated personnel" means agency representatives identified this subchapter as those responsible for processing reasonable accommodation requests including agency managers (as defined by the agency in policy or rule to promote consistency with internal policies and procedures), ADA coordinators, Equal Employment Opportunity (EEO) officers, human resource staff, and individuals involved in the hiring process.

(b) "Extenuating circumstances" means circumstances beyond management's control and may include time spent waiting for medical documentation, special equipment, modifications to a work area, or other factors.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

### **2-21-4104** RESPONSIBILITIES

(1) The Department of Administration shall:

(a) periodically review and update, as needed, reasonable accommodation and equal access rules, processes, and procedures; and

(b) design and develop training for employees that includes reasonable accommodations, reasonable modifications, and effective communication processes and procedures.

(2) Agency managers shall:

(a) provide reasonable accommodations to known physical or mental limitations of otherwise qualified employees or applicants with disabilities unless doing so would create an undue hardship;

(b) make reasonable modifications to policies, practices, or procedures unless doing so would create an undue financial or administrative burden or fundamentally alter the nature of a service, program, or activity;

(c) offer equally effective communications to people with disabilities and post public notice statements in areas frequented by employees and the public and on the agency's website to increase awareness of individual rights and the state's responsibilities under the ADA;

(d) include a reasonable accommodation statement in all job listings; and

(e) provide a copy of these rules to all employees.

History: 2-18-102, MCA; IMP, 2-18-102, 49-3-201, 49-3-205, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

#### **2-21-4105 REASONABLE ACCOMMODATIONS**

(1) Agency managers shall provide reasonable accommodations to qualified individuals with disabilities in all aspects of employment unless doing so would cause undue hardship.

(2) Agency managers shall encourage employees and applicants with disabilities to request reasonable accommodations at any time they identify a barrier to employment. A barrier may include a policy, procedure, or workplace arrangement preventing applicants from effectively competing for a position and employees from performing essential functions of their position or receiving benefits of employment.

(3) The obligation to provide reasonable accommodations applies to all aspects of employment. This responsibility is ongoing and a reasonable accommodation may become necessary any time a person's disability or job changes.

History: 2-18-102, MCA; IMP, 2-18-102, 49-2-101, 49-3-101, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

#### **2-21-4106 REQUESTING REASONABLE ACCOMMODATIONS**

(1) Employees or applicants with a disability may request reasonable accommodations through any one of the designated personnel.

(2) Reasonable accommodation requests may be oral or in writing and do not have to include the words "reasonable accommodation" or "disability."

Employees may simply indicate they are having difficulty performing their job or applying for a position because of a disability.

(3) Family members, friends, health care professionals, or other representatives may request reasonable accommodations on employees' or applicants' behalf.

(4) There are no time limits for requesting an accommodation; however, employees should not wait for an impairment to affect their job performance before requesting an accommodation. Employees are encouraged to communicate with agency management about performance issues as soon as they realize the need for an accommodation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4107 RESPONDING TO REASONABLE ACCOMMODATION REQUESTS**

(1) Designated personnel who receive reasonable accommodation requests shall promptly notify their agency ADA coordinator of the request.

(2) If the request comes from someone other than an agency manager, the ADA coordinator shall inform the appropriate manager and provide assistance throughout the reasonable accommodation process. With assistance from the ADA coordinator, the agency manager shall:

(a) participate in an informal dialogue (known as the interactive process) with the employee or applicant;

(b) periodically follow up with the employee or applicant on all reasonable accommodation requests; and

(c) approve or deny the request within 30 working days following the initial request, unless extenuating circumstances exist.

(3) Designated personnel shall always consider an employee's or applicant's requested accommodation; however, they may elect another reasonable accommodation if it would effectively allow the employee to perform the essential functions of the job or allow an applicant to compete for a position.

(4) Employees may refuse the elected accommodation; however, if the employee cannot perform the essential functions of the job, with or without the accommodation, the refusal may limit the employee's qualifications for the position.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4112 PARTICIPATING IN THE INTERACTIVE PROCESS**

(1) Agency managers shall participate in the interactive process until they identify an effective accommodation or determine a reasonable accommodation is not possible. Failure to participate in the interactive process could result in a delay or failure to provide a reasonable accommodation.

(2) When an employee or applicant requests a reasonable accommodation, the dialogue between designated personnel and the employee may include the following:

- (a) a discussion of the employee's specific limitations;
- (b) how the limitation affects the employee's performance;
- (c) specific job tasks or selection procedures that are or may be problematic for the employee;
- (d) possible accommodations; and
- (e) if implemented, whether the accommodation was effective.

(3) The extent of the dialogue between designated personnel and the employee or applicant may vary because of the nature of an individual's disability or their specific request. If the disability and the need for an accommodation are obvious, the discussion may be brief. In some cases, the agency manager may need to ask questions about the nature of the individual's disability and the individual's functional limitations in an effort to identify an effective accommodation.

(4) Designated personnel shall limit discussion with applicants to the individual's specific request, their inability to participate in a particular selection process, and possible accommodations.

(5) Designated personnel may not ask probing questions likely to disclose genetic information in compliance with ARM Title 2, chapter 21, subchapter 40, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention Policy.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4113 DOCUMENTING REASONABLE ACCOMMODATION REQUESTS**

(1) Agency managers shall document all reasonable accommodation requests and their contact with designated personnel. Documentation must include the following:

- (a) accommodation requested and discussed;



(b) impact of the impairment on the employee's ability to perform their job or an applicant's ability to participate in the selection process;

(c) follow-up discussions with employees, applicants, or their representative; and

(d) decisions made and actions taken.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4114 REQUESTING MEDICAL DOCUMENTATION**

(1) Medical examinations must be job-related and consistent with business necessity.

(2) Agency managers may request documentation from an appropriate health care professional when the need for a reasonable accommodation is not known or obvious. If an agency manager requests medical documentation, the manager:

(a) shall provide the request to the applicant or employee in writing;

(b) shall explain the need for documentation and limit the request to information

(c) about the individual's disability, functional limitations, and the need for a reasonable accommodation to perform the essential functions of the job;

(d) shall include a statement to the applicant, employee, or health care provider to not provide genetic information as specified under ARM Title 2, chapter 21, subchapter 40, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention Policy;

(e) may not request more information than required to support the need for a specific type of accommodation; and

(f) may not request documentation when the disability and the need for a reasonable accommodation are obvious or when the individual has already provided sufficient information to substantiate their need for a reasonable accommodation.

(3) If the individual does not provide the requested documentation, agency managers are not required to provide an accommodation. Agency managers may make exceptions if extenuating circumstances prevent the individual from providing the documentation.

(4) Agency managers shall document the time exhausted while waiting for documentation. This time does not count against the agency's 30-working day timeline to process the request.

(5) If an individual provides insufficient documentation, the agency manager shall explain why the documentation was insufficient and allow additional time to provide sufficient documentation.

(6) Agency management may require an individual to go to a health care professional of the agency's choice when the individual fails to provide sufficient documentation. If management requires an individual to go to a health care provider, the agency shall pay costs associated with the visit.

(7) If an employee chooses not to see a health care professional of the agency's choice and fails to provide sufficient documentation, agency managers are not required to provide an accommodation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

### **2-21-4115 APPROVING REASONABLE ACCOMMODATION REQUESTS**

(1) Agency managers shall serve as the approval authority for all reasonable accommodation requests.

(2) If agency managers determine the request is reasonable, they shall:

(a) grant the request and notify the employee or applicant in writing of their decision;

(b) implement the accommodation as soon as practical;

(c) follow up with the employee or applicant to ensure the accommodation is effective;

(d) continue the interactive process if the accommodation is not effective, the need for the accommodation has changed, or the job has changed; and

(e) continue the interactive process until they find an alternative or determine it is not possible to provide a reasonable accommodation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

### **2-21-4116 REASSIGNING AN EMPLOYEE AS A REASONABLE ACCOMMODATION**

(1) When an employee with a disability can no longer perform the essential functions of their position with or without a reasonable accommodation, the agency manager shall consider reassigning the employee to an equivalent vacant position unless doing so would create an undue hardship. The employee shall concur with the reassignment.

(2) When reassigning an employee to a vacant position as a reasonable accommodation, agency managers shall:

- (a) do so without a competitive process;
  - (b) consider any implications under a seniority system of a collective bargaining agreement;
  - (c) attempt to reassign a qualified employee to a vacant position equivalent in pay, status, and other relevant factors (e.g., benefits, geographical location); and
  - (d) continue the interactive process after reassigning an employee to ensure the employee is able to perform the essential functions of the job, with or without a reasonable accommodation.
- (3) If reassigning an employee would violate a seniority system or collective bargaining agreement, is not reasonable to reassign an employee.
- (4) If an equivalent vacant position is not available, management may reassign the employee to a lower-pay position, provided the employee is qualified and agrees to the transfer.
- (5) "Vacant" means the position is available when the employee asks for an accommodation, or the employer knows a position is to become available within a reasonable amount of time. Agency managers shall determine a reasonable amount of time on a case-by-case basis.
- (6) Agency managers are not required to create a new position as a reasonable accommodation.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4117 DENYING REASONABLE ACCOMMODATION REQUESTS**

- (1) If agency managers determine they cannot reasonably accommodate a request or an accommodation would create an undue hardship, they shall forward the recommendation to their division administrator. If the division administrator is the manager receiving the request, the administrator shall make the recommendation to their supervisor.
- (2) If the division administrator or higher-level manager concurs with the recommendation, the administrator or manager shall notify the employee or applicant in writing within 30 working days of the initial request.
- (3) The written notification must include an explanation for the denial and the appeal process.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4118 DISCHARGING EMPLOYEES WITH DISABILITIES**

(1) Agency managers may discharge an employee with a disability when the employee is no longer able to perform the essential functions of their job with or without a reasonable accommodation, and managers have ruled out all possible options.

(2) If denial of a reasonable accommodation results in the discharge of an employee, the appeal process outlined in [ARM Title 2, chapter 21, subchapter 65](#), Discipline Policy or applicable collective bargaining agreement supersedes the reasonable accommodation appeal process.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## **2-21-4119 APPEALING DENIAL OF REASONABLE ACCOMMODATION REQUESTS**

(1) The department head shall serve as the appeal authority for all denials.

(2) Employees and applicants wishing to appeal a denial shall submit a written request, along with supporting documents, to the department head within 15 working days from the time they receive the denial letter.

(3) The department head shall work with the appropriate agency manager, the ADA coordinator, and human resources manager to review pertinent information and the rationale for denial.

(4) Upon completion of the review, the department head shall:

(a) deny the request, approve the request, or refer it back to management for further action; or

(b) notify the employee or applicant of their decision in writing within 15 working days of receiving the appeal.

(5) If the department head denies the appeal, the written notification must include an explanation for the denial and information on the right to file a complaint with the Montana Human Rights Bureau, Department of Labor and Industry.

(6) Employees and applicants may contact the Montana Human Rights Bureau at (406) 444-2884 or (800) 542-0807 or the federal Equal Employment Opportunity Commission at (800) 669-4000 to file a complaint.

History: [2-18-102](#), MCA; IMP, [2-18-102](#), [49-2-101](#), [49-2-501](#), [49-3-102](#), [49-3-301](#), MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## 2-21-4120 CONFIDENTIALITY REQUIREMENTS

(1) Agency managers shall:

(a) treat all information related to an employee's or applicant's disability as confidential; and

(b) maintain disability-related information according to the requirements of ARM Title 2, chapter 21, subchapter 66, Employee Records Management Policy.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

## 2-21-4121 TRACKING AND REPORTING REASONABLE ACCOMMODATION REQUESTS

(1) Agency ADA coordinators shall track reasonable accommodation requests using the Reasonable Accommodation Tracking Sheet at the State Human Resources Division web site: <http://hr.mt.gov/hrpp/policies.mcp>x and also available from the State Human Resources Division, Department of Administration, Room 125 Mitchell Building, 125 Roberts Street, P.O. Box 200127, Helena, MT 59620- 0127, or telephone (406) 444-3871.

(2) ADA coordinators shall provide a quarterly summary of all reasonable accommodation requests to the State Human Resources Division no later than the fifteenth day of each quarter.

(3) The report must include the following information:

(a) total number of requests;

(b) whether requests were by employees or applicants;

(c) types of accommodations requested and approved;

(d) cost of accommodations;

(e) effectiveness of the accommodations;

(f) number of days to process the requests (including extenuating circumstances); and

(g) if denied, the reason for denial and whether the employee or applicant appealed.

(4) Data are for tracking purposes only and must not include confidential information such as names or references to medical conditions or impairments.

(5) The State Human Resources Division shall collect and analyze data to:

(a) assess program effectiveness;

- (b) develop or modify existing policies, procedures and guides; and
- (c) promote compliance with applicable laws, regulations, and policies.

History: 2-18-102, MCA; IMP, 2-18-102, 49-3-205, MCA; NEW, 2011 MAR p.1668, Eff. 8/26/11.

#### **2-21-4122 DISABILITY RETIREMENT**

(1) Employees with disabilities may be eligible for disability retirement benefits under 19-3-1002, MCA. Employees may contact the Montana Public Employee Retirement System at (877) 275-7372 (toll free) or (406) 444-3154 for more information.

History: 2-18-102, MCA; IMP, 2-18-102, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

#### **2-21-4127 REASONABLE MODIFICATION PROCEDURES**

(1) Agency managers shall make reasonable modifications to policies, practices, and procedures that deny, or have the potential to deny, equal access to programs, services, or activities to individuals with disabilities, unless doing so would result in an undue burden or fundamentally alter a program, service, or activity.

(2) Anyone requesting to modify a policy, practice, or procedure may contact the office responsible for providing the program, service, or activity, including agency management, ADA coordinator, EEO officer, or human resources staff.

History: 2-18-102, MCA; IMP, 2-18-102, 49-3-201, 49-3-205, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.

#### **2-21-4128 EFFECTIVE COMMUNICATION PROCEDURES**

(1) Agency managers shall furnish auxiliary aids and services, upon request, to promote equally effective communication for people with disabilities, unless doing so would result in an undue burden or fundamentally alter the program, service, or activity.

(2) Anyone requiring auxiliary aids and services may contact the department directly responsible for providing the program, service, or activity, including agency management, ADA coordinator, EEO officer, or human resources staff.

(3) Agency managers may not charge individuals with disabilities to offset costs associated with providing required auxiliary aids and services.

(4) Agency managers are not required to provide personal use items such as wheelchairs, prescription eyeglasses, hearing aids, or personal services such as eating, toileting, or dressing.

History: 2-18-102, MCA; IMP, 2-18-102, 49-3-201, 49-3-205, 49-4-202, 49-4-211, 49-4-503, MCA; NEW, 2011 MAR p. 1668, Eff. 8/26/11.