



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee
FROM: K. Virginia Aldrich
DATE: May 4, 2016
RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 2-21-545

AGENCY/BOARD: Department of Administration

RULE CLASSIFICATION: (e.g. substantive/interpretative/emergency/temporary):
Substantive

SUBJECT: Equal Employment Opportunity -- Nondiscrimination -- Harassment Prevention

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Public Hearing on Proposed Amendment

SUMMARY OF RULE(S): The Department of Administration proposes to amend 6 rules pertaining to equal employment opportunity, nondiscrimination, and harassment prevention.

The Department proposes to update its current rule establishing policy and objectives with respect to its equal opportunity program for entities within the Executive Branch. The rule specifies that the program will be in compliance with certain state and federal laws and policies, including Governor's Executive Order No. 41-2008, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention. The proposed amendment updates the order to reference a 2016 order: Governor's Executive Order No. 04-2016, Executive Order Prohibiting Discrimination in State Employment and Contracts.

The second proposed amendment inserts references to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth, gender identity or expression, and military service to an existing rule listing prohibited discrimination or harassment for entities within the Executive Branch. According to the Department, the changes align Executive Branch policy with Equal Employment Opportunity Commission (EEOC) enforcement guidance on pregnancy

discrimination and related issues. The policy is also amended to expressly prohibit discrimination and harassment based on gender identity and gender expression in accordance with decisions by the U.S. Supreme Court and lower courts which 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." In addition, this year the EEOC has filed sex discrimination lawsuits against employers based on sexual orientation. The Department also proposes to protect military service, in alignment with federal and state laws and policy prohibiting discrimination against current service members, regardless of status, and veterans.

The third rule that the Department proposes to amend relates to Department responsibilities concerning equal employment opportunity and nondiscrimination. The Department proposes to insert an additional responsibility concerning the creation and maintenance of an annual report summarizing state government's efforts toward achieving diversity and inclusion. The Department proposes to include diversity and inclusion training with equal opportunity training, including creating minimum standards for new employee orientation and refresher training. The Department specifies that it will submit a biennial report to the EEOC by the reporting deadlines. The proposed amendments require agencies to update their Department's action plan or affirmative action plan if required by the federal government, develop measurable objectives to evaluate the effectiveness of the EEOC report, and annually report the agency's progress toward minimizing underutilization of women and minorities to the Department. The rule also updates existing policies to include diversity and inclusion training in addition to existing employment opportunity and harassment prevention training to new and existing employees, and it requires agency managers to report training to the Department. The proposed amendments require agency managers to provide reasonable accommodations related to pregnancy-related disabilities; develop internal procedures for access to services for customers with limited English proficiency (e.g. translators, etc.); include provisions in contracts that prohibit discrimination or harassment consistent with existing policy and the new amendments discussed above, and have employees sign an acknowledgment of their understanding and acceptance of these rules. The Department proposes these changes to consistently enforce policy across Executive Branch agencies, to minimize duplication of effort, to align with federal law, and to train employers and employees about their rights and responsibilities.

The Department proposed to update a existing rule relating to harassment. Previously, the rule prohibited agency managers from tolerating behavior that negatively focused on a protected class, whether or not the behavior constituted illegal discrimination. The proposed changes amend this to prohibit agency managers from tolerating behavior that "that intentionally or unintentionally degrades or demeans an individual or group of individuals, whether based on a legally protected class or not". The Department notes that "[w]hile 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."

The Department also proposed to amend a rule concerning the investigation of a complaint. Currently, the rule requires the appropriate manager to explain to a complainant and an accused what retaliation is and that it is unacceptable behavior. The proposed amendments will update this to clarify that retaliation is illegal, not simply unacceptable. Furthermore, the amendments will remove a section requiring the manager to discuss the expectations and consequences of discussing the complaint with anyone other than the investigator, management, union representative, or legal counsel. The removal makes the policy consistent with a National Labor Relations Board decision that does not allow employers to make blanket rules and that requires consideration of certain factors before suggesting that employees refrain from discussing the complaint or pending investigation.

The proposed amendments also update the addresses for initiating an external complaint and removes "sexual orientation" from examples pertaining to jurisdictions of external agencies because the external agencies have begun pursuing employment discrimination complaints alleging discrimination based on sexual orientation as a violation of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964.

NOTES: A public hearing is scheduled for May 12, 2016, at 9:30 a.m. in Room 136, Mitchell Building, 125 N. Roberts St., Helena, Montana. The public comment period ends on May 20, 2016.

FULL TEXT OF NOTICE: The full text of the notice proposal is available online at <http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=7113>.

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