

Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention

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

State Human Resources Division

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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

(1) 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) and the Governor's Executive Order 41-2008, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention.

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

(3) 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.

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, sexual orientation, political beliefs, genetic information, veteran's status, culture, social origin or condition, or ancestry. Likewise, agency management may not tolerate discrimination or harassment because of a

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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.

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) provide EEO analyses, reports, and technical assistance to agencies;
 - (e) recommend strategies to promote diversity and overcome potential barriers to employment; and
 - (f) design and develop equal opportunity training.
- (2) Executive branch department heads shall:
 - (a) appoint an EEO officer responsible for:
 - (i) managing the agency's EEO program;

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- (ii) training employees on EO;
 - (iii) assisting employees and managers with resolving EO issues;
 - (iv) conducting internal investigations; and
 - (v) developing written EEO action plans; and
 - (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) post the state's EO policy poster and complaint-resolution procedures, including contact information for the agency EEO officer and ADA coordinator, in areas frequented by employees and the public;
 - (d) provide a copy of these rules to all employees;
 - (e) provide EO and harassment prevention training to all new employees within 90 days of hire or within [six months of the effective date of these rules] for current employees who have not yet received training;
 - (f) provide EO and harassment prevention refresher training for all employees every three years or more frequently as needed; and
 - (g) 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.

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:

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- (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 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

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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

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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.

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(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;

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

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

(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.

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,

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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) Employees involved in the complaint process (e.g., complainant, accused, witnesses, etc.) may not discuss the complaint or investigation with anyone other than management, the EEO officer, ADA coordinator, human resources manager, investigator, union representative, or legal counsel. Discussing the complaint or investigation with individuals who do not have an official need to know may result in disciplinary action under the [ARM Title 2, chapter 21, subchapter 65](#), Discipline Policy.

(3) 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.

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.

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- (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 (HRB), 1625 11th Avenue, P.O. Box 1728 Helena, MT 59624-1728, (406) 444-2884, (800) 542-0807, TTY (406) 444-0532; or email <http://erd.dli.mt.gov/humanright/hrhome.asp>; or
- (b) United States Equal Employment Opportunity Commission (EEOC) San Francisco District Office, 350 The Embarcadero, Suite 500, San Francisco, CA 94105-1260, (800) 669-4000, TTY (800)-669-6820; or email www.eeoc.gov.

(2) Jurisdiction may vary based on the nature of the complaint. For example, neither the HRB nor the EEOC considers complaints based on sexual orientation, culture, social origin or condition, or ancestry.

(3) The HRB or EEOC must receive the complaint within 180 days of the alleged incident or when first discovered. If the complainant uses the internal complaint process, they will have 300 days from the alleged incident to file a complaint with the HRB or EEOC.

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

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.

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