

# Persons with Disability Employment Preference Policy

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

State Human Resources Division

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## 2.21.1412 SHORT TITLE

(1) This policy may be cited as the Persons with Disabilities Employment Preference Policy.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## 2.21.1413 POLICY AND OBJECTIVES

(1) It is the policy of the state of Montana, executive, legislative and judicial branches, and covered local governments to provide preference in employment to eligible persons with disabilities and certain spouses, when they are substantially equal in qualifications to others applying for initial appointments to positions.

(2) It is the objective of this policy to establish uniform practices and procedures for the administration of the preference by public employers covered by the Persons with Disabilities Employment Preference Act, [39-30-101](#), et seq., MCA.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## 2.21.1414 ELIGIBILITY

(1) As provided in [39-30-202](#), MCA, "No person with a disability or eligible spouse is entitled to receive employment preference as provided in [39-30-201](#), MCA, unless:

- (a) the individual is a United States citizen;
- (b) the individual has resided continuously in the state for at least 1 year immediately before applying for employment;
- (c) if applying for municipal or county employment, the individual has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and
- (d) the individual meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which the individual is applying."

(2) A person with a disability must be an individual whose disability is certified by the department of public health and human services, as provided in ARM [2.21.1427](#).

(3) As provided in [39-30-103](#), MCA, an eligible spouse is "the spouse of a person with a disability determined by the department of public health and human services to have a 1000 disability and who is unable to use the employment preference because of the person's disability."

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(4) The marital relationship will be verified by the department of public health and human services in accordance with Montana law.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## **2.21.1422 EMPLOYMENT COVERED**

(1) Public employers covered by the Persons with Disabilities Employment Preference Act, [39-30-101](#) et seq., MCA, include:

(a) "any department, office, board, bureau, commission, agency, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(b) any county, city, or town.

(2) The term does not include a school district, a college of technology, a community college, the board of regents of higher education, the Montana university system, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town."

(3) All permanent and seasonal employment is covered by the employment preference.

(4) Temporary and short-term employment is excluded from the employment preference. Temporary employment is established for a definite period of time not to exceed 12 months. Shortterm employment is established for a definite period not to exceed 90 days in one year.

(5) As provided in [39-30-103](#), MCA, position means "a position occupied by a permanent or seasonal employee as defined in [2-18-101](#), MCA, for the state or a position occupied by a similar permanent or seasonal employee with a public employer other than the state. However, the term does not include:

(a) a position occupied by a temporary employee as defined in [2-18-101](#), MCA, for the state or similar temporary employee with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal adviser, court reporter, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

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(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer or a local government; or

(g) engagement as an independent contractor or employment by an independent contractor."

(6) Also excluded is appointment by lawful authority to fill an unexpired term in an elected office.

(7) A temporary employee shall not be considered a current employee for purposes of ARM [2.21.1423](#). If a temporary employee is considered in the applicant pool for permanent or seasonal employment, the selection is considered an initial hire and the employment preference must be applied.

History: [39-30-106](#), MCA; [IMP, 39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1998 MAR p. 157, Eff. 12/16/97.

## **2.21.1423** APPLYING PREFERENCE

(1) As provided in [39-30-201](#), MCA, an applicant who is eligible for preference under these rules shall be hired over any other applicant with substantially equal qualifications who is not a preference-eligible applicant, when:

(a) the applicant has claimed a preference as required in ARM [2.21.1414](#), and

(b) the hiring is an initial hiring to employment covered in ARM [2.21.1422](#).

(2) A preference-eligible applicant who is a person with a disability shall be hired over any other preference-eligible applicant with substantially equal qualifications when the applicant also meets the requirements of this rule.

(3) As provided in [39-30-103](#), MCA, an initial hire means "a personnel action for which applications are solicited from outside the ranks of the current employee of:

(a) a department, as defined in [2-15-102](#), MCA, for a position within the executive branch;

(b) a legislative agency for a position within the legislative branch;

(c) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(d) a city or town for a municipal position, including a city or municipal court position; and

(e) a county for a county position, including a justice's court position.

(4) A personnel action limited to current employees of a specific public entity identified in [this rule], current employees in a reduction-in-force pool who have been

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laid off from a specific public entity identified in [this rule], or current participants in a federally-authorized employment program is not an initial hiring."

(5) A current employee of an agency who meets eligibility requirements may claim and shall receive the persons with disabilities preference when the employee is considered an applicant for a position which is an initial hire as that term is defined in this policy, whether or not the agency originally limited recruitment for the position to current employees.

(6) As provided in [39-30-103](#), MCA, substantially equal qualifications means "the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons."

(7) Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job.

Qualifications shall include job-related competencies, which are knowledge, skill, and behaviors.

(8) The public employer covered by the Persons with Disabilities Employment Preference Act, [39-30-101](#) et seq., MCA, has the burden of proving by a preponderance of the evidence that the employer made a reasonable determination of the applicant's qualifications for the position and that substantially equally qualified applicants were afforded preference.

(9) The public employer shall retain a record of the hiring decision for at least 90 calendar days after the notice of the hiring decision. Depending on the selection procedures used, the record may include, but is not limited to, the following:

- (a) a copy of the vacancy announcement or external recruitment announcement;
- (b) a record of the selection procedure used to screen job applicants;
- (c) a record of written and oral evaluations of applicants;
- (d) a copy of applications that were considered for the specific vacancy; and
- (e) a record of the notice of the hiring decision, the written request for an employer's explanation of the hiring decision by an applicant, and the employer's written explanation.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq., MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97; [AMD](#), 2000 MAR p. 448, Eff. 2/11/00.

### [2.21.1424](#) CLAIMING PREFERENCE - DOCUMENTATION AND VERIFICATION

(1) As provided in [39-30-206](#), MCA, "a public employer shall, by posting or on the application form, give notice of the preferences that [the Persons with Disabilities

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Employment Preference Act] provides in public employment." The notice shall appear at the place where applications are received.

(2) As provided in [39-30-206](#), MCA, "a job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed." An employer may provide a standard form for claiming employment preference. However, failure to complete such a form does not negate an applicant's claim for preference, as long as a reasonable and timely claim is made as required by this rule. As provided in [39-30-206](#), MCA, "failure to make a timely employment preference claim for a position is a complete defense to an action in regard to that position under [39-30-207](#), MCA."

(3) At the place where applications are received, the hiring authority or other agency receiving applications shall inform applicants of requirements for documentation of eligibility for preference which the applicant may be required to provide to the hiring authority.

(4) The person claiming eligibility for employment preference is responsible for providing all information necessary to document the claim.

(5) The hiring authority must obtain documentation of eligibility for employment preference at least from the applicant who is selected for the vacancy.

(6) The hiring authority shall determine when in the selection process submission of documentation of eligibility for the preference shall be provided by the applicant. This may be at the time an offer of employment is made or at an earlier time specified by the hiring authority.

(7) Where appropriate, documentation will include the following or an acceptable substitute:

(a) from a person with a disability, a document from the department of public health and human services certifying that the applicant is eligible for preference as a person with a disability;

(b) from an eligible spouse of a person with a disability, a document from the department of public health and human services certifying the person with a disability has a total disability, is unable to use the preference because of the disability, and is married to the eligible spouse in accordance with Montana law.

(c) a statement signed by the applicant attesting to U.S. citizenship, and Montana or local residency. Where the hiring authority has reason to question the validity of such statement, further evidence may be requested. For U.S. citizenship such evidence may include, but is not limited to, a birth certificate, voter registration card, U.S. passport, or naturalization papers. For Montana residency, evidence may include, but is not limited to, payment of state of Montana income tax, Montana driver's license, vehicle registration, or hunting and fishing license.

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(8) All documentation submitted to a public employer, an entity designated to receive applications for a public employer, or to the department of public health and human services in support of a claim of employment preference shall be considered confidential.

(9) A public employer may release general information relating to a successful applicant's eligibility for preference upon request. The information provided should not be specific to the nature of the disability or other personally identifying information.

(10) Applicants shall be notified that intentional misrepresentation of the claim for preference is cause for immediate discharge.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97; [AMD](#), 2000 MAR p. 448, Eff. 2/11/00.

## **2.21.1425** DURATION OF PREFERENCE

(1) Subject to provisions of [39-30-203](#), MCA, a person with a disability qualifies for employment preference as long as the disabling condition persists.

(2) The spouse of a person who is totally disabled qualifies for employment preference as long as:

(a) the person who is totally disabled is unable to use the preference due to the severity of the disabling condition; and

(b) the spousal relationship continues.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## **2.21.1427** CERTIFICATION OF PERSONS WITH DISABILITIES

(1) As provided in [39-30-107](#), MCA, "the department of public health and human services shall certify persons with disabilities for the purpose of employment preference."

(2) In order to be eligible for employment preference, a person with a disability must be certified by the department of public health and human services to have, as provided in [39-30-103](#), MCA, a "physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment." The certification process may also consider impairments which limit an individual's ability to know or reason; or an individual's ability to make a choice or decision. The person with a disability shall have a professional diagnosis establishing the disabling condition.

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Medical evidence shall be provided by a licensed physician or a licensed practitioner competent to treat and diagnose the particular disabling condition.

(3) Each disabling condition will be individually evaluated on a case-by-case basis to determine eligibility for employment preference with the exception of those persons specifically excluded in this rule.

(4) As provided in [39-30-103](#), MCA, "the term mental impairment does not include alcoholism or drug addiction and does not include any mental impairment, disease, or defect that has been asserted by the individual claiming the preference as a defense to any criminal charge."

(5) The department of public health and human services will establish a process and standards for certifying persons with disabilities for employment preference. The process shall include, but is not limited to:

(a) a determination established by a professional medical diagnosis that the person has a physical or mental impairment as defined by these rules; and

(b) a determination that the physical or mental impairment substantially limits one or more major life activities and as a consequence of the disability, the person's ability to obtain, retain, or advance in employment is substantially limited; or

(c) a determination by the counselor and medical consultant designated by the department of public health and human services that the disability is so severe or apparent that it has lead to or could lead to employment discrimination which would substantially limit the person's ability to obtain, retain, or advance in employment; or

(d) a determination that the person with a disability is totally disabled, is unable to use the preference because of the disability and therefore the person's spouse is eligible for preference.

(6) Each determination will be provided in writing in a standard form as established by the department of public health and human services. The written notice shall include a statement regarding the duration of the certification. The written notice shall be provided to the person with a disability within 30 days of the receipt of all information necessary to make the certification decision.

(7) The process shall allow for permanent certification of those impairments (in the judgment of the counselor and medical consultant designated by the department of public health and human services) considered to be permanent and shall allow for loss of certification for those impairments which may be considered temporary.

(8) The person requesting certification by the department of public health and human services is responsible for providing all information necessary to document the claim to be certified for employment preference. All costs of obtaining the necessary information, including medical evidence to substantiate the claim, are the responsibility of the person requesting the certification.

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(9) The written notice of certification for an eligible spouse must clearly state the preference-eligible person is an eligible spouse.

(10) The department of public health and human services shall ensure the confidentiality of information gathered when making employment preference determination in accordance with federal and state law and as provided in ARM [2.21.1424](#).

(11) Any person with a disability, as provided in [39-30-103](#), MCA, who is dissatisfied with the department of public health and human services' certification decision regarding eligibility for employment preference, shall be advised of the right to file a request for an administrative review of that action and right to a fair hearing if dissatisfied with the outcome of the administrative review. The administrative review shall be conducted by the administrator of vocational rehabilitative services division or a designee. The fair hearing shall be conducted in accordance with the fair hearing rules of the department of public health and human services as provided for in ARM [46.2.201](#) et seq.

History: [39-30-106](#), MCA; [IMP](#), [39-30-103](#) and [39-30-107](#), MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## [2.21.1428](#) HIRING DECISIONS

(1) As provided in [39-30-206](#), MCA, "If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference."

(2) Written notice must be given to each applicant claiming preference who is actually considered by the public employer as an applicant for a specific vacancy.

(3) Public employers who maintain active application files or conduct continuous recruitment must give written notice to each person claiming preference whose application is active in accordance with the employer's selection procedures and who is actually considered for a specific vacancy. Notice must be given at the time a vacancy is filled or by the end of each month in which a vacancy is filled.

(4) The public employer must maintain a record of which applicants were notified and the date the notification was sent for at least 90 days after notification of the hiring decision.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## [2.21.1429](#) INTERNAL PROCEDURES - ENFORCEMENT OF PREFERENCE

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(1) As provided in [39-30-207](#), MCA, "an applicant who believes he has not been accorded his rights under [the Persons with Disabilities Employment Preference Act, [39-30-101](#), et seq., MCA], may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision."

(2) The written request for an explanation shall contain, but is not limited to, such information as is necessary to determine:

(a) the applicant's name and address;

(b) that the applicant is requesting an explanation from the hiring authority regarding the hiring decision; and

(c) the position for which the person applied.

(3) As provided in [39-30-207](#), MCA, "Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation." The written explanation shall contain specific job-related reasons why the person claiming preference was not hired. The explanation should be dated and identify the specific vacancy in question. The employer shall safeguard the confidentiality of information the employer has considered in accordance with state and federal law and as provided in ARM [2.21.1424](#).

(4) All days are calendar days.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.

## **2.21.1430** EXTERNAL PROCEDURES - ENFORCEMENT OF PREFERENCE

(1) "An applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in district court in the county in which his application was received by the public employer," as provided in [39-30-207](#), MCA.

(2) All days are calendar days.

History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90.

## **2.21.1431** REOPENING THE SELECTION PROCESS

(1) If a court orders a public employer covered by these rules to reopen the selection process for the position involved, the public employer shall repeat the selection process including any job announcement and solicitation of applications. In addition, the public employer shall notify all persons who were previously considered applicants for the position that the position has been reopened. Employment preference shall be applied as specified in these rules.

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History: [39-30-106](#), MCA; [IMP](#), [39-30-101](#) et seq. , MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1990 MAR p. 485, Eff. 3/16/90.

## **2.21.1432 CONFLICT WITH FEDERAL LAW**

(1) As provided in [39-30-108](#), MCA, employment preference does "not apply to work or positions subject to federal laws or regulations, if application of the employment preference conflicts with those laws or regulations."

(2) An agency that believes such a conflict exists shall submit the position and documentation of the laws or regulations in conflict for review by the State Personnel Division, Department of Administration, P.O. Box 200127, Helena, Montana 59620-0127. The division shall determine if the position is excluded from application of the preference.

History: [39-30-106](#), MCA, [IMP](#), [39-30-108](#), MCA; [NEW](#), 1984 MAR p. 425, Eff. 3/16/84; [AMD](#), 1997 MAR p. 2277, Eff. 12/16/97.