94-348 MAINE HUMAN RIGHTS COMMISSION

Chapter 3: EMPLOYMENT REGULATIONS OF THE MAINE HUMAN RIGHTS COMMISSION

SECTION 1. PURPOSE, EFFECT, AND CONSTRUCTION

1. Purpose.

Pursuant to 5 M.R.S. § 4566(7), the Maine Human Rights Commission has adopted the following regulations to implement Subchapter 3 of the Maine Human Rights Act, 5 M.R.S. §§ 4551-4634 ("the Act"), which prohibits employment discrimination because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter 5-B.

Comment [J1]: This sub-section has been changed from current MHRC Employment Reg § 3.01(A). § 3.01(A) provides: "Pursuant to Title 5 M.R.S.A., §4566(7), the Maine Human Rights Commission has adopted the following regulations which are designed to inform employers, labor organizations, employment agencies, and other interested parties of the Commission's interpretation of the Maine Human Rights Act, Title 5 M.R.S.A., §4551, *et seq.*, hereinafter referred to as "the Act"."

2. Effect.

These regulations shall be accorded the full force and effect of interpretative administrative regulations.

Comment [J2]: This sub-section is the same as current MHRC Employment Reg § 3.01(B).

3. Construction.

A. Consistent with the public policy underlying the Act (as expressed in § 4552), and with firmly established principles for the interpretation of such humanitarian legislation, the remedial provisions of the Act shall be given broad construction and its exceptions shall be construed narrowly.

Comment [J3]: This paragraph is the same as current MHRC Employment Reg § 3.01(C)(1).

B. The provisions of these regulations are severable. If any provision or the application of any provision of these regulations to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Comment [J4]: This paragraph is the same as current MHRC Employment Reg § 3.01(C)(2).

C. References to "employer" or "employers" in this chapter state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

Comment [J5]: This paragraph is new; it is identical to EEOC Sex Reg § 1604.1(a).

SECTION 2. DEFINITIONS

Comment [J6]: New definitions have been added compared with current MHRC Employment Reg § 3.02, and the definition of "unlawful discrimination, § 3.02(A), has been removed.

1. *Commission* means the Maine Human Rights Commission established by the Act.

Comment [J7]: This definition is new; it is identical to MHRA § 4553(1).

2. *Covered entity* means an employer, employment agency, labor organization or joint labor-management committee.

Comment [J8]: This is new; it is identical to MHRA § 4553(1-B).

3. *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

Comment [J9]: This is new; it is identical to EEOC ADA Reg § 1630.2(r). The first sentence modifies the definition in MHRA § 4553(1-C), which provides that "'direct threat' means a significant risk to the health or safety of others that can not be eliminated by reasonable accommodation."

A. The duration of the risk;

B. The nature and severity of the potential harm;

C. The likelihood that the potential harm will occur; and

D. The imminence of the potential harm.

4. *Discriminate* includes, without limitation, segregate or separate.

Comment [J10]: This is new; it is the same as the first sentence in MHRA § 4553(2). The remainder of the MHRA definition is covered in other parts of this chapter.

5. *Employee* means an individual employed by an employer. *Employee* does not include any individual employed by that individual's parents, spouse or child, except for purposes of disability-related discrimination, in which case the individual is considered to be an employee.

Comment [J11]: This is new; it is the same as MHRA § 4553(3).

6. *Employer* includes any person in this State employing any number of employees, whatever the place of employment of the employees, and any person outside this State employing any number of employees whose usual place of employment is in this State; any person acting in the interest of any employer, directly or indirectly; and labor organizations, whether or not organized on a religious, fraternal or sectarian basis, with respect to their employment of employees. *Employer* does not include a religious or fraternal corporation or association, not organized for private profit and in fact not conducted for private profit, with respect to employment of its members of the same religion, sect or fraternity, except for purposes of disability-related discrimination, in which case the corporation or association is considered to be an employer.

Comment [J12]: This is new; it is the same as MHRA § 4553(4).

7. *Employment agency* includes any person undertaking with or without compensation to procure opportunities to work, or to procure, recruit, refer or place employees; it includes, without limitation, placement services, training schools and centers, and labor organizations, to the extent that they act as employee referral sources; and it includes any agent of such person.

Comment [J13]: This is new; it is the same as MHRA § 4553(5).

8. *Gender expression* means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth.

Comment [J14]: This is the same as the definition in current MHRC Employment Reg § 3.02(C)(3).

9. *Essential functions*—

Comment [J15]: This is new; it is the same as the definition in EEOC ADA Reg § 1630.2(n). There is not a definition in the MHRA.

A. In general. The term *essential functions* means the fundamental job duties of the employment position the individual with a physical or mental disability holds or desires. The term *essential functions* does not include the marginal functions of the position.

B. A job function may be considered essential for any of several reasons, including but not limited to the following:

(1) The function may be essential because the reason the position exists is to perform that function;

(2) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(3) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

C. Evidence of whether a particular function is essential includes, but is not limited to:

(1) The employer's judgment as to which functions are essential;

(2) Written job descriptions prepared before advertising or interviewing applicants for the job;

(3) The amount of time spent on the job performing the function;

(4) The consequences of not requiring the incumbent to perform the function;

(5) The terms of a collective bargaining agreement;

(6) The work experience of past incumbents in the job; and/or

(7) The current work experience of incumbents in similar jobs.

10. *Gender identity* means an individual's gender-related identity, whether or not that identity is different from that traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

Comment [J16]: This is the same as the definition in current MHRC Reg § 3.02(C)(2).

11. *Labor organization* means a labor organization and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

Comment [J17]: This is new; it is the same as the definition in Title VII § 2000e(d), except "industry affecting commerce" has been removed. There is not a definition in the MHRA.

12. *Normal retirement age* means the specified age, the years of service requirement or any age and years of service combination at which a member may become eligible for retirement benefits. This sub-section may not be construed to require the mandatory retirement of a member or to deny employment to any person based solely on that person's normal retirement age.

Comment [J18]: This is new; it is the same as the definition in MHRA, § 4553(6-A).

13. *Person* includes one or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, labor organizations, mutual companies, joint-stock companies and unincorporated organizations and includes the State and all agencies thereof.

Comment [J19]: This is new; it is the same as in the MHRA § 4553(7).

14. *Physical or mental disability* has the meaning set forth in the Act, 5 M.R.S. § 4553-A.

Comment [J20]: This is new. Further interpretation would be "major substantive," 5 M.R.S. § 4566(7), and will be undertaken at another time.

15. *Protected class* means race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, a previous assertion of a claim or right under former Title 39 or Title 39-A or previous actions that are protected under Title 26, chapter 7, subchapter 5-B. *Protected class* does not include discrimination governed by 39-A M.R.S. § 353.

Comment [J21]: This is new; it lists the protected classes in Subchapter 3 of the MHRA.

16. *Qualified individual with a disability* means an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.

Comment [J22]: This is new; it is the same as in MHRA § 4553(8-D). The definition in the EEOC ADA Reg, 1630.2(m), includes an additional sentence, "the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires," which is not included here because it is not in the MHRA.

17. *Reasonable accommodation* –

A. *Reasonable Accommodation* means:

Comment [J23]: This is new; it is the same as in the EEOC ADA reg § 1630.2(o)(1). A definition is not in the MHRA.

(1) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(2) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(3) Modifications or adjustments that enable a covered entity's employee with a physical or mental disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

B. *Reasonable accommodation* may include but is not limited to:

Comment [J24]: This is new; it is the same as in the MHRA § 4554(9-A). The same language is also in EEOC ADA Reg § 1630.2(o)(2).

(1) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

C. To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a physical or mental disability in need of the accommodation. This process should identify the precise limitations resulting from the physical or mental disability and potential reasonable accommodations that could overcome those limitations.

Comment [J25]: This is new; it is the same as EEOC ADA Reg § 1630.2(o)(3).

D. A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of physical or mental disability under the "actual disability" prong (5 M.R.S. § 4553-A(1)(A, B)), or "record of" prong (5 M.R.S. § 4553-A(1)(C)), but is not required to provide a reasonable accommodation to an individual who meets the definition of physical or mental disability solely under the "regarded as" prong (5 M.R.S. § 4553-A(1)(D)).

Comment [J26]: This is new; it is substantively the same as EEOC ADA Reg § 1630.2(o)(4).

18. *Religion* includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Comment [J27]: This is new; it is the same as in Title VII § 2000e(j).

19. *Sexual orientation* means a person's actual or perceived heterosexuality, bisexuality, homosexuality, gender identity, or gender expression.

Comment [J28]: This is the same as current MHRC Employment Reg § 3.02(C).

20. *Test* means all employee selection procedures used to make employment decisions. Employee selection procedures include the evaluation of applicants, candidates or employees on the basis of stated minimum and preferred job qualifications, application forms, interviews, performance examinations, paper and pencil examinations, performance in training programs or probationary periods and any other procedures used to make an employment decision whether administered by an employer, employment agency, labor organization, licensing or certification board or apprenticeship committee. Employment decisions include, but are not limited to hiring, promotion, demotion, membership in a labor organization, referral, retention, licensing, certification and membership in an apprenticeship program.

Comment [J29]: This is the same as current MHRC Employment Reg § 3.02(B).

21. *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the following factors:

Comment [J30]: This is new. The opening language is the same as EEOC ADA Reg. § 1630.2(p)(1). It is somewhat different from the language in MHRA § 4553(9-B), which provides, "… 'Undue hardship' or 'undue burden' mean an action requiring undue financial or administrative hardship…."

A. The nature and cost of the accommodation needed under the Act, taking into consideration the availability of tax credits and deductions, and/or outside funding;

Comment [J31]: The language before the comma is the same as MHRA § 4553(9-B)(A). The language after the comma is not in the MHRA; it is the same as EEOC ADA Reg § 1630.2(p)(2)(i).

B. The overall financial resources of the facility or facilities involved in the action, the number of persons employed at the facility, the effect on expenses and resources;

Comment [J32]: This is the same as MHRA § 4553(9-B)(B), except "or the impact otherwise of the action upon the operation of the facility" appears in the MHRA but not here. That language is added as paragraph (E) below, making both (B) and (E) the same as EEOC ADA Reg § 1630.2(p)(2)(ii, v).

C. The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees and the number, type and location of its facilities;

Comment [J33]: This is the same as MHRA § 4553(9-B)(C); it is also the same as EEOC ADA Reg § 1630.2(p)(2)(iii).

D. The type of operation or operations of the covered entity, including the composition, structure and functions of the work force of the entity, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity;

Comment [J34]: This is the same as MHRA § 4553(9-B)(D); it is also substantively identical to EEOC ADA Reg § 1630.2(p)(2)(iv).

E. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Comment [J35]: E. This paragraph is not in the MHRA; it is the same as ADA Reg § 1630.2(p)(2)(v).

F. The extent to which current costs of accommodations have been minimized by past efforts to provide equal access to persons with disabilities;

Comment [J36]: This is the same as MHRA § 4553(9-B)(F). There is not corresponding language in the EEOC ADA Reg. Note: MHRA § 4553(9-B)(E) has been omitted here because it is covered by (A).

G. The extent to which resources spent on improving inaccessible equipment or service could have been spent on making an accommodation so that

Comment [J37]: This is the same as MHRA § 4553(9-B)(G). There is not a corresponding category in the EEOC ADA Reg.

service or equipment is accessible to individuals with disabilities, as well as to individuals without disabilities;

H. Documented good faith efforts to explore less restrictive or less expensive alternatives;

I. The availability of equipment and technology for the accommodation;

J. Efforts to minimize costs by spreading costs over time; and

K. The extent to which resources saved by failing to make an accommodation for persons who have disabilities could have been saved by cutting costs in equipment or services for the general public.

22. *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

Comment [J38]: This is the same as MHRA § 4553(9-B)(H). There is not a corresponding category in the EEOC ADA Reg.

Comment [J39]: This is the same as MHRA § 4553(9-B)(I). There is not a corresponding category in the EEOC ADA Reg.

Comment [J40]: J. This is the same as MHRA § 4553(9-B)(K). There is not a corresponding category in the EEOC ADA Reg.

Comment [J41]: K. This is the same as MHRA § 4553(9-B)(L). There is not a corresponding category in the EEOC ADA Reg.

Comment [J42]: This is new. It is the same as EEOC ADA Reg § 1630.2(q). There is not a corresponding definition in the MHRA.

SECTION 3. UNLAWFUL EMPLOYMENT DISCRIMINATION

Comment [J43]: This section is new.

1. It is unlawful employment discrimination, except when based on a bona fide occupational qualification or as otherwise permitted by this chapter:

A. For any employer to:

(1) Fail or refuse to hire or otherwise discriminate against any applicant for employment because of protected class;

(2) Because of protected class, discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or

(3) In recruiting individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their protected class.

Comment [J44]: This paragraph is substantively identical to MHRA § 4572(1)(A).

B. For any employment agency to:

(1) Fail or refuse to classify properly, refer for employment or otherwise discriminate against any individual because of protected class; or

Comment [J45]: This paragraph is substantively identical to MHRA § 4572(1)(B).

(2) Comply with an employer's request for the referral of job applicants if a request indicates either directly or indirectly that the employer will not afford full and equal employment opportunities to individuals regardless of their protected class.

C. For any labor organization to:

Comment [J46]: This paragraph is substantively identical to MHRA § 4572(1)(C), except apprenticeship programs are covered in a different section of this chapter.

(1) Exclude from apprenticeship or membership or to deny full and equal membership rights to any applicant for membership because of protected class;

(2) Whether or not authorized or required by the constitution or bylaws of that labor organization or by a collective labor agreement or other contract, deny a member full and equal membership rights; expel from membership; penalize; or otherwise discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, representation, grievances or any other matter directly or indirectly related to membership or employment because of protected class;

(3) Fail or refuse to classify properly or refer for employment or otherwise discriminate against any member because of protected class; or

(4) Cause or attempt to cause an employer to discriminate against an individual in violation of the Act.

D. For any employer, employment agency or labor organization, prior to employment or admission to membership of any individual, to:

(1) Elicit or attempt to elicit information directly or indirectly pertaining to protected class;

Comment [J47]: This subparagraph is substantively identical to MHRA § 4572(1)(D)(1).

(2) Make or keep a record of protected class, except under physical or mental disability when an employer requires a physical or mental examination prior to employment, a privileged record of that examination is permissible if made and kept in compliance with this chapter and the Act;

Comment [J48]: This subparagraph is substantively identical to MHRA § 4572(1)(D)(2).

(3) Use any form of application for employment or personnel or membership blank containing questions or entries directly or indirectly pertaining to protected class. This subparagraph does not prohibit any officially recognized government agency from keeping records permitted to be kept under this chapter or the Act in order to provide free services to individuals requesting rehabilitation or employment assistance;

Comment [J49]: This subparagraph is substantively identical to MHRA § 4572(1)(D)(3).

(4) Print, publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon protected class;

Comment [J50]: This subparagraph is substantively identical to MHRA § 4572(1)(D)(4).

(5) Handwrite, print or circulate any interoffice or interagency communication, job order, advertisement, brochure, or notice that expresses directly or indirectly a preference or specification on the basis of protected class unless the expression is made in accordance with a corrective employment program such as an affirmative action plan; or

Comment [J51]: This subparagraph is not in the MHRA. It is substantively identical to current MHRC Employment Reg § 3.04(B)(2), here applicable to all "protected classes."

(6) Establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the protected class of that group.

Comment [J52]: This subparagraph is substantively identical to MHRA § 4572(1)(D)(5).

E. For an employer, employment agency or labor organization to discriminate in any manner against individuals because they have opposed a practice that would be a violation of the Act or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under the Act. Such action or assistance includes, but is not limited to, filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process and educating others concerning the coverage of the Act.

Comment [J53]: E. The first sentence in this paragraph is substantively identical to MHRA § 4572(1)(E). The second is not in the MHRA. It is substantively identical to current MHRC Employment Reg § 3.13.

2. Unlawful employment discrimination also includes, but is not limited to, the prohibited acts described in § 4 and §§ 6 through 16 of this chapter.

SECTION 4. PRE-EMPLOYMENT OR ADMISSION INQUIRIES

Comment [J54]: This section is similar to former MHRC Employment Regs §§ 3.06(B), 3.07(B), 3.09(B), 3.10(B), 3.11(D), and 3.12(C), which are combined and reorganized.

1. Pre-employment or admission inquiries prohibited.

A. It is unlawful employment discrimination, except when based on a bona fide occupational qualification, for any employer, employment agency or labor organization, prior to employment or admission to membership of any individual, to elicit or attempt to elicit information directly or indirectly pertaining to protected class or use any form of application for employment or personnel or membership blank containing questions or entries directly or indirectly pertaining to protected class.

Comment [J55]: The first sentence of this paragraph is substantively identical to MHRA § 5 M.R.S. § 4572(1)(D)(1,3). It does not appear in the current MHRC Employment Reg. It replaces the following language in current Regs: "Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to [protected class] shall be unlawful unless based on a bona fide occupational qualification."

Pre-employment or admission inquiries covered by this section include, but are not limited to, questions asked on application forms, questions

asked in employee interviews, questions asked of references or former employers, requests for photographs or any other kind of inquiry used before selection.

Examples of unlawful pre-employment or admission inquiries include the use of the following inquiries:

(1) NAME. Where original name of applicant has been changed by court order, inquiries that could indicate or suggest religious group or national origin or ancestry by requesting any former names, including maiden names, ever used by applicant; names or former names of spouse, parents or other relatives.

(2) BIRTHPLACE. Requirement that applicant submit birth certificate or baptismal record, which could indicate religious denomination, national origin or ancestry. Inquiries into the place of birth of applicant, spouse, parents or other relatives could indicate national origin or ancestry.

(3) CITIZENSHIP. Whether applicant is native born or naturalized citizen; country of former citizenship or date of naturalization; citizenship of spouse, parents or other relatives. Nothing in this chapter, however, precludes an employer from asking questions necessary to comply with the Immigration Reform and Control Act of 1986.

Comment [J56]: This reference has been added and replaces language from former MHRC Employment Reg § 3.11(D): "Nothing in this regulation, however, precludes an employer from inquiring whether an applicant for employment is a citizen of the United States or whether the applicant, if not a citizen, has the legal right to remain permanently in the United States."

(4) NATIONAL ORIGIN OR ANCESTRY. Nationality, lineage ancestry or descent of applicant, spouse, parents or other relatives; language commonly used by applicant, or how applicant acquired ability to read, write or speak a foreign language.

(5) MILITARY SERVICE. Applicant's military experience in armed forces, other than U.S., draft classification or other military eligibility, which could indicate national origin or ancestry.

(6) RELIGION. Applicant's religious denomination, affiliation, church, parish, pastor, or religious holidays observed; representing to applicants that employer is of a predominant or particular religious orientation.

(7) EDUCATION. Inquiry asking specifically for the religious affiliation of applicant's school.

(8) REFERENCES. Requirement of submission of a religious reference.

(9) WORK SCHEME. Any inquiry into willingness to work any particular religious holiday.

(10) ORGANIZATIONS. Request a list of all clubs, social fraternities, societies, lodges, or organizations to which the applicant belongs, other than trade, professional or service organizations.

B. It is unlawful employment discrimination for an employer, employment agency or labor organization to request information from a member of one protected class that would not be requested from a member of another, e.g., one cannot ask a female questions concerning the care of her children during employment unless the same questions are asked of males; ask older applicants questions concerning their health if the employer does not ask the same questions of younger applicants.

Comment [J57]: Employment agencies and labor organizations have been added compared with the current MHRC Employment Reg.

C. It is unlawful employment discrimination to deny equal consideration for employment, promotion or any other term, condition or privilege of employment or membership in a labor organization because that person refused to answer a pre-employment or admission inquiry if that inquiry is prohibited by this chapter and the Act.

Comment [J58]: The reference to labor organizations has been added compared with the current MHRC Employment Reg.

2. Pre-employment or admission inquiries permitted.

A. Pre-employment or admission inquiries that are made in conformance with the instructions from, or requirements of, an agency or agencies of the local, state or federal government in connection with the administration of fair employment practices programs will not constitute evidence of unlawful employment discrimination under the Act.

Comment [J59]: 2. "Or admission" has been added compared with the current MHRC Employment Reg.

B. It is not an unlawful employment practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of the Act.

Comment [J60]: This paragraph is substantively identical to MHRA § 4573(3).

C. Subsequent to employment or admission to membership, it is not unlawful employment discrimination to make a record of such information or features concerning an individual as are needed in good faith for the purpose of identifying that individual, provided these records are intended for and used in good faith solely for such identification, and not for the purpose of unlawful discrimination in violation of the Act. Records of features regarding physical or mental disability that are collected must be collected and maintained on separate forms and in separate files and be treated as confidential records.

Comment [J61]: "Or admission to membership" has been added compared with the current MHRC Employment Reg. This paragraph is substantively identical to MHRA § 4573(2).

D. Physical or mental disability. A covered entity may make pre-employment or membership inquiries as permitted by § 13(3) of this chapter.

Comment [J62]: This is new compared with the current MHRC Employment Reg.

SECTION 5. JOB ADVERTISING

Comment [J63]: Current MHRC Employment Reg § 3.04 addressed job advertising and solicitation. Only advertising is covered here because solicitation is covered under "unlawful employment discrimination" above. This section is substantively identical to former § 3.04(A), except all "protected classes" are covered here, consistent with the MHRA.

1. In general. It shall be an unlawful employment practice for any person to print or publish or cause to be printed or published any notice or advertisement relating to employment or membership in a labor organization indicating any preference, limitation, specification or discrimination based upon protected class, unless there is a bona fide occupational qualification for such preference, limitation, specification or discrimination.

2. The Commission will consider to be a violation of the Act the acceptance for publication, by any communications medium, of any notice or advertisement relating to employment preference, limitation, specification or discrimination based on protected class, unless there is a bona fide occupational qualification for such preference, limitation, specification or discrimination. Placement of any notice or advertisement of job opportunities in newspaper columns headed "Male" or "Female" will be considered a violation of the Act.

Comment [J64]: Note: Current § 3.06(H) (prohibiting sex-specific job titles in advertisements) is not being duplicated in this revised chapter in light of this sub-section, which covers the same issue.

3. An employer, union, employment agency, newspaper or other publication may, and is encouraged to, make an inquiry of the Commission as to whether protected class is a bona fide occupational qualification for a particular job which they intend to publish, print or circulate or cause to be published, printed or circulated. The Commission shall, as soon as possible, give informal opinions in response to such inquiries.

   An informal opinion rendered orally or in writing by the Commission prior to the publication of any advertisement in response to such an inquiry shall be binding for the purpose of this chapter, except in those instances in which the inquiry has not fully and accurately disclosed the relevant facts regarding the particular job in question.

   The Commission shall maintain records as to each inquiry made pursuant to this section, to include the name, title and address of the caller, a summary of the job and job duties, the bases for the exception claimed, the time, date and identification number of the inquiry and a record of the opinion given in response to the inquiry.

   A newspaper or other publication shall not be in violation of this section where it has accepted any specific advertisement in good faith and in reasonable reliance upon the representations of the person placing the advertisement that he/she has obtained from the Commission an opinion that there is a bona fide occupational qualification for the specific job advertised together with the identification number of that opinion.

4. It is not unlawful for employers engaged in corrective employment programs, or employment or referral agencies, to print or cause to be printed any advertisement which encourages applications from persons who are members of classes protected by the Act. The term "corrective employment program" means any affirmative action or other remedial program designed to increase the number of protected class employees in any industry, occupation, or place of work in order to correct the effects of past limited employment opportunities for members of the protected class. All advertising may include positive statements such as "We hire people with disabilities" or "We are an Equal Employment Opportunity Employer."

SECTION 6. PRE-EMPLOYMENT TESTS

Comment [J65]: This section is substantively identical to current MHRC Employment Reg § 3.05, but case citations have been omitted.

1. After an applicant for employment, candidate for membership in a labor organization or employee has established that a test, used by an employer, employment agency, labor organization, licensing certification board or apprenticeship committee for the purpose of making an employment decision, disproportionately excludes members of a protected class, the burden is on the person or organization requiring the test to show that the test standard is manifestly related to the job. In other words, it must be shown that performance on the test is predictive of how well the examinee will perform the job and that the test is justified by business necessity.

2. This section applies to employers having any number of employees. When evidence of test validity is presented to the Commission by an entity that is subject to the federal Uniform Guidelines on Employee Selection, the Commission will consider the applicable standards set forth in the Uniform Guidelines and will look favorably upon evidence presented which meets those standards.

SECTION 7. SEPARATE LINES OF PROGRESSION AND SENIORITY SYSTEMS

Comment [J66]: This section is substantively identical to current MHRC Employment Reg §§ 3.06(C), 3.07(C), 3.08(F), 3.09(D), 3.11(E), and 3.12(D), which have been combined. 3.07(C)((3) (allowing maximum age in apprenticeship programs) is included under a different section of this chapter.

1. It is unlawful employment discrimination for any employer, employment agency or labor organization to classify any job according to protected class or to maintain separate lines of progression or separate seniority lists based on protected class where this would adversely affect any employee unless justified by a bona fide occupational qualification for that job. For example, employment practices are unlawful that arbitrarily classify jobs so that:

   A. A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

Comment [J67]: These examples are based on EEOC Sex Reg § 1604.3(a)(1,2). They are not in the current MHRC Employment Reg.

   B. A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

2. A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes unlawful employment discrimination if it operates as a form of classification by protected class, or creates unreasonable obstacles to the advancement by members of a protected class into jobs that those members are capable of performing.

SECTION 8. FRINGE BENEFITS

Comment [J68]: This section is substantively identical to current MHRC Employment Reg §§ 3.06(D), 3.07(D), 3.08(G), 3.09(D), 3.10(E), 3.11(F), and 3.12(F), which have been combined. 3.07(D)(3) is included under a different section in this chapter.

1. "Fringe benefits" as used herein includes medical, hospital, accident, disability, life insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits; and other terms, conditions; and privileges of employment.

2. It is unlawful employment discrimination for an employer, employment agency, or labor organization to discriminate because of protected class with regard to fringe benefits.

3. Discrimination because of sex with regard to fringe benefits.

   A. Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found to be prima facie evidence of unlawful employment discrimination on the basis of sex.

   B. It shall be unlawful employment discrimination for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

   C. It shall not be a defense under the Act to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

   D. It shall be unlawful employment discrimination for an employer to have a pension or retirement plan which establishes different optional or

compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

E. The Act does not require any employer to grant paid or unpaid child care leave of absence. Any employer providing such leaves, however, must do so without regard to the sex of the person applying for such leave.

SECTION 9. EMPLOYMENT AGENCIES

1. It is unlawful employment discrimination, except when based on a bona fide occupational qualification for any employment agency to fail or refuse to classify properly, refer for employment or otherwise discriminate against any individual because of protected class or comply with an employer's request for the referral of job applicants if a request indicates either directly or indirectly that the employer will not afford full and equal employment opportunities to individuals regardless of their protected class.

2. Employment agencies that deal exclusively with one protected class are engaged in unlawful employment discrimination, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which that protected class is a bona fide occupational qualification.

3. An employment agency that receives a job order containing an unlawful protected-class specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the protected-class specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

SECTION 10. HARASSMENT

1. Harassment on the basis of protected class is a violation of Section 4572 of the Act. Unwelcome advances because of protected class (e.g., sexual advances or requests for sexual favors), comments, jokes, acts and other verbal or physical conduct related to protected class (e.g., of a sexual, racial, or religious nature) or directed toward a person because of protected class constitute unlawful harassment when:

A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or union membership;

Comment [J69]: This section is based on current MHRC Employment Reg §§ 3.06(G), 3.07(E), 3.08(H), 3.09(E), 3.10(F), 3.11(G), and 3.12(G), which have been combined.

Comment [J70]: This sub-section is not in the current MHRC Employment Reg. It is substantively identical to MHRA § 4572(1)(B).

Comment [J71]: This sub-section is not in the current MHRC Employment Reg. It is similar to EEOC Sex Reg § 1604.6(a).

Comment [J72]: This section is based on current MHRC Employment Reg §§ 3.06(I), 3.07(F), 3.08(I), 3.09(F), 3.10(G), 3.11(H), and 3.12(H), which have been combined.

Comment [J73]: The language "or directed toward a person because of protected class" is new. It is based on the Law Court's decision in *Finnemore v. Bangor Hydro-Electric Co.*, 645 A.2d 15, 17 (Me. 1994)("A test for determining whether a comment is of a religious nature is whether it occurred because of an individual's religious beliefs or would not have occurred but for the individual's religion.").

Comment [J74]: Compared with the current MHRC Employment Regs, "union membership" has been added to this paragraph because the MHRA, § 4572(1)(C), applies to labor organizations.

B. Submission to or rejection of such conduct by an individual is used as the basis for employment or union membership decisions affecting such individual; or

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

2. An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer" in this section) is responsible for its acts and those of its agents and supervisory employees with respect to unlawful harassment. When the supervisor's harassment culminates in a tangible employment or union membership action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

A. That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

B. That the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

3. With respect to persons other than those mentioned in sub-section 2 of this section, an employer is responsible for acts of unlawful harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct unless it can show that it took immediate and appropriate corrective action. In reviewing cases involving non-employees, the Commission will consider the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of such non-employees.

4. In determining whether alleged conduct constitutes unlawful harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the alleged incidents and the context in which they allegedly occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

5. Prevention is the best tool for the elimination of unlawful harassment. An employer should take all steps necessary to prevent unlawful harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise

Comment [J75]: "Union membership" is added here for the same reason.

Comment [J76]: Compared with the current MHRC Employment Regs, the term "unreasonably interfering" replaces "substantially interfering." The new language is the same as the EEOC Sex Reg § 1604.11. "Union environment" is added.

Comment [J77]: "Union membership" is added.

Comment [J78]: Compared with the current MHRC Employment Reg, this sub-section replaces the language, "An employer may rebut apparent liability for such acts by showing," with, "unless it can show," in the first sentence, and adds the second sentence. These changes make the sub-section substantively identical to EEOC Sex Reg § 1604.11(d,e), with added protected classes.

Comment [J79]: This sub-section is not in the current MHRC Employment Regs. It is substantively identical EEOC Sex Reg § 1604.11(b), with added protected classes.

Comment [J80]: 5. This sub-section is not in the current MHRC Employment Regs. It is substantively identical to EEOC Sex Reg § 1604.11(f), with added protected classes.

the issue of harassment under the Act, and developing methods to sensitize all concerned.

6. Other prohibited practices related to sexual and sexual orientation harassment. Where employment or union opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex or sexual orientation discrimination against other persons who were qualified for but denied that employment or union opportunity or benefit.

Comment [J81]: This sub-section is not in the current MHRC Employment Reg. It is substantively identical to EEOC Sex Reg § 1604.11(g), with the inclusion of sexual orientation and "union."

SECTION 11. SEX DISCRIMINATION

In addition to any other unlawful practice on the basis of sex prohibited by this chapter or the Act:

1. Discrimination against married women.

Comment [J82]: This sub-section is substantively identical to current MHRC Employment Reg § 3.06(E).

It is unlawful employment discrimination to forbid or restrict the employment of married women when such a prohibition or restriction is not applicable to married men.

2. Discrimination on the basis of pregnancy and related conditions.

Comment [J83]: This sub-section is substantively identical to current MHRC Employment Reg § 3.06(F), with the changes noted below.

A. For the purpose of this chapter, the word *sex* includes pregnancy and medical conditions which result from pregnancy.

Comment [J84]: This paragraph is substantively identical to MHRA § 4572-A(1). It is not in the current MHRC Employment Reg.

B. Pregnant women who are able to work. It shall be unlawful employment discrimination in violation of this chapter and the Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.

Comment [J85]: This paragraph is substantively identical to MHRA § 4572-A(2). It is not in the current MHRC Employment Reg.

C. Pregnant women who are not able to work. It shall also be unlawful employment discrimination in violation of this chapter and the Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.

Comment [J86]: This paragraph is substantively identical to MHRA § 4572-A(3). It is not in the current MHRC Employment Reg.

D. Any written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is prima facie evidence of unlawful employment discrimination.

E. Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, or related medical conditions, and recovery therefrom, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.

F. Any written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

Comment [J87]: This paragraph has been changed from current MHRC Employment Reg § 3.06(F)(3) to include payment under disability insurance or sick leave plans, to cover "related medical conditions" in addition to pregnancy and childbirth, and to include the last sentence. The new language is substantively identical to EEOC Sex Reg § 1604.10(b).

G. Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination is unlawful employment discrimination on the basis of sex if it has a disparate impact on employees of one sex and is not justified as a business necessity.

H. Employer not responsible for additional benefits. Nothing in this sub-section may be construed to mean that an employer, employment agency or labor organization is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions that result from pregnancy, if the employer, employment agency or labor organization does not also provide sick leaves, leaves of absence, medical benefits or other benefits for the employer's other employees and is not otherwise required to provide those leaves or benefits under other state or federal laws.

Comment [J88]: This exception is substantively identical to MHRA § 4572-A(4). It is not in the current MHRC Employment Reg.

SECTION 12. AGE DISCRIMINATION

In addition to any other unlawful practice on the basis of age prohibited by this chapter or the Act:

1. Mandatory retirement age prohibited.

Comment [J89]: This sub-section is substantively identical to MHRA § 4574, but the federal exception is in another section of this chapter. There is not a similar provision in the current MHRC Employment Reg.

A. Definitions. As used in this sub-section, unless the context otherwise indicates, the following terms shall have the following meanings:

(1) *Employer* shall mean any individual or type of organization, including domestic and foreign corporations and partnerships, doing business in the State. *Employer* also includes the State or any local government, and any department, agency, special purpose district or other instrumentality of the State, 2 or more states or a local government.

Comment [J90]: The first sentence is substantively identical to MHRA § 4574(1)(A); the second is added to reflect Legislative intent in the MHRA, § 4575, that the prohibition on mandatory retirement age extends to public sector employment.

(2) *Normal retirement age* means the specified age, the years of service requirement or any age and years of service combination at which a member may become eligible for retirement benefits. This subparagraph may not be construed to require the mandatory retirement of a member or to deny employment to any person based solely on that person's normal retirement age.

Comment [J91]: This definition is substantively identical to MHRA § 4553(6-A).

B. Unlawful employment discrimination. It shall be unlawful employment discrimination:

(1) For any employer to fail or refuse to hire any applicant for employment because of the age of the individual; or

(2) For any employer to require or permit, as a condition of employment, any employee to retire at or before a specified age or after completion of a specified number of years of service.

C. This sub-section shall not be construed to prohibit the use of a normal retirement age, provided that normal retirement age and the accrual or awarding of pension or retirement benefits shall not be used in any way to require the retirement of an employee or to deny employment to a person.

D. Applicability. This sub-section shall apply to all employers in the State.

SECTION 13. PHYSICAL OR MENTAL DISABILITY DISCRIMINATION

In addition to any other unlawful practice on the basis of physical or mental disability prohibited by this chapter or the Act:

1. Discrimination prohibited.

Comment [J92]: This sub-section is new. It is based on the EEOC ADA Regs and the MHRA §§ 4553(2), 4572(2).

It is unlawful employment discrimination:

A. In general. For a covered entity to discriminate on the basis of physical or mental disability against a qualified individual in regard to:

Comment [J93]: This paragraph is substantively identical to EEOC ADA Reg § 1630.4(a)(1).

(1) Recruitment, advertising, and job application procedures;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(7) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(8) Activities sponsored by a covered entity, including social and recreational programs; and/or

(9) Any other term, condition, or privilege of employment.

B. Limiting, segregating, and classifying. For a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of physical or mental disability.

Comment [J94]: This paragraph is substantively identical to EEOC ADA Reg § 1630.5. It is substantively identical to MHRA § 4553(2)(A).

C. Contractual or other relationships.

Comment [J95]: This paragraph is substantively identical to EEOC ADA Reg § 1630.6, which interprets a provision in the ADA that is substantively identical to MHRA § 4553(2)(B).

(1) In general. For a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(2) Contractual or other arrangement defined. The phrase contractual or other arrangement or relationship includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization

providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(3) Application. This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

D. Standards, criteria, or methods of administration. For a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

Comment [J96]: This paragraph is substantively identical to EEOC ADA Reg § 1630.7. It is substantively identical to MHRA § 4553(2)(C).

(1) That have the effect of discrimination on the basis of physical or mental disability; or

(2) That perpetuate the discrimination of others who are subject to common administrative control.

E. Relationship or association with an individual with a disability. For a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

Comment [J97]: This paragraph is substantively identical to EEOC ADA Reg § 1630.8. It is the same as MHRA § 4553(2)(D), except that "a family, business, social or other relationship or association" is added instead of only "relationship or association." The ADA Reg interprets language in the ADA that is identical to that in the MHRA.

F. Not making reasonable accommodation.

(1) For a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

Comment [J98]: This subparagraph is substantively identical to EEOC ADA Reg § 1630.9(a). It is substantively identical to MHRA § 4553(2)(E).

(2) For a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

Comment [J99]: This subparagraph is substantively identical to EEOC ADA Reg § 1630.9(b). It is substantively identical to MHRA § 4553(2)(F).

(3) An individual with a physical or mental disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and

Comment [J100]: This subparagraph is substantively identical to EEOC ADA Reg § 1630.9(d). The MHRA, § 4554(3), provides, "Nothing in this Act may be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity or benefit that the individual chooses not to accept." Note: § 1630.9(c) is not included here because it deals with technical assistance under the ADA.

cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of physical or mental disability under the "actual disability" prong (5 M.R.S. § 4553-A(1)(A, B)), or "record of" prong (5 M.R.S. § 4553-A(1)(C)), but is not required to provide a reasonable accommodation to an individual who meets the definition of physical or mental disability solely under the "regarded as" prong (5 M.R.S. § 4553-A(1)(D)).

Comment [J101]: This subparagraph is substantively identical to EEOC ADA Reg § 1630.9(e). There is not a corresponding provision in the MHRA.

G. Qualification standards, tests, and other selection criteria.

Comment [J102]: This paragraph is substantively identical to EEOC ADA Reg § 1630.10. Subparagraph (1) is the same as MHRA § 4553(2)(G), but "on the basis of disability" does not appear in § 4553(2)(G). Subparagraph (2) is not in the MHRA. The ADA Reg interprets a substantively identical provision in the ADA to MHRA § 4553(2)(G).

(1) In general. For a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a physical or mental disability or a class of individuals with disabilities, on the basis of physical or mental disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

(2) Qualification standards and tests related to uncorrected vision. A covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a physical or mental disability, but must be adversely affected by the application of the standard, test, or other criterion.

H. Administration of tests. For a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a physical or mental disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Comment [J103]: This paragraph is substantively identical to EEOC ADA Reg § 1630.11. It is substantively identical to MHRA § 4553(2)(H).

2. Prohibited medical examinations and inquiries.

Comment [J104]: This sub-section is new. It is substantively identical to EEOC ADA Reg § 1630.13. It is based on MHRA § 4572(2)(A through F).

A. Pre-employment examination or inquiry. Except as permitted by sub-section (3) of this section, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a physical or mental disability or as to the nature or severity of such physical or mental disability.

B. Examination or inquiry of employees. Except as permitted by sub-section (3) of this section, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a physical or mental disability or as to the nature or severity of such physical or mental disability.

3. Medical examinations and inquiries specifically permitted.

Comment [J105]: This sub-section is new. It is substantively identical to EEOC ADA Reg § 1630.14. It is based on MHRA § 4572(2)(A through F).

A. Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

B. Employment entrance examination. A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of physical or mental disability.

(1) Information obtained under paragraph (B) of this sub-section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the physical or mental disability might require emergency treatment; and

(c) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this chapter or the Act.

(3) Medical examinations conducted in accordance with paragraph (B) of this sub-section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with physical or mental disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part.

C. Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (C) of this sub-section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the physical or mental disability might require emergency treatment; and

(c) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (C) of this sub-section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this chapter or the Act.

D. Other acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (D) of this sub-section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the physical or mental disability might require emergency treatment; and

(c) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (D) of this sub-section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this chapter or the Act.

E. When a covered entity is taking remedial action to correct the effects of past discrimination, when a covered entity is taking voluntary action to overcome the effects of conditions that, in the past, resulted in limited employment opportunities for individuals with physical or mental disabilities or when a covered entity is taking other affirmative action, covered entity may ask applicants to what extent they have a physical or mental disability, provided that:

Comment [J106]: This paragraph is not in the EEOC ADA Reg. It is taken from current MHRC Employment Reg § 3.08(E)(2).

(1) The covered entity states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The covered entity states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in subparagraph (B)(1) of this sub-section, that refusal to provide it will not subject the applicant or employee to any adverse treatment and that it will be used only in accordance with this chapter and the Act.

SECTION 14. RELIGIOUS DISCRIMINATION

In addition to any other unlawful practice on the basis of religion prohibited by this chapter or the Act:

1. "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in this chapter includes both religious observances and practices, as stated in § 2(18) of this chapter.

Comment [J107]: This sub-section is substantively identical to EEOC Religion Reg § 1605.1, except it does not include the sentence, "The Commission has consistently applied this standard in its decisions." There is not a similar provision in the current MHRC Employment Reg or the MHRA.

2. Reasonable accommodation without undue hardship.

A. Duty to Accommodate. It is unlawful employment discrimination for an employer, employment agency or labor organization (hereinafter collectively referred to as "employer" in this section) to fail to reasonably accommodate the religious practices of an employee or member or prospective employee or member, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

B. Reasonable accommodation.

(1) After an employee or prospective employee or member notifies the employer of his or her need for a religious accommodation, the employer has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available that would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

Comment [J108]: This sub-section is substantively identical to EEOC Religion Reg § 1605.2. It replaces current MHRC Employment Reg § 3.10(C).

(a) The alternatives for accommodation considered by the employer; and

(b) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment or union opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer must offer the alternative which least disadvantages the individual with respect to his or her employment or union opportunities.

C. Alternatives for accommodating religious practices.

(1) Employees or members and prospective employees or members most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices, which the Commission believes that employers should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives that would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling that may conflict with religious practices and cause an individual to request an accommodation. The principles expressed in this chapter apply as well to such requests for accommodation.

(a) Voluntary substitutes and “swaps”.

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this that employers should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(b) Flexible scheduling.

One means of providing reasonable accommodation for the religious practices of employees or members or prospective employees or members that employers should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.

(c) Lateral transfer and change of job assignments.

When an employee or member cannot be accommodated either as to his or her entire job or an assignment within the job, employers should consider whether or not it is possible to change the job assignment or give the employee or member a lateral transfer.

(2) Payment of dues to a labor organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

D. Undue hardship.

(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's or member's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a de minimis cost". *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The Commission will determine what constitutes "more than a de minimis cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra*, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see division C(1)(a) of this sub-section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Act or this chapter precludes an employer from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

3. Selection practices.

Comment [J109]: This sub-section is substantively identical to EEOC Religion Reg § 1605.3. There is not a similar provision in the MHRA or the current MHRC Employment Reg.

A. Scheduling of tests or other selection procedures. When a test or other selection procedure is scheduled at a time when an employee or member or prospective employee or member cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in this chapter apply and that it has an obligation to accommodate such employee or member prospective employee or member unless undue hardship would result.

B. Inquiries that determine an applicant's availability to work during an employer's scheduled working hours.

(1) The duty to accommodate pertains to prospective employees or members as well as current employees or members. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) The Commission has concluded that the use of pre-selection inquiries that determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate the Act unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or members or prospective employees or members needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures that would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire

into the need for a religious accommodation and determine, according to the principles of this chapter, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (a) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (b) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

SECTION 15. ANCESTRAL OR NATIONAL ORIGIN DISCRIMINATION

In addition to any other unlawful practice on the basis of ancestry or national origin prohibited by this chapter or the Act:

1. Definition of national origin discrimination.

Unlawful employment discrimination includes discrimination because of ancestry or national origin. The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general nondiscrimination principles, such as disparate treatment and adverse impact.

Comment [J110]: This sub-section is substantively identical to EEOC National Origin Reg § 1601.1. It is similar to current MHRC Employment Reg § 3.11(A), but some wording is different.

2. Citizenship requirements.

Comment [J111]: This sub-section is substantively identical to EEOC National Origin Reg § 1606.5(a). It is similar to the example listed in current MHRC Employment Reg § 3.11(B)(3).

In those circumstances where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are unlawful employment discrimination prohibited by this chapter and the Act.

3. Selection procedures.

Comment [J112]: This sub-section is substantively identical to EEOC National Origin Reg § 1606.6. It is similar to the examples listed in current MHRC Employment Reg § 3.11(B)(1,2).

A. In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the Uniform Guidelines on Employee Selection Procedures ("UGESP"), 29 C.F.R. part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.

Because height or weight requirements tend to exclude individuals on the basis of national origin, the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP, as exceptions to the "bottom line" concept.

B. The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English.

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

4. Speak–English-only rules.

Comment [J113]: This sub-section is substantively identical to EEOC National Origin Reg § 1606.7. There is not a similar provision in the current MHRC Employment Reg.

A. When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment

opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule is unlawful employment discrimination and will closely scrutinize it.

B. When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

C. Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of unlawful employment discrimination on the basis of national origin.

SECTION 16. SEXUAL ORIENTATION DISCRIMINATION

In addition to any other unlawful practice on the basis of sexual orientation prohibited by this chapter or the Act:

1. Obligation to make reasonable accommodations.

Comment [J114]: This sub-section is substantively identical to current MHRC Employment Reg § 3.12(F).

A. It is unlawful employment discrimination for an employer, employment agency or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity.

B. It is an unlawful employment practice for an employer, employment agency or labor organization to deny employment or labor organization membership opportunities to an applicant, employee or labor organization member if the denial is based on the need of the covered entity to make reasonable accommodations in rules, policies, practices or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the operation of the business of the covered entity.

C. With respect to the two preceding paragraphs, the burden of proof on the issue of whether the accommodations would impose an undue hardship is on the employer, employment agency or labor organization. Resolution of such cases depends on the specific factual circumstances and involves a balancing of the needs of the applicant, employee or labor organization member with the degree of hardship imposed on the covered entity's business operation.

SECTION 17. RETALIATION, INTERFERENCE, AND OTHER UNLAWFUL DISCRIMINATION

Comment [J115]: This section is new. Together with § 3(1)(E) in this chapter, it replaces current MHRC Employment Reg § 3.13, addressing retaliation.

1. Except as otherwise permitted by this chapter, it is unlawful discrimination for a person to:

A. Discriminate against any individual because that individual has opposed any act or practice that is unlawful under the Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the Act;

Comment [J116]: This paragraph is substantively identical to MHRA § 4633(1).

B. Coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by the Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights;

Comment [J117]: This paragraph is substantively identical to MHRA § 4633(2).

C. Aid, abet, incite, compel or coerce another to do any type of unlawful employment discrimination;

Comment [J118]: This paragraph is substantively identical to MHRA § 4553(10)(D), except "person" is not specified in the MHRA and "unlawful employment discrimination" is substituted here for "such types of unlawful discrimination."

D. Obstruct or prevent any person from complying with this Act or any order issued under it;

Comment [J119]: This paragraph is substantively identical to MHRA § 4553(1)(D), except "order issued under it" is substituted for "order issued in this subsection."

E. Attempt to do any act of unlawful discrimination;

Comment [J120]: This paragraph is substantively identical to MHRA § 4553(1)(D).

F. Punish or penalize, or attempt to punish or penalize, any person for seeking to exercise any of the civil rights declared by the Act; or

Comment [J121]: 1.F. This paragraph is substantively identical to MHRA § 4553(1)(D), except the language, "or for complaining of a violation of this Act or for testifying in any proceeding brought in this subsection," is omitted because it is covered by paragraph 2(A) in this sub-section.

G. Engage in the prohibited acts described in § 5 of this chapter.

SECTION 18. DEFENSES

Comment [J122]: This section is new.

Defenses to an allegation of discrimination under this chapter or the Act may include, but are not limited to, the following:

1. Bona fide occupational qualification.

Comment [J123]: This sub-section is similar to current MHRC Employment Reg §§ 3.06(A), 3.07(A), 3.08(B), 3.09(A), 3.10(A), 3.11(A), and 3.12(A), which are combined. The standard has been modified to reflect the holding in *LeBlond v. Sentinel Serv.*, 635 A.2d 943, 944 (Me. 1993).

A. It is a defense to unlawful employment discrimination under this chapter and the Act when such discrimination is based on a bona fide occupational qualification ("BFOQ"). The Commission construes the BFOQ exception very narrowly, and requires the person accused of discrimination to prove by a preponderance of the evidence that (1) the essence of the business operation requires the discriminatory practice and (2) there was a factual basis for the belief that all or substantially all persons in the excluded category would be unable to perform the job in a safe or efficient manner.

B. The following are examples of cases that do not warrant application of the BFOQ qualification exception, and will be considered unlawful employment practices.

(1) Refusal to select an individual for a position based on assumptions about comparative employment characteristics between protected classes, such as an assumption that the turnover rate among women is higher than among men, men are less capable of assembling intricate equipment, women are incapable of aggressive sales techniques, people over 40 years of age are too hard to retrain, assumptions about persons with physical or mental disabilities and persons without such disabilities or among different races, religions, or national origins. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

(2) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers. An example is the assertion that passengers prefer female airline stewardesses to male flight cabin attendants.

(3) The fact that an employer may have to provide separate sanitary facilities for employees of each sex will not justify discrimination, nor will the fact that members of one sex have traditionally been hired for particular jobs. Past discrimination and usage may have created limitations on an employer's facilities, so the failure to hire individuals because of such limitations will not justify continuing such discrimination in violation of the Act.

(4) Refusal to hire a woman for a position based on the fear that pregnancy may in the future render her unable to work, or the belief that women with children should not work or are less reliable employees.

C. The following situations are recognized as those in which a distinction based on protected class is a bona fide occupational qualification.

(1) Where it is necessary for the purpose of authenticity or genuineness, e.g., an actor or actress.

(2) Where the biological functions of a particular sex are crucial to the successful performance of the job, e.g., a wetnurse or sperm donor.

(3) The requirement by a religious corporation or association, not organized for private profit and in fact not conducted for private profit, that certain of its employees be members of that religious faith. For example, a requirement that a Rabbi be Jewish or that a member of a Roman Catholic religious order be a Roman Catholic is valid.

(4) The requirement by an employer, subject to a statute of the United States, an Executive Order of the President, or a valid regulation of a department of the Executive Branch of the Federal Government, imposed in the interests of national security, that its employees be citizens of the United States.

2. Religious entities.

Comment [J124]: This defense is substantively identical MHRA § 4573-A(2), as modified by MHRA § 4553(10)(G), and with the inclusion of paragraph (C), which is taken from the EEOC ADA Reg § 1630.16(a). The sexual orientation exception is consistent with the religious entity exclusion in current MHRC Employment Reg § 3.12(B)

A. This chapter does not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion to perform work connected with the carrying on by the corporation, association, educational institution or society of its activities. With respect to discrimination on the basis of sexual orientation, this exception does not apply to any religious corporation, association, educational institution or society that receives public funds or is a for-profit organization owned, controlled, or operated by a religious association or corporation and subject to the provisions of the Internal Revenue Code, 26 U.S.C. § 511(a).

B. Under this chapter, a religious organization may require that all applicants and employees conform to the religious tenets of that organization. With respect to discrimination on the basis of sexual orientation, this exception does not apply to any religious corporation, association, educational institution or society that receives public funds or is a for-profit organization owned, controlled, or operated by a religious association or corporation and subject to the provisions of the Internal Revenue Code, 26 U.S.C. § 511(a).

C. Notwithstanding any other provision in this sub-section, a religious entity may not discriminate against a qualified individual with a physical or mental disability, who satisfies the permitted religious criteria, on the basis of his or her physical or mental disability.

3. Defenses relating to claims of physical or mental disability discrimination.

A. Charges of discriminatory application of selection criteria—

(1) In general. It may be a defense to a charge of discrimination, as described in § 13(1)(G) of this chapter, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a physical or mental disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this chapter.

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See § 2(3) of this chapter defining direct threat.)

Comment [J125]: This defense is substantively identical to EEOC ADA Reg § 1630.15(b). It is not in current the current MHRC Employment Reg. It is substantively identical to MHRA § 4573-A(1, 1-A), but in subparagraph(2), "of the individual or others," has been added.

B. Other disparate impact charges. It may be a defense to a charge of discrimination brought under this chapter that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a physical or mental disability or a class of individuals with physical or mental disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this chapter.

Comment [J126]: This defense is substantively identical to EEOC ADA Reg § 1630.15(c). It is not in the current MHRC Employment Reg.

C. Charges of not making reasonable accommodation. It may be a defense to a charge of discrimination, as described in § 13(1)(F) of this chapter, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

Comment [J127]: This defense is substantively identical to EEOC ADA Reg § 1630.15(d). The "undue hardship" defense is in current MHRC Employment Reg § 3.08(D)(1), and in the MHRA § 4553(2)(E).

D. Conflict with Federal laws. It may be a defense to a charge of discrimination under this chapter that a challenged action is required or necessitated by a Federal law or regulation, or that a Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this chapter.

Comment [J128]: This defense is substantively identical to EEOC ADA Reg § 1630.15(e). It is not in the current MHRC Employment Reg or the MHRA.

E. Additional defenses. It may be a defense to a charge of discrimination under this chapter that the alleged discriminatory action is specifically permitted by § 13(3) or § 19 of this chapter.

Comment [J129]: This defense is substantively identical to EEOC ADA Reg § 1630.15(g).

F. This chapter does not prohibit an employer from discharging or refusing to hire an individual with physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an individual with physical or mental disability, if the individual, because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others or is unable to be at, remain at or go to or from the place where the duties of employment are to be performed.

In deciding whether to hire, discharge or otherwise change the status or job description of a physically or mentally disabled applicant or employee, the employer shall use an objective standard. The employer shall not make the decision based upon general assumptions or stereotypes as to whether a particular physical or mental disability would interfere with the applicant or employees ability to safely perform the duties of the job.

Comment [J130]: The first paragraph of this defense is identical to MHRA § 4573-A(1-B). The second paragraph is taken from current MHRC Reg 3.08(C)(1). Neither are in the EEOC ADA Reg.

SECTION 19. SPECIFIC ACTIVITIES PERMITTED

Comment [J131]: This section is new.

The following shall not be unlawful under this chapter or the Act:

1. Age.

A. Apprenticeship programs. For labor organizations and employers to adopt a maximum age limitation in apprenticeship programs if the employer or labor organization obtains prior approval from the Maine Human Rights Commission of any maximum age limitation employed in an apprenticeship program. The Commission shall approve the age limitation if a reasonable relationship exists between the maximum age limitation employed and a legitimate expectation of the employer or labor organization in receiving a reasonable return upon their investment in an apprenticeship program. The employer or labor organization bears the burden of demonstrating that such a relationship exists.

Comment [J132]: Nearly identical language is in MHRA § 4572(1)(C). An exception for apprenticeship programs is the current MHRC Employment Reg § 3.07(C)(3). There is a similar provision allowing the EEOC to exempt age limitations in apprenticeship programs in EEOC Age Reg § 1625.21.

B. To discriminate on account of age to comply with the state or federal laws relating to the employment of minors.

Comment [J133]: This exception is identical to MHRA § 4573(1-A)(A). It is not in current MHRC Employment Reg, and is not in the EEOC ADEA Reg.

C. On account of age, to observe the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan that does not evade or circumvent the purpose of the Act and which complies with the Federal Age Discrimination in Employment Act, United States Code, Title 29, Section 621, as amended, and the federal Americans with Disabilities Act, 42 United States Code, Section 12101, et seq., and federal administrative interpretations thereof, including 29 C.F.R. § 1625.10, provided that the benefit does not require or permit any employer to refuse or fail to hire an applicant because of the age of the individual; and provided that the

Comment [J134]: This exception is substantively identical to MHRA § 4573(1-A)(B) and current MHRC Employment Reg § 3.07(D)(3), except a reference to EEOC Age Reg § 1625.10 is added, which defines permissible bona fide employee benefit plans.

benefit plan does not require or permit the denial or termination of employment of any individual because of the age of the individual or after completion of a specified number of years of service.

D. Bona fide seniority systems.

Comment [J135]: This exception is substantively identical to EEOC Age Reg § 1625.8. There is not a similar provision in the MHRA or the current MHRC Employment Reg.

(1) For an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system that is not a subterfuge to evade the purposes of this chapter or the Act except that no such seniority system shall require or permit the involuntary retirement of any individual because of the age of such individual.

(2) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(3) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

(4) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the Act.

(5) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of other protected classes than age are also prohibited under the Act, where the Act otherwise applies. The "bona fides" of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide.

E. Federal requirements. This chapter shall not be construed to affect or limit any power or duty relating to pension or retirement plans which the United States Government reserves to itself.

Comment [J136]: This exception is substantively identical to MHRA § 4574(5). It is not in the current MHRC Employment Reg.

F. As specified in 29 C.F.R. § 1625.31, all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the employment of, persons with special employment problems, including employment activities and programs under the

Comment [J137]: This exception is substantively identical to EEOC Age Reg § 1625.31(a). It is not in the current MHRC Employment Reg.

Manpower Development and Training Act of 1962, Pub.L. No. 87–415, 76 Stat. 23 (1962), as amended, and the Economic Opportunity Act of 1964, Pub.L. No. 88–452, 78 Stat. 508 (1964), as amended, for persons among the long-term unemployed, individuals with disabilities, members of minority groups, older workers, or youth.

G. Coordination of retiree health benefits with Medicare or a comparable State health benefit plan, as specified in 29 C.F.R. § 1625.32.

Comment [J138]: This exception is substantively identical to EEOC Age Reg § 1625.32. It is not in the current MHRC Employment Reg.

2. Physical or mental disability.

With regard to individuals with physical or mental disabilities:

A. Claims of no disability. Nothing in this chapter shall provide the basis for a claim that an individual without a physical or mental disability was subject to discrimination because of his lack of physical or mental disability, including a claim that an individual with a physical or mental disability was granted an accommodation that was denied to an individual without a physical or mental disability.

Comment [J139]: This exception is identical to the EEOC ADA Reg § 1630.4(b). There is not a similar exception in the MHRA or the current MHRC Employment Reg.

B. Infectious and communicable diseases; food handling jobs –

(1) In general. In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the United States Secretary of Health and Human Services under the federal Americans with Disabilities Act, Title I, Section 103(d)(1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign the individual a job involving food handling.

(2) Nothing in this chapter or the Act may be construed to preempt, modify or amend any state, county or local law, ordinance, rule or regulation applicable to food handling that is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the United States Secretary of Health and Human Services.

Comment [J140]: This exception is substantively identical to MHRA § 4573(6), and the EEOC ADA Reg § 1630.16(e). There is not a similar exception in the current MHRC Employment Reg.

C. Health insurance, life insurance, and other benefit plans –

(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks,

Comment [J141]: This exception is substantively identical to MHRA § 4554(2), and the EEOC ADA Reg § 1630.16(f). There is not a similar exception in the current MHRC Employment Reg.

classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in subparagraphs (C) (1), (2), and (3) of this sub-section are permitted unless these activities are being used as a subterfuge to evade the purposes of this chapter or the Act.

3. Regulation of alcohol and drugs. A covered entity:

Comment [J142]: This exception is substantively identical to MHRA § 4572(2)(F)(1), except paragraphs (E) and (F) are added. It is substantively identical to EEOC ADA Reg 1630.16(b), except in paragraph (D) the following language is added to make it consistent with MHRA § 4572(2)(F): "… provided that an employer shall make reasonable accommodation to an alcoholic or drug user who is seeking treatment or has successfully completed treatment."

A. May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

B. May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

C. May require that all employees behave in conformance with the requirements established under the Drug–Free Workplace Act of 1988 (41 U.S.C. §§ 701 et seq.);

D. May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism; provided that an employer shall make reasonable accommodation to an alcoholic or drug user who is seeking treatment or has successfully completed treatment;

E. May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

F. May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

4. Drug testing –

A. General policy. For purposes of this chapter, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its job applicants or employees is not a violation of § 13(2) of this chapter. However, this chapter does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

B. Transportation employees. This chapter does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(1) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(2) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to subparagraph (B)(1) of this paragraph.

C. Confidentiality. Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 13(B)(2) and (3) this chapter.

Comment [J143]: This exception is substantively identical to EEOC ADA Reg § 1630.16(c). It expands upon MHRA § 4572(2)(F), which states, "For purposes of this subsection, a test to determine the illegal use of drugs may not be considered a medical examination." There is not a similar exception in the current MHRC Employment Reg.

5. Regulation of smoking.

A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this chapter.

Comment [J144]: This exception is substantively identical to MHRA § 4554(1), and the EEOC ADA Reg § 1630.16(d). There is not a similar exception in the current MHRC Employment Reg.

6. Records.

A. After employment or admission to membership, to make a record of such features of an individual as are needed in good faith for the purpose of identifying them, provided the record is intended and used in good faith solely for identification, and not for the purpose of discrimination in violation of this chapter or the Act. Records of features regarding physical or mental disability that are collected must be collected and maintained on separate forms and in separate files and be treated as confidential records; or

Comment [J145]: This exception is substantively identical to MHRA § 4573(2), and current MHRC Employment Regs, e.g., § 3.06(B)(5).

B. To record any data required by law, or by the rules and regulations of any state or federal agency, provided the records are recorded and kept in good

Comment [J146]: This exception is substantively identical to MHRA § 4573(3), and the current MHRC Employment Regs, e.g., § 3.06(B)(4).

faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this chapter or the Act

7. Federal Indian policy.

For any business or enterprise on or near an Indian reservation to follow any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Comment [J147]: This exception is substantively identical to MHRA § 4573(5), which references 42 U.S.C. § 2000e-2(i) (1982), the substantive language of which is set forth here. A similar exception is not in the current MHRC Employment Reg.

8. The national security exception.

It is not unlawful under this chapter or the Act to deny employment opportunities to any individual who does not fulfill the national security requirements stated in 42 U.S.C. § 2000e-2(g).

Comment [J148]: This exception is substantively identical to EEOC National Origin Reg § 1606.3. It is not in the MHRA or the current MHRC Employment Reg.

SECTION 20. PRESERVATION OF RECORDS

Comment [J149]: This is the same as current MHRC Employment Reg § 3.03.

1. Record preservation requirements

Any personnel or employment record (including, but not limited to: employment application forms, applicant and employee rating sheets, tests, and other records having to do with job referral, hiring, promotion, demotion, transfer, lay-off, rates of pay or other terms of compensation, seniority, labor organization memberships or selection for training or apprenticeship) made or kept by an employer, employment agency or labor organization shall be preserved for a period of at least one (1) year from the date of the making of the record or the personnel action involved, whichever occurs later. When an employee has been involuntarily terminated, the personnel records of the individual terminated shall be kept for a period of one (1) year from the date of termination.