

Clearinghouse Rule 21-110

ORDER of the DEPARTMENT OF ADMINISTRATION

The Wisconsin Department of Administration proposes an order to amend Wis. Admin. Code §§ Adm 1.05 (2), Adm 1.05 (3), Adm 2.04 (1m) (b), Adm 2.04 (5), Adm 21.09 (7), Adm 30.05 (11), Adm 50.02 (2), Adm 50.03 (1), Adm 50.03 (6), Adm 50.03 (8), Adm 50.03 (9) (note); Adm 50.04 (1) (a); Adm 50.04 (2); Adm 50.04 (5); Adm 50.04 (6); Adm 50.05 (1) (note); Adm 50.05 (2) (d); Adm 50.05 (3) (f); Adm 50.05 (5); Adm 89.02 (5), Adm 89.05 (6), Adm 92.01 (8) (c), Adm 92.04 (2) (j), Adm 92.40 (11), Adm 92.40 (18) (b), ER 44.09 (1) (intro), and Game 4.04 (1) (i), relating to updating terminology in administrative rules.

Rule Analysis prepared by the Department of Administration

1. Citations to statutes interpreted:

s. 16.304, Wis. Stats.

2. Citations to statutory authority:

Sections 16.843 (2) (a), 16.765 (5), 16.846 (1), 16.855 (15), 20.291 (1) (a) 4., 32.26 (2) (a), 230.04 (5), 230.046 (5) (c), 227.11 (2) (a) and (b), and 562.02 (1) (a), Wis. Stats.

3. Explanation of the agency's statutory authority to promulgate the rule under the statutes cited:

Section 227.11 (2) (a), Wis. Stats., provides explicit authority for an agency to “promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.” Section 227.11 (2) (b), Wis. Stats., provides explicit authority for an agency to “prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.” The proposed rule interprets the provisions of statutes enforced or administered by the Department and updates procedures as necessary to effectuate the purpose of the statutes, consistent with the above statutory authority.

Additional statutes provide the Department's explicit authority to revise the following code chapters:

- **Adm 1 – Parking:** Section 16.843 (2) (a), Wis. Stats., provides that “Parking of any motor vehicle on the grounds of any of the state office buildings shall be in accordance with rules and orders established by the department.” This provides the explicit authority for the Department to provide regulations governing parking spaces at state office buildings for persons with disabilities.

- **Adm 2 – Use of State Buildings and Facilities:** Section 16.846 (1), Wis. Stats., provides that the Department “shall promulgate under ch. 227, and shall enforce or have enforced, rules of conduct for property leased or managed by the department,” which includes the state capitol building and numerous other state office buildings. *See* s. 16.84 (1), Wis. Stats. This provides explicit authority for the policies currently codified in s. Adm 2.04, which contains the nondiscrimination provisions that the Department will update in this rulemaking.
- **Adm 21 – Advertising, Bidding, and Award of Construction Contracts.** Section 16.855 (15), Wis. Stats., provides that the Department “shall promulgate rules to implement the advertising and award of contracts” under s. 16.855. This provides explicit statutory authority for the rules codified in ch. Adm 21, including the requirement that contracts include provisions for affirmative action and equal employment, s. Adm 21.09 (7), which will be updated as part of this rulemaking.
- **Adm 30 – Payroll Deductions for Charitable Purposes.** Section 20.921 (1) (a) 4., Wis. Stats., provides for the approval of groups or charitable purpose eligible to receive donations by payroll deduction, “under rules of the department of administration for state officers or employee.” This provides explicit authority for the Department’s rules in ch. Adm 30.
- **Adm 50 – Contract Compliance:** Section 16.765 (5), Wis. Stats., provides that the “department shall promulgate such rules as may be necessary for the performance of its functions under this section.” This provides the explicit authority for the Department to revise its rules implementing this section, including rules referencing persons with disabilities.
- **Adm 89 – Housing Cost Grants and Loans.** Because the Department intends to update provisions of ss. Adm 89.02 (5) and Adm 89.05 (5) that exist solely to interpret “low or moderate income” in s. 16.304, Wis. Stats., and the Department has deemed this necessary to effectuate the purpose of that statute, this proposed change is authorized by s. 227.11 (2) (a), Wis. Stats.
- **Adm 92 – Relocation Assistance.** Section 32.26 (2) (a), Wis. Stats., provides that the department “shall promulgate rules to implement and administer ss. 32.19 to 32.27.” This provides explicit statutory authority for the Department to revise its rules in ch. Adm 92, including rules regarding standards for decent, safe, and sanitary housing and services for displaced individuals, which all reference persons with disabilities.
- **ER 44 - Employment Development and Training.** The provision that the Department intends to update, s. ER 44.09 (1), relates to the authority to fill positions with trainees. This rule is authorized by s. 230.04 (5), which explicitly authorizes the promulgation of rules “on all matters relating to the administration of the division and the performance of the duties assigned to the administrator.” Specifically, s. 230.046 (5) (c), Wis. Stats., provides for “rules of the administrator whenever on-the-job trainees are employed.”

- **Game 4 – Duties and Responsibilities of Associations and Racetrack Operators.** This chapter exists under the authority of s. 562.02 (1) (a), which provides that the Department shall “[r]egulate racing and on-track pari-mutuel wagering in this state and shall promulgate all rules necessary to administer this chapter.” The non-substantive procedures that the Department intends to review and update are authorized by this statute and by s. 227.11 (2) (b), Wis. Stats.

4. Related statutes or rules:

2019 Wisconsin Act 1 made numerous terminology updates to administrative rules of the Department of Health Services, the Department of Safety and Professional Services, and the Public Service Commission, regarding references to individuals with intellectual disabilities. The proposed rule is intended to make similar updates with regard to usage of the term “disability” in place of outdated terminology in the Department’s existing rules.

5. Brief plain language summary of the proposed rule:

The proposed rule revises the Department’s administrative code provisions to refer to disability or individuals with disabilities, instead of handicap or handicapped individuals. In places where current rules provide a definition of the term “handicapped,” the rules are revised to remove that term and to instead define the term “disability” consistently with the federal definition of “disability” as set forth in the Americans with Disabilities Act of 1990.

6. Summary of, and preliminary comparison with, any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The federal Americans with Disabilities Act of 1990 does not use the outdated language of “handicapped,” instead referring to “individuals with disabilities.” Pub. L. No. 101-336, 104 Stat. 327, codified at 42 USC 12101–12213. The proposed rule is intended to align Wisconsin code provisions by updating terminology similarly.

7. Comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota:

A review of administrative rules in Illinois, Iowa, and Michigan shows that most current provisions of these states’ rules use updated terminology, though some instances of the term “handicap” can still be found in certain rules in these states which have not been updated. An online search of Minnesota administrative rules was not able to identify any current provisions where the term “handicap” is used in reference to individuals with disabilities; it appears that all previous usage of such terminology has been repealed in Minnesota.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule:

The Department reviewed existing statutes and administrative rules in order to determine the necessary revisions to the administrative rules to implement the Governor’s directive in

Executive Order #15. Where appropriate, terminology and definitions were made consistent with those used in the federal Americans with Disabilities Act of 1990.

9. Effect on small business:

There is no anticipated effect on small business from implementing the proposed rule.

10. Any analysis and supporting documents used in support of the agency's determination of the rule's effect on small business or in preparation of economic impact report:

Not applicable.

11. Email address and telephone number of agency contact person:

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12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted by regular mail to the address above, or by email to DOARulesReview@wisconsin.gov.

A public hearing will be held on January 24, 2022, at 10:00 a.m., via conference call.

Rule comments will be accepted until 5:00 p.m. on January 24, 2022.

RULE TEXT

SECTION 1. Adm 1.05 (2) is amended to read:

Adm 1.05 (2) Accommodation for disabled employees. An employee's disability shall be shown by a statement from a physician, an advanced practice nurse, a physician assistant, a chiropractor or a Christian science practitioner, indicating that the employee is disabled according to those standards established in s. 341.14, Stats. Parking for vehicles with special identification cards for the physically ~~handicapped~~ disabled pursuant to s. 343.51, Stats., shall be provided as close as possible to an entrance which can be used by disabled employees. Disabled employees allocated parking under this section shall not be exempted from payment for parking privileges under s. 16.843 (2), Stats.

SECTION 2. Adm 1.05 (3) is amended to read:

Adm 1.05 (3) Accommodation for disabled visitors. Motor vehicles using public parking stalls or spaces designated for ~~the handicapped individuals with disabilities~~ shall be equipped with license plates issued to or for disabled persons pursuant to s. 341.14, Stats. Parking for vehicles with special identification cards for the physically ~~handicapped~~ disabled pursuant to s. 343.51, Stats., shall be provided as close as possible to an entrance which can be used by disabled visitors.

SECTION 3. Adm 2.04 (1m) (b) is amended to read:

Adm 2.04 (1m) (b) Events or exhibits, whether based upon permit or advance notice shall not be restricted, denied, or disallowed on the basis of age, race, creed, color, ~~handicap~~ disability, marital status, sex, sexual orientation, national origin, ancestry, arrest or conviction record, religion, or political affiliation of the person applying for the permit or giving notice.

SECTION 4. Adm 2.04 (5) is amended to read:

Adm 2.04 (5) The department and the applicant may not discriminate against any individual on the basis of age, race, creed, color, ~~handicap~~ disability, marital status, sex, sexual orientation, national origin, ancestry, arrest record, or conviction record in the utilization of state office buildings and facilities for government business, public meetings for free discussion of public questions, or for civic activities.

SECTION 5. Adm 21.09 (7) is amended to read:

Adm 21.09 (7) Any contractor or subcontractor who enters into a contract on a state construction project shall assume an obligation to take whatever affirmative action is necessary to assure equal employment opportunity in all aspects of employment, irrespective of age, race, religion, color, ~~handicap~~ disability, sex, physical condition, developmental disability as defined in s. 51.01 (5), Stats., or national origin. It is expected that all contractors and subcontractors will carry out that part of their contract pertaining to equal employment opportunity and affirmative action with the same amount of thought and diligence as with any other part of the contract.

SECTION 6. Adm 30.05 (11) is amended to read:

Adm 30.05 (11) NONDISCRIMINATION. The charitable organization shall have a policy and procedure of nondiscrimination in regard to race, color, religion, national origin, ~~handicap disability~~, age, or sex applicable to persons served by the charitable organization, applicable to charitable organization staff employment, and applicable to membership on the charitable organization's governing board.

SECTION 7. Adm 50.02 (2) is amended to read:

Adm 50.02 (2) Encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, religion, color, ~~handicap disability~~, sex, physical condition, developmental disability, sexual orientation, as defined in s. 111.32 (13m), Stats., or national origin.

SECTION 8. Adm 50.03 (1) is amended to read:

Adm 50.03 (1) (1) "Balanced work force" means an equitable representation of qualified ~~handicapped~~ persons with disabilities, minorities and women in each level of a work force which approximates the percentage of ~~handicapped~~ persons with disabilities, minorities and women available for jobs at any particular level from the relevant labor market. For construction work, the relevant labor market consists of all craft journeypersons, all craft indentured apprentices and all qualified apprentice applicants available for employment for a specific project. Persons in the construction workforce shall be excluded from the labor market where the contractor can show that these persons are unwilling to make themselves available at the job site for employment on a regular and ongoing basis.

SECTION 9. Adm 50.03 (6) is amended to read:

Adm 50.03 (6) "~~Handicapped person~~" "Disability" means any person who, with respect to an individual:

- (a) ~~Has a~~ A physical or mental impairment which substantially limits one or more of the major life activities of such individual;
- (b) ~~Has a~~ A record of such an impairment; or
- (c) ~~Is~~ Being regarded as having such an impairment.

SECTION 10. Adm 50.03 (8) is amended to read:

Adm 50.03 (8) "Qualified ~~handicapped person~~ persons with disabilities" means, with respect to employment, ~~a person~~ persons with a handicap who disabilities each of whom is capable of performing the essential functions of the job for which the person is being considered with reasonable accommodation to the person's ~~handicap disability~~; and with respect to employment-related training programs, ~~a handicapped~~ persons with disabilities who ~~meets~~ meet both the eligibility requirements for participation in the program and valid job or training qualifications with reasonable accommodation.

SECTION 11. Adm 50.03 (9) (Note) is amended to read:

Adm 50.03 (9) Note. Reasonable accommodation may include making the facilities used by the employers or employees, including hallways, restrooms, cafeterias and lounges readily accessible to ~~handicapped~~ persons with disabilities. It also may include job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar action.

SECTION 12. Adm 50.04 (1) (a) is amended to read:

Adm 50.04 (1) (a) The contractor agrees to make every reasonable effort to develop a balance in either its total workforce or in the project-related workforce that is based on a ratio of work hours performed by ~~handicapped~~ persons with disabilities, minorities, and women except that, if the department finds that the contractor is allocating its workforce in a manner which circumvents the intent of this chapter, the department may require the contractor to attempt to create a balance in its total workforce. The balance shall be at least proportional to the percentage of minorities and women present in the relevant labor markets based on data prepared by the department of industry, labor and human relations, the office of federal contract compliance programs or by another appropriate governmental entity. In the absence of any reliable data, the percentage for qualified ~~handicapped~~ persons with disabilities shall be at least 2% for whom a contractor must make a reasonable accommodation.

SECTION 13. Adm 50.04 (2) is amended to read:

Adm 50.04 (2) The contractor shall, in all solicitations or advertisement for employees placed by it or on its behalf, state that all qualified applicants shall receive consideration for employment without regard to age, race, religion, color, ~~handicap~~ disability, sex, physical condition, developmental disability as defined in s. 51.01 (5), Stats., sexual orientation as defined in s. 111.32 (13m), Stats., or national origin.

SECTION 14. Adm 50.04 (5) is amended to read:

Adm 50.04 (5) The contractor shall regularly submit an employment report as required by the department showing the number of contractor's employees by sex and ethnic background as well as ~~handicapped~~ employees with disabilities for each job category established by the U.S. office of federal contract compliance programs.

SECTION 15. Adm 50.04 (6) is amended to read:

Adm 50.04 (6) The contractor shall invite all employees to voluntarily identify themselves if they ~~are handicapped~~ have a disability, to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential except for the purposes of this chapter, and that refusal to provide it will not subject the employee to any adverse treatment.

SECTION 16. Adm 50.05 (1) (Note) is amended to read:

Adm 50.05 (1) Note: The following is an example of an acceptable policy statement: It is the policy of (name of firm) not to discriminate against any employee or applicant for employment because of age, race, religion, color, ~~handicap—disability~~, sex, physical condition, developmental disability, sexual orientation, as defined in s. 111.32 (13m), Stats., or national origin. This policy shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or other compensation; and selection for training, including apprenticeship. Except with respect to sexual orientation, this company further agrees to take affirmative action to ensure equal employment opportunities. (Name of executive and title) has been appointed equal opportunity officer and is responsible for the planning, implementation and day-to-day monitoring of the affirmative action program. All personnel responsible for hiring and promotion of employees and the development and implementation of programs and activities are charged to support this program and shall provide leadership in carrying out the goals and objectives. During the life of the contract, the (name of firm) shall comply with s. 16.765, Stats., state regulations and federal law, and shall continue to work cooperatively with governmental and community organizations in ensuring equal employment and advancement opportunities.

SECTION 17. Adm 50.05 (2) (d) is amended to read:

Adm 50.05 (2) (d) Informing employment sources verbally and in writing of company policy to actively recruit and refer qualified ~~handicapped—persons~~ with disabilities, minorities and women for all positions listed. All solicitations or advertisements for employees placed by or on behalf of the company shall state that qualified applicants will receive consideration for employment without regard to age, race, religion, color, ~~handicap—disability~~, sex, physical condition, developmental disability, sexual orientation, as defined in s. 111.32 (13m), Stats., or national origin; and

SECTION 18. Adm 50.05 (3) (f) is amended to read:

Adm 50.05 (3) (f) Total number of ~~handicapped—persons~~ with disabilities.

SECTION 19. Adm 50.05 (5) is amended to read:

Adm 50.05 (5) MONITORING. The affirmative action plan shall include a description of a planned internal system to monitor and evaluate regularly the results achieved by the company in the implementation of its affirmative action plan. This system will include evaluation of the results regarding minorities, women and ~~handicapped—persons~~ with disabilities including those actions taken to provide reasonable accommodation for qualified ~~handicapped—persons~~ with disabilities.

SECTION 20. Adm 89.02 (5) is amended to read:

Adm 89.02 (5) "~~Handicapped~~"—"Disability" means, with respect to a person: a physical or mental impairment which substantially limits one or more of such person's major life activities; or a record of having such an impairment; or being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to alcohol or a controlled substance as defined in section 102 of the Controlled Substances Act 21 USC 802.

SECTION 21. Adm 89.05 (6) is amended to read:

Adm 89.05 (6) Funds granted or loaned by eligible applicants to eligible households under this program shall be provided to households which do not exceed low-income or moderate-income guidelines. For households that have at least one member who ~~is handicapped with~~ has a disability and has recurring medical costs or support costs directly related to the ~~handicap disability~~, the eligible applicant shall deduct the amount by which those expenses exceed 3% of the household's monthly income from the household's monthly income for purposes of determining eligibility.

SECTION 22. Adm 92.01 (8) (c) is amended to read:

Adm 92.01 (8) (c) Is available to the person regardless of sex, race, color, ~~handicap disability~~, religion, national origin, sex or marital status of the person maintaining a household, legal sources of income, age, ancestry, sexual orientation or other applicable federal, state or local fair housing laws.

SECTION 23. Adm 92.04 (2) (j) is amended to read:

Adm 92.04 (2) (j) Barrier-free. A dwelling and access to the dwelling shall be free of barriers for a ~~physically handicapped~~ person or family member with a physical disability.

SECTION 24. Adm 92.40 (11) is amended to read:

Adm 92.40 (11) Relocation services which result in equal treatment for persons regardless of sex, race, color, ~~handicap disability~~, religion, national origin, sex or marital status of a person maintaining a household, lawful source of income, sexual orientation, age, ancestry or a person's status as an owner or tenant;

SECTION 25. Adm 92.40 (18) (b) is amended to read:

Adm 92.40 (18) (b) Services necessary to guard against housing discrimination by a seller, broker, landlord, rental agent, or financial institution on the basis of sex, race, color, ~~handicap disability~~, religion, national origin, sex or marital status of a person maintaining a household, lawful source of income, sexual orientation, age or ancestry;

SECTION 26. ER 44.09 (1) (intro) is amended to read:

ER 44.09 (1) USE OF TRAINEES. The administrator may authorize the use of trainees, except for career executives, when the special funding requirements of a position require that the position be filled by a trainee, or when the administrator determines that a sufficient number of qualified promotional candidates for the objective level, including women, minorities, and ~~handicapped individuals with disabilities~~, are not available within the agency or employing unit; and:

SECTION 27. Game 4.04 (1) (i) is amended to read:

Game 4.04 (1) (i) The location of facilities for ~~handicapped patrons~~ individuals with disabilities.

SECTION 28: EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro), Wis. Stats.

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION

Joel Brennan, Secretary

Date