

## **CHAPTER 5** **DISCRIMINATION IN EMPLOYMENT**

### **PREAMBLE** **GENERAL PRINCIPLES**

References to “employer” and “employers” in these rules 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 as defined in the Act (Dubuque Code of Ordinances Title 8).

## **AGE DISCRIMINATION IN EMPLOYMENT**

### **5.15 Age discrimination in employment.**

**5.15(1)** Any person who has reached eighteen (18) years of age may not be excluded from an employment right because of an arbitrary age limitation and shall be an aggrieved party for the purposes of the Act regardless of whether the person is excluded by reason of excessive age or insufficient age, and shall possess all the rights and remedies for such discrimination

**5.15(2)** No employer, employment agency, or labor organization shall set an arbitrary age limitation in relation to employment or membership except as otherwise provided by commission rules, by the Iowa Code or Title 8 of the Dubuque Code of Ordinances.

**5.15(3)** Help wanted notices. No newspaper or other publication published within the state of Iowa shall accept, publish, print or otherwise cause to be advertised any notice of an employment opportunity from an employer, employment agency, or labor organization containing any indication of a preference, limitation, or specification based upon age, except as provided in these rules, unless the newspaper or publication has first obtained from the employer, employment agency, or labor organization an affidavit indicating that the age requirement for an applicant is a bona fide occupational qualification.

**5.15(4)** Help wanted notices of advertisements shall not contain terms and phrases such as "young," "boy," "girl," "college student," recent college graduate," "retired person," or other of a similar nature unless there is a bona fide occupational requirement for the position.

**5.15(5)** Job applications for and other pre-employment inquiries. An employer, employment agency or labor organization may make pre-employment inquiry regarding the age of an applicant provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to age shall be unlawful unless based upon a bona fide occupational qualification. The burden shall be on the person to demonstrate that the direct or indirect pre-employment inquiry is based upon a bona fide occupational qualification.

**5.15(6)** Nothing above shall be construed to prohibit any inquiry as to whether an applicant is over eighteen (18) years of age.

**5.15(7)** Nothing in the above shall be construed to prohibit post employment inquiries as to age where such inquiries serve legitimate record-keeping purposes.

#### **5.15(8) Bona fide occupational qualifications.**

a. A person may take any action otherwise prohibited under commission rules where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

b. The concept of the bona fide occupational qualification is narrow in scope and will not be applied to include the mere preference of convenience of the employer.

c. Age requirements set by federal or state statute or regulatory agency shall be considered to be bona fide occupational qualifications where such requirements are necessarily related to the work which the employee must perform.

d. A bona fide occupational qualification will also be recognized where there exists special individual occupational circumstances such as where actors are required for characterizations of individuals of specified age or where persons are used to advertise or promote the sale of products designed for, and directed to, certain age groups.

**5.16 Bona fide apprenticeship programs.** Where an age limit is placed upon entrance into an apprenticeship program, the limitation shall not be a violation of Dubuque Code of Ordinances Title 8 where the employer can demonstrate a legitimate economic interest in the limitation in terms of the length of the training period and the costs involved in providing the training. The age limit shall not be set any lower than reasonably necessary to enable the employer to recover the costs of training the employee and a reasonable profit.

**5.17 Employment benefits.**

**5.17(1)** An employer is not required to provide the same pension, retirement, or insurance benefits to all employees where the cost thereof varies with the age of the individual employee. Business necessity or bona fide underwriting criteria shall be the only basis used by employers for providing different benefits to employees of different ages unless such benefits are provided under a retirement plan or benefit system not adopted as a mere subterfuge to evade the purposes of the Act.

**5.17 (2)** The existence of a provision in a retirement plan stating a maximum eligibility age for entrance into a retirement plan shall not authorize rejecting from employment an applicant who is over the maximum eligibility age for the retirement plan.

**5.18 Retirement plans and benefit systems.**

**5.18(1)** Commission rules shall not be construed so as to prohibit an employer from retiring an employee, or to require an employer to hire back an employee following retirement, or to hire an applicant for employment whose age is the retirement age under the employer's retirement plan or benefit system, provided that the plan or system is not a mere subterfuge for the purpose of evading the provisions of the Act.

**5.18(2)** However, a retirement plan or benefit system shall not require the involuntary retirement of a person under the age of 70 because of that person's age, with the following exceptions:

a. Peace officers, in the divisions of highway safety and uniformed force, criminal investigation and bureau of identification, drug law enforcement, beer and liquor law enforcement, police officers, firefighters, and conservation officers, so long as their maximum age by statute is 65 years;

b. Bona fide executives and high policymaking employees who have served in that capacity for the two prior years who are entitled to an immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan of the employer which equals \$27,000; and

c. The involuntary retirement of a person covered by a collective bargaining agreement which was entered into by a labor organization and was in effect on September 1, 1977. This exemption does not apply after termination of that agreement or January 1, 1980, whichever first occurs.

**5.18(3)** State employees who are members of the Iowa public employee's retirement system are not subject to mandatory retirement based on age.

**5.19 to 5.25 Reserved.**

## **DISABILITY DISCRIMINATION IN EMPLOYMENT**

### **5.26 Disability discrimination in employment.**

**5.26.(1)** The term "disabled person" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

**5.26.(2)** The term "physical or mental impairment" means:

a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

**5.26.(3)** The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

**5.26.(4)** The term "has a record of such an impairment" means has a history of, or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

**5.26.(5)** The term "is regarded as having an impairment" means:

a. Has a physical or mental impairment that does not substantially limit major life activities but that is perceived as constituting such a limitation;

b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such an impairment.

**5.26.(6)** The term "employer," shall include any employer, labor organization, or employment agency insofar as their action or inaction may adversely affect employment opportunities.

### **5.27 Assessment and placement.**

**5.27(1)** If examinations or other assessments are required, they should be directed towards determining whether an applicant for a job:

a. Has the physical and mental ability to perform the duties of the position. An individual applicant would have to identify the position for which he or she has applied.

b. Is physically and mentally qualified to do the work without adverse consequences such as creating a danger to life or health of fellow employees.

c. Is professionally competent or has the skills or ability to become professionally competent to perform the duties and responsibilities which are required by the job.

**5.27(2)** Examinations or other assessments should consider the degree to which the person has compensated for the person's limitations and the rehabilitation service the person has received.

a. No medical examination shall be permitted until an applicant has been offered a conditional offer of employment. Medical examinations are permitted only if all prospective employees for a particular position are required to undergo a medical examination.

b. It is impermissible to ask or request information regarding medical information, previous workers compensation claims, or inquires into any disability or perceived disability.

c. It is permissible to inquire of applicants whether they are able to perform essential functions of a job.

**5.27(3)** Physical standards for employment should be fair, reasonable, and adapted to the actual requirements of the employment. They shall be based on complete factual information concerning working conditions, hazards, and essential physical requirements of each job. Physical standards will not be used to arbitrarily eliminate the disabled person from consideration.

**5.27(4)** Where pre-employment tests are used, the opportunity will be provided applicants with disabilities to demonstrate pertinent knowledge, skills and abilities by testing methods adapted to their special circumstances.

**5.27(5)** Probationary trial periods in employment for entry-level positions which meet the criteria of business necessity may be instituted by the employer to prevent arbitrary elimination of the disabled.

**5.27(6)** Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

a. Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by disabled persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

b. In determining, pursuant to the first paragraph of this subrule, whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:

(1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) The nature and cost of the accommodation needed.

c. An employer may not deny any employment opportunity to a qualified disabled employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

**5.27(7)** Occupational training and retraining programs, including but not limited to guidance programs, apprentice training programs, on-the-job training programs and executive training programs, shall not be conducted in such a manner as to discriminate against persons with physical or mental disabilities.

**5.28 Disabilities arising during employment.** When an individual becomes disabled, from whatever causes, during a term of employment, the employer shall make every reasonable effort to continue the individual in the same position or to retain and re-assign the employee and to assist in his or her rehabilitation. No terms in this section shall be construed to mean that the employer must erect a training and skills center.

## **5.29 Wages and benefits.**

**5.29(1)** While employers may re-engineer the conditions of work for the disabled person, the salary paid to said person shall be no lower than the lowest listed on the applicable wage grade schedule.

**5.29(2)** The wage schedule must be unrelated to the existence of physical or mental disabilities.

**5.29(3)** It shall be an unfair employment practice for an employer to discriminate between persons who are disabled and those who are not, with regard to fringe benefits, unless there is bona fide underwriting criteria.

**5.29(4)** A condition of disability shall not constitute a bona fide underwriting criteria in and of itself.

### **5.30 Job policies.**

**5.30(1)** Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of disability.

**5.30(2)** If the employer deals with a bargaining representative for the employees and there is a written agreement on conditions of employment, it shall not be inconsistent with these guidelines.

### **5.31 Recruitment and advertisement.**

**5.31(1)** It shall be an unfair employment practice for any employer to print or circulate or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application pre-employment inquiry regarding mental or physical disability for prospective employment which is not a bona fide occupational qualification for employment and which directly or indirectly expresses any negative limitations, specifications, or discrimination as to persons with physical or mental disabilities. The burden shall be on the employer to demonstrate that the statement, advertisement, publication or inquiry is based upon a bona fide occupational qualification.

**5.31(2)** It shall be an unfair employment practice to ask any question on the employment application form regarding a physical or mental disability unless the question is based upon a bona fide occupational qualification. The burden will be on the employer to demonstrate that the question is based upon a bona fide occupational qualification.

**5.31(3)** An employment interviewer may inquire as to a physical or mental disability provided the inquiry is made in good faith for a nondiscriminatory purpose.

### **5.32 Bona fide occupational qualifications.**

**5.32(1)** It shall be lawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under these rules where mental or physical ability is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

**5.32(2)** The concept of the bona fide occupational qualification is narrow in scope and will not be applied to include the mere preference or convenience of the employer.

**5.32(3)** Physical or mental disability requirements set by federal or state statute or regulatory agency shall be considered to be bona fide occupational qualifications where the requirements are necessarily related to the work which the employee must perform.

**5.33 to 5.46 Reserved.**

## **SEX DISCRIMINATION IN EMPLOYMENT**

**5.47 Sex as a bona fide occupational qualification.** The bona fide occupational qualification exception as to sex is strictly and narrowly construed. Labels - "men's jobs" and "women's jobs" - tend to unnecessarily deny employment opportunities to one sex or the other.

**5.47(1)** The following situations do not warrant the application of the bona fide occupational qualification exception:

a. The refusal to hire an individual because of gender, based on assumptions of the comparative employment characteristics of that gender in general;

b. The refusal to hire an individual based on stereotypical characterizations of the sexes, for example, that men are less capable of assembling intricate equipment or that women are less capable of aggressive sales work. The principle of nondiscrimination requires that individual be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group;

c. The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in 5.47(2).

**5.47(2)** Where it is necessary for the purpose of authenticity or genuineness, sex is a bona fide occupational qualification, e.g., an actor or actress.

### **5.48 Recruitment and advertising.**

**5.48(1)** Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

**5.48(2)** Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "male" or "female" will be considered an expression of a preference, limitation, specification or discrimination based on sex.

### **5.49 Employment agencies.**

**5.49(1)** The Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. Private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

**5.49(2)** An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency is not 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. The 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.

**5.49(3)** It is the responsibility of employment agencies to keep informed of opinions and decisions of the commission on sex discrimination.

**5.50 Preemployment inquiries as to sex.** A preemployment inquiry may ask "male . . . , female . . . ,"; or "Mr., Mrs., Miss" provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any preemployment inquiry which expresses directly or indirectly a limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

**5.51 Job policies and practices.**

**5.51(1)** Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for the employer's employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

**5.51(2)** Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

**5.51(3)** No employer shall make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not violate these guidelines if the employer's contributions are the same for both sexes or if the resulting benefits are equal.

**5.51(4)** Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

**5.51(5)** The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire either sex, or deny either sex a particular job because there are no restrooms or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

**5.51(6)** An employer must not deny a female employee the right to any job that she is qualified to perform. For example, an employer's rules cannot bar a woman from a job that would require more than a certain number of hours or from working at jobs that require lifting or carrying more than designated weights.

**5.52 Separate lines of progression and seniority systems.**

**5.52(1)** It is unlawful employment practices to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which 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.
- b. A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list, and vice versa.

**5.52(2)** A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the

advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

### **5.53 Discriminatory wages.**

**5.53(1)** The employer's wages schedules must not be related to or based on the sex of the employees.

**5.53(2)** The employer may not discriminatorily restrict one sex to certain job classifications. The employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex.

### **5.54 Terms and conditions of employment.**

**5.54(1)** It shall be an unlawful employment practice for an employer to discriminate between either sex with regard to terms and conditions of employment.

**5.54(2)** Difference in benefits on a sexual basis.

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, the benefits tend to be available only to male employees and their families. Due to the fact that these conditions 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 a *prima facie* violation of the prohibition against sex discrimination contained in the Act.

b. It shall be an unlawful employment practice 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.

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

**5.54(3)** A health insurance program provided in whole or in part by an employer shall include coverage for pregnancy-related conditions; the plan may exclude coverage of 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.

### **5.55 Employment policies relating to pregnancy and childbirth.**

**5.55(1)** A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is a *prima facie* violation under the Act and may be justified only upon showing of business necessity.

**5.55(2)** Disabilities caused or contributed to by pregnancy, miscarriage, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and 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 temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

**5.55(3)** Disabilities caused or contributed to by legal abortion and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any temporary disability or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matter such as the commencement and duration of leave, the availability of extension, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any temporary disability insurance or sick leave plan, formal or informal, shall be applied to other temporary disabilities. The employer may elect to exclude health insurance coverage for abortion from a plan provided by the employer, 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.

**5.55(4)** 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 violates the Act if it has a disparate impact on employees of one sex and is not justified by a business necessity.

#### **5.56 Cease use of sex-segregated want ads.**

**5.56(1)** All newspapers within the state of Iowa shall cease to use sex-segregated want ads. e.g. "Male Help Wanted," "Female Help Wanted," and "Male and Female Help Wanted" or "Men - Jobs of Interest," "Women - Jobs of Interest," and "Men and Women."

**5.56(2)** Any newspapers failing to comply with 5.56(1) shall be deemed in violation of the Act, and legal proceedings shall henceforth be initiated against them.

**5.56(3)** The commission will regard any publication of sex preference for a job to be in violation of the Act and, therefore, suggests that all Iowa newspapers refrain from publishing any sex preference which an employer, in its job order, may want printed.

**5.56(4)** The commission suggests that newspapers, instead of using sex-titled sex-segregated want ads, use neutral want ads. e.g. "Help Wanted," "Jobs of Interest," "Positions Available."

#### **5.57 Exception to ban on sex-segregation want ads.**

**5.57(1)** The commission recognizes that sex may, in very limited circumstances, be a bona fide occupational qualification, e.g., a women to be a women's fashion model. Therefore, an employer seeking to place a job order or want ad which shows sex preference must, by affidavit, claim that the preference is based upon bona fide occupational qualification.

**5.57(2)** The affidavit referred to in 5.57(1) must set out the complete basis upon which the employer believes that a person of a particular sex is required for the job the employer wishes to fill. The affidavit must also clearly state that the employer truly believes the sex preference is bona fide and that the employer, and not the newspaper or publisher of the ad, is responsible for the content of the ad.

**5.57(3)** Any newspaper, or other publisher which prints want ads, can publish a want ad with a sex preference, if, and only if, that newspaper or publisher has received from the employer the affidavit referred to in 5.57(1) and 5.57(2). The newspaper or publisher, upon receipt of such affidavit, will submit a copy to the commission.

**5.58 to 5.64 Reserved**