

Rule Summary and Fiscal Analysis

Part A - General Questions

Rule Number: 4112-5-08

Rule Type: Amendment

Rule Title/Tagline: Discrimination in the employment of the disabled.

Agency Name: Ohio Civil Rights Commission

Division:

Address: 30 East Broad Street Fifth floor Columbus OH 43215

Contact: Stephanie Demers **Phone:** 614-466-6255

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I. Rule Summary

1. Is this a five year rule review? Yes
 - A. What is the rule's five year review date? 1/18/2019
2. Is this rule the result of recent legislation? No
3. What statute is this rule being promulgated under? 119.03
4. What statute(s) grant rule writing authority? 4112.04
5. What statute(s) does the rule implement or amplify? 4112.04; 4112.05
6. What are the reasons for proposing the rule?

Five-year review cycle.
7. Summarize the rule's content, and if this is an amended rule, also summarize the rule's changes.

The rule outlines what constitutes discrimination against the disabled in employment. The rule also addresses pre-employment inquiries and examinations, the burden of proof when an employer discriminates against a disabled person, reasonable accommodation and undue hardship, and appropriate defenses. The agency seeks to make the following amendments:

* Correct grammatical issues in paragraphs (A)(1) and (6) by eliminating "the," [processing] and "of" and "or not" [after whether]; in paragraph (B) (2) by changing "nor" to "or;" and (E)(1) by changing "disability of an" to "disabled" employee/applicant; (employers make accommodations for people, not the condition); and paragraph (E)(2) from "may take the form, for example, of" to "include, but are not limited to," and change "Specific examples include" to "for example:"

* Add "or" to (B)(1) because the rule outlines two permissible types of inquiries. The lack of "or" made it seem as if both elements are required.

* Eliminate "paragraph (E) when referencing the pre-employment inquiries because (E) pertains to reasonable accommodations. We believe the rule is referring to what is now paragraph (C), so in order to eliminate an inaccurate reference and accounting for the paragraphs could again change, we are suggesting limiting the language to "the inquiries permissible under this rule."

* Eliminate the phrase in paragraph (D) "whether it is based upon a BFOQ, occupational hazard, inability to substantially perform the job; or inability of the employer to accommodate." The burden is on the employer to articulate why an employee/applicant was discriminated against.

* A bona fide occupational qualification (BFOQ) is, in essence, a pass to discriminate without violating the law. Federal courts have held there is no BFOQ under the ADA. State law allows an employer to seek a BFOQ as a pass to discriminate only in for certain circumstances and generally with job applicants: (1) to elicit information about protected class, including disability from applicants; (2) to keep records of applicants' information; (3) to use an application or otherwise elicit information about applicants' protected status; (4) print/publish statements, notices or advertisements indicating a preference for specific applicants; (5) Follow or deny through quota systems hiring a certain protected class; (6) using an employment agency known to discriminate. The agency seeks to substantially amend paragraph (D)(2) to clarify a BFOQ based on disability is extremely limited to those outlined circumstances.

* Further, in paragraph (D)(2)(b), instead of outlining what is and is not a BFOQ, the more appropriate verbiage provides examples of what are and are not legally supported bases for discriminating against disabled persons. For example, compliance with a statutory provision or regulation is not a BFOQ; it is a legitimate non-discriminatory reason (defense) to discrimination. We suggest moving those provisions under (1) where they more appropriately fit.

* Change reference from Division (L) to (K) of 4112.02 in paragraphs (D)(2),(3),(4) and (E)(4). Recent statutory amendments changed the numbering of 4112.02.

* Separate "the requirements of other laws and contracts" in paragraph (E)(3)(b) as its own enumerated example (now section (c)) of what might constitute undue hardship;

* Alter paragraph (F)(1) very slightly to make it clear the employer must prove a test that creates barriers for disabled persons is related to job performance. Test validation

is a term of art. There are very specific reasons an employment test must be valid and reliable, which is typically determined by experts in the field.

8. Does the rule incorporate material by reference? Yes
9. If the rule incorporates material by reference and the agency claims the material is exempt pursuant to R.C. 121.71 to 121.76, please explain the basis for the exemption and how an individual can find the referenced material.

Not applicable.

10. If revising or re-filing the rule, please indicate the changes made in the revised or re-filed version of the rule.

Not Applicable

II. Fiscal Analysis

11. As a result of this proposed rule, please estimate the increase / decrease in revenues or expenditures affecting this agency, or the state generally, in the current biennium or future years. If the proposed rule is likely to have a different fiscal effect in future years, please describe the expected difference and operation.

This will have no impact on revenues or expenditures.

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Not applicable.

12. What are the estimated costs of compliance for all persons and/or organizations directly affected by the rule?

Not applicable.

13. Does the rule increase local government costs? (If yes, you must complete an RSFA Part B). No

14. Does the rule regulate environmental protection? (If yes, you must complete an RSFA Part C). No

III. Common Sense Initiative (CSI) Questions

15. Was this rule filed with the Common Sense Initiative Office? No

16. Does this rule have an adverse impact on business? No

- A. Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? No**
- B. Does this rule impose a criminal penalty, a civil penalty, or another sanction, or create a cause of action, for failure to comply with its terms? No**
- C. Does this rule require specific expenditures or the report of information as a condition of compliance? No**

Rule Summary and Fiscal Analysis
(Part A – General Questions)

4112-5-08

Rule Number

Existing – Five-year review (Amended)

TYPE of rule filing

Rule Title/Tag Line

Discrimination in the employment of the disabled.**Ohio Civil Rights Commission**

Agency Name

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RULE SUMMARY

1. Is this a five-year rule review?

Yes.

a. If so, what is the rule's five-year review date?

01/19/2019

2. Is this rule the result of recent legislation?

No.

a. If so, what is the bill number, General Assembly and Sponsor?

Bill Number:

General Assembly:

Sponsor:

3. What statute is this rule being promulgated under?

Section 4112.04 of the Revised Code.

4. What statute (s) grant the rule writing authority?

Section 119.03 of the Revised Code.

5. What statute(s) does the rule implement or amplify?

Sections 4112.04 and 4112.05 of the Revised Code.

6. What are the reasons for proposing (i.e., why are you filing,) the rule?

Five-year review.

7. Summarize the rule's content, and if this is an amended rule, also summarize the rule's changes.

The rule outlines what constitutes discrimination against the disabled in employment. The rule also addresses pre-employment inquiries and examinations, the burden of proof when an employer discriminates against a disabled person, reasonable accommodation and undue hardship, and appropriate defenses.

The agency seeks to make the following amendments:

- Correct grammatical issues in paragraphs (A)(1) and (6) by eliminating “the,” [processing] and “of” and “or not” [after whether]; in paragraph (B)(2) by changing “nor” to “or;” and (E)(1) by changing “disability of an” to “disabled” employee/applicant; (employers make accommodations for people, not the condition); and paragraph (E)(2) from “may take the form, for example, of” to “include, but are not limited to,” and change “Specific examples include” to “for example:”
- Add “or” to (B)(1) because the rule outlines two permissible types of inquiries. The lack of “or” made it seem as if both elements are required.
- Eliminate “paragraph (E) when referencing the pre-employment inquiries because (E) pertains to reasonable accommodations. We believe the rule is referring to what is now paragraph (C), so in order to eliminate an inaccurate reference and accounting for the paragraphs could again change, we are suggesting limiting the language to “the inquiries permissible under this rule.”
- Eliminate the phrase in paragraph (D) “whether it is based upon a BFOQ, occupational hazard, inability to substantially perform the job; or inability of the employer to accommodate.” The burden is on the employer to articulate why an employee/applicant was discriminated against.
- A bona fide occupational qualification (BFOQ) is, in essence, a pass to discriminate without violating the law. Federal courts have held there is no BFOQ under the ADA. State law allows an employer to seek a BFOQ as a pass to discriminate only in for certain circumstances and generally with job applicants: (1) to elicit information about protected class, including disability from applicants; (2) to keep records of applicants’ information; (3) to use an application or otherwise elicit information about applicants’ protected status; (4) print/publish statements, notices or advertisements indicating a preference for specific applicants; (5) Follow or deny through quota systems hiring a certain protected class; (6) using an employment agency known to discriminate. The agency seeks to substantially amend paragraph (D)(2) to clarify a BFOQ based on disability is extremely limited to those outlined circumstances.
- Further, in paragraph (D)(2)(b), instead of outlining what is and is not a BFOQ, the more appropriate verbiage provides examples of what are and are not legally supported bases for discriminating against disabled persons. For example, compliance with a statutory provision or regulation is not a BFOQ; it is a legitimate non-discriminatory reason

(defense) to discrimination. We suggest moving those provisions under (1) where they more appropriately fit.

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- Separate “the requirements of other laws and contracts” in paragraph (E)(3)(b) as its own enumerated example (now section (c)) of what might constitute undue hardship;
- Alter paragraph (F)(1) very slightly to make it clear the employer must prove a test that creates barriers for disabled persons is related to job performance. Test validation is a term of art. There are very specific reasons an employment test must be valid and reliable, which is typically determined by experts in the field.

8. Does the rule incorporate material by reference?

Yes. Chapter 4112. Generally and sections 4112.02(E) and 4112.02(L) [now (K)] of the revised code.

9. If the rule incorporates material by reference and the agency claims the material is exempt pursuant to R.C. 121.71 to 121.76, please explain the basis for the exemption and how an individual can find the referenced material.

Not applicable.

10. If revising or re-filing the rule, please indicate the changes made in the revised or re-filed rule.

Not applicable.

Fiscal Analysis

11. Estimate the total amount by which *this proposed rule* would **increase/decrease** either **revenues/expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

Not applicable.

12. What are the estimated costs of compliance of all persons and/or organizations directly affected by the rule?

None.

13. Does the rule increase local government costs? (If yes, you must complete an RSFA Part B).

No.

14. Does the rule regulate environmental protection? (If yes, you must complete an RSFA, Part C).

No.

Common Sense Initiative (CSI) Questions

15. Was this rule filed with the Common-Sense Initiative Office?

Not applicable.

16. Does this rule have an adverse impact on business?

No.

- a. Does this rule require a license, permit or any other prior authorization to engage in or operate a line of business?
- b. Does this rule impose a criminal penalty, a civil penalty or another sanction, or create a cause of action for failure to comply with its terms?
- c. Does this rule require specific expenditures or the report of information as a condition of compliance?

No.