

Chapter 162-16 WAC

EMPLOYMENT

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162-16-170	Employee distinguished from independent contractor. [Statutory Authority: RCW 49.60.120(3). 82-19-072 (Order 42), § 162-16-170, filed 9/20/82.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

162-16-010	Photographs of prospective employees. [Rule, filed 10/18/61.] Repealed by Order 8, filed 6/22/70.
162-16-020	Bona fide occupational qualification defined. [Order 16, § 162-16-020, filed 5/22/74; Order 9, § 162-16-020, filed 9/23/71; Order 8, § 162-16-020, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-030	Advice of commission. [Order 16, § 162-16-030, filed 5/22/74; Order 9, § 162-16-030, filed 9/23/71; Order 8, § 162-16-030, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-040	Identification in use. [Order 16, § 162-16-040, filed 5/22/74; Order 9, § 162-16-040, filed 9/23/71; Order 8, § 162-16-040, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-050	Discrimination in employment because of arrests. [Order 19, § 162-16-050, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-060	Discrimination in employment because of convictions. [Order 19, § 162-16-060, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-070	Applicability of WAC 162-16-050 and 162-16-060 to nonminorities. [Order 19, § 162-16-070, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-080	Purpose. [Order 20, § 162-16-080, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-090	Job titles. [Order 20, § 162-16-090, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-100	Discriminatory language. [Order 20, § 162-16-100, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-110	Employment agencies. [Order 20, § 162-16-110, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-120	Newspapers and other advertising media. [Order 20, § 162-16-120, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-130	Bona fide occupational qualification. [Order 20, § 162-16-130, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-140	Affirmative action. [Order 20, § 162-16-140, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
162-16-150	Discrimination because of spouse. [Order 21, § 162-16-150, filed 4/18/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).

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WAC 162-16-200 General purpose and definitions.

The law against discrimination protects persons from discrimination in employment (RCW 49.60.180, 49.60.190, and 49.60.200). Persons are also protected from discrimination as provided in RCW 49.60.172 (unfair practices with respect to HIV infection), RCW 49.60.174 (actual or perceived HIV infection), and RCW 49.60.210 (unfair to discriminate against person opposing unfair practice).

(1) The commission's first objective in writing the rules in this chapter and in making future decisions on questions not addressed in this chapter is to eliminate and prevent discrimination. This is the overall purpose of the law against discrimination.

(2) Other objectives in writing these rules are:

(a) To be consistent with interpretations of federal anti-discrimination law and the antidiscrimination laws of other states, where these are comparable to Washington law, and where the commission does not find that a different rule would better serve the state of Washington.

(b) To avoid the uncritical adoption of definitions from areas of law other than antidiscrimination law. It is appropriate to define employment differently in different areas of the law to carry out the separate purpose of each area of law.

(c) To give effect to the purposes of the exemption of employers of less than eight from public enforcement of the law against discrimination, as identified in RCW 49.60.040.

(d) The public and commission staff need standards that are certain and that are easy to understand and apply. Therefore we must sometimes simply draw a line, although reasonable persons could differ as to where the line should be drawn.

(3) The state law against discrimination covers employers with eight or more employees. Persons should also educate themselves on relevant local or federal antidiscrimination laws.

(4) Definition:

In this chapter, the following words are used in the meaning given, unless the context clearly indicates another meaning.

"Protected status" is short for the phrase, "age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person," and means the full phrase (see RCW 49.60.180).

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-200, filed 7/12/99, effective 8/12/99.]

WAC 162-16-210 Advice of commission. (1) When requested to do so, the commission's staff will advise persons on how to meet particular employment needs consistently with the law against discrimination.

(2) Persons may petition the commission for an executive director's opinion determining whether protected status would be a bona fide occupational qualification in particular circumstances, unless the commission or another public agency with comparable jurisdiction has directed or authorized the action. (Please see WAC 162-04-070 on executive director's opinions and WAC 162-16-240 on bona fide occupational qualification.)

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-210, filed 7/12/99, effective 8/12/99.]

WAC 162-16-220 Jurisdiction—Counting the number of persons employed. (1) **Purpose and scope.** RCW 49.60.040 defines "employer" for purposes of the law against discrimination in part as "any person. . . who employs eight or more persons." This section establishes standards for determining who is counted as employed when deciding whether a person is an employer. The standards in this section do not define who is entitled to the protection of the law against discrimination.

(2) **Time of calculation.** A person will be considered to have employed eight if the person either:

(a) Had an employment relationship with eight or more persons for any part of the day on which the unfair practice is alleged to have occurred, or did occur; or

(b) Had an employment relationship with an average of eight or more persons over a representative period of time including the time when the unfair practice is alleged to have occurred.

An employment relationship is most readily demonstrated by a person's appearance on the employer's payroll. The representative period of time for (b) of this subsection will ordinarily be the twenty weeks prior to and including the date on which the unfair practice is alleged to have occurred. However, where this period will not accurately reflect the overall employment level, as in a seasonal industry, we will use the month during which the unfair practice is alleged to have occurred plus the preceding eleven months.

(3) **Part-time employees.** A person working part time will be counted the same as a person working full-time. Persons subject to call to work (such as volunteer firefighters) will be considered to be employed at all times when they are subject to call.

(4) **Area of calculation.** A person who employs eight or more persons is an "employer" for purposes of the law against discrimination even though less than eight of the employees are located in the state of Washington.

(5) **Multiple places of employment.** The count will include all persons employed by the same legal entity, whether or not the persons work in the same place of business or line of business.

(6) **Connected corporations.** Corporations and other artificial persons that are in common ownership or are in a parent-subsidiary relationship will be treated as separate

employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management.

(7) **Persons on layoff.** Persons on layoff will not be counted.

(8) **Persons on leave.** Persons on paid leave will be counted. Persons on unpaid leave will not be counted.

(9) **Employee or independent contractor.** Independent contractors will not be counted. In determining whether a person is employed or is an independent contractor for the jurisdictional count we will use the same standards that we use for the purpose of determining whether a person comes within the protection of the law against discrimination. These standards are set out in WAC 162-16-230.

(10) **Pay.** Anyone who is paid for work and who otherwise meets the standards in this section will be counted. This includes paid interns and work study program participants. Pay includes compensation for work by the hour, by commission, by piecework, or by any other measure. For the treatment of unpaid persons, see subsection (11) of this section.

(11) **Unpaid persons.** An unpaid person will be counted if he or she is generally treated in the manner that employers treat employees. That is, if management selects the person (particularly if selected in competition with other persons), assigns work hours, disciplines the unpaid person like an employee, or provides employment benefits such as industrial insurance, then the person will be counted as an employee. The typical volunteer firefighter would be counted. A person who comes into the food bank when he or she pleases, is put to work if there is anything to do, who leaves when he or she pleases, who has no expectation of paid employment, and who receives no employment benefits, would not be counted.

(12) **Family members.** Because of the definition of "employee" in RCW 49.60.040, we will not count "any individual employed by his or her parents, spouse, or child." Other family members will be counted.

(13) **Domestic help.** Because of the definition of "employee" in RCW 49.60.040, we will not count a person in the domestic service of the employing person.

(14) **Directors.** Directors of corporations, and similar officers of other private or public artificial legal entities, will not be counted simply because they serve in that capacity.

(15) **Officers.** Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

(16) **Partners.** Partners will not be counted as employed by the partnership or by each other.

(17) **Members of a professional service corporation.** All persons who render professional services for a profes-

sional service corporation will be counted as employees of the corporation.

(18) **Temporary employee placement services.** Persons placed with an on-site employer by a temporary employee placement service:

(a) Will be counted as employees of the temporary placement service; and

(b) Will also be counted as employees of the on-site employer if the on-site employer generally treated them in the manner that employers treat employees (please see the factors listed in WAC 162-16-230).

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-220, filed 7/12/99, effective 8/12/99.]

WAC 162-16-230 Jurisdiction—Independent contractors. (1) **Purpose of section.** RCW 49.60.180 defines unfair practices in employment. A person who works or seeks work as an independent contractor, rather than as an employee, is not entitled to the protection of RCW 49.60.180. This section outlines the standards that we will use to determine whether a person is an employee as distinguished from an independent contractor for the purpose of entitlement to the protection of RCW 49.60.180.

(2) **Rights of independent contractor.** While an independent contractor does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1). The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW 49.60.-030(2) but not by actions of the Washington state human rights commission.

(3) **General approach.** We will consider all the relevant facts, particularly those bearing on the following factors. No one factor is determinative, but the most important is the extent to which the purchaser of work controls the manner and means of performance of the work.

(a) **Control of work.** An employment relationship probably exists where the purchaser of work has the right to control and direct the work of the worker, not only as to the result to be achieved, but also as to the details by which the result is achieved.

(b) **Tools and place of work.** Does the purchaser of the work or the worker furnish the equipment used and the place of work? Generally, the purchaser of work furnishes tools and equipment for employees while independent contractors furnish their own. Some employees furnish some of their own tools, however.

(c) **Skill level involved.** The skill required in the particular occupation. Skilled workers are typically less closely supervised than unskilled workers, but they are employees if indicia of employment other than close supervision are present.

(d) **Type of work involved.** The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision. Some persons, such as lawyers or doctors, may be employees even though they are not closely supervised. The test for such specialists is not whether the lawyer or doctor is closely supervised, but whether he or she is treated the way that employed lawyers or doctors are commonly treated. Lawyers and doctors are typically independent contractors, however, with respect to their clients or patients.

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(e) **Duration of work.** The length of time during which the person has worked or the length of time that the job will last. Independent contractors typically are hired for a job of relatively short duration, but there are instances of independent contracts for an indefinite period - for example, contracts for janitorial service.

(f) **Method of payment.** The method of payment, whether by time or by the job. Independent contractors are usually paid by the job but are sometimes paid by time. Employees are usually paid by time but are sometimes paid by the job.

(g) **Ending the work relationship.** Whether the work relationship is terminable by one party or both parties, with or without notice and explanation. An employee is usually free to quit and is usually subject to discharge or layoff without breach of the employment contract. An independent contractor usually has more fixed obligations.

(h) **Leave.** Whether annual leave is afforded. Leave with pay is almost exclusively accorded to employees.

(i) **Integration of the work in the purchaser's operations.** Whether the work is an integral part of the business of the purchaser of it. Usually, employees rather than independent contractors do the regular work of a business.

(j) **Accrual of benefits.** Whether the worker accumulates retirement benefits. Retirement benefits are almost exclusively accorded to employees.

(k) **Taxation.** Whether with respect to the worker the purchaser of work pays taxes levied on employers, such as the Social Security tax, unemployment compensation tax, and worker's compensation tax, or withholds federal income tax. The tax laws do not have the same purposes as the law against discrimination, so employee status for tax purposes is helpful but not controlling.

(l) **Salary or income.** Whether the worker treats income from the work as salary or as business income. See subsection (3)(k) of this section.

(m) **Employer records.** Whether with respect to the worker the purchaser of work keeps and transmits records and reports required of employers, such as those required under the worker's compensation act. Worker's compensation coverage, like tax coverage, is helpful but not conclusive.

(n) **The intention of the parties.** The fact that a contract says that the worker is an independent contractor will be considered in this respect, but it is not conclusive for the purpose of coverage of RCW 49.60.180.

(4) **Burden of persuasion.** The party asserting that the complainant is an independent contractor has the burden of proving that status.

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-230, filed 7/12/99, effective 8/12/99.]

WAC 162-16-240 Bona fide occupational qualification. Under the law against discrimination, there is an exception to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of protected status; that is if a bona fide occupational qualification (BFOQ) applies. The commission believes that the BFOQ exception should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of

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the job. The following examples illustrate how the commission applies BFOQs:

(1) Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., locker room attendant, intimate apparel fitter) the commission will consider protected status to be a BFOQ.

(2) A 911 emergency response service needs operators who are bilingual in English and Spanish. The job qualification should be spoken language competency, not national origin.

(3) An employer refuses to consider a person with a disability for a receptionist position on the basis that the person's disability "would make customers and other coworkers uncomfortable." This is **not** a valid BFOQ.

(4) A person with a disability applies for promotion to a position at a different site within the firm. The firm does not promote the person because doing so would compel the firm to install an assistive device on equipment at that site to enable the person to properly perform the job. This is **not** a valid BFOQ.

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-240, filed 7/12/99, effective 8/12/99.]

WAC 162-16-250 Discrimination because of marital status. (1) **General rule.** It is an unfair practice to discriminate against an employee or job applicant because of marital status. Examples of unfair practices include, but are not limited to:

(a) Refusing to hire a single or divorced applicant because of a presumption that "married persons are more stable."

(b) Refusing to promote a married employee because of a presumption that he or she "will be less willing to work late and travel."

(2) **Exceptions to the rule.** There are narrow exceptions to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of marital status:

(a) If a bona fide occupational qualification applies (please see WAC 162-16-240).

(b) If an employer is enforcing a documented conflict of interest policy limiting employment opportunities on the basis of marital status:

(i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;

(ii) Where one spouse would be responsible for auditing the work of the other;

(iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own; or

(iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of policy level officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-250, filed 7/12/99, effective 8/12/99.]

WAC 162-16-260 Discriminatory language in advertising and recruiting. (1) **Unfair practice.** The law against discrimination (RCW 49.60.180, 49.60.190 and 49.60.200) makes it an unfair practice for employers, labor unions, employment agencies, or other persons to discriminate on the basis of protected status. An exception is if a bona fide occupational qualification applies (please see WAC 162-16-240). The law against discrimination (RCW 49.60.220) also makes it an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice.

The commission provides the following charts as guidance in avoiding discriminatory language in advertising and recruiting. These are suggested terms only. The commission invites persons who want further assistance to contact commission staff.

(2) **Discriminatory language.** It is an unfair practice to use any word, term, phrase, or expression that tends to influence, persuade or dissuade, encourage or discourage, attract or repel, any person or persons because of protected status. An exception is if a bona fide occupational qualification applies (please see WAC 162-16-240).

DISCRIMINATORY TERMS

IN ADVERTISEMENTS:

Man, woman, girl, boy, lady, etc.

Cute, handsome, pretty, clean-cut, attractive

Married, single
Recent graduate, college student (implies preference for youth)

Mother, housewife
Young

Christian, Jewish, etc.
Interracial, segregated,
Black, White, colored, Oriental, Asian, Mexican, minority.

SUGGESTED SUBSTITUTES:

Person, applicant, hiree, one, trainee, or a sex-neutral job title

Neat, well-groomed, personable, professional appearance

No substitutes
Degree required, Internship

Part-time, short hours
Entry level, beginner, trainee

No substitutes
Person, applicant, etc.

Other nondiscriminatory terms: Reliable, responsible, efficient, minimum wages, long hours, overtime, able to travel, willing to relocate.

(3) **Job titles.** It is an unfair practice to use a discriminatory job title in any help wanted advertisement, job description, job announcement, or any other notice, statement, or publication, unless the employer has shown that a bona fide occupational qualification applies (please see WAC 162-16-240).

The term "discriminatory job title" includes but is not limited to any job title that contains a gender noun or suffix, such as waitress, foreman, salesman, maid, or counter girl. If the use of a gender neutral job title is not practicable, two alternatives are permissible:

(a) The sex specific job title may be used with its counterpart title (e.g., waiter/waitress);

(b) The sex specific title may be used if accompanied by the designation "man or woman," "male or female," or "M-F" (e.g., foreman, man or woman; tailor, male or female; line-man, M-F).

DISCRIMINATORY JOB

TITLES:	SUGGESTED SUBSTITUTES:
Barmaid	Server, Cocktail Server
Busboy, tray girl	Busser, Cafeteria Worker
Cleaning woman, cleaning lady	Cleaning Assistant
Draftsman	Drafter, AutoCAD Specialist
Fireman	Firefighter
Fisherman	Fisher
Foreman	Supervisor
Handyman	Miscellaneous Repairer
Journeyman	Journey Level
Leadman	Crew, Shift, or Team Leader
Longshoreman	Longshore Worker
Maid	Domestic Helper, House-keeper
Maintenance man	Maintenance Worker
Policeman	Police Officer
Repairman	Repairer, Technician
Salesman, saleslady, sales-girl	Salesperson, Sales Clerk, Sales Representative
Stewardess, Steward	Flight Attendant, Cabin Attendant

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-260, filed 7/12/99, effective 8/12/99.]

WAC 162-16-270 Employment agencies. (1) It is an unfair practice for any employment agency to:

(a) Handwrite, print, or circulate any interoffice or inter-agency communication, job order, advertisement, brochure, or notice which expresses overtly or subtly, directly or indirectly a preference, specification or limitation on the basis of protected status. An exception is if a bona fide occupational qualification applies (please see WAC 162-16-240).

(b) Maintain, formally or informally, agency division titles that are not clearly neutral in terms of sex.

(2) It is not an unfair practice for an employment agency to assist an employer in recruiting applicants based on protected status when:

(a) The employer has a documented affirmative action plan; and

(b) The employer's affirmative action plan is authorized or required by a governmental agency or court of competent authority and jurisdiction.

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-270, filed 7/12/99, effective 8/12/99.]

WAC 162-16-280 Newspapers and other advertising media. (1) It is an unfair practice for a newspaper or other advertising medium to publish or circulate within the state an employment advertisement under a column heading or designation which segregates or expresses a preference on the basis of protected status. An exception is if a bona fide occupational qualification applies (please see WAC 162-16-240).

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(2) It is not an unfair practice for any newspaper or other advertising medium to print, publish, or circulate employment advertisements expressing the wording of the advertisement, or subtly, directly or indirectly a preference, specification or limitation on the basis of protected status, provided the newspaper or other advertising medium furnishes, on request of a duly authorized representative of the commission, the name and address of the person who submitted the advertisement for publication.

(3) The commission encourages advertising media that circulate employment advertisements to:

(a) Maintain lists of discriminatory job titles and terms and suggested substitutes, as compiled by the commission;

(b) Instruct their ad-takers to advise employers and employment agencies of these terms; and

(c) Have copies of this regulation available for distribution to advertisers on request.

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-280, filed 7/12/99, effective 8/12/99.]

WAC 162-16-290 Recruiting statements. (1) Employers are encouraged to seek a broad pool of applicants through recruitment efforts. It is permissible to use advertisements that contain nonexclusionary recruitment phrases, such as:

(a) "Equal opportunity employer."

(b) "We encourage workforce diversity."

(2) IT IS NOT PERMISSIBLE, however, to express or exercise a hiring preference based on protected status, UNLESS:

(a) The employer has a court order to do so or an authorization from this commission or another governmental agency of competent authority and jurisdiction; or

(b) The employer can prove that the expression is justified by a bona fide occupational qualification (please see WAC 162-16-240). In the absence of proof, the advertisement will be considered evidence of an unfair practice under the law.

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-290, filed 7/12/99, effective 8/12/99.]