Supporting Statement for Recordkeeping under Title VII, the ADA, and GINA

A. Justification

1. The Equal Employment Opportunity Commission (EEOC) enforces title VII of the Civil Rights Act of 1964, as amended (Title VII), which prohibits discrimination against individuals on the basis of race, sex, national origin and religion, title I of the Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals with disabilities, and title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination based on genetic information. Section 709 of Title VII, 42 U.S.C. § 2000e-8, section 107(a) of the ADA, 42 U.S.C. § 12117, and section 209 of GINA, 42 U.S.C. § 2000ff-6, authorize the EEOC to issue recordkeeping regulations that are deemed reasonable, necessary or appropriate to the enforcement of the Acts. The Commission has issued recordkeeping regulations pursuant to those statutory sections which are found throughout 29 C.F.R. Part 1602. Copies of the statutory and regulatory provisions are attached. The recordkeeping requirements in Part 1602 cover all non-federal employers with 15 or more employees, as well as certain apprenticeship committees and labor unions (hereinafter referred to collectively as "employers" for ease of reference). The recordkeeping requirements themselves do not mandate the creation of any records. However, they do require that all employment records a covered employer creates or uses (including, for example: personnel records – hiring, promotion, demotion, transfer, termination, rates of pay, selection for training, or reasonable accommodation requests; apprenticeship records – reasonable accommodation requests, test papers, interview records; union records – membership or referral records) must be preserved for the periods specified in Part 1602.

2. Recordkeeping is necessary to the enforcement of Title VII, the ADA, and GINA. After a charge of unlawful employment discrimination is filed with the EEOC by an employee or applicant against an employer and served by the EEOC on the employer, the employer is often asked to submit a position statement. The respondent employer typically uses the preserved records to prepare its position statement and may attach relevant retained records to document its defense. Sometimes the EEOC will request additional documents relevant to the case during the investigation and conciliation of the charge. The EEOC investigators review the records proffered or requested (including records relating to the charging party and to other similarly situated employees or applicants) to help determine whether reasonable cause exists to believe that a charging party's allegation of discrimination against the respondent employer is true. In particular, the investigator reviews records to determine what exactly occurred and whether there is evidence that the action

was taken for a prohibited reason or produced an adverse impact on members of a protected class.

If the records are not preserved, an employer may be unable to reconstruct what actually occurred and, absent documentary evidence, may have difficulty demonstrating to the EEOC that the charging party's allegations are incorrect. In addition, the EEOC's ability to investigate, issue determinations, conciliate, and litigate will be unduly complicated, made more costly and, in some cases, defeated.

3. This collection of information does not involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, and the EEOC has not considered using information technology to reduce the burden because this is a recordkeeping requirement which does not require reporting or the creation of any records. However, employers may create and retain records electronically, and we assume that many employers do so to comply with this recordkeeping requirement.

4. Other agencies may require entities they regulate to keep certain types of records related to their areas of regulation, e.g., banking, pay, tax, or health records. The EEOC is not aware of any other agency that requires employers to preserve all employment records. In the PRA notices we publish every three years in the Federal Register, we invite the public to comment on the recordkeeping requirement, and we have never received any comment indicating that it duplicates another agency's requirement. In addition, no employer subject to these recordkeeping requirements has ever complained to EEOC that the recordkeeping requirement duplicates another agency's requirement.

5. Small businesses with 15 or more employees are subject to this recordkeeping requirement. The burden on small businesses is minimal because, as discussed in item 1 above, employers must only preserve records that they otherwise make or use in the course of their business. The regulation does not require them to create any new records. For these reasons, the EEOC has not taken any additional steps to minimize the burden on small businesses.

6. If the records required by the regulation to be preserved are not retained at all or are retained for a shorter period of time, the EEOC's ability to investigate, issue determinations, conciliate, and litigate will be unduly complicated and, in some cases, defeated. An individual who wishes to file a charge has up to 300 days from the date of the discrimination to do so; therefore, it is necessary for employers to retain pertinent records for at least one year to ensure that they are not destroyed before a charging party files his/her charge. Further, retaining the records benefits employers because, as noted above in item 2, an employer asked to respond to charges filed against it needs the records in

order to prepare a position statement. For these reasons, the regulation requires employers to preserve employment records for the following periods:

Private Employers – one year from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General under Title VII, the ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.

Apprenticeship Committees – two years from the date an application was received, except that where an annual statistical report is required by the Commission, the person required to file the report shall preserve the list and forms for a period of two years or the period of a successful applicant's apprenticeship, whichever is longer. Persons required to file Report EEO–2 or similar reports, shall preserve any other record made solely for the purpose of completing such reports for a period of one year from the due date thereof. Other records relating to apprenticeship shall be retained for a period of two years from the date of the making of the record, but, if a charge of discrimination is filed or an action is brought by the Attorney General under Title VII, the ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.

Labor Unions – records made solely for the purpose of completing Report EEO–3 shall be preserved for a period of one year from the due date of the report. Other membership or referral records (including applications for same) shall be retained for a period of one year from the date of the making of the record, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General under Title VII, the ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.

State and Local Governments – two years from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Attorney General, all personnel records relevant to that charge or action must be preserved until final disposition of the charge or action.

Educational Institutions – two years from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General, all personnel records relevant to that charge or action must be preserved until final disposition of the charge or action.

7. There are no special circumstances.

8. As required by 5 C.F.R. § 1320.11, the EEOC published a notice in the Federal Register on June 2, 2011 at page 31892-31895 soliciting comments on the proposed extension of our recordkeeping regulations concurrent with the submission to OMB of the proposed rule. See FR Volume 76, Number 106. The EEOC received only one public comment on its proposed rule, from an association of state credit unions. The comment expressed support for the proposed changes.

Over the years, the EEOC has attended numerous conferences comprised of advocacy groups and employers concerning enforcement of Title VII and the ADA. The EEOC also presents many forums for discussion of enforcement issues through its various outreach, training, and assistance to small business programs.

In November of 2010, the EEOC furnished copies of its proposed Federal Register notice to the following, inviting them to review the proposed regulatory change and provide comments:

U.S. Department of Labor
Office of the Solicitor

Office of Health Plan Standards and Compliance Assistance
U.S. Department of Labor
Employee Benefits Security Administration

U.S. Department of Heath and Human Services
Office for Civil Rights

U.S. Small Business Administration
Office of Advocacy

Disability Rights Section
U. S. Department of Justice
Civil Rights Division

Office of the Chief Counsel
U.S. Department of the Treasury
Internal Revenue Service

Over the years, the EEOC has consulted with the U.S. Department of Labor (DOL) on our respective agency recordkeeping regulations, and coordinated with the Office of Federal Contract Compliance Programs (OFCCP) of the DOL on their proposed recordkeeping regulations to eliminate the possibility of unnecessary duplication.

The EEOC has also met with representatives of the OFCCP, the Employment Standards Administration, the Wage and Hour Administration, the Solicitor's Office and other components of DOL to discuss various aspects of our agency recordkeeping requirements.

9. The EEOC does not provide payments or gifts to respondents.

10. The EEOC does not provide an assurance of confidentiality as the regulations do not require employers to disclose any information to the Commission. Any of the records maintained pursuant to the regulations that are subsequently disclosed to the EEOC during an investigation are protected from public disclosure by the confidentiality provisions of sections 706(b) and 709(e) of Title VII which are incorporated by reference into the ADA and GINA.

11. There are no questions of a sensitive nature; in fact, there are no questions of any nature involved in this collection as it is a recordkeeping requirement only.

12. This information collection is limited to record retention; it does not require record creation or reporting. In order to estimate the hour burden for retaining these records we made some assumptions.

First, firms do not engage in a special process in order to meet Title VII, ADA, and GINA recordkeeping requirements specifically. We assume that firms already create, access and collect records during the employment process. Some or all of this information may be collected automatically through electronic means or entered by the employees. Once created or collected, the information is automatically retained until the firm decides to destroy the information. Therefore, firms with processes in place incur little or negligible additional cost in complying with the EEOC's record retention requirement. While there are approximately 899,580 employers[1] subject to the recordkeeping requirement, only the portion of those employers that are newly created will incur a burden.

Second, newly formed firms may incur a small cost in time when installing and learning how to use their automated data collection systems. Although the information required under Title VII, the ADA, and GINA is collected automatically, we assume some effort and time has to be expended so that employers can familiarize themselves with the Title VII, ADA, and GINA recordkeeping requirements and inform staff about those requirements. Once this cost is incurred, we assume that the employer will never face this cost again. In the Final Rule, the EEOC included a link to a brief summary of our

[1] This number was reached using data on private employers from the Small Business Administration, census data on state and local government employers (including schools), data on colleges and universities from the National Center for Education Statistics, and data on referral unions collected from EEO-3 reports filed with the EEOC.

recordkeeping requirements that employers can use to familiarize themselves with the recordkeeping requirements and that employers can share, as needed, with staff members who have recordkeeping responsibilities. We estimate that 10 minutes of time would be spent for this familiarization process.

The annual hour burden is based on the number of new firms with 15 or more employees that enter the market annually. Using 2007 data from the Small Business Administration, we estimate that there are 94,910 firms[2] that would incur a start-up burden due to the Acts. Assuming 10 minutes of time per firm, we estimate that the total annual hour burden is 15,818 hours.

In addition to the annual hour burden for new firms, the proposed amendment would impose a negligible burden on established firms who are parties to charges filed under GINA. We estimate that an employer that is a party to a GINA charge will need less than ten minutes to ensure that its existing system of retaining records pertinent to charges filed under Title VII and the ADA also includes records relating to charges filed under GINA. Assuming that 200 GINA charges will be filed and using a burden estimate of 10 minutes per charge, the annual aggregate burden would increase by only about 33 hours, to 15,851 hours.

13. There is no additional annual cost to the employers as this is a recordkeeping requirement which does not require reporting or the creation of any new documents. As noted above, employers must only retain those records that they have already made or kept for other reasons.

14. There is no cost to the Federal Government because this is merely a recordkeeping requirement for regulated entities and does not obligate the EEOC to incur any costs.

15. The total burden estimate of 15,851 is less than the burden estimate of 16,002 that was used the last time this information collection was approved. The decrease is due to the use of more recent data on the number of new firm births. Because the updated data indicates fewer new firm births per year, the total burden decreased slightly.

16. No results will be published.

17. The EEOC is not seeking approval for non-display of the OMB approval date for this collection.

---

[2] Data from SBA estimated that there were 668,395 firm births in 2006-2007. "Employer Firm Births and Deaths by Employment Size of Firm, 1989-2007", Source: Office of Advocacy, U.S. Small Business Administration, from data provided by the U.S. Bureau of the Census, Statistics of U.S. Business, http://www.sba.gov/ADVO/research/data.html . Using data about firm size from the SBA, we estimated that about 14.2 percent of all small businesses have 15 or more employees. "Employer Firms, Establishments, Employment, and Annual Payroll Small Firm Size Classes, 2007". Therefore, 14.2 percent of 668,395 led to an estimated 94,910 new firms with 15 or more employees.

18. There are no exceptions to the EEOC's certification statement.