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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1602

RIN: 3046-AA89

Recordkeeping and Reporting Requirements under Title VII, the ADA, and GINA

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Rule.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission), through this final rule, extends its existing recordkeeping requirements under title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) to entities covered by title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information.

EFFECTIVE DATE: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Thomas J. Schlageter, Assistant Legal Counsel, (202) 663-4668, or Erin N. Norris, Senior Attorney, (202) 663-4876, Office of Legal Counsel, 131 M Street, NE, Washington, D.C. 20507. Copies of this notice are available in the following alternate formats: large print, Braille, electronic computer disk, and audio tape. Requests for this notice in an alternative format should be made to the Publications Center at 1-800-699-3362 (voice), 1-800-800-3302 (TTY), or

(703) 821-2098 (FAX – this is not a toll free number).

SUPPLEMENTARY INFORMATION: On May 21, 2008, President George W. Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law. Title II of GINA protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. The coverage in title II of GINA corresponds with that of title VII of the Civil Rights Act of 1964, as amended, covering employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs, as well as federal sector employers. Title II became effective on November 21, 2009. EEOC has issued interpretive regulations under GINA (See 75 FR 68912). Further, EEOC issued a final rule implementing changes to its administrative and procedural regulations in a separate notice found at 74 FR 63981. On June 2, 2011, EEOC proposed to amend its recordkeeping regulations to add references to GINA and sought public comment (76 FR 31892). EEOC received only one comment, from an association of state credit unions. The comment expressed support for the proposed changes. Accordingly, the Commission has decided to adopt its proposed changes as its final rule. The final rule does not require the creation of any documents or impose any reporting requirements. It imposes the same record retention requirements under GINA that apply under Title VII and the ADA, i.e., any records made or kept must be retained for the period of time specified in the Title VII and ADA regulations

Regulatory Procedures

EXECUTIVE ORDERS 12866 AND 13563

The Commission has complied with the principles in section 1(b) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review. This rule is not a “significant regulatory action” under section 3(f) of the Order 12866, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order.

PAPERWORK REDUCTION ACT

This final rule contains information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act. It is estimated that the public recordkeeping burden will not increase significantly as a result of the amendments because all employers affected by them are already required to retain all personnel or employment records that they make or keep for a specified period of time, and the only new requirement is that they retain any of those records relevant to a charge of discrimination filed under GINA until the charge is resolved. As required by the Paperwork Reduction Act, the Equal Employment Opportunity Commission has submitted to the Office of Management and Budget a request for approval of these information collection requirements under section 3507(d) of the Act.

Collection title: Recordkeeping under Title VII, the ADA, and GINA.

OMB number: 3046-0040.

Description of affected public: Employers with 15 or more employees are subject to Title VII, the ADA, and GINA.

Number of respondents: 899,580.

Reporting hours: Not applicable.

Number of forms: None.

Federal cost: None.

Abstract: Section 207 of GINA, 42 U.S.C. §§ 2000ff et seq., incorporates the powers, procedures, and remedies found in section 709 of Title VII. Section 709(c) of Title VII, 42 U.S.C. 2000e-8(c), requires the Commission to establish regulations pursuant to which employers subject to the Act shall preserve certain records to assist the EEOC in assuring compliance with the Act's nondiscrimination in employment requirements. Any of the records maintained which are subsequently disclosed to the EEOC during an investigation are protected from public disclosure by the confidentiality provision in section 709(e) of Title VII. EEOC has previously issued recordkeeping regulations under Title VII and the ADA which require all covered entities to preserve all employment and personnel records that they make or keep for a specified period of time, and to preserve all records relevant to a Title VII or ADA charge until the charge is resolved. This revision extends these same requirements to entities covered by GINA.

Burden statement: This recordkeeping requirement does not require reports or the creation of new documents; it merely requires retention of documents that the employer has already made or kept, and the burden imposed by these regulations is therefore minimal. An employer subject to the existing requirements in 29 CFR Part 1602 currently must retain all personnel or employment records made or kept by that employer for the period specified in the regulations, and must retain any records relevant to charges

filed under Title VII or the ADA until final disposition of those matters, which may be longer than one year. This rulemaking requires employers to also retain documents relevant to charges filed under GINA until final disposition of those charges.

Existing Burdens Prior to Change

-- *Establishing Recordkeeping System:* There are approximately 899,580 employers subject to the recordkeeping requirement in Part 1602. According to our prior calculations, the previously approved Title VII and ADA recordkeeping requirement in Part 1602 imposed a total burden on covered employers in the aggregate of approximately 16,002 hours, which represented the aggregated time that had to be spent by all new firms taken together (an estimated 96,013 covered firms per year) to ensure that their record maintenance systems complied with EEOC's recordkeeping requirements. For the current approval process, we used more recent data on the number of new firms (an estimated 94,910 per year), which decreased the total burden to 15,818 hours. Based on the fact that these regulations do not require employers to create any records and do not impose any reporting requirements, but merely require employers to maintain the records that they do create, we estimate that it would take each new firm ten minutes or less to comply. A summary of the recordkeeping requirements covered by this notice, which covered entities may use to familiarize themselves and their staffs with EEOC's recordkeeping requirements, is available at http://www.eeoc.gov/employers/recordkeeping_obligations.cfm. Established firms bear no burden under this analysis, because their systems for retaining personnel and employment records are already in place.

-- Retention of Records When Charge Is Filed: For firms that have recordkeeping systems in place, the fact that a charge is filed should not impose any additional burden, because we assume that employers set up their recordkeeping systems in such a way as to ensure that records related to a charge are retained in accordance with EEOC regulations.

Effect of Proposed Change on Existing Burdens

-- Establishing Recordkeeping System: There will be no increase in the existing burden as a result of this regulatory change. As stated above, established firms bear no burden because their systems for retaining personnel and employment records are already in place. The burden imposed upon new firms created after the regulatory change becomes effective would be the same as the burden shouldered by new firms prior to the change because it will take no longer to set up a recordkeeping system to retain records relevant to Title VII, ADA, and GINA charges than it did to set up a recordkeeping system to retain records relevant to Title VII and ADA charges. As a result of the above-mentioned decrease in the number of new firms, we estimate that the aggregate burden for new firms of establishing a compliant recordkeeping system decreased to 15,818 hours.

-- Retention of Records When Charge Is Filed: The only employers who may be subject to an increased burden are those existing firms that become parties to charges filed under GINA and must therefore ensure that relevant records are retained until the final disposition of the GINA charges. We estimate that an employer that is a party to a GINA charge will need less than ten minutes to ensure that its previously existing system of retaining records pertinent to charges filed under Title VII and the ADA is revised to retain records relating to charges filed under GINA (based upon our estimate that a new firm would need ten minutes to ensure that any recordkeeping system it maintains

complies with EEOC regulations). Assuming that 200 GINA charges will be filed, that each charge is filed against a different employer, and using a burden estimate of ten minutes per charge, the annual aggregate burden would increase by only about 33 hours to 15,851.

REGULATORY FLEXIBILITY ACT

Title II of GINA applies to all employers with fifteen or more employees, approximately 822,000 of which are small firms (entities with 15-500 employees) according to data provided by the Small Business Administration Office of Advocacy. *See Firm Size Data* at <http://sba.gov/advo/research/data.html#us>. We estimate that there will be 200 new charges filed under GINA per year. We estimate that typical human resources professionals will need to dedicate no more than ten minutes per charge to ensure that the employer's existing record retention system retains any personnel documents relevant to a charge of discrimination under GINA until the resolution of the matter. We further estimate that the median hourly pay rate of an HR professional is approximately \$46.40. *See* Bureau of Labor Statistics, Occupational Employment and Wages, May 2009 at <http://www.bls.gov/oes/current/oes113049.htm>. Therefore, the cost of spending ten minutes per charge would be approximately \$7.73 (one-sixth of \$46.40). Even assuming that every one of the estimated 200 GINA charges is filed against a small business, EEOC does not believe that a cost of approximately \$7.73 per charge will be significant for the impacted small entities. Further, if each of the 200 GINA charges was filed against a different small entity, 200 affected firms out of 822,000 is not a substantial number of small firms. Accordingly, the Commission certifies under 5 U.S.C. 605(b)

that this rule will not have a significant economic impact on a substantial number of small entities because any burden it may impose on business entities is minimal. For this reason, a regulatory flexibility analysis is not required.

UNFUNDED MANDATES REFORM ACT OF 1995

This final rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

CONGRESSIONAL REVIEW ACT

This action does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 29 CFR Part 1602:

Administrative practice and procedure, Equal Employment Opportunity.

For the Commission

Dated: January 30, 2012

Jacqueline A. Berrien
Chair

Accordingly, part 1602 is amended as follows:

PART 1602 – RECORDKEEPING AND REPORTING REQUIREMENTS UNDER
TITLE VII, THE ADA, AND GINA

1. The authority citation for part 1602 continues to read as follows:

Authority: 42 U.S.C. 2000e-8, 2000e-12; 44 U.S.C. 3501 *et seq.*; 42 U.S.C. 12117; 42 U.S.C. 2000ff-6.

2. Amend Part 1602 by removing the words “title VII or the ADA” and adding in their place the words “title VII, the ADA, or GINA” in the following places:

- a. § 1602.14.
- b. § 1602.21(b).
- c. § 1602.28(a).
- d. § 1602.31.

[FR Doc. 2012-2420 Filed 02/02/2012 at 8:45 am; Publication Date: 02/03/2012]