Supporting Statement for Recordkeeping under Title VII, 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, color, religion, sex, or national origin, 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 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. The statutory language authorizing the recordkeeping is included at the end of this supporting statement. 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, 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, made more costly, 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, 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, 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, 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. § 1320.12, the EEOC published a notice in the Federal Register on January 29, 2015 at pages 4917-4918 soliciting comments on the proposed extension of our recordkeeping regulations. The EEOC received only one public comment; however, the comment did not address recordkeeping or the specific requirements in 29 CFR Part 1602, but rather appeared to concern the merits of a federal EEO complaint filed by the commenter. As such, the comment was deemed non-responsive, and its contents were not considered in regards to this information collection. To protect the personal privacy of the commenter, EEOC elected not to post the non-responsive comment on regulations.gov.

   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 expanding its recordkeeping requirements from TVII and ADA to TVII, ADA, and GINA 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 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 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. The total number of employers subject to the recordkeeping requirement is estimated to be 914,843, which combines estimates from

private employment,[1] the public sector,[2] colleges and universities,[3] and referral unions.[4]

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, 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. We estimate that 30 minutes would be spent for this familiarization process. This figure has increased from our previous estimate of 10 minutes per new firm, as we believe the previous estimate may have been too low for some employers to ensure compliance with EEOC's requirements. Once this cost is incurred during the familiarization process, we assume that the employer will never face this cost again.

The annual hour burden is based on the number of new firms with 15 or more employees that enter the market annually. Using 2011 data from the Small Business Administration, we estimate that there are 82,516 firms[5] that would incur a start-up burden due to the recordkeeping requirements in Part 1602. Assuming 30 minutes of time per firm, we estimate that the total annual hour burden is 41,258 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.

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[1] Source: Census Bureau 2011 County Business Patterns: Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States and States, Totals: 2011, Release Date 12.13. (https://www.census.gov/econ/susb/.) Select U.S. & states, Totals. Downloaded on October 2, 2014.

[2] Source of original data: 2012 Census of Governments: Employment. Individual Government Data File (http://www.census.gov/govs/apes/), Local Downloadable Data zip file 12ind_all_tabs.xls. The original number of government entities was adjusted to only include those with 15 or more employees.

[3] Source: U.S. Department of Education, National Center for Education Statistics, IPEDS, Fall 2013. Number and percentage distribution of Title IV institutions, by control of institution, level of institution, and region: United States and other U.S. jurisdictions, academic year 2013-1(http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2014066rev).

[4] EEO-3 Reports filed by referral unions in 2012 with EEOC.

[5] Data from SBA estimated that there were 534,907 firm births in 2010-2011. "Employer Firm Births and Deaths by Employment Size of Firm, 1989-2011", 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, https://www.sba.gov/advocacy/firm-size-data. Using data about firm size from the SBA, we estimated that about 15.4 percent of businesses have 15 or more employees. See reference above to Census Bureau 2011 County Business Patterns Therefore, 15.4 percent of 534,907 led to an estimated 82,516 new firms with 15 or more employees. The number of 15.42622436 percent (i.e. unrounded) is included in the calculation to determine the number of firms.

15. The total burden estimate of 41,258 is greater than the burden estimate of 15,851 that was used the last time this information collection was approved. The increase is due to a revised agency estimate of the time needed for new firms to familiarize themselves with the recordkeeping requirements in Part 1602. Because of the increase in this estimate from 10 minutes to 30 minutes, the burden estimate had a corresponding increase from 15,851 hours to 41,258 hours.

16. No results will be published.

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

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

42 U.S.C. § 2000e-8(c)

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.