



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

August 26, 2021

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Michael DeFrank
U.S. Census Bureau
Management Services Branch
4600 Silver Hill Road
Hillcrest Heights, MD 20746

Re: EEOC Comments Regarding U.S. Census Bureau Forms BC-170, U.S. Census Employment Application, and BC-171, Additional Applicant Information (OMB No. 0607-0139)

Dear Mr. DeFrank:

The U.S. Equal Employment Opportunity Commission (EEOC) submits this comment for the Census Bureau's consideration concerning Census Bureau Forms BC-170: U.S. Census Employment Application, and BC-171: Additional Applicant Information, published in the Federal Register on July 27, 2021.¹

The EEOC enforces the federal laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, and genetic information.² The laws enforced by the EEOC also prohibit retaliation for filing a charge or complaint of employment discrimination, participating in an employment discrimination proceeding, or reasonably opposing such discrimination.³ Further, the EEOC coordinates and leads the federal government's efforts to eradicate employment discrimination.⁴

¹ Department of Commerce, Census Bureau, Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Form BC-170, U.S. Census Employment Application and Form BC-171, Additional Applicant Information, 86 Fed. Reg. 40,191 (July 27, 2021).

² See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.; Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791; Titles I and V of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

³ 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 29 U.S.C. § 791(f) (incorporating, among other provisions, the anti-retaliation provision of the ADA into the Rehabilitation Act); 29 U.S.C. § 215(a)(3); 42 U.S.C. § 2000ff-6(f).

⁴ Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

As discussed below in greater detail, we recommend that the Census Bureau amend the criminal background check language on Form BC-170 to enhance the likelihood that such language will not unintentionally dissuade members of particular racial or ethnic groups from submitting applications. We also recommend that the Census Bureau ensure that applicant medical information recorded on or submitted in association with Forms BC-170 and BC-171 is maintained in accordance with Section 501 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and disclosed only in the limited circumstances permitted under the statute and associated regulations.

Recommendation Regarding Criminal Background Check Notification

Form BC-170 states that applicants “must pass a Census Bureau performed criminal background check and review of criminal records (including fingerprinting) as part of the hiring process.”⁵

While Title VII of the Civil Rights Act of 1964, as amended, does not prohibit employers, including federal agencies, from requesting or obtaining criminal history information regarding applicants or employees,⁶ employers’ use of this information to make employment decisions may violate Title VII in certain circumstances.⁷ Specifically, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, national origin, or another basis protected by law.⁸ In addition, even if employers apply criminal record restrictions uniformly, such restrictions may disproportionately exclude applicants or employees of a particular race or national origin.⁹ If so, to prevail, employers must demonstrate that such exclusions are job-related and consistent with business necessity for the position in question, and no less discriminatory alternatives must exist.¹⁰

To reduce the likelihood that the reference to criminal background checks on Form BC-170 will disproportionately discourage members of particular racial or ethnic groups from applying for

⁵ Form BC-170, page 2.

⁶ Other federal laws may apply to employer requests or requirements for criminal history information from, or related to, applicants. For example, the Fair Credit Reporting Act imposes requirements on employers that obtain criminal history information from third-party consumer reporting agencies. 15 U.S.C. § 1681 et seq.; *see also, e.g.*, EEOC & Federal Trade Commission, *Background Checks: What Employers Need to Know* (2014), <https://www.eeoc.gov/laws/guidance/background-checks-what-employers-need-know>.

⁷ *See generally* EEOC, *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (2012), 2012 WL 1499883, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [hereinafter *Criminal History Guidance*].

⁸ *Criminal History Guidance*, *supra* note 7, at *6–8.

⁹ *Criminal History Guidance*, *supra* note 7, at *9–10.

¹⁰ *Criminal History Guidance*, *supra* note 7, at *13–19.

Census Bureau positions, we recommend that the Census Bureau add the following language to the criminal history eligibility information, and make any necessary adjustments to the agency's processes for requesting and considering applicants' criminal history information:¹¹

A criminal record may not automatically disqualify you. Unless a federal law or regulation prohibits the Census Bureau from hiring individuals with certain criminal records for applicable positions or occupations, we will consider, among other things, the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question. In addition, we will provide you with an opportunity to explain any errors in your criminal record or to provide other supportive information.

Recommendations Regarding Permitted Disclosure of Applicants' Medical Information

Federal employment discrimination laws and associated regulations restrict the disclosure of applicants' medical information. Specifically, the Rehabilitation Act requires that federal agencies that lawfully obtain applicants' medical information treat such information as a "confidential medical record" and maintain it in separate medical files.¹² Disclosure of medical information governed by the Rehabilitation Act's confidentiality provisions is permitted only in limited circumstances.¹³

Forms BC-170 and BC-171 may include applicants' medical information, rendering the Rehabilitation Act applicable.¹⁴ The forms allow for disclosure of information for "work-related

¹¹ *Criminal History Guidance*, *supra* note 7, at *21 (noting that federal agencies have discretion to consider relevant mitigating criteria when determining whether an individual is suitable for a federal position, and outlining the criteria); and *17 (providing a non-exhaustive list of relevant factors for consideration in individualized assessments of individuals excluded based on a criminal history background check).

¹² 42 U.S.C. §§ 12112(d)(3)(B), (4)(C); 29 C.F.R. §§ 1630.14(b)(1), (c)(1), (d)(4)(i).

¹³ *See id.* (allowing covered entities to share medical information with supervisors and managers who need to know about an employee's work restrictions and necessary accommodations, with first aid and safety personnel if an employee's disability might require emergency treatment or assistance in the event of an emergency, and with government officials investigating Rehabilitation Act compliance); 29 C.F.R. pt. 1630, App. § 1630.14(b) (allowing disclosure of protected medical information for workers' compensation and insurance purposes).

¹⁴ For example, Form BC-170 requests information and related documentation regarding veterans' preferences associated with, among other things, service-connected disabilities. *See* Form BC-170, page 4.

purposes” consistent with the Privacy Act,¹⁵ as well as pursuant to various routine uses,¹⁶ but do not include any references to the Rehabilitation Act’s confidentiality and disclosure provisions. We therefore recommend that the Census Bureau review and revise the circumstances under which such information may be disclosed as necessary to prevent any legal conflicts with the Rehabilitation Act.¹⁷ For example, the Census Bureau could clarify that disclosure of protected medical information will be subject to the confidentiality provisions of the Rehabilitation Act; exempt medical records, reports, or information from disclosure, where possible; or redact protected medical information from records prior to disclosure. We also encourage the Census Bureau to update Forms BC-170 and BC-171, the associated supporting statement, and any relevant policies, procedures, and training as appropriate to address the applicability of the Rehabilitation Act to the acquisition, retention, and disclosure of applicant medical information included on these forms or in associated documentation.

Thank you for your consideration. Should you have any questions, please feel free to contact me at lisa.schnall@eeoc.gov or (202) 441-2497.

Sincerely,

¹⁵ Form BC-170, page 2; Form BC-171, page 4; *see also* Census Bureau, Supporting Statement A, Form BC-170, U.S. Census Employment Application and Form BC-171, Additional Applicant Information, OMB Control No. 0607-0139, page 5.

¹⁶ Form BC-170 permits disclosure subject to the routine uses of OPM-GOVT 5, Recruiting, Examining, and Placement Records, while Form BC-171 permits disclosure of aggregate, non-identifiable information consistent with OPM-GOVT 7, Applicant Race, Sex, National Origin, and Disability Status Records. Form BC-170, page 2; Form BC-171, page 4.

¹⁷ For example, several routine uses in OPM-GOVT 5 may, in some circumstances, violate Rehabilitation Act confidentiality requirements, including: (a) (permitting disclosure for federal employment referral purposes); (d) (permitting disclosure to any source from which information is requested when necessary to obtain information relevant to an agency decision concerning hiring or retention, suitability investigations, position classifications, contract letting, or issuance of a license, grant, or other benefit); (e) (permitting disclosure to a federal agency upon request in connection with a hiring or retention decision, suitability investigation, position classification, contract letting, or issuance of a license, grant, or other benefit by the requesting agency, when relevant and necessary); (k) (permitting disclosure to locate individuals for personnel research or survey response, or for workforce studies or statistical purposes); and (q) (permitting disclosure to governmental and professional licensing boards, medical boards, or similar non-governmental entities to obtain information relevant to an agency decision concerning the hiring, retention, or termination of an employee).

Further, both OPM-GOVT 5 and OPM-GOVT 7 include a routine use permitting disclosure of records to produce published statistics and studies that do not include individual identifiers, but “in some instances the selection of elements of data included in the study may be structured in such a way as to make the data individually identifiable by reference.” *See* OPM-GOVT 5, Routine Use (k); OPM-GOVT 7, Routine Use (c). Disclosure of applicants’ medical information in such circumstances may exceed the limited confidentiality exceptions in the Rehabilitation Act.

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