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Executive Officer
To: Executive Secretariat

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From: Acting General Counsel

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Pages: Five

Phone:

Date: April 16, 2013

Federal Register Notice
Re: No. 2013-03528

CC:

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• Comments:



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Office of the
General Counsel

April 16, 2013

Via Facsimile ((202) 663-4114)

Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M St, NE
Suite 4NW08R
Room 6NE03F
Washington, DC 20507

Dear Sir/Madam:

The U.S. Equal Employment Opportunity Commission (EEOC) issued Federal Register Notice No. 2013-03528 to implement proposed changes to OMB Form No. 3046-0046, collecting demographic information on applicants for Federal employment by adding disability status to the existing collection of race and ethnicity data (RNO Form). Through this letter, the U.S. Office of Personnel Management (OPM) is submitting comments for the EEOC's consideration.

OPM supports the efforts of the EEOC to change the RNO Form to the extent that they are directed at obtaining a broader range of data regarding applicants for Federal employment. In fact, OPM has received requests from multiple stakeholder agencies in the past for such data. OPM is concerned, however, about the more limited format for the collection of data on applicants with disabilities that the EEOC proposes. Accordingly, OPM comments below on several specific aspects of the proposed changes to the RNO Form, in order to ensure that the data collected through the new form are not inconsistent with existing data collection efforts within the Federal workforce and in consideration of the changes under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).

Concerns Regarding Labeling and Tracking of Non-Targeted Disabilities

OPM believes the RNO Form should refer to all conditions that are covered by the ADAAA as "disabilities and/or health conditions," to avoid any confusion. The current proposal collapses non-targeted disabilities into a single question which characterizes those in the collapsed group as a "serious health condition." OPM is concerned that the question as phrased will send an unintended message to people in the disability community as to which disabilities are more likely to result in an appointment to the Federal civil service. Moreover, many of the specific disabilities that would not be tracked as targeted disabilities could still be used by applicants

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with those disabilities for consideration for employment under the Schedule A hiring authority at 5 C.F.R. § 213.3102(u). OPM is concerned that suggesting that such conditions are something other than “disabilities” may undermine its efforts to ensure everyone within the disability community who could be eligible for the section 213.3102(u) authority is aware of the availability of that authority when applying for Federal employment.

OPM also is concerned that the proposed changes to the RNO Form lack specificity concerning types of disabilities traditionally collected by the Federal government. This lack of specificity will make it difficult to link current data with historical data. Accordingly, OPM recommends including additional specific disabilities in the same manner as targeted disabilities are provided on the current proposed RNO Form.

Collecting information on specific types of both targeted and non-targeted disabilities is necessary to acquire data that is both accurate and that links to past data in a manner that makes it possible to make appropriate comparisons. Currently, Standard Form (SF) 256 collects information on specific disabilities across two broad categories. Based on responses to the *2012 Federal Employee Viewpoint Survey* (EVS) workforce demographic questions, we know that people with disabilities represent approximately 13 percent of the Federal workforce. This information, compared to preliminary FY 2012 self-identification data collected on SF 256 and DD Form 214 on 30% or more disabled veterans, showing that people with disabilities were approximately 12 percent of the Federal workforce, resulted in an estimated data differential of 1 percent. Therefore, the EVS shows that the current method for collecting disability data produces accurate results.

Further, collecting more limited data from applicants than from the workforce creates different sets of data and will prevent later comparison of data related to hiring rates. It is important to continue collecting data that can be translated to the existing two broad categories described above in order to identify trends. Without specific data to compare with SF 256 data, there will be gaps in needed information. For example, when examining the section 213.3102(u) hiring authority, it is vital to identify trends at all points in the process. As noted earlier, although everyone with a targeted disability is qualified for Schedule A, not everyone qualified for Schedule A has a targeted disability. Without collecting data on the above categories, therefore, OPM will be unable to identify trends for those utilizing Schedule A who do not have targeted disabilities.

In addition, OPM believes designation of which disabilities are considered targeted is likely to change over time. The current version of the proposed RNO Form creates an information deficit by collecting only summary information on the “other disabilities.” If there are later revisions as to what constitutes a targeted disability drawn from the list of “other disabilities,” agencies will not be able to package the data in a manner that will permit it to be compared to earlier data and will lose valuable information in the long term by focusing only on the short term.

Lastly, given the expansive approach to the definition of disability established by the ADAAA, the decision to collect no information on non-targeted disabilities is counter-intuitive. Indeed, EEOC’s FY 2012 enforcement and litigation statistics (private sector) show that the

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discrimination charge receipt and resolution rates among those with non-targeted disabilities are in some instances higher than the rates among those with targeted disabilities, further illustrating the need to capture this data to identify trends.

Concerns Regarding Inclusion of American Community Survey Question on a Pre-Employment Form

The area where OPM wishes to express particular discomfort with the proposed form is with the inclusion of the American Community Survey (ACS) question on the RNO Form. The limited list provided in the "ability to function" question neither corresponds to likely workplace concerns nor collects information that would be useful in tracking the applicant flow of people with disabilities. In the employment context, candidates will be highly unlikely to respond truthfully to questions regarding difficulty concentrating, remembering or making decisions. As stated above, the current method utilized for collecting disability demographics is producing fairly accurate data. Including the ACS question could lead to inaccurate data and undermine EEOC's goals in proposing changes to the RNO Form.

The ACS question also could be considered intrusive and potentially inappropriate in the context of applicant data collection. Functional limitation questions are appropriate in the community context, *i.e.* the American Community Survey. These questions are not common in the employment context, however, and may be disconcerting to those who are asked to respond. For example, collecting demographic information on specific disabilities is common. Collecting personal information concerning bathing and dressing could be considered intrusive and inappropriate.

Support for Change in Treatment of Intellectual Disabilities

As a final matter, OPM supports the changes to the RNO Form concerning intellectual disabilities. OPM sees the clarification between Intellectual Disabilities, Developmental Disabilities (Cerebral Palsy (CP) and those on the Autism spectrum) and Traumatic Brain Injury as an important distinction. Separating these categories will, OPM believes, increase self-identification among people with disabilities and the overall accuracy of data collected. In addition, the clarification between Intellectual Disabilities, Developmental Disabilities (CP and Autism) and Traumatic Brain Injury will likely increase data accuracy, reducing the current 1 percent differential in the EVS noted earlier. OPM notes that it uses the term "intellectual disabilities" in the new version of 5 C.F.R. § 213.3102(u) to take the place of the disabilities that used to be covered by the term "mental retardation," as that term was used in the Executive Order that gave rise to that provision (see 5 C.F.R. § 3.2(b)(1)). It would be helpful if EEOC would indicate, perhaps in a parenthetical, that EEOC does not intend to suggest, by breaking certain disabilities out from the term "intellectual disabilities" and counting them separately for purposes of the SF 181, that the term "intellectual disabilities" will have a narrower scope for other purposes.

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We appreciate the opportunity to provide written comments to the EEOC regarding the proposed changes to the RNO Form. OPM is available for additional discussion if desired.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon McGowan", with a long horizontal flourish extending to the right.

Sharon M. McGowan
Acting General Counsel