



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

Office of
Legal Counsel

April 9, 2007

John O'Connell
Paperwork Reduction Act Coordinator
Food Safety and Inspection Service
USDA
300 12th Street, S.W.
Room 112
Washington, D.C. 20250-3700

Re: Docket No. FSIS-2006-0042

Dear Mr. O'Connell:

The Equal Employment Opportunity Commission (Commission or EEOC) submits these comments to the Department of Agriculture, Food Safety and Inspection Service (FSIS) in response to FSIS' notice and request for comments concerning its intention to begin collecting information regarding the medical history and status of certain job applicants. 72 Fed. Reg. 6195 (February 9, 2007). In order to avoid possible inconsistencies with Section 501 of the Rehabilitation Act, we request that FSIS make certain modifications to the proposed information collection.

The EEOC enforces the federal laws that prohibit employment discrimination on the basis of an individual's race, color, religion, sex, national origin, age, or disability. These include the laws prohibiting discrimination in federal employment. *See* Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d); and Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791. Moreover, the EEOC has responsibility under Executive Order 12067 to coordinate the federal government's enforcement of laws, executive orders, regulations, and policies that require equal employment opportunity without regard to race, color, religion, sex, national origin, age, or disability. 43 Fed. Reg. 28967 (July 5, 1978).

Requesting Medical Information from Applicants

According to the February 9 Federal Register notice (Notice), the purpose of the proposed information collection is to collect the medical information of applicants for certain positions in FSIS to assist the agency in making a determination of their medical fitness for duty. The new collection includes two forms, a Certification of Medical Examination and a Report of Medical History. Neither the Notice nor the forms indicate at what point in the application process individuals are required to submit the requested information.

The Rehabilitation Act restricts the type of medical documentation an employer may request, and the circumstances under which a medical examination may be required. Prior to an offer of employment, the Rehabilitation Act prohibits all disability-related inquiries and medical examinations.¹ *See* 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13; *see also* *ADA Enforcement Guidance: Preemployment Questions and Medical Examinations (Preemployment Questions)*, p. 1. The questions and exam contemplated by FSIS’ proposed information collection are covered by this prohibition and therefore may not be asked or required prior to a conditional offer of employment.² After making an offer of employment to an applicant but before an applicant begins her employment duties, an employer may make disability-related inquiries and conduct medical examinations, and may condition an offer of employment on the responses and results, as long as this is done for all entering employees in that job category.³ *See* 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b); *see also* *Preemployment Questions*, p. 2. In order to ensure that these restrictions are not violated, we request that FSIS modify the proposed collection to make clear that individuals need only submit the requested medical information after a conditional offer of employment has been made. This could be accomplished by revising the “principle purpose(s)” section of each form as follows (EEOC proposed modifications in strikeouts and bold):

Principle Purpose(s): To obtain medical information from FSIS candidates **to whom conditional offers of employment have been made** ~~and employees~~ to assist in making a determination of medical fitness for duty.

Furthermore, although it appears that FSIS intends to require all applicants for particular positions to submit the proposed forms, we suggest that the forms be modified to state this requirement explicitly. We further suggest that both forms include a list of the positions for which they are to be used.⁴

¹ In 1992, the Rehabilitation Act was amended to apply the standards applied under Title I and Title V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. §§ 12101, 12111, 12201) (ADA), as those sections relate to employment, to complaints alleging non-affirmative action employment discrimination under part 1614. These standards are found at 29 CFR part 1630.

² For a detailed explanation of what is and what is not a disability-related inquiry, *see Preemployment Questions*, pp. 4-12. In general, any question or series of questions that is likely to elicit information about a disability is a disability-related inquiry and therefore prohibited prior to an offer of employment. *See id.* This guidance also provides a detailed explanation of what procedures and tests qualify as medical examinations. *Id.* pp. 13 – 16.

³ Although such questions and examinations are permitted after a conditional offer, if the question or examination screens out an individual because of a disability, the employer must demonstrate that the rejection is job-related and consistent with business necessity. *See* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10; *see also Preemployment Questions*, p. 2

⁴ Although the proposed Certificate of Medical Examination lists the positions to which it applies on page 2, the proposed Report of Medical History does not provide this information.

Requesting Medical Information from Employees⁵

Although the Notice describes the proposed information collection as if it will apply only to FSIS applicants, the forms themselves indicate that they will also be used to obtain medical information from FSIS employees. The Rehabilitation Act strictly limits the circumstances in which employees may make disability-related inquiries or require medical examinations of employees. After employment begins, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity. See 42 U.S.C. § 12112(d)(4)(A); 29 CFR § 1630.14(c); see also *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations (Inquiries Guidance)* (July 27, 2000), Question 5. In general, a disability-related inquiry or medical examination of an employee may be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. See *Inquiries Guidance*, Question 5. Even an employer that has a reasonable belief that an employee's ability to perform the essential functions of his job or to perform them safely may be impaired by a medical condition is entitled only to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat. See *Inquiries Guidance*, Question 13.

The FSIS proposes to ask for medical information that goes far beyond these restrictions. In order to avoid violations of the Rehabilitation Act, the FSIS should not use the proposed forms to collect medical information from employees. Instead, when a situation arises in which an employer may ask for medical documentation from an employee, the agency should request the limited information necessary to determine if the employee in question can do the essential functions of the job or work without posing a direct threat.⁶

The Rehabilitation Act and 5 CFR Part 339

As a final matter, we note that FSIS cites 5 CFR Part 339, the regulations governing medical qualification determinations issued by the Office of Personnel Management, in support of its collection of the medical information at issue. We have found that some agencies believe that the Rehabilitation Act's restrictions on medical inquiries and examinations do not apply to actions taken under Part 339. We therefore remind FSIS that all actions taken under Part 339 must be consistent with the Rehabilitation Act. See 5 CFR § 339.103; see also *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable*

⁵ To the extent that FSIS is attempting to obtain medical information from employees who handle food in accordance with the Food and Drug Administration's Model Food Code (FDA Food Code), we note that following the FDA Food Code's reporting requirements does not violate the Rehabilitation Act. See EEOC's *How to Comply with the ADA: A Guide for Restaurants and Other Food Service Employers*, Question 9 available at http://www.eeoc.gov/facts/restaurant_guide.html.

⁶ An employer may also request medical documentation when an employee has requested a reasonable accommodation and the disability and/or need for accommodation is not obvious or otherwise already known. In these circumstances, the employer may only request medical information that is sufficient to substantiate that the employee has a disability and needs the reasonable accommodation requested. See *Inquiries Guidance*, Question 10.

Accommodation (October 20, 2000), note 9 (agencies must comply with Rehabilitation Act requirements when requesting medical examinations of applicants and employees under 5 CFR Part 339).

Thank you for the opportunity to provide these comments in response to the proposed information collection. If you have any questions or would like to discuss these comments, please feel free to contact Kerry Leibig, Senior Attorney Advisor, at 202-663-4516.

Sincerely,

/s/

Peggy R. Mastroianni
Associate Legal Counsel

cc: Desk Officer for Agriculture
Office of Information and Regulatory Affairs
Office of Management and Budget