RECOMMENDATIONS FOR IMPROVEMENTS TO THE CONGRESSIONAL ACCOUNTABILITY ACT

An Analysis of Federal Workplace Rights, Safety, Health, and Accessibility Laws that Should be Made Applicable to Congress and Its Agencies

December 2014

STATE OF THE CONGRESSIONAL WORKPLACE SERIES

OFFICE OF COMPLIANCE—BOARD OF DIRECTORS BIENNIAL REPORT REQUIRED BY §102(b) OF THE CONGRESSIONAL ACCOUNTABILITY ACT ISSUED AT THE CONCLUSION OF THE 113TH CONGRESS (2013–2014) FOR CONSIDERATION BY THE 114TH CONGRESS (2015–2016)

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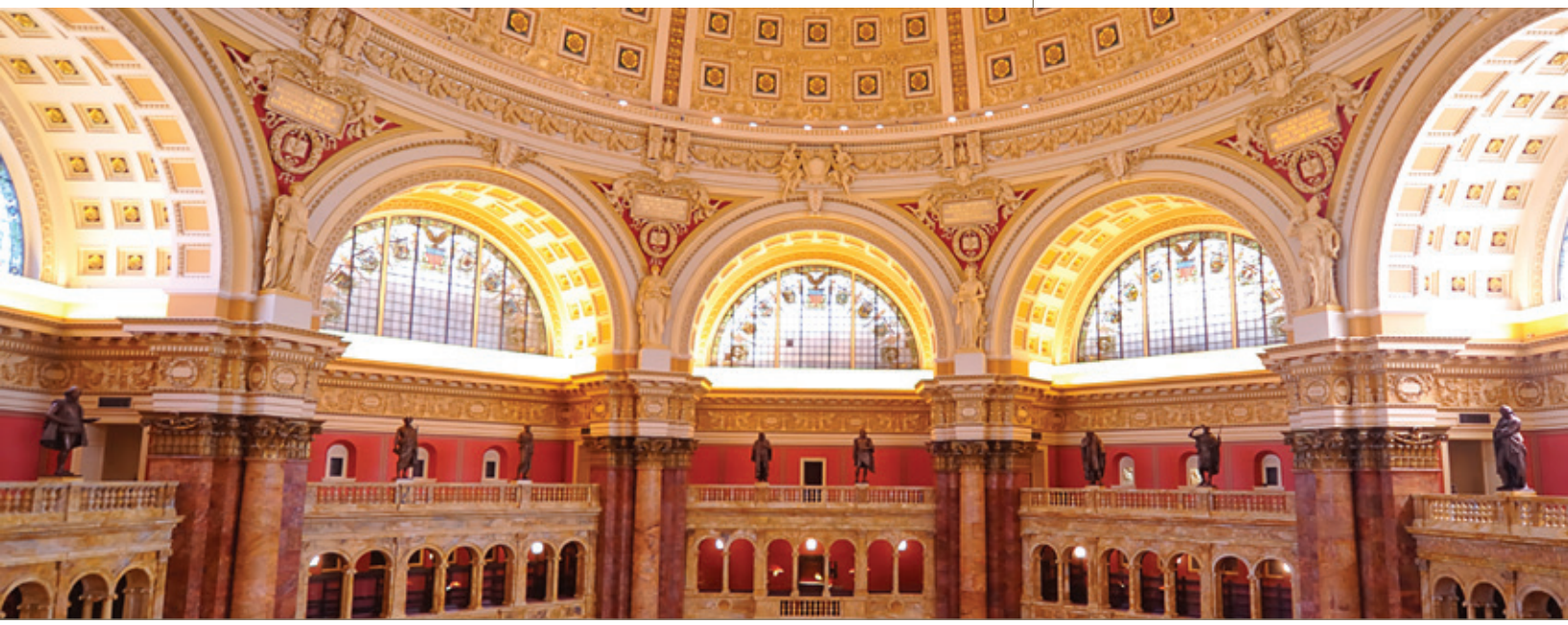

STATEMENT FROM

THE BOARD OF DIRECTORS

Next month we celebrate the twentieth anniversary of Congress' passage of the Congressional Accountability Act of 1995 (CAA). This anniversary marks the establishment of the Congressional Office of Compliance (OOC) and the promise by Congress that it would hold itself to the same workplace rights protections for its employees that it requires in the public and private sectors. The Board of Directors believes now is the time to celebrate Congress' many accomplishments in the area of workplace rights. However, it is also the time to acknowledge that much work remains, particularly in such areas as mandatory workplace rights training for staff, applying the Whistleblower Protection Act to the Legislative Branch, and increasing protections against retaliation in Occupational Safety and Health matters.

On the eve of this significant milestone, we are very pleased to submit to Congress these 2014 biennial recommendations for improvements to the CAA. In the coming year, we look forward to working with Congress to more fully realize the goal of parity with all workplace rights laws.

As part of Congress' effort to bring accountability to itself and its instrumentalities, the CAA established the OOC to: administer a dispute resolution program for the resolution of claims by Legislative Branch employees under the CAA; carry out an education program to inform Congressional Members, employing offices, and employees about their rights and obligations under the CAA; inspect and investigate Legislative Branch facilities for compliance with safety and health and accessibility laws; and, under the guidance of the Board of Directors, promulgate regulations and advise Congress on needed changes and amendments to the CAA.

The CAA was drafted to provide for ongoing review of the workplace laws that apply to Congress. Section 102(b) of the CAA tasks the Board of Directors of the OOC to do just that. Thus, every Congress, the Board reports on:

> *(A) whether or to what degree [provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees; and (B) access to public services and accommodations]1...are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.*

In keeping with this mandate, the report for 2014 analyzes certain "parity gaps" between Federal workplace rights laws that apply to employers in the private sector and Federal Executive Branch but do not apply to the Legislative Branch and recommends whether these laws should be incorporated into the CAA or made applicable to the Legislative Branch. This report also recommends pragmatic improvements to the CAA to make administering the CAA more efficient and effective.

In some cases, the Board identifies Congressional exemptions from entire statutes, such as the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002, commonly known as the NoFEAR Act, Public Law 407-174 (2002). In the NoFEAR Act, Congress found that "agencies cannot be run effectively if those agencies practice or tolerate discrimination." Public Law 407-174, Title I, General Provisions, section 101(1). The NoFEAR Act requires agencies to provide notice and anti-discrimination training to Federal employees of their rights and protections under Federal anti-discrimination and whistleblower protection laws. While the anti-discrimination protections apply to the Legislative Branch, the obligation to train Legislative Branch employees and post notices about their rights does not. This is despite the fact that training and notice posting under the NoFEAR Act have been successful in lowering not only the number of complaints but also the cases of actual discrimination in the Federal government. As we have in past years, we include a recommendation that requires such training for all Legislative Branch employees.

The Board also recommends that Congress consider expanding the CAA to allow the OOC General Counsel to investigate and file complaints with OOC using the procedural rules in place under the CAA for allegations by employees that an employing office retaliated against them because they complained or testified about unsafe or unhealthy working conditions under the Occupational Safety and Health Act of 1970 (OSHAct). Private sector workers can file such complaints with the Occupational Safety and Health Administration under Section 11(c) of the OSHAct, and the Department of Labor's Office of the Solicitor may pursue settlement and file a civil action in U.S. District Court on those complaints. Currently, Legislative Branch employees must pursue such allegations on their own under Section 207 of the CAA, which is the general prohibition against intimidation and reprisal. While Legislative Branch employing offices must comply with Section 5 of the OSHAct and follow the OSHAct standards promulgated by the Secretary of Labor, OSHAct's Section 11(c) does not apply to the Legislative Branch, and there is no similar provision under the CAA that enables the General Counsel to investigate and file complaints with OOC for allegations of retaliation for reporting or testifying about safety and health violations.

The Board welcomes discussion and dialogue on these recommendations. We note that the last time Congress added significant workplace protections to the CAA was in 2008 with passage of the Genetic Information Nondiscrimination Act. That same year Congress made the Americans with Disabilities Act Amendments Act of 2008 applicable to the Legislative Branch. The recommendations in this report concern laws that have been in place for many years for private businesses or the Executive Branch, and long-standing provisions in the CAA that over time have proved the need for an adjustment. We believe these recommendations, if adopted, will demonstrate their worth in terms of more efficient proceedings, reduced complaints, reduced discrimination, and safer workplaces. Again, as we approach our twentieth anniversary we urge Congress to once again consider strengthening its own processes and protections for its most valuable asset, its people.

Sincerely,

Barbara L. Camens, Chair

Roberta L. Holzwarth

Susan S. Robfogel

Alan V. Friedman

Barbara Childs Wallace

THE CONGRESSIONAL WORKPLACE AND THE **CONGRESSIONAL ACCOUNTABILITY ACT**

The Congressional Accountability Act of 1995 (CAA) applies private sector and Executive Branch workplace rights, safety, health, and public access laws to Congress and its agencies, and provides the legal process to resolve alleged violations of the CAA through the Office of Compliance (OOC). The CAA protects over 30,000 employees of the Legislative Branch nationwide (including state and district offices). Under certain circumstances, job applicants and former employees are protected. The CAA also provides protections and legal rights for members of the public with disabilities who are entitled to access to public accommodations and services in the Legislative Branch.

CONGRESSIONAL WORKPLACES COVERED BY THE CAA

- House of Representatives
- Senate
- Congressional Budget Office
- Government Accountability Office*
- Library of Congress*
- Office of the Architect of the Capitol
- Office of the Attending Physician
- Office of Compliance
- Office of Congressional Accessibility Services
- United States Capitol Police

**Certain provisions of the CAA may not apply to the Government Accountability Office and Library of Congress; however, employees of those agencies may have similar legal rights under different statutory provisions and procedures.*

LAWS APPLIED TO THE CONGRESSIONAL WORKPLACE BY THE CAA:		
Section 201 of the CAA	No Harassment or Discrimination	Prohibits harassment and discrimination in personnel actions based on race, national origin, color, sex, religion, age, or disability. Laws applied: Title VII of the Civil Rights Act, Age Discrimination in Employment Act (ADEA), Rehabilitation Act of 1973, Title I of the Americans with Disabilities Act (ADA), Americans with Disabilities Act Amendments Act of 2008 (ADAA)
Section 202 of the CAA	Family and Medical Leave	Provides leave rights and protections for certain family and medical reasons. Law applied: Family and Medical Leave Act (FMLA)
Section 203 of the CAA	Fair Labor Standards	Requires the payment of minimum wage and overtime compensation to nonexempt employees, restricts child labor, and prohibits sex discrimination in wages paid to men and women. Law applied: Fair Labor Standards Act (FLSA)
Section 204 of the CAA	Polygraph Testing Protections	With some exceptions, prohibits requiring or requesting that lie detector tests be taken; using, accepting, or inquiring about the results of a lie detector test; or firing or discriminating against an employee based on the results of a lie detector test or refusing to take a test. Law applied: Employee Polygraph Protection Act (EPPA)
Section 205 of the CAA	Notification of Office Closing or Mass Layoffs	Under certain circumstances, requires that employees be notified of an office closing or of a mass layoff at least sixty days in advance of the event. Law applied: Worker Adjustment and Retraining Notification Act (WARN)
Section 206 of the CAA	Uniformed Services Rights and Protections	Protects employees who are performing service in the uniformed services from discrimination and provides certain benefits and reemployment rights. Law applied: Uniformed Services Employment and Reemployment Rights Act (USERRA)
Section 207 of the CAA	Prohibition of Reprisal or Intimidation for Exercising Workplace Rights	Prohibits employing offices from intimidating, retaliating, or discriminating against employees who exercise their rights, as applied by the CAA.
Section 210 of the CAA	Access to Public Services and Accommodations	Protects members of the public who are qualified individuals with disabilities from discrimination with regard to access to public services, programs, activities, or places of public accommodation in Legislative Branch agencies. Law applied: Titles II and III of the Americans with Disabilities Act (ADA)
Section 215 of the CAA	Hazard-Free Workplaces	Requires that all workplaces be free of recognized hazards that might cause death or serious injury. Law applied: Occupational Safety and Health Act (OSHAct)
Section 220 of the CAA	Collective Bargaining and Unionization	Protects the rights of certain Legislative Branch employees to form, join, or assist a labor organization, or to refrain from such activity. Law applied: chapter 71 of Title 5
Genetic Information Nondiscrimination Act (GINA)	Genetic Information Nondiscrimination & Privacy	Prohibits the use of an employee's genetic information as a basis for discrimination in personnel actions.
Veterans' Employment Opportunities Act (VEOA)	Veterans' Employment Opportunities	Gives certain veterans enhanced access to job opportunities and establishes a redress system for preference eligible veterans in the event that their veterans' preference rights are violated.

MATRIX OF

KEY RECOMMENDATIONS BY THE BOARD OF DIRECTORS

This matrix provides a brief summary of the key recommendations from the Board of Directors of the Office of Compliance regarding the Federal laws that currently do not apply to Congress, but do apply to private sector and/or Federal Executive Branch employers. These laws are discussed in-depth at the page numbers indicated.

Recommendations for Improvements to Workplace Rights Laws

Which law does not apply to the Legislative Branch?	What is the purpose of the law?
Training of employees about workplace rights and legal remedies *See e.g.*, 5 U.S.C. § 2301 (No FEAR Act)	• Informs employees about basic workplace rights, remedies and how to seek redress for alleged violations of the law • Reminds employers of their workplace obligations and consequences for failure to follow the law
Notice-posting of rights under antidiscrimination and other workplace rights laws *See e.g.*, 42 U.S.C. § 2000e-10(a) (Title VII) 29 U.S.C. § 627 (ADEA) 42 U.S.C. § 12115 (ADA) 29 U.S.C. § 211 (FLSA /EPA) 29 U.S.C. § 2619(a) (FMLA) 29 U.S.C. § 2003 (EPPA) 38 U.S.C. § 4334(a) (USERRA) 29 U.S.C. § 657(c)(OSHA ct) 5 U.S.C. § 2301 note (No FEAR Act)	• Informs employees about basic workplace rights, remedies and how to seek redress for alleged violations of the law • Reminds employers of their workplace obligations and consequences for failure to follow the law
Prosecution of employing offices for retaliating against employees who report safety and health hazards *See* OSHAct § 11(c), 29 U.S.C. § 660(c)	• Allows agency with investigatory and prosecutorial authority over substantive violations to protect those who participate in its investigations and proceedings • Allows employees to cooperate with investigators by reporting OSHAct violations and discussing workplace conditions with less fear of reprisal because enforcement agency will investigate and prosecute claims of retaliation • Discourages employing offices from retaliating against employees who report OSHAct violations or otherwise cooperate with investigators • Vests enforcement discretion with the agency having knowledge of the protected conduct and the underlying policy considerations

Recommendations for Improvements to Workplace Rights Laws

Which law does not apply to the Legislative Branch?	What is the purpose of the law?
Protections against retaliation for whistleblowers who disclose violations of laws, rules or regulations, gross mismanagement, gross waste of funds, abuses of authority, or substantial and specific dangers to public health *See e.g.*, Whistleblower Protection Act of 1989 and Whistleblower Protection Enhancement Act of 2012	• Employees are often in the best position to know about and report violations of law, waste, mismanagement, and abuse in government and need protections against retaliation when they disclose these violations • Violations of law, waste, mismanagement and abuse of power are often not discovered by other sources • Whistleblowers save taxpayer dollars by exposing waste and abuse • Increases taxpayers' faith in government by protecting whistleblowers who act as "watchdogs" and protect the public's health and safety
Name Change Redesignation	• Redesignates the "Office of Compliance" to the "Office of Congressional Workplace Rights"

RECOMMENDATIONS FOR **IMPROVEMENTS TO THE CONGRESSIONAL ACCOUNTABILITY ACT**

> “Diversity is great, but in and of itself, it is not the answer. Enforcing the laws protecting employees from harassment, discrimination and retaliation is the answer.”
>
> *—The Honorable F. James Sensenbrenner, Jr. (WI), House of Representatives, Extension of Remarks on the Notification and Federal Employee Anti-Discrimination and Retaliation Act (No FEAR Act).*

The Congressional Accountability Act (CAA) applies most Federal employment and labor laws to the Congressional workplace. The Office of Compliance (OOC) has a unique role in administering workplace rights laws. The OOC is required to educate Members of Congress, employing offices, and Congressional employees about their rights and obligations under the CAA. The OOC also implements and ensures the integrity of a dispute resolution system that requires confidential counseling and mediation prior to the adjudication of workplace disputes.

Examples of workplace rights that apply to Congress through the CAA include Title VII, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act, and the Age Discrimination in Employment Act. Nevertheless, in passing the CAA, Congress omitted significant statutory provisions from these laws including mandatory training, notice-posting and recordkeeping requirements. As a result, a primary means of notifying employees that they have protections and remedies through notice-posting is not required in the Congressional workplace.

Congress has also not afforded whistleblower protections to employees who report illegal conduct, gross mismanagement, gross waste of funds, and abuse of authority. It also does not extend workplace protections for employees who serve on jury duty, face bankruptcy, or who have their checks garnished by reason of indebtedness.

WORKPLACE RIGHTS RECOMMENDATION #1

Mandatory Anti-Discrimination, Anti-Harassment and Anti-Retaliation Training for All Congressional Employees and Managers

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RECOMMENDATION TO THE 114TH CONGRESS

The Board recommends that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training in accordance with Section 301(h)(1) of the Congressional Accountability Act (CAA). Section 301(h)(1) requires that the Office of Compliance (OOC) carry out a program of education for Members of Congress and other employing authorities of the Legislative Branch, with regard to the laws made applicable to them, and a program to inform individuals of their rights under those laws. Currently, training is sporadic, and often does not involve, nor even mention the OOC as a resource or as the place to go for assistance in resolving workplace disputes. Consequently, for consistency and to ensure that the Congressional community is aware of the laws affecting the workplace, we recommend mandatory training on the CAA developed by, or in collaboration with the OOC.

Recommended in prior § 102(b) reports.

PURPOSE OF THE LAW

- Reduces discrimination and retaliation claims
- Informs managers of their obligations under workplace rights laws and improves compliance
- Informs employees about their workplace rights and how workplace conflicts can be resolved
- Puts all employees on notice that inappropriate conduct will not be tolerated

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PARITY GAP IDENTIFIED

Congress and its agencies are exempt from

5 U.S.C. § 2301 note (No FEAR Act of 2002)
(Training Provision)

With the passage of the No FEAR Act of 2002, Congress required all Federal Executive Branch agencies to provide mandatory anti-discrimination and anti-retaliation training to all employees to reinvigorate their longstanding obligation to provide a work environment free of discrimination and retaliation.

ANALYSIS

It is widely acknowledged that education directly impacts employee behavior. In the area of harassment and discrimination prevention, a comprehensive training program continues to be the most effective investment an organization can make in reducing complaints and creating a more productive workforce. The Executive Branch, recognizing this effect, requires each federal agency to provide employees training regarding their rights and remedies under anti-discrimination and anti-retaliation laws (Section 202(c) of the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (No FEAR Act)). The No FEAR Act mandates that all current employees and managers be trained by a date certain, and training thereafter must be conducted no less than every two years. New employees must receive training as part of a new hire orientation program and where there is no new hire orientation program, new employees are to receive the applicable training within 90 days of their appointment.

The Office of Compliance (OOC) conducted a review of the impact of the mandatory anti-discrimination/harassment training under the No FEAR Act, which revealed that a modest (every two years) training program reduced discrimination complaints by approximately 25%.

This is all the more important when assessing the larger issue of sexual harassment, which remains grossly underreported by its victims. A study conducted by the U.S. Merit Systems Protection Board (MSPB) found that 44% of women and 19% of men employed in the Executive Branch reported encountering some form of sexual harassment during a two year period. Of those individuals, only 6% took any formal action to stop the behavior. The MSPB study also determined that this unreported harassment wields hidden costs, which cause the government a loss of over $300 million a year in excessive sick leave usage, lowered productivity, and increased turnover rates. Because sexual harassment remains so underreported, training takes on heightened importance as organizations attempt to curtail objectionable behavior at the outset, in addition to giving victims an avenue for redress.

The OOC not only has the statutory mandate by Congress to carry out a program of education under Section 301(h)(1), but also the practical and subject matter expertise to effectively work with Members, employing offices, and individuals in implementing this initiative. The Board believes that such a comprehensive training program by the OOC would greatly benefit the Congressional community and go far in creating a model workplace.

WORKPLACE RIGHTS RECOMMENDATION #2

Require Notice-Posting of Congressional Workplace Rights in All Employing Offices

RECOMMENDATION TO THE 114TH CONGRESS

The Board of Directors recommends that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, safety and health, and other workplace rights laws covered under the CAA, and no longer exempt itself from the responsibility of notifying employees about their rights through this medium. Private and public employers are required by law to post notices of workplace rights and information necessary for asserting claims for alleged violations of those rights. The reason that most workplace rights laws passed by Congress require noticeposting is that it is a proven and effective tool in providing consistent and ongoing information to employees about their rights notwithstanding changes in workforce composition or location.

Recommended in prior § 102(b) reports.

PURPOSE OF THE LAW

- Informs employees of basic workplace rights, remedies, and how to seek redress for alleged violations of the law
- Reminds employers of their workplace obligations and consequences for failure to follow the law

PARITY GAP IDENTIFIED

Congress and its agencies are exempt from notice posting provisions 42 U.S.C. § 2000e-10(a)

(Title VII)
29 U.S.C. § 627 (ADEA)
42 U.S.C. § 12115 (ADA)
29 U.S.C. § 211 (FLSA/EPA)
29 U.S.C. § 2619(a) (FMLA)
29 U.S.C. § 2003 (EPPA)
38 U.S.C. § 4334(a) (USERRA)
29 U.S.C. § 657(c) (OSHA)
5 U.S.C. § 2301 note
(notice-posting provision)
(No FEAR Act)

Almost all Federal anti-discrimination, anti-harassment, safety and health and other workplace rights laws require that employers prominently post notices of those rights and information pertinent to asserting claims for alleged violations of those rights. Although the CAA does provide for the OOC to distribute informational material "in a manner suitable for posting," it does not mandate the actual posting of the notice. Exemption from notice-posting limits Congressional employees' access to a key source of information about their rights and remedies.

ANALYSIS

Most federal workplace rights statutes that apply in the private and public sectors require employers to post notices to inform employees of their workplace rights, remedies for violations of the law and the appropriate authorities to contact for assistance. Because the legal obligation results in permanent postings, current and new employees are informed about their rights regardless of their location, employee turnover, or other changes in the workplace. The notices also serve as a reminder to employers about their obligations and the legal ramifications for violating the law.

Even though Federal law imposes notice-posting on private and public sector employers, most notice-posting requirements do not apply to the Legislative Branch. The failure to require notice-postings in the Congressional workplace may explain recent findings by the Congressional Management Foundation that most Congressional employees have limited to no knowledge of their workplace rights.[5]

Currently, the following notice-posting provisions have no application to Congress and its employing offices:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-10(a), requires private sector and Federal Executive Branch employers to notify employees about Title VII's protections that personnel actions affecting covered employees shall be free from discrimination or harassment on the basis of race, color, religion, sex and national origin.

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 627, requires private sector and Federal Executive Branch employers to notify employees about the ADEA's protections that personnel actions affecting covered employees shall be free from discrimination or harassment on the basis of age.

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12117, requires private sector and Federal Executive Branch employers to notify employees about ADA's protections that provide that personnel actions affecting covered employees shall be free from discrimination or harassment on the basis of disability.

The Fair Labor Standards Act of 1938 (FLSA) (including the Equal Pay Act), 29 U.S.C. § 211, requires private sector and Federal Executive Branch employers to notify employees about FLSA protections which require payment of the minimum wage and overtime compensation to nonexempt employees, restrict child labor, and prohibit sex discrimination in wages paid to men and women.

Family And Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2619(a), requires private sector and Federal Executive Branch employers to notify employees about FMLA's protections which require unpaid leave for covered employees for certain family and medical reasons.

The Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. § 2003, requires private sector and Federal Executive Branch employers to notify employees about EPPA's protections which, with certain exceptions, prohibit requiring or requesting that lie detector tests be taken; using, accepting, or inquiring about results of a lie detector test; or firing or discriminating against an employee based on the results of a lie detector test or for refusing to take a test.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4334(a), requires private sector and Federal Executive Branch employers to notify employees about USERRA's protections which protect employees performing service in the uniformed services from discrimination and provide certain rights to benefits and reemployment rights upon completion of service.

The Occupational Safety and Health Act of 1970 (OSHAct), 29 U.S.C. § 657(c), requires private sector employers to notify employees about OSHAct's protections which require that all workspaces be free from safety and health hazards that might cause death or serious injury.

These notice-posting statutory provisions require that the Equal Employment Opportunity Commission or the Secretary of Labor promulgate regulations to implement the notice-posting requirements.[6] If Congress were to adopt the statutory provisions regarding notice-posting, the OOC Board would promulgate similar posting regulations tailored to the Congressional workplace.

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[5] See Fiscal Year 2009 Annual Report "State of the Congressional Workplace" at pp. 38–41.

[6] The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) also requires notice-posting of anti-discrimination laws in all Federal Executive Branch agencies.

WORKPLACE RIGHTS RECOMMENDATION #3

Authority to Investigate and Litigate Claims of Retaliation Against Congressional Employees

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RECOMMENDATION TO THE 114TH CONGRESS

The Board of Directors recommends that Congress grant the OOC General Counsel authority to investigate and pursue complaints of retaliation with the OOC using the procedural rules in place for OSHAct violations under the Act. This change will provide parity with private sector workers, who can file such matters with OSHA, and have the Department of Labor's Office of the Solicitor consider whether to pursue settlements and file a civil action in U.S. District Court. Currently, Legislative Branch employees lack the same rights, thus leaving them to pursue protections on their own through the OOC.

Recommended in prior § 102(b) reports.

PURPOSE OF THE LAW

- Allows agency with investigatory and prosecutorial authority over substantive violations to protect those who participate in its investigations and proceedings
- Facilitates employee cooperation with investigators in reporting OSHAct violations and discussing workplace conditions with less fear of reprisal because enforcement agency will investigate and prosecute claims of retaliation
- Discourages employing offices from retaliating against employees who report OSHAct violations or otherwise cooperate with investigators
- Vests enforcement discretion with the agency having knowledge of the protected conduct and the underlying policy considerations

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PARITY GAP IDENTIFIED

Congress and its agencies are exempt from

OSHAct § 11(c), 29 U.S.C. § 660(c)(2)

Under OSHAct § 11(c), 29 U.S.C. § 660(c), the Secretary of Labor can protect employees in the private sector who report OSHAct violations by investigating and litigating retaliation claims. Legislative Branch employees receive no such protection from the OOC General Counsel and must shoulder the costs and burdens of investigating and litigating such claims of retaliation.

ANALYSIS

Section 215 of the CAA tasks the General Counsel with conducting, on a regular basis and at least once each Congress, periodic inspections of all facilities of the House of Representatives, the Senate, and the many Legislative Branch entities. Such inspections are our principle means of identifying and preventing the occurrence of serious safety and health hazards. Due to limited resources, the General Counsel has focused the inspections on higher-risk hazards in the facilities and operations that pose the greatest threat of fatalities and injuries to workers and building occupants. Because we are not thoroughly inspecting all facilities at least once each Congress, it becomes even more vital that Legislative Branch employees step forward to report safety and health violations. They will not do so if there are not robust protections against retaliation. Providing the General Counsel with the ability to investigate and pursue complaints of retaliation with OOC is a significant step in providing that protection. Employee participation is critical to identifying and preventing hazards, especially where the CAA does not provide other well-established means for investigating potential hazards, such as applying OSHAct record-keeping requirements to employing offices, or granting the General Counsel subpoena power for documents.

Therefore, the Board recommends that Congress expand the CAA to allow the OOC General Counsel to investigate and file complaints of retaliation with OOC using the procedural rules in place for OSHAct violations under the CAA. This change will provide parity with private sector workers, who can file such matters with the Occupational Safety and Health Administration under Section 11(c) of the OSHAct and have the Department of Labor's Office of the Solicitor consider whether to pursue settlement and file a civil action in U.S. District Court on those complaints. Section 11(c) does not apply to the Legislative Branch, leaving Legislative Branch employees to pursue protection on their own before the OOC under the CAA's general prohibition against intimidation or reprisal.

WORKPLACE RIGHTS RECOMMENDATION #4

Whistleblower Protections for Disclosing Violations of Laws, Rules or Regulations, Gross Mismanagement, Gross Waste of Funds, Abuses of Authority, or Substantial and Specific Dangers to Public Health

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RECOMMENDATION TO THE 114TH CONGRESS

The Board of Directors recommends that Congress and its agencies be held accountable under appropriate provisions that are similar to those in the Whistleblower Protection Act of 1989 and Whistleblower Protection Enhancement Act of 2012, and provide Congressional employees with protections from retaliation when they disclose violations of laws, rules or regulations, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety in the Legislative Branch.

Recommended in prior § 102(b) reports.

PURPOSE OF THE LAW

- Employees are often in the best position to know about and report violations of law, waste, mismanagement, and abuse in government and need protections against retaliation when they disclose these violations
- Violations of law, waste, mismanagement and abuse of power are often not discovered by other sources
- Whistleblowers save taxpayer dollars by exposing waste and abuse
- Provisions increase taxpayers' faith in government by protecting whistleblowers who act as "watchdogs" and protect the public's health and safety

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PARITY GAP IDENTIFIED

Congress and its agencies are exempt from

Whistleblower Protection Act of 1989
Whistleblower Protection Enhancement Act of 2012

Congress passed the Whistleblower Protection Act of 1989 (WPA) to protect Federal workers in the Executive Branch from retaliation for reporting violations of laws, rules, or regulations, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. Since that time, Congress has also passed other whistleblower protection laws, such as the Sarbanes-Oxley Act, to protect employees in the private sector from reporting similar violations. While the Legislative Branch may experience abuses and gross mismanagement similar to those in the private sector and Executive Branch, Congressional employees do not have whistleblower protection if they decide to report on such matters.

ANALYSIS

Over the years, the OOC has received numerous inquiries from Legislative Branch employees about their legal rights following their disclosures of alleged violations of law, abuses, or mismanagement. Unfortunately, employees wishing protection for such disclosures are not currently protected from employment retaliation by any law.[1] The anti-retaliation provisions of the CAA provide protection only to employees who exercise rights covered under the current provisions of the CAA. Whistleblower protections are intended specifically to add to these protections by preventing employers from taking retaliatory employment action against an employee who discloses information which he or she reasonably believes evidences a violation of law, gross mismanagement, or substantial and specific danger to public health or safety. When Congress first enacted the Whistleblower Protection Act (WPA) in 1989[2], it stated that the intent of the legislation was to:

> strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing...that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[3]

These rights were not extended to Congressional employees under the CAA, and the OOC has urged Congress and its agencies to afford their employees these same protections. In both the 109th and 110th Congresses, legislation was introduced[4] that would have amended the CAA to give Legislative Branch employees some of the whistleblower protection rights that are available to Federal Executive Branch and private sector employees. Efforts to pass the legislation failed. Now that Congress has passed, and the President has signed, the WPEA, the rights of Executive Branch employees have been solidified, providing an excellent framework to follow for Legislative Branch employees. One of the strongest proponents of whistleblower protections for Legislative Branch employees has been Senator Chuck Grassley. In introducing legislation that would give Legislative Branch employees whistleblower protections, Senator Grassley released this statement:

> "Americans want an accountable and responsible Congress. Whistleblowers can be a key component to ensuring that misdeeds are uncovered. They are often the only ones who know the skeletons hidden deep in the closets. It takes courage to stand up and point out wrongdoing and it's unacceptable that people would be retaliated against for doing the right thing…Whistleblowers in the executive branch have helped me do my job of oversight. It's simply not fair, nor is it good governance for Congress to enact whistleblower protections on the other branches of government without giving its own employees the same consideration. Congress needs to practice what it preaches." —Press release, February 25, 2009.

Senator Claire McCaskill who co-sponsored this legislative effort stated the following:

> "Whistleblowers are the eyes and ears that expose some of the worst cases of fraud, waste and abuse of power... Since I arrived in Washington, I have made it a goal to protect watchdogs who keep government and industry on the straight and narrow, and Congress should be no exception. We need to make sure that congressional employees have the same protections from retaliation as their colleagues in the executive branch."

While the Board understands that there may be practical problems with applying all aspects of the WPA and the WPEA to the Legislative Branch, we support the efforts of Senators Grassley and McCaskill as they continue to advocate for whistleblower protections for Congressional employees.

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[1] As the Board has indicated in prior § 102(b) reports, Legislative Branch employees may currently be covered by the anti-retaliation provisions of the Toxic Substances Control Act; Clean Water Act; Safe Drinking Water Act; Energy Reorganization Act; Solid Waste Disposal Act/ Resources Conservation Recovery Act; Clean Air Act; and Comprehensive Environmental Response, Compensation and Liability Act. While the Board has previously recommended that Congress clarify that protection for Legislative Branch employees exists under these environmental statutes, the current Board has concluded that it is no longer necessary to include this as a separate recommendation because such protection can be provided by enacting comprehensive whistleblower protection.

[2] The Whistleblower Protection Act was amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA) (PL 112–199).

[3] 5 U.S.C. § 1201 nt.

[4] S.3676, 109th Cong. (2006); S. 508, 110th Cong. (2007).

WORKPLACE RIGHTS RECOMMENDATION #5

Redesignating the "Office of Compliance" as the "Office of Congressional Workplace Rights"

The Congressional Accountability Act (CAA), Public Law 104-1, was passed in 1995 with almost unanimous support. Section 301 of the CAA establishes an independent office within the legislative branch of the Federal Government and named the office the Office of Compliance.

Unfortunately, the Office of Compliance as an organizational name does not accurately reflect the work of our office in enforcing the thirteen workplace rights and safety laws made applicable to Congress by the CAA. The Board believes that changing the name of the office to better reflect our mission will make it easier for employees and the public to identify us for their needs.

RECOMMENDATION TO THE 114TH CONGRESS

The Board recommends that Congress redesignate the Office of Compliance under Title 2 of the United States Code Section 1381 as the Office of Congressional Workplace Rights.

PURPOSE OF THE LAW

- To better reflect the mission and function of our office under the CAA
- Enable legislative branch employees to better identify and access the services of our office
- To reduce confusion and misdirected contact by the public because of an ambiguous name

ANALYSIS

The Office of Compliance (OOC) is a multi-faceted agency for legislative branch personnel. The OOC and its small staff of 22 employees serve the functions of numerous Executive branch agencies with thousands of personnel, including the Occupational Safety and Health Administration (OSHA), the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC). While this consolidation of services or "one-stop" shop for workplace rights makes it simple for employees, it is only effective if an employee can find our office when they need it to take advantage of those services. Also, as our office provides access coverage to the public under the American with Disabilities Act (ADA), it is important to ensure that the public visiting both Capitol Hill and member district/state offices can quickly and easily identify and locate us.

One part of solving this problem, as seen by recommendations 1 and 2 of this report, is prioritizing outreach, education and notice posting to Congressional staff to explain the OOC's mission and the services we provide. However, while these initiatives will have an impact, a simple name change enhances these efforts and will make accessing services more intuitive both in web-based searches and in printed directories.

ADDITIONAL WORKPLACE RIGHTS RECOMMENDATIONS

> "And how can Congress claim to pass laws in the best interest of the American people if Congress refuses to abide by those very same laws... Congress should be the very last institution in America to exempt itself from living under the Nation's laws. Rather, Congress should always be the very first institution to be covered by the laws of the land, especially as the body legislating such laws."
>
> *—Senator Olympia Snowe (ME), January 5, 1995, from the legislative history of the Congressional Accountability Act of 1995*

APPROVAL OF UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT REGULATIONS

Section 206 of the CAA applies certain rights and protections of USERRA to covered employees performing service in the "uniformed services." The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was enacted to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from military service. The uniformed services includes the Armed Forces (active and reserve), the National Guard, the Public Health Service, or any other category designated by the President during time of war or emergency. There is an immediate need for USERRA regulations in the Legislative Branch, sensitive to its particular procedures and practices. Congress has seen fit to provide servicemen and women certain protections in federal civilian employment and the Board of Directors urges speedy passage of the regulations to make meaningful to the covered community the rights afforded by USERRA.

PROTECT EMPLOYEES WHO SERVE ON JURY DUTY (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover Legislative Branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 § 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

PROTECT EMPLOYEES AND APPLICANTS WHO ARE OR HAVE BEEN IN BANKRUPTCY (11 U.S.C. § 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the Legislative Branch. For the reasons stated in the 1996, 1998, 2000 and 2006 § 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

PROHIBIT DISCHARGE OF EMPLOYEES WHO ARE OR HAVE BEEN SUBJECT TO GARNISHMENT (15 U.S.C. § 1674(A))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the Legislative Branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 § 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

ACRONYMS

ADEA: Age Discrimination in Employment Act of 1967

ADA: Americans with Disabilities Act of 1990

CAA: Congressional Accountability Act of 1995

DOL: Department of Labor (Federal Executive Branch)

EPPA: Employee Polygraph Protection Act of 1988

EPA: Equal Pay Act

FLSA: Fair Labor Standards Act of 1938

FMLA: Family Medical Leave Act of 1993

GINA: Genetic Information Nondiscrimination Act of 2008

No FEAR Act: Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002

OSHAct: Occupational Safety and Health Act of 1970

OOC: Office of Compliance

Title VII: Title VII of the Civil Rights Act of 1964

USERRA: Uniformed Services Employment and Reemployment Rights Act of 1994

WPA: Whistleblower Protection Act of 1989

WPEA: Whistleblower Protection Enhancement Act of 2012

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