SECTION 230 STUDY

Study of Laws, Regulations, and Procedures at The General Accounting Office The Government Printing Office and The Library of Congress

Prepared by the Board of Directors of the Office of Compliance
Pursuant to Section 230 of the Congressional Accountability Act of 1995
(PL 104-1)

December 31, 1996

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Section 230 of the Congressional Accountability Act of 1995 (CAA) mandates a study of the application of the laws listed in section 230(b) to the General Accounting Office (GAO), Government Printing Office (GPO) and Library of Congress (the Library) (referred to collectively as the instrumentalities).[1] Originally, section 230 directed the Administrative Conference of the United States (ACUS) to conduct the study but, in connection with the dissolution of ACUS in November of 1995, the law was amended to transfer responsibility for the study to the Board of Directors of the Office of Compliance.[2]

The study is organized into three sections which, as required by section 230(a), review the application of laws, regulations, and procedures to each instrumentality and, as required under section 230(c), evaluate whether these rights, protections, and procedures (including administrative and judicial relief) are "comprehensive and effective." Because the CAA does not define the phrase "comprehensive and effective," the Board has found guidance in two other sections of the statute, as well as the legislative history, in determining what the phrase "comprehensive and effective" should be understood to mean. These sources all use the CAA as their benchmark, suggesting that "comprehensive and effective" in the section 230 context is also best understood in comparison to the CAA.

Section 505 of the CAA directs the Judicial Conference of the United States to report on the application to the judicial branch of the eleven laws made applicable by the CAA, and to include any recommendations to grant to employees of the judicial branch rights, protections, procedures, and relief under those laws "that are comparable to those available to employees in the legislative branch under [the CAA]."[3] This direction suggests a statutory interest in parity in the application of the eleven laws to agencies in the legislative and in the judicial branches. Additionally, section 102(b)(2) requires the Board to report on whether other provisions of laws relating to employment and public access, in addition to those incorporated into the CAA, should be made applicable to the legislative branch. That the CAA separately requires the Board to make proposals about extensions of the CAA suggests that, for these purposes, the CAA is the appropriate point of comparison.

The legislative history of section 230 also suggests using the CAA as the reference point. The section-by-section analysis placed in the record by Senator Grassley on behalf of himself and

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[1] 2 U.S.C. 1371.

[2] Pub. L. No. 104-53, section 309, 109 Stat. 538 (November 19, 1995).

[3] 2 U.S.C. 1434.

Senator Lieberman makes clear their expectation that the report would use the CAA to evaluate comprehensiveness and effectiveness: "This study should evaluate not only the extent to which employees are provided the rights and protections of the laws made applicable to Congress in this act. But also whether they are as comprehensive and effective as those provided under this act."[1] Similar views were expressed by committees of the House and Senate during the 103rd Congress in reports on bills similar to the CAA.[2] Accordingly, for purposes of this 230(b) study, the Board has interpreted the phrase "comprehensive and effective" to mean comprehensive and effective when compared with the rights, protections, procedures, and relief afforded under the CAA.

In evaluating the comprehensiveness and effectiveness of the rights, protections and procedures available to the instrumentalities, the Board reviewed the following key aspects of the current statutory and regulatory regimes: *(1)* the nature of the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations; *(2)* the adequacy of administrative processes, including: *(a)* adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and *(b)* a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes; *(3)* the availability and adequacy of judicial processes and relief; and *(4)* the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria. The Board's purpose in doing so is to fully explicate the issues of concern in section 230(c).

Section 230(c) also states that the study should "include recommendations for any improvements in regulations or legislation, including proposed regulatory or legislative language." Section 230(c) originally required ACUS to "prepare and complete the study and recommendations" and then "submit the study and recommendations to the Board."[3] The Board, in turn, was to "transmit such study and recommendations (with the Board's comments)" to the instrumentalities and the Congress.[4] Thus, the Board's role as commentator was, quite literally, parenthetical. After the dissolution of ACUS, Congress transferred the responsibility for conducting the study and making recommendations from ACUS to the Board. The Board's institutional role, functions, and resources are vastly different from those of ACUS and, therefore, these differences must necessarily reshape the contours of the study.

For example, the chief function of ACUS, an advisory committee with a broad membership of

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1 141 Cong. Rec. S627 (daily ed. Jan. 9, 1995).

2 House Committee on House Administration, Report to accompany H.R. 4822, H.R. Rep. No. 103-650 Part 2, 103d Cong., 2d Sess. 19 (1994); Senate Committee on Governmental Affairs, Report to accompany H.R. 4822, S. Rep. No. 103-397, 103d Cong., 2d Sess. 26 (1994).

3 2 U.S.C. 1371(d)(1).

4 2 U.S.C. 1371(d)(2).

representatives from federal administrative agencies and the private sector, was to study administrative agencies and recommend improvements in their procedures. In contrast, the chief functions of the five-member Board are to issue legally binding regulations and to adjudicate disputes cognizable under the CAA.[1] With this transfer of authority, the Board is now called upon to make determinations as to what changes would constitute "improvements" in the statutory schemes governing the instrumentalities.

Such determinations would be made comparing the studied statutory and regulatory regimes with the regime established by the CAA. However, for the Board to issue recommendations as to the relative merits of the CAA or the statutory schemes in place at the instrumentalities at this early stage of its administration of the Act would be premature. Section 102(b) is instructive in this context. There, the Congress requires the Board to conduct a biennial review of federal employment law and "to report, with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch."[2] The Board notes in its 102(b) report that the ongoing nature of the 102(b) reporting requirement argues for accomplishing statutory change on an incremental basis as the Board gains rulemaking and adjudicatory experience.

Because the Board reads its statutory mandate in the 102(b) study as informing its 230 study mandate, the Board has determined that its recommendations for change in the section 230 study should likewise proceed incrementally. Therefore, in the time available, consistent with executing its considerable rulemaking responsibilities in its first year of operation, the Board has gathered all the pertinent facts, elicited comments from interested parties, performed a searching analysis and come to conclusions as to comprehensiveness and effectiveness. The Board's conclusions, which follow, will be the foundation for recommendations for change, if the Congress wishes the Board to proceed in either a further 230 study or in a future 102(b) report.

CONCLUSIONS

Overall

On the basis of the foregoing review and evaluation, the Board concludes that, overall, the rights, protections, procedures and relief afforded to employees at the GAO, the GPO and the Library under the twelve laws listed in section 230(b) are, in general, comprehensive and effective when compared to those afforded other legislative branch employees covered under the CAA. The rights, protections, procedures and relief applicable to the three instrumentalities are different in some respects from those afforded under the CAA, in part because employment at the instrumentalities is governed either directly under civil service statutes and regulations or under

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[1] *See* sections 301, 304, 406 of the CAA, 2 U.S.C. 1381, 1384, 1406.

[2] 2 U.S.C. 1302(b)(2)(B).

laws and regulations modeled on civil service law. The comments from employees at the instrumentalities generally supported the retention or further application of civil service-type protections, rather than substantial replacement of existing protections with the CAA.

The CAA will extend rights and protections to fill most remaining gaps in coverage at the three instrumentalities, effective one year after this study is transmitted to Congress. However, certain gaps in coverage of GPO employees will remain because GPO is not covered under certain CAA provisions that will apply to GAO and the Library.

Substantive Rights

The Board found that the substantive provisions applicable at the instrumentalities are, in most respects, the same as, or similar to, those made applicable by the CAA and are at least as protective of employees. Moreover, at all three instrumentalities, employees have civil service protections that are outside the scope of the CAA. In certain areas, however, gaps in coverage were identified; for example, employees at GPO are not covered under either the Worker Adjustment and Retraining Notification Act or the Employee Polygraph Protection Act, and the CAA does not extend that protection to them in the future. And, the instrumentalities, like federal agencies generally, are authorized to allow employees to take compensatory time off instead of receiving overtime pay under a wider range of circumstances than is authorized under the CAA.

Adequacy of Administrative Processes

Conclusions with respect to the adequacy of administrative processes are more complicated. Congressional decisions made over many years in different statutes subject the instrumentalities to the authorities of certain executive branch agencies with respect to certain laws, but exempt them from executive branch authority with respect to others. The exemptions, which vary from one instrumentality to another, appear intended to preserve separation between legislative branch and executive branch functions and, in the case of GAO, to prevent conflicts that could arise from being regulated by the same civil service agencies that it audits. The CAA will establish additional avenues for administrative enforcement and relief by granting the Office of Compliance certain authorities in the areas of occupational safety and health and several other kinds of matters effective one year after transmittal of this study, applicable to GAO and the Library, but not to GPO.

The result is a patchwork of coverages and exemptions from the procedures afforded under civil service law and the authority of executive branch agencies, and from the procedures afforded under the CAA and the authority of the Office of Compliance. The procedural regimes at the three instrumentalities differ from one another, are different from the CAA, and are different from that in the executive branch. While it is difficult to make normative judgments about these differences, the multiplicity of regulatory schemes means that, in some cases, employees have more procedural options available, and in some cases, fewer. Additional procedural steps may afford opportunities to employees in some cases, but may also be more time-consuming and inefficient. Furthermore, the remaining exemptions from the authority of both executive branch agencies and the Office of Compliance leave gaps in the rights of employees at the

instrumentalities to have their complaints resolved through an administrative process external to, and independent from, the employing agency -- one of the key elements of comprehensiveness and effectiveness that is guaranteed by the CAA.

For example, Library employees may pursue a complaint of discrimination through procedures administered by the instrumentality, but if the Librarian of Congress denies the complaint, the employees have no right of appeal to the Equal Employment Opportunity Commission or any other administrative authority. In contrast, legislative branch employees covered by the CAA may pursue complaints of discrimination through administrative adjudication administered by the Office of Compliance with appeal to its Board of Directors. The Office of Compliance is an independent office external to, and independent from, the House or Senate or any covered instrumentality.

Adequacy of Judicial Processes and Relief

Judicial processes and relief are more limited at the instrumentalities than under the CAA, because civil service laws do not generally afford judicial remedies to the same extent as the CAA. The CAA will reduce this discrepancy by extending a private right of action for violations of several laws (the Family and Medical Leave Act, the Worker Adjustment and Retraining Notification Act, the Uniformed Services Employment and Reemployment Rights Act, and the Employee Polygraph Protection Act), to employees of GAO and the Library, though not of GPO, effective as of one year after transmittal of this study.

In certain other respects, however, the available judicial processes and relief will remain more limited at all three instrumentalities. For example, while employees under the CAA may request a jury trial in any situation where a private sector employee could do so, civil service laws applicable at the instrumentalities arguably authorize jury trials only in cases under Title VII or the Americans with Disabilities Act.

Adoption of Substantive Regulations

Instrumentalities in certain instances also have significant latitude to establish (and limit) substantive rights for their own employees. For example, in issuing an order to establish its labor-management program, GAO included limits on appropriate bargaining units and on the scope of bargaining that are more restrictive than the provisions in either the civil service statute governing labor-management relations in the federal service or the regulations adopted by the Board based on Federal Labor Relations Authority regulations. In this respect, substantive regulations are not proposed and adopted by an independent regulatory authority, which is an important element of the statutory scheme of the CAA.

These and additional conclusions are further explained at the end of the study sections on each of the three instrumentalities.

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The analysis and conclusions in this study are being made solely for the purposes set forth in section 230 of the Congressional Accountability Act. Nothing in this study is intended or should be construed as a definitive interpretation of any factual or legal question by the Office of Compliance or its Board of Directors.

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The Board of Directors of the Office of Compliance gratefully acknowledges the contributions of Lawrence B. Novey, who directed this study.

INTRODUCTION

Section 230 of the Congressional Accountability Act of 1995 (CAA) directs the Board of Directors (Board) of the Office of Compliance to conduct this study of the application of certain employment and antidiscrimination laws to the General Accounting Office (GAO), the Government Printing Office (GPO), and the Library of Congress (the Library). Section 230 requires the study, including recommendations, be prepared and transmitted to each of these instrumentalities and to the Congress by December 31, 1996.

Background

The CAA, the first law passed by the 104th Congress, applies eleven labor, employment and public access laws to the House of Representatives, the Senate, and the instrumentalities of the legislative branch. The laws made applicable by the CAA provide rights and protections in the areas of: employment discrimination (race, color, religion, sex, national origin, age, disability), overtime pay, minimum wage, and child labor, family and medical leave, occupational health and safety, labor-management relations, employee notification in case of office or plant closings or mass layoffs, employment and reemployment rights for those in the uniformed services, employee polygraph protection, and discrimination on the basis of disability in the provision of public services and public accommodations.

Statutory Mandate for the Study

Even before enactment of the CAA, legal rights and protections in many of these areas had applied to the three largest Congressional instrumentalities – GAO, GPO, and the Library. The CAA made certain modifications in the laws that already apply at these instrumentalities, and mandated a study of the laws, regulations, and procedures applicable to these instrumentalities and their employees.

As originally enacted, the CAA directed the Administrative Conference of the United States (ACUS) to conduct and submit the study to the Board, which would then transmit it, together with the Board's comments, to the Congress and the instrumentalities by December 31, 1996. However, Congress amended the CAA in November 1995 to transfer responsibility for conducting the study from ACUS to the Board.[1]

Laws Specified for Study

The eleven laws that the CAA makes applicable are listed in the following chart, organized by the subject matter of the law. Since certain of the laws address more than one subject matter, different portions of these laws are entered separately on the chart.

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[1] Section 309 of the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, 109 Stat. 538 (Nov. 19, 1995). The amendment was made effective if and when ACUS should cease to exist. When ACUS was dissolved in November of 1995, the Board became responsible for conducting the study.

LAWS MADE APPLICABLE BY THE CAA		
Abbreviation	***Law***	***Subject of Law***
EMPLOYMENT DISCRIMINATION		
Title VII	Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)	Prohibits discrimination in employment because of race, color, religion, sex, or national origin.
ADEA	Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.)	Prohibits employment discrimination against persons 40 years of age and over.
ADA (employment provisions)	Title I of the Americans With Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)	Prohibits employment discrimination against qualified individuals with disabilities.
Rehabili-tation Act	Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.)	Prohibits employment discrimination on the basis of handicapping condition.
EPA	Equal Pay Act (part of the FLSA) (29 U.S.C. 206(d))	Prohibits pay discrimination on the basis of sex.
EMPLOYEE BENEFITS, LABOR, HEALTH AND SAFETY		
FLSA	Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.)	Governs overtime pay, minimum wage, and child labor protection.
FMLA (title 29 provisions)	Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.)	Entitles eligible employees to take leave for certain family and medical reasons.
OSHA	Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.)	Protects the safety and health of employees from physical, chemical, and other hazards in their places of employment.
Chapter 71	Federal Service Labor-Management Relations statute (5 U.S.C. chapter 71)	Entitles individuals to form, join, or assist a labor organization, or to refrain from such activity, and to collectively bargain.
WARN Act	Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.)	Provides certain employees with notice in advance of office or plant closings or mass layoffs.
USERRA	Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. chapter 43)	Protects job rights of individuals who serve in the military and other uniformed services.
EPPA	Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001et seq.)	Restricts use of "lie detector" tests by employers.
DISCRIMINATION ON THE BASIS OF DISABILITY IN PROVIDING PUBLIC SERVICES AND PUBLIC ACCOMMODATIONS		
ADA (public access provisions)	Titles II and III of the Americans With Disabilities Act of 1990 (42 U.S.C. 12131 et seq.)	Prohibits discrimination against qualified individuals with disabilities in the provision of public services and accommodations.

In addition to the laws that the CAA makes applicable, section 230 also requires study of certain provisions of civil service law and the GAO Personnel Act, which may apply, supplement, or affect the rights and protections under the laws made applicable by the CAA. These laws are listed in the following chart.

OTHER RELATED LAWS		
Abbreviation	***Law***	***Subject of Law***
"Prohibited Personnel Practices" provisions	Section of civil service law on Prohibited Personnel Practices (5 U.S.C. 2302)	Prohibits certain employment practices, including unlawful discrimination on the basis of race, color, religion, sex, national origin, age, or handicapping condition, and retaliation for "whistleblowing" or for exercising appeal rights.
FMLA (title 5 provisions)	Subchapter of civil service law on Family and Medical Leave (5 U.S.C. 6381 et seq.), enacted by the FMLA	Entitles eligible employees to take leave for certain family and medical reasons.
"Premium Pay" provisions	Subchapter of civil service law on Premium Pay (5 U.S.C. 5541 et seq.)	Provides for overtime pay in addition to that under the FLSA, and provides certain exceptions to the requirements of the FLSA.
"Safety Programs" provisions	Section of civil service law on Safety Programs (5 U.S.C. 7902)	Requires the establishment of certain safety programs.
GAOPA	General Accounting Office Personnel Act of 1980 (31 U.S.C. 731 et seq.)	Requires a personnel management system at GAO, and establishes responsibilities and procedures for implementing the rights and protections under several employment laws.

Collection of Information

To compile the information needed in this study, the Board conducted a process of outreach and data collection and received full cooperation and assistance from the instrumentalities and their representatives, unions and other employee organizations, and individual employees.

Materials Collected by the Administrative Conference

Before responsibility for conducting the study was transferred to the Board in November of 1995, ACUS had begun the task of collecting the materials and information necessary for the study. The materials collected by ACUS included materials provided by the instrumentalities and an employee union describing the applicable laws, regulations, and procedures, and suggesting topics that should be emphasized in the study. When the Board assumed responsibility for the study, ACUS transferred these materials to the Office of Compliance.

Notice of Request for Information

On May 2, 1996, the Office of Compliance issued a Notice of Request for Information. This Notice described the nature and scope of the study, and requested that the three instrumentalities, their employees and employee representatives, and persons who use public services and public accommodations at the instrumentalities, as well as any other interested persons, provide information helpful to the Board in conducting the study.

The Notice (a copy of which is set forth in Appendix B) was sent to GAO, GPO, and the Library, to each union at GPA and the Library, and to each employee council at GAO. Included with the letters to these instrumentalities and organizations were copies of a poster summarizing the contents of the Notice and inviting interested persons to provide information for the study and to contact the Office of Compliance if further information was needed, which was circulated and posted at GAO and GPO and published in the Library *Gazette*, which is widely circulated at the Library. Because the coverage of ADA titles II and III includes non-employees who use public services and public accommodations, the Notice was also sent to several organizations with an interest in the accessibility of public services and public accommodations to persons with disabilities.

Consultations and Meetings

In response to the Notice of Request for Information, numerous calls were received from individual employees, unions, other employee organizations, and lawyers representing individual employees asking for further information, and meetings were held with those who requested meetings. Although a better understanding of the nature of employment at the instrumentalities was gained in these conversations and meetings, only the information and comments received in writing were included in the record upon which the study is based.

Each instrumentality chose to designate its General Counsel as the principal contact point for the study, and conversations and meetings were held with the General Counsel and other officials and staff within the instrumentalities to ascertain the instrumentalities' views as to what laws, regulations, and procedures are applicable, and to obtain copies of the regulations and procedures issued internally by the instrumentalities by which they apply and enforce the laws. These meetings and discussions provided useful insight and understanding, but, again, only the information and comments received in writing were included in the record upon which the study is based. Furthermore, in several instances, inquiries made in conducting the study prompted the instrumentalities to conclude that their regulations and procedures should be modified or updated, or that the timing of a planned modification or update in those regulations and procedures should be accelerated.

Materials Received

Submissions were received from the management of the instrumentalities, unions or other employee organizations, and individual employees. In total, 42 different commenters provided submissions – 15 different management officials at the instrumentalities, 9 unions and other

employee organizations, 17 individual employees, and one outside organization interested in public accessibility by persons with disabilities.

Disclosure of Initial Submissions and Notice of Opportunity to Respond

In mid-October, letters were sent to the instrumentalities, employee unions and other employee organizations, and organizations interested in accessibility to persons with disabilities instrumentalities, notifying them that the materials submitted for the study were available for public inspection, and inviting interested persons to submit, by November 15, 1996, any comments or materials in response to the earlier submissions. Additional submissions were received in response to this notice.

Public Documents

Materials submitted to the Office of Compliance for use in this study are available for inspection and copying upon request by any member of the public. However, the identity of individual employees who provided submissions for the study will be kept confidential. A summary of all comments received is provided in Appendix C.

Contents and Organization of the Study

The study is divided into three sections, one for each instrumentality. Each section first reviews the application of the laws at the instrumentality. This review is organized on a law-by-law basis, with anti-discrimination laws grouped together. The review includes the substantive rights afforded by statute and regulations and the administrative and judicial processes and enforcement mechanisms available for resolving disputes, remedying violations, and assuring compliance.

As required by section 230(c) of the CAA, the study evaluates "whether the rights, protections, and procedures, including administrative and judicial relief," are "comprehensive and effective." To conduct this evaluation, the study compares the rights, protections, and procedures at each of the instrumentalities with the corresponding rights, protections, and procedures afforded to covered employees under the CAA.

In making these comparisons, the study reviews key aspects of the current statutory and regulatory regimes:

(a) the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations;

(b) the adequacy of administrative processes, including: *(i)* adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and *(ii)* a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes;

(c) the availability and adequacy of judicial processes and relief; and

(d) the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria.

The study includes brief descriptions of the comments received that are relevant to the evaluations.

Future-Effective Changes Under the CAA

Several provisions of the CAA are to become effective at the instrumentalities one year after this study is transmitted to Congress: *(i)* GAO and the Library are included under the CAA provisions that apply the rights and protections of EPPA, WARN, USERRA, and OSHA; *(ii)* GAO and the Library are removed from coverage by the Title 5 provisions of the FMLA, which ordinarily apply in the Federal civil service, and are placed under the coverage of the Title 29 FMLA provisions, which ordinarily apply in the private sector; and *(iii)* the remedies and procedures in section 717 of Title VII[1] will apply for claims under public access provisions of the ADA with respect to any of the three instrumentalities. To enable Congress to review these delayed statutory provisions during the year after the study is transmitted, the study includes evaluation of these statutory provisions with delayed effective dates.

Finally, at the end of each of the three sections of the study, the Board sets forth its conclusions drawn from the evaluation of rights, protections, and procedures at the instrumentalities.

[1] 29 U.S.C. 2000e-16.

GENERAL ACCOUNTING OFFICE

OVERVIEW

Section 230 of the CAA directs a study of the application of the laws listed in section 230(b) of the Congressional Accountability Act (CAA) to, among others, the General Accounting Office (GAO) and its employees.[1] The study is to "evaluate whether the rights, protections, and procedures, including administrative and judicial relief," are "comprehensive and effective," and to "include recommendations for any improvements in regulations or legislation."[2] Section 230(b) of the CAA lists the eleven laws made applicable by the CAA to "covered" legislative branch employees and adds, for study, the General Accounting Office Personnel Act of 1980 (GAOPA).

In this section on GAO, the Board first reviews the rights, protections, procedures, and relief afforded to GAO employees under the GAOPA. The GAOPA provisions on discrimination, labor-management relations, and notification to employees affected by reduction in force (RIF) are discussed in the separate sub-sections on Title VII of the Civil Rights Act of 1964 (Title VII), Age Discrimination in Employment Act of 1967 (ADEA), Americans with Disibilities Act of 1990 (ADA), Chapter 71 of title 5, United States Code, relating to Federal Service Labor-Management Relations (Chapter 71) and Worker Adjustment and Retraining Notification Act (WARN). The GAOPA does not expressly address the remaining CAA laws -- Fair Labor Standards Act of 1938 (FLSA), Family and Medical Leave Act of 1963 (FMLA), Uniformed Services Employment and Reemployment Act of 1994 (USERRA), Employee Polygraph Protection Act of 1988 (EPPA), Occupational Safety and Health Act of 1970 (OSHA), and the public access provisions of the ADA -- which will be discussed separately as well.

To evaluate comprehensiveness and effectiveness of the rights, protections, procedures, and relief afforded to GAO employees under the laws listed in section 230(b), the study compares them with those available to other legislative branch employees under the CAA. In addition, where appropriate, the rights, protections, procedures and relief under the GAOPA and the eleven CAA laws are compared with those applicable in the executive branch under civil service law and with those afforded to employees in the private sector. Comments submitted by interested persons were reviewed, summarized, and have been considered in the Board's evaluations and conclusions.

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[1] As originally enacted, section 230 directed the Administrative Conference of the United States (ACUS) to conduct the study and submit it to the Board of Directors of the Office of Compliance, which would then transmit the study, together with the Board's comments, to the Congress and the instrumentalities by December 31, 1996. However, Congress amended section 230 in November of 1995 to transfer responsibility for conducting the study from the Conference to the Board. Section 309 of Pub. L. No. 104-53, 109 Stat. 538 (Nov. 19, 1995).

[2] Section 230(c) of the CAA, 2 U.S.C. 1371(c).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (TITLE VII)

Substantive Rights

GAO and its employees are specifically covered by section 717, which is the provision of Title VII generally applicable to federal sector employees.[1] Under section 717(a), "[a]ll personnel actions affecting employees or applicants for employment" in covered agencies and offices "shall be made free from any discrimination based on race, color, religion, sex, or national origin." This provision has been understood to prohibit retaliation against an employee for asserting rights under Title VII.[2]

Regulations

The GAOPA provides that, as to discrimination matters, the PAB and the Comptroller General exercise the authority of executive branch agencies for GAO employees. Accordingly, the regulations of the Equal Employment Opportunity Commission (EEOC) expressly exclude GAO from coverage.[3] GAO's regulations establishing the GAO personnel management system restate the language in the GAOPA prohibiting discrimination,[4] and also define prohibited personnel practices, based on civil service law, to include discrimination "as prohibited under section 717 of [Title VII]" committed by a GAO employee with personnel authority.[5] In

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[1] 42 U.S.C. 2000e-16. The coverage of section 717 includes employees and applicants "in executive agencies as defined in section 105 of Title 5" of the U.S. Code. GAO comes within this statutory definition of an "executive agency." The definition of an "executive agency" in 5 U.S.C. 105 includes: an executive department, a government corporation, and an independent establishment. An "independent establishment" is further defined in 5 U.S.C. 104(2) to include: an "establishment in the executive branch" (with certain exceptions), and GAO. (This definition does not mean that GAO is in the "executive branch" of government, and, indeed, GAO is generally considered to be in the legislative branch.) Furthermore, section 201(c)(1) of the CAA amended Title VII to include GAO, by name, within the coverage of section 717.

[2] *See Tomasello v. Rubin*, 920 F.Supp. 4, 6-7 (D.D.C. 1996); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1905, 1915 n.13 (D.C. Cir. 1985); *Porter v. Adams*, 639 F.2d 273, 278 (5th Cir. 1981).

[3] 31 U.S.C. 732(f)(2); 29 C.F.R. 1614.103(d)(2).

[4] 4 C.F.R. 7.2(a).

[5] 4 C.F.R. 2.5(a)(1). This corresponds to the prohibited personnel practices defined in civil (continued...)

addition, GAO and the PAB have each issued regulations governing the administrative processing of discrimination complaints.

Procedures

Administrative

With respect to anti-discrimination laws, including Title VII, the GAOPA withdraws GAO from the jurisdiction of executive branch agencies, and divides regulatory authority between the Comptroller General and the PAB. The GAOPA grants to the PAB the same authority over "oversight and appeals matters" as is exercised by executive branch regulatory agencies, including the EEOC and MSPB.[1] GAO management exercises the same authority as executive branch agencies have over them.

The GAO discrimination complaint process, similar to the executive branch agencies' discrimination complaint process, is established under GAO Order 2713.2.[2] A discrimination proceeding at GAO begins with a mandatory counseling period, and may also include, with the consent of the parties, a period of mediation, conducted by the agency's Civil Rights Office. After the counseling phase, the employee may file an individual complaint. Unless the Civil Rights Office dismisses the complaint, it develops a factual record by conducting its own investigation, including the collection of documents and testimonial evidence. (In the case of a class complaint, an outside hearing officer develops a record and conducts a hearing as part of the investigatory process before the agency makes its final decision.) After the investigation (or hearing), the Comptroller General or a designee issues a final decision on behalf of the agency. A reasonable amount of official time must be granted to an employee to participate in a proceeding, respond to an inquiry by the Civil Rights Office, or prepare a complaint. A GAO employee may designate another GAO employee as his or her representative, and that representative shall also be granted a reasonable amount of official time for the same purpose.[3]

Appeal to the PAB. An individual may file a charge with the PAB General Counsel either after a GAO agency decision has been issued on the complaint, or if more than 120 days have

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[5] (...continued)
service law at 5 U.S.C. 2302(b)(1)(A).

[1] 31 U.S.C. 732(f)(2)(A).

[2] The current version of the Order was issued on October 14, 1994, but GAO is circulating a draft revision, dated April 23, 1996.

[3] *See* GAO Order 2723.2, chap. 8, sec. 2, pages 27-28 (Oct. 14, 1994).

elapsed since the complaint was filed.[1] The General Counsel conducts an investigation, including gathering information and interviewing and taking statements from witnesses, refines the issues where appropriate, and attempts to settle the matters at issue. Following the investigation, the General Counsel provides the charging employee with a "Right to Appeal Letter," accompanied by a confidential statement of the General Counsel advising the charging party of the results of the investigation.[2] Whenever the General Counsel finds reasonable grounds to believe that the charging party's rights have been violated, the General Counsel represents the charging party unless that party elects otherwise.

In the case of a class complaint, a petition for review may be submitted directly to the Board, following a GAO decision rejecting or modifying the class action, or after a final GAO decision on the complaint, or if more than 180 days have elapsed, without a final GAO decision. A formal adjudicatory hearing is then held, ordinarily before a single Board member, who renders an initial decision, with appeal to the entire Board.[3] In the case of a class complaint, the Board may choose to render a decision without further hearing, based on the record of the hearing conducted under Order 2713.2.[4]

If an employee is affected by an appealable adverse action (defined as a "removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days (whether due to disciplinary, performance-based or other reasons))", which the employee alleges was due to prohibited discrimination, the employee may elect to file a complaint of discrimination with GAO or file a charge with the PAB General Counsel without having first filed a discrimination complaint with GAO.

Other Avenues of Enforcement. An EEO violation committed by a GAO employee with personnel authority constitutes a "prohibited personnel practice."[5] If information comes to the attention of the PAB General Counsel suggesting that a prohibited personnel practice may have occurred or is to be taken, the PAB General Counsel shall investigate and may recommend corrective action to GAO or petition the PAB for corrective action, may initiate disciplinary proceeding against a responsible employee, or (except in the case of a RIF) may request a stay

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1 The PAB's regulations establishing procedures for discrimination cases are codified at 4 C.F.R. 28.95-28.101.

2 *See* 4 C.F.R. 28.11-28.12.

3 *See* 4 C.F.R. 28.86 (hearings before non-Board members), 28.87 (hearings before Board members).

4 4 C.F.R. 28.97(d).

5 By a GAO employee "who has authority to take, direct others to take, recommend, or approve any personnel action." 4 C.F.R. 2.5.

from the Board.[1]

Additionally, any person or the PAB General Counsel may petition the PAB for enforcement of a final PAB order, including a final PAB order involving unlawful discrimination. PAB regulations provide that, upon receipt of a petition for enforcement, or of a report from the PAB's Solicitor indicating non-compliance, the PAB may initiate a PAB proceeding to determine whether there was non-compliance, and may then seek judicial enforcement of its order.[2]

PAB's Oversight Authority. Under the GAOPA, the PAB exercises oversight authority over the anti-discrimination program at GAO.[3] Such oversight includes requiring GAO to provide to the PAB, upon request, various plans, reports, and statistics, reviewing and evaluating the GAO's regulations, procedures, and practices in the anti-discrimination area. The PAB can require GAO to make any changes it determines are needed due to violations or inconsistencies with applicable anti-discrimination law.[4]

Judicial

Civil Action. Section 717 entitles executive branch employees, as well as GAO employees, to file a civil action and request a jury trial if the complaining party seeks compensatory damages.[5] Section 717 specifies that a civil action may be filed after a complaint has reached one of four stages in the administrative processing of the complaint: *(i)* after 180 days from filing the complaint with the employing agency if there is no final decision on the complaint, or *(ii)* within 90 days of receipt of notice of final action by the employing agency, or *(iii)* after 180 days from appealing to the EEOC if there is no final decision on the appeal, or *(iv)* within 90 days of receipt of notice of final decision by the EEOC.[6] However, there has been some uncertainty how this provision applies to GAO employees whose right of appeal is to the PAB, not the EEOC.

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1 *See* 4 C.F.R. 28.130-28.133

2 *See* 4 C.F.R. 28.88.

3 31 U.S.C. 732(f)(2)(A).

4 4 C.F.R. 28.91-28.92.

5 In any action brought under section 717 of Title VII, if a complaining party seeks compensatory damages under 42 U.S.C. 1981a, subsection (c) of that section authorizes any party to demand a jury trial.

6 42 U.S.C. 2000e-16(c).

The circumstances under which a GAO employee may file a civil action in district court under Title VII after having taken an appeal before the PAB were addressed by the U.S. Court of Appeals for the District of Columbia Circuit in *Ramey v. Bowsher*.[1] The Court in that case held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision. The Court found that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case." The Court did not, however, "address the issue whether in a discrimination case, a GAO employee may bypass the Board and proceed directly to district court."[2]

In response to the *Ramey* decision, the PAB withdrew its guidance as to when GAO employees might file a civil action, explaining: "The legal uncertainty highlighted by the *Ramey* case concerns whether GAO employees have any other options [besides asking the court of appeals to review a final PAB decision] for obtaining judicial consideration of their claims of discrimination. The PAB will leave that matter for resolution by the Courts."[3]

Judicial Review of Agency Administrative Processes. In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[4]

Relief

In the case of a violation of Title VII, the following relief may be available to a GAO employee: enjoining unlawful employment practices; ordering that such affirmative steps be taken as may be appropriate, including reinstatement or hiring, with or without back pay; and/or any other equitable relief as may be deemed appropriate.[5] Interest may be awarded to compensate for delay in payment. In addition, under 42 U.S.C. 1981a, compensatory damages are available for intentional discrimination. In such a case, compensatory damages for future pecuniary losses, emotional pain and suffering, and other nonpecuniary losses are

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136 n.6. A concurring opinion stated that a GAO employee has the option "either to sue his employing agency in district court, or to seek relief from the GAO's Personnel Appeals Board." 9 F.3d at 137.

3 59 Fed. Reg. 59103, 59105 (Nov.16, 1994). PAB had originally interpreted Title VII as affording GAO employees the same opportunities to file a civil action in district court as it affords to executive branch employees. *See* former PAB regulations, 4 C.F.R. 28.100(a), as promulgated at 58 Fed. Reg. 61988, 62005 (Nov. 23, 1993).

4 *See* 31 U.S.C. 732(f)(1), 753(a)(7), 755.

5 *See* 42 U.S.C. 2000e-5(g), which is made applicable by 42 U.S.C. 2000e-16(d).

capped at no more than $300,000.[1] If the employee prevails in a Title VII case, the court may, in its discretion, allow the employee reasonable attorney's fees (including expert fees) as part of the costs.[2]

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[1] *See* 42 U.S.C. 1981a(a)(1), 1981a(b)(2), 1981a(b)(3)(D).

[2] *See* 42 U.S.C. 2000e-5(k), which is made applicable by 42 U.S.C. 2000e-16(d).

THE GENERAL ACCOUNTING OFFICE PERSONNEL ACT OF 1980 (GAOPA)

The GAOPA was introduced in Congress at the request of the Comptroller General to grant GAO independence from regulation by executive branch agencies.[1] Before the GAOPA was enacted in 1980, GAO employees were subject to the provisions of law concerning pay, classification, appointment, and other matters applied to the executive branch. GAO was thus regulated in personnel matters by executive branch agencies, including the Office of Personnel Management (OPM), the Office of Special Counsel, and the Merit System Protection Board (MSPB), while, at the same time, responsible to Congress for examining, evaluating, and reporting on the programs and financial activities of these executive branch agencies. As explained in a Senate committee report describing the legislation that became the GAOPA, after the passage of the Civil Service Reform Act of 1978, GAO assumed added responsibility for monitoring executive branch personnel agencies and evaluating the effectiveness of programs established under the statute.[2] Congress therefore enacted the GAOPA to establish a self-contained personnel system for GAO, largely removing it from the regulation of OPM and other executive branch agencies. In addition, because the civil service laws were seen as "not readily accommodat[ing] the special needs of the GAO which arise from its unique status and responsibilities as an arm of the Congress," that system was to have "greater flexibility in hiring and managing its workforce without regard to civil service laws governing such matters as appointments, classifying and grading positions, compensation, adverse actions and appeals." Accordingly, the legislation gave "broad authority to the Comptroller General" in designing GAO's personnel system.[3]

Substantive Rights

The GAOPA requires the Comptroller General to "maintain a personnel management system" that confers rights in the subject areas of several of the laws made applicable by the CAA.[4] The

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1 *See* S. Rep. (Governmental Affairs Committee) No. 96-540 (Dec. 20, 1979), reprinted in 1980 U.S. Code Cong. and Admin. News 50-53.

2 *Id.*

3 *Id.* at 52.

4 A number of GAOPA provisions apply other rights, protections, and prohibitions of civil service laws. For example, the GAOPA requires that the GAO personnel management system must: include "merit system principles," provide for performance appraisals and adverse actions, veterans' preferences, and pay consistent with civil service pay systems, prohibit discrimination on the basis of marital status, political affiliation, refusal to engage in political

(continued...)

GAOPA both requires GAO management to protect employees against discrimination and preserves GAO employees' rights under applicable anti-discrimination laws. In other areas, the GAOPA requires GAO management to afford specified rights and protections based on provisions of civil service law such as merit system principles, veterans' preference, and prohibited personnel practices. The term "prohibited personnel practices" in civil service law encompasses a range of practices including unlawful discrimination, nepotism, violation of any law or rule relating to merit system principles, and retaliation against an employee for exercise of appeal rights granted by any law. Reprisal for disclosure of information ("whistleblowing") that the employee believes evidences a violation of any law also is prohibited. These prohibited personnel practices thus afford protections against retaliation that supplement whatever retaliation protection is applicable under particular anti-discrimination or other employment laws.[1]

Regulations and Orders

The basic substantive elements of the personnel management system required by the GAOPA were established by regulations promulgated by the Comptroller General in the Federal Register and codified in the Code of Federal Regulations.[2] These regulations restate the prohibition of unlawful employment discrimination, and the right of employees to form, join, or assist unions, or to refrain from doing so, in the same terms as are used in the GAOPA.[3] The prohibited personnel practices forbidden by GAO regulations now differ in some respects from civil service law, because GAO regulations were issued in 1980, and have not been amended to conform to amendments made to civil service law in 1989.[4] GAO has also issued Orders containing more detailed standards and procedures for certain elements of the personnel management system, including employment discrimination, labor-management relations, adverse actions, and a general administrative grievance procedure.[5]

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4 (...continued)
activity, or any conduct that does not adversely affect performance, forbid nepotism, and prohibit political practices prohibited under the Hatch Act. 31 U.S.C. 732.

1 4 C.F.R. 2.5(a).

2 4 C.F.R. parts 2 et seq.

3 4 C.F.R. 7.1(a), 7.2(a).

4 4 C.F.R. 2.4-2.5.

5 GAO Orders 2713.1 and 2713.2 (employment discrimination); Order 2711.1 (labor management relations); Order 2752.1(adverse actions); Order 2771.1, as amended by GAO Notice 2771.1 (A-92) (April 2, 1992) (administrative grievance procedure).

Procedures

Under the GAOPA, several procedural avenues are available to GAO employees to resolve employment-related disputes. The GAOPA retains many features of the federal employee dispute resolution system, itself complicated, and transfers authorities administered and enforced by the executive branch to GAO management and to the Personnel Appeals Board (PAB). The PAB has adjudicative and appellate authority, including authority over the appeal of discrimination cases, and appeals from agency decisions involving certain adverse actions and prohibited personnel practices, including retaliation.

Administrative Grievance Procedure

The GAOPA requires the GAO personnel management system to include comprehensive procedures for processing complaints and grievances.[1] Thus, the GAO established, by order, a general Administrative Grievance Procedure, which is broadly available to resolve any employee grievance in "a matter of concern or dissatisfaction relating to the employment of the employee(s) that is subject to the control of GAO management," but *not* including any discrimination complaint, which is handled by specialized procedures at GAO, and not including any matter appealable to the PAB.[2] The GAO order offers several examples of matters that might be resolved through the Administrative Grievance Procedure: official reprimands, suspensions from duty without pay for 14 days or less, inconsistent application of office policy, or nonselection for training.

Most complaints brought under the Administrative Grievance Procedure are presented first to the lowest level supervisor or manager who has authority to grant the requested relief, *i.e.*, ordinarily the immediate supervisor. Appeal is made to a higher-level manager, with further appeal to the Special Assistant to the Comptroller General, who has the discretion to use the fact finding services of an examiner. The examiner, who may be a GAO or contract employee, determines whether a hearing is necessary.

Personnel Appeals Board (PAB)

The GAOPA established the PAB as an independent office within GAO to adjudicate employee claims and appeals and perform oversight functions that, for the executive branch agencies, are performed by independent boards and agencies. The PAB is composed of five members appointed by the Comptroller General for a five-year term from a list of candidates submitted by an organization of individuals experienced in adjudicating or arbitrating personnel matters.[3] Current or former GAO officers or employees are ineligible. A member may not be reappointed,

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1 31 U.S.C. 732(d)(5).

2 GAO Order 2771.1, as amended by GAO Notice 2771.1 (A-92) (April 2, 1992).

3 31 U.S.C. 751-755.

and may be removed only by a majority of the other PAB members, and only for inefficiency, neglect of duty, or malfeasance. The Board selects one of its own members as Chairman. The Chairman selects an individual, who is then appointed by the Comptroller General to be General Counsel of the PAB, and who serves at the pleasure of the Chairman.

The PAB has independent authority, including authority over appeals of EEO cases, appeals from agency decisions involving adverse actions, and adjudicative and appellate authority over prohibited personnel practices, including retaliation. The PAB also handles representation matters and certain claims and appeals involving labor-management relations.

Judicial

PAB decisions are subject to judicial review by appeal to the U.S. Court of Appeals for the Federal Circuit.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

Substantive Rights

GAO and its employees are covered by section 15 of the ADEA, the provision of the ADEA generally applicable to federal sector employees.[1] Furthermore, the CAA amended the ADEA to specifically include GAO within the coverage of section 15.[2] Under section 15, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in covered agencies and offices "shall be made free from any discrimination based on age," and section 12(b) of the ADEA reiterates that the prohibitions established in section 16 "shall be limited to individuals who are at least 40 years of age."[3] The GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, including ADEA, reiterates those rights, and requires that they be protected by the GAO personnel management system.[4]

The law is unsettled as to whether the retaliation prohibition contained in section 4(d) of the ADEA[5] is made applicable to federal agencies by section 15 of the ADEA. Two recent decisions by federal district courts for the District of Columbia, where most GAO employees are located, have held that it does not.[6] It also is unclear whether the ADEA protections with respect to waivers -- under which any waiver of a right or claim requested by an employer must be "knowing and voluntary" and must be in exchange for valuable consideration -- applies to federal agencies, including GAO, under section 15 of the ADEA.[7]

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1 29 U.S.C. 633a.

2 Section 201(c)(2) of the CAA.

3 29 U.S.C. 631(b).

4 31 U.S.C. 732(f)(1)(A), (2).

5 29 U.S.C. 623(d).

6 Tomasello v. Rubin, 920 F. Supp. 4 (D.D.C. 1996); Koslow v. Hundt, 919 F. Supp. 18 (D.D.C. 1995).

7 The waiver provisions, in section 7(f) of the ADEA purport to apply to "any right or claim under this Act." 29 U.S.C. 626(f) ("any right or claim under this chapter [14 of title 29, which encompasses 29 U.S.C. 621-634]"). However, section 15(f) of the ADEA states that provisions outside of section 15 do not affect claims under section 15. 29 U.S.C. 633a(f).

THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND THE REHABILITATION ACT OF 1973

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Basic provisions with respect to employment discrimination are set forth in title I of the ADA,[2] although additional provisions are found elsewhere in the ADA. In general terms, the law prohibits employment discrimination against "a qualified individual with a disability" because of the disability.[3]

GAO takes the position that section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicapping condition for employees in the executive branch, does not apply to GAO, an agency in the legislative branch.[4] However, with respect to the prohibitions against discrimination, the ADA and the Rehabilitation Act each contains cross-references to the other, so that their standards are in most respects substantially the same.[5]

Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, reiterates those rights, and requires that they be protected by the GAO personnel management system.[6]

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1 42 U.S.C. 12209(1)-(2).

2 42 U.S.C. 12111-12117.

3 42 U.S.C. 12112 (a).

4 29 U.S.C. 791. The PAB has reserved judgment on this issue, because the GAOPA, as enacted, contains references specifically to the Rehabilitation Act. *See* statement of PAB, 58 Fed. Reg. 61988, 61990 (Nov. 23, 1993). These and other references to specific anti-discrimination laws are omitted from the GAOPA language that Congress codified in Title 31, U.S. Code. *See* 31 U.S.C. 732 (historical and revision notes).

5 29 U.S.C. 791(g); 42 U.S.C. 12201(a).

6 The GAOPA requires that personnel actions be taken without regard to "handicapping condition." The term "handicapping condition" is the term that was used in section 501 of the Rehabilitation Act before it was amended to conform to the ADA, which uses the term "individual with a disability."

Regulations

GAO's current regulations establishing the GAO personnel system restate the language in the GAOPA prohibiting discrimination, and also define prohibited personnel practices, based on civil service law, to include discrimination: "[o]n the basis of handicapping condition, as prohibited under section 501 of [the Rehabilitation Act]."[1] On August 28, 1996, GAO published a proposal to amend these regulations by striking references to the Rehabilitation Act and replacing them with references to the ADA.[2] In addition, GAO and the PAB have each issued regulations governing how they will handle ADA complaints, which are described below.

Procedures

Administrative

Section 509 of the ADA states that nothing in that section shall alter "the enforcement procedures for individuals with disabilities" provided in the GAOPA. Under the GAOPA, GAO provides the same administrative processes for ADA complaints as it provides for Title VII complaints (described above in the section on Title VII).

However, the CAA added a new paragraph (5) to section 509 of the ADA, providing that the "remedies and procedures" of section 717 of Title VII shall be available to employees of the congressional instrumentalities covered by section 509 who allege a violation of sections 102 through 104 of the ADA, including a GAO employee, except that the authorities of the EEOC are to be exercised by the head of the instrumentality.[3] Under section 717, the EEOC hears appeals from employing agencies' disposition of discrimination complaints, and has oversight responsibility of employing agencies' EEO programs. GAO management, in its comments, has stated that this provision appears inconsistent with the GAOPA, which provides that the PAB, not the Comptroller General, exercises the EEOC's authority over appeals and oversight matters.

Judicial

Civil Action

As noted above, paragraph (5) of ADA section 509, which was added by the CAA, states that the "remedies and procedures" of section 717 of Title VII shall be available to a GAO employee who alleges a violation of sections 102 through 104 of the ADA. Considered

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[1] 4 C.F.R. 2.5(a)(4). Apparently quoting from the GAOPA as enacted, this GAO regulation also states: "Nothing in this order shall be construed to abolish or diminish any right or remedy granted to employees of or applicants for employment in GAO— . . . (4) by sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) . . . ."

[2] 61 Fed. Reg. 44187 (Aug. 28, 1996).

[3] 41 U.S.C. 12209(5), as added by section 201(c)(3)(E) of the CAA.

without reference to the GAOPA, section 509(5) could be interpreted to entitle GAO employees to file a civil action at corresponding points in the administrative process at GAO. However, as discussed above in the context of Title VII, the court in *Ramey v. Bowsher*[1] held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision, and the court stated that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case."[2]

Section 509(5) of the ADA makes the remedies and procedures of section 717 of Title VII available for violations of sections 101-104 of the ADA, which establish the basic prohibition of employment discrimination and defenses. The study has identified two areas of inconsistency in coverage. Section 509(5) does not refer to ADA section 503, which prohibits retaliation against employees for exercising ADA rights. The omission of section 503 from the provisions referenced in section 509(5) may prevent a district court from granting a remedy for GAO employees who suffer retaliation for exercising ADA rights.

Second, section 509(5) of the ADA applies to "any employee" of GAO, but does not refer to applicants for employment. The definition of "employee" in the ADA does not include applicants,[3] who are referenced specifically, along with employees, in relevant ADA provisions.[4] It could therefore be argued that applicants for employment at GAO cannot invoke the remedies provided by section 509(5), including the right to file a civil action.

Appellate Review of Agency Administrative Processes

In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[5]

Relief

Section 509(5) applies the remedies and procedures "set forth in" section 717 of Title VII (see discussion above).

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136.

3 *See* 42 U.S.C. section 12111(4).

4 *See* 42 U.S.C. section 12112(b).

5 31 U.S.C. 732(f)(1), 753(a)(7), 755.

Regulations

GAO is not covered under EEOC's regulations on federal sector equal employment opportunity. GAO's regulations establishing the GAO personnel management system restate the language in the GAOPA prohibiting discrimination,[1] and also define prohibited personnel practices, based on civil service law, to include discrimination "[o]n the basis of age, as prohibited under sections 12 and 15 of [the ADEA]," committed by a GAO employee with personnel authority.[2]

Procedures

Administrative

The administrative processes at GAO for ADEA violations are generally the same as those for Title VII violations, as described above in the section on Title VII.

Judicial

A GAO employee is entitled under the ADEA section 15(c) to file a civil action in any federal district court of competent jurisdiction. However, employees at federal agencies covered by section 15 of the ADEA are not entitled to a jury trial in an ADEA action.[3] And, as discussed above in the Title VII section, the *Ramey* decision has created some legal uncertainty as to whether GAO employees' have access to federal district courts in discrimination cases.

Appellate Review of Agency Administrative Processes. In a case alleging discrimination made unlawful under the GAOPA including age discrimination cases, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[4]

Relief

In case of a violation of the ADEA, the relief available to a GAO employee is: such legal or equitable relief as will effectuate the purposes of the ADEA.[5]

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1 4 C.F.R. 7.2(a).

2 4 C.F.R. 2.5(a)(2). This corresponds to the prohibited personnel practices defined in civil service law at 5 U.S.C. 2302(b)(1)(B).

3 *See Lehman v. Nakshian*, 453 U.S. 156 (1981).

4 31 U.S.C. 732(f)(1), 753(a)(7), 755.

5 *See* 29 U.S.C. 633a(c).

THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND THE REHABILITATION ACT OF 1973

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Basic provisions with respect to employment discrimination are set forth in title I of the ADA,[2] although additional provisions are found elsewhere in the ADA. In general terms, the law prohibits employment discrimination against "a qualified individual with a disability" because of the disability.[3]

GAO takes the position that section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicapping condition for employees in the executive branch, does not apply to GAO, an agency in the legislative branch.[4] However, with respect to the prohibitions against discrimination, the ADA and the Rehabilitation Act each contains cross-references to the other, so that their standards are in most respects substantially the same.[5]

Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, reiterates those rights, and requires that they be protected by the GAO personnel management system.[6]

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1 42 U.S.C. 12209(1)-(2).

2 42 U.S.C. 12111-12117.

3 42 U.S.C. 12112 (a).

4 29 U.S.C. 791. The PAB has reserved judgment on this issue, because the GAOPA, as enacted, contains references specifically to the Rehabilitation Act. *See* statement of PAB, 58 Fed. Reg. 61988, 61990 (Nov. 23, 1993). These and other references to specific anti-discrimination laws are omitted from the GAOPA language that Congress codified in Title 31, U.S. Code. *See* 31 U.S.C. 732 (historical and revision notes).

5 29 U.S.C. 791(g); 42 U.S.C. 12201(a).

6 The GAOPA requires that personnel actions be taken without regard to "handicapping condition." The term "handicapping condition" is the term that was used in section 501 of the Rehabilitation Act before it was amended to conform to the ADA, which uses the term "individual with a disability."

Regulations

GAO's current regulations establishing the GAO personnel system restate the language in the GAOPA prohibiting discrimination, and also define prohibited personnel practices, based on civil service law, to include discrimination: "[o]n the basis of handicapping condition, as prohibited under section 501 of [the Rehabilitation Act]."[1] On August 28, 1996, GAO published a proposal to amend these regulations by striking references to the Rehabilitation Act and replacing them with references to the ADA.[2] In addition, GAO and the PAB have each issued regulations governing how they will handle ADA complaints, which are described below.

Procedures

Administrative

Section 509 of the ADA states that nothing in that section shall alter "the enforcement procedures for individuals with disabilities" provided in the GAOPA. Under the GAOPA, GAO provides the same administrative processes for ADA complaints as it provides for Title VII complaints (described above in the section on Title VII).

However, the CAA added a new paragraph (5) to section 509 of the ADA, providing that the "remedies and procedures" of section 717 of Title VII shall be available to employees of the congressional instrumentalities covered by section 509 who allege a violation of sections 102 through 104 of the ADA, including a GAO employee, except that the authorities of the EEOC are to be exercised by the head of the instrumentality.[3] Under section 717, the EEOC hears appeals from employing agencies' disposition of discrimination complaints, and has oversight responsibility of employing agencies' EEO programs. GAO management, in its comments, has stated that this provision appears inconsistent with the GAOPA, which provides that the PAB, not the Comptroller General, exercises the EEOC's authority over appeals and oversight matters.

Judicial

Civil Action

As noted above, paragraph (5) of ADA section 509, which was added by the CAA, states that the "remedies and procedures" of section 717 of Title VII shall be available to a GAO employee who alleges a violation of sections 102 through 104 of the ADA. Considered

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[1] 4 C.F.R. 2.5(a)(4). Apparently quoting from the GAOPA as enacted, this GAO regulation also states: "Nothing in this order shall be construed to abolish or diminish any right or remedy granted to employees of or applicants for employment in GAO— . . . (4) by sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) . . . ."

[2] 61 Fed. Reg. 44187 (Aug. 28, 1996).

[3] 41 U.S.C. 12209(5), as added by section 201(c)(3)(E) of the CAA.

without reference to the GAOPA, section 509(5) could be interpreted to entitle GAO employees to file a civil action at corresponding points in the administrative process at GAO. However, as discussed above in the context of Title VII, the court in *Ramey v. Bowsher*[1] held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision, and the court stated that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case."[2]

Section 509(5) of the ADA makes the remedies and procedures of section 717 of Title VII available for violations of sections 101-104 of the ADA, which establish the basic prohibition of employment discrimination and defenses. The study has identified two areas of inconsistency in coverage. Section 509(5) does not refer to ADA section 503, which prohibits retaliation against employees for exercising ADA rights. The omission of section 503 from the provisions referenced in section 509(5) may prevent a district court from granting a remedy for GAO employees who suffer retaliation for exercising ADA rights.

Second, section 509(5) of the ADA applies to "any employee" of GAO, but does not refer to applicants for employment. The definition of "employee" in the ADA does not include applicants,[3] who are referenced specifically, along with employees, in relevant ADA provisions.[4] It could therefore be argued that applicants for employment at GAO cannot invoke the remedies provided by section 509(5), including the right to file a civil action.

Appellate Review of Agency Administrative Processes

In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[5]

Relief

Section 509(5) applies the remedies and procedures "set forth in" section 717 of Title VII (see discussion above).

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136.

3 *See* 42 U.S.C. section 12111(4).

4 *See* 42 U.S.C. section 12112(b).

5 31 U.S.C. 732(f)(1), 753(a)(7), 755.

THE EQUAL PAY ACT OF 1963
(EPA)

Substantive Rights

GAO and its employees are covered by the provisions of the EPA, which were enacted as section 6(d) of the Fair Labor Standards Act of 1938 (FLSA).[1] The coverage of the FLSA includes any individual employed by the U.S. Government "in any executive agency (as defined in section 105 of such title [5 of the U.S. Code]," and GAO comes within this statutory definition of an "executive agency."[2]

These same provisions are generally applicable to both federal sector and private sector employees. The EPA prohibits any employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex" when they perform substantially equal work under similar working conditions in the same establishment. The FLSA also contains a general prohibition against retaliation, which prohibits discrimination for instituting or testifying in a proceeding under or related to the FLSA (including EPA).[3] Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, including the EPA, and also reiterates those rights and requires that they be protected by the GAO personnel management system.[4]

Regulations

GAO's regulations establishing the GAO personnel system restate the language of the GAOPA prohibiting discrimination,[5] and also define prohibited personnel practices, based on civil service law, to include discrimination "[o]n the basis of sex, as prohibited under section 6(d) of [the FLSA]."[6]

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1 29 U.S.C. 206(d).

2 The definition of an "executive agency" in 5 U.S.C. 105 includes: an executive department, a government corporation, and an independent establishment, and 5 U.S.C. 104(2) includes GAO within the definition of "independent establishment."

3 29 U.S.C. 215(a)(3).

4 31 U.S.C. 732(f)(1)(A), (2).

5 4 C.F.R. 7.2(a).

6 4 C.F.R. 2.5(a)(3).

Procedures

Administrative

The administrative processes at GAO for EPA violations are the same as those for Title VII violations, as described above in the section on Title VII.

Judicial

Civil Action. GAO employees are entitled under the EPA to file a civil action in federal district court.[1] The FLSA (of which the EPA is a part) authorizes a civil action in any court of competent jurisdiction. Jury trials are ordinarily not available against the federal government without express statutory authority, and, therefore, are probably not available in EPA cases against GAO or other federal agencies.[2]

Appellate Review of Agency Administrative Processes In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[3]

Relief

In case of a violation of the EPA, a GAO employee may recover: any amounts withheld from an employee in violation of EPA requirements; and also an additional equal amount as liquidated damages, except that liquidated damages may be excused if the employer shows that its act or omission was in good faith.[4]

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[1] Section 16(b) of the FLSA authorizes the filing of a civil action. 29 U.S.C. 216(b).

[2] *See Walker v. Thomas*, 678 F. Supp. 164 (E.D. Mich. 1987) (denying a jury trial in an EPA case against a federal employer).

[3] 31 U.S.C. 732(f)(1), 753(a)(7), 755.

[4] *See* 29 U.S.C. 206(d)(3), 216(b), 260.

ALL ANTI-DISCRIMINATION LAWS

EVALUATION

Substantive Rights

The basic prohibitions against discrimination under the anti-discrimination laws (Title VII, ADEA, ADA and EPA) at GAO are generally the same as those afforded other federal sector employees, those in the private sector, and other legislative branch employees covered under the CAA.

The issue of retaliation, however, is somewhat more complicated. In this area, GAO employees like other federal sector employees enjoy broad protections for asserting retaliation claims arising under laws prohibiting discrimination. They can seek administrative remedies under GAOPA. They are also covered specifically under Title VII and EPA and can, therefore, gain access to federal district court in claims of retaliation under Title VII and EPA. But the law is uncertain with respect to ADEA and ADA violations. By comparison, covered legislative branch employees are protected by section 207 of the CAA, which prohibits retaliation for exercise of rights with respect to any law made applicable by the CAA, including the anti-discrimination laws, and private sector employees are protected under specific statutory retaliation provisions in anti-discrimination laws.

Procedures

Administrative

The procedural avenues open to GAO employees are analogous to those in the executive branch, in that the employing agency administers the initial dispute resolution procedures and renders a decision, after which appeal is available to a separate administrative tribunal -- yielding a process that is thorough, but can be duplicative and lengthy. The GAO personnel system also includes enforcement mechanisms for monitoring compliance and detecting violations. The General Counsel of the PAB has authority to take enforcement actions in discrimination cases, including investigation of allegations (with or without a charge having been filed), and seek corrective action or stays and disciplinary action. Although similar investigatory and prosecutorial authorities are available in the executive branch at the EEOC and the Office of Special Counsel and in the private sector at the EEOC, there is no comparable authority under the CAA.

Independence is an important aspect of a comprehensive and effective administrative process in resolving employee complaints. Both the GAOPA and the CAA establish independent avenues for adjudication structured on a model analogous to independent regulatory commissions like the EEOC and the MSPB — boards composed of members with staggered terms, no reappointment, and subject to limited powers of removal. The PAB General Counsel — who is selected by the

Chair and serves at the pleasure of the Chair, albeit formally appointed by the Comptroller General — has statutory responsibility for certain investigatory and prosecutorial functions, and has been assigned by the PAB the additional responsibility of representing claimants in PAB proceedings. Under the CAA, the General Counsel of the Office of Compliance is a statutory appointee selected by the Chair with the approval of the Board, but has no investigatory or prosecutorial authority in EEO cases. The CAA instead establishes a dispute resolution process that provides confidential counseling and mediation and an independent administrative hearing.

The degree of independence of the PAB from GAO management, and the degree of independence and accountability of the PAB General Counsel, were addressed in several comments. One employee organization described widespread dissatisfaction among GAO employees with the performance of the GAO and the PAB in personnel matters, arising largely from a perceived lack of independence of the PAB and its General Counsel. However, another employee organization commented that the PAB does seem to act independently and without bias.

Some commenters expressed concern that the PAB is administratively part of GAO and its Board members and General Counsel are appointed by the head of GAO — the agency that is the subject of PAB's jurisdiction. In contrast, under the CAA, the Board of Directors of the Office of Compliance is established outside of either the House or the Senate or any congressional instrumentality. In enacting the CAA, the Congress was mindful that placing the Board outside of either House of Congress, with jurisdiction spanning both Houses, was essential for the laws to "be enforced in a fair and uniform manner — and employees and the public [to] be convinced that the laws are being enforced in a fair and uniform manner."[1]

An employee organization also commented that the GAO Civil Rights Office and the process for addressing discrimination complaints are compromised and lack credibility. Further, this commenter stated that although mediation services are available, they are provided by agency staff who are responsible for implementing the agency's civil rights and other programs, and are controlled by agency management. According to this commenter, employees are reluctant to use these resources because they are not independent and may not be neutral. Under the CAA, counseling and mediation services are provided to all covered employees who allege discrimination. The mediators are trained neutrals who are not employees of the Office of Compliance and the confidentiality of the process is guaranteed by statute, and is provided for in Office of Compliance procedural regulations. Mediation has only recently been provided on a pilot basis for private sector discrimination claims. Alternative dispute resolution in the form of

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[1] 141 Cong. Rec. S444 col. 1 (daily ed. Jan. 5, 1995). *See also* Report of the Senate Committee on Governmental Affairs to accompany H.R. 4822, S. Rep. No. 103-397, 103d Cong., 2d Sess. 7 (Oct. 3, 1994); testimony of Norman Ornstein (Resident Scholar, American Enterprise Institute) before the Senate Committee on Governmental Affairs, S. Hrg. 103-1047, at 28-29 (June 29, 1994).

mediation is provided in the executive branch EEO process in some agencies.[1]

Section 201(c)(3)(E) of the CAA, while granting employees of GAO (and the other two instrumentalities) administrative and judicial procedures for ADA violations, provides that the authorities of the EEOC will be exercised by the head of the employing instrumentality. GAO has suggested that the law be clarified to assure that this provision does not affect the PAB's authority to decide claims alleging discrimination on the basis of disability.

Judicial

Employees at GAO may file a civil action under anti-discrimination laws at various points after filing an administrative complaint, or as an alternative to filing an administrative complaint in the case of an ADEA or EPA claim. But as discussed above, the *Ramey* decision left some legal uncertainty as to when, and whether, any of the anti-discrimination laws provides any right to GAO employees to file a civil action in federal district court.

Under the CAA, covered legislative branch employees may elect to file a civil action in federal district court after counseling and mediation. Employees in the private sector may obtain a "right to sue notice" from the EEOC.

Under the 1991 amendments to the Civil Rights Act, jury trials are generally available in Title VII and ADA cases. Like other federal sector employees, GAO employees have a right to a jury trial under Title VII and the ADA, but probably not under ADEA and EPA. Jury trials are generally available in EEO cases for private sector employees, as well as for covered legislative branch employees under the CAA.

Judicial Review. Final PAB decisions are subject to appellate judicial review by the U.S. Court of Appeals for the Federal Circuit. Similar appellate review by the Federal Circuit is available for final decisions of the Office of Compliance Board under the CAA.

In the executive branch, by contrast, EEOC decisions may not be appealed to the court of appeals, but the employee retains the right to file a civil action in federal district court even after seeking or receiving EEOC review of the employing agency's decision. Executive branch employees may file a civil action and seek a jury trial *de novo* either after receiving a final decision from the EEOC, or after the appeal to the EEOC has been pending for 180 days without a final decision having been made. One GAO employee organization commented that, as a result of *Ramey*, GAO employees do not have a right that is enjoyed by employees of the executive branch. As the organization explained, if a GAO employee elects to appeal to the PAB, but is not satisfied with the result, the employee has forfeited a right to a jury trial.

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[1] Under the CAA, Capitol Police and Architect of the Capitol employees have the option, if the Executive Director so recommends, of using the grievance procedures administered by each of these employing offices. Section 401 of the CAA, 2 U.S.C. 1401.

Relief

The relief available to GAO employees for EEO violations is generally the same as that available to other legislative branch employees covered under the CAA, as well as for executive branch and private sector employees. However, two kinds of damages are available to private sector employees and covered employees under the CAA, but are not available to GAO or executive branch employees: compensatory damages for discrimination involving race, ancestry, and ethnicity, under 42 U.S.C. 1981; and liquidated damages in the case of a willful violation of the ADEA, in an amount equal to the amount owing as a result of the violation.

In addition, certain punitive damages and penalties are available against private sector employers in Title VII and ADA cases that are not available against federal government employers, including both employing offices under the CAA, and GAO.

Process for Issuing Substantive Regulations

The process for issuing substantive regulations is relatively less important in the EEO area; neither the EEOC nor the Office of Compliance have substantive ruelmaking authority under Title VII; and the Comptroller General's regulations do little more than restate the statutory rights against discrimination.

Timeliness in Resolving EEO Complaints

The PAB regularly reports on timeliness in the GAO internal case handling process. In its 1995 report, [1] the PAB found that, in the 17 discrimination cases in which final agency decisions were issued in FY 1993-1995, it took an average of 581 days from the filing of a formal complaint to the issuance of a final decision. The PAB report concluded this was well below the average for other federal agencies.

The PAB also submitted data indicating that its case processing times compare favorably with those of the EEOC and of the MSPB. For example, the PAB reported that its average case processing time over an approximately 2-1/2 year period through May 1996 was 277 days, compared with an average complaint resolution time at the EEOC of 356 days for FY94.

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[1] GAO Personnel Appeals Board, "GAO's Discrimination Complaint Process and Mediation Program," Chap. 2 (Formal Complaint Process) (September 29, 1995). The PAB determined that, according to the most current EEOC statistics available for 74 executive branch agencies, GAO would fall in the bottom one-third for average case-processing time.

FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

Substantive Rights

While the private sector, state and local governments, and certain federal agencies and employees are covered by FMLA provisions codified in title 29 of the United States Code (FMLA private-sector provisions), most federal agencies and employees, including those at GAO, are covered by the provisions that were added by the FMLA to the civil service law, codified in title 5 of the U.S. Code (FMLA civil service provisions).[1]

The FMLA entitles eligible employees to take up to 12 weeks of unpaid leave in a 12-month period for certain family and medical reasons. The employee may elect to substitute accrued sick leave or annual leave for the unpaid FMLA leave. The employing agency must maintain group health coverage for the employee on leave, and, in most cases, must restore the employee to the same or an equivalent position upon returning from the leave. The FMLA also forbids intimidation, coercion or threats to interfere with an employee's exercise of FMLA rights.

Regulations

OPM has issued regulations implementing the FMLA civil service provisions, applicable to all employees covered by those provisions and their employing agencies, including GAO and its employees.[2]

When the FMLA went into effect in 1993, GAO issued a Personnel Management Memorandum advising all division and office heads of the legislation and of OPM's interim regulations, and directing that employees be notified of their rights and that records be maintained.[3] GAO issued additional Personnel Management Memoranda, GAO Orders, and other documents establishing and describing GAO's general leave policies and procedures and other programs designed to carry out the intent of the FMLA.

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[1] 5 U.S.C. 6381-6387, added by Pub. L. No. 103-3, title II, 107 Stat. 19 (Feb. 5, 1993). Most employees of agencies headed by Presidential appointees are included within the coverage of the FMLA civil service provisions, and the Comptroller General is such a Presidential appointee. *See* 5 U.S.C. 2105(a)(1)(A), (D), 6301(2)(A), 6381(1)(A).

[2] 5 C.F.R. 630.1201-630.1211.

[3] GAO Personnel Management Memorandum No. 2630-5, "The Family and Medical Leave Act of 1993 (FMLA) Posting and Reporting Requirements" (August 3, 1993).

Procedures

Administrative

The FMLA civil service provisions do not provide any administrative or judicial processes by which employees may seek redress for violations. Therefore, employees who believe their rights have been violated must rely on the various remedial provisions available generally for employment-related disputes in the federal government. For example:

- If a GAO employee believes the agency has violated rights and protections under the FMLA, the employee may file a claim under GAO's general administrative grievance procedure.

- If an employee suffers a removal, reduction in pay or grade, or other appealable adverse action, under the GAOPA the employee has a right to appeal to the PAB.[1] Under civil service appeals authority on which the PAB's authority is modeled, the MSPB has ruled that it has jurisdiction over the FMLA as a defense to an otherwise appealable action, and: "If an adverse action is predicated on the agency's erroneous interference with an employee's rights under the FMLA, such adverse action is in violation of law, and it may not be sustained."[2]

- A GAO employee who believes the agency has violated the FMLA could ask the PAB to hear a FMLA complaint alleging that a prohibited personnel practice has occurred.

- A GAO employee who has a claim arising from an FMLA violation could seek redress by applying to OPM under its statutory responsibility to receive and settle federal employees' claims against the government.[3]

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[1] 31 U.S.C. 753(a)(1).

[2] *Ramey v. U.S.P.S.*, 70 M.S.P.R. 463, 467 (May 9, 1996) (citing 5 U.S.C. 7701(c)(2)(C)).

[3] The authority to settle claims against the government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L. No.104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

Judicial

A GAO employee who appeals to the PAB may obtain review of the PAB's decision by the court of appeals. In appropriate cases, a GAO employee may also bring suit in the Court of Federal Claims for money owed by the government as a result of an FMLA violation, and may seek restoration to position and correction of records, if warranted, as an incident to a monetary judgment. If the claim does not exceed $10,000, the employee may sue in federal district court.[1]

Relief

Since the FMLA civil service provisions do not specify what relief would be available in case of a violation, an aggrieved employee must rely on other laws or on general legal principles to obtain relief. For example, if an employee is demoted or fired or denied restoration, the employee may claim compensation due under the Back Pay Act.[2] The employee may also seek to recover the amount of benefits guaranteed by the FMLA that are unlawfully denied and are therefore due and owing from the government.

Future-Effective Changes Under the CAA

The CAA amends the FMLA to remove GAO from coverage under the civil service FMLA provisions, and places GAO under the private sector FMLA provisions.[3] The amendment becomes effective one year after this study is transmitted to Congress. Although the basic entitlement — up to 12 weeks of job-protected unpaid leave in a 12-week period — is the same, there are several significant differences in particular substantive provisions.

Under the private sector FMLA provisions, damages may include salary and benefits lost, or actual monetary losses such as the cost of providing care (up to 12 weeks'-worth of salary), plus an equal amount of liquidated damages unless the employer proves that the act or omission was in good faith.[4]

As amended by the CAA, the FMLA private sector provisions state that, in the case of GAO,

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[1] 28 U.S.C. 1346(a)(2), 1491(a).

[2] 5 U.S.C. 5596

[3] Section 202(c)(1)(A), (2) of the CAA, amending sections 101(4)(A) and 107 of the FMLA, 29 U.S.C. 2611(4)(A), 2617, and 5 U.S.C. 6381(1)(A).

[4] 29 U.S.C. 2617(a)(1).

the authority of the Secretary of Labor is to be exercised by the Comptroller General.[1] The Labor Secretary's FMLA authority includes the responsibility to promulgate such regulations as are necessary to carry out the provisions, as well as certain enforcement responsibilities.[2] GAO and its employees would thus be removed from coverage by the FMLA regulations promulgated by OPM, which apply generally to employees under the FMLA civil service provisions, and would apparently become subject to regulations that the Comptroller General would promulgate to implement the private sector provisions of the FMLA.

The private sector FMLA provisions authorize employees to bring a civil action for FMLA violation to recover damages and obtain equitable relief.[3] However, jury trials are ordinarily not available against the federal government without express statutory authority,[4] and, since the FMLA provision has no express authority for a jury trial, in a case against GAO under the private sector FMLA provisions, jury trials might not be available.

EVALUATION

Substantive Rights

All of the relevant statutory programs provide the same basic substantive entitlement — up to 12 weeks of job-protected leave in a 12-month period for family and medical purposes. However, there are significant differences in eligibility criteria and substantive rights. Generally, employees are granted greater substantive rights under the civil service FMLA provisions than under the FMLA provisions that apply in the private sector and that are also made applicable by the CAA. Therefore, transferring GAO employees from the coverage of Title 5 to the coverage of Title 29 will reduce their substantive FMLA rights.

Eligibility Criteria. The civil service provisions, the private sector provisions, and the CAA all prescribe different criteria that an employee must meet to be eligible for FMLA leave:

- Under the ***GAO/civil service provisions***, employees become eligible by working at least 12 months at GAO or any other federal civil service agency, except that

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[1] Section 107(f) of the FMLA, 29 U.S.C. 2617(f), as added by section 202(c)(1)(B) of the CAA.

[2] 29 U.S.C section 2654 (Secretary to promulgate regulations); 29 U.S.C. section 2617(b) (Action by the Secretary).

[3] 29 U.S.C. 2617(a)(2).

[4] *See generally Lehman v. Nakshian*, 453 U.S. 156 (1981).

"temporary and intermittent" employees are excluded from coverage.[1]

- Under the ***private sector provisions,*** which the CAA would apply to ***GAO in the future***, employees become eligible by having worked for at least 12 months for an employer, and at least 1,250 hours during the previous 12 months for that employer.[2]

- Under ***the CAA***, employees becomes eligible by working at least 12 months at any employing office covered under the CAA, and for at least 1,250 hours during the previous 12 months for any such employing office.[3]

The "temporary and intermittent" criterion is already widely used in the civil service personnel system for determining eligibility for benefits programs, including annual and sick leave, health benefits, and life insurance benefits.[4]

Of the three eligibility criteria, only the private sector provisions afford no portability. The civil service provisions allow an eligible employee to transfer among federal agencies without losing eligibility, and the CAA allows an eligible employee to transfer among employing offices without losing eligibility. After the private sector provisions go into effect at GAO, an eligible employee who transfers to GAO from any other federal agency or employing office would lose eligibility until after having worked 12 months and 1,250 hours in the previous 12 months for GAO.

Specific FMLA Rights. The specific FMLA rights afforded to eligible employees under the civil service provisions differ in several respects from those accorded under the private sector provisions and the CAA. In each of these instances, the civil service provisions — which apply now to GAO — provide greater FMLA substantive rights than the private sector and CAA provisions. When the FMLA amendments made by the CAA go into effect, and the private sector provisions become applicable to GAO, the substantive rights of GAO employees under FMLA will be diminished:

- ***Employee choice of which kind of leave to take.*** Under the FMLA *private sector and CAA provisions*, the employer may require the employee to take accrued paid leave rather than unpaid FMLA leave, and, if the employee chooses to take paid leave for FMLA purposes, the employer may charge the

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[1] *See* 5 U.S.C. 6381(1)(A).

[2] *See* section 202(a)(2)(B) of the CAA (2 U.S.C. 1312(a)(2)(B)).

[3] *See* section 202(a)(2)(B) of the CAA (2 U.S.C. 1312(a)(2)(B)).

leave against the employee's FMLA entitlement.[1] Under *civil service provisions*, it is entirely the employee's option whether to take accrued paid leave or unpaid FMLA leave, and whether paid leave should be charged against the FMLA entitlement.[2]

- ***Employer recoupment of health insurance contribution.*** Under the FMLA *private sector and CAA provisions*, if the employee fails to return to work for reasons not beyond the employee's control, the amount paid by the employer for health coverage during unpaid FMLA leave may be recovered from the employee.[3] The *civil service provisions* contain no such provision.[4]

- ***Restoration of "key" employees.*** Under the *private sector and CAA provisions*, an employer may deny restoration to certain highly-paid "key" employees, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office.[5] The *civil service provisions* contain no such provision.[6]

- ***Spouses working for the same employing office.*** Under the *private sector and CAA provisions*, if a husband and wife work for the same employer, their FMLA leave upon birth or placement for adoption or foster care of a child, or to care for a sick parent, may be limited to 12 workweeks in a 12 month period in the aggregate. The *civil service provisions* contain no such provision.

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1 *See* 29 U.S.C. 2612(d)(2), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1); 29 C.F.R. 825.208; section 825.208 of the Office of Compliance Board's Family and Medical Leave regulations.

2 *See* 5 U.S.C. 6382(d); 5 C.F.R. 630.1203(h), 630.1205(d).

3 *See* 29 U.S.C. 2614(c)(2), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1).

4 *See* 5 U.S.C. 6386; 5 C.F.R. 630.1209.

5 *See* 29 U.S.C. 2614(b), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1).

6 *See* 5 U.S.C. 6384(a); 5 C.F.R. 630.1208(a).

Procedures

Administrative

The CAA provides a single administrative process for any FMLA claim, starting with counseling and mediation, and then offering the option of a formal administrative adjudication and appeal. By contrast, civil service law has no single administrative remedy for FMLA claims. Instead, several different administrative routes may be available for an employee seeking redress, depending on the nature of the employee's alleged harm. The PAB offers a measure of independence, but only if the case fits within a category that the PAB has statutory authority to hear, such as certain adverse actions or prohibited personnel practices. GAO's administrative grievance procedure would generally be available for FMLA claims that may not be presented to the PAB, but does not offer a process independent of GAO management. OPM's claims settlement process is available, but only if the claim is for money owed by the Government.

The future-effective CAA provisions would not substantially change this situation, however, because the private sector provisions of the FMLA do not afford administrative remedies. The Comptroller General would assume the statutory authority of the Secretary of Labor to "receive, investigate, and attempt to resolve complaints of [FMLA] violations,"[1] but GAO management already has this authority and responsibility under the administrative grievance procedures.

Judicial

The judicial remedies available under civil service law in case of an FMLA violation are less protective of employee rights than those under the private sector law and the CAA. As is the case with administrative processes, the civil service law does not establish a judicial remedy for FMLA claims, but, depending on the particular circumstances, there may be avenues by which an employee can seek judicial redress for an FMLA violation. For example, an employee who is owed money could seek to collect it by suing in the Court of Federal Claims.

In contrast, employees in the private sector, or legislative branch employees covered under the CAA, may file a civil action in federal district court to seek redress of any FMLA violation, and the right to a jury trial applies under the CAA to the same extent as in the private sector. When private sector provisions go into effect at GAO, employees there would be granted the same access to federal district court, but probably without the right to a jury trial.

Relief

Unlike the civil service FMLA provisions, which do not specify what relief will be available in case of violation, the private sector FMLA provisions specify available relief explicitly. Such relief may include:

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[1] 29 U.S.C. 2617(b)(1).

- Such *equitable relief* as may be appropriate, including employment, reinstatement, and promotion.

- *Salary*, benefits, or other compensation wrongly denied.

- *The cost of providing care*, or any other actual monetary losses sustained as a direct result of the violation, up to a sum equal to 12 weeks of wages or salary for the employee, in a case in which salary and benefits have not been denied or lost.

- *Liquidated damages*, equal to the sum of other damages to which the employee is entitled, including lost salary and benefits or the cost of providing care. (The court may reduce or dispense with the liquidated damages if the employer proves that the violation was in good faith and that the employer had reasonable grounds for believing that the FMLA was not being violated.)

Recovery of the cost of providing care, and an equal amount of liquidated damages, would be an especially important remedy in a situation where an employer has discouraged an employee from taking FMLA leave because the employer does not agree that the employee is entitled. These forms of relief, as specified in the private sector FMLA provisions, are made applicable to other legislative branch employees by the CAA, and would also became available under the future-effective CAA provisions applicable to GAO.[1]

[1] FMLA civil service provisions also make no provision for *attorneys fees*. GAO employees with FMLA-related disputes would have to rely on other available authority, such as EAJA, the Back Pay Act, or PAB regulations, to the extent that they may be applicable to the circumstances of a particular case.

FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

Substantive Rights

Like most federal agencies, GAO and its employees have been covered under the Fair Labor Standards Act of 1938 (FLSA) since enactment of the Fair Labor Standards Amendments of 1974.[1] The FLSA requires payment of the minimum wage and overtime compensation for over 40 hours of work in a workweek to nonexempt employees, and restricts child labor. Employees employed in a bona fide executive, administrative, or professional capacity are exempt from the basic wage and hour standards. Except for employees to whom these or other specific exemptions or exclusions apply, employees are entitled to: *(i)* a minimum wage, currently $4.75 an hour, and *(ii)* overtime compensation for all hours worked over 40 in a workweek at a rate not less than 1-1/2 times the employee's regular rate of pay. Overtime compensation owed to an employee may not be reduced by compensatory time off, except as specifically authorized by statute. The minimum-wage and overtime-pay entitlements at GAO are also governed by implementing regulations promulgated by the Office of Personnel Management (OPM).[2]

Regulations and Civil Service Statutes

GAO and its employees are also covered under the premium pay provisions of the civil service statutes and OPM's regulations, which entitle certain Federal employees to overtime pay for hours of work in excess of 40 in a workweek or 8 in a day.[3] Furthermore, the civil service statutes and OPM regulations on premium pay and on flexible and compressed work schedules,[4] which also apply to GAO and its employees, provide several statutory exceptions

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[1] *See* 29 U.S.C. 203(e)(2)(A)(ii), added by section 6(a) of Pub. L. No. 93-259, 88 Stat. 58 (April 8, 1974). This provisions refers to "any executive agency (as defined in section 105 of such title [5, United States Code]." 5 U.S.C. 105 defines "executive agency" to include an independent establishment, and 5 U.S.C. 104(2) includes GAO within the definition of "independent establishment."

[2] 5 C.F.R. part 551.

[3] 5 U.S.C. 5541-5550a. OPM's FLSA regulations at 5 C.F.R. part 551 specify additional requirements for overtime pay pursuant to the civil service Premium Pay provisions, so that employees who are covered by both the FLSA requirements and the Premium Pay provisions will get the benefit of both entitlements through application of these regulations. *See* 5 C.F.R. 551.401(b), 551.501(a)(4).

[4] 5 U.S.C. 6120-6133.

from the overtime-pay requirements of the FLSA[1]:

- GAO may grant compensatory time off instead of overtime pay for an equal amount of irregular or occasional overtime work to employees upon request (other than a Federal Wage System (FWS)[2] employee).

- "Alternative work schedules" programs allow employees to work over their basic work requirement and accumulate "credit hours" or compensatory time off, or to complete the biweekly work requirement in less than 10 working days, without entitlement to overtime pay.[3]

- GAO employees may elect to work overtime and be granted compensatory time off, instead of overtime pay, for time lost for the employee's religious observances.[4]

GAO Orders

GAO applies the FLSA and applicable OPM regulations through GAO-issued orders:

- GAO's Order on *Compensation for Overtime Work* states that the basic entitlement to overtime pay and compensatory time is governed by applicable statutes and OPM regulations.[5] The Order also establishes supplementary policies regarding accrual and use of compensatory time at GAO, including a "use-it-or-lose-it" rule for compensatory time, under which accrued hours of compensatory time in excess of 10 that GAO does not approve for carryover at the end of a year are lost to the employee, with no entitlement to pay.[6]

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1 OPM's regulations codify the exceptions from overtime-pay requirement that are provided under civil service law. *See* 5 C.F.R. 550.1002(d), 551.209, 551.501(a)(6)-(7), 551.531.

2 FWS employees are, in general terms, "blue collar" employees. FWS covers those employed in a trade or craft, or in a manual labor occupation, or a foreman or supervisor requiring trade, craft, or laboring experience and knowledge, whose pay is set under a prevailing wage system. *See* 5 U.S.C. 5342(a)(2)(A), 5541(2)(xi).

3 *See* 5 U.S.C. 6123, 6128.

4 *See* 5 U.S.C. 5550a.

5 GAO Order No. 2550.1 (April 15, 1994).

6 GAO has explained that this "use-it-or-lose-it" rule is only applied for employees who are exempt from the overtime-pay requirements of the FLSA, and that GAO plans to amend the Order to avoid any misunderstanding. *Cf.* OPM's FLSA regulations at 5 C.F.R.

(continued...)

- GAO's Memorandum on *FLSA Coverage* describes the process by which GAO determines which employees it will treat as exempt and which employees it will treat as non-exempt from FLSA coverage.[1] For most occupational series or other employee categories, the memorandum states that positions in certain grade-levels or band-levels are exempt and positions in other levels are non-exempt.[2]

Procedures

Administrative

OPM's FLSA compliance process and general claims settlement authority. The FLSA provides that OPM administers the Act with respect to most federal employees, including GAO employees.[3] Under this authority, OPM accepts employees' claims of violation, conducts investigations, makes determinations of whether employees are exempt or non-exempt and whether payment is owed to an employee, and issues compliance orders against the employing agency. Furthermore, OPM also has recently been assigned the statutory responsibility to receive and settle monetary claims against the government by federal employees.[4] Under this process, GAO employees may seek redress if they believe they have a claim arising from an FLSA violation.

GAO's administrative grievance procedure. If a GAO employee believes the agency has violated any of the rights and protections under the FLSA, the employee may file a claim

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[6] (...continued)
551.531(d) ("If compensatory time off is not requested or taken within the established time limits [established by the employing agency], the employee must be paid for overtime work at the overtime rate . . . .").

[1] GAO Personnel Management Memorandum No. 2511.1 (Feb. 14, 1990).

[2] GAO has advised that it is now preparing a revised memorandum on this subject. Among other things, the memorandum will emphasize that it is the actual duties and responsibilities being performed by the employee that determine an employee's entitlement to overtime pay under the FLSA.

[3] *See* 29 U.S.C. 204(f); 5 C.F.R. 551.101(a).

[4] The authority to settle claims against the Government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L.104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

under GAO's administrative grievance procedure.[1]

Judicial

Under section 216(b) of the FLSA, an action to recover any unpaid compensation owed under the FLSA may be brought in any court of competent jurisdiction.[2] Under the Tucker Act, FLSA actions by federal employees may be brought in the Claims Court or, if the amount claimed does not exceed $10,000, in an appropriate federal district court.[3]

Relief

Under the FLSA, employers, including federal agencies, shall be liable to the employee for unpaid minimum wages or unpaid overtime compensation. The employer shall also be liable for liquidated damages in an amount equal to the amount of unpaid minimum wages or unpaid compensation, except that a court has discretion to reduce or dispense with the award of liquidated damages if the employer shows that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation. For a violation of the FLSA prohibition against retaliation, legal or equitable relief may be available, including employment, reinstatement, promotion, and the payment of lost wages and an additional amount of liquidated damages.[4] The FLSA also provides that the court shall allow reasonable attorney's fees.[5]

EVALUATION

Substantive Rights

The basic FLSA requirements of minimum wage, overtime compensation, and child labor protections are substantially the same at GAO for working more than 40 hours in a work week as under the CAA. However, there is substantial difference with respect to the availability of compensatory time and other exceptions from overtime pay requirements.

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[1] GAO order No. 2771.1 (May 12, 1989), as amended by GAO order No. 2771.1(A.92)(April 12, 1992).

[2] 29 U.S.C. 216(b).

[3] 28 U.S.C. 1346(a), 1491. *See Parker v. King*, 935 F.2d 1174,1178 (11th Cir. 1991) (section 1346(a) case); *Brooks v. Weinberger*, 637 F. Supp 22. (D.D.C 1986) (same); *Saraco v. U.S.*, 130 Lab. Cas. (CCH) ¶ 33259 (Fed. Cir. 1995) (section 1491 case).

[4] 29 U.S.C. 216(b), 260.

[5] 29 U.S.C. 216(b).

As is generally the case among salaried workers in the federal sector, compensatory time, "credit hours," and compressed schedules outside the FLSA overtime requirements are widely available — but only at the option of employees, and subject to a statutory prohibition of coercion. Compensatory time is less widely available under the CAA, but it can be required under limited circumstances for employees whose schedules depend directly on the schedule of the House or Senate, and it can be provided to Capitol Police law enforcement personnel at their request.[1]

GAO employees are also entitled under civil service law to receive overtime compensation for working more than 8 hours in a day. This entitlement is not made applicable under the CAA.

The FLSA includes a general prohibition against retaliation, forbidding discrimination against employees for filing an FLSA complaint, or testifying in a proceeding under or related to the FLSA.[2] Unlike the retaliation provision in the CAA,[3] which is based on the retaliation provisions in EEO laws, the FLSA does not prohibit retaliation for having "opposed any practice made unlawful."

Procedures

Administrative

A GAO employee may seek to resolve a FLSA dispute administratively, both within GAO's general grievance process, and by application to OPM. These mechanisms do not include structured stages of counseling, mediation, and formal adjudication and appeal that are available under the CAA. OPM may investigate violations and issue corrective orders to federal agencies.[4] No such investigative authority is established under the CAA.

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1 *See* sections 203(c)(3), (4) of the CAA, 2 U.S.C. 1313(c)(3), (4). Subsection (c)(4), regarding the Capitol Police, was added by section 312 of Pub. L. No. 104-197, 110 Stat. 2415 (Sept. 16, 1996).

2 29 U.S.C. 215(a)(3), 216(b).

3 Section 207 of the CAA, 2 U.S.C. 1317.

4 5 C.F.R. 551.104; Federal Personnel Manual (FPM) letter No. 551.9 (March 30, 1996), which, according to OPM, continues to accurately describe OPM practices in spite of the elimination of the FPM system.

Judicial

Employees may file a civil action under the FLSA regardless of whether the employee pursued any administrative complaint processing. Under the CAA, a covered employee may file a civil action after counseling and mediation, plus an additional waiting period of 30 days. Thus, an employee who wishes to file a civil action without first filing an administrative complaint may do so under the FLSA as it applies at GAO, but not under the CAA.

Since the constitutional right to a jury trial is available in appropriate FLSA cases in the private sector, the right to a jury trial is available to the same extent in FLSA cases under the CAA. However, jury trials are ordinarily not available against the federal government without express statutory authority,[1] and, therefore, are probably not available in FLSA cases in the federal sector or against GAO or other federal agencies.

Relief

The unpaid minimum wages, unpaid overtime compensation, additional liquidated damages, and legal or equitable relief for retaliation, as provided in the FLSA, are available for a violation at GAO, elsewhere in the federal sector, in the private sector, and under the CAA.

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[1] *See, generally, Lehman v. Nakshian*, 453 U.S. 156 (1981).

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Substantive Rights

The Occupational Safety and Health Act protects the safety and health of employees in their places of employment. GAO is currently covered by section 19 of OSHA, which requires the head of each federal agency to establish and maintain a comprehensive occupational safety and health program, consistent with the standards promulgated by the Secretary.[1] This provision also requires agency heads to submit annual reports to the Secretary of Labor on occupational accidents and injuries, and on the status of the agency's safety and health program.[2]

The related provisions of 5 U.S.C. 7902, establishing safety programs, cover an agency "in any branch of the Government of the United States,"[3] and therefore cover GAO. They are similar in their requirements to those of 29 U.S.C. 668, which also address safety and health programs of federal agencies. Executive Order 12196, which was promulgated under 5 U.S.C. 7905, and which sets forth specific duties for heads of federal agencies in establishing health and safety programs and requires executive branch agencies to comply with the provisions of 29 C.F.R. part 1960, however, covers only executive branch agencies.[4] Although GAO is not bound by the Executive Order, the agency does subscribe to its intent and has adopted comparable safety and health standards.[5]

Regulations

OSHA regulations issued by the Secretary are not binding on the legislative branch unless by agreement by the head of the agency.[6] GAO does not have such an agreement with the Secretary,

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1 *See* 29 U.S.C. 668(a). "It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655 of this title."

2 29 U.S.C. 668(a)(5).

3 5 U.S.C. 7902(a)(2).

4 *See* Executive Order 12196, February 26, 1980, as amended by Executive Order 12223, June 30, 1980, and Executive Order 12608, September 9, 1987, section 1-102.

5 *See* GAO Order 2792.4, Ch. 1 sec. 4(c) (February 8, 1996).

6 *See* 29 C.F.R. 1960.2(b). ("By agreement between the Secretary of Labor and the head of an agency of the Legislative or Judicial branches of the Government, these regulations may be applicable to such agencies.")

and has therefore issued its own health and safety regulations.[1]

GAO Order. Although the agency is not compelled to comply with the OSHA regulations issued by the Secretary, GAO has adopted portions of the relevant health and safety codes and standards, thereby making them applicable to the agency.[2] Through the adoption of these codes and standards, GAO has developed a health and safety compliance program that includes periodic inspections of GAO facilities and equipment, monitoring procedures, counsel and assistance concerning health and safety to GAO employees, and evaluation and correction of health and safety issues.

Procedures

Administrative

GAO employees who have complaints related to safety and health submit those complaints (preferably in writing) to the Unit or Site Health and Safety Representative, who will either resolve the complaint or solicit the assistance of General Service and Controller/Office of Real Property Services (GS&C/ORPS), as necessary. Upon request, complaints will remain anonymous. If the employee who filed the complaint has not received adequate resolution within 30 days, he/she contacts the Director, Office of Security and Safety (GS&C/OSS).[3] There is apparently no further review available to employees. Because the Occupational Safety and Health Administration does not have enforcement authority over GAO, the administrative review process is self-enclosed internal process, and GAO employees may not go outside of the agency for further review of safety and health issues.

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1 *See* GAO Order 2792.4.

2 *See* GAO Order 2792.4, Ch. 1 sec. 7(b). GAO has adopted applicable portions of the following codes and standards: 29 C.F.R. parts 1910, 1915-1919, 1926, and 1960; 40 C.F.R. part 763, sub-part E; 41 C.F.R. subtitle C, Chapter 101; PBS-P-3430.1A, Facilities Standards for Public Buildings Service, U.S. General Services Administration (GSA); PBS-P-5900, Safety and Environmental Management Program, GSA; National Fire Protection Association Codes and Standards; Building Officials and Code Administrators International Inc., Basic Building and Fire Codes; Americans with Disabilities Act Guidelines; American National Standards Institute/American Society of Mechanical Engineers A17.1, Safety Code for Elevators and Escalators; American Conference of Governmental Industrial Hygienists, Threshold Limit Values and Biological Exposure Indices; Occupational Safety and Health Administration (OSHA) Standards; EM 385-1-1, Safety and Health Requirements Manual, U.S. Army Corps of Engineers.

3 *See* GAO Order 2792.4 at Ch. 3 sec. 3.

GAO currently maintains an accident reporting and investigation program.[1] Each Health and Safety Representative must maintain an Accident Reporting Log for the site by fiscal year.[2] Throughout the year all accidents, fires, and other emergencies, with or without injuries, should be thoroughly investigated by the Health and Safety Representative for the affected site.[3] A copy of the resulting report must be submitted to the Health and Safety Staff, through unit management, no later than 30 days after the incident was reported.[4]

Judicial

Under current law no judicial remedies are available to GAO employees to redress safety and health issues.

Future-Effective Changes Under the CAA

Pursuant to the CAA, one year after this Section 230 Study is transmitted to Congress, the provisions of section 215 implementing OSHA become applicable to GAO.[5]

Section 215(a) of the CAA requires each employing office and each covered employee to comply with the provisions of section 5 of OSHA. Section 5(a) of OSHA provides that every covered employing office has a general duty to furnish each employee with employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to those employees, and a specific duty to comply with occupational safety and health standards promulgated under the law.[6] Section 5(b) requires covered employees to comply with occupational safety and health standards, and with all rules, regulations, and orders issued pursuant to OSHA that are applicable to their actions and conduct.[7]

Under section 215(c) of the CAA, any employing office or covered employee may request the General Counsel to inspect and investigate places of employment under the jurisdiction of the employing offices. A citation or notice may be issued by the General Counsel to any employing

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1 *Id.*

2 *See* GAO Order 2792.4, Ch.3.

3 *See id.*

4 *See id.*

5 2 U.S.C. 1341(g)(2).

6 29 U.S.C. 654(a).

7 29 U.S.C. 654(b).

office that is responsible for correcting a violation of OSHA, or that has failed to correct a violation within the period permitted for correction.[1] The citation is issued only against the employing office that is responsible for the particular violation, as determined by the regulations issued by the Board. If the violation is not corrected, the General Counsel may file a complaint against the employing office with the Office of Compliance. The complaint is then submitted to a hearing officer for decision, with subsequent review by the Board.

Section 215(e) requires that the General Counsel on a regular basis, and at least once each Congress, conduct periodic inspections of all covered facilities and report to Congress on compliance with health and safety standards.[2]

Section 215(d) of the CAA requires the Board of Directors of the Office of Compliance to issue regulations that are "the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights under this section."[3]

Section 11(c) of OSHA, prohibiting discharge or discrimination against an employee for exercise of the employee's rights, is not one of the provisions of OSHA that was incorporated into the CAA by section 215. However, a GAO employee who believes that the agency has retaliated for exercising employee rights regarding OSHA might claim that this is a prohibited personnel practice under administrative procedures established by the GAOPA. Furthermore, after GAO and its employees become subject to the provisions in section 215 of the CAA, GAO and its employees will also become subject to the provisions of the CAA forbidding retaliation and establishing administrative and judicial dispute-resolution procedures.[4] Assuming that these provisions do become applicable, a GAO employee alleging retaliation would be able to file an administrative complaint with the Office of Compliance or a civil action in district court.

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[1] 2 U.S.C. 1341(c).

[2] 2 U.S.C. 1341(e).

[3] 2 U.S.C. 1341(d).

[4] Sections 207 and 401-416 of the CAA, 2 U.S.C. 1317, 1401-1416.

EVALUATION

Substantive Rights

In making certain provisions of OSHA applicable to GAO, the CAA will impose additional obligations on the agency. Under the CAA, GAO will be required to adhere to the safety and health regulations issued by the Board under section 215(d), whereas GAO's compliance with safety and health standards under OSHA is not now subject to enforcement by any entity outside of GAO.[1] However, in satisfying its requirement to issue regulations, the Board has determined that all regulations promulgated by the Secretary to implement section 5 of OSHA are "substantive regulations" within the meaning of section 215(d).[2] The Board has therefore proposed to adopt all otherwise applicable substantive health and safety standards of the Secretary's regulations published at 29 C.F.R. parts 1910 and 1926, with only limited modifications.[3] GAO already purports to comply with applicable federal laws and regulations, including the health and safety standards published at 29 C.F.R. parts 1910 and 1926.[4] Therefore, despite the fact that GAO's compliance with safety and health standards under the CAA will be subject to enforcement by an outside entity, the promulgation of external safety and health regulations under the CAA may not have the practical effect of changing the working environment of GAO employees.

Retaliation

The CAA will, however, provide GAO employees with a right to bring a civil action for intimidation, discrimination or reprisal actions taken by an employing office because the employee has opposed a practice made unlawful by the CAA, or because the employee has initiated proceedings, made a charge, or testified, assisted, or participated in a hearing or proceeding under the CAA.[5] Section 11(c) of OSHA, prohibiting discharge or discrimination against an employee for exercise of the employee's rights, is not one of the provisions of OSHA that was incorporated into the CAA in section 215. However, the general anti-retaliation provision in section 207 of the CAA prohibits retaliation against a covered employee for exercising rights under the CAA,

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1 141 Cong. Rec. S11020 (daily ed. Sept. 19, 1996).

2 *See*, e.g., 142 Cong. Rec. S11019, S11020 (daily ed. September 19, 1996) (Notice of Proposed Rule Making implementing section 215 of the CAA).

3 *See id*.

4 *See* GAO Order 27924.4, Ch.1 sec. 7(b).

5 2 U.S.C. 1317.

including the rights and protections of section 215.[1]

Administrative

Under present law, GAO has an internal investigation and administrative grievance process to address employee safety and health complaints.[2] Under the CAA, however, the General Counsel of the Office of Compliance will exercise the authority to investigate and inspect places of employment, as well as issue citations and prosecute violations that are not corrected by the employing office named in the citation or notification.[3]

The CAA grants the General Counsel the authority under subsections (a), (d), (e), and (f) of section 8 of OSHA to inspect places of employment under the jurisdiction of employing offices, upon written request of any employing office or covered employee.[4] Section 8 of OSHA establishes the authority of the Secretary of Labor to conduct inspections of work sites in the private sector.[5] Section 215 of the CAA, however, sets forth the inspection authority of the General Counsel in different terms than section 8 of OSHA. Subject to the constraints of the fourth amendment,[6] section 8 of OSHA grants the Secretary a broad power to enter and inspect private sector workplaces,[7] whereas section 215 of the CAA states that the General Counsel may inspect places of employment "[u]pon written request of any employing office or covered employee."[8] The General Counsel shall also, however, inspect all covered facilities "on a regular basis, and at least once each Congress" to determine compliance with the substantive protections granted in section 215(a) of the CAA.[9]

In addition, section 215(c)(2) of the CAA gives the General Counsel the authority to issue

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1 *Id.*

2 *See* discussion of "Administrative Processes" at section 1 *supra.*

3 2 U.S.C. 1341(c).

4 2 U.S.C. 1341(c)(1).

5 29 U.S.C. 657.

6 No search warrant is expressly required under the Act. However, since the Supreme Court's decision in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), OSHA has been required to perform consensual worksite inspections pursuant to an administrative search warrant. *See* BOKAT AND THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW 214 (BNA Books 1988).

7 Section 8(a) of OSHA, 29 U.S.C. 657(a).

8 2 U.S.C. 1341(c).

9 Section 215 (e)(1) of the CAA, 2 U.S.C. 1341 (e)(1)

citations for violations of OSHA in the same manner as the Secretary of Labor under sections 9 and 10 of OSHA.[1] Under section 10 an employer has fifteen working days from the issuance of a citation to notify the Secretary that he/she wishes to contest the citation.[2] That right is not provided to employing offices under section 215 the CAA.

Record Keeping and Report Obligations

Section 668(a)(5) of title 29 requires agency heads, including the head of GAO, to submit annual reports to the Secretary on occupational accidents and injuries and on the agency programs established under section 668. Section 7902(e) of title 5 imposes similar record keeping and report requirements on each agency. However, there is no apparent mechanism for enforcement of these sections against federal agencies.

Section 215 of the CAA, and the proposed requirements thereunder, do not require employing offices to comply with these general safety and health record keeping requirements.[3] However, certain record keeping requirements that are part of the substantive safety and health standards under 29 C.F.R. parts 1910 and 1926, such as employee exposure records, are required.[4] The Board has not addressed whether section 215 of the CAA, and the regulations the Board proposes to implement thereunder can be harmonized with the preexisting statutory requirements otherwise applicable to GAO, but not within the scope of the CAA, that might independently apply to GAO.[5]

Judicial

Under present law, no judicial remedies are available to GAO employees, nor would the CAA provide GAO employees with a judicial remedy. However, the General Counsel or an employing office aggrieved by a final decision of the Board following a hearing or variance proceeding, may file a petition for review with the United States Court of Appeals for the Federal Circuit pursuant

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1 29 U.S.C. 658, 659.

2 29 U.S.C. 659(a).

3 *See* Notice of Proposed Rule Making Implementing section 215 of the CAA, 142 Cong. Rec. S11021.

4 *See id.*

5 *See* 142 Cong. Rec. S11021, 11022 (citing Notice of Adoption of Regulations and Submission for Approval and Issuance of Interim Regulations under section 203 of the CAA), 142 Cong. Rec. S224 (daily ed. Jan. 22, 1996) (declining to address issue of harmonizing regulations regarding overtime exemption for law enforcement officers under section 203 with preexisting statutory overtime exemption for Capitol Police under 40 U.S.C. 206b-206c).

to section 407 of the CAA.[1]

Office of Compliance Inspection

The General Counsel of the Office of Compliance conducted inspections of the main headquarters building of GAO on February 27 and 29, 1996. Based upon the inspection tours the General Counsel made the following finding: "The GAO has an active and effective safety and health program staffed with knowledgeable personnel. The few deficiencies noted were generally minor in nature and corrective actions were initiated almost immediately."[2]

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[1] 2 U.S.C. 1341(c)(5).

[2] *See* "Report on Initial Inspections of Facilities for Compliance with Occupational Safety and Health Standards Under Section 215," June 28, 1996, at III-54 (Office of Compliance publication).

LABOR-MANAGEMENT RELATIONS
(Chapter 71, Title 5, U.S.C.)

Substantive Rights

Under the GAOPA, as part of its personnel management system, the Comptroller General is authorized to adopt procedures that ensure the right of employees either to form, join, or assist an employee organization, or to refrain from such activity, and to adopt a labor-management relations program that is "consistent" with the Federal Service Labor-Management Relations Statute, chapter 71 of title 5 U.S.C. (Chapter 71).[1]

Regulations

GAO order 2711.1 and the GAO Operations Manual set forth detailed provisions of its labor-management relations program, which are modeled after the provisions of Chapter 71. The General Accounting Office Personnel Appeals Board (PAB) promulgated regulations establishing its special procedures rules for conducting representation proceedings, and for the consideration of unfair labor practices.[2]

Procedures

Administrative

The PAB is vested with authority to consider cases arising from representation matters and from other matters that are "appealable to the Board under the labor-management relations program" of the Comptroller General, including unfair labor practices.[3] The PAB's powers and duties include:

- determining appropriate units for labor organization representation;
- supervising or conducting elections to determine whether a labor organization has been selected as exclusive representative;

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[1] 31 U.S.C. 732(e). Chapter 71 generally ensures that federal employees in the executive branch have the right to choose freely and without reprisal whether to organize and to be represented by an exclusive representative for purposes of bargaining over terms and conditions of employment. The Federal Labor Relations Authority (FLRA) is the independent agency responsible for enforcing Chapter 71. Chapter 71 expressly excludes GAO from coverage.

[2] 4 C.F.R. 28.110-28.124. Given the exclusion of the GAO from the provisions of Chapter 71, the implementing regulations promulgated by the FLRA do not apply.

[3] 31 U.S.C. 753(a)(4)-(6).

- C certifying labor organizations as exclusive representative;
- C resolving certain issues regarding the duty to bargain in good faith;
- C conducting hearings and resolving complaints of unfair labor practices and standards of conduct for labor organizations;
- C resolving exceptions to arbitrators' awards; and
- C "tak[ing] such other actions as are necessary and appropriate to effectively administer the provisions of [GAO Order 2711.1]."

Resolution of Negotiating Impasses. GAO Order 2711.1 provides for the establishment of a seven-member "ad hoc joint management-union committee," to be chaired by the PAB Chair or the Chair's designee, to assist in resolving impasses. If the committee determines that the process of collective bargaining has been exhausted, the chair conducts binding arbitration of the dispute.

Grievance Procedures and Arbitration. GAO Order 2711.1 provides that any collective bargaining agreement shall provide procedures for settlement of grievances, and that grievances not satisfactorily settled shall be subject to binding arbitration.

Judicial

Judicial review to the Court of Appeals for the Federal Circuit is available for decisions made under the PAB's authority to hear cases arising from "a matter appealable to the Board under the labor-management relations program under section 732(e)(2) of this title, including a labor practice prohibited [under the GAOPA]."[1] Under this scheme, direct judicial review of representation issues, such as the appropriateness of the bargaining unit and conduct of the election, is not immediately available.

EVALUATION

Substantive Rights

In so far as the CAA applies the rights, protections, and responsibilities of chapter 71 to employing offices of the legislative branch, a comparison of GAO's current labor-management relations law with what would be available under the CAA yields some noteworthy differences:

- C Definition of "employee". In order to be a covered "employee" under GAO Order 2711.l,

[1] 31 U.S.C. 753(a)(6), 755.

an individual must hold either a full-time or a part-time appointment that confers competitive status under 31 U.S.C. §732(g).[1] In contrast, under the CAA, the definition of covered employee contains no such qualification. With respect to exclusions, there is likewise a difference. Under GAO Order 2711.l, an individual "appointed as a temporary or intermittent expert or consultant" is expressly excluded.[2] There is no comparable provision under the CAA.

C Definition of "professional employee". While the GAO Order incorporates the definition of "professional employee" that is found in chapter 71, and is applied by the CAA, the order also adds as an alternative definition an "employee engaged in the performance of audit or evaluator work."[3] The CAA contains no corresponding alternative definition. Thus, under the CAA, the fact that an employee is engaged in the performance of audit and evaluator work by itself would not suffice to classify the individual as a "professional employee."

C Definition of "conditions of employment". For purposes of negotiating conditions of employment, the GAO Order excludes as a bargaining subject any matter "relating to the pay and number of work hours of GAO employees."[4] The CAA contains no explicit exclusion for matters relating to pay or number of work hours. To the extent that any such matters would be excluded as bargaining subjects, they would have to satisfy the exclusion for matters that are specifically provided for by federal statute.

C Definition of "grievance" and grievance procedures. For purposes of resolving grievances under the GAO Order, the definition of "grievance" is limited to "any complaint concerning the interpretation or application of a collective bargaining agreement."[5] In addition, the GAO Order expressly excludes from a negotiated grievance procedure that is established under a collective bargaining agreement certain subjects, including discrimination claims based on race, color, religion, age, sex, national origin, political affiliation, marital status, or disability.[6] Also, the negotiated grievance procedure may not be used when grievances over reductions in grade and removals because of unacceptable

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1 Section 4.d.(1)(a) & (b).

2 Section 4.d.(2)(b).

3 Section 4.h.(1).

4 Section 4.n.(3).

5 Section 4.o.

6 Section 17.d.

performance are involved.[1] In contrast, as applied under the CAA, by definition, "grievance" includes: any complaint by any employee or labor organization concerning any matter relating to the employment of any employee; or any complaint by any labor organization or employing agency concerning the effect, interpretation, or alleged breach of a collective bargaining agreement, or concerning any alleged violation, misinterpretation, or misapplication of any law, rule, or regulation affecting employment conditions.

C Minimum voting threshold for obtaining exclusive recognition. Under the GAO Order, the GAO will accord exclusive recognition to a labor organization that receives the vote of a majority of unit employees voting in a secret ballot election, with the proviso that the labor organization must receive the votes of at least 30 percent of employees in the unit.[2] There is no such 30 percent minimum under the CAA.

C Scope of appropriate bargaining units. In addition to setting forth a general standard for determining appropriate bargaining units, drawn from Chapter 71, the GAO Order declares in three instances what is the appropriate unit scope: (1) for regional offices and suboffices, the appropriate unit consists of a nationwide unit of all professional or nonprofessional employees; (2) for headquarters, the appropriate unit consists of a headquarters-wide unit of all professional, nonprofessional, or craft employees (including all audit sites in the Washington, D.C. area); and (3) for overseas offices, the appropriate unit consists of a unit which includes all professional or nonprofessional employees.[3] The CAA and regulations adopted by the Board (based on regulations of the FLRA for the executive branch) do not include comparable provisions that predetermine the appropriate unit scope for such offices.

C Consultation rights. The GAO Order contains no provision for affording an exclusive representative either national consultation rights with respect to substantive changes in conditions of employment, or government-wide rule or regulation consultation rights with respect to rules or regulations that substantively change conditions of employment.[4] Under the CAA, such rights would be afforded to exclusive representatives.

C Procedure for authorizing dues allotments to representatives. The GAO Order does not incorporate from chapter 71, the procedure by which a labor organization with a 10 percent showing of interest may petition for authorization to negotiate with an employing

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[1] Section 17.e.

[2] Section 8.a.

[3] Section 9.a.(1), (2), (3).

[4] *Compare* 5 U.S.C. 7113, 7117.

agency over a dues deduction procedure covering members in the labor organization.[1] The CAA, in applying the rights and protections of chapter 71, would provide for such a procedure.

The CAA applies provisions of Chapter 71, rather than the provisions of the National Labor Relations Act (NLRA),[2] which is applicable to private employers, and is administered by the National Labor Relations Board. There are fundamental differences between Chapter 71 and the NLRA, most notably in the areas of union recognition, the right to strike and the use of other economic weapons, the availability of union security, and the manner in which negotiations over terms and conditions of employment are conducted and impasses are resolved. In the federal sector, recognition of a union as exclusive representative may be effectuated only after a representation election; strikes are proscribed; a labor organization may not enter into a union security agreement with an employing agency; an employing agency in certain instances may be required to submit to impasse procedures that can result in the imposition of employment terms. In the private sector, as an alternative to a representation election, an employer is permitted to voluntarily recognize a union upon a showing of majority support; employees have, with limitations, the right to strike and to use other economic weapons; a union, with limitations, may negotiate a union security agreement with an employer; and, an employer after impasse cannot be ordered to agree to employment terms.

Procedures

Administrative

The PAB, an internal office of the GAO, administers the labor management relations program. The PAB decides legal issues in connection with representation matters and in unfair labor practices. The PAB General Counsel has certain responsibilities in investigating representation matters and prosecuting unfair labor practice cases before an agency hearing officer and before the PAB. In certain cases, however, before an employee can file an unfair labor practice charge with the General Counsel, the employee must seek an informal resolution of the matter with the charged party. Where the PAB General Counsel does not believe that the charge is reasonably well-founded, the charging party may nevertheless pursue the claim individually.

Under the CAA, the Board of Directors exercises the authority to conduct representation cases and to decide unfair labor practice cases. Legal questions on such matters as the appropriateness of the bargaining unit, exclusions, and whether representation elections were conducted free of objectionable conduct, are decided by the Board. The General Counsel of the Office of Compliance exercises the authority to investigate and prosecute unfair labor practice allegations before a hearing officer, who issues a written decision within 90 days determining whether the

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[1] *Compare* section 11 with 5 U.S.C. 7115(c).

[2] 29 U.S.C. 151 et seq.

allegations have merit and if so, what remedies are appropriate. Hearing officer decisions may be appealed to the Board of Directors. Unlike the GAO scheme, if the General Counsel determines that an unfair labor practice charge is not meritorious, the General Counsel dismisses the charge, for which there is no right of review; the charging party may not pursue his or her claim individually.

Many similarities exist between the administrative processes for handling labor-management relations matters under the GAOPA and those under the CAA, both being patterned after the processes established under chapter 71 of title 5, U.S.C. Coverage under the CAA, however, would afford GAO employees the ability to pursue their rights with an enforcement office whose adjudicatory body and prosecuting officer are completely separate and independent of the employing office. Under the CAA, a GAO employee would not have the right individually to pursue an unfair labor practice claim that the Office of Compliance's General Counsel has found nonmeritorious.

Judicial

With the one significant exception, the rights of judicial review under the GAO and the CAA schemes are similar. The GAOPA provides that any person, including employees aggrieved by a final decision of the PAB, may seek judicial review in the Court of Appeals for the Federal Circuit. Under the CAA, only the General Counsel or a respondent to an unfair labor practice complaint, if aggrieved by a final decision of the Board of Directors, may file a petition for judicial review in the U. S. Court of Appeals for the Federal Circuit. Thus, were GAO employees covered under the CAA, their right of judicial review would be more circumscribed. For example, the Board may dismiss a claim prosecuted by the General Counsel, based on a charge filed by an employee, if the General Counsel elects not to seek review in the court of appeals. In such a case, the charging party would have no standing to appeal the matter.

Process for Issuing Substantive Regulations

GAOPA authorizes the Comptroller General, who is the head of the employing office, to establish substantive rights and protections regarding labor-management relations. The CAA provides that substantive regulations implementing the labor-management provisions be adopted by the independent Office of Compliance Board of Directors (Board), subject to approval or disapproval by the House and Senate.

Furthermore, the statutory standard governing the rulemaking by the Comptroller General is that the labor-management relations program for GAO be "consistent" with Chapter 71. By comparison, the CAA makes the rights, protections, and responsibilities established under specified sections of Chapter 71 applicable, and the Board is directed to issue implementing regulations that must be "the same as" FLRA regulations, except to the extent the Board determines that a modification is required by virtue of specified statutory criteria (involving more effective implementation of rights and protections, a conflict of interest, or Congress' constitutional responsibilities).

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

Substantive Rights

The Worker Adjustment and Retraining Notification Act (WARN), which assures employees in the private sector of notice in advance of office or plant closings or mass layoffs, does not apply to GAO. However, effective one year after this study is transmitted to Congress, the CAA provisions that apply WARN rights and protections to congressional offices and employees will be extended to cover GAO and its employees as well.

Until recently, GAO was subject to the provisions of generally applicable civil service law and OPM regulations regarding "Retention Preference," which requires that 60 days' advance notice be given to employees affected by a RIF.[1] However, in November 1995, as part of the FY96 Legislative Branch Appropriations Act, Congress added a new section to the GAOPA directing the Comptroller General to "prescribe regulations . . . [for RIFs] which give due effect to tenure of employment, military preference, performance and/or contributions to the agency's goals and objectives, and length of service," but notwithstanding the generally applicable civil service requirements regarding Retention Preference.[2] The new legislation does not include a guarantee that GAO employees be granted notice in advance of a RIF, although GAO-issued Order 2351.1, on Reduction in Force, which implements the 1995 legislation (RIF Order), establishes standards and procedures for conducting a RIF at GAO, including a requirement to notify affected employees similar in most respects to the notice requirement under civil service law and regulations that had previously applied to GAO.

Procedures

Administrative

The various administrative complaint processes established under the GAOPA are available in a case where a GAO employee is affected by a RIF, including where notice requirements were not met. Thus, any employee who has been furloughed for more than 30 days, separated, or demoted may file an appeal with the PAB. GAO management has explained that, if notice has been defective, the PAB can order back pay and direct that the employee be reinstated until the notice defect is corrected.

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[1] 5 C.F.R. 351.801 - 351.807

[2] 31 U.S.C. 732(h), as added by section 213 of Pub. L. No. 104-53, 109 Stat. 536 (Nov. 19, 1995).

Judicial

The GAOPA does not provide the right to file a civil action in case of violation of the rights under the RIF Order. Final decisions of the PAB are appealable to the U.S. Court of Appeals for the Federal Circuit.

Future-Effective Changes Under the CAA

When the WARN Act provisions of the CAA go into effect at GAO, one year after this study is transmitted to Congress, a GAO employee who claims a violation of these provisions under the CAA may elect to file a civil action, request a jury trial, and receive the remedies afforded under the WARN Act provisions of the CAA, which are back pay and benefits for each day of violation, up to 60 days. If the GAO employee elects to have an adjudicatory hearing under the CAA, and if the case is decided on appeal by the Office of Compliance Board, the CAA provides the right of judicial review in the U.S. Court of Appeals for the Federal Circuit.

EVALUATION

Substantive Rights

Unlike the GAOPA, which requires certain protections regarding RIFs, but does not specify that advance notice be among the protections, the CAA affords a statutory guarantee of advance notice in the case of an office or plant closing or mass layoff. However, the Comptroller General has provided for advance notice in the GAO RIF Order, and, in most respects, the GAO Order provides employees substantive rights to notice that are as extensive as, or more extensive than, the rights afforded under WARN provisions made applicable by the CAA:

C The CAA guarantees notice only in the case of an "office closing" or "mass layoff."[1] As defined in applicable statutes and regulations, these terms involve an employment loss during a 30-day period to a significant number of employees at an employment site.[2] Under the GAO RIF Order, there is no minimum number of employees who must be affected to trigger notice requirements. If a single employee is separated, demoted, reassigned, or furloughed for more than 30 days, and if the cause is a lack of work, a shortage of funds, reorganization, or certain similar reasons, the action is a

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[1] *See* section 205(a)(1) of the CAA, 2 U.S.C. 1315(a)(1); regulations of the Board implementing section 205.

[2] 29 U.S.C. 2102; 20 C.F.R. 639 et. seq.

RIF, and notice must be given.[1]

- Both the CAA and the GAO RIF Order ordinarily require 60 days' advance notice. Both also provide for a shortened notice period in the case of unforeseeable circumstances, but the GAO Order, unlike the CAA, establishes a minimum notice period of 30 days under any circumstances.[2]

In at least one respect, however, the substantive notice requirements in the CAA provide greater employee protection. In the case of an office closing or mass layoff, when not all employees are to be laid off on the same date, the CAA requires that notice regarding all affected employees be given 60 days before the date on which the first individual is laid off.[3] The GAO Order contains no such provision.

GAO management has recommended that WARN should not be made applicable to GAO, because GAO's RIF Order provides employees more extensive rights than WARN. The comment explained that the 60-day notice requirement in the Order is only one of many procedures designed to protect GAO employees who could be affected by a RIF, and that, even as to the limited issue of the notice requirement, which is the only protection offered by WARN, GAO's RIF Order provides employees more extensive rights than are available under WARN.

Moreover, the notice requirement is only one component of an "integrated system," which also guarantees that seniority, performance, and veterans' preference will be taken into account in any RIF decisions, and also provides that employees will be permitted to inspect relevant records on which a RIF decision will be based. An employee advisory council commented that the GAO RIF Order provides less protection to employees than the civil service law and regulations that formerly applied at GAO. However, except for the notice requirements of WARN Act, the CAA does not govern conduct of a RIF at all.

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[1] GAO Order 2351.1, Chap. 1(6) (February 28, 1996).

[2] *Id.*, Chap. 5(1).

[3] *See* Office of Compliance Board regulations implementing the WARN Act, section 639.5(a)(1).

Procedures

Administrative

Under the GAOPA, only administrative processes would be available in a case where a GAO employee is affected by a RIF, including where notice requirements were not met. The GAOPA does not does not provide the right to file a civil action in case of violation of the rights under the RIF Order.

Judicial

In contrast, an employee covered by WARN provisions of the CAA who alleges a violation may elect to file a civil action. As a jury trial should be available to private sector employees,[1] a covered employee should be able to request a jury trial under the CAA as well.

As noted in comments, the GAOPA provisions on RIFs afford particularly broad discretion to the Comptroller General in establishing substantive rights. In fact, the statute makes no mention of any requirement that advance notice be given in case of a RIF.

The GAO employee Advisory Council on Civil Rights criticized the provisions added to GAOPA by the FY96 appropriations legislation, which "gave management wide latitude to draw RIF rules," as well as GAO's RIF Order issued pursuant to those provisions. According to the comment, "GAO's use of narrowly drawn competitive areas targeted people on a discriminatory basis," and permitting managers in each unit to decide how to make cuts resulted in the targeted RIFing of African-Americans and people who filed complaints on various grounds.

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[1] *See Bentley v. Arlee Home Fashions, Inc.*, 861 F.Supp. 65 (E.D. Ark. 1994).

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

Substantive Rights

Under the USERRA, all employees of the federal government, including employees of GAO performing service in the uniformed services, are protected from discrimination on the basis of such service, denial of reemployment rights, and denial of employment benefits. Like other federal employers, if it is "impossible or unreasonable" for GAO to reemploy a person otherwise entitled to reemployment, OPM shall ensure that the person is offered alternative employment of like seniority, status, and pay at a federal executive agency.[1]

The USERRA directs OPM to prescribe regulations implementing the provisions of the USERRA with regard to "executive agencies" as that term is defined in section 105 of title 5 of the U.S. Code, and GAO comes within the statutory definition of an "executive agency."[2] OPM's regulations spell out specific employee rights and protections under the USERRA in the civil service context.[3] For example, the regulations specify that an employee absent because of service in the uniformed services "is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency."[4] Upon reemployment, the employee "is generally entitled to be treated as though he or she has never left," receives credit for the entire period of absence for purposes of seniority and length of service, and is protected against discharge (except for cause) for a period after reemployment.[5]

On January 24, 1992, GAO issued Order 2353.1, which includes a description of GAO employees' right to return to employment after military duty. However, this Order was issued prior to the enactment of the USERRA in 1994, and is not consistent with it.

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1 *See* 38 U.S.C. 4314(a), (b), (c).

2 38 U.S.C. 4303(5), 4331(b)(1). The inclusion of GAO within the definition of "executive agency" is explained earlier in this study.

3 5 C.F.R. part 353.

4 5 C.F.R. 353.106, 353.208.

5 5 C.F.R. 353.107, 353.209.

Procedures

Administrative

The USERRA establishes several administrative processes to assure that rights and protections under the Act are provided to Federal Government employees, including those at GAO:

- ***Placement by OPM.*** When a legislative branch employer determines that it is impossible or unreasonable to reemploy an employee after service in a uniformed service, OPM will offer placement of the employee in the executive branch.[1] GAO employees and former employees might apply to OPM for this placement.

- ***Investigation and informal compliance efforts by Labor Department.*** An employee of an "executive agency," including GAO, who claims that the employer or OPM has failed or refused, or is about to fail or refuse, to comply with USERRA may file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS).[2] The VETS staff will make reasonable efforts to ensure compliance, and will attempt to informally resolve the employment dispute brought to them.

- ***Representation by the Office of Special Counsel (OSC).*** If the Labor Department is unsuccessful in resolving the dispute, the employee may request that the complaint be referred to the OSC. If the Special Counsel is reasonably satisfied that the employee is entitled to the rights or benefits sought, the Special Counsel may, upon the employee's request, appear on behalf of the employee and initiate an action before the Merit Systems Protection Board (MSPB).[3]

- ***Adjudication of the complaint before the Merit Systems Protection Board.*** The employee may have the claim adjudicated before the MSPB. If the employee chooses not to be represented by the Special Counsel, or if the Special Counsel declines to represent the employee, the employee may submit the claim directly to the MSPB. The MSPB will adjudicate the complaint and may order the GAO to comply with the provision of the USERRA and to compensate the

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1 *See* 38 U.S.C. 4314; 5 C.F.R. 353.110.

2 *See* 38 U.S.C. 4322; 5 C.F.R. 353.210.

3 38 U.S.C. 4324(a).

employee for any loss of wages or benefits.[1]

A GAO employee who alleges a deprivation of USERRA rights and benefits may also submit a complaint under the administrative processes established under the GAOPA. For example, a GAO employee who suffers an appealable adverse action could bring a complaint before the PAB and allege that the action was taken in violation of USERRA.

Judicial

Although the USERRA makes provision for employees of private employers or state governments to file a civil action against the employer, this right is not made available to employees of the federal government.[2] The USERRA does provide for judicial review of a final order or decision of the MSPB, by petition to the U.S. Court of Appeals for the Federal Circuit.[3]

Future-Effective Changes Under the CAA

GAO and its employees are covered under the CAA provisions that apply the rights and protections of the USERRA, effective as of one year after this study is transmitted to Congress.[4]

EVALUATION

Substantive Rights

GAO is subject to the substantive provisions of the USERRA, which only apply throughout the federal government and are also made applicable under the CAA.

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1 38 U.S.C. 4324(b)-(c).

2 *See* 38 U.S.C. 4323.

3 38 U.S.C. 4324(d).

4 Section 204(d)(2) of the CAA, 2 U.S.C. 1314(d)(2).

Procedures

Administrative

Under present law, the USERRA provides a multi-step administrative process, including an investigation and informal efforts to resolve the dispute by the Labor Department, administrative adjudication before the MSPB, and the opportunity to be represented by the Special Counsel. The CAA provides counseling, mediation, and the option of an adjudicatory hearing and appeal. However, there is no provision for investigation of USERRA claims under the CAA.

One year after this study is transmitted to Congress, GAO and its employees will be treated as an employing office, and as covered employees, for purposes of section 206 of the CAA, which applies substantive rights and protections of the USERRA and specifies remedies that may be awarded in case of a violation.[1] GAO and its employees also will then become subject to the provisions of the CAA that establish administrative and judicial dispute-resolution procedures, and that forbid retaliation.[2]

Judicial

Unlike the CAA, which entitles covered legislative branch employees to file a civil action, USERRA does not entitle federal government employees alleging a violation of USERRA rights and protections to file a civil action. The CAA also provides that covered employees may obtain the same relief in district court as employees in the private sector. This available relief includes: requiring that the employer comply with applicable USERRA requirements; compensation for any loss of wages and benefits; liquidated damages equal to the lost wages and benefits, in situations where failure to comply was willful; and other remedies under the court's "full equity powers," including injunctions, temporary restraining orders, and contempt orders. Furthermore, assuming that GAO becomes subject to the judicial procedures of the CAA, GAO employees will gain the right to sue in district court for USERRA violations.

The USERRA provision forbidding retaliation is not listed among the provisions made applicable to covered legislative branch employees by the CAA.[3] However, the CAA contains its own provision forbidding retaliation, so GAO employees' right to file a civil action should extend to claims of retaliation.

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[1] *See* sections 206(a)(2)(B)-(C), (d)(2) of the CAA, 2 U.S.C. 1316(a)(2)(B)-(C), (d)(2).

[2] Sections 207 and 401-416 of the CAA, 2 U.S.C. 1317, 1401-1416.

[3] Section 206(a)(1)(A) of the CAA, 2 U.S.C. 1316(a)(1)(A).

EMPLOYEE POLYGRAPH PROTECTION ACT (EPPA)

Substantive Rights

The Employee Polygraph Protection Act of 1988 (EPPA) does not apply to GAO or its employees, nor does this legislation apply to any federal agencies or employees, except as made applicable by the CAA. EPPA restricts employers' use of lie detector tests of their employees.

Comments

GAO management has stated that GAO has never utilized polygraphs. As discussed above in the discussion of the GAOPA, the PAB has suggested that consideration be given to assigning to the PAB responsibility for enforcing the EPPA with respect to GAO. The Mid-Level Employees Council recommended that the law be amended to clearly designate the PAB as the arbiter of employee complaints dealing with EPPA matters.

EVALUATION

Under presently effective law and regulations, no rights and protections under EPPA are applicable to GAO and its employees. The EPPA does not apply to the federal sector.

Effective one year after this study is transmitted to Congress, however, the CAA will apply EPPA rights and protections to GAO and its employees under the same statutory provisions as now apply under the CAA at congressional employing offices.

THE AMERICANS WITH DISABILITIES ACT OF 1990
(Public Access Provisions)

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Titles II and III of the ADA, which relate to public access to public services and public accommodations, are therefore applicable in their entirety.[2]

Title II generally guarantees that a qualified person with a disability shall not "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[3] Title III, which applies to the private sector, generally prohibits discrimination against an individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation,"[4] and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with accessibility standards.[5]

Regulations

Under ADA titles II and III, the Attorney General has promulgated implementing regulations for matters other than public transportation,[6] and the Secretary of Transportation has promulgated regulations for public transportation matters.[7] According to GAO, these regulations do not apply to GAO.

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1 42 U.S.C. 12209(1).

2 Sections 201-245, 301-309 of the ADA, 42 U.S.C. 12131-12165, 12181-12189. Title II of the ADA has also been interpreted to apply to employment by a public entity, as well as public access. Insofar as title II applies to employment, it is covered by the earlier discussion of the application at GAO of the EEO provisions of the ADA.

3 42 U.S.C. 12132.

4 42 U.S.C 12182.

5 42 U.S.C. 12183.

6 *See* 42 U.S.C. 12134, 12186(b); 28 C.F.R. part 36.

7 *See* 42 U.S.C. 12143, 12149, 12164, 12186; 49 C.F.R. part 37.

Procedures

Administrative

Section 509(2) of the ADA authorizes instrumentalities, including GAO, to "establish remedies and procedures to be utilized with respect to the rights and protections" of the ADA made applicable to GAO.[1] GAO has stated that it is considering various appeal options for visitors, guests, or patrons at GAO buildings who have ADA complaints, and GAO has circulated a draft Order 2713.4 on discrimination complaint processing.

Under the draft Order, the individual must file a written complaint with GAO's Civil Rights Office (CRO) within 45 days of the incident or occurrence. CRO will attempt to mediate the matter. If mediation fails, CRO will issue a written decision. If the complainant is not satisfied with the final decision of CRO, he or she may appeal to the Office of the Assistant Comptroller General for Operations, which will review the matter and issue a final decision. No provision is made for an administrative hearing.

Judicial

The ADA public access provisions now in effect do not provide judicial processes in case of a complaint against GAO.

Future-Effective Provision Under the CAA

The CAA added a new paragraph (6) to section 509 of the ADA providing that the "remedies and procedures set forth in" section 717 of title VII shall be available to "any qualified person with a disability" who is a "visitor, guest, or patron" of an instrumentality of Congress, including GAO.[2] However, the provision specifies that the authorities of the EEOC under section 717 shall be exercised by the chief official of the instrumentality, who, in the case of GAO, is the Comptroller General. This new paragraph (6) is to become effective one year after this study is transmitted to Congress.

Administrative processes. Section 717 provides that the complainant shall be notified of the final action taken by the agency on any complaint of discrimination, and that the EEOC shall enforce through appropriate remedies and shall take appeals from the decision of the agency. ADA section 509(6) will require that these functions be the responsibility of the Comptroller General.

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[1] 42 U.S.C. 12209(2).

[2] Sec. 210 (g) of CAA.

Judicial processes. Section 717, which is made applicable by ADA section 509(6), also provides that the complainant may file a civil action in district court. The complainant may request a trial *de novo* by filing suit after receipt of final action taken by an agency, or if 180 days have passed since filing the complaint without the agency having rendered a final decision.

Relief. In case of a violation, section 717 authorizes the following relief: "the court may enjoin . . . unlawful employment practices and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."[1]

EVALUATION

Substantive Rights

All of the rights and protections of the ADA are made applicable to GAO by section 509. Accordingly, the provisions of the ADA regarding public access applicable to GAO are the same as those applicable to state and local governments and the private sector. Although all of the provisions of title II of the ADA were applied by the CAA, only certain provisions of title III were applied: 42 U.S.C. 12182 (prohibition of discrimination by public accommodations); 42 U.S.C 12183 (new construction and alteration in public accommodations and commercial facilities); 42 U.S.C 12189 (examinations and courses).

According to GAO, the substantive regulations promulgated by the Attorney General and the Secretary of Transportation implementing titles II and III of the ADA do not apply to GAO. By contrast, these regulations apply to state and local governments and the private sector under the ADA, and regulations [that are substantially the same] have been [adopted] by the Office of Compliance Board for congressional offices subject to the CAA.[2]

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[1] 42 U.S.C. 2000e-5(g), which is referenced in 42 U.S.C. 2000e-16(d).

[2] Even in the executive branch, the Attorney General is responsible, under Executive Order No. 12250, for reviewing agency regulations under section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), which prohibits discrimination on the basis of disability in conducting programs and activities, and for otherwise coordinating the implementation and enforcement of this provision. E.O. 12250, 45 Fed. Reg. 72995 (1980), reproduced as a note under 42 U.S.C. 2000d-1.

Procedures

Administrative and Enforcement

The administrative processes required at GAO by section 509(6) of the ADA differ from those under the CAA. Section 509(6) will require a process comparable to that used for EEO complaints, under which the complaining party initiates the proceeding and pursues the complaint. The legislation does not require an administrative hearing, and GAO's draft order does not provide for one.

The CAA adopts an enforcement-based process, under which the complaining individual files a charge with the General Counsel of the Office of Compliance, who investigates and decides whether he believes a violation may have occurred.[1] If so, the General Counsel may request mediation, and, if necessary, may file a complaint. The complaint is submitted to a hearing officer for an adjudicatory hearing, subject to appeal to the Office of Compliance Board. The charging party, while not entitled to file a complaint, may intervene as a party if the General Counsel does so.

The administrative process at GAO is similar to that in the executive branch under section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in the programs and activities of federal agencies. The statute does not specify what procedures shall be applied, but many agencies have established an administrative process under which the agency investigates complaints, responds in writing, and provides an appeal within the agency.[2]

Judicial

In entitling individuals to sue GAO for violations of the public access provisions of the ADA, section 509(6) differs from the CAA. A final decision of the Office of Compliance Board is subject to review by the U.S. Court of Appeals for the Federal Circuit, but a complaint alleging that an office under the CAA violated the public access provisions may not be brought as a civil action in district court.[3] In this respect, the law for GAO will be similar to that for state and local governments and the private sector and for the executive branch, where violation of public access provisions of the ADA may be vindicated in district court.

The prohibition against retaliation under section 503 the ADA applies to individuals seeking public access to GAO, but an individual who claims such retaliation will not be entitled to a

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[1] 2 U.S.C 1331 (d).

[2] *See* 29 U.S.C. 794(a); 53 Fed. Reg. 25872 (1988) (promulgating regulations for 13 different agencies, based on a prototype prepared by the Department of Justice, *e.g.*, OPM regulations codified at 5 C.F.R. part 723).

[3] 2 U.S.C. 1410.

judicial remedy. Section 503 is not included among the ADA sections referenced in section 509(6) of the ADA, which makes the "remedies and procedures" of section 717 available at GAO. In comparison, the CAA does not prohibit retaliation against individuals who assert rights under the ADA public access provisions. The CAA does not make section 503 of the ADA applicable, and section 207 of the CAA, which forbids retaliation against covered employees, does not apply to individuals who use public services and accommodations who are not covered employees.[1]

Relief

The law at GAO would apply the remedies of section 717 of title VII in cases under title II and title III of the ADA. Section 717 provides relief tailored to EEO situations, including back pay. This differs from the CAA, which makes available the same relief as is available under the ADA in cases involving state or local governments or the private sector.

Section 203 of the ADA provides that, in case of a violation of title II, relief may be available either under section 717 or under title VI of the Civil Rights Act. Title VI does not specify what relief is available, but courts have found that injunctive relief, but not back pay or other damages, is available.[2] Section 308(a) of the ADA provides that, in the case of a violation of title III, either the remedies under title II (which forbids discrimination by public accommodations) or injunctive relief to alter facilities will be available.[3] Under title II of the Civil Rights Act, "preventive relief," including injunction, is available, but courts have found that damages are not available.[4]

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1 2 U.S.C. 1317.

2 *See, e.g., Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981).

3 42 U.S.C. 12188(a).

4 42 U.S.C. 2000a-3(a); *see, e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990).

CONCLUSIONS

Substantive Rights

GAO employees are currently granted substantive rights under most CAA laws, and, one year after this study is transmitted to Congress, the CAA will extend the substantive rights under additional laws to fill most remaining gaps in coverage. In addition, GAO employees enjoy many of the substantive civil service protections that apply generally in the executive branch. Consequently, employees at the instrumentality have certain rights and protections beyond those afforded legislative branch employees covered by the CAA. No employee comment endorsed the idea of transferring GAO from civil-service-based coverage to CAA coverage, and some employees suggested that it would be advisable to provide GAO employees with a statutory guarantee of all protections that apply in the executive branch.

Administrative Processes

GAO provides several avenues for administrative resolution of employee complaints and grievances on a wide range of subjects. However, one element of comprehensiveness and effectiveness is the independence of administrative procedures, and, in this respect, the picture at GAO is mixed. GAO employees can submit claims and appeals to the PAB in a number of areas — including EEO, appealable adverse actions, and prohibited personnel practices. These rights are in some respects broader in scope than those available under the CAA, which allows appeals to the Board only under the specific laws covered by the Act. The PAB's investigatory, enforcement, and oversight authorities in various areas, as well as the investigatory functions of GAO's Civil Rights Office, significantly exceed the investigation, enforcement, and oversight provided under the CAA. However, the PAB is administratively a part of GAO, and, while some employees commented that the PAB seems to act independently and without bias, others reported widespread employee dissatisfaction largely because of concerns about a lack of independence.

One recently imposed limitation on administrative enforcement at GAO — and a subject of dissatisfaction expressed in employee comments — is the provision in FY96 appropriations legislation forbidding the PAB to stay a RIF, even if discriminatory or otherwise a prohibited personnel practice. Like the MSPB for the executive branch, the PAB may generally stay agency action that is based on a prohibited personnel practice. It should be noted that such stay authority is outside the scope of remedies made available to covered employees by the CAA.

The legislative decision to establish the PAB as an office within GAO was originally intended to avoid subjecting GAO to the regulatory authority of the executive branch agencies that it may be called upon to audit. However, this decision is apparently undergoing reconsideration. GAO advised the Board that, because of budgetary considerations, the House Appropriations Committee has asked GAO to find a more appropriate placement for the functions that the PAB now performs, and that GAO has been considering this matter but has not come to any conclusions.

Judicial Processes and Relief

GAO employees either now have, or will be granted under the CAA, rights to use judicial procedures that are generally comparable to rights available to covered Congressional employees under the CAA. However, under certain applicable laws, the right to jury trial and to recover certain kinds of relief are not available to GAO employees. For example, GAO employees, like executive branch employees, arguably may not request a jury trial in cases under the ADEA, EPA, or FLSA, and may not recover compensatory damages under 42 U.S.C. 1981 or liquidated damages under the ADEA.

After the *Ramey* decision, GAO employees may not file a civil action in district court on a discrimination complaint after having appealed to the PAB. Employee comments expressed their dissatisfaction with this result, pointing out that executive branch employees may sue in district court and obtain a trial *de novo* even after appealing to the EEOC. However, under the CAA, covered employees must make a similar election, between either filing a civil action in district court or filing an administrative complaint with the Office of Compliance and thereby foregoing the right to file a civil action (although retaining the right to obtain appellate court review of final Board decisions).

In addition, the court in *Ramey* declined to decide whether GAO employees have the option of bringing a civil action on a discrimination complaint even before having appealed to the PAB. The resulting uncertainty can be resolved only through further litigation or by enactment of legislation.

Independent Process for Issuing Substantive Regulations

For most of the laws made applicable by the CAA, the substantive rights of GAO employees are generally defined not by GAO management, but by applicable statutes and Government-wide regulations adopted by executive branch agencies, or will be defined by regulations of the Office of Compliance Board when they go into effect with respect to GAO. However, in one significant exception, GAO's order establishing a labor-management program includes limits on appropriate bargaining limits and on the scope of bargaining that are more restrictive than the provisions in Chapter 71 or in regulations adopted by the Board under the CAA, based on FLRA regulations. In this respect, GAO has authority to define (and limit) employee rights that is not granted to employing offices under the CAA.

Furthermore, GAO has some authority to define its employees' rights with respect to certain general civil service protections outside the scope of the CAA. For example, amendments to GAOPA in the FY96 appropriations legislation granted the GAO wide latitude in establishing job retention rights in the conduct of RIFs. Certain employee comments were critical of the degree of latitude granted GAO in employment matters generally, especially the broad authority recently granted to GAO regarding RIFs.

The study also identified several issues regarding GAO that warrant further discussion:

FMLA

GAO is now subject to the FMLA provisions in civil service law, codified in Title 5 of the U.S. Code, and by OPM regulations implementing those provisions. However, section 202(c) of the CAA transfers coverage of GAO from the civil service provisions to the private sector provisions of the FMLA (codified in Title 29 of the U.S. Code), effective as of one year after this study is transmitted to Congress.[1] Section 202(c) will grant employees a private right of action that is unavailable for FMLA violations under civil service law, but will also reduce substantive FMLA protections, which are stronger under civil service law than in the private sector.

Section 202(c) covers Library of Congress as well as GAO, and both instrumentalities recommended that section 202(c) be rescinded. They explained that they have already established their FMLA leave systems in conformity with Title 5 requirements and within the parameters of the general federal leave system, and a shift to Title 29 would, in their view, be administratively disruptive without serving a significant public purpose.

GAO employees did not comment on this subject, but two unions of Library employees recommended that coverage be retained under Title 5, because Title 29 provides exemptions tailored to the private sector that are not appropriate to civil service employment. The unions also stated that the right to sue for civil damages under Title 29 would be "a rather extraordinary remedy when extended to federal employees," and that "administrative remedies which are typically available to federal employees would appear to be a more appropriate response to" an FMLA violation. On the other hand, section 202(c) furthers the general principle, expressed by Congress in enacting the CAA, that private sector law should apply to the legislative branch.

WARN

Employees at GAO do not now have protection under the WARN Act, but the CAA extends protection one year after this study is transmitted to Congress. However, GAO recommended that the application of WARN Act requirements to GAO should be rescinded, because greater employee protection is already available under a GAO Order governing RIFs. Applying to any RIF, no matter how small, the Order affords substantive rights generally more comprehensive than those under the WARN Act. Furthermore, while relief under the WARN Act is limited to 60 days' back pay, under GAO's Order the PAB may order the employee reinstated until the notice defect is corrected, in addition to back pay.

However, the WARN Act provisions of the CAA establish only a minimum level of notice protection, and do not foreclose the retention of additional protections in GAO's Order. Furthermore, the CAA provisions afford certain rights and protections not provided by GAO's Order. Employees who allege a violation of the WARN Act requirements of the CAA have the right to file a civil action — a right that is not available in case of a violation of the GAO Order.

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[1] Section 202(c) of the CAA, 2 U.S.C. 1312(c).

Furthermore, unlike the notice requirements that GAO management chose to incorporate in its RIF Order, the WARN Act provisions of the CAA are guaranteed in statute and cannot be modified or rescinded by any employing office.

GOVERNMENT PRINTING OFFICE
(GPO)

OVERVIEW

The Government Printing Office (GPO) prints, binds, and distributes the publications of the Congress, as well as the executive branch of the federal government. The Public Printer, who serves as head of the agency, is appointed by the President with the advice and consent of the Senate.

Although GPO is a part of the legislative branch, most GPO employees are included in the federal competitive service, and employment laws that apply generally in the executive branch apply at GPO. These rights and protections are somewhat similar to those afforded GAO employees except that, unlike GAO, which has its own personnel management system, including the Personnel Appeals Board, GPO is subject to direct regulation by the Office of Personnel Management (OPM), the Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority (FLRA), and other executive branch agencies that regulate executive branch employment.

The federal sector laws and procedures applicable at GPO provide a multiplicity of avenues for administrative consideration of employee complaints. All GPO employees can appeal discrimination complaints to the EEOC, and can apply to the FLRA in case of labor-management disputes. Furthermore, certain kinds of employment actions taken by GPO are subject to appeal to the MSPB, including appealable adverse actions (removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs of 30 days or less) and performance-based actions (removals or reductions in grade).[1]

In addition, GPO has established several internal administrative mechanisms to hear and resolve employee grievances. Over seventy-five percent of GPO employees are covered by collective bargaining agreements and may use the negotiated grievance procedures provided in these agreements.[2] When an employee submits a grievance under these procedures, the matter is presented to the agency and, if necessary, submitted to binding arbitration. Exceptions to the arbitral award may be taken to the FLRA,[3] or, if the grievant objects to an appealable adverse action or performance-based action by the agency, judicial review of the arbitral award may be

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1 *See* 5 U.S.C. 4303, 7512, 7513.

2 *See, e.g.*, Article VII, Master Labor-Management Agreement between Joint Council of Unions, GPO and the GPO, effective April 25, 1988; *see generally*, 5 U.S.C. 7121-7122.

3 *See* 5 U.S.C 7122 and 7703.

obtained in the United States Court of Appeals for the Federal Circuit.[1] GPO has also established a process for handling and resolving complaints of discrimination, and a general administrative grievance procedure under which non-members of bargaining units may present other kinds of grievances to GPO management.[2]

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[1] *See* 5 U.S.C. 7121(f).

[2] *See* GPO Instruction 680.1B, CH-1 (July 25, 1985).

ANTI-DISCRIMINATION LAWS

Substantive Rights

GPO, like GAO, is covered under section 717 of Title VII, section 15 of the Age Discrimination Employment Act (ADEA), the Equal Pay Act (EPA), and section 509 of the ADA,[1] and is not subject to section 501 of the Rehabilitation Act.[2] The substantive rights and protections afforded GPO employees under these laws therefore parallel those afforded GAO employees.

GPO is also included under provisions of civil service statutes that forbid prohibited personnel practices.[3] It is a prohibited personnel practice for a GPO employee who has personnel authority[4] to discriminate in violation of Title VII, the ADEA, or the EPA.[5] Prohibited personnel practices also forbid retaliation for the exercise of certain appeal and "whistleblower" rights with respect to any applicable law.[6]

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1 42 U.S.C. 2000e-16 (Title VII); 29 U.S.C. 633a (ADEA); 29 U.S.C. 206(d) (EPA); 42 U.S.C. 12209 (ADA). Even before enactment of the CAA, most GPO employees were covered under Title VII, the ADEA, and the EPA, because these laws covered units of the legislative branch "having positions in the competitive service," and most GPO employees are in the competitive service. However, sections 201(c)(1) and 203(d) of the CAA amended Title VII, the ADEA, and the FLSA (of which the EPA is a part) to include GPO by name, and all of its employees, under the coverage of these laws. GPO was included under the coverage of section 509 of the ADA as originally enacted in 1990.

2 GPO has advised that section 501 of the Rehabilitation Act, 29 U.S.C. 791(b), applies to the executive branch, and, as an agency in the legislative branch, it is not included.

3 5 U.S.C. 2302(a)(2)(C).

4 *I.e.*, an employee "who has authority to take, direct others to take, recommend, or approve any personnel action." 5 U.S.C. 2302(b)(1).

5 5 U.S.C. 2302(b)(1)(A)-(C). However, according to GPO, the agency is not covered by the prohibited personnel practice that forbids discrimination "on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973." 5 U.S.C. 2302(b)(1)(D).

6 The prohibited personnel practices include discrimination because of the exercise of appeal, complaint, or grievance right granted by any law, assisting any other individual in the exercise of such a right, or for refusing to obey an unlawful order. 5 U.S.C. 2302(b)(9). Prohibited personnel practices also include discrimination for disclosure of information reasonably

(continued...)

ANTI-DISCRIMINATION LAWS

EVALUATION

Substantive Rights and Protections .

At GPO, as at GAO, the basic prohibitions against discrimination under the anti-discrimination laws (title VII, ADEA, ADA and EPA) are generally the same as those afforded other federal sector employees, those in the private sector, and other legislative branch employees covered under the CAA.

Procedures

The administrative and judicial procedures available to GPO employees with discrimination complaints are generally the same as those available to executive branch employees.

Administrative

The procedures for GPO employees are similar to those at GAO, but are significantly different from those under the CAA. Executive branch procedures offer multiple stages of fact finding, decision making, and review, which can be lengthier than under the CAA, and the employing agency plays a much greater role in the initial counseling, mediation, investigation and decision phases.

The EEO complaints procedures available to GPO employees include mechanisms for investigating complaints and taking enforcement action. GPO's EEO Service investigates individual complaints, the EEOC monitors compliance with final decisions of the Commission, and the Office of Special Counsel has authority for taking enforcement actions in discrimination cases, including investigation with or without a charge, seeking corrective action or stays, and disciplinary action. Although similar enforcement authorities are available in the private sector at the EEOC, there is no comparable authority under the CAA, which establishes a dispute resolution process that provides confidential counseling and mediation and an independent administrative hearing.

GPO employees with discrimination complaints generally are afforded access to independent administrative tribunals to the same extent as executive branch employees. Final GPO decisions may be appealed to the EEOC, and certain complaints may be reviewed by the MSPB or the FLRA prior to EEOC review. GPO employees also enjoy the protection of the Office of Special Counsel, which investigates and prosecutes allegations of EEO violations government-wide. Unlike executive branch employees, however, GPO employees may not obtain EEOC review of complaints alleging discrimination on the basis of disability. Other legislative branch employees covered by the CAA may obtain review of any discrimination complaint by the independent Office

of Compliance Board, but the General Counsel of the Office of Compliance has no investigatory or prosecutorial authority in EEO cases.

Judicial

Employees at GPO have the same right as executive branch employees to file a civil action under anti-discrimination laws at various points after filing an administrative complaint or, in the case of an ADEA or EPA claim, as an alternative to filing an administrative complaint. Even after exhausting administrative remedies, these employees retain the right to file a civil action in federal district court and have a trial *de novo*. A jury trial is available in cases under Title VII and the ADA, but probably not under the ADEA and EPA.

For private sector employees and covered legislative branch employees under the CAA, the right to file a civil action and request a jury trial is generally available in discrimination cases. However, under the CAA, a covered employee who elects to pursue an administrative rather than judicial complaint may obtain only appellate judicial review in the Court of Appeals for the Federal Circuit, after exhausting administrative remedies.

GPO employees also enjoy broad protections against retaliation for asserting rights under anti-discrimination laws, similar to the protections available to employees of GAO and the executive branch. GPO employees may seek administrative remedies under the discrimination complaints procedure or negotiated grievance procedure at GPO, or under civil service law. They can also gain access to federal district court in claims of retaliation under Title VII and EPA, but the law is uncertain with respect to ADEA and ADA violations. By comparison, covered legislative branch employees are protected by section 207 of the CAA, which prohibits retaliation for the exercise of rights with respect to any CAA law, including any of the anti-discrimination laws, and private sector employees are protected under specified statutory anti-retaliation provisions in these laws.

Relief

Most types of relief available for discrimination violations are the same for GPO employees as for other legislative branch employees covered under the CAA, as well as executive branch and private sector employees. However, two kinds of damages are available to private sector employees and employees covered under the CAA that are not available to GPO or executive branch employees: *(a)* compensatory damages for discrimination involving race, ancestry, and ethnicity, under 42 U.S.C. 1981; and *(b)* liquidated damages in the case of a willful violation of the ADEA, in an amount equal to the amount owing as a result of the violation.

In addition, certain punitive damages and penalties are available against private sector employers in title VII and ADA cases that are not available against federal government employers, including employing offices under the CAA, in the executive branch, and GPO.

Timeliness in Resolving Discrimination Complaints

Commenters expressed concern about the slowness with which they believe GPO processes discrimination cases.

The EEOC has reported that the average case processing time by GPO was 620 days for cases closed in FY94, and 940 days for cases closed in FY93.[1] Of the more than 80 federal agencies included in the EEOC survey, GPO was in the 15%, with the longest average case processing times.

[1] The Equal Employment Opportunity Commission issues annual reports on case handling in the federal sector agencies over which it exercises jurisdiction. In Fiscal Year (FY) 1994, the EEOC reported that the average processing time at GPO, leading to the closure of a total of 54 cases, was 620 days per case. In that year, GPO's rank among federal agencies was 72nd out of 84 agencies, where the first agency on the list has the lowest average days per case. In FY 1993, the average case processing time for a total of 23 cases closed at GPO was 940 days per case. That placed GPO 72nd among 80 agencies on which EEOC reported. *See* EEOC, "Federal Sector Report on EEO Complaints and Appeals -- By Federal Agencies for Fiscal Year 1994," at pages 34-36; EEOC, "Federal Sector Report on EEO Complaints and Appeals -- By Federal Agencies for Fiscal Year 1993," at pages 34-36.

Procedures

Administrative

GPO — unlike GAO — is subject to the requirements prescribed by the EEOC for agency EEO programs, and to the EEOC's authority to hear appeals from GPO's decisions on discrimination complaints.[1] The EEOC's authority with respect to GPO extends to discrimination under Title VII, the ADEA, and the EPA,[2] but not under the ADA.[3]

The GPO Discrimination Complaint Process. GPO's Equal Employment Opportunity Service (EEO Service) administers a process for resolving complaints of discrimination against GPO. For allegations of a violation of title VII, the ADEA, and the EPA, the complaints process is governed by EEOC's regulations for executive branch agencies,[4] and for allegations of ADA violations, GPO's complaints process is similar.[5] Under this process, GPO employees who allege violations of anti-discrimination laws must bring the matter to the attention of an EEO counselor within 45

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[6] (...continued)
believed to evidence a violation of law or gross mismanagement. 5 U.S.C. 2302(b)(8).

[1] *See* 29 C.F.R. part 1614. Reflecting the terms of the anti-discrimination laws prior to the enactment of the CAA, EEOC's regulations state that their coverage includes units of the legislative branch "having positions in the competitive service," but do not expressly cover GPO in its entirety. 29 C.F.R. 1614.103(b)(4). However, the EEOC has advised that it intends to update its regulations to cover GPO by name, in conformity with the amendments made by the CAA.

[2] *See* 42 U.S.C. 2000e-16(b) (Title VII); 29 U.S.C. 633a(b) (ADEA); Section 1 of Reorg. Plan No. 1 of 1978, reproduced in 5 U.S.C. appendix (transferring to the EEOC the authority to enforce and administer the EPA); 29 C.F.R. 1614.103(a), (b)(4).

[3] Section 509(5) of the ADA, 42 U.S.C. 12209(5), which was added by section 201(c)(3)(E) of the CAA, provides that, with respect to GPO employees, the authorities of the EEOC are to be exercised by the head of GPO.

[4] *See* GPO Instruction 650.1C, "Equal Employment Opportunity and Affirmative Action Programs in the Government Printing Office" (Mar. 29, 1979); GPO Notice 650-29, "Changes to the Discrimination Complaint Process" (Dec. 1, 1992). The 1992 Notice advised employees that EEOC's new regulations, at 29 C.F.R. part 1614, had gone into effect, and that the discrimination complaint process had been changed. The Notice also stated that GPO's Instruction 650.1C was in the process of being revised.

[5] *See* GPO Notice 650-30, "Procedures for filing Discrimination Complaints Based on Disability" (May 5, 1993).

days of the alleged act. The EEO Service provides counseling to the complainant and offers voluntary mediation at the option of the complainant.[1]

If attempts to resolve the matter informally are not successful, a formal complaint is submitted, which is investigated by GPO's EEO Service.[2] After receiving the investigation report, or after 180 days, the complainant may request a hearing, in which case the EEOC appoints an administrative judge to conduct the hearing and issue findings of fact and conclusions of law and order appropriate relief.[3] After the hearing, or if the complainant declines to request a hearing, GPO has 60 days within which to issue a final agency decision, including findings and appropriate remedies and relief. GPO may reject or modify the findings and conclusions or relief ordered by the administrative judge, but, if the agency does not do so within the 60-day deadline, the administrative judge's order becomes the final agency decision.[4]

The GPO Negotiated Grievance Procedures. Members of bargaining units may also grieve claims of unlawful discrimination under the negotiated grievance procedures established under collective bargaining agreements.[5]

Appeal to the EEOC. GPO employees may have the EEOC review a final GPO decision on a

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[1] *See* GPO Instruction 650.12 (June 3, 1994), "Mediation for Equal Employment Opportunity Claims." The mediators are EEO counselors or other GPO employees trained as mediators.

[2] In the case of a class complaint, necessary fact-gathering is ordinarily conducted by the parties through discovery, although the administrative judge may request that the agency conduct an investigation if necessary. *See* 29 C.F.R. 1614.204(f); Paragraphs 11.f-g of GPO Notice 650-30 (May 5, 1993).

[3] *See* EEOC's regulations at 29 C.F.R. 1614.108(f). For claims of discrimination on the basis of disability, for which GPO is not governed by EEOC regulations, GPO's regulations do not authorize the employee to request a hearing until the investigation is completed, even if it takes longer than 180 days. Paragraph 10.d(2) of GPO Notice 650-30. If a hearing is requested in a disability case, GPO, by agreement with the EEOC, appoints an EEOC administrative judge to hear the case.

[4] *See* EEOC's regulations at 29 C.F.R. 1614.109(g). For claims of discrimination on the basis of disability, GPO's regulations do not cause the administrative judge's order to become the agency's final decision, even if the agency takes longer than 60 days to reach a final decision. Paragraph 10.d(2) of GPO Notice 650-30.

[5] *See* 29 C.F.R. 1614.301.

discrimination complaint (except for complaints alleging disability discrimination).[1] A grievant under a negotiated grievance procedure may have the EEOC review the final decision of the arbitrator or the FLRA.[2]

"Mixed Case" Complaints and Appeals. Even though the GPO is in the legislative branch, certain GPO employees are entitled to appeal certain kinds of agency actions to the MSPB.[3] Such an appeal to the MSPB may include allegations of employment discrimination under any of the anti-discrimination laws applicable at GPO. Civil service statutes and regulations provide a multiplicity of appeal rights available for "mixed case" complaints and appeals in the federal government.[4] These provisions afford the employee various options to elect consideration of the complaint sequentially under the GPO's EEO complaint procedure, by the MSPB, by the EEOC, and, if these appellate boards disagree, by a Presidentially appointed Special Panel.[5]

Enforcement of EEO Decisions and Settlements. The complainant may appeal to the EEOC for a determination as to whether the agency has complied with a settlement agreement or final agency decision,[6] or for enforcement of an EEOC final decision.[7] The EEOC has also directed its Office of Federal Operations to ascertain whether an employing agency is implementing a decision, and to submit findings and recommendations for enforcement to the EEOC or other appropriate agency, and, where appropriate, the EEOC may refer the matter to the Office of Special Counsel for enforcement action.[8] (The Special Counsel's enforcement authority is described below.)

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1 *See* 29 C.F.R. 1614.401(a)-(b).

2 *See* 29 C.F.R. 1614.401(c).

3 These include serious adverse actions resulting from a performance appraisal or effected by a RIF and certain other appealable adverse actions. *See*, *e.g.*, 5 U.S.C. 4301 *et seq.* (performance appraisals); 5 U.S.C. 7511 *et seq*. (appealable adverse actions); *see generally* 5 C.F.R. 1201.3 (summary of MSPB's appellate jurisdiction).

4 5 U.S.C. 7702; 5 C.F.R. 1201.151-1201.175 (MSPB regulations); 29 C.F.R. 1614.302-1614.310 (EEOC regulations).

5 Complaints asserting discrimination on the basis of disability, not being appealable to the EEOC, are also not included under the provisions of civil service statute and regulation governing "mixed cases."

6 29 C.F.R. 1614.504.

7 29 C.F.R. 1614.503.

8 *Id.*

Other Avenues of Enforcement. Under civil service law applicable to GPO, the Special Counsel is responsible for investigating any allegation of the occurrence of a prohibited personnel practice, and is authorized to conduct an investigation even in the absence of an allegation.[1] Based on the outcome of the investigation, the Special Counsel may request a stay from the MSPB, may submit a report to the agency involved in recommending corrective action, may petition the MSPB for corrective action, or may submit a complaint to the MSPB recommending disciplinary action. An employee may apply directly to the MSPB for corrective action or stay in the case where an agency retaliates because of "whistleblowing" by the employee.[2]

Judicial

Civil Action. Unlike GAO employees, whose right to file a civil action is affected by the GAOPA and the *Ramey* decision,[3] GPO employees have the right to file a civil action to the full extent provided under the applicable anti-discrimination laws. A GPO employee may file a civil action after having filed a complaint and after having reached one of four stages in the administrative processing of the complaint: *(i)* after 180 days from filing the complaint with the employing agency, if there is no final agency decision on the complaint, or *(ii)* within 90 days of receipt of notice of final action by the employing agency, or *(iii)* after 180 days from appealing to the EEOC, if there is no final decision by EEOC, or *(iv)* within 90 days of receipt of notice of final decision by EEOC on appeal.[4] (In the case of an EPA complaint, the employee may file a civil action regardless of whether he or she has pursued any administrative complaint processing.)[5]

As explained in the section on GAO, a jury trial may be requested in civil actions under Title VII or the ADA if the complaining party seeks compensatory damages, but a jury trial is not available in an EPA action, and probably not in an ADEA action, brought against a federal agency. And GPO employees, like GAO employees, may not be able to bring a civil action in case of retaliation for exercising ADEA or ADA rights. However, as retaliation is forbidden under applicable EEO regulations,[6] and under prohibited personnel practices, GPO employees may seek protection against retaliation through available administrative procedures.

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1 5 U.S.C. 1214-1215.

2 5 U.S.C. 1221.

3 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

4 42 U.S.C. 2000e-16(c); 29 U.S.C. 633a(c); 42 U.S.C. 12209(5); 29 C.F.R. 1614.408.

5 29 U.S.C. 216(b) (right to file a civil action under the FLSA, of which the EPA is a part); 29 C.F.R. 1614.409.

6 *See* 29 C.F.R. 1614.101(b) (EEOC regulations); Paragraph 8 of GPO Notice 650-30, "Procedures for Filing Discrimination Complaints Based on Disability" (May 5, 1993).

Relief

The relief available in an EEO case brought by a GPO employee is the same as for a GAO employee. In appropriate cases, this may include reinstatement or hiring, with or without back pay, or other injunctive relief.[1] In addition, in a case under Title VII or the ADA, compensatory damages may also be available for intentional discrimination,[2] and in a case under the EPA, double damages may be available as liquidated damages, unless the employer shows that its act or omission was in good faith.[3]

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[1] In case of a violation of Title VII or the ADA, the following relief may be available to a GPO employee: Enjoining unlawful employment practices, ordering that such affirmative steps be taken as may be appropriate, including reinstatement or hiring, with or without back pay, or any other equitable relief as may be deemed appropriate. Interest may be awarded to compensate for delay in payment. *See* 42 U.S.C. 2000e-5(g); 42 U.S.C. 2000e-16(d); 42 U.S.C. 12209(5). In case of a violation of the ADEA, the relief available to a GPO employee is such legal or equitable relief as will effectuate the purposes of the ADEA. 29 U.S.C 633a(c). In case of a violation of the EPA, a GPO employee may recover any amount withheld from an employee in violation of EPA requirements. 29 U.S.C. 216(b).

[2] 42 U.S.C. 1981a affords compensatory damages for intentional discrimination in violation of Title VII or the ADA. In such a case, compensatory damages for future pecuniary losses, emotional pain and suffering, and other nonpecuniary losses are capped at no more than $300,000.

[3] *See* 29 U.S.C. 206(d)(3), 216(b), 260.

ANTI-DISCRIMINATION LAWS

EVALUATION

Substantive Rights and Protections .

At GPO, as at GAO, the basic prohibitions against discrimination under the anti-discrimination laws (title VII, ADEA, ADA and EPA) are generally the same as those afforded other federal sector employees, those in the private sector, and other legislative branch employees covered under the CAA.

Procedures

The administrative and judicial procedures available to GPO employees with discrimination complaints are generally the same as those available to executive branch employees.

Administrative

The procedures for GPO employees are similar to those at GAO, but are significantly different from those under the CAA. Executive branch procedures offer multiple stages of fact finding, decision making, and review, which can be lengthier than under the CAA, and the employing agency plays a much greater role in the initial counseling, mediation, investigation and decision phases.

The EEO complaints procedures available to GPO employees include mechanisms for investigating complaints and taking enforcement action. GPO's EEO Service investigates individual complaints, the EEOC monitors compliance with final decisions of the Commission, and the Office of Special Counsel has authority for taking enforcement actions in discrimination cases, including investigation with or without a charge, seeking corrective action or stays, and disciplinary action. Although similar enforcement authorities are available in the private sector at the EEOC, there is no comparable authority under the CAA, which establishes a dispute resolution process that provides confidential counseling and mediation and an independent administrative hearing.

GPO employees with discrimination complaints generally are afforded access to independent administrative tribunals to the same extent as executive branch employees. Final GPO decisions may be appealed to the EEOC, and certain complaints may be reviewed by the MSPB or the FLRA prior to EEOC review. GPO employees also enjoy the protection of the Office of Special Counsel, which investigates and prosecutes allegations of EEO violations government-wide. Unlike executive branch employees, however, GPO employees may not obtain EEOC review of complaints alleging discrimination on the basis of disability. Other legislative branch employees covered by the CAA may obtain review of any discrimination complaint by the independent Office

FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

Substantive Rights

GPO, like GAO, is covered by the provisions of civil service law enacted by the FMLA[1] and by OPM's FMLA regulations,[2] which are described in the section of this study on GAO. GPO has also promulgated its own internal policy to ensure FMLA compliance, and to provide instructions for processing FMLA requests.[3]

Procedures

The FMLA civil service provisions do not provide any administrative or judicial processes by which employees may seek redress for violations. Therefore, employees who believe their rights have been violated must rely on the various remedial provisions available generally for employment-related disputes in the federal government. Several administrative and judicial avenues are available to GPO employees:

Appeal to the MSPB. As GAO employees may turn to the PAB to seek redress for FMLA violations, a GPO employee may request MSPB review of an appealable GPO action that the employee believes was in violation of the FMLA. For example, if an employee suffers an appealable adverse action or performance-based action, the employee may appeal under civil

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1 5 U.S.C. 6381-6387, added by Pub. L. No. 103-3, title II, 107 Stat. 19 (Feb. 5, 1993). Coverage of the FMLA civil service provisions includes, among others, most employees of agencies headed by Presidential appointees, and the Public Printer is such a Presidential appointee. *See* 5 U.S.C. 2105(a)(1)(A), (D), 6301(2)(A), 6381(1)(A).

2 5 C.F.R. 630.1201-630.1211 (regulations promulgated by OPM). Regulations promulgated by the Secretary of Labor implementing the private sector provisions of the FMLA contain a provision stating that these regulations also apply to GPO. 29 C.F.R. 825.109(d). However, this provision is incorrect, since the private sector FMLA provisions do not apply to any employee covered by the civil service FMLA provisions. *See* 29 U.S.C. 2611(2)(B)(I). A Department of Labor official has acknowledged orally that the regulations' purported coverage of GPO is incorrect, and has said that this will be confirmed to the Office of Compliance in writing.

3 GPO Instruction 645.16, "Family/Medical Leave Without Pay (FMLWOP) Under the Family and Medical Leave Act of 1993" (Aug. 5, 1993).

FAIR LABOR STANDARDS ACT OF 1938
(FLSA)

Substantive Rights

Statutes

Most GPO employee have been covered under the Fair Labor Standards Act (FLSA) since the enactment of the Fair Labor Standards Amendments of 1974.[1] The CAA amended the FLSA so as to extend coverage to all nonexempt employees.[2] The substantive provisions of the FLSA and OPM's regulations implementing the FLSA, which also cover GPO, are described in the section of this study on GAO.

Some GPO employees have additional coverage under the civil service laws and OPM regulations. Those GPO employees whose compensation is determined by a conference between the Public Printer and a committee selected by the trades affected, are entitled to overtime in accordance with the overtime provisions of 5 U.S.C. 5544.[3] Employees are entitled to overtime (at a rate of not less than time and one-half) for work in excess of 40 hours a week or 8 hours a day. OPM is been responsible for administering this provision in conjunction with its responsibilities for administering the FLSA. By regulation, OPM is to prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for purposes of section 7 of the FLSA, so as to ensure that no employee receives less than what he or she would receive under 5 U.S.C. 5544.[4]

GPO and its employees are also covered under the pay provisions of the Kiess Act (which applies to GPO only).[5] Among other things, this statute states that the "minimum pay of journeymen printers, pressman, and bookbinders employed in the Government Printing Office shall be at the

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[2] The CAA, aside from applying certain rights and protections of the FLSA to the legislative branch, amended this definitional section of the FLSA by striking the reference to "legislative" in clause (iii) and adding as a new clause (vi) "the Government Printing Office." 29 U.S.C. 203(e)(2)(A)(vi), added by section 203(d) of Pub. L. No. 104-1, 109 Stat. 10 (January 23, 1995).

[3] 46 Comp. Gen. 217 (1966); B-191619, 1978 WL 9921 (C.G. May 9, 1978).

[4] *See* section 2(42)(B) of Pub. L. No. 102-378, 106 Stat. 1352, amending 5 U.S.C. 5544(a).

[5] 44 U.S.C. 305.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Substantive Rights

GPO is currently covered by section 19 of the OSHA,[1] as well as the related provisions of 5 U.S.C. 7902, which require GPO to establish and maintain a comprehensive occupational safety and health program. These are the same provisions as apply to GAO, and the requirements of these provisions are described in the GAO portion of this study.

Regulations

GPO Instructions. Although the OSHA regulations promulgated by the Secretary of Labor are not binding on GPO, the applicable statutes require that GPO's OSHA program be consistent with the standards promulgated by the Secretary, and GPO operates through negotiated agreements and GPO-issued instructions as though the Secretary's regulations did apply. The GPO instructions and agreements address issues ranging from the creation of safety and health programs to the establishment of safety requirements and procedures, and refer to the Secretary's regulations as guidance in developing these instructions.[2]

Procedures

Administrative

GPO's complaint procedures. Under procedures established by GPO,[3] employees are instructed to report hazards or unsafe conditions in writing to their supervisor. If corrective action is not

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1 29 U.S.C. 668.

2 For example, GPO's instruction establishing its "Occupational Safety and Health Policy" cites section 19 of the OSHA, Executive Order 12196, (describing the Occupational Safety and Health Program for Federal Employees), and 29 C.F.R. 1960 as the guidelines that the agency relied on in establishing the policy. *See* GPO Instruction 670.42, "Occupational Safety and Health Policy" (Aug. 29, 1986). *See also*, e.g. GPO Instruction 670.50, "Electrical and Mechanical Lockout-Tagout Safety Procedures" (May 1, 1991) ("It is the policy of the GPO that the OSHA safety regulations appearing in 29 C.F.R. 1910.47 be adopted to provide maximum employee protection and that the procedures identified in this Instruction be followed to implement that regulation."); GPO Instruction 670.1B, "Foot Protection Program" (May 5, 1995) (citing as authority 5 U.S.C. 7902 and 29 U.S.C. 668).

3 *See* GPO Instruction 670.55, "Procedure to Report Hazards, Unsafe Conditions or Practices" (Oct. 22, 1993).

taken by the supervisor, or the employee believes that the action taken is not appropriate, the employee may submit a follow-up report. Within 30 days, the unit Occupational Safety and Health Committee (OSHC) will forward to the employee a written report on the status of the complaint and corrective action. If the employee believes that the determination of the unit OSHC does not adequately address the problem, or that the recommendations to correct the situation are not appropriate, the employee may refer the problem to the GPO safety office. Upon request of the employee his or her name will not be disclosed.

The negotiated grievance procedure for bargaining unit employees may also be used by bargaining unit employees who believe that occupational safety and health standards are violated.

GPO's compliance mechanisms. GPO's Occupational Health and Environmental Services unit conducts comprehensive safety and industrial hygiene surveys and inspections on a regular basis, maintains a computerized tracking system to follow through on corrective actions required as a result of inspections, conducts formal accident investigations, maintains a plan for hazard abatement and control, and conducts hazard awareness training for employees and supervisors.[1]

Based on the Labor Secretary's safety and health regulations, GPO established the Occupational Safety and Health Committee Program. A Joint Labor-Management Safety Committee was created, allowing direct union/employee participation and discussion of safety-related matters. Under the Program, there are also seventeen local Occupational Safety and Health Committees.[2] The Joint Labor-Management Committee meets monthly to discuss issues that are better addressed globally than at the local level, and recommends corrections. The local Committees perform various safety-related activities, such as monitoring safety and health programs; and assisting accident investigations.

Judicial

Under current law no judicial remedies are available to GPO employees to redress safety and health issues.

Future-Effective Changes Under the CAA

Unlike GAO and the Library, the rights and protections of OSHA are not made applicable to GPO by section 215 of the CAA.

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[1] *See* comments (dated May 17, 1996) submitted for the study by GPO Director of Occupational Health and Environmental Services.

[2] *See* GPO Instruction 670.49, "Occupational Safety and Health Committees" (Feb. 21, 1990).

EVALUATION

Procedures

Administrative

Under present law, GPO has an internal investigation process and both administrative and negotiated grievance procedures to address employee safety and health complaints. By comparison, under the CAA the General Counsel of the Office of Compliance will exercise the authority to investigate and inspect places of employment under the jurisdiction of employing offices, as well as issue citations and prosecute violations that are not corrected by the employing office named in the citation or notification.[1]

Record Keeping and Report Obligations. Section 19 of OSHA requires agency heads, including the Public Printer, to submit annual reports to the Secretary of Labor on occupational accidents and injuries and on the agency programs established under that section.[2] Section 7902(e) of title 5 imposes similar record keeping and reporting requirements on each agency. However, there is no apparent mechanism for enforcement of these sections against federal agencies. These provisions may arguably impose general record keeping requirements with respect to occupational accidents and injuries on GPO, because it is a federal agency within the meaning of those statutory provisions.

GPO currently maintains an accident reporting and investigation program, under which supervisor's reports, investigation reports of motor vehicle accidents, and medical injury reports are maintained.[3] By comparison, the CAA and the proposed regulations thereunder do not require employing offices to comply with general safety and health record keeping requirements.[4]

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1 2 U.S.C. 1341(c).

2 29 U.S.C. 668(a)(5).

3 *See* GPO Instruction 670.8B, "Accident Reporting System" (Jan. 9, 1987).

4 *See* 142 Cong. Rec. S11021, 3d col. (Sept. 19, 1996) (Notice of Proposed Rulemaking Under section 215 of the CAA).

Judicial

Under present law no judicial remedies are available to GPO employees. Nor would the CAA provide GPO employees with a judicial remedy, but the General Counsel or an employing office aggrieved by a final decision of the Board following a hearing or variance proceeding may file a petition for review with the United States Court of Appeals for the Federal Circuit pursuant to section 407 of the CAA.[1]

[1] 2 U.S.C. 1341(c)(5).

rate of 90 cents an hour for the time actually employed." In addition, the Act states that the Public Printer may grant to an employee who is paid on an annual basis compensatory time off from duty, instead of overtime pay for overtime work.[1]

Regulations

GPO has issued GPO Instruction 640.7B, dated March 19, 1979 (amended December 2, 1994), governing general pay administration. Its intended purpose is "to serve managers as a practical guide concerning pay matters," including overtime. Several aspects of this Instruction are worthy of note relative to the FLSA:

- The Instruction seems to suggest that, for purposes of overtime, exempt employees include not only executive and administrative employees but also supervisory employees. While executive and administrative employees are indeed exempt under section 13 of the FLSA, "supervisors" as such are not included within the exemption. In addition, the FLSA overtime exemption afforded "professional" employees is not specifically mentioned in the Instruction. The GPO advises that it does "not believe the discrepancy [with respect to "supervisors"] has any practical impact."[2] In its view, the employees whom it exempts as "supervisors" would be exempt under the term "executive" as defined in the FLSA implementing regulations issued by OPM. With respect to "professional" employees, GPO advises that despite the lack of the term "professional" in its regulations, it nevertheless treats such employees as exempt, based on OPM grading and classification standards.

- The Instruction provides that compensatory time off in lieu of overtime will be granted to employees in grades PG-14 and PG-15, who perform irregular or occasional overtime work that is ordered or approved by variously named GPO officials.[3]

On June 5, 1995, the Public Printer issued a Notice informing supervisors at all grades, series, and pay levels that any approved work in excess of their basic tour of duty will not be paid at current overtime rates of 150 percent, but with compensatory time off instead. For each hour of overtime worked, a supervisor will receive one hour of compensatory time.

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[1] 44 U.S.C. 305(b).

[2] Memorandum from GPO to Office of Compliance (October 9, 1996).

[3] The authority for allowing compensatory time off is apparently derived from the Kiess Act, 44 U.S.C. § 305(b), since the FLSA does not authorize GPO to satisfy its overtime pay obligations with compensatory time off.

Procedures

GPO employees may seek redress for violation of their FLSA rights through several administrative and judicial avenues:

Administrative

OPM's FLSA compliance process and general claims settlement authority. As more fully described in the section of this study on GAO, employees of GPO who allege violation of their FLSA rights may apply to OPM under its statutory responsibility to receive and settle federal employees' claims against the government.

GPO employees who are members of bargaining units may also submit FLSA complaints under the negotiated grievance procedure, and non-members may proceed under GPO's administrative grievance procedures.

Judicial

An action to recover any unpaid compensation owed under the FLSA may be brought in any court of competent jurisdiction.[1] FLSA actions by federal employees may be brought, under the Tucker Act, in the Court of Federal Claims or, if the amount claimed does not exceed $10,000, in an appropriate federal district court.[2]

Relief

Under the FLSA, GPO employees are entitled to minimum wage and overtime compensation. Additionally, liquidated damages are available, in an amount equal to the amount of unpaid minimum wages or unpaid compensation, except that a court has discretion to reduce or dispense with the award of liquidated damages if the employer shows that the violation was in good faith, and that the employer had reasonable grounds for believing that the act or omission was not a violation. For a violation of the FLSA prohibition against retaliation, legal or equitable relief may be available, including employment, reinstatement, promotion, and the payment of lost wages and an additional amount of liquidated damages.[3]

The FLSA also provides that the court shall allow reasonable attorney's fees.[4]

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[1] 29 U.S.C. 216(b).

[2] 28 U.S.C. 1346(b), 1491.

[3] 29 U.S.C. 216(b), 260.

[4] 29 U.S.C. 216(b).

EVALUATION

GPO is subject to the same FLSA provisions, regulations, and procedures as is the GAO, and the rights and protections under these laws and regulations were evaluated in the section of this study on the GAO. Thus, except as noted below, the evaluation for GAO generally applies to GPO.

GPO, unlike GAO, is not covered by 5 U.S.C. 5543(a), which authorizes federal agencies, at the request of an employee, to grant compensatory time off in lieu of FLSA overtime pay for time spent in "irregular or occasional overtime work." Instead, GPO is covered by a provision of the Kiess Act that authorizes the Public Printer to grant compensatory time off for employees who are paid on an annual basis.[1] Unlike section 5543(a), which includes an express exception from FLSA requirements, it is unclear to what extent this Kiess Act provision can be reconciled with the FLSA, which does not generally allow employers to satisfy overtime obligations with compensatory time off. Similarly, while the FLSA, as recently amended, provides a current minimum wage of $4.75 per hour,[2] the rate specified in the Kiess Act remains at 90 cents per hour.[3]

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1 44 U.S.C. 305(b).

2 Pub. L. No. 104-188 (August 20, 1996).

3 44 U.S.C. 305.

service law to the MSPB,[1] and could argue that the adverse action violated the FMLA and should be reversed.[2]

Administrative and Negotiated Grievance Procedures. For matters not appealable to the MSPB, employees can file a complaint under GPO's general administrative grievance procedure, referred to above. Furthermore, a member of a bargaining unit at GPO can seek resolution of a claim under the negotiated grievance procedure.

OPM's General Claims Settlement Process. A GPO employee can also seek redress by applying to OPM under its statutory responsibility to receive and settle federal employees' claims against the Government.[3]

Judicial

A GPO employee who appeals to the MSPB may obtain review of the MSPB decision by the U.S. Court of Appeals for the Federal Circuit.[4] In appropriate cases, a GPO employee, like a GAO employee, may also bring suit in the Court of Federal Claims for money owed by the government as a result of an FMLA violation, and could seek restoration to position and correction of records, if warranted, as an incident to a monetary judgment. If the claim does not exceed $10,000, the employee can sue in federal district court.[5]

Relief

Since the FMLA civil service provisions do not specify what relief would be available in case of a violation, an aggrieved employee must rely on other laws or on general legal principles to obtain relief. For example, if an employee is demoted, or fired, or denied restoration, the employee can

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1 The MSPB's appellate jurisdiction is summarized at 5 C.F.R. 1201.3.

2 The MSPB has ruled that it has jurisdiction over the FMLA as a defense to an otherwise appealable action, and: "If an adverse action is predicated on the agency's erroneous interference with an employee's rights under the FMLA, such adverse action is in violation of law, and it may not be sustained." *Ramey v. U.S.P.S.*, 70 M.S.P.R .463, 467 (citing 5 U.S.C. 7701(c)(2)(C)).

3 The authority to settle claims against the government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996 transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L. No. 104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

4 *See* 5 U.S.C. 7703.

5 28 U.S.C. 1346(a)(2), 1491(a).

claim compensation due under the Back Pay Act.[1] The employee may also seek to recover the amount of benefits guaranteed by the FMLA that are unlawfully denied, and are therefore due and owing from the Government.

Future-Effective Changes Under the CAA

The CAA does not affect the application of FMLA at GPO, unlike GAO and the Library, which the CAA removes from the civil service version of the FMLA, and places under the private sector FMLA.[2]

EVALUATION

Substantive Rights

GPO is subject to the same FMLA civil service laws and regulations as GAO, and the rights and protections were evaluated in the GAO section of this study. The evaluation for GAO applies in nearly all respects for GPO as well.

The civil service FMLA provisions afford greater substantive rights to employees than the private sector provisions, which are applicable under the CAA, but the civil service version of the FMLA does not provide administrative or judicial procedures.

Procedures

Administrative
Civil service law authorizes a GPO employee to appeal certain kinds of personnel actions to the MSPB, where the employee could argue that the agency's action violated FMLA rights. Furthermore, GPO's administrative grievance procedure is generally available for claims that cannot be presented to the MSPB, but this procedure does not offer a process independent of GPO management. The negotiated grievance procedure is also available, provided the employee is a member of a bargaining unit.

By comparison, the CAA provides administrative procedures, including the right to an adjudicatory hearing and appeal to the independent Board of the Office of Compliance, for a covered employee who alleges any FMLA violation.

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[1] 5 U.S.C 5596.

[2] 2 U.S.C. 1312(c), (e)(1).

Judicial

As discussed in the context of GAO, the civil service remedies and relief available under civil service law in a case of an FMLA violation are less protective of employee rights than those under the CAA and under private sector law.

of Compliance Board, but the General Counsel of the Office of Compliance has no investigatory or prosecutorial authority in EEO cases.

Judicial

Employees at GPO have the same right as executive branch employees to file a civil action under anti-discrimination laws at various points after filing an administrative complaint or, in the case of an ADEA or EPA claim, as an alternative to filing an administrative complaint. Even after exhausting administrative remedies, these employees retain the right to file a civil action in federal district court and have a trial *de novo*. A jury trial is available in cases under Title VII and the ADA, but probably not under the ADEA and EPA.

For private sector employees and covered legislative branch employees under the CAA, the right to file a civil action and request a jury trial is generally available in discrimination cases. However, under the CAA, a covered employee who elects to pursue an administrative rather than judicial complaint may obtain only appellate judicial review in the Court of Appeals for the Federal Circuit, after exhausting administrative remedies.

GPO employees also enjoy broad protections against retaliation for asserting rights under anti-discrimination laws, similar to the protections available to employees of GAO and the executive branch. GPO employees may seek administrative remedies under the discrimination complaints procedure or negotiated grievance procedure at GPO, or under civil service law. They can also gain access to federal district court in claims of retaliation under Title VII and EPA, but the law is uncertain with respect to ADEA and ADA violations. By comparison, covered legislative branch employees are protected by section 207 of the CAA, which prohibits retaliation for the exercise of rights with respect to any CAA law, including any of the anti-discrimination laws, and private sector employees are protected under specified statutory anti-retaliation provisions in these laws.

Relief

Most types of relief available for discrimination violations are the same for GPO employees as for other legislative branch employees covered under the CAA, as well as executive branch and private sector employees. However, two kinds of damages are available to private sector employees and employees covered under the CAA that are not available to GPO or executive branch employees: *(a)* compensatory damages for discrimination involving race, ancestry, and ethnicity, under 42 U.S.C. 1981; and *(b)* liquidated damages in the case of a willful violation of the ADEA, in an amount equal to the amount owing as a result of the violation.

In addition, certain punitive damages and penalties are available against private sector employers in title VII and ADA cases that are not available against federal government employers, including employing offices under the CAA, in the executive branch, and GPO.

Timeliness in Resolving Discrimination Complaints

Commenters expressed concern about the slowness with which they believe GPO processes discrimination cases.

The EEOC has reported that the average case processing time by GPO was 620 days for cases closed in FY94, and 940 days for cases closed in FY93.[1] Of the more than 80 federal agencies included in the EEOC survey, GPO was in the 15%, with the longest average case processing times.

[1] The Equal Employment Opportunity Commission issues annual reports on case handling in the federal sector agencies over which it exercises jurisdiction. In Fiscal Year (FY) 1994, the EEOC reported that the average processing time at GPO, leading to the closure of a total of 54 cases, was 620 days per case. In that year, GPO's rank among federal agencies was 72nd out of 84 agencies, where the first agency on the list has the lowest average days per case. In FY 1993, the average case processing time for a total of 23 cases closed at GPO was 940 days per case. That placed GPO 72nd among 80 agencies on which EEOC reported. *See* EEOC, "Federal Sector Report on EEO Complaints and Appeals -- By Federal Agencies for Fiscal Year 1994," at pages 34-36; EEOC, "Federal Sector Report on EEO Complaints and Appeals -- By Federal Agencies for Fiscal Year 1993," at pages 34-36.

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Procedures

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claim compensation due under the Back Pay Act.[1] The employee may also seek to recover the amount of benefits guaranteed by the FMLA that are unlawfully denied, and are therefore due and owing from the Government.

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The CAA does not affect the application of FMLA at GPO, unlike GAO and the Library, which the CAA removes from the civil service version of the FMLA, and places under the private sector FMLA.[2]

EVALUATION

Substantive Rights

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The civil service FMLA provisions afford greater substantive rights to employees than the private sector provisions, which are applicable under the CAA, but the civil service version of the FMLA does not provide administrative or judicial procedures.

Procedures

Administrative
Civil service law authorizes a GPO employee to appeal certain kinds of personnel actions to the MSPB, where the employee could argue that the agency's action violated FMLA rights. Furthermore, GPO's administrative grievance procedure is generally available for claims that cannot be presented to the MSPB, but this procedure does not offer a process independent of GPO management. The negotiated grievance procedure is also available, provided the employee is a member of a bargaining unit.

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Judicial

As discussed in the context of GAO, the civil service remedies and relief available under civil service law in a case of an FMLA violation are less protective of employee rights than those under the CAA and under private sector law.

FAIR LABOR STANDARDS ACT OF 1938
(FLSA)

Substantive Rights

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Most GPO employee have been covered under the Fair Labor Standards Act (FLSA) since the enactment of the Fair Labor Standards Amendments of 1974.[1] The CAA amended the FLSA so as to extend coverage to all nonexempt employees.[2] The substantive provisions of the FLSA and OPM's regulations implementing the FLSA, which also cover GPO, are described in the section of this study on GAO.

Some GPO employees have additional coverage under the civil service laws and OPM regulations. Those GPO employees whose compensation is determined by a conference between the Public Printer and a committee selected by the trades affected, are entitled to overtime in accordance with the overtime provisions of 5 U.S.C. 5544.[3] Employees are entitled to overtime (at a rate of not less than time and one-half) for work in excess of 40 hours a week or 8 hours a day. OPM is been responsible for administering this provision in conjunction with its responsibilities for administering the FLSA. By regulation, OPM is to prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for purposes of section 7 of the FLSA, so as to ensure that no employee receives less than what he or she would receive under 5 U.S.C. 5544.[4]

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[1] *See* 29 U.S.C. 203(e)(2)(A)(iii), added by section 6(a) of Pub. L. No. 93-259, 88 Stat. 58 (April 8, 1974). This provision formerly referred to "any unit of the legislative or judicial branch of the Government which has positions in the competitive service."

[2] The CAA, aside from applying certain rights and protections of the FLSA to the legislative branch, amended this definitional section of the FLSA by striking the reference to "legislative" in clause (iii) and adding as a new clause (vi) "the Government Printing Office." 29 U.S.C. 203(e)(2)(A)(vi), added by section 203(d) of Pub. L. No. 104-1, 109 Stat. 10 (January 23, 1995).

[3] 46 Comp. Gen. 217 (1966); B-191619, 1978 WL 9921 (C.G. May 9, 1978).

[4] *See* section 2(42)(B) of Pub. L. No. 102-378, 106 Stat. 1352, amending 5 U.S.C. 5544(a).

[5] 44 U.S.C. 305.

rate of 90 cents an hour for the time actually employed." In addition, the Act states that the Public Printer may grant to an employee who is paid on an annual basis compensatory time off from duty, instead of overtime pay for overtime work.[1]

Regulations

GPO has issued GPO Instruction 640.7B, dated March 19, 1979 (amended December 2, 1994), governing general pay administration. Its intended purpose is "to serve managers as a practical guide concerning pay matters," including overtime. Several aspects of this Instruction are worthy of note relative to the FLSA:

- The Instruction seems to suggest that, for purposes of overtime, exempt employees include not only executive and administrative employees but also supervisory employees. While executive and administrative employees are indeed exempt under section 13 of the FLSA, "supervisors" as such are not included within the exemption. In addition, the FLSA overtime exemption afforded "professional" employees is not specifically mentioned in the Instruction. The GPO advises that it does "not believe the discrepancy [with respect to "supervisors"] has any practical impact."[2] In its view, the employees whom it exempts as "supervisors" would be exempt under the term "executive" as defined in the FLSA implementing regulations issued by OPM. With respect to "professional" employees, GPO advises that despite the lack of the term "professional" in its regulations, it nevertheless treats such employees as exempt, based on OPM grading and classification standards.

- The Instruction provides that compensatory time off in lieu of overtime will be granted to employees in grades PG-14 and PG-15, who perform irregular or occasional overtime work that is ordered or approved by variously named GPO officials.[3]

On June 5, 1995, the Public Printer issued a Notice informing supervisors at all grades, series, and pay levels that any approved work in excess of their basic tour of duty will not be paid at current overtime rates of 150 percent, but with compensatory time off instead. For each hour of overtime worked, a supervisor will receive one hour of compensatory time.

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[1] 44 U.S.C. 305(b).

[2] Memorandum from GPO to Office of Compliance (October 9, 1996).

[3] The authority for allowing compensatory time off is apparently derived from the Kiess Act, 44 U.S.C. § 305(b), since the FLSA does not authorize GPO to satisfy its overtime pay obligations with compensatory time off.

Procedures

GPO employees may seek redress for violation of their FLSA rights through several administrative and judicial avenues:

Administrative

OPM's FLSA compliance process and general claims settlement authority. As more fully described in the section of this study on GAO, employees of GPO who allege violation of their FLSA rights may apply to OPM under its statutory responsibility to receive and settle federal employees' claims against the government.

GPO employees who are members of bargaining units may also submit FLSA complaints under the negotiated grievance procedure, and non-members may proceed under GPO's administrative grievance procedures.

Judicial

An action to recover any unpaid compensation owed under the FLSA may be brought in any court of competent jurisdiction.[1] FLSA actions by federal employees may be brought, under the Tucker Act, in the Court of Federal Claims or, if the amount claimed does not exceed $10,000, in an appropriate federal district court.[2]

Relief

Under the FLSA, GPO employees are entitled to minimum wage and overtime compensation. Additionally, liquidated damages are available, in an amount equal to the amount of unpaid minimum wages or unpaid compensation, except that a court has discretion to reduce or dispense with the award of liquidated damages if the employer shows that the violation was in good faith, and that the employer had reasonable grounds for believing that the act or omission was not a violation. For a violation of the FLSA prohibition against retaliation, legal or equitable relief may be available, including employment, reinstatement, promotion, and the payment of lost wages and an additional amount of liquidated damages.[3]

The FLSA also provides that the court shall allow reasonable attorney's fees.[4]

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[1] 29 U.S.C. 216(b).

[2] 28 U.S.C. 1346(b), 1491.

[3] 29 U.S.C. 216(b), 260.

[4] 29 U.S.C. 216(b).

EVALUATION

GPO is subject to the same FLSA provisions, regulations, and procedures as is the GAO, and the rights and protections under these laws and regulations were evaluated in the section of this study on the GAO. Thus, except as noted below, the evaluation for GAO generally applies to GPO.

GPO, unlike GAO, is not covered by 5 U.S.C. 5543(a), which authorizes federal agencies, at the request of an employee, to grant compensatory time off in lieu of FLSA overtime pay for time spent in "irregular or occasional overtime work." Instead, GPO is covered by a provision of the Kiess Act that authorizes the Public Printer to grant compensatory time off for employees who are paid on an annual basis.[1] Unlike section 5543(a), which includes an express exception from FLSA requirements, it is unclear to what extent this Kiess Act provision can be reconciled with the FLSA, which does not generally allow employers to satisfy overtime obligations with compensatory time off. Similarly, while the FLSA, as recently amended, provides a current minimum wage of $4.75 per hour,[2] the rate specified in the Kiess Act remains at 90 cents per hour.[3]

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1 44 U.S.C. 305(b).

2 Pub. L. No. 104-188 (August 20, 1996).

3 44 U.S.C. 305.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Substantive Rights

GPO is currently covered by section 19 of the OSHA,[1] as well as the related provisions of 5 U.S.C. 7902, which require GPO to establish and maintain a comprehensive occupational safety and health program. These are the same provisions as apply to GAO, and the requirements of these provisions are described in the GAO portion of this study.

Regulations

GPO Instructions. Although the OSHA regulations promulgated by the Secretary of Labor are not binding on GPO, the applicable statutes require that GPO's OSHA program be consistent with the standards promulgated by the Secretary, and GPO operates through negotiated agreements and GPO-issued instructions as though the Secretary's regulations did apply. The GPO instructions and agreements address issues ranging from the creation of safety and health programs to the establishment of safety requirements and procedures, and refer to the Secretary's regulations as guidance in developing these instructions.[2]

Procedures

Administrative

GPO's complaint procedures. Under procedures established by GPO,[3] employees are instructed to report hazards or unsafe conditions in writing to their supervisor. If corrective action is not

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1 29 U.S.C. 668.

2 For example, GPO's instruction establishing its "Occupational Safety and Health Policy" cites section 19 of the OSHA, Executive Order 12196, (describing the Occupational Safety and Health Program for Federal Employees), and 29 C.F.R. 1960 as the guidelines that the agency relied on in establishing the policy. *See* GPO Instruction 670.42, "Occupational Safety and Health Policy" (Aug. 29, 1986). *See also*, e.g. GPO Instruction 670.50, "Electrical and Mechanical Lockout-Tagout Safety Procedures" (May 1, 1991) ("It is the policy of the GPO that the OSHA safety regulations appearing in 29 C.F.R. 1910.47 be adopted to provide maximum employee protection and that the procedures identified in this Instruction be followed to implement that regulation."); GPO Instruction 670.1B, "Foot Protection Program" (May 5, 1995) (citing as authority 5 U.S.C. 7902 and 29 U.S.C. 668).

3 *See* GPO Instruction 670.55, "Procedure to Report Hazards, Unsafe Conditions or Practices" (Oct. 22, 1993).

taken by the supervisor, or the employee believes that the action taken is not appropriate, the employee may submit a follow-up report. Within 30 days, the unit Occupational Safety and Health Committee (OSHC) will forward to the employee a written report on the status of the complaint and corrective action. If the employee believes that the determination of the unit OSHC does not adequately address the problem, or that the recommendations to correct the situation are not appropriate, the employee may refer the problem to the GPO safety office. Upon request of the employee his or her name will not be disclosed.

The negotiated grievance procedure for bargaining unit employees may also be used by bargaining unit employees who believe that occupational safety and health standards are violated.

GPO's compliance mechanisms. GPO's Occupational Health and Environmental Services unit conducts comprehensive safety and industrial hygiene surveys and inspections on a regular basis, maintains a computerized tracking system to follow through on corrective actions required as a result of inspections, conducts formal accident investigations, maintains a plan for hazard abatement and control, and conducts hazard awareness training for employees and supervisors.[1]

Based on the Labor Secretary's safety and health regulations, GPO established the Occupational Safety and Health Committee Program. A Joint Labor-Management Safety Committee was created, allowing direct union/employee participation and discussion of safety-related matters. Under the Program, there are also seventeen local Occupational Safety and Health Committees.[2] The Joint Labor-Management Committee meets monthly to discuss issues that are better addressed globally than at the local level, and recommends corrections. The local Committees perform various safety-related activities, such as monitoring safety and health programs; and assisting accident investigations.

Judicial

Under current law no judicial remedies are available to GPO employees to redress safety and health issues.

Future-Effective Changes Under the CAA

Unlike GAO and the Library, the rights and protections of OSHA are not made applicable to GPO by section 215 of the CAA.

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[1] *See* comments (dated May 17, 1996) submitted for the study by GPO Director of Occupational Health and Environmental Services.

[2] *See* GPO Instruction 670.49, "Occupational Safety and Health Committees" (Feb. 21, 1990).

EVALUATION

Procedures

Administrative

Under present law, GPO has an internal investigation process and both administrative and negotiated grievance procedures to address employee safety and health complaints. By comparison, under the CAA the General Counsel of the Office of Compliance will exercise the authority to investigate and inspect places of employment under the jurisdiction of employing offices, as well as issue citations and prosecute violations that are not corrected by the employing office named in the citation or notification.[1]

Record Keeping and Report Obligations. Section 19 of OSHA requires agency heads, including the Public Printer, to submit annual reports to the Secretary of Labor on occupational accidents and injuries and on the agency programs established under that section.[2] Section 7902(e) of title 5 imposes similar record keeping and reporting requirements on each agency. However, there is no apparent mechanism for enforcement of these sections against federal agencies. These provisions may arguably impose general record keeping requirements with respect to occupational accidents and injuries on GPO, because it is a federal agency within the meaning of those statutory provisions.

GPO currently maintains an accident reporting and investigation program, under which supervisor's reports, investigation reports of motor vehicle accidents, and medical injury reports are maintained.[3] By comparison, the CAA and the proposed regulations thereunder do not require employing offices to comply with general safety and health record keeping requirements.[4]

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1 2 U.S.C. 1341(c).

2 29 U.S.C. 668(a)(5).

3 *See* GPO Instruction 670.8B, "Accident Reporting System" (Jan. 9, 1987).

4 *See* 142 Cong. Rec. S11021, 3d col. (Sept. 19, 1996) (Notice of Proposed Rulemaking Under section 215 of the CAA).

Judicial

Under present law no judicial remedies are available to GPO employees. Nor would the CAA provide GPO employees with a judicial remedy, but the General Counsel or an employing office aggrieved by a final decision of the Board following a hearing or variance proceeding may file a petition for review with the United States Court of Appeals for the Federal Circuit pursuant to section 407 of the CAA.[1]

[1] 2 U.S.C. 1341(c)(5).

LABOR-MANAGEMENT RELATIONS
(Chapter 71, Title 5, U.S.C.)

Substantive Rights

Because GPO is expressly included within the definition of employing "agency," GPO employees are directly covered under the federal service labor-management relations statute in chapter 71 of title 5, U.S.C.[1] Thus, they have the right to choose whether to be represented by a labor organization for purposes of bargaining over terms and conditions of employment, they are protected against unfair labor practices that may be committed by either an employing office or a labor organization, and their representatives may avail themselves of the provisions governing the resolution of grievances and of disputes over the negotiability of bargaining proposals. Further, the regulations promulgated by the Federal Labor Relations Authority (FLRA) apply to the GPO.

Procedures

Administrative

The Federal Labor Relations Authority, an independent agency in the executive branch, is responsible for administering chapter 71. The FLRA conducts elections and other proceedings to decide issues of representation, and it rules on whether unfair labor practices have been committed, and orders appropriate relief. The Authority's General Counsel is responsible for investigating and prosecuting such unfair labor practice cases before the FLRA. Through the Federal Services Impasses Panel, the FLRA resolves disputes over the negotiability of bargaining proposals.

Judicial

Decisions of the FLRA are judicially reviewable by the U.S. Courts of Appeals.

EVALUATION

Substantive Rights

Insofar as the CAA applies the rights, protections and responsibilities of chapter 71 to employing offices of the legislative branch, subjecting the GPO to the CAA in lieu of chapter 71 would not result in significant changes in the substantive rules governing labor-management relations.

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[1] 5 U.S.C. 7103(a)(3).

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

Substantive Rights

The Worker Adjustment and Retraining Notification Act (WARN) does not apply to GPO or its employees, nor does this legislation apply to any federal employers, except as made applicable by the CAA and similar law.[1] The WARN Act assures employees in the private sector of notice in advance of office or plant closings or mass layoffs.

GPO noted in its comments that, while not covered under WARN, GPO employees are afforded notice rights established under civil service and labor-management law. GPO, like GAO, applies RIF regulations that guarantee advance notice, ordinarily at least 60 days, to affected employees. However, in contrast to GAO, where applicable RIF regulations are issued by the employing agency, GPO is subject to the RIF regulations promulgated by OPM that apply throughout the executive branch.[2]

Procedures

An employee covered by OPM's RIF regulations who has been furloughed for more than 30 days, separated, or demoted by a RIF may appeal to the MSPB.[3] Judicial review of MSPB decisions may be obtained by appeal to the U.S. Court of Appeals for the Federal Circuit.[4] However, civil service law does not provide the right to file a civil action in case of violation of the notice requirements or other provisions of OPM's RIF regulations.

Furthermore, bargaining unit members at GPO may submit a claim under negotiated grievance procedures alleging a violation of notice requirements, and non-members of bargaining units may

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1 *See* Presidential and Executive Office Accountability Act, Pub. L. No. 104-331.

2 5 C.F.R. part 351. Provisions on RIFs, including the right to receive advance notice, applies under civil service statute to employees of an Executive agency. 5 U.S.C. 3501(b), 3502(d). However, OPM's regulations governing RIFs, which include the guarantee of advance notice, apply as well to legislative and judicial branch employers that are subject to competitive service requirements or that "are determined by the appropriate legislative or judicial administrative body to be covered hereunder." 5 C.F.R. 351.202 (a)(2). Most positions at GPO are in the competitive service and GPO considers itself bound by these OPM regulations.

3 5 C.F.R. 351.901, 1201.3(a)(10).

4 5 U.S.C. 7703.

submit such a claim under GPO's administrative grievance procedures.

Future-Effective Changes Under the CAA

Section 205 of the CAA, which applies the rights and protections of WARN to GAO and the Library employees as of one year after this study is transmitted to Congress, does not apply to GPO.[1]

EVALUATION

In most respects, the rights to advance notice established in OPM's RIF regulations afforded to GPO employees are as extensive as, or more extensive than, the rights afforded under WARN provisions made applicable by the CAA:[2]

- The CAA guarantees notice only in the case of an "office closing" or "mass layoff." As defined in applicable statutes and regulations, these terms involve an employment loss during a 30-day period to a significant number of employees at an employment site.[3] Under OPM's RIF regulations, there is no minimum number of employees who must be affected to trigger notice requirements. If a single employee is separated, demoted, reassigned, or furloughed for more than 30 days, and if the cause is a lack of work, a shortage of funds, reorganization, or certain similar reasons, the action is a RIF and notice must be given.[4]

- Both the CAA and the OPM RIF regulations ordinarily require 60 days advance notice. Both also provide for a shortened notice period in the case of unforeseeable circumstances, but OPM's regulations, unlike the CAA, establish a minimum notice period of 30 days under any circumstances, and allow the notice period to be reduced below 60 days only with the approval of the Director of OPM.[5]

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1 2 U.S.C. 1315(a)(2), (d)(2).

2 The notice requirements under OPM's regulations are similar, but not identical, to those under GAO's RIF Order, which are discussed in the evaluation of the WARN Act in the section of this study on GAO.

3 2 U.S.C 1315 (a)(1); sections 639.3(b) and (c) of Office of Compliance regulations.

4 5 C.F.R. 351.201(a)(2), 351.801(a)(1).

5 5 C.F.R. 351.801(b).

In at least one respect, however, the substantive notice requirements in the CAA provide greater employee protection. In the case of an office closing or mass layoff, when not all employees are to be laid off on the same date, the CAA requires that notice regarding all affected employees be given 60 days before the date on which the first individual is laid off.[1] OPM's RIF regulations contain no such requirement.

Procedures

Administrative

Civil service law does not provide the right to file a civil action in case of violation of the rights under OPM's RIF regulations. Therefore, only administrative processes are available in a case where a GPO employee is affected by a RIF, including where notice requirements were not met.

Judicial

In contrast, an employee covered by the WARN Act provisions of the CAA who alleges a violation may elect to file a civil action. As a jury trial should be available to private sector employees,[2] and any party under the CAA "may demand a jury trial where a jury trial would be available in an action against a private defendant,"[3] a covered employee may request a jury trial under the CAA as well.

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1 *See* Office of Compliance Board regulations implementing the WARN Act, section 639.5(a)(1).

2 *See Bentley v. Arlee Home Fashions, Inc.*, 861 F.Supp. 65 (E.D. Ark. 1994).

3 Section 408(c) of the CAA, 2 U.S.C. 1408(c).

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

Substantive Rights

GPO is covered by the substantive provisions of USERRA, which apply throughout the federal government, and which are described in the section of this study on GAO.[1] Like other employers that are part of the legislative branch, GPO is authorized under USERRA to determine that it is "impossible or unreasonable" to reemploy a person otherwise entitled to reemployment, in which case OPM shall ensure that the person is offered alternative employment of like seniority, status, and pay at a federal executive agency.[2]

Like the Library but unlike GAO, GPO is excluded from coverage by OPM's authority to establish regulations implementing the provisions of USERRA, which applies only to federal executive agencies.[3]

Procedures

Administrative

As was described in the section on GAO, OPM is responsible for offering placement in the executive branch when a legislative branch employer determines it impossible or unreasonable to reemploy an employee after service in a uniformed service, and any employee may invoke the investigation and informal compliance efforts by the Labor Department.[4] However, unlike employees of GAO, GPO employees may not use the other federal sector administrative procedures under USERRA -- representation by the OSC, and adjudication of a complaint before the MSPB -- which apply only to "federal executive agencies."[5]

A GPO employee who suffers a personnel action appealable under general civil service law can

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1 *See* 38 U.S.C. 4303(4)(A)(ii), (5), 4313, 4314.

2 *See* 38 U.S.C. 4314(a), (c).

3 Pursuant to 38 U.S.C. 4303(5), 4331(b)(1), OPM's regulations apply with regard to any "Federal executive agency," which does not include the Library. *See also* 5 C.F.R. 353.102(2) (scope of application of OPM regulations).

4 *See* 38 U.S.C. 4314(c), 4322.

5 *See* 38 U.S.C. 4303(5), 4324.

bring a complaint before the MSPB and allege that the action was taken in violation of USERRA. A member of a bargaining unit may submit a complaint under the administrative grievance procedure.

Judicial
Employees of the federal government, unlike those in the private sector, have no right to file a civil action under USERRA.[1]

Future-Effective Changes under the CAA

Section 206 of the CAA, which applies the rights and protections of USERRA to GAO and Library employees as of one year after this study is transmitted to Congress, does not apply to GPO.[2]

EVALUATION

Substantive Rights

GPO is subject to the substantive provisions of the USERRA, which apply in the private sector and throughout the federal government, and are also made applicable under the CAA.

Procedures

GPO employees may appeal certain personnel actions to the MSPB, which is totally independent of GPO management, but only if the case fits within a category that the MSPB has statutory authority to hear. GPO's administrative grievance procedure is generally available for claims that cannot be presented to the MSPB, but this procedure does not offer a process independent of GPO management. The negotiated grievance procedure is also available, provided the employee is a member of a bargaining unit.

By comparison, the CAA provides administrative procedures, including the right to an adjudicatory hearing and appeal to the independent Office of Compliance Board, for any alleged USERRA violations.

The CAA also provides the right to file a civil action, which is not available to GPO employees

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1 *See* 38 U.S.C. 4323.

2 2 U.S.C. 13116(a)(2)(B)-(C), (d)(2).

under the USERRA. Employees of private employers or state governments may also commence a civil action under the USERRA, or the Attorney General may commence a civil action of behalf of these employees.[1]

[1] *See* 38 U.S.C. 4323.

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988 (EPPA)

The Employee Polygraph Protection Act (EPPA) of 1988 does not apply to GPO or its employees, nor does this legislation apply to any federal employers except as made applicable by the CAA and similar law.[1] EPPA restricts employers' use of lie detector tests of their employees.

Section 204 of the CAA, which applies rights and protections of the EPPA to GAO and Library employees as of one year after this study is transmitted to Congress, does not apply to GPO.[2]

EVALUATION

No rights and protections of EPPA are applicable to GPO and its employees. By comparison, the CAA makes the rights and protections of the EPPA applicable to covered employees of the legislative branch and provides administrative and judicial procedures by which employees may obtain redress in case of a violation.

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1 *See* Presidential and Executive Office Accountability Act, Pub .L. No. 104-331, section 414.

2 2 U.S.C. 1314(a)(2), (d)(2).

THE AMERICANS WITH DISABILITIES ACT OF 1990
(Public Access Provisions)

Substantive Rights

Titles II and III of the ADA, which relate to public access to public services and public accommodations,[1] are applicable in their entirety to certain congressional instrumentalities, including GPO, under section 509 of the ADA.[2] The substantive provisions are described in the section of this report on GAO.

Under ADA titles II and III, the Attorney General has promulgated implementing regulations for matters other than public transportation,[3] and the Secretary of Transportation has promulgated regulations for public transportation matters.[4] GPO has stated that it is not subject to these regulations.

Procedures

Section 509(2) of the ADA requires certain instrumentalities, including GPO, to "establish remedies and procedures to be utilized with respect to the rights and protections" of the ADA made applicable to GPO.[5] GPO has stated that it has not established remedies and procedures for visitors, guests, or patrons who may allege a violation of the public access provisions. Furthermore, the ADA public access provisions now in effect do not provide judicial processes in case of a complaint against GPO.

Future-Effective Provision Under the CAA

Section 509(6) of the ADA makes the remedies and procedures of section 717 of title VII available to visitors, guests, and patrons of GPO, as well as GAO and the Library, who wish to pursue claims under the public access provisions of the ADA, effective one year after this study is transmitted to Congress. The administrative and judicial procedures to be provided under section 509(6) are described in the portion of this study on GAO.

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1 Sections 201-245 and 301-309 of the ADA, 42 U.S.C. 12141-12165, 12181-12189.

2 42 U.S.C. 12209(1).

3 *See* 42 U.S.C. 12134, 12186(b); 28 C.F.R. part 36.

4 *See* 42 U.S.C. 12143, 12149, 12164, 12186; 49 C.F.R. part 37.

5 42 U.S.C. 12209(2).

EVALUATION

The evaluation in the section of this study on GAO applies as well for GPO. In general terms, section 509(6) establishes a process under which a visitor, guest, or patron may pursue a complaint individually through an administrative complaints process administered by the agency and then, if not satisfied, may file a civil action in district court.

The CAA does not provide a visitor, guest, or patron of GPO the right to file a civil action or to pursue an administrative remedy on his or her own. Instead, the CAA adopts an enforcement-based process. An individual may file a charge with the General Counsel of the Office of Compliance, who investigates and may pursue an administrative complaint on the individual's behalf.

CONCLUSIONS

Substantive Rights

GPO employees currently are granted substantive rights under most CAA laws, and, in addition, enjoy many of the substantive civil service protections that apply generally in the executive branch. Consequently, employees at the instrumentality have certain rights and protections beyond those afforded legislative branch employees covered by the CAA. However, the CAA does not extend substantive rights under EPPA and the WARN Act to GPO, as it does to GAO and the Library.

Furthermore, the terms of the Kiess Act, which state that GPO may grant time off from duty instead of overtime pay for overtime work to an employee paid on an annual basis, appear inconsistent with the terms of the Fair Labor Standards Act, which require that covered employees be paid for all hours over 40 in a workweek at a rate not less than one-and-one-half times the employee's regular rate of pay.

Administrative Processes

Administrative procedures administered by GPO, by executive branch agencies, or established under collective bargaining agreements are available to resolve GPO employees' complaints and grievances on a wide range of subjects. GPO employees can submit claims and appeals to executive branch agencies (EEOC, MSPB, OPM) in a number of areas — including discrimination complaints, appealable adverse actions and performance-based actions, and FLSA disputes. This protection is in some respects broader in scope than the CAA, which allows appeals to the Office of Compliance Board only under the specific laws covered by the Act. One exception is that, under the ADA as amended by the CAA, claims of discrimination on the basis of disability may not be appealed administratively outside of GPO.[1]

GPO employees are also afforded the benefit of investigatory, enforcement, and oversight authorities of the EEOC and the Special Counsel in various subject areas, as well as the investigatory functions of GPO's EEO Service, which significantly exceed the investigation, enforcement, and oversight provided under the CAA. However, GPO is not subject to the investigatory or enforcement authority of any outside agency in the occupational safety and health area.

Judicial Processes and Relief

Judicial procedures available to GPO employees are generally comparable to rights available to covered Congressional employees under the CAA, but certain gaps remain. In addition to EPPA and WARN, which do not apply at GPO at all, the substantive rights under FMLA and USERRA apply but may not be enforced by civil action. Furthermore, under certain applicable laws the

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[1] Section 509(5) of the ADA, 42 U.S.C. 12209(5), as added by section 201(c)(3)(E) of the CAA.

right to jury trial and to recover certain kinds of relief are not available to GAO employees. For example, GAO employees, like executive branch employees, arguably may not request a jury trial in cases under the ADEA, EPA, or FLSA, and may not recover compensatory damages under 42 U.S.C. 1981 or liquidated damages under the ADEA.

Independent Process for Issuing Substantive Regulations

GPO is generally subject to the same government-wide regulations as are employing agencies in the executive branch.

The study also identified several issues regarding GPO that warrant further discussion:

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Although GPO must establish and maintain a comprehensive occupational safety and health program consistent with the OSHA standards promulgated by the Secretary of Labor, it is not now subject to inspection or enforcement by any outside agency. One year after this study is transmitted to Congress, inspection and enforcement procedures under section 220 of the CAA will become effective for GAO and the Library. However, GPO is not included under the coverage of this section.

A union of GPO employees suggested that this study should investigate whether OSHA enforcement responsibilities should apply to GPO, and questioned whether GPO should be excluded from the OSHA provisions of the CAA. However, GPO has commented that, inasmuch as GPO's performance and compliance record has been found in a 1992 GAO report to be better than the average federal or private operation, it is unnecessary to extend additional OSHA statutory coverage to the agency at this time. GPO further explained that any additional coverage would require limited staff to devote time and energy to administrative requirements, thereby likely reducing GPO's ability to fully protect its employees.

EMPLOYEE POLYGRAPH PROTECTION ACT (EPPA)
WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)
UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

The rights and protections of the EPPA and WARN do not apply to GPO employees. Employees at GPO are granted substantive rights under USERRA, but may neither enforce those rights through a claim to the Special Counsel or the MSPB, as executive branch employees can, nor sue in district court, as private sector employees can. A union of GPO employees suggested that this study should investigate whether GPO should be included under CAA provisions with respect to these laws.

GPO commented that it has no requirement for lie detector tests and does not anticipate the need for their future use for employment purposes, and therefore sees no benefit from including the

agency under the EPPA. However, extending the EPPA provisions of the CAA to cover GPO would impose no burden or inconvenience so long as the agency sees no need for the use of lie detector tests for employment purposes, but could protect employees should the agency ever change its policy and seek to use such tests. On the other hand, GPO has no objection to being included in the USERRA provisions.

GPO also stated that it is not averse to being covered by the provisions of the WARN Act, but believes that extending the legislation to GPO would add no benefit to employees and merely duplicate or conflict with existing rights and protections under OPM's government-wide RIF regulations, which apply to GPO, and under GPO's collective-bargaining obligations. It should be noted, however, that application of the WARN Act provisions of the CAA would entitle GPO employees to seek a remedy through civil action and to request a jury trial. These district court remedies would not otherwise be available to GPO employees given legally insufficient notice of a layoff.

THE LIBRARY OF CONGRESS

OVERVIEW

The Library of Congress (Library), originally established to purchase books for the use of Congress, is today the national library. Under its aegis are the Congressional Research Service (CRS), which provides nonpartisan research, analysis, and information to Congress, and the Office of the Register of Copyrights, which receives and registers copyrightable works. The Librarian of Congress, who serves as head of the agency, is appointed by the President with the advice and consent of the Senate.

Although the Library is part of the legislative branch, Library employees enjoy general civil service protections in a number of areas.[1] Additionally, Library employees now enjoy rights and protections under most of the eleven laws that are the subject of this study, and principal remaining gaps in coverage -- *e.g.*, in the areas of occupational safety and health, notification of office closings and mass layoffs, and polygraph protection -- will be filled when certain CAA provisions become effective at the Library one year after this study is transmitted to Congress.

With respect to independent administrative mechanisms, the Library is not subject to the jurisdiction of the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), or the Office of Special Counsel (OSC), as are executive branch agencies and GPO; nor does the Library have its own personnel appeals board as does GAO. Thus, Library employees' complaints of discrimination or challenges to adverse actions are not subject to administrative appeal beyond the final decision of the Librarian. In the labor-management area, however, the Library, like GPO, is subject to regulation by the Federal Labor Relations Authority (FLRA).

The Library has established several internal administrative mechanisms to hear and resolve employee grievances. Over 70 percent of the Library employees are covered by collective bargaining agreements and are eligible to use the negotiated grievance procedures provided in

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[1] For example, the Library is covered under certain government-wide civil service provisions including classification and grading of positions, premium pay, and flexible work schedules, and under a specific mandate that Library employees be appointed solely with reference to fitness. *See* 2 U.S.C. 140; 5 U.S.C. 5102(a)(1)(B), 5541(1)(D), 6121(1). Regulations issued by the Librarian (Library of Congress Regulations, or LCRs) and collective bargaining agreements establish requirements in such areas as merit hiring, retention and promotion, performance evaluation, and reduction in force. *See, e.g.*, LCR 2013 and 2017 series (performance evaluations, quality increases and incentive awards); LCR 2021-2 (reductions in force); Collective Bargaining Agreements between the Library and AFSCME Local 2477, AFSCME Local 2910, and Congressional Research Employees Assoc., IFPTE Local 75.

ANTI-DISCRIMINATION LAWS

Substantive Rights

The Library, like GAO and GPO, is covered under section 717 of Title VII, section 15 of the ADEA, the EPA, and section 509 of the ADA,[1] and is not subject to section 501 of the Rehabilitation Act.[2] The substantive rights and protections afforded Library employees under these laws therefore parallel those afforded GAO and GPO employees.

Unlike either GAO or GPO, the Library is not included under the prohibition in applicable civil service statutes against prohibited personnel practices.

Procedures

Administrative

Unlike the situation at either GAO or GPO, applicable statutes authorize the Librarian to exercise the authorities of the EEOC with respect to employment at the Library.[3] Consequently, the Librarian has sole administrative responsibility for assuring that employment at the Library is free from discrimination, and is subject to neither the requirements prescribed by the EEOC for agency anti-discrimination programs, nor to the EEOC's authority to hear appeals from the Library's decisions on discrimination complaints.[4]

The Library Discrimination Complaint Process. Library regulations establish an Equal Employment Opportunity Complaints Office (EEOCO) to administer a process for resolving

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1 42 U.S.C. 2000e-16 (Title VII); 29 U.S.C. 633a (ADEA); 29 U.S.C. 203(e)(1)(A)(v), 206(d) (EPA); 42 U.S.C. 12209 (ADA).

2 The Library has advised that section 501 of the Rehabilitation Act, 29 U.S.C. 791(b), applies to the executive branch, and, as an agency in the legislative branch, it is not included.

3 Title VII and the ADEA both provide that "authorities granted in this subsection to the [EEOC] shall be exercised by the Librarian of Congress." 42 U.S.C. 2000e-16(b); 29 U.S.C. 633a(b). The ADA also provides for implementation by the Librarian. 42 U.S.C. 12209(2), (5). The FLSA, of which the EPA is a part, is ordinarily implemented by the Secretary of Labor, but, under the authority of 29 U.S.C. 204(f), the Secretary in 1975 entered into an agreement with the Librarian under which the Librarian makes necessary investigations and handles complaints from Library employees. The Secretary's functions with respect to the EPA were transferred to the EEOC by Reorg. Plan No. 1 of 1978, 5 U.S.C. appendix.

4 *See* 29 C.F.R. 1614.103(d)(3) (EEOC regulations).

complaints against the Library.[1] Under the individual complaints process, an employee must request counseling within 20 workdays after the allegedly unlawful conduct. The EEOCO provides counseling, conducts an inquiry, and may refer the matter to the appropriate Library officer.

If the matter is not resolved at this early stage, the employee may file a complaint with the EEOCO Assistant Chief, who again attempts to resolve the issues and, if the issues are still not resolved, the EEOCO conducts an investigation and the Assistant Chief decides the merits and makes a recommendation to the Chief of the EEOCO for decision. If the employee complainant, the staff member charged with having discriminated,[2] or both, remain unsatisfied, they may ask for reconsideration and/or a hearing. The Library then provides a hearing officer with the investigative file, and after the hearing (which is considered "an adjunct" of the investigation), the hearing officer renders an advisory opinion. After receiving the hearing officer's advisory opinion, the Librarian makes the final agency decision. The procedure for class complaints is similar, but allows longer periods for filing such complaints with the EEOCO.

The Dispute Resolution Center. The Library also has a Dispute Resolution Center, which offers mediation and other dispute resolution services to both bargaining unit members and nonmembers. At any time during the dispute resolution process, a "disputant" may opt out of the dispute resolution process and file an EEO complaint.

The Library Negotiated Grievance Procedures. Members of bargaining units may also grieve claims of unlawful discrimination under the negotiated grievance procedures established under collective bargaining agreements.

Judicial

Civil Action. Library employees, like those at GPO, have the right to file a civil action to the full extent provided under the anti-discrimination laws. A Library employee may file a civil action after having filed a complaint and after having reached either of two stages in the administrative processing of the complaint: *(i)* after 180 days from filing a complaint in the Library process if there has been no final agency decision; or *(ii)* within 90 days of receipt of a final agency decision from the Librarian.[3] In the case of an EPA complaint, the employee may file a civil action

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[1] The procedures apply, by their terms, to complaints under Title VII, the ADEA, and the ADA. The Library's regulations establishing its procedures for discrimination complaints make no reference to actions under the EPA.

[2] LCR 2010-3.1, sections 9 and 10, make "the staff member charged" a party to the complaint and hearing process. There is no similar provision in EEOC regulations, 29 C.F.R. part 1614.

[3] LCR 2010-2 at 2 (February 23, 1973) and LCR 2010-3.2, section 17 (April 20, 1983) each specify a deadline for filing a civil action of no later than 30 days after receipt of notice of final

(continued...)

regardless of whether he or she has pursued any administrative complaint processing.[1]

As explained in the sections on GAO and GPO, a jury trial may be requested in civil actions under Title VII or the ADA if the plaintiff seeks compensatory damages, but a jury trial is not available in an EPA action, and probably not in an ADEA action, brought against a federal agency. Library employees, like GAO and GPO employees, may not be able to bring a civil action in case of retaliation for exercising ADEA or ADA rights. However, as retaliation is forbidden under applicable Library regulations,[2] Library employees may seek protection through available administrative procedures.

Relief

The relief available in a discrimination case brought by a Library employee is the same as for a GAO or GPO employee, and is generally the same as is available to other legislative branch employees covered under the CAA. In appropriate cases, this may include reinstatement or hiring, with or without back pay, or other injunctive relief.[3] In addition, in a case under Title VII or the ADA, compensatory damages may also be available for intentional discrimination,[4] and in a case under the EPA, double damages may be available as liquidated damages, unless the

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[3] (...continued)
action. That time limitation was expanded to 90 days in the 1991 Amendments to Title VII. Pub. L. No. 102-166, section 114(1).

[1] 29 U.S.C. 216(b) (right to file a civil action under the FLSA, of which the EPA is a part); 29 C.F.R. 1614.409 (EEOC regulations).

[2] *See* LCR 2010-3.2, section 9.

[3] In case of a violation of Title VII or the ADA, the following relief may be available to a Library employee: Enjoining unlawful employment practices, ordering that such affirmative steps be taken as may be appropriate, including reinstatement or hiring, with or without back pay, or any other equitable relief as may be deemed appropriate. Interest may be awarded to compensate for delay in payment. *See* 42 U.S.C. 2000e-5(g); 42 U.S.C. 2000e-16(d); 42 U.S.C. 12209(5). In case of a violation of the ADEA, the relief available to a Library employee is such legal or equitable relief as will effectuate the purposes of the ADEA. 29 U.S.C. 633a(c). In case of a violation of the EPA, a Library employee may recover any amounts withheld from an employee in violation of EPA requirements. 29 U.S.C. 216(b).

[4] 42 U.S.C. 1981a affords compensatory damages for intentional discrimination in violation of Title VII or the ADA. In such a case, compensatory damages for future pecuniary losses, emotional pain and suffering, and other nonpecuniary losses are capped at no more than $300,000.

employer shows that its act or omission was in good faith.[1]

[1] *See* 29 U.S.C. 206(d)(3), 216(b), 260.

these agreements. Grievances that cannot be resolved informally may be submitted to binding arbitration, with appeal to the FLRA, or, if the objection is to an appealable adverse action or performance-based action, judicial review may be obtained in the United States Court of Appeals for the Federal Circuit.[1]

The Library has also established a discrimination complaints process available for the discrimination complaints of both members and non-members of bargaining units, and administrative grievance procedures under which non-members of bargaining units may present other kinds of grievances to Library management and may appeal from adverse actions.[2] These procedures provide for the presentation of grievances and appeals for consideration by management, the opportunity for a hearing before an independent hearing officer, and a final, non-appealable decision by the Library. In addition, the Library has recently established a Dispute Resolution Center to administer mediation and other alternative dispute resolution mechanisms to resolve discrimination complaints, grievances, and certain other kinds of disputes, before resorting to the more formal complaints and grievances procedures.[3] The processes administered by the Dispute Center were established after collective bargaining and are available to both bargaining unit members and non-members.

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1 *See generally*, 5 U.S.C. 7121-7122, 7703.

2 *See* LCR 2020-1, "Grievances, Adverse Actions, Appeals: Policy and General Provisions" (April 10, 1990); LCR 2020-2, "Policy and Procedures for Resolving Grievances" (March 1, 1984); LCR 2020-3, "Policies and Procedures Governing Adverse Actions" (March 1, 1984); LCR 2020-4, "Hearing Procedures" (March 1, 1984).

3 *See* LCR 2020-7, "Policy and Procedures for Using the Alternative Dispute Resolution Process to Resolve Disputes" (June 16, 1995).

ANTI-DISCRIMINATION LAWS

EVALUATION

Substantive Rights and Protections

At the Library, as at GPO and GAO, the basic prohibitions against discrimination under the anti-discrimination laws (Title VII, ADEA, ADA and EPA) are generally the same as those afforded other federal sector employees, those in the private sector, and other legislative branch employees covered by the CAA.

Procedures

The administrative and judicial procedures available to Library employees with discrimination complaints are generally similar to those available to employees of GAO, GPO, and the executive branch, except that Library employees have no right of administrative appeal from the final decision of the employing agency.

Administrative

The administrative procedures applied by the Library are generally similar to those at GPO and GAO and in the executive branch. The Library plays the predominant role in administering the initial counseling, mediation, investigation, and investigative hearing, and the final decision is made by the Librarian. There is no administrative appeal from the Librarian's final decision. By contrast, legislative branch employees covered by the CAA have the right to counseling, mediation, and adjudicatory procedures administered by the independent Office of Compliance, and may appeal to the independent Office of Compliance Board.

The discrimination complaints procedure at the Library includes a mechanism for the investigation of individual complaints, conducted by the Equal Employment Opportunity Complaints Office. Unlike at the GAO, GPO, and executive branch agencies, however, no independent administrative authority has the power to take enforcement action at the Library by conducting investigations without a charge or by seeking corrective action, stays, or disciplinary action. Under the CAA, there is no investigatory or prosecutorial authority in discrimination cases.

Judicial

Employees at the Library have the same right as executive branch employees to file a civil action under anti-discrimination laws at various times after filing an administrative complaint, or, in the case of an ADEA or EPA claim, as an alternative to filing an administrative complaint. After exhausting their administrative remedies, Library employees retain the right to file a civil action in federal district court and have a trial *de novo*. A jury trial is available in cases under Title VII and the ADA, but probably not under the ADEA and EPA.

For private sector employees and covered legislative branch employees under the CAA, the right to file a civil action and obtain a jury trial is generally available in discrimination cases. However, under the CAA, a covered employee who elects to pursue an administrative, rather than judicial, complaint may obtain only appellate judicial review in the Court of Appeals for the Federal Circuit, after exhausting administrative remedies.

Library employees have access to federal district court in claims of retaliation under Title VII and EPA, but the law is uncertain with respect to ADEA and ADA violations. By comparison, covered legislative branch employees are protected by section 207 of the CAA, which prohibits retaliation for exercise of rights with respect to any CAA law, including the anti-discrimination laws; and private sector employees are protected under specific anti-retaliation provisions in these laws.

Relief

Most kinds of relief available for discrimination violations are the same for Library employees as for other legislative branch employees covered under the CAA, as well as executive branch and private sector employees. However, two kinds of damages are available to private sector employees and under the CAA that are not available to Library employees: *(a)* compensatory damages for discrimination involving race, ancestry, and ethnicity, under 42 U.S.C. 1981; and *(b)* liquidated damages in the case of a willful violation of the ADEA, in an amount equal to the amount owing as a result of the violation.

In addition, certain punitive damages and penalties are available against private sector employers in Title VII and ADA cases that are not available against federal government employers, including employing offices under the CAA, in the executive branch, and the Library.

Timeliness in Resolving Discrimination Complaints

Employee representatives — and the Library itself — expressed concern about the slowness of discrimination complaint processing at the Library. The Library reported that, in Fiscal Year 1993, the latest year for which it has compiled data, the average time that formal complaint cases remained open was 1,231 days. The time to complete investigations was 618 days. In the Dispute Resolution Center program, disputes remained in the process for an average of 449 days.

FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

Substantive Rights

The Library, like both GAO and GPO, is covered by the civil service provisions of the FMLA[1] and by OPM's FMLA regulations,[2] which are described in the section of this study on GAO. The Library has also issued a regulation that implements the rights and procedures under the statute.[3]

Procedures

The FMLA civil service provisions do not provide any administrative or judicial processes by which employees may seek redress for violations. Therefore, employees who believe their rights have been violated must rely on the various remedial provisions available generally for employment-related disputes in the federal government. Several administrative and judicial avenues are available to Library employees.

Administrative and Negotiated Grievance Procedures. Library employees may use the Library's dispute resolution process, referred to above. Furthermore, a member of a bargaining unit at the Library can seek resolution of a claim under the negotiated grievance procedure, and a non-member may proceed under the administrative grievance or appeals procedures established by the Library.

OPM's General Claims Settlement Process. A Library employee can also seek redress by applying to OPM under its statutory responsibility to receive and settle federal employees' claims against the government.[4]

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[1] 5 U.S.C. 6381-6387, added by Pub. L. No. 103-3, title II, 107 Stat. 19 (Feb. 5, 1993). Coverage of the FMLA civil service provisions includes, among others, most employees of agencies headed by Presidential appointees. *See* 5 U.S.C. 2105(a)(1)(A), (D), 6301(2)(A), 6381(1)(A). The Librarian of Congress is appointed by the President.

[2] 5 C.F.R. 630.1201-630.1211 (regulations promulgated by OPM).

[3] LCR 2015-21, "Family and Medical Leave" (May 1996).

[4] The authority to settle claims against the government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L. No. 104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note.

(continued...)

Judicial

In appropriate cases, a Library employee, like a GAO employee, may also bring suit in the Court of Federal Claims for money owed by the government as a result of an FMLA violation, and could seek restoration to position and correction of records, if warranted, as an incident to a monetary judgment. If the claim does not exceed $10,000, the employee can sue in federal district court.[1]

Relief

Since the FMLA civil service provisions do not specify what relief would be available in case of a violation, an aggrieved employee must rely on other laws, or on general legal principles, to obtain relief. For example, if an employee is demoted or fired or denied restoration, the employee can claim compensation due under the Back Pay Act.[2] The employee may also seek to recover the amount of benefits guaranteed by the FMLA that are unlawfully denied and are therefore due and owing from the government.

Future-Effective Changes Under the CAA

The CAA removes the Library, like GAO, from the civil service version of the FMLA in title 5 of the U.S. Code and places it under the private sector FMLA codified in title 29 of the U.S. Code.[3] The specific differences between the FMLA provisions in civil service law and the FMLA provisions applicable to the private sector are described in detail in the section of this study on GAO.

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[4] (...continued)
OMB has delegated the authority to settle employee claims to OPM.

[1] 28 U.S.C. 1346(a)(2), 1491(a).

[2] 5 U.S.C. 5596.

[3] Section 202(c) and (e)(1) of the CAA, 2 U.S.C. 1312(c), (e)(1).

EVALUATION

Substantive Rights

The Library is now covered by the same FMLA civil service laws and regulations as GAO, and is subject to the same CAA provision that will cause the private sector FMLA to apply in the future. The evaluation for GAO therefore applies in nearly all respects for the Library as well. That is, all of the relevant statutory programs provide the same basic entitlement — up to 12 weeks of job-protected leave in a 12-month period for family and medial purposes — with similar differences in eligibility criteria and substantive rights.

The civil service FMLA provisions afford greater substantive rights to employees than the private sector provisions, which are applicable under the CAA, but the civil service version of the FMLA does not provide administrative or judicial procedures.

Procedures

Administrative

The Library's administrative dispute resolution, grievance, appeal, and hearing processes are generally available, but these do not offer a process external to Library management. The negotiated grievance procedure with neutral arbitration is available to members of a bargaining unit. The provisions of the CAA that apply to the Library will not change this situation because the private sector FMLA provisions do not afford administrative remedies.

In comparison, the CAA provides administrative procedures, including the right to an adjudicatory hearing and appeal to the independent Office of Compliance Board, for a covered employee who alleges any FMLA violation.

Judicial

As discussed in the context of GAO, the civil service remedies and relief available under civil service law in a case of an FMLA violation are generally less protective of employee rights than those under the CAA and under private sector law.

FAIR LABOR STANDARDS ACT OF 1938
(FLSA)

Substantive Rights

Statutes

Employees of the Library have been covered under the Fair Labor Standards Act (FLSA) since the enactment of the Fair Labor Standards Amendments of 1974.[1] Thus, nonexempt employees must be paid a minimum wage rate, currently $4.75 per hour, and are entitled to overtime compensation, at a rate of at least time and one-half, for work in excess of 40 hours in a workweek. (Nonexempt employees are those who do not fall within one of the three statutory exemptions -- executive, administrative, or professional.)

In addition, since before 1974, most Library employees generally come under the premium pay provisions of the civil service laws, which establish overtime rates and authorize compensatory time off.[2] These statutory provisions also apply to GAO, and are described in the section of this study on GAO.

Regulations

Under a 1975 Memorandum with the Department of Labor, noted below, the Library agreed to follow the regulations and interpretations of the Wage and Hour Division in administering the application of the FLSA to its employees.

The Library is not subject to OPM's regulations implementing the overtime and compensatory time off provisions of the civil service laws, and the instrumentality has issued its own regulations for this purpose. [3] Library of Congress Regulation (LCR) 2013-11 (May 9, 1994) generally covers (with the exception of prevailing wage employees) the Library staff members, including employees who are otherwise exempt under the FLSA as well as employee are nonexempt under

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[1] 29 U.S.C. 203(e)(2)(A)(v), added by section 6(a) of Pub. L. No. 93-259, 88 Stat. 58 (April 8, 1974).

[2] 5 U.S.C. 5541(2)(C). *See* 5 U.S.C. 5542-5543.

[3] OPM, pursuant to its authority to promulgate regulations implementing the premium pay provisions of the civil service laws, title 5, issued the regulations found in 5 C.F.R. part 550, which includes regulations implementing the overtime and compensatory time off provisions of sections 5542 and 5543, of title 5, U.S.C. However, these overtime and compensatory time off regulations do not apply to the Library. *See* 5 C.F.R. 550.101(a)(1), which states that the subpart pertaining to premium pay applies "to each employee in or under an Executive agency, as defined in 5 U.S.C. 105." The Library is not an "Executive agency" under 5 U.S.C. 105.

the FLSA. This regulation implements the statutory requirement that overtime work must be ordered or approved; its sets forth both the manner in which overtime pay is calculated and the conditions under which overtime is to be paid; and it sets forth conditions under which compensatory time off may be given in lieu of overtime pay.

The Library issued LCR 2013-14 (May 9, 1994) to implement the civil service law covering employees who are entitled to be paid on the basis of a prevailing wage. In addition to establishing the rules for determining eligibility, the rates of pay, promotions, and premium pay for night shift work and holidays, the regulations provide that overtime is to be paid for ordered or approved work at a rate of one and one-half times the rate of an employee's basic pay. In addition, an employee may request, and the supervisor in his or her discretion may grant, compensatory time off in lieu of overtime pay.[1]

Procedures

Administrative

The 1974 FLSA Amendments authorized the Secretary of Labor and the Librarian of the Congress to enter into an enforcement agreement to provide for carrying out the Secretary's functions with respect to individuals employed in the Library. [2] A Memorandum of Agreement was executed in July 1975 setting forth the mutual responsibilities of both agencies. The Memorandum, among other things, provided that the Library will follow the published regulations and interpretations of the Wage and Hour Division in administering the FLSA; the Library will conduct internal investigations to resolve compliance problems; the Wage and Hour Division will refer complaints from Library employees to the Library for resolution; and the Library will submit an annual report of its activities to the Wage and Hour Division.

The Library has not promulgated FLSA-specific regulations for investigating and processing FLSA claims. However, several avenues of review are available. As described above, Library employees may use the agency's dispute resolution process. Furthermore, bargaining unit members may use negotiated grievance and binding arbitration procedures, and non-members of bargaining units may use the Library's administrative grievance and hearing procedures leading to a final decision by the Library.

Finally, insofar as FLSA claims constitute a monetary claim against the Federal government, an employee not satisfied with a determination of the Librarian may file a claim with OPM. [3]

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[1] The Library has advised that it plans to review its pay regulations and revise them if necessary.

[2] 29 U.S.C. 204(f), added by section 7(f) of Pub. L. No. 93-259, 88 Stat. 58 (April 8, 1974).

[3] The authority to settle claims against the Government has historically been assigned to the GAO (continued...)

However, while OPM has statutory authority to administer the FLSA with respect to most federal agencies, including GAO and GPO, its authority does not extend to the Library.[1]

Judicial

An action to recover any unpaid compensation owed under the FLSA may be brought in any court of competent jurisdiction.[2] FLSA actions by federal employees may be brought, under the Tucker Act, in the Court of Federal Claims or, if the amount claimed does not exceed $10,000, in an appropriate federal district court.[3]

Relief

Under the FLSA, Library employees are entitled to minimum wage and overtime compensation. Additionally, liquidated damages are available, in an amount equal to the amount of unpaid minimum wages or unpaid compensation, except that a court has discretion to reduce or dispense with the award of liquidated damages if the employer shows that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation. For a violation of the FLSA prohibition against retaliation, legal or equitable relief may available, including employment, reinstatement, promotion, and the payment of lost wages, and an additional amount of liquidated damages.[4]

The FLSA also provides that the court shall allow reasonable attorneys fees.[5]

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[3] (...continued)
under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Pub. L. No. 104-53, 211, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

[1] *See* 29 U.S.C. 204(f); 5 C.F.R. 551.101(a). Under this authority with respect to other federal agencies, for example, OPM accepts employees' claims of violation, conducts investigations, makes determinations of whether employees are exempt or non-exempt, and issues compliance orders against employing agencies.

[2] 29 U.S.C. 216(b).

[3] *See* 28 U.S.C. 1346(a), 1491.

[4] 29 U.S.C. 216(b), 260.

[5] 29 U.S.C. 216(b).

EVALUATION

Substantive Rights

The Library is subject to the same substantive provisions of the FLSA governing minimum wage, overtime compensation, and child labor as GAO, GPO, and other agencies in the federal sector, as well as employers in the private sector, and employing legislative offices under the CAA. Furthermore, like GAO, the Library is covered by certain civil service statutes that supplement, and also provide exceptions to, the overtime pay requirements of the FLSA. Thus, while the civil service laws entitle Library employees to overtime for authorized work in excess of 8 hours a day, in addition to work in excess of 40 hours a week, the FLSA requires overtime for nonexempt employees (but not for exempt employees) for work only in excess of the 40 hour workweek (and without regard to whether the work was actually "authorized"). Certain employees are entitled to the benefit of the 8-hour day overtime premium even in instances where their workweek does not exceed 40 hours. Similarly, FLSA exempt employees are entitled to overtime for authorized work in excess of a 40 hour workweek. Furthermore, as described in the section of this study on GAO, the civil service laws that cover the Library frequently authorize the employer to satisfy overtime obligations by allowing compensatory time off. In contrast, the FLSA generally does not permit such time off for nonexempt employees. Similarly, compensatory time off is generally unavailable under the CAA, although it can be required under limited circumstances for employees whose schedules depend directly on the schedule of the House or Senate.

Procedures

Administrative

Pay disputes, including overtime matters under both the FLSA and the civil service laws, are resolved administratively through the Library's general grievance and dispute resolution processes. Employees can also apply to OPM for satisfaction of monetary claims. In contrast, the CAA generally does not authorize an internal administrative process for resolving FLSA disputes, but instead authorizes counseling, mediation, and formal adjudication, that is administered by the Office of Compliance (or, in the alternative, resort to district court).

Judicial Processes

Library employees may file a civil action under the FLSA regardless of whether the employee pursued any administrative complaint processing. In contrast, under the CAA, a covered employee can file a civil action only after pursuing his or her claim through the counseling and mediation stages, plus an additional waiting period of 30 days.

Jury trials are ordinarily not available against the federal government without express statutory

authority, [1] and therefore, are probably not available in FLSA cases against the Library. However, since a jury trial is available in appropriate FLSA cases in the private sector, the right is available to the same extent in FLSA cases under the CAA.[2]

Relief

The unpaid minimum wages, unpaid overtime compensation, additional liquidated damages, and legal or equitable relief for retaliation, as provided for in the FLSA, are available for a violation by the Library. This is the same relief as is available elsewhere in the federal sector, in the private sector, or under the CAA.

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[1] *See generally, Lehman v. Nakshian,* 453 U.S. 156 (1981).

[2] Section 408(c) of the CAA, 2 U.S.C. 1408(c).

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Substantive Rights

The Library is currently covered by section 19 of OSHA,[1] as well as the related provisions of 5 U.S.C. 7902, which require the establishment and maintenance of a comprehensive occupational safety and health program. These provisions are the same as those applicable to GAO, and the requirements of these provisions are described in the GAO portion of this study.

Although the regulations promulgated by the Secretary of Labor are not binding on the Library, the applicable statutes require that the Library's OSHA program be consistent with the standards promulgated by the Secretary. The Library regulations and collective bargaining agreements that establish the Safety and Environmental Health Programs of the Library, as well as the Library of Congress Safety and Health Committee, cite the Secretary's standards as the authority and note the importance of conforming with them.[2]

Procedures

Administrative

Complaint procedures. The Library's employee complaint procedures to report unsafe conditions are currently in draft form, but Library officials have indicated that the procedures in the draft regulation are to be followed until final instructions are provided.[3] Employees are instructed to report unsafe conditions to their supervisor, or, if appropriate, to Safety Services. (Employees reporting unsafe conditions to Safety Services may remain anonymous.) If the appropriate Library officials determine that an unsafe or unhealthful working condition cannot be eliminated or reduced to an acceptable level within 30 days, a hazard abatement plan will be developed. This plan will explain the circumstances of the delay in abatement, and provide a proposed timetable for the abatement, and a summary of steps being taken in the interim to

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1 29 U.S.C. 668.

2 *See* LCR 1817-1, "Safety and Environmental Health Programs of the Library of Congress" (September 1994), and LCR 218-18, "Library of Congress Safety and Health Committee" (1995) (Draft) (both noting the importance of conforming with Executive Order 12196 and title 29 of the Code of Federal Regulations, Part 1960).

3 *See* LCR 1817-6, "Hazard Abatement Program to Ensure Safe Conditions for Library Employees" (September 1994) (Draft).

protect employees. A copy of the plan will be sent to the Joint Labor-Management Health and Safety Committee. Non-bargaining employees may also file safety and health grievances under the Library dispute resolution process,[1] while bargaining unit employees may use the negotiated grievance procedure.

Compliance mechanisms. The Library of Congress Safety and Health Committee was established to monitor and assist in safety and health programs.[2] The committee, which consists of equal representation of labor and management, assists Library management in improving policies, conditions, and practices that have potential impact on employee/workplace safety and health. In addition, a Hazard Abatement Program was established to monitor and track unsafe conditions until identified problems are corrected.[3]

Safety and occupational health inspections are conducted annually by the Safety Services staff and/or members of the Joint Labor-Management Advisory Committee. Situations that involve imminent danger must be brought to the immediate attention of supervisors or other persons with authority to correct the problem and to the service unit head for necessary action. Written inspection reports are then forwarded to the inspecting office within 30 days of the inspection report date. Written reports are maintained on file with Safety Services for five years. In addition, unsafe conditions are recorded in the Hazard Abatement Program database, and, in cases where personnel are exposed to unsafe or unhealthful working conditions, a Hazard Notice must be posted in the immediate vicinity. Safety Service's approval is required for all interim protective measures for unsafe conditions requiring more than 60 days to correct.

Judicial

Under current law no judicial remedies are available to Library employees to redress safety and health complaints.

Future-Effective Changes Under the CAA

Section 215 of the CAA applies the rights and protections of OSHA to the Library and to GAO, effective one year after this study is transmitted to Congress.[4] The applicable sections are described in the GAO portion of this study.

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1 *See* LCR 2020-7, "Policy and Procedures for Using the Alternative Dispute Resolution Process to Resolve Disputes" (June 6, 1995).

2 *See* LCR 218-18, "Library of Congress Safety and Health Committee" (1995).

3 *See* LCR 1817-6.

4 2 U.S.C. 1341(g)(2).

EVALUATION

Substantive Rights

The CAA will impose additional obligations on the Library. Under the CAA, the Library will be required to adhere to the safety and health regulations issued by the Board under section 215(d), whereas the Library's compliance with safety and health standards under OSHA is not now subject to enforcement by any entity outside of the Library. However, the Library already purports to conform with applicable federal laws and regulations, including Executive Order 12196 and 29 C.F.R. part 1960, which set out the basic program elements for federal employee occupational safety and health programs.

Retaliation

The CAA will provide Library employees with a right to bring a civil action for intimidation, discrimination or reprisal actions taken by an employing office because the employee has opposed a practice made unlawful by the CAA, or because the employee has initiated proceedings, made a charge, or testified, assisted, or participated in a hearing or proceeding under the CAA.[1]

Administrative

Under present law, the Library has an internal investigation and administrative grievance process to address safety and health complaints.[2] Under the CAA, however, the General Counsel of the Office of Compliance will exercise the authority to investigate and inspect places of employment, as well as issue citations and prosecute violations that are not corrected by the employing office named in the citation or notification.[3]

Library of Congress unions noted that they and management have cooperated regarding safety inspections and ergonomic issues, and that the Library's Safety Services Office has adopted an active safety program. However, the current exemption of the Library from OSHA provisions has caused occasional enforcement problems, and the control exercised by the Architect of the Capitol over most of the Library's buildings, including high-hazard areas, creates questions of who is responsible for correcting problems.

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[1] The general anti-reprisal provision in section 207 of the CAA prohibits retaliation against a covered employee for exercising rights under the CAA, including the rights and protections of section 215.

[2] *See* LCR 1817-6, "Hazard Abatement Program to Ensure Safe Conditions for Library Employees" (September 1994) (Draft) and LCR 2020-7, "Policy and Procedures for Using the Alternative Dispute Resolution Process to Resolve Disputes" (June 16, 1994).

[3] 2 U.S.C. 1341(c).

Record Keeping and Report Obligations

Section 668(a)(5) of title 29 requires agency heads, including the head of the Library of Congress, to submit annual reports to the Secretary of Labor on occupational accidents and injuries and on the agency programs established under section 668. Section 7902(e) of title 5 imposes similar record keeping and report requirements on each agency. However, there is no apparent mechanism for enforcement of these sections against federal agencies.

Section 215 of the CAA and the proposed requirements thereunder do not require employing offices to comply with these general safety and health record keeping requirements.[1] However, certain record keeping requirements that are part of the substantive safety and health standards under 29 C.F.R. parts 1910 and 1926, such as employee exposure records, are required.[2] The Office of Compliance Board has not addressed whether section 215 of the CAA and the regulations the Board proposes to implement thereunder can be harmonized with the preexisting statutory requirements otherwise applicable to the Library, but not within the scope of the CAA, that might independently apply to the Library.[3]

Judicial

Under present law no judicial remedies are available to Library employees, nor will the CAA provide employees with a judicial remedy. However, the CAA does afford employing offices and the General Counsel of the Office of Compliance certain appeal rights following a hearing or variance proceeding. These appeal rights are discussed in the section of this study on GAO.

Office of Compliance Inspection

The Office of Compliance General Counsel conducted inspections of the Library of Congress buildings in March of 1996. Based on the inspection tours, the General Counsel made the following finding: "The Library has an active and effective safety and health program staffed with knowledgeable personnel. . . . The safety and health staff of the Library, along with employee members of the safety and health committee, should be commended. Of the deficiencies noted in

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1 *See* Notice of Proposed Rule Making implementing section 215 of the CAA, 142 Cong. Rec. S11021 (daily ed. Sept. 19, 1996).

2 *See id.*

3 *See* 42 Cong. Rec. S 11019, S 11020 (daily ed. September 19, 1996) (NPRM implementing section 215) (citing Notice of Adoption of Regulations and Submission for Approval and Issuance of Interim Regulations under section 203 of the CAA 142 Cong. Rec. S224 (daily ed. Jan. 22, 1996) (declining to address issue of harmonizing regulations regarding overtime exemption for law enforcement officers under section 203 with preexisting statutory overtime exemption for Capitol Police under 40 U.S.C. 206b-206c)).

these buildings, almost none were in areas within control of the Library."[1]

[1] *See* "Report on Initial Inspections of Facilities for Compliance with Occupational; Safety and Health Standards Under Section 215," June 28, 1996, at III-57 (Office of Compliance publication).

LABOR-MANAGEMENT RELATIONS
(Chapter 71, Title 5 U.S.C.)

Substantive Rights

Because the Library is expressly included within the definition of employing "agency," Library employees are directly covered under the federal service labor-management relations statute in chapter 71 of title 5, U.S.C.[1] Thus, they have the right to choose whether to be represented by a labor organization for purposes of bargaining over terms and conditions of employment, they are protected against unfair labor practices (ULP) that may be committed by either an employing office or a labor organization, and their representatives may avail themselves of the provisions governing the resolution of grievances and of disputes over the negotiability of bargaining proposals. Further, the regulations promulgated by the Federal Labor Relations Authority (FLRA) apply to the Library.

Procedures

Administrative

The Federal Labor Relations Authority, an independent agency in the executive branch, is responsible for administering chapter 71. The FLRA conducts elections and other proceedings to decide issues of representation, and it rules on whether unfair labor practices have been committed and orders appropriate relief. The Authority's General Counsel is responsible for investigating and prosecuting such unfair labor practice cases before the FLRA.

In the event of a collective bargaining impasse, the Federal Mediation and Conciliation Service (FMCS) provides mediating services to facilitate the reaching of an agreement. Where agreement is not reached, the parties may present the issue for resolution to the Federal Services Impasses Panel, which operates as an adjunct to the FLRA.

Judicial

Decisions of the FLRA are judicially reviewable by U.S. Courts of Appeals.

EVALUATION

Substantive Rights

Insofar as the CAA applies the rights, protections and responsibilities of chapter 71 to employing offices of the legislative branch, subjecting the Library to the CAA in lieu of chapter 71 would not

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[1] 5 U.S.C. 7103(a)(3).

result in significant changes in the substantive rules governing labor-management relations.

Procedures

Administrative

Bringing the Library under the coverage of the CAA would afford the Library and its employees an administrative mechanism closely modeled after the procedures of Federal Labor Relations Authority. Under the CAA, the Board of Directors exercises the authority to conduct representation cases and to decide unfair labor practices. Legal questions on such matters as the appropriateness of bargaining units, exclusions from bargaining units, and whether representation elections were conducted free of objectionable conduct are decided by the Board. The General Counsel of the Office of Compliance exercises the authority to investigate and prosecute unfair labor practice allegations before a hearing officer, who issues a written decision within 90 days of determining whether the allegations have merit and if so, what remedies are appropriate. Hearing officer decisions may be appealed to the Board of Directors.

Judicial

Decisions of the FLRA under chapter 71 are reviewable by appropriate U.S. Courts of Appeals, while decisions of the Board of Directors of the Office of Compliance under the CAA are reviewable by the U.S. Court of Appeals for the Federal Circuit.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

Substantive Rights

The Worker Adjustment and Retraining Notification Act (WARN Act) does not currently apply to the Library or its employees. The WARN Act assures employees in the private sector of notice in advance of office or plant closings or mass layoffs.[1]

Either under Library regulations [2] or collective bargaining agreements, the Library is generally obligated to provide advance notice to employees affected by a reduction in force (RIF). This notice period is longer than the 60 days ordinarily guaranteed under the WARN Act.

Procedures

Administrative

Bargaining unit members at the Library may submit a claim alleging a violation of notice requirements under negotiated grievance procedures, and non-members of bargaining units may submit such a claim under the Library's administrative grievance procedures.

Future-Effective Changes Under the CAA

Section 205 of the CAA applies the rights and protections of the WARN Act to the Library and GAO employees, effective one year after this study is transmitted to Congress.[3]

EVALUATION

For the reasons discussed in the GAO and GPO sections of this study, the right to advance notice established in the Library's RIF regulations are, in most respects, as extensive as, or more extensive than, the rights afforded under WARN Act provisions made applicable by the CAA. However, unlike the notice rights under the Library regulation, the notice rights under the CAA

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1 *See* 29 U.S.C. 2101-2109.

2 Section 4 of LCR 2021-2, "Policies and Procedures in a Reduction-in-Force for Non-Bargaining Unit Staff Members and Staff Members in Bargaining Unit Positions in the Law Library" (September 30, 1981).

3 2 U.S.C. 1315(a)(2), (d)(2).

are provided for by statute and can be enforced by the filing of a civil action.

Administrative and Judicial Procedures

Only administrative processes are available in a case where a Library employee is affected by a RIF, including where notice requirements were not met. After the WARN Act provisions of the CAA go into effect, a Library employee who alleges a violation may elect to pursue an administrative complaint and appeal through the Office of Compliance, or may file a civil action. As a jury trial should be available to private sector employees[1] and any party under the CAA "may demand a jury trial where a jury trial would be available in an action against a private defendant,"[2] a covered employee may request a jury trial under the CAA as well.

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[1] *See Bentley v. Arlee Home Fashions, Inc.*, 861 F.Supp. 65 (E.D. Ark. 1994).

[2] Section 408(c) of the CAA, 2 U.S.C. 1408(c).

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

Substantive Rights

The Library is covered by the substantive provisions of USERRA, which apply throughout the federal government, and which are described in the section of this study on GAO.[1] Like other employers that are part of the legislative branch, the Library is authorized under USERRA to determine that it is "impossible or unreasonable" to reemploy a person otherwise entitled to reemployment, in which case OPM shall ensure that the person is offered alternative employment of like seniority, status, and pay at a federal executive agency.[2]

Like GPO, but unlike GAO, the Library is excluded from coverage by OPM's authority to establish regulations implementing the provisions of USERRA, which applies only to Federal executive agencies.[3] The Library has issued a regulation governing reemployment rights of veterans, but the Library has indicated that the regulation is out of date and will be revised.

Procedures

Administrative

As was described in the section on GAO, an employee may invoke the investigation and informal compliance efforts by the Labor Department.[4] However, Library employees (like those at GPO, but unlike those at GAO) are not entitled to use the other federal sector administrative procedures under USERRA — representation by the Office of Special Counsel, and adjudication of a complaint before the MSPB — which apply only to "Federal executive agencies."[5]

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1 *See* 38 U.S.C. 4303(4)(A)(ii), (5), 4313, 4314.

2 *See* 38 U.S.C. 4314(a), (c).

3 Pursuant to 38 U.S.C. 4303(5), 4331(b)(1), OPM's regulations apply with regard to any "Federal executive agency," which does not include the Library. *See also* 5 C.F.R. 353.102(2) (scope of application of OPM regulations).

4 *See* 38 U.S.C. 4314(c), 4322.

5 *See* 38 U.S.C. 4303(5), 4324.

Library employees may use the agency's dispute resolution process, described above, and a member of a bargaining unit may submit a complaint under the negotiated grievance procedure and a non-member may proceed under the Library's administrative grievance or appeals procedures.

Judicial

Employees of the federal government, unlike those in the private sector, have no right to file a civil action under USERRA.[1]

Future-Effective Changes under the CAA

The Library, like GAO but unlike GPO, is also covered by section 206 of the CAA, which makes the rights and protections of USERRA applicable, effective one year after this study is transmitted to Congress.[2]

EVALUATION

Substantive Rights

The Library is subject to the substantive provisions of the USERRA, which apply throughout the federal government and are also made applicable under the CAA.

Procedures

The Library's administrative dispute resolution processes are generally available for Library employees, but these procedures do not offer a process independent of Library management. The negotiated grievance and arbitration procedure is also available, provided the employee is a member of a bargaining unit.

In comparison, the CAA provides administrative procedures, including the right to an adjudicatory hearing and appeal to the independent Office of Compliance Board, for any alleged USERRA violation. The CAA also provides the right to file a civil action, which is not now available to Library employees under the USERRA.[3] After CAA coverage of the

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[1] *See* 38 U.S.C. 4324.

[2] 2 U.S.C. 1316(a)(2)(B), (C), (d)(2).

[3] Employees of private employers or state governments may also commence a civil action under the USERRA, or the Attorney General may commence a civil action on behalf of

(continued...)

Library goes into effect, Library employees alleging violations of USERRA will become entitled to use the procedures provided by the CAA.

[3] (...continued)
these employees. *See* 38 U.S.C. 4323.

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988 (EPPA)

The Employee Polygraph Protection Act (EPPA) of 1988 does not apply to the Library or its employees, nor does this legislation apply to any federal employers except as made applicable by the CAA and similar law.[1] EPPA restricts employers' use of lie detector tests of their employees.

Effective one year after this study is transmitted to Congress, section 204 of the CAA will grant the rights and protections of the EPPA to employees of the Library, as it does to GAO employees.[2]

EVALUATION

Under presently effective law, no rights and protections of EPPA are applicable to the Library and its employees. In the future, however, Library employees will be afforded the same EPPA rights and protections as other employees covered under the CAA, including the right to use the administrative and judicial procedures of the CAA to obtain redress in case of a violation.

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1 *See* section 414 of the Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, 110 Stat. 4053 (Oct. 26, 1996).

2 2 U.S.C. 1314(a)(2), (d)(2).

THE AMERICANS WITH DISABILITIES ACT OF 1990
(Public Access Provisions)

Substantive Rights

Titles II and III of the ADA, which relate to public access to public services and public accommodations,[1] are applicable in their entirety to certain congressional instrumentalities, including the Library, under section 509 of the ADA.[2] The substantive provisions are described in the section of this report on GAO.

Procedures

Section 509(2) of the ADA currently requires certain instrumentalities, including the Library, to "establish remedies and procedures to be utilized with respect to the rights and protections" of the ADA made applicable.[3] The Library has provided that members of the public who allege violation of the public access requirements may file a complaint with the Associate Librarian for Constituent Services.[4] However, the ADA public access provisions now in effect do not provide judicial processes in case of a complaint against the Library.

Future-Effective Provision Under the CAA

Section 509(6) of the ADA will make the remedies and procedures of section 717 of Title VII available to visitors, guests, and patrons of the Library, as well as GAO and GPO, who wish to pursue claims under the public access provisions of the ADA, effective one year after this study is transmitted to Congress. The administrative and judicial procedures to be provided under section 509(6) are described in the portion of this study on GAO.

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1 Sections 201-245 and 301-309 of the ADA, 42 U.S.C. 12141-12165, 12181-12189.

2 42 U.S.C. 12209(1).

3 42 U.S.C. 12209(2).

4 Library of Congress, "Interim Policies, Procedures, and Remedies to Implement Pub. L. No. 101-336 [ADA]," section 9(B) (undated).

EVALUATION

The evaluation in the section of this study on GAO applies as well for the Library. In general terms, section 509(6) establishes a process under which a visitor, guest, or patron may pursue a complaint individually through an administrative complaints process administered by the agency and then, if not satisfied, may file a civil action in district court.

The CAA does not provide a visitor, guest, or patron of the Library the right to file a civil action or to pursue an administrative remedy on his or her own. Instead, the CAA adopts an enforcement-based process. An individual may file a charge with the General Counsel of the Office of Compliance, who investigates and may pursue an administrative complaint on the individual's behalf.

CONCLUSIONS

Substantive Rights

Library employees currently are granted substantive rights under most CAA laws, and, one year after this study is transmitted to Congress, the CAA will extend the substantive rights under additional laws to fill most remaining gaps in substantive coverage. In addition, Library employees enjoy civil service protections in a number of areas, whether guaranteed by statute or established administratively by regulation and collective bargaining agreements, extending beyond the scope of the rights and protections applied by the CAA. Two Library unions commented that generally the "written protections" at the Library are roughly equivalent to protections applying to other federal workers, but that there is a problem with the lack of effective enforcement of those standards.

Administrative Processes

Administrative procedures applied by the Library or established under collective bargaining agreements are available to resolve Library employees' complaints and grievances on a wide range of subjects. However, Library employees have no right to appeal administratively from the Librarian's final decision on discrimination complaints or adverse actions. (Bargaining unit members can secure the decisions of a neutral arbitrator.) Furthermore, while the Library provides for investigation of discrimination complaints, and hearings before a neutral hearing examiner, no outside agency has authority to investigate or take enforcement action. Nor does an outside agency now have authority to investigate or take enforcement action regarding occupational safety and health, although the Library will come under the jurisdiction of the Office of Compliance with respect to OSHA and certain other laws, effective one year after this study is transmitted to Congress. The Library currently is subject to the jurisdiction of the FLRA in labor-management matters.

Judicial Processes and Relief

Library employees now have, or will be granted under the CAA, rights to use judicial procedures that are comparable to rights available to covered Congressional employees under the CAA. However, under certain applicable laws, the right to a jury trial and to recover certain kinds of relief are not available to Library employees. For example, Library employees, like executive branch employees, arguably may not request a jury trial in cases under the ADEA, EPA, or FLSA, and may not recover compensatory damages under 42 U.S.C. 1981 or liquidated damages under the ADEA. Nor will the CAA extend these remedies to Library employees.

Independent Process for Issuing Substantive Regulations

For the subject areas within the scope of the CAA, substantive rights of Library employees are generally defined not by Library regulation, but by statute or government-wide regulations adopted by executive branch agencies and, in the future, by the Office of Compliance Board. With respect to general civil service protections, such as merit hiring and the conduct of RIFs, the Library has exercised considerable authority to promulgate substantive regulations, and Library

unions assert the right to bargain collectively about the terms of such regulations.

The study also identified several issues regarding the Library that warrant further discussion:

Administrative Processes for Discrimination Complaints

Employees of the Library — alone among the instrumentalities — have no administrative avenue for appeal from a final decision by the head of the agency on a discrimination complaint. The Library has suggested that its employees be authorized to use the administrative procedures of the Office of Compliance under the CAA, after first having used the EEO procedures of the Library for a period up to 180 days.

Two employee unions responded with support for the general concept of authorizing appeals to the Office of Compliance. However, instead of the application of CAA procedures, the unions advocate the application of EEO procedures like those at executive branch employing agencies, except that administrative appeal to the Office of Compliance would be substituted for appeal to the EEOC. The unions commented that, for most complainants, the investigatory process that the Library's EEO office is supposed to undertake are far more important than remedies before a hearing officer. Such investigation is provided under the Library's current procedures, as it is under executive branch procedures, but is not required under the CAA.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

The Library is now subject to the FMLA provisions in civil service law, codified in title 5 of the U.S. Code, and by OPM regulations implementing those provisions. However, section 202(c) of the CAA transfers coverage of the Library from the civil service provisions to the private sector provisions of the FMLA (codified in title 29 of the U.S. Code), effective as of one year after this study is transmitted to Congress. Section 202(c) will grant employees a private right of action that is unavailable for FMLA violations under civil service law, but will also reduce substantive FMLA protections, which are stronger under civil service law than in the private sector.

Section 202(c) covers GAO as well as the Library, and both instrumentalities recommended that section 202(c) be rescinded, because they have already established their FMLA leave systems in conformity with title 5 requirements and within the parameters of the general federal leave system, and a shift to title 29 will be administratively disruptive without serving a significant public purpose. Two Library union locals likewise recommended that coverage be retained under title 5, because title 29 provides exemptions tailored to the private sector that are not appropriate to civil service employment. These unions also stated that the right to sue for civil damages under title 29 would be "a rather extraordinary remedy when extended to federal employees," and that "administrative remedies that are typically available to federal employees would appear to be a more appropriate response to" an FMLA violation. On the other hand, section 202(c) furthers the general principle, expressed by Congress in enacting the CAA, that private sector law should apply to the legislative branch.

The Library also suggested that its employees who allege any FMLA violations be able to seek a

remedy by using the procedures prescribed in the CAA. The result would be a hybrid arrangement favorable to Library employees — substantive rights more protective than those afforded to covered employees under the CAA, and judicial procedures more favorable than those afforded to most federal sector employees under civil service statutes.

LABOR-MANAGEMENT RELATIONS (CHAPTER 71)

Labor-management relations at the Library are governed by Chapter 71 and implemented by the FLRA. The Library has recommended that legislation be enacted to place it instead under the labor-management program of the CAA. The three unions of Library employees disagree with this recommendation.

The Library does not assert that the rights, protections, procedures, and relief afforded Library employees in the labor-management relations area are not now comprehensive and effective, or that placing the Library under the CAA would make them more so. Rather, due to the special relationship between the Library and Congress, the Library suggested that it should come under the Office of Compliance's authority with respect to most of the laws made applicable by the CAA, and urged that the Library be included under the labor-management provisions of the CAA so as to achieve an integrated approach to employment matters administered by a single body. The Congressional Research Service (CRS), a division of the Library, presented a somewhat different rationale: that it is anomalous and raises separation-of-powers concerns for labor relations issues involving CRS, a legislative entity, to be resolved by the FLRA, an agency in the executive branch.

The three unions of Library employees urged that application of Chapter 71 to the Library not be changed. Comments from unions stated that collective bargaining under Chapter 71 has functioned effectively at the Library for nearly 20 years, and shifting coverage to the CAA would be disruptive. A union questioned whether the Office of Compliance would have the resources necessary to provide the services required by the Library and its labor organizations. Furthermore, certain of these commenters raised separation-of-powers concerns that they say actually argue against placing the Library under the Congressional employment system, because the Library exercises certain executive functions, especially in the area of copyright. Even CRS employees are unlike Congressional employees, a union explained, in that they are career merit employees, for whom collective bargaining affords essential protection against partisan and ideological pressures.

ADA PUBLIC ACCESS PROVISIONS

In case of a dispute over accessibility by visitors, guests, or patrons, section 210(g) of the CAA establishes a private right of action in United States district court after there has been resort to an administrative process in the Library. This provision will be effective one year after this study is submitted to Congress.

Section 210(g) applies as well to GAO and GPO. However, the Library is unique among the

three instrumentalities in that the Architect of the Capitol has responsibilities with respect to Library facilities and would have a role in correcting certain access violations. The Architect, however, is not covered by section 210(g). For the Architect, as for the House and Senate, charges concerning access are considered in an administrative process under the Office of Compliance, with judicial review to the U.S. Court of Appeals for the Federal Circuit.

The Library recommends that legislation be enacted to shift the remedial system, insofar as it concerns the Library, from private enforcement through civil action to enforcement through the Office of Compliance. Because of the Architect's pervasive role, this recommendation is intended to promote an integrated approach that avoids fragmentation of procedures and responsibility.

APPENDIX A

SECTION 230 OF THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS AMENDED

Section 230 of the Congressional Accountability Act of 1995 (2 U.S.C. 1371), as amended by section 309 of the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, 109 Stat. 538 (Nov. 19, 1995):

PART F—STUDY

SEC. 230. STUDY AND RECOMMENDATIONS REGARDING GENERAL ACCOUNTING OFFICE, GOVERNMENT PRINTING OFFICE, AND LIBRARY OF CONGRESS.

(a) IN GENERAL.—The Board shall undertake a study of—

(1) the application of the laws listed in subsection (b) to—

(A) the General Accounting Office;

(B) the Government Printing Office; and

(C) the Library of Congress; and

(2) the regulations and procedures used by the entities referred to in paragraph (1) to apply and enforce such laws to themselves and their employees.

(b) APPLICABLE STATUTES.—The study under this section shall consider the application of the following laws:

(1) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), and related provisions of section 2302 of title 5, United States Code.

(2) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), and related provisions of section 2302 of title 5, United States Code.

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and related provisions of section 2302 of title 5, United States Code.

(4) The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.), and related provisions of sections 6381 through 6387 of title 5, United States Code.

(5) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.), and related provisions of sections 5541 through 5550a of title 5, United States Code.

(6) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), and related provisions of section 7902 of title 5, United States Code.

(7) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

(8) Chapter 71 (relating to Federal service labor-management relations) of title 5, United States Code.

(9) The General Accounting Office Personnel Act of 1980 (31 U.S.C. 731 et seq.).

(10) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).

(11) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).

(12) Chapter 43 (relating to veterans' employment and reemployment) of title 38, United States Code.

(c) CONTENTS OF STUDY AND RECOMMENDATIONS.—The study under this section shall evaluate whether the rights, protections, and procedures, including administrative and judicial relief, applicable to the entities listed in paragraph (1) of subsection (a) and their employees are comprehensive and effective and shall include recommendations for any improvements in regulations or legislation, including proposed regulatory or legislative language.

(d) DEADLINE AND DELIVERY OF STUDY.—Not later than December 31, 1996—

(1) the Board shall prepare and complete the study and recommendations required under this section; and

(2) the Board shall transmit such study and recommendations (with the Board's comments) to the head of each entity considered in the study, and to the Congress by delivery to the Speaker of the House of Representatives and President pro tempore of the Senate for referral to the appropriate committees of the House of Representatives and of the Senate.

APPENDIX B

May 2, 1996

NOTICE OF REQUEST FOR INFORMATION

STUDY OF
STATUTORY RIGHTS AND PROTECTIONS AT THE
GENERAL ACCOUNTING OFFICE
GOVERNMENT PRINTING OFFICE
AND LIBRARY OF CONGRESS

MANDATED BY
SECTION 230 OF THE CONGRESSIONAL ACCOUNTABILITY ACT

The Board of the Office of Compliance, established by the Congressional Accountability Act of 1995 (CAA), is studying the application of certain employment and antidiscrimination laws at the General Accounting Office (GAO), the Government Printing Office (GPO), and the Library of Congress (LC).

This notice requests GAO, GPO, and LC, their employees and employee representatives, persons who use their public services and public accommodations, as well as any other interested persons, to provide information helpful to the Board in conducting the study. To enable the Board to fully consider all information, such information should be submitted to: Executive Director, Office of Compliance, at the address or fax number printed below, by May 31, 1996.

BACKGROUND

The Congressional Accountability Act, the first law passed by the 104th Congress, applies eleven employment and antidiscrimination laws to employees of the House of Representatives, the Senate, and instrumentalities of the legislative branch. The laws made applicable by the CAA provide rights and protections in the areas of: employment discrimination (race, color, religion, sex, national origin, age, disability); overtime pay and minimum wage; family and medical leave; employee polygraph protection; employee notification in case of office or plant closings or mass layoffs; employment and reemployment rights for those in the uniformed

services; occupational health and safety; labor-management relations; and discrimination on the basis of disability in the provision of public services and public accommodations. Eight of the eleven laws became effective under the CAA on January 23, 1996, and the remaining three will go into effect by the end of 1996.

Before enactment of the CAA, legal rights and protections in many of these areas already applied to the three largest Congressional instrumentalities -- GAO, GPO, and LC. The CAA makes certain initial modifications in the laws that now apply, and mandates a study that will:

- review the laws, regulations, and procedures applicable to these instrumentalities and their employees;

- evaluate whether the rights, protections, and procedures currently in place are "comprehensive and effective;" and

- provide recommendations for improvement in regulations and legislation.

As originally enacted, the CAA directed the Administrative Conference of the United States (Conference) to conduct the study and submit it to the Board, which would then transmit the study, together with the Board's comments, to the Congress and the instrumentalities by December 31, 1996. However, Congress amended the CAA in November 1995 to transfer responsibility for conducting the study from the Conference to the Board.

To assist interested persons in identifying information pertinent to the study, Appendix A lists the laws made applicable by the CAA and describes the statutory, regulatory, and procedural provisions that will be the subject of the study.

SCOPE OF THE STUDY

Part 1. Application of laws, regulations, and procedures. The first part of the study will describe:

(a) *What laws apply:* the substantive statutory provisions applicable to the instrumentalities and their employees. These will include the 11 laws made applicable by the CAA, as well as the GAO Personnel Act and certain provisions of civil service law, which apply, supplement, or affect the rights and protections of the laws made applicable by the CAA.

(b) *How do the laws apply:* the administrative and judicial mechanisms that apply the substantive provisions of laws to the instrumentality and its employees. These will include: (1) the authority of regulatory agencies, or of the instrumentality itself, to issue regulations, adjudicate or resolve claims, or take enforcement action; (2) judicial mechanisms for adjudicating claims and hearing appeals from administrative decisions; and (3) the remedies that may be granted in case of a violation.

(c) *Regulations and procedures:* the regulations and administrative procedures used to apply and enforce these laws to the instrumentality and its employees. These will include: (1) regulations and procedures issued by regulatory agencies that have jurisdiction over the instrumentalities, (2) regulations and procedures issued by the instrumentalities themselves, and (3) collective bargaining agreements that provide procedures for applying the rights and protections of the listed laws.

Part 2. Evaluation. The second part of the study will *evaluate* whether the rights, protections and procedures, including administrative and judicial relief, are "comprehensive and effective."

The study will use the CAA itself as a standard against which to evaluate the rights, protections, and procedures applicable at the instrumentalities. Thus, the study will include a comparison between the rights, protections, and procedures applicable at each of the instrumentalities with the corresponding rights, protections, and procedures applied to the House of Representatives and the Senate under the CAA.

Furthermore, the rights, protections, and procedures applied at the three instrumentalities are in many ways similar to those at executive branch agencies. In conducting the evaluation, the study will consider how the rights, protections, and procedures applied at each instrumentality compare with those available to executive branch employees generally.

Part 3. Recommendations. Finally, the study will include *recommendations* for improvements in regulations or legislation, including proposed regulatory and statutory language.

REQUEST FOR INFORMATION

The purpose of this Notice is to request that the three instrumentalities, their employees and employee representatives, and persons who use public services and public accommodations at the instrumentalities, as well as any other interested persons, provide information helpful to the Board in conducting the study, such as:

- Studies, evaluations, and other reports conducted by the instrumentalities or by outside auditors or agencies, evaluating the rights, protections, and procedures available to employees and users of public services and accommodations at the instrumentalities. Please include reports showing the extent of compliance with applicable requirements, and the timeliness and effectiveness of responses to any complaints.

- Information showing the extent to which rights, protections, and procedures at the instrumentalities are "comprehensive and effective."

- Identification of any rights, protections, and procedures that the commenter believes may *not* be "comprehensive and effective."

- Information that would help the Board in comparing the rights, protections, and procedures at each instrumentality with: (1) those applied to the House of Representatives and the Senate under the CAA[1] and (2) those generally applicable to executive branch employees.

- Information that would be helpful to the Board in making recommendations for improvements in regulations or legislation, and in ascertaining how a recommended change would affect the "comprehensiveness and effectiveness" of applicable rights, protections, and procedures, and other likely consequences of the change.

Commenters are requested to provide specific rationale and any supporting information.

PUBLIC DOCUMENTS

All materials submitted to the Executive Director in response to this notice will be considered public documents and will be made available for inspection upon request by any member of the public. (If an employee submits any comment or other document and requests not to be identified, the identity of the employee will be kept confidential.)

FOR FURTHER INFORMATION

For further information about this notice and the study, please contact Lawrence Novey, Senior Counsel to the Office of Compliance, at (202) 724-9250.

Ricky Silberman
Executive Director

[1] Any individual who desires additional information about the rights, protections, and procedures applicable under the CAA may contact the Office of Compliance.

APPENDIX A

In describing the application of laws, regulations, and procedures at the instrumentalities, the study will cover the following:

I. STATUTORY AUTHORITIES

A. SUBSTANTIVE RIGHTS AND PROTECTIONS. The study will identify and describe the substantive provisions of law that apply, or will apply, to the instrumentalities and their employees.

1. Laws made applicable by the Congressional Accountability Act. The laws to be studied are listed in section 230(b) of the Congressional Accountability Act (CAA).

a. EMPLOYMENT DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) (Title VII) prohibits discrimination in employment because of race, color, religion, sex, or national origin.

- The Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621 et seq.) (ADEA) prohibits employment discrimination against individuals 40 years of age and over.

- Title I of the Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12101-12117) (ADA) and the Rehabilitation Act of 1973 (29 U.S.C. §§ 701 et seq.) prohibit employment discrimination against qualified individuals with disabilities.

- The Equal Pay Act (29 U.S.C. § 206(d)) prohibits pay discrimination on the basis of sex.

b. EMPLOYEE BENEFITS, LABOR, HEALTH AND SAFETY

- The Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201 et seq.) (FLSA) governs overtime pay, minimum wage, and child labor protection.

- The Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2611 et seq.) (FMLA) entitles eligible employees to take leave for certain family and medical reasons.

- The Employee Polygraph Protection Act of 1988 (29 U.S.C. §§ 2001 et seq.) (EPPA) restricts use of lie detector tests by employers.

- The Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.) (WARN) assures employees of notice in advance of office or plant closings or mass layoffs.

- Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. chapter 43) (USERRA) protects job rights of individuals who serve in the military and other uniformed services.

- The Federal Service Labor-Management Relations statute (5 U.S.C. chapter 71) establishes the rights of individuals to form, join, or assist a labor organization, or to refrain from such activity, and to collectively bargain over terms and conditions of employment through their representatives.

- The Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 651 et seq.) (OSHA) protects the safety and health of employees from physical, chemical, and other hazards in their places of employment.

c. *DISCRIMINATION ON THE BASIS OF DISABILITY IN PROVIDING PUBLIC SERVICES AND PUBLIC ACCOMMODATIONS*

- Titles II and III of the Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12131-12189) (ADA) prohibit discrimination against qualified individuals with disabilities in the provision of public services and public accommodations.

2. Civil Service Laws and Other Relevant Statutes. The laws to be studied under section 230(b) of the CAA also include certain civil service and other laws that apply, supplement, or affect the substantive rights and protections afforded by the laws listed above, including several provisions of civil service law codified in title 5 of the U.S. Code, and the General Accounting Office Personnel Act of 1980 (31 U.S.C. §§ 731 et seq.).

3. CAA Provisions with Future Effective Dates. Several provisions of the CAA become effective at the instrumentalities one year after the study is transmitted to Congress:

- CAA provisions that now apply to Congressional offices will be extended to cover GAO and LC (but not GPO) with respect to four of the laws: *EPPA*, *WARN*, *USERRA*, and *OSHA*.

- GAO and LC (but not GPO) will be subject to the private-sector provisions, rather than the federal-sector provisions, of the *FMLA*, except that the authority of the Department of Labor will be exercised by the heads of these two instrumentalities.

- In case of any claims under *ADA titles II and III*, the judicial and administrative mechanisms under section 717 of Title VII will apply for all three instrumentalities,

except that the authorities of the Equal Employment Opportunity Commission (EEOC) will be exercised by the heads of the instrumentalities.

To enable Congress to review the delayed statutory provisions during the year after the study is transmitted, the study will evaluate and provide any necessary recommendations regarding these delayed provisions.

B. HOW DO THE LAWS APPLY? The study will identify and describe the statutory provisions establishing administrative and judicial mechanisms that apply the laws at the instrumentality. This includes:

- authority for the instrumentalities, or for regulatory agencies that have jurisdiction over the instrumentality, to perform regulatory functions, such as issuing regulations, hearing and resolving employee claims, or conducting enforcement activities;

- judicial mechanisms to adjudicate employee claims or to hear appeals from agency decisions; and

- the kinds of remedies that can be awarded in case of a violation.

II. REGULATIONS, PROCEDURES, AND IMPLEMENTATION.

The study will identify and describe the regulations and administrative procedures used to apply and enforce those laws to the instrumentality and its employees. This includes:

- regulations and procedures issued by the instrumentalities to apply and enforce the laws (instrumentalities may call these "regulations," "orders," "notices," or "instructions");

- regulations and procedures applicable to the instrumentality that are issued by outside regulatory agencies and offices; and

- any procedures under collective bargaining agreements that are used to apply and enforce the listed laws to the instrumentality and its employees.

APPENDIX C

SUMMARY OF COMMENTS

General Accounting Office (GAO)

GAO Management

Comments from officials of GAO, submitted on behalf of the agency, stated that most of the protections given to GAO employees under the CAA were already available to the employees under the terms of other laws, and further stated that GAO provides a comprehensive and effective set of policies and procedures to protect the rights of its employees.

The GAO comments also stated the belief that the GAO Personnel Appeals Board (PAB) has effectively performed its roles, but also stated that there is some Congressional concern about the need for GAO to have a PAB. The comments further stated that, because of budgetary considerations, the House Report accompanying the FY96 Legislative Branch Appropriations Bill requested GAO to review the PAB and consult with the oversight committee to find a more appropriate placement for the PAB's functions. Accordingly, GAO stated that it has been considering what would be a more appropriate placement for the PAB functions, but has not come to any conclusions on this matter.

The GAO comments offered several recommendations for statutory amendment. First, GAO recommended that sections 201(c)(1) and (2) of the CAA, which insert GAO into the coverage provisions of Title VII and the ADEA, be repealed. GAO stated that it would be subject to both of those laws anyway, because the laws apply to "executive agencies," a term that includes GAO. GAO stated that sections 201(c)(1) and (2) are therefore redundant, and, more important, are not consistent with past practice of legislative drafters and may create some ambiguity with respect to the inclusion of GAO under other statutes.

The GAO comments also expressed concern that sections 201(c)(3)(E) and 210(g) of the CAA (which assign certain authorities of the EEOC to the Comptroller General) would interfere with the division of powers established between the Comptroller General and the GAO Personnel Appeals Board (PAB) pursuant to the GAO Personnel Act (GAOPA). GAO recommended that provisions of these CAA sections covering the authority of the Comptroller General be repealed, or, in the alternative, that the provisions be amended to reference that the Comptroller General and the PAB share the responsibility of the EEOC pursuant to the GAOPA.

With respect to the Family and Medical Leave Act (FMLA), GAO's comments recommended that GAO should remain covered under the provisions of title 5, United States Code. The comments stated that GAO employees are career civil servants who have always been subject to the annual and sick leave provisions of title 5, and that these provisions, together with the FMLA provisions in title 5, form a comprehensive scheme for federal employees' leave entitlements. The comments

also recommended that the current appeals procedures for violations remain in place, and stated that an employee may seek redress through OPM's claims settlement authority or through the Court of Federal Claims.

With regard to the Worker Adjustment and Retraining Notification Act (WARN Act), GAO recommended that coverage of GAO under the CAA be repealed. The comments stated that GAO's Order on reductions in force (RIFs) affords employee protections that are more extensive and comprehensive than those under the WARN Act. Those procedures, the commenter stated, form an integrated system of which the notice provision is only one component. Protections include guaranteed consideration of seniority, performance, and veterans' preference in making the RIF decision. Also, even as to the limited issue of notice protection, the commenter stated that GAO's RIF order provides employees more extensive rights than the WARN Act provisions of the CAA. For example, the commenter stated that the GAO order is not restricted to plant or office closings, but that full notice must be provided if even just one employee is affected by a RIF. GAO employees may resort to the PAB to decide whether notice is defective. The commenter also stated that the PAB has the authority to direct that the employee be reinstated until the notice defect is corrected and that this relief is not provided under the WARN Act.

Concerning titles II and III of the Americans with Disabilities Act (ADA) (which forbid discrimination on the basis of disability in the provision of public services and public accommodations), GAO recommended that section 210(g) of the CAA be amended to provide that the remedies available to an individual alleging a denial of rights by GAO would be such remedies as would be awarded under sections 203 or 309(a) of the ADA.[1] GAO's comment stated that this would insure consistency of remedies provided by GAO with those provided by congressional entities under the CAA.

GAO also recommended several amendments to the procedures as provided in the CAA:

The GAO comments recommended that the CAA be amended to provide a mechanism whereby employing offices could challenge the issuance of an Occupational Safety and Health Act (OSHA) citation under the CAA. The comments stated that section 10 of OSHA gives an employer in the private sector 15 working days from notice of a citation to notify the Secretary that he wishes to contest the citation. The comment further stated that, if such procedure were implemented under the CAA, employing offices would not be required to wait until an enforcement proceeding to challenge a citation.

GAO recommended that section 407 of the CAA be amended so that the employing office, rather than the Office of Compliance, is the respondent in judicial review proceedings. The

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[1] Section 210(g) added a provision to the ADA making the remedies and procedures set forth in section 717 of the Civil Rights Act of 1964 available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress who alleges a violation of certain rights and protections under titles II and III of the ADA.

comment stated that the employing office is clearly an interested party and should be the named respondent. The comment also suggested that consideration be given to the fact that the federal courts and the GAO PAB are not parties in appellate review proceedings, nor is the Merit Systems Protection Board where the employee seeks review of a decision on the merits of the underlying personnel action.

GAO also recommended that section 414 of the CAA be amended so that GAO could settle a case without the approval of the Executive Director of the Office of Compliance. If all parties agree that a case should be settled, the comment questioned the necessity for review by the Executive Director. GAO further stated that there seemed to be no reason for Executive Director review when any costs of settlement will be funded out of GAO's appropriation. In this respect, the comment stated, GAO is different from most other offices subject to section 414, since their settlements are funded by the account established under section 415 of the CAA.

GAO Personnel Appeals Board

Comments from officials of the PAB, submitted on behalf of the Board, recommended that the study recognize the similarity of the legal protections in GAO to those in the executive branch. The comments stated that, in enacting the GAOPA in 1980, Congress concluded that the independence of GAO was threatened by having its employment matters subject to review by the very agencies that GAO could be called upon by Congress to evaluate, and that GAO's mission therefore mandates an independent and neutral personnel review system like the PAB provides.

The comments also described the PAB's oversight role in recommending systemic changes at GAO and the role of the PAB General Counsel as a salaried employee advocate, which reduces the potential cost to GAO of outside legal fees where GAO is on the losing side in an employment rights case. The comments stated that the PAB system, overall, is a comprehensive and effective mechanism for accomplishing the goal of enforcing employee rights at the GAO.

The comments stated that the PAB is well-suited to handle other GAO employee appeals in areas applied by the CAA that are not currently under the PAB's jurisdiction. The subject areas over which the PAB thinks that it could exercise enforcement authority are: public access provisions of the ADA, the Fair Labor Standards Act (FLSA), the FMLA, the Employee Polygraph Protection Act (EPPA), the WARN Act, and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The comments also stated that consideration should be given to the potential problems of having GAO employees bringing charges against GAO management to the Office of Compliance, when GAO may well be called upon to evaluate that office. According to the comments, this type of conflict situation is exactly what Congress sought to avoid in giving GAO an independent personnel system and establishing the PAB.

The comments suggested that it might be desirable to centralize enforcement coverage of

legislative employees for whom enforcement by the Office of Compliance is not appropriate due to extensive differences in statutory protection. The comments stated that GAO, GPO and the Library have personnel legislation directly comparable to that of executive branch agencies, and that the PAB is the only established board equipped to deal with the full range of appeals arising from these instrumentalities.

Finally, the comment recommended reducing the number of members of PAB from five members to three members total in order to enhance efficiency of the PAB.

A PAB official submitted a separate comment on behalf of the PAB in response to an inquiry from a staff member at the Office of Compliance regarding the legislative removal of the PAB's stay authority with respect to RIF-based actions. The comment stated that the PAB is troubled by the change and had communicated its opinions to the Comptroller General when the proposal was made by him to the Congress. The comment further stated that the PAB remains unaware of the rationale for denying the availability of this relief to GAO employees affected by a RIF action. The comment stated that the PAB continues to support the availability of stay relief, in appropriate circumstances, for GAO employees appealing a RIF-based action.

GAO Employee Councils

(1) An employee council that concentrates on civil rights issues submitted comments stating their belief that the separate personnel legislation for GAO has worked to the detriment of employee rights, and that alternatives to the present system, most likely requiring legislative change, must be found. The comment stated that the PAB receives it budget through GAO and that the Board members and the PAB General Counsel are appointed by the Comptroller General, and "[m]any employees do not believe that the PAB is either independent or effective in protecting employee rights."

The comment criticized the November 1995 legislation granting GAO management wide latitude in drawing RIF rules. The comment stated that the GAO's use of narrowly drawn competitive areas likely allowed African Americans to be disproportionately affected and allowed GAO management to retaliate against people who filed complaints. Furthermore, the withdrawal of the PAB's authority to stay a RIF "effectively rob[s]" employees of job rights where employees were targeted by RIFs because of unlawful discrimination.

The commenter stated that GAO management has a history of challenging the PAB's authority to address various issues, and recommended committing to law all those protections that currently apply in the executive branch.

In the labor-management relations area, the commenter stated that there is no collective bargaining at GAO, and that the employee councils, which are chartered by GAO management, can only provide their views and that GAO "management routinely ignores us."

Regarding the GAO dispute resolution efforts in civil rights matters, the commenter stated that

internal GAO mediation services “are provided by agency staff who are responsible for implementing the agency's civil rights and other programs and who are controlled by GAO management. Employees may be reluctant to utilize these resources, because they are not independent and may not be neutral.” The commenter claimed that the GAO civil rights office works closely with the GAO Office of the General Counsel in drafting decisions. The commenter added that employees' options regarding court review of Title VII claims have been narrowed by the U.S. Court of Appeals for the D.C. Circuit in *Ramey v. Bowsher*, which held that, after employees have chosen to bring their case to the PAB, their right to a jury trial in district court is forfeited. Finally, the commenter expressed concern about the lack of timeliness in the PAB's handling of cases.

This commenter attached a letter from an employee, who also commented separately. The employee stated that the PAB General Counsel does not function independently of the GAO, but rather favors the GAO by settling cases that merit prosecution.

(2) A comment from another employee council stated that GAO employees have rights and protection beyond those afforded other legislative branch employees by the CAA, and that those rights and protections are "comprehensive and effective." Specifically, the commenter stated that, while the council did not agree with all the PAB decisions, the PAB seems to act independently and without any predisposition to rule either in management's or the employees' favor.

The employee council member suggested that legislation should be amended to clearly designate the PAB as the arbiter for employee complaints and class actions arising from employment and anti-discrimination laws and regulations. The commenter suggests that FMLA, OSHA, polygraph protection, and other claims would be properly heard by the PAB.

(3) A comment from the employee council with an interest in persons with disabilities stated that overall, GAO has done very well in the past in hiring persons with disabilities. The commenter stated that problems exist in identification of current employees with disabilities. With regard to reasonable accommodations, the commenter stated that front-line supervisors often deny requests for accommodations of disabilities, and suggested that GAO can do much better in sensitizing managers about what a disability is. Regarding FMLA, the commenter stated that GAO has implemented this legislative mandate very well and there are no significant problems. Further, the commenter observed that, overall, GAO has made many improvements in making the headquarters building accessible. The commenter added that the PAB has been especially helpful in focusing GAO attention on those statutes that directly affect disabled employees, and suggested that PAB authority should be more explicit with regard to addressing issues relevant to laws that it enforces.

Government Printing Office (GPO)

GPO Management

A GPO official, on behalf of the agency, urged the continuation of the status quo, with minor

changes, and supported a consideration of the "resource sharing among the legislative branch agencies." The comments explained: "If it is Congress' desire that legislative branch agencies not use the boards and services of the executive branch to adjudicate employment and related issues, perhaps GAO's Personnel Appeals Board or a similar panel could be the designated body for such purposes with respect to all three legislative branch agencies."

The GPO comments recommended against extending EPPA provisions to GPO, because GPO has no intention to administer lie detector tests. GPO stated that it is not averse to being covered by WARN Act provisions, but believes that extending coverage to the agency would not benefit employees and would merely duplicate or conflict with the existing notice protections under collective bargaining obligations and under applicable regulations regarding RIFs. Comments stated that GPO would not be opposed to being included in the USERRA provisions. As to whether GPO should be switched from FMLA provisions of title 5, U.S. Code, to those in title 29, GPO observed that its FMLA program has worked well under OPM guidelines, which apply under title 5. Finally, GPO commented that GPO's performance and compliance record has been found to be "better than the average federal or private operation," and therefore GPO believes that it is unnecessary to extend additional OSHA coverage to the agency at this time. GPO further explained its view that any additional coverage would require a limited staff to devote time and energies to administrative requirements, thereby likely reducing GPO's ability to fully protect its employees.

A GPO official responsible for equal employment opportunity also submitted recommendations separately. These comments recommended that procedures be established to enable employees who work in the EEO program to file complaints outside the agency. Furthermore, the comments recommended that GPO employees be allowed to have decisions dealing with position classification be reviewed outside of the agency, the same as employees in the executive branch. The comment noted that, because of this lack of recourse to an outside agency, employees often bring the unfairness of this situation to the attention of the agency through the discrimination complaint process.

GPO Employee Representative

A union at GPO submitted comments noting that certain provisions of the CAA will apply to GAO and the Library, but not to GPO (relating to EPPA, WARN Act, USERRA, OSHA, and FMLA), and questions whether or not GPO should be included in these provisions. The union also commented that GPO's classification system is not fair and equitable when it involves minority workers.

GPO Employees

Several GPO employees expressed concern about the slowness of the EEO process at GPO. An employee also objected to GPO's pre-selection of employees for upward mobility programs.

One commenter, who is a non-bargaining unit employee located in a regional GPO office, stated that non-bargaining unit employees' terms and conditions are linked to the terms and conditions

negotiated by management and labor in headquarters. The commenter expressed the view that GPO has too much power in setting wage rates with non-bargaining unit employees' having no means of appealing wage determinations that adversely affect them.

Library of Congress

Library Management

Comments submitted on behalf of the Library urged, at a general level, that "the special relationship between the Library and the Congress" be considered. The comment stated that the Library's primary historical mission is to serve Congress, and that, operationally, there are strong connections between the Library and the day-to-day functions of the Congress.

The Library's comments made several specific recommendations. First, regarding the handling of discrimination complaints, the comment stated that Library employees now lack the availability of an office, outside of the Library, to provide mediation services to them, and lack an administrative adjudication system that is outside of the control of their employer. The comment stated the belief that employees would have increased confidence in impartiality and expertise of the claims system if the Library is placed under the CAA's EEO procedures, and recommended that the employees be authorized to use the administrative procedures of the Office of Compliance under the CAA, after first having used the EEO procedures of the Library for a period of up to 180 days.

With regard to OSHA and the ADA public access provisions, the comments stated that the CAA recognizes the important role of the Architect of Capitol in both areas, and that the role is so pervasive that it would be sound policy to promote an integrated approach that avoids fragmentation of procedures and responsibility. The commenter adds that "Congress might find appealing the benefit of having the Office of Compliance's inspection reports on the Library both for OSHA and ADA public access" for considering the cost of "correcting violations and anticipating remedial issues." The comment therefore recommends that legislation be enacted to shift the remedial system for ADA public access matters, insofar as it concerns the Library, from private enforcement through court suits to enforcement through the Office of Compliance, as the Congress has provided for all other Capitol Hill entities.

The comments recommended that the Library be placed under the labor-management provisions of the CAA. The comment stated that, together with the other recommendations, this would place the Library within a labor and employment law system administered by a single body, and the commenters underscored their belief in the long-term benefit of an integrated approach to employment matters (including labor-management relations) at the Library, under a common regulatory and enforcement office.

With regard to the FMLA, the comments recommended that the Library remain under the provisions of the FMLA that apply in the executive branch, not those provisions that apply to the

private sector. The Library stated that its pay and personnel officials have worked diligently to establish an administrative system for family and medical leave within the parameters of the general federal leave system, and they are concerned that a shift to private sector provisions of the FMLA would be administratively disruptive without serving a significant public purpose. The Library also recommended that the procedures of the Office of Compliance be applied to the resolution of any family and medical leave grievances at the Library.

The Library also recommended that, if the Library is put under the Office of Compliance, it is imperative that legislation be enacted to permit the Department of Justice to continue to represent the Library for that purpose. The commenter added that the Library also must continue to have access to the GAO Judgment Fund for payment of claims against the Library.

Another commenter, representing the Congressional Research Service (CRS) of the Library, emphasized the "exclusive congressional support role" that CRS plays in serving Congress. Based on that role, the commenter recommends placing the CRS under the jurisdiction of the Office of Compliance, particularly with regard to the labor-management relations laws. The commenter stated that CRS is a legislative entity, that it is anomalous and raises separation-of-powers concerns for labor-relations issues involving CRS to be resolved by the Federal Labor Relations Authority, an agency in the executive branch, and that CRS should be treated the same as the other legislative entities on Capitol Hill.

A Library official whose responsibility involves addressing the issues concerning persons with disabilities stated that there is a need for a comprehensive survey of Library staff to determine the number and types of disabilities among them and applying the authority given to other federal agencies to establish a selective placement program for qualified individuals with disabilities.

Library Employee Representatives

Two labor organizations representing Library employees recommended that application of the federal sector Labor-Management Relations statute to the Library be preserved, pointing to the number of cases filed with Federal Labor Relations Authority (FLRA) and the agreements negotiated with the Library management since the FLRA jurisdiction began. The commenters stated that, "on balance, we believe the record of the FLRA clearly reflects an even-handed approach between the labor organizations and Library management." The unions also stated that the CAA contains a number of provisions to fit a political environment, which have no bearing on employees of the Library, who do not engage in partisan politics. For example, the comment quoted from section 220(e)(1)(B), which requires the Board to exclude employees from coverage by labor-management laws if exclusion is required because of a conflict of interest or Congress' constitutional responsibilities. One of the unions further stated that the Office of Compliance may be unable to handle the extra workload involved in assuming jurisdiction over Library matters because of a focus on congressional offices and limited resources.

With regard to discrimination coverage at the Library, the comment urged that there be "extensive and thoughtful study" before making changes in the EEO laws. The comment cautions not to go

from an "imperfect" system, which affords an investigation into EEO charges, to a system that lacks any investigatory component, like the procedures under CAA. After reviewing the Library's proposal, one of these unions responded that the EEO procedures used in the executive branch "should govern at the Library of Congress, except that administrative appeal to the Office of Compliance should be substituted for appeal to the EEOC."

With respect to FMLA, union commenters recommended that coverage be retained under title 5, explaining their view that title 29 provides exemptions tailored to the private sector that are not appropriate to civil service employment. These commenters also stated that the right to sue for civil damages under title 29 (which would become available if the CAA provision takes effect) would be "a rather extraordinary remedy when extended to federal employees," and that "administrative remedies that are typically available to federal employees would appear to be a more appropriate response to" an FMLA violation.

With regard to OSHA, these commenters stated that the Library's Safety Services Office has "an active safety program" and the Joint Labor-Management Safety and Health Committee, whose existence is guaranteed by all three union agreements, is "unique in the federal government." A union stated that it proposes no statutory changes to the applicable provisions of the CAA, and "strongly supports the efforts of the General Counsel's Office of the Office of Compliance to apply OSHA standards to the Library of Congress and other legislative branch agencies." The commenter also referred to the Library's comment that the Architect's role is so pervasive that an integrated approach should be promoted that avoids fragmentation of procedures and responsibilities, and the union expressed its belief that it would make sound public policy to establish a common procedure for both the Library and the Architect with respect to OSHA and the public access provisions of the ADA.

A commenter representing the CRS bargaining unit urged that the Library not be placed under the labor-management provisions of the CAA. The comment stated that section 220(e) of the CAA requires the Board of the Office of Compliance to exclude from coverage any covered employee listed in section 220(e)(2) either because of a conflict of interest or appearance of a conflict of interest or because of Congress' constitutional responsibilities. The comment stated concern that "[i]f the Library and CRS were included under the CAA, then the Board may be compelled to exclude all employees in CRS from coverage of the labor relations program." The comments stated that the result would be the complete decertification of the existing union at CRS. The commenter recommended keeping the Library under the jurisdiction of the FLRA because the current arrangement fully comports with the purpose and intent of the CAA and the application of the exemption under section 220(e) of the CAA could only move the Library away from the comprehensive scheme now in place. The commenter stated that the current system is comprehensive and effective, and it is beyond the directive of this study to recommend the implementation of a scheme that is "*less* comprehensive." The commenter added that placing the Library and Congressional Research Service (CRS) within the CAA would be disruptive to labor-management relations and would not improve either those relations or employee protections at the Library. Further, the nature and character of non-partisan employment and objective work

product in CRS differs substantially from employment in the House or the Senate.

Further, the commenter stated that the Library should not be covered under the congressional labor-management relations program because the Librarian is an officer of the United States, appointed by, and subject to the orders of, the President. In particular, the comment stated the "Librarian is vested with executive authority for copyright and other matters." In addition, being subject to the federal labor-management program, the commenter stated, enables CRS analysts and attorneys to take positions adverse to members of Congress, because "[e]mployees who are protected by tenure are free to express objective opinions and conclusions without the fear of retaliation or retribution."

Library Employees

An employee commenter expressed his concern about the lack of coverage in the anti-discrimination laws that apply to the Library regarding employment discrimination based on sexual orientation. There were several comments from individual employees regarding their individual cases. One Library employee commented regarding her own race discrimination complaint against the Library and her dissatisfaction regarding slowness in its processing. Another commenter charged that he had been discriminated against at the Library by the failure of the EEO office to investigate his charge that a second employee, who was a member of a minority group, engaged in allegedly racist conduct against the commenter, who is not a minority. Another employee commented on the failure of the Library to take into account the total length of all federal service (in both executive and legislative branches) for RIF purposes.

Other Comment

A nonprofit organization, which is concerned with advancing the interests of people who are blind or visually impaired, commented regarding the need for accessibility of facilities and information services, at all three instrumentalities, to individuals whose vision may be impaired. The commenter emphasized the importance of a consistent application of the ADA Accessibility Guidelines developed by federal agencies in consultation with blind and visually impaired consumers. Moreover, the commenter highlighted the need that information generated by pubic entities be made available in alternative, accessible formats, in addition to the ordinary printed format.