RECOMMENDATIONS FOR

Improvements to the Congressional Accountability Act

AN ANALYSIS OF FEDERAL WORKPLACE RIGHTS,

SAFETY, HEALTH, AND ACCESSIBILITY LAWS THAT SHOULD

BE MADE APPLICABLE TO CONGRESS AND ITS AGENCIES

STATE OF THE CONGRESSIONAL WORKPLACE SERIES

OFFICE OF COMPLIANCE—BOARD OF DIRECTORS
BIENNIAL REPORT REQUIRED BY § 102(B) OF THE CONGRESSIONAL ACCOUNTABILITY ACT
ISSUED AT THE CONCLUSION OF THE 111TH CONGRESS (2009-2010) FOR CONSIDERATION BY THE 112TH CONGRESS (2011-2012)

> Congress simply cannot continue to live above the law and call itself a body that is 'representative' of the America we live in today. After all, what kind of message does Congress send to Americans when it sets itself above the law? What kind of message does Congress send to America when it believes it is beholden to a different set of standards? And how can Congress claim to pass laws in the best interest of the American people if Congress refuses to abide by those very same laws... Congress should be the very last institution in America to exempt itself from living under the Nation's laws. Rather, Congress should always be the very first institution to be covered by the laws of the land, especially as the body legislating such laws.
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> ***—Senator Olympia Snowe (ME), January 5, 1995, from the legislative history of the Congressional Accountability Act of 1995.***

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Statement from the **Board of Directors**

We have much to celebrate as we reflect on the 15 years since the historic passage of the Congressional Accountability Act (CAA) and the establishment of the Office of Compliance (OOC). With the CAA's passage, Congress became accountable—for the first time—under major federal civil rights statutes that apply to private sector and Federal Executive Branch employers, such as the Americans with Disabilities Act of 1990, and safety and health standards under the Occupational Safety and Health Act of 1970. Our fiscal year 2009 annual report "State of the Congressional Workplace"—released earlier this year—and other reports provide ample evidence of dramatic improvements in the state of the Congressional workplace as a result of the CAA.

In Congress's effort to bring accountability to itself and its agencies, the CAA established the OOC to: administer a dispute resolution program for the resolution of claims by Congressional employees under the CAA; carry out an education program to inform Congressional Members, employing offices, and employees about their rights and obligations under the CAA; inspect Congressional facilities for compliance with safety and health and accessibility laws; and, under the guidance of the Board of Directors, promulgate regulations and make recommendations for changes to the CAA to keep Congress current with and accountable to the workplace laws that apply to private and public employers.

This latter role of the Board is the subject of this report. The CAA was drafted in a manner that demonstrates that Congress intended that there be an ongoing, vigilant review of the workplace laws that apply to Congress. In so doing, Congress would be held accountable under the same Federal workplace laws that apply to private businesses, the Federal Executive Branch, and the American people. At its core, § 102(b) of the CAA essentially asks the Board of Directors for the OOC to report, on a biennial basis:

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

[1] Bracketed portion from Section 102(b)(1).

This report analyzes certain "parity gaps" between Federal workplace rights laws that apply to employers in the private and Federal Executive Branch sectors but do not apply to Congress and its agencies and recommends whether these laws should be incorporated into the CAA or made applicable to the Legislative Branch.

In carrying out our duty under § 102(b), the Board's analysis in this report demonstrates that Congress remains exempt from certain workplace laws that it passed to hold private and public sector employers accountable. Indeed, the vast majority of the laws that we recommend apply to Congress in this report existed at the time the CAA was passed. Most of the recommendations the Board makes here have been made in prior reports.

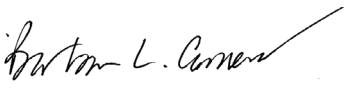
In some cases, the Board identifies Congressional exemption from entire statutes, such as the Whistleblower Protection Act of 1989. Congress recognizes whistleblowers as a key resource in weeding out fraud and misuse of taxpayer dollars in the Federal Executive Branch and under some laws in the private sector, yet its own employees are denied whistleblower protections from retaliation if they report such illegalities.

Even with respect to laws that it applied to itself through the CAA, Congress carved out significant and potent portions. For example, Congress is accountable to the main remedial provisions of workplace rights laws, such as the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, but not the provisions that would have required its employing offices in the Legislative Branch to post notification to their employees of their workplace rights and keep personnel records so that employees have evidence to prove violations occurred. The lack of notification may explain why a recent baseline survey conducted by the Congressional Management Foundation found that most Congressional employees have limited-to-no knowledge of their workplace rights.[2]

Congress has also been inconsistently applying notice-posting and recordkeeping requirements to itself. While the notice-posting and recordkeeping requirements of other anti-discrimination statutes do not apply to Congress and its agencies, Congress included itself in the notice-posting and recordkeeping requirements in the landmark Genetic Nondiscrimination Act of 2008 (GINA). Employing offices must post a notice of rights about genetic nondiscrimination, but not about nondiscrimination with regard to race, sex, national origin, age, disability, and age. Congress and its agencies must follow the recordkeeping provisions of GINA but not the similar provisions of the Americans with Disabilities Act, even though both laws limit access to sensitive medical information disclosed by employees. The inconsistency of requiring the notice-posting and recordkeeping under GINA, but not under other nondiscrimination laws, may lead to unnecessary confusion by employing offices and employees alike.

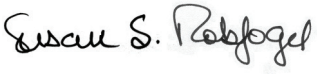
The Board welcomes discussion and dialogue on these recommendations. We urge Congress to hold itself and its agencies accountable under all of the significant employment laws of the land.

Sincerely,



Barbara L. Camens, Chair

Roberta L. Holzworth



Susan S. Robfogel

Alan V. Friedman

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[2] See pages 38–41, Fiscal Year 2009 Annual Report, "State of the Congressional Workplace".

Summary Matrix of Key Recommendations by the Board of Directors

THIS MATRIX PROVIDES A BRIEF SUMMARY OF THE KEY RECOMMENDATIONS FROM THE BOARD REGARDING THE FEDERAL LAWS THAT CURRENTLY DO NOT APPLY TO CONGRESS, BUT DO APPLY TO PRIVATE SECTOR AND/OR FEDERAL EXECUTIVE BRANCH EMPLOYERS. THESE LAWS ARE DISCUSSED IN-DEPTH AT THE PAGE NUMBERS INDICATED.

RECOMMENDATIONS FOR IMPROVEMENTS TO SAFETY AND HEALTH LAWS

Which law does not apply to the Legislative Branch?	What is the purpose of the law?	Does the Board recommend that the law apply to the Legislative Branch?
Investigatory subpoenas issued to obtain needed information for safety and health investigations *See* OSHAct § 8(b), 29 U.S.C. § 657(b)	■ Encourages voluntary and timely cooperation with investigating agency that saves time and money ■ Allows investigating agency access to essential health and safety information ■ More effective preservation of witness recollection and other evidence ■ Reduces employee exposure time to hazardous conditions	Yes Page 10
Recordkeeping of safety and health injuries of employees *See* OSHAct § 8(c), 29 U.S.C. § 657(c)	■ Provides a cost-efficient method for identifying injury and illness-producing hazards and conditions by providing information about injuries and/or illnesses that are serious enough to require more than first aid ■ Assists in the enforcement of and compliance with health and safety standards ■ Reduces injuries and long-term costs by identifying hazards for abatement	Yes Page 12
Prosecution of employing offices for retaliating against employees who report safety and health hazards *See* OSHAct § 11(c), 29 U.S.C. § 660(c)	■ Allows agency with investigatory and prosecutorial authority over substantive violations to protect those who participate in its investigations and proceedings ■ Allows employees to cooperate with investigators by reporting OSHAct violations and discussing workplace conditions with less fear of reprisal because enforcement agency will investigate and prosecute claims of retaliation ■ Discourages employing offices from retaliating against employees who report OSHAct violations or otherwise cooperate with investigators ■ Vests enforcement discretion with the agency having knowledge of the protected conduct and the underlying policy considerations	Yes Page 14

RECOMMENDATIONS FOR IMPROVEMENTS TO WORKPLACE RIGHTS LAWS

Which law does not apply to the Legislative Branch?	What is the purpose of the law?	Does the Board recommend that the law apply to the Legislative Branch?
Protections against retaliation for whistleblowers who disclose violations of laws, rules or regulations, gross mismanagement, gross waste of funds, abuses of authority, or substantial and specific dangers to public health *See e.g.,* Whistleblower Protection Act of 1989	■ Employees are often in the best position to know about and report violations of law, waste, mismanagement, and abuse in government and need protections against retaliation when they disclose these violations ■ Violations of law, waste, mismanagement and abuse of power are often not discovered by other sources ■ Whistleblowers save taxpayer dollars by exposing waste and abuse ■ Increases taxpayers' faith in government by protecting whistleblowers who act as "watchdogs" and protect the public's health and safety	Yes Page 20
Notice-posting of rights under anti-discrimination and other workplace rights laws *See e.g.,* 42 U.S.C. § 2000e-10(a) (Title VII) 29 U.S.C. § 627 (ADEA) 42 U.S.C. § 12115 (ADA) 29 U.S.C. § 211 (FLSA/EPA) 29 U.S.C. § 2619(a) (FMLA) 29 U.S.C. § 2003 (EPPA) 38 U.S.C. § 4334(a) (USERRA) 29 U.S.C. § 657(c)(OSHAct) 5 U.S.C. § 2301 note (No FEAR Act)	■ Informs employees about basic workplace rights, remedies and how to seek redress for alleged violations of the law ■ Reminds employers of their workplace obligations and consequences for failure to follow the law	Yes Page 22
Retention of employee records that are necessary and appropriate for the administration of laws *See e.g.,* 42 U.S.C. § 2000e-8 (Title VII) 29 U.S.C. § 626(a) (ADEA) 42 U.S.C. § 12117 (ADA) 29 U.S.C. § 2616(b) (FMLA) 29 U.S.C. § 211(c) (FLSA/EPA)	■ Records assist in speedier resolution of claims ■ Employers can use records as critical evidence to demonstrate that no violation of the law occurred ■ Employees can use records as critical evidence to assert their rights	Yes Page 24
Training of employees about workplace rights and legal remedies *See e.g.,* 5 U.S.C. § 2301 (No FEAR Act)	■ Informs employees about basic workplace rights, remedies and how to seek redress for alleged violations of the law ■ Reminds employers of their workplace obligations and consequences for failure to follow the law	Yes Page 26

Recommendations for Improvements to **Safety & Health Laws**

The Congressional Accountability Act (CAA) applies the broad protections of Section 5 of the Occupational Safety and Health Act (OSHAct) to the Congressional workplace. The Office of Compliance (OOC) enforces the OSHAct in the Legislative Branch much in the same way the Secretary of Labor enforces the OSHAct in the private sector.[3] Under the CAA, the OOC is required to conduct safety and health inspections of covered employing offices at least once each Congress and in response to any request, and to provide employing offices with technical assistance to comply with the OSHAct's requirements.

But Congress and its agencies are still exempt from critical OSHAct requirements imposed upon American businesses. Under the CAA, employing offices in the Legislative Branch are not subject to investigative subpoenas to aid in inspections as are private sector employers under the OSHAct. Similarly, Congress exempted itself from the OSHAct's recordkeeping requirements pertaining to workplace injuries and illnesses that apply to the private sector. Finally, Legislative Branch employees who report workplace hazards or who cooperate with OSH investigators are not protected from retaliation in the same manner as private sector employees. The Secretary of Labor protects private sector employees by investigating and litigating retaliation claims while Legislative Branch employees have the burden of investigating and litigating their own cases. As a result, when it comes to workplace safety and health, parity gaps exist between the rights and protections that Congressional employees have as compared with private sector employees.

[3] As to the Federal Executive Branch, the OSHAct and the Executive Order implementing it place more extensive occupational safety and health responsibilities upon those agencies than are placed upon Legislative Branch offices under the CAA.

> The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> *—Congressional findings in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(a)*

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Subpoena Authority to Obtain Information Needed for Safety & Health Investigations

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM

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OSHAct § 8(b), 29 U.S.C. § 657(b)

PARITY GAP IDENTIFIED

Employers in the private sector that do not cooperate with the U.S. Department of Labor (DOL) in an OSHAct investigation may be subpoenaed to compel the production of information by the DOL under OSHAct § 8(b), 29 U.S.C. § 657(b).

PURPOSE OF THE LAW

- Saves time and money by encouraging voluntary and timely cooperation with investigating agency
- Allows investigating agency access to essential health and safety information
- More effective preservation of witness recollection and other evidence
- Reduces employee exposure time to hazardous conditions

RECOMMENDATION TO 112TH CONGRESS

The Board of Directors recommends that Legislative Branch employing offices be subject to the investigatory subpoena provisions contained in OSHAct § 8(b).

Recommended in prior § 102(b) reports.

ANALYSIS

One of the most significant authorities of the Secretary of Labor is the ability to compel the attendance and testimony of witnesses and the production of evidence under oath in the course of conducting inspections and investigations of workplaces under OSHAct § 8(b), 29 U.S.C. § 657(b). In enacting the OSHAct, Congress observed that investigatory subpoena power "is customary and necessary for the proper administration and regulation of an occupational safety and health statute."[4] Investigatory subpoena authority is common to other Federal agencies that have investigative functions similar to that of the Secretary of Labor under the OSHAct.[5] Absent such authority, a recalcitrant employer under investigation could easily delay or even disable a regulatory agency from conducting an adequate investigation.[6]

Unlike the Department of Labor and other state and federal entities, subpoena authority in aid of investigations was not given to the OOC under the CAA.[7] This exemption in the CAA considerably limits the OOC's ability to investigate promptly and effectively safety and health hazards within the Congressional workplace.

In many, if not most, instances, safety and health inspections and investigations of employment areas must rely on witnesses and the examination of records that are solely within the possession and control of the employing office. If an employing office refuses to provide pertinent information, the OOC may be forced to limit or even abort an inspection or investigation. In some instances, the absence of investigatory subpoena authority has significantly contributed to protracted delays in investigations. *See e.g., Biennial Report on Occupational Safety and Health Inspections* during the 109th Congress, pp. 5-6 (April 2008). Inordinate delay or provision of only partial information can easily result in faulty witness recollection, the loss of evidence, and untimely completion of inspections.

Investigatory subpoena power would encourage employing offices to provide documents or other evidence necessary for an investigation. At the same time, this authority would provide a neutral forum for the timely resolution of legitimate disputes over the production of evidence. Hence, it would enhance the OOC's ability to obtain promptly information necessary to ascertain whether further investigation was required, immediate enforcement action was warranted, or to otherwise conclude that no factual basis existed for finding a violation.

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[4] Report No. 91-1291 of the House Committee on Education and Labor, 91st Congress, *2d Session, p. 22*, to accompany H.R 16785 (OSHAct) (Section 8(b) "grants the Secretary of Labor a subpoena power of books, records and witnesses—a power which is customary and necessary for the proper administration and regulation of an occupational safety and health statute."); Report No. 91-1291 of the Senate Committee on Labor and Public Welfare, 91st Congress, *2d Session*, p.12, to accompany S. 2193 (OSHAct) ("a power which is customary and necessary for the proper administration and enforcement of a statute of this nature.").

[5] *See e.g., Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, U.S. Department of Justice, pp. 6-7 and Appendix AI: ("'Without sufficient investigatory powers, including some authority to issue administrative subpoena requests, federal governmental entities would be unable to fulfill their statutorily imposed responsibility to implement regulatory or fiscal policies. Congress has granted some form of administrative subpoena authority to most federal agencies, with many agencies holding several such authorities. The Supreme Court has construed administrative subpoena authority broadly and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitation of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.").

[6] *See e.g.,* Federal Efforts to Eradicate Employment Discrimination in State and Local Governments: An Assessment of the U.S. Department of Justice's Employment Litigation Section, U.S. Commission on Civil Rights (September 2001) ("A major obstacle to the investigative process is [the Employment Litigation Section] ELS's lack of subpoena power and its resulting reliance on voluntary compliance from employers under investigation. Without this authority, ELS cannot force employers to provide documents, access to personnel, or other evidence necessary to complete an investigation. *** '[I]nvestigations get strung along by employers very often and the collection of information alone can take months. *** Thus, without having subpoena power, ELS runs the risk of needlessly expending resources on efforts to compel employers to produce the information necessary for an investigation.")

[7] Research disclosed nothing in the legislative history to explain why § 8(b) of OSHAct was not incorporated in the CAA.

Safety & Health Recordkeeping of Congressional Employee Injuries

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM

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OSHAct § 8(c), 29 U.S.C. § 657(c)

PARITY GAP IDENTIFIED

Employers in the private sector are required to keep records of workplace injuries and illnesses under OSHAct § 8(c), 29 U.S.C. § 657(c).

PURPOSE OF THE LAW

- Saves time and money by providing information about injuries and/or illnesses that can be used to develop and assess the effectiveness of measures taken to protect safety and health
- Assists in the enforcement of and compliance with health and safety standards
- Reduces injuries and associated costs by identifying hazards and conditions in need of abatement

RECOMMENDATION TO 112TH CONGRESS

The Board of Directors recommends that covered Legislative Branch employing offices be required to keep and provide safety and health records to the General Counsel of the OOC consistent with the requirements of the OSHAct § 8(c), 29 U.S.C. § 657(c), which requires private employers to keep and provide similar records to DOL.

Like other employers, Congress and its employing offices should be required to maintain records of occupational injuries and illnesses serious enough to require more than first aid treatment.

Recommended in prior § 102(b) reports.

ANALYSIS

Section 8(c) of the OSHAct (29 U.S.C. § 657(c)), requires employers to make, keep and preserve, and provide to the Secretary of Labor, records required by the Secretary as necessary and appropriate for the enforcement of the OSHAct or for developing information regarding the causes and prevention of occupational accidents and illnesses; records on work-related deaths, injuries and illnesses; and records of employee exposure to toxic materials and harmful physical agents. None of these recordkeeping provisions was adopted by the CAA to apply to the Legislative Branch.[8]

In enacting the OSHAct, Congress recognized that "[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program." Congress observed that a recordkeeping requirement should be included in that legislation since "the Federal government and most of the states have inadequate information on the incidence, nature, or causes of occupational injuries, illnesses, and deaths."[9] With respect to Legislative Branch workplaces, however, inaccessibility to full and accurate safety and health information continues to impede the OOC's ability to administer effectively the CAA because the recordkeeping requirements of § 8(c) of the OSHAct were not incorporated in the CAA.

Without access to such information, the OOC is unable to enforce effectively several critical safety and health standards within the Legislative Branch. Substantive occupational safety and health standards concerning asbestos in the workplace (29 C.F.R. 1910.1001), providing employees with safety information regarding hazardous chemicals in their workspaces (29 C.F.R. 1910.1200), emergency response procedures for release of hazardous chemicals (29 C.F.R. 1910.120), and several others rely on accurate recordkeeping to ensure that employees are not exposed to hazardous materials or conditions. However, because the CAA does not contain § 8(c)'s recordkeeping requirements, employing offices may contend that they are not required to maintain or submit such records to OOC for review. Absent these requirements, we cannot fulfill Congress's objective of ensuring that all Legislative Branch employees are provided with places of work that comply with the occupational safety and health standards protecting their private sector counterparts.

Without the benefit of § 8(c) authority, the OOC is hampered in its ability to access records needed to develop information regarding the causes and prevention of occupational injuries and illnesses. § 8(c)(1). As the Department of Labor recognized, "Analysis of the data is a widely recognized method for discovering workplace safety and health problems and tracking progress in solving these problems."[10]

In February 2004, the Government Accountability Office issued its report, *Office of Compliance, Status of Management Control Efforts to Improve Effectiveness*, GAO-04-400. In its report, GAO made a number of recommendations to improve the OOC's effectiveness, one of which was to increase "its capacity to use occupational safety and health data to facilitate risk-based decision making" to ensure that the OOC's activities contribute to "a safer and healthier workplace." (pp. 4, 14). Without the ability to acquire relevant and targeted employing office accident and injury data under OSHAct § 8(c)(2), the OOC cannot efficiently tailor the biennial inspections by focusing its limited resources on work areas that have the highest incidence of illness or injury.

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[8] Occupational accident and illness recordkeeping and reporting requirements are applied to "each Federal Agency" by virtue of Section 19 of OSHAct (29 U.S.C. § 668). Section 19 was not incorporated in the CAA. Accordingly, the Secretary of Labor's recordkeeping regulations under Section 19 apply only to Executive Branch agencies, except that "By agreement between the Secretary of Labor and the head of an agency of the Legislative and Judicial Branches of the Government, these regulations may be applicable to such agencies." 29 C.F.R 1960.2(b) and 1960.66 et seq. The Department of Labor has advised that it has no such agreements with any Legislative Branch employing offices.

[9] Senate Report No. 91-1282 (October 6, 1970) respecting the recordkeeping and records provisions of now Section 8(c) of OSHAct. See also, Report No. 91-1291 of the House Committee on Education and Labor, 91st Congress, *2d Session*, p. 30, to accompany H.R 16785 (OSHAct) ("Adequate information is the precondition for responsive administration of practically all sections of this bill.").

[10] *See,* "Detailed Frequently Asked Questions for OSHA's Injury and Illness Recordkeeping Rule for Federal Agencies," www.osha.gov/recordkeeping/detailedfaq.html.

Authority to Investigate and Litigate Claims of Retaliation Against Congressional Employees

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM

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OSHAct § 11(c), 29 U.S.C. § 660(c)(2)

PARITY GAP IDENTIFIED

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

PURPOSE OF THE LAW

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

RECOMMENDATION TO 112TH CONGRESS

The Board of Directors recommends amending the CAA to permit the OOC to enforce anti-retaliation rights for covered employees of employing offices under OSHAct § 11(c), 29 U.S.C. § 660(c) who report health and safety hazards or who otherwise participate or cooperate in occupational safety and health investigations.

Recommended in prior § 102(b) reports.

ANALYSIS

Legislative Branch employees have provided the OOC with invaluable insight into the existence of hazardous or unhealthful conditions. The information received from employees has proven essential in advising the OOC of the possible existence of serious hazards that may affect the safety and health of employees and members of the public. All too often, the hazards these employees have brought to the OOC's attention might not otherwise have been detected during the mandated periodic inspections of Legislative Branch facilities. Because of the strong institutional interest in ensuring that this information continues to flow freely, it is critical that the CAA effectively protect employees from reprisal when they exercise their right to report occupational hazards within the workplace or otherwise cooperate with the OOC on matters relating to occupational safety and health. Authorizing the OOC to investigate and litigate retaliation claims would vindicate more effectively these basic rights, deter acts taken in reprisal, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the CAA and its processes.

The only protection currently provided to employees reporting OSHAct violations is contained in § 207 of the CAA, which makes it "unlawful for a covered employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by [the CAA]...or initiated proceedings...or participated in...[a] proceeding" 2 U.S.C. § 1317(a). Under this general anti-retaliation provision, the employee may bring a retaliation claim, using the counseling, mediation, and complaint procedures set forth in §§ 401-408 of the CAA. With that process comes the obligation to shoulder the financial and logistical burden of litigating a charge of reprisal without the support of the OOC's investigative process and enforcement procedures in an area of law that can be complex and highly technical.

While the CAA substantially follows the OSHAct in vesting with the OOC the same authority to investigate OSHAct violations and issue OSHAct citations and complaints as is given to the Secretary of Labor, it fails to give the General Counsel the same authority granted to the Secretary of Labor with respect to retaliation against employees. This disparity means that even though the OOC is responsible for identifying, investigating, and obtaining abatement of workplace hazards, the OOC can do nothing to protect from retaliation the employees who assist the OOC in the performance of these responsibilities.

Under § 11(c) of the OSHAct, the Secretary of Labor can investigate and bring an action against a person who discharges or otherwise discriminates against an employee because that employee has exercised rights on behalf of himself or others under the OSHAct. 29 U.S.C. § 660(c)(2). In contrast, under the CAA, the OOC's General Counsel does not have the authority to bring a claim on behalf of an employee who alleges retaliation because he or she cooperated in one of the OOC's investigations. While employees have reported to OOC's safety inspectors instances of harassment and other acts of retaliation because they reported hazards, under current law, the OOC cannot initiate or investigate these claims. With few exceptions, employees reporting OSHAct retaliation to the OOC have not initiated § 207 retaliation claims under the CAA. Some employees have expressed to the OOC great concern about their exposure in coming forward to bring a claim of retaliation; others have indicated their unwillingness to proceed without having the protections provided by OSHAct § 11(c). Consequently, the General Counsel's ability to identify, investigate, and obtain abatement of workplace hazards is being compromised by the inability to offer and provide protection against retaliation to those employees who have reported hazards and cooperated with investigations. Merely knowing that the General Counsel possesses such authority may deter employing offices from retaliating against their employees.

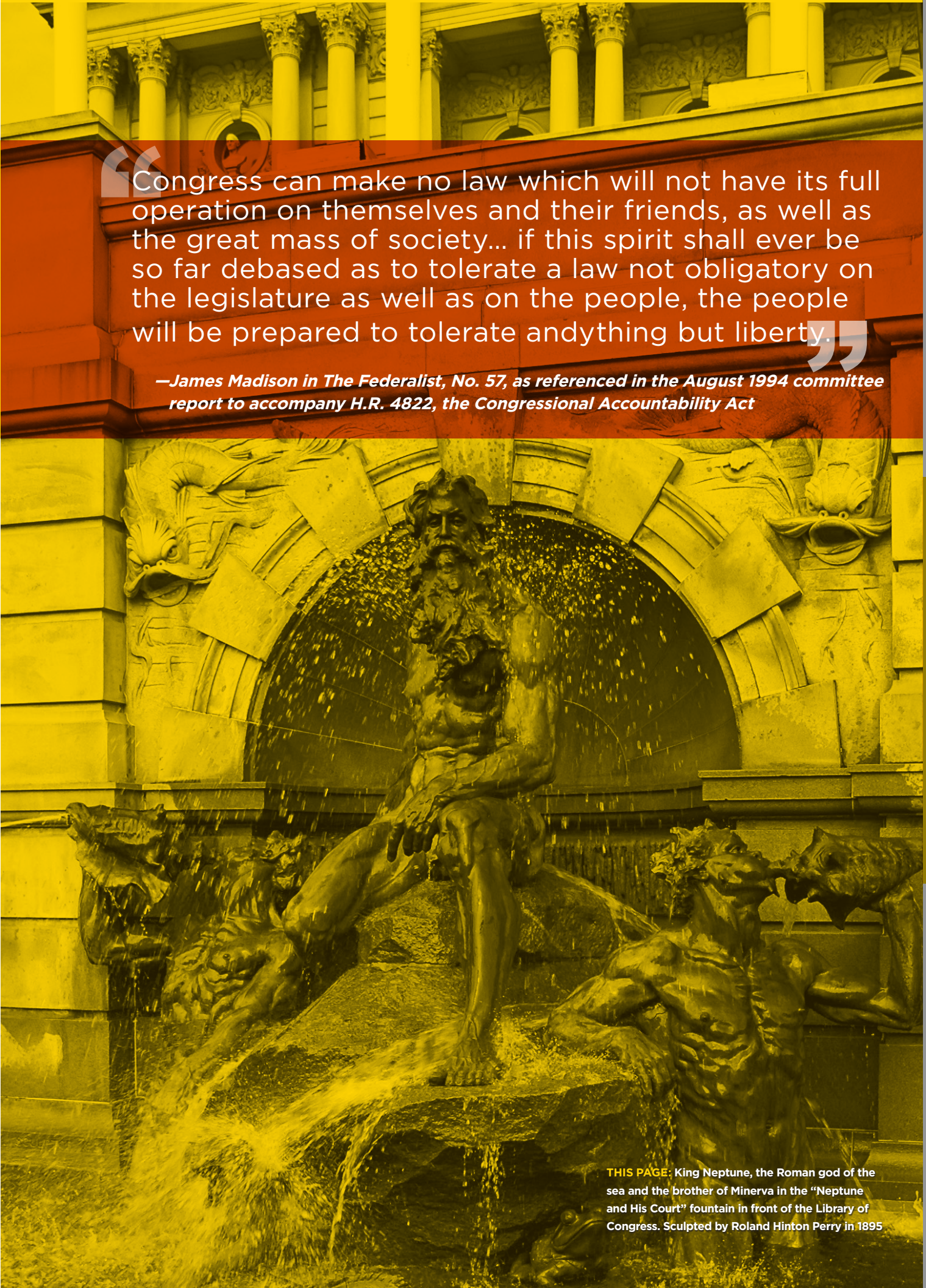
The General Counsel's lack of authority to prosecute meritorious retaliation claims weakens employee confidence in the efficacy of the CAA, and places health and safety unnecessarily at risk. Not only is the employee affected, but others may be deterred from reporting a hazard. Employee reluctance to report uncorrected hazardous conditions within the workplace both undermines the core objective of the CAA—to foster a safe and healthful work environment—and deprives the OOC of information critical to its mission.

Recommendations for Improvements to **Public Access Laws**

The Congressional Accountability Act (CAA) applies Titles II and III of the Americans with Disabilities Act of 1990 (ADA) to the public services and accommodations provided by Legislative Branch offices. The OOC enforces public access laws in the Legislative Branch by conducting inspections of Legislative Branch facilities, providing technical assistance to covered offices, and investigating and processing access complaints filed by members of the public.

In prior § 102(b) reports, the Board has recommended that the rights and protections afforded by Titles II and III of the Civil Rights Act of 1964 against discrimination with respect to public facilities and places of public accommodation should be applied to employing offices within the Legislative Branch. Titles II and III of the Civil Rights Act of 1964 prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations provided at these locations. These prior reports, however, did not note that Legislative Branch entities are prohibited by the Constitution from engaging in such discrimination or segregation and that under current law a tort remedy does exist against any individual engaging in such illegal conduct. See, e.g., *Davis v. Passman*, 442 U.S. 228, 234 (1979). Normally a statutory remedy is unnecessary unless it can be demonstrated that the common law remedy is inadequate. After careful reflection and after finding no evidence that the existing tort remedy is inadequate, the Board no longer deems it necessary to continue recommending that coverage under Titles II and III of the Civil Rights Act of 1964 be expanded to include Legislative Branch offices.

Also in prior § 102(b) reports, the Board has recommended that the CAA be amended to incorporate the provisions of § 508 of the Rehabilitation Act of 1973, which was added to this law in 1998 to "require each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to technology as individuals without disabilities." Senate Report on S. 1579, March 1998. This amendment is no longer necessary because, as the Department of Justice has made clear in its recent Advance Notice of Proposed Rulemaking, the use of accessible electronic information technology is required by Titles II and III of the ADA (which do apply to Legislative Branch offices). See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, U.S. Department of Justice, 75 FR 43460 (July 26, 2010). In the future, the OOC intends to enforce Titles II and III of the ADA in a manner consistent with this interpretation from the Department of Justice.



"Congress can make no law which will not have its full operation on themselves and their friends, as well as the great mass of society... if this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate andything but liberty."

—James Madison in The Federalist, No. 57, as referenced in the August 1994 committee report to accompany H.R. 4822, the Congressional Accountability Act

THIS PAGE: King Neptune, the Roman god of the sea and the brother of Minerva in the "Neptune and His Court" fountain in front of the Library of Congress. Sculpted by Roland Hinton Perry in 1895

Recommendations for Improvements to **Workplace Rights Laws**

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

Examples of workplace rights that apply to Congress through the CAA include Title VII, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act, and the Age Discrimination in Employment Act. Nevertheless, in passing the CAA, Congress omitted significant statutory provisions from these laws including notice-posting and recordkeeping requirements. The effect of these omissions is that a primary means of notifying employees that they even have such protections and remedies through notice-posting is not required in the Congressional workplace. Furthermore, Congress and its employing offices are exempt from recordkeeping requirements, which are required in the private and Federal Executive Branch sectors because such records often keep vital documentation and evidence to prove (or disprove) violations of employment discrimination laws.

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

> The Congress finds that…[whistleblowers] serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures… [and that] protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.

—Congressional findings for the Whistleblower Protection Act of 1989 (S. 20 enrolled bill, final as passed both House and Senate).

THIS PAGE: "The Goddess Minerva" in a marble mosaic by Elihu Vedder on the landing of the second-floor stairs to the Visitors' Gallery at the Library of Congress

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

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM

WHISTLEBLOWER PROTECTION ACT OF 1989

PARITY GAP IDENTIFIED

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

PURPOSE OF THE LAW

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

RECOMMENDATION TO 112TH CONGRESS

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

Recommended in prior § 102(b) reports.

ANALYSIS

Over the years, the OOC has received numerous inquiries from Legislative Branch employees about their legal rights following their disclosures of alleged violations of law, abuses, or mismanagement. Unfortunately, these employees are not currently protected from employment retaliation by any law.[11] The anti-retaliation provisions of the CAA only provide protection to employees who exercise their rights under the current provisions of the CAA. Whistleblower protections are intended specifically to add to these protections by preventing employers from taking retaliatory employment action against an employee who discloses information which he or she reasonably believes evidences a violation of law, gross mismanagement, or substantial and specific danger to public health or safety. When Congress first enacted the Whistleblower Protection Act (WPA) in 1989, it stated that the intent of the legislation was to:

> strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing...that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[12]

These rights were not extended to Congressional employees under the CAA and the OOC has urged Congress and its agencies to afford their employees these same protections. In both the 109th and 110th Congresses, legislation was introduced[13] that would have amended the CAA to give Legislative Branch employees some of the whistleblower protection rights that are available to Federal Executive Branch and private sector employees. Efforts to pass the legislation failed. One of the strongest proponents of whistleblower protections has been Senator Chuck Grassley. In introducing legislation that would give Legislative Branch employees whistleblower protections, Senator Grassley released this statement:

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

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

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

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

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

[12] 5 U.S.C. § 1201 nt.

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

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

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM NOTICE-POSTING PROVISIONS

42 U.S.C. § 2000e-10(a) (TITLE VII)
29 U.S.C. § 627 (ADEA)
42 U.S.C. § 12115 (ADA)
29 U.S.C. § 211 (FLSA/EPA)
29 U.S.C. § 2619(a) (FMLA)
29 U.S.C. § 2003 (EPPA)
38 U.S.C. § 4334(a) (USERRA)
29 U.S.C. § 657(c) (OSHA)
5 U.S.C. § 2301 note (notice-posting provision) (No FEAR Act)

PARITY GAP IDENTIFIED

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

PURPOSE OF THE LAW

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

RECOMMENDATION TO 112TH CONGRESS

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

Recommended in prior § 102(b) reports.

ANALYSIS

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

Even though Federal law imposes notice-posting on private and public sector employers, most notice-posting requirements do not apply to the Legislative Branch. The failure to require notice-postings in the Congressional workplace may explain recent findings by the Congressional Management Foundation that most Congressional employees have limited to no knowledge of their workplace rights.[14]

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

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

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

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

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

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

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

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

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

These notice-posting statutory provisions require that the Equal Employment Opportunity Commission or the Secretary of Labor promulgate regulations to implement the notice-posting requirements.[15] If Congress were to adopt the statutory provisions regarding notice-posting, the OOC Board would promulgate similar posting regulations tailored to the Congressional workplace.

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

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

Require Retention by All Employing Offices of Records that are Necessary and Appropriate for the Administration of Laws

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM THE FOLLOWING RECORDKEEPING PROVISIONS

42 U.S.C. § 2000e-8(c) (TITLE VII)
29 U.S.C. § 626(a) (ADEA)
42 U.S.C. § 12117 (ADA)
29 U.S.C. § 2616(b) (FMLA)
29 U.S.C. § 211(c) (FLSA/EPA)

PARITY GAP IDENTIFIED

Under most Federal workplace rights laws, Congress has imposed on private and public employers requirements to retain records that are necessary for enforcement of various workplace laws. Both employers and employees benefit from the retention of documented personnel actions. Records can greatly assist in the speedy resolution of claims. If the law has not been violated, employers more readily can demonstrate compliance if adequate records have been made and preserved. Effective recordkeeping may also be necessary for effective vindication of employee rights. The types of records that must be retained, the method by which they must be retained, and the time periods for which they must be retained differ substantially based upon the statute involved. Congress has exempted itself from these requirements.

PURPOSE OF THE LAW

- Records assist in speedier resolution of claims
- Employers can use records as critical evidence to demonstrate that no violation of the law occurred
- Employees can use records as critical evidence to assert their rights

RECOMMENDATION TO CONGRESS

The Board recommends that Congress adopt all recordkeeping requirements under Federal workplace rights laws. The reason that most workplace rights laws passed by Congress require recordkeeping is to ensure compliance with the various statutes. Records may be necessary for employees to assert their rights. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred.

Recommended in prior § 102(b) reports.

ANALYSIS

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Although some employing offices in Congress keep personnel records, there are no legal requirements under workplace rights laws to do so in Congress. These recordkeeping laws provide separate legal requirements for the retention of personnel records.

Title VII of the Civil Rights Act of 1964 ("Title VII") requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for one year from the date of making the record or the personnel action involved, whichever is later. Title VII further requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

Americans With Disability Act of 1990 ("ADA") mandates that records be kept in accordance with Title VII requirements for a one year period. Any records related to an employee's request for accommodation under the ADA are considered relevant personnel records and must be retained for one year. The biggest ADA recordkeeping issue of which employers need to be aware relates to medical confidentiality concerns under the ADA. Any records containing medical information must be kept in a separate, confidential medical file. They cannot be kept in an employee's personnel file.

Age Discrimination in Employment Act of 1967 ("ADEA") contains recordkeeping requirements. Payroll or other records containing an employee's name, address, date of birth, occupation, pay rate and compensation earned per week must be kept for a minimum of three years and be readily available. All personnel or employment records relating to job applications, promotion, demotion, transfer, training, discharge, employment tests, or job advertisements must be kept for at least one year after the personnel action is taken. Records relating to employee benefit plans and written seniority or merit rating systems must be kept while the plan or system is in effect, plus one year after its termination. Finally, personnel records relevant to any enforcement action brought against an employer under the ADEA must be kept until final disposition of the action.

Fair Labor Standards Act of 1938 ("FLSA") has very broad recordkeeping requirements. Specified records must be kept two or three years, depending on the type of record. Some of the most important provisions of which an employer must be aware are the records mandated for exempt and non-exempt employees. For all employees, an employer must keep records containing the following information: employee name and identifying number/symbols; home address and zip code; date of birth, if under 19; gender; and occupation in which employee is employed. For non-exempt employees, employers must also keep records containing: time of day and day of week that work week begins; pay rate; hours worked each work day and week; total daily and hourly straight time earnings; total overtime earnings; total additions/deductions to/from wages each pay period; total wages each pay period; date of payment and pay period covered by payment; and any retroactive wage payment information.

Equal Pay Act ("EPA") adopts the basic recordkeeping requirements set forth under the FLSA. In addition, it requires employers to retain records made in the regular course of business which relate to wages or other matters that describe or explain the basis for payment of wage differentials to employees of the opposite sex in the same establishment; for example, records relating to wage payments, wage rates, job evaluations, job descriptions, and merit or seniority systems. The records must be kept for at least two years and for all employees regardless of their exempt or non-exempt status. Records relevant to any enforcement action under the EPA must be kept until final disposition of the action.

Family and Medical Leave Act of 1993 ("FMLA") requires that for every employee, employers must retain the following for three years: records pertaining to compliance with FMLA's leave requirements, basic payroll information and identifying employee data, pay rate, compensation terms, daily and weekly hours worked per pay period, additions/deductions to/from wages and total compensation paid. In addition to the basic records, employers must maintain certain records for eligible employees for three years: dates of FMLA leave taken by employee, hours of leave, if taken incrementally, copies of written employee notices given to the employer, copies of all general and specific notices given to employees by the employer, all documents describing employee benefits or employee policies and practices relating to paid and unpaid leave, premium payment of employee benefits, and records of any disputes between employer and employee about designation of leave as FMLA.

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

CONGRESS AND ITS AGENCIES ARE EXEMPT FROM

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

PARITY GAP IDENTIFIED

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

PURPOSE OF THE LAW

- Reduces discrimination and retaliation claims
- Informs managers of their obligations under workplace rights laws and improves compliance
- Informs employees about their workplace rights and how workplace conflicts can be resolved

RECOMMENDATION TO CONGRESS

The Board recommends that Congress mandate anti-discrimination and anti-retaliation training for all employees and managers.

ANALYSIS

Section 202(c) of the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR Act) requires that each Federal agency in the Executive Branch provide employees training regarding their rights and remedies under anti-discrimination and anti-retaliation laws. By regulation, all current employees and managers must be trained by a date certain and training thereafter must be conducted no less than every two years. New employees receive training as part of a new hire orientation program. If there is no new hire orientation program, new employees must receive the applicable training within 90 days of their appointment.

It has long been recognized that anti-discrimination and anti-retaliation training for employees provides many benefits to the workplace. By informing employees about their rights, they learn to differentiate between what the law prohibits, such as unlawful harassment, and what the law does not prohibit, such as everyday non-discriminatory personnel decisions. Employees also learn about how to seek redress for violations of their rights and the remedies available to them under the law.

Training also informs managers of their obligations as employers. Often employers run afoul of the law because they were not properly informed of their duties as employers or about best practices for how to handle discrimination and retaliation issues.

Mandatory training has the effect of reducing discrimination and retaliation claims, resulting in lower administrative and legal costs. The Board believes that mandatory training would also benefit the Legislative Branch in the same manner.

Additional Workplace Rights **Recommendations**

Approval of Uniformed Services Employment and Reemployment Rights Act Regulations

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was enacted to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service. USERRA seeks to ensure that entry and re-entry into the civilian workforce are not hindered by participation in non-career military service and accomplishes this purpose by providing rights in two kinds of cases: discrimination based on such military service, and denial of an employment benefit as a result of such military service. The Department of Labor submitted implementing regulations for the Executive Branch in 2005.

USERRA was made applicable to eligible employees of the Legislative Branch under the CAA. The Board of Directors of the OOC proposed implementing regulations in May 2008. Subsequent to receipt of comments, the Board adopted regulations on December 3, 2008 and sent them for approval by the 111th Congress at the beginning of its new session.[16]

The regulations cover employees and applicants for employment who are serving or have served in the uniformed services and work in the Legislative Branch.[17] They provide reemployment rights and protection from discrimination and retaliation. Generally, with sufficient notice, an "eligible employee" with five or less years of service in the uniformed services has the right to be reemployed by an employing office if that employee left that job to perform service in the uniformed services. An employing office may not deny an "eligible employee" initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of the employee's status in the uniformed services.

Further, the regulations address health and pension plan benefits. Upon returning to employment with the employing office, eligible employees are entitled to health benefits coverage, generally without any waiting periods or exclusions except for service-connected illnesses or injuries. In addition, upon reemployment, an eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan.

Under USERRA, as enforced by the CAA, an employing office may not retaliate against an "eligible employee" for asserting, or assisting in the enforcement of a right under USERRA, including testifying or making a statement in connection with a proceeding under USERRA. While not specifically protected by USERRA, a "covered employee" who has no service connection is protected under the anti-retaliation provisions of the CAA for assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA.

An "eligible employee" may file a USERRA complaint, subsequent to CAA-mandated counseling and mediation, either with the OOC or in a civil action in district court. Similarly, after the required period of counseling and

[16] See www.compliance.gov for full text of the regulations.

[17] For purposes of USERRA, an employee or applicant for employment with the House of Representatives, Senate, Congressional Budget Office, Government Accountability Office, Library of Congress, Office of Compliance, Office of Congressional Accessibility Services, Office of the Architect of the Capitol, Office of the Attending Physician, or United States Capitol Police is a "covered employee" under the CAA. A "covered employee" who is a past or present member of the uniformed service; has applied for membership in the uniformed service; or is obligated to serve in the uniformed service is an "eligible employee" protected by USERRA, as applied by the CAA.

mediation, a "covered employee" may bring an action for retaliation under the retaliation sections of the CAA. Although USERRA has no statute of limitations, the CAA requires that a request for counseling be brought to the OOC within 180 days after the alleged violation.

There is a need for USERRA regulations in the Legislative Branch, sensitive to its particular procedures and practices. Congress has seen fit to provide servicemen and women certain protections in federal civilian employment. The Board of Directors urges speedy passage of the regulations to make meaningful to the covered community the rights afforded by USERRA.

Protect Employees Who Serve on Jury Duty

(28 U.S.C. § 1875)

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

Protect Employees and Applicants For Being in Bankruptcy

(11 U.S.C. § 525)

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

Prohibit Discharge of Employees For Being Subject to Garnishment

(15 U.S.C. § 1674(a))

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

Telework Improvements

(TELEWORK IMPROVEMENTS ACT OF 2010)

In 2010, Congress passed the Telework Improvements Act but applied it only to the Federal Executive Branch. In addition to requiring telework improvements for each agency, the Act mandates equal treatment of teleworkers and nonteleworkers for purposes of performance appraisals, work requirements, or other employment related acts involving management discretion. The Office of Personnel Management will be providing guidance and issuing regulations to implement the Act. The Board believes that it is prudent to monitor and observe the Act's impact on the Executive Branch before commenting further about whether the Act should apply to Congress and its agencies.

Acronyms

Age Discrimination in Employment Act of 1967: **ADEA**

Americans with Disabilities Act of 1990: **ADA**

Congressional Accountability Act of 1995: **CAA**

Department of Labor (Federal Executive Branch): **DOL**

Employee Polygraph Protection Act of 1988: **EPPA**

Equal Pay Act: **EPA**

Fair Labor Standards Act of 1938: **FLSA**

Family Medical Leave Act of 1993: **FMLA**

Genetic Information Nondiscrimination Act of 2008: **GINA**

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

Occupational Safety and Health Act of 1970: **OSHAct**

Office of Compliance: **OOC**

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

Uniformed Services Employment and Reemployment Rights Act of 1994: **USERRA**

Whistleblower Protection Act of 1989: **WPA**

THIS PAGE: In the center—under the Capitol's dome—is the Rotunda, a circular ceremonial space that also serves as a gallery of paintings and sculpture depicting significant people and events in the nation's history

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