BIENNIAL REPORT OF THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS

Recommendations for Improvements to the Congressional Accountability Act

Required by Section 102(b) of the Congressional Accountability Act
Issued at the Conclusion of the 117th Congress for Consideration by the 118th Congress

December 22, 2022

Executive Summary

The Office of Congressional Workplace Rights (OCWR) Board submits this report to Congress per section 102(b) of the Congressional Accountability Act (CAA). In accordance with the CAA, the Board is to provide each Congress with recommendations regarding the applicability to the legislative branch of Federal workplace rights, safety and health, and public access laws and regulations. The Board's fulfillment of this requirement provides Congress with information and recommendations necessary to ensure that the rights and protections applied to the legislative branch are equal to those applied to the executive branch and to the private sector.

In this report, the Board addresses and recommends changes to the CAA's substantive protections and obligations, and to the necessary implementing procedures and regulations. Adoption of these recommendations would ensure Congress meets the goal it set for itself: to apply to the legislative branch those workplace rights and obligations that it has applied to the executive branch and the private sector.

Improving Protections and Obligations to Create Parity with the Executive Branch and the Private Sector

- Require employing offices to maintain records of workplace injuries and illnesses to identify and prevent workplace hazards.
- Protect from retaliation employees who make whistleblower disclosures to authorized officials.
- Protect from retaliation non-employees with disabilities who pursue claims under the CAA's public accessibility provisions.
- Protect employees who serve on jury duty, declare bankruptcy, or have their wages garnished.
- Extend paid child bereavement leave to legislative branch employees.

Improving Implementation of Existing Rights

- Require employing offices to maintain personnel records under the CAA.
- Empower the OCWR General Counsel to seek a court order to enjoin temporarily unfair labor practices.
- Provide transparency by allowing disclosure of labor-management proceedings and of proceedings regarding disability-related public access.
- Approve pending regulations, including those related to overtime pay, paid parental leave, the right to collective bargaining throughout the legislative branch, service members and their families, and public access to facilities.

Statement from the Board of Directors

The cornerstone of the *Congressional Accountability Act* (CAA), enacted in 1995 with nearly unanimous approval, is Congress's steadfast commitment to the American public that it will apply to itself labor, employment, accessibility, and health and safety laws that are on par with those that apply to the private sector and the executive branch. This commitment is an ongoing one. To ensure that it continues to be fulfilled, section 102 of the CAA, 2 U.S.C. § 1302, requires the Board of Directors of the Office of Congressional Workplace Rights (OCWR) to issue a report to each Congress that describes: (1) to what degree such provisions of Federal law are applicable or inapplicable to the legislative branch; and (2) whether any inapplicable provisions should be made applicable.

One of our central recommendations in this Report is to require employing offices in the legislative branch to maintain accurate records of workplace injuries and illnesses. The events of January 6, 2021 and their aftermath demonstrate the critical importance of recordkeeping in ensuring that covered employees in the legislative branch are provided a workplace free from recognized hazards that could cause death or serious physical harm. We urge Congress to adopt these recommendations.

We also highlight in this Report additional recommendations to amend the CAA to apply to the congressional workplace certain employee protections applicable to the executive branch or the private sector, increase transparency, discourage protracted administrative proceedings at the taxpayers' expense, and enjoin unlawful conduct, as well as key recommendations that the Board has made in past Section 102(b) Reports that have not yet been implemented.

We welcome the opportunity to further discuss these recommendations, and ask for careful consideration of them by the 118th Congress.

Sincerely,

BARBARA CHILDS WALLACE,
Chair, Board of Directors

BARBARA L. CAMENS,
Member

ROBERTA L. HOLZWARTH,
Member

ALAN V. FRIEDMAN,
Member

SUSAN S. ROBFOGEL,
Member

Recommendations for the 118th Congress

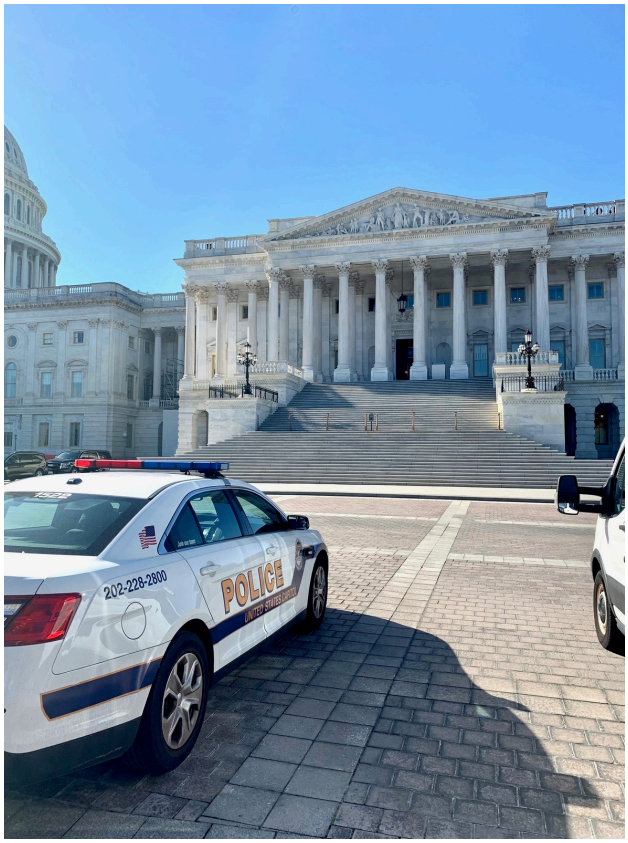
I. Improving Protections and Obligations to Create Parity with the Executive Branch and the Private Sector

A. Require Employing Offices in the Legislative Branch to Maintain Records of Workplace Injuries and Illnesses To Ensure Workplace Safety.

The Board has long expressed its concerns that the CAA's failure to apply the critical recordkeeping requirements of the *Occupational Safety and Health Act* (OSHAct) to the congressional workplace might undermine occupational safety and health. This fear was confirmed during the OCWR General Counsel's investigation of occupational safety and health concerns arising out of the unprecedented events of January 6, 2021, which is summarized in his *Special Report on the Occupational Safety and Health Concerns of the Events of January 6, 2021*.[1] The General Counsel's Special Report cites a Senate Staff Report concerning these events.[2] As reported, in addition to a tragic loss of lives, many U.S. Capitol Police (USCP) officers suffered injuries during the attack, including brain injuries, cracked ribs, smashed spinal discs, loss of an eye, and a wound caused by a stabbing with a metal fence stake. One officer was reported to have suffered a cardiac arrest after being attacked several times with a stun gun.

As an essential part of his OSH investigation of the January 6 riot, the OCWR General Counsel requested that the USCP identify the types and causes of injuries sustained by USCP officers. The USCP responded that it "does not maintain a list of employees injured," because it is not required to do so by the provisions of the OSHAct incorporated into the CAA. The information ultimately provided by the USCP—obtained from worker's compensation filings—was so lacking in detail, particularly as to the specific causes of the described injuries, as to make it impossible for the General Counsel to determine precisely how each of these employees was injured.

Under the CAA, Congress and its instrumentalities are exempt from critical OSHAct requirements that apply to the private sector, including the requirement at section 8(c) that employers make, keep and preserve, and provide, upon request, records necessary and appropriate for the enforcement of the OSHAct. 29 U.S.C. § 657(c).



As the January 6 Special Report of the General Counsel demonstrates, workplace injury and illness recordkeeping is essential to ensuring safety and health in the congressional workplace.

Recordkeeping improves safety. As explained in the General Counsel's Special Report, to effectively control recognized workplace hazards as the OSHAct requires, legislative branch employers must generally perform a job hazard analysis. That analysis is intended to identify, eliminate, or minimize those hazards and, if necessary, provide effective Personal Protective Equipment (PPE) to prevent serious injury or death from those hazards that cannot be eliminated.[3] A key component of any job hazard analysis is a review of workplace accident history. Without a requirement that employing offices keep illness and injury data under the OSHAct, the OCWR's ability to prescribe appropriate remedies to keep the congressional workplace safe is severely hampered.

Accordingly, the Board again strongly recommends—as it has for years—that legislative branch employing offices be required to maintain records of workplace injuries and illnesses under OSHAct section 8(c). As the January 6 Special Report of the General Counsel demonstrates, workplace injury and illness recordkeeping is essential to ensuring safety and health in the congressional workplace.

B. Expand Paid Bereavement Leave to Legislative Branch Employees.

The *National Defense Authorization Act* for Fiscal Year 2022 amended the provisions of the *Family and Medical Leave Act* (FMLA) to establish a new paid leave entitlement for most Federal civilian employees. This paid leave benefit is codified at 5 U.S.C. § 6329d. Under section 6329d, executive branch employees are now entitled to 2 workweeks of parental bereavement leave in connection with the death of an employee's child.

Because legislative branch employees and employing offices are not governed by the FMLA provisions of title 5, but are instead covered via the CAA by the FMLA provisions of title 29, they are not covered by this important workplace benefit.

The Board recommends that the CAA be amended to provide paid bereavement leave in a similar manner for legislative branch employees. Such an amendment would help balance work and family responsibilities by allowing employees to take reasonable paid leave in the catastrophic circumstance of the death of a child, and would ensure parity between the legislative and executive branches.

C. Provide Whistleblower Protections to Legislative Branch Employees Who Make Disclosures to Authorized Officials.

Federal law provides broad employment protection to executive branch employees who disclose information that the whistleblower reasonably believes evidences a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public

health and safety.[4] There are no analogous protections for legislative branch employees, even those who would raise an issue with a committee of jurisdiction or other appropriate legislative branch official. The lack of statutory protection leaves legislative branch employees who would provide critical information at risk for retaliation. This absence of whistleblower protection also risks depriving Congress of information it needs to oversee the entirety of the legislative branch in the public interest.

Statutory protection for legislative branch employees who disclose evidence of wrongdoing must be carefully drafted in light of the special constitutional role of Congress as the nation's forum for robust policy debate. To be effective, such protections must respect important legislative branch prerogatives, accommodate the need for confidentiality in the course of congressional deliberations, and more generally protect the necessary confidentiality of sensitive information handled in many contexts across the legislative branch. Effective whistleblower protections must account for the wide range of workplace environments and job functions, from librarians to landscapers to law enforcement officers to committee staff, and accommodate the concerns unique to each.

To achieve these important ends, the Board recommends that Congress amend the CAA to protect employees who make whistleblower disclosures to officials or entities specifically designated to receive such disclosures, such as an instrumentality's Inspector General or an appropriate committee of jurisdiction. This approach would parallel laws in the executive branch designed to protect whistleblowers who work in special environments, who must also follow specific procedures to make protected disclosures to designated individuals or entities through designated channels.[5]

To facilitate compliance with the recommended whistleblower protections, the Board further recommends that the OCWR be granted investigatory and prosecutorial authority over whistleblower reprisal complaints, by incorporating into the CAA authority analogous to that granted to the Office of Special Counsel for executive branch claims.

D. Permit Non-Employees to Claim Retaliation under the CAA's ADA Public Access Provisions.

The *Americans with Disabilities Act of 1990* (ADA) is unique among the laws applied by the CAA as it affords protections to members of the public as well as to employees. The rights and protections for the public are found in section 210 of the CAA, 2 U.S.C. § 1331, which incorporates titles II and III of the ADA. These public access provisions, as applied by the CAA, require that employing offices make their services, programs, and activities for the public—as well as the facilities where these services, programs, and activities are provided—accessible to individuals with disabilities.

Section 208 of the CAA, 2 U.S.C. § 1317, prohibits employing offices from intimidating, retaliating against, or discriminating against employees who exercise their rights under the CAA. However, section 208 does not authorize ADA retaliation claims by members of the public who are not covered employees.

Section 503 of the ADA, 42 U.S.C. § 12203, prohibits retaliation, interference, coercion, or intimidation against "any individual" relating to exercising their rights under the ADA's public access provisions. Although section 503 covers the public and private sectors, that section is not incorporated by the CAA. *See* 2 U.S.C. § 1331(b). Therefore, it does not provide a statutory basis for non-employees to bring ADA retaliation claims under the CAA.

This parity gap is contrary to the purpose of the CAA, and deters members of the public with disabilities from asserting their rights under the ADA in the legislative branch.

Accordingly, the Board recommends that the CAA be amended to incorporate the ADA's anti-retaliation provisions at section 503.

E. Protect Employees who Serve on Jury Duty.

Jury duty is a fundamental civic responsibility. Section 1875 of title 28 of the U.S. Code 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 several previous Section 102(b) Reports, the Board continues to recommend that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

F. Protect Employees and Applicants who are or have been in Bankruptcy.

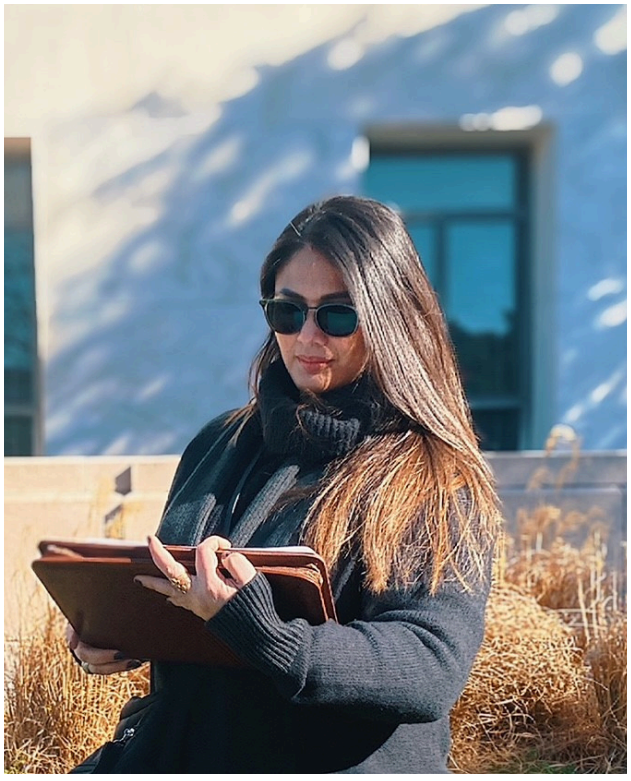
Section 525(a) of title 11 of the U.S. Code provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. Reiterating the recommendations made in several previous Section 102(b) Reports, the Board continues to recommend that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

G. Prohibit Discharge of Employees who are or have been subject to Garnishment.

Section 1674(a) of title 15 of the U.S. Code prohibits terminating an employee because their wages have been garnished. This section is limited to private employers. For the reasons set forth in several previous Section 102(b) Reports, the Board continues to recommend that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

H. Adopt Recordkeeping Requirements under other Federal Workplace Rights Laws.

The Board has also recommended in several Section 102(b) Reports, and continues to recommend that Congress adopt all recordkeeping requirements under federal workplace rights laws, including title VII. Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under the CAA to do so.



II. Improving Implementation of Existing Rights

A. Empower the OCWR General Counsel to Seek a Court Order to Enjoin Temporarily Unfair Labor Practices.

Section 220 of the CAA applies certain provisions of the *Federal Service Labor-Management Relations Statute* (FSLMRS) to the legislative branch. 2 U.S.C. § 1351. In general, the OCWR General Counsel exercises the same authority delegated to the General Counsel of the Federal Labor Relations Authority (FLRA) under 5 U.S.C. §§ 7104 and 7118 in the executive branch, that is, the authority to investigate allegations of workplace unfair labor practices (ULPs) and to file and prosecute complaints regarding ULPs.

The CAA, however, does not incorporate the provisions of 5 U.S.C. § 7123(d), pursuant to which parties to ULP proceedings in the executive branch may request the FLRA General Counsel to seek appropriate temporary relief, including issuance of a temporary restraining order. This important statutory provision in the FSLMRS allows the FLRA General Counsel to seek, in appropriate cases when an ULP Complaint is filed, temporary relief in any United States District Court when it would be just and proper to do so and the record establishes probable cause that an ULP is being committed.

Granting the OCWR General Counsel the authority to seek appropriate temporary injunctive relief would protect parties from irreparable harm during ULP litigation.[6]

B. Provide Transparency by Allowing Disclosure of Labor-Management Proceedings and of Proceedings regarding Disability-Related Public Access.

The CAA generally requires confidentiality in proceedings before the OCWR to protect the privacy of individuals. However, Congress excluded proceedings under the OSHAct from these confidentiality provisions because it determined that the public interest in transparency concerning safety and health on Capitol Hill outweighed any value in keeping them confidential.

As with OSHAct proceedings, proceedings involving ADA public access and labor-management issues primarily involve public and institutional concerns with maintaining facilities, policies, and programs that are safe, healthful, accessible, and free from ULPs. The current lack of transparency in such matters is unnecessary to protect individual privacy and undermines the public's confidence that those statutory mandates are being fully enforced.

Accordingly, section 416 of the CAA should be amended to eliminate these unnecessary confidentiality restrictions.

C. Status of the Board's Recommendation to the 117th Congress that the Voluntary Mediation Provisions of the CAA's Administrative Dispute Resolution (ADR) Procedures be Amended to Require Mediation upon Request of the Claimant

Prior to the CAA of 1995 Reform Act (Reform Act), Pub. L. 115-397, the CAA's ADR procedures required that an employee file a request for mediation with the OCWR as a jurisdictional prerequisite to filing a complaint with the OCWR or in U.S. district court. Further, the CAA provided that the mediation period "shall be 30 days," which could be extended upon the joint request of the parties.

As a result of the Reform Act amendments, mediation is no longer mandatory—rather mediation takes place only if requested and only if both parties agree. 2 U.S.C. § 1403. The Board previously expressed its concern that the Reform Act amendments requiring the consent of both parties to mediation effectively gives the employing offices a veto over claimants who seek to settle their claims with the assistance of an OCWR mediator. The Board recommended that the CAA be amended to provide that mediation take place if requested by the claimant, or if requested by the employing office and agreed to by the claimant.

Experience under the Reform Act indicates that the parties agree to requests for mediation in the vast majority of cases.[7] Under these circumstances, the Board withdraws its mediation recommendation, will continue to evaluate the data, and will revisit the issue if necessary.

D. Approve Pending Regulations, including those related to Overtime Pay, Paid Parental Leave, Servicemembers and their Families, the Right to Collective Bargaining throughout the Legislative Branch, and Public Access to Facilities.

Congress has not approved several substantive OCWR Board regulations necessary to fully implement workplace protections made applicable to legislative branch employees through the CAA. As discussed below, the regulations that have been approved for the House but are awaiting congressional approval for the Senate and other employing offices in the

legislative branch are the Board's updated regulations concerning overtime pay, paid parental leave and leave benefits for service members and their families, and the Board's regulations concerning the right to engage in collective bargaining. The regulations awaiting congressional approval for all employing offices in the legislative branch are those implementing employment and reemployment protections for servicemembers and their families, and the Board's amended regulations concerning the access rights of members of the public with disabilities. The Board urges Congress to approve these regulations.

***Fair Labor Standards Act* (FLSA) Regulations**

The CAA's FLSA provisions provide for minimum wage and overtime compensation for certain legislative branch employees.[8] If nonexempt, these employees are entitled to overtime compensation when working over 40 hours in a workweek.

The FLSA's overtime exemptions are not defined in the FLSA itself but by regulations issued by the Secretary of Labor.[9] Through the CAA, Congress requires that the OCWR's FLSA regulations substantially mirror regulations issued by the Secretary of Labor. Congress last approved OCWR regulations implementing the FLSA in 1996. As the Secretary of Labor updated its overtime regulations, the OCWR also adopted updated regulations, but Congress has not approved them. As a result, the overtime rules currently applicable in the legislative branch are woefully out of date and no longer ensure the FLSA requirements are properly applied.

In 2022, the OCWR further updated its FLSA regulations to reflect the Secretary's substantial increase in the minimum salary test used to determine who may be exempt from overtime protections.[10] The House of Representatives, by resolution, recently approved the Board's amended FLSA regulations, thereby applying them to House employees and offices.[11] The Senate must take similar action in order to apply those regulations to Senate offices and employees. Full approval by both houses is needed to make these regulations applicable to employees and congressional instrumentalities, including the Library of Congress and the USCP.

Until the 2022 OCWR regulations are fully approved by Congress, many covered employees in the legislative branch may be denied the overtime pay to which they would be entitled for comparable work performed in the executive branch or private sector. Approval of the regulations will ensure that Congress and the legislative branch at large are able to attract and retain a talented, motivated, and high-performing workforce.

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***Family and Medical Leave Act* (FMLA) Regulations**

The CAA's FMLA provisions provide rights and protections for legislative branch employees needing leave for specified family and medical reasons.[12] The Board adopted FMLA regulations to implement recent amendments to the FMLA and transmitted the regulations to Congress in December 2021.[13] These OCWR FMLA regulations would implement FMLA amendments that (1) provide up to 12 weeks of paid parental leave for the birth, adoption, or placement in foster care of a child;[14] and (2) enhance leave benefits for service members and their families. These regulations would further revise the definition of "spouse" to include same-sex spouses to remain consistent with Department of Labor's February 25, 2015 Final Rule on the definition of that term.[15]

The House of Representatives, by resolution, also recently approved the Board's amended FMLA regulations, thereby applying them to House employees and offices.[16] As with the Board's modified FLSA regulations, the Senate must take similar action in order to apply the modified FMLA regulations to Senate offices and employees. Full approval by both houses is needed to make these regulations applicable to employees and congressional instrumentalities.

FSLMRS Regulations for the Senate and other Offices.

Through the CAA, Congress made applicable to the legislative branch specific sections of the FSLMRS, which governs unionization and collective bargaining in the executive branch. In 1996, the Board adopted final regulations implementing those sections of the FSLMRS in the legislative branch. These regulations were approved by Congress for certain employees and employing offices covered by the CAA, such as the Office of the Architect of the Capitol and the USCP.

Congress did not approve complementary regulations adopted by the OCWR Board necessary to implement those sections of the FSLMRS for offices listed in section 220(e)(2) of the CAA, *i.e.*, most offices within the House of Representatives or the Senate, the Congressional Budget Office, or the OCWR. These additional regulations are straightforward. They would apply to those offices and employees listed in section 220(e)(2) the same regulations that Congress approved and that have applied to many legislative branch employees, labor representatives, and offices since 1996.

The House of Representatives approved the regulations through a resolution earlier this year, thereby extending the labor-management rights and obligations of the FSLMRS to House employees and offices.[17] Full approval by both houses would apply the regulations to employees and offices in both the House and Senate and to the additional legislative branch instrumentalities listed in section 220(e)(2). This is required to ensure that the protections afforded by the FSLMRS apply to the entire legislative branch similar to how they apply in the executive branch. Accordingly, the Board urges Congress to adopt resolutions approving these regulations.

***Uniformed Services Employment and Reemployment Act* (USERRA) Regulations.**

The CAA's USERRA provisions protect servicemembers and veterans from discrimination on the basis of their service, and allow them to regain their civilian jobs upon return from service. The Board's USERRA regulations, transmitted to Congress over 14 years ago, have not yet been approved. The Board recently made minor amendments to its USERRA regulations and will transmit the amended regulations to Congress in early 2023 for approval.

Congressional approval of the USERRA regulations would signal a continued commitment to the welfare of service members on Capitol Hill—where they remain a significantly underrepresented percentage of the workforce—by granting them the same workplace protections and entitlements as servicemembers in the private sector and the executive branch.

ADA Public Access Regulations.

The CAA's ADA public access provisions protect the right of members of the public with disabilities, including constituents and employees, to accessible facilities, programs, services, activities and accommodations in the legislative branch. The Board recently made additional modifications to the pending ADA regulations that it adopted in 2016 and will transmit the amended regulations to Congress in early 2023 for approval. In accordance with the CAA, the 2022 amended regulations incorporate by reference the most recent comparable regulations issued by the Department of Justice and the Department of Transportation. If approved by Congress, these regulations would provide much-needed guidance both to those charged with the legal duty to provide accessible services and accommodations, as well as to the members of the public who have the right to them.

[1] Office of the General Counsel, Office of Congressional Workplace Rights, *Special Report: Occupational Safety and Health Concerns Arising out of the Events of January 6, 2021*, https://www.ocwr.gov/wp-content/uploads/2021/07/report_osh_concerns_arising_from_events_Jan_6_2021.pdf.

[2] U.S. Senate, Committee on Homeland Security and Governmental Affairs and Committee on Rules and Administration, *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, Staff Report at 1 (June 8, 2021), https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf ("Senate Staff Report").

[3] According to the General Counsel's *Special Report*, of the approximately 1,200 officers defending the Capitol on January 6, fewer than 300 were equipped with much in the way of PPE.

[4] *See*, *e.g.*, the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8); as amended by the the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199.

[5] *See*, *e.g.*, the Intelligence Community Whistleblower Protection Act of 1998, 5 U.S.C. App. § 8H, 50 U.S.C. §3033, 50 U.S.C. § 3517; and the FBI Whistleblower Protection Enhancement Act of 2016, 5 U.S.C §2303(a).

[6] *See*, *e.g.*, *United States Capitol Police v. Office of Compliance*, 916 F.3d 1023 (Fed. Cir. 2019) (affirming the Board's determination that the USCP had committed an ULP when it refused to participate in an arbitration concerning an officer's termination, where two Federal Circuit Court of Appeal decisions had already flatly rejected the statutory interpretation arguments made by USCP that termination decisions were not subject to arbitration).

[7] Between June 2019 and June 2022, 91% of mediation requests (41 of 45) were accepted by the non-requesting party.

[8] *See* at 2 U.S.C. § 1313.

[9] *See* 29 U.S.C § 213; 29 C.F.R. part 541.

[10] The 1996 FLSA regulations exempt from overtime any employee whose salary (exclusive of board and lodging) is "**not less than $155 per week**" or "**not less than $250 per week**" if their primary duty involves management of the employing office, and includes the customary and regular direction of two or more employees. The 2022 FLSA regulations pending Congressional approval increase the salary test to not less than **$684 per week** (exclusive of board, lodging, or other facilities). *See generally*, 168 Cong. Rec. H8203, S5148 (Sep. 28, 2022).

[11] *See* H. Res. 1516 (117th Cong. 2022).

[12] *See* 2 U.S.C. § 1312.

[13] *See* 167 Cong. Rec. H7224, S8966 (Dec. 7, 2021).

[14] *See Federal Employee Paid Leave Act* (subtitle A of title LXXVI of division F of the *National Defense Authorization Act for Fiscal Year 2020*, Public Law 116—92, Dec. 20, 2019).

[15] 162 Cong. Rec. H4128, S4475 (June 22, 2016).

[16] *See* H. Res. 1516 (117th Cong. 2022).

[17] *See* H. Res. 1096 (117th Cong. 2022).