



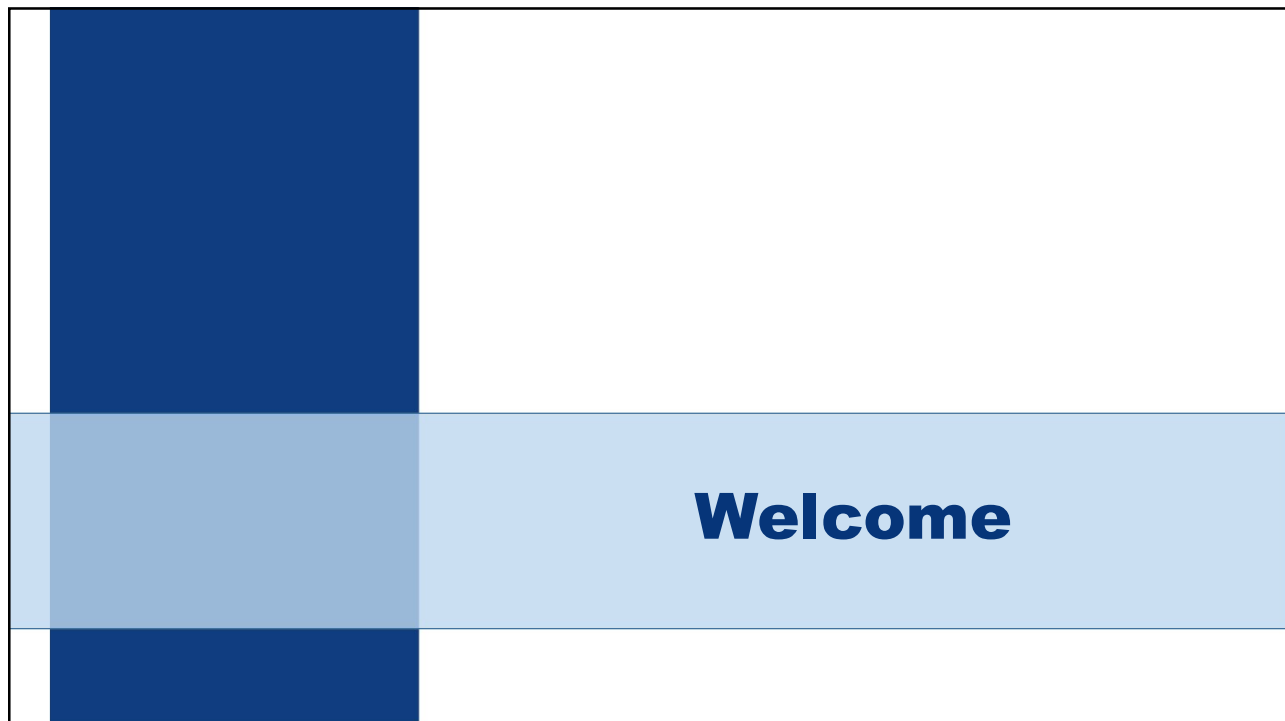
**CAA
Statutory,
Regulatory,
and
Case Law
Updates**

Office of Congressional
Workplace Rights


Office of the
General Counsel

Union Forum
June 26, 2024

*advancing
workplace rights,
safety & health, and
accessibility in the
legislative branch*




Welcome



Overview

- CAA Background
- ADR and Enforcement
- Statutory Updates
- Regulatory Updates
- Case Law Updates



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CAA Overview

Congressional Accountability Act

- Pub. L. 104-1 (January 23, 1995), 2 U.S.C. §§ 1301 et seq.
- Applied certain labor and employment laws to the legislative branch
- Established the Office of Compliance (opened January 1996)
- CAA Reform Act passed in December 2018, effective June 2019
 - Changed name to the Office of Congressional Workplace Rights
 - Updates to ADR process
 - Required posting of CAA rights poster
 - Expanded some rights to unpaid staff
 - ... and other changes

Applicable Laws

- Genetic Information Nondiscrimination Act (GINA)
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Rehabilitation Act
- Family and Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)
- Employee Polygraph Protection Act (EPPA)
- Worker Adjustment and Retraining Notification (WARN) Act
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Veterans Employment Opportunity Act (VEOA)
- Fair Chance to Compete for Jobs Act (FCA)
- Occupational Safety and Health Act (OSH Act)
- Federal Service Labor-Management Relations Statute (FSLMRS)
- Pregnant Workers Fairness Act (PWFA)

Anti-Retaliation Provision

“It shall be unlawful for an 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 this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.”

CAA section 208(a), 2 U.S.C. §1317(a)

Administrative Dispute Resolution (ADR)

- Claim must be filed with OCWR within 180 days of alleged violation
- Claim assigned to Preliminary Hearing Officer
 - If claim passes preliminary review, claimant may choose to proceed with OCWR administrative hearing or file a complaint in federal district court
 - If claim fails preliminary review, claimant may only pursue allegations in federal district court
- OCWR administrative hearing
 - Confidential hearing before Merits Hearing Officer
 - Petition for review by OCWR Board of Directors
 - Appeal to U.S. Court of Appeals for the Federal Circuit

Enforcement by Office of General Counsel

- ADA public access provisions
 - Biennial inspections – areas of focus, Member offices
 - Investigations – requests for inspection/charges of discrimination
- OSH Act
 - Biennial inspections – high hazard areas, Member offices
 - Investigations – requests for inspection, incident reports, etc.
- FSLMRS unfair labor practice provisions
 - ULP charges filed by unions, employing offices, or covered employees
 - Investigation
 - Complaint → administrative hearing → petition for review by OCWR Board → appeal to U.S. Court of Appeals for the Federal Circuit

Statutory Updates

Federal Employee Paid Leave Act (FEPLA)

- Signed into law December 2019, effective October 1, 2020
- Amended the Family and Medical Leave Act (FMLA)
- Allows most covered employees to substitute up to 12 weeks of paid parental leave for unpaid FMLA leave in connection with:
 - the birth of an employee's child; or
 - the placement of a child with an employee for adoption or foster care
- Eligibility and return-to-work requirements for executive branch employees do not apply to legislative branch employees

Fair Chance to Compete for Jobs Act (FCA)

- Federal “Ban the Box” law
- Signed into law December 2019, effective December 20, 2021
- Amended CAA to add new section 207, 2 U.S.C. § 1316b
- Prohibits employing offices from requesting information, either orally or in writing, from most job applicants about their criminal history prior to extending a conditional offer of employment
- Claims may be filed with the OCWR, but no federal civil action
- No relief for claimants
- No judicial review of OCWR Board decisions
- Employees found to violate FCA are subject to progressive discipline

Pregnant Workers Fairness Act (PWFA)

- Signed into law December 2022, effective June 27, 2023
- Applicable to covered employees, including unpaid staff
- Requires employers to grant reasonable accommodations based on known limitations related to pregnancy or childbirth, unless undue hardship would result
- Five specific unlawful employment practices
- Reasonable accommodation and undue hardship provisions based on ADA, including interactive process
- Claims for violations may be filed with the OCWR

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP for Nursing Mothers Act or PUMP Act)

- Signed into law December 29, 2022
- Amends FLSA to enhance protections for nursing employees
- Requires employers to provide:
 - Reasonable break time to express breast milk whenever needed for 1 year after child's birth
 - A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to express milk
- Drafting error removed protections for legislative branch employees but will hopefully be corrected soon

Regulatory Updates

House Approved Final Regulations

- FSLMRS
 - Approved – H. Res. 1096 (May 10, 2022)
 - Issued – 168 Cong. Rec. H5006 (May 16, 2022)
- FLSA overtime provisions
 - Approved – H. Res. 1516 (Dec. 14, 2022)
 - Issued – 169 Cong. Rec. H1008 (Mar. 1, 2023)
- FMLA paid parental leave
 - Approved – H. Res. 1516 (Dec. 14, 2022)
 - Issued – 169 Cong. Rec. H1017 (Mar. 1, 2023)

Pending Regulations

- FSLMRS for Senate/Instrumentalities
 - Issued for employing offices not listed in CAA section 220(e)(2), 142 Cong. Rec. S12062 (Oct. 1, 1996)
- FLSA overtime provisions for Senate/Instrumentalities
 - Adopted – 168 Cong. Rec. S5148 (Sept. 28, 2022)
- FMLA paid parental leave for Senate/Instrumentalities
 - Adopted – 167 Cong. Rec. S8966 (Dec. 7, 2021)
- ADA public access
 - Adopted – 169 Cong. Rec. S989, H1521 (Mar. 28, 2023)
- USERRA
 - Adopted – 169 Cong. Rec. S1161, H1801 (Apr. 18, 2023)

Future Regulations

- FCA
- PWFA
- PUMP Act

What happens if there are no regulations?

CAA section 411, 2 U.S.C. § 1411: “In any proceeding under section 1405, 1406, 1407, or 1408 of this title, except a proceeding to enforce section 1351 of this title with respect to offices listed under section 1351(e)(2) of this title, if the Board has not issued a regulation on a matter for which this chapter requires a regulation to be issued, the hearing officer, Board, or court, as the case may be, shall apply, to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding.”

- FEPLA – OPM regulations forthcoming
- FCA – OPM regulations, 88 FR 60317 (Sept. 1, 2023)
- PWFA – EEOC regulations, 89 FR 29096 (Apr. 19, 2024)
- ADA Public Access – DOJ regulations, 28 C.F.R. Parts 35 & 36; DOT regulations, 49 C.F.R. Parts 37 & 38
- USERRA – DOL regulations, 20 C.F.R. Part 1002

Case Law Updates – OCWR Board

U.S. Capitol Police v. FOP Lab. Comm., No. 15-LMR-02 (CA), 2019 WL 4085113 (OCWR Aug. 20, 2019)

- FOP filed grievance alleging that officer's termination violated the CBA
- Arbitrator sustained the grievance and ordered employing office to pay backpay, attorney's fees, and expenses
- Employing office did not file exceptions, but did not comply with the arbitrator's award, and the union filed a ULP charge
- Hearing Officer found a violation of the FSLMRS, and the employing office appealed to the Board, arguing, among other things, that sovereign immunity bars the payment of attorney's fees and that the award was punitive and therefore impermissible
- Board upheld the award, emphasizing that an employing office cannot "collaterally attack" an arbitrator's award before the Board after failing to file exceptions to the original award

***Aiken v. Libr. of Cong.*, No. 19-LC-78, 2022 WL 21807824 (OCWR May 16, 2022)**

- Claim alleged discrimination and hostile work environment based on race and color
- Summary judgment was granted for employing office on discrimination claim, and the Board affirmed, because although employee alleged that others outside her protected class were allowed to work extra hours while she was not, she did not show that she requested to work those additional hours, thus there was no adverse employment action
- Hostile work environment claim also failed because incidents presented were not “objectively offensive, abusive, hostile, or threatening”; Board noted that “general feelings of workplace discomfort or unease unrelated to membership in a protected classification are simply not enough.”

***Waddy v. Libr. of Cong.*, No. 22-LC-23, 2023 WL 8471329 (OCWR Sep. 15, 2023)**

- Unvaccinated employee refused to take COVID-19 tests, in violation of the Library’s policy, claiming the test violated her religious beliefs
- Library offered to allow her to wear a Library-issued N95 mask to the office as a religious accommodation, but she refused, insisting on wearing only her own mask, and she was then terminated
- Hearing Officer granted summary judgment for the Library on employee’s Title VII religious discrimination claim, holding that the Library’s accommodation offer “effectively eliminated the religious conflict,” and also rejected employee’s harassment claims
- Board affirmed, holding that under the Supreme Court’s newly articulated standard in *Groff v. DeJoy*, the Library established that the employee’s request would have resulted in a substantial burden on the Library’s business, in light of the Library’s “legitimate concerns about its ability to protect the health of library employees”

Doe v. Off. of the Architect of the Capitol, No. 19-AC-81, 2021 WL 1200013 (OCWR Mar. 18, 2021)

- Employee fractured her shoulder in a car accident, and her doctor restricted her from certain physical activities, including driving
- Employing office denied employee's accommodation request and offered her a different arrangement, which would require less telework than she requested, and therefore more commuting
- Hearing Officer granted summary judgment for employing office on employee's ADA claim, but the Board reversed and remanded, holding that a genuine issue of material fact existed as to whether the employing office failed to engage in the interactive process
- A hearing was needed to determine whether the doctor's "no driving" restriction put the employing office on notice of the employee's need for a commute-related accommodation

Cobbin v. U.S. Capitol Police, No. 21-CB-10, 2023 WL 8471328 (Sep. 27, 2023)

- African-American K9 officer filed claim for race discrimination and retaliation based on his involuntary transfer after complaining about racially-tinged emails
- Hearing Officer held in favor of claimant, because evidence showed he was far more qualified than his White replacement and because the employing office gave shifting and inconsistent reasons for transfer
- Board affirmed, rejecting employing office's arguments that the decisionmaker was concerned about morale in the claimant's division, and agreeing with the Hearing Officer that the morale issues may have been caused by racial animus toward the claimant

***West v. U.S. Capitol Police*, No. 21-CP-18, 2022 WL 21807826 (OCWR Nov. 17, 2022)**

- Employee filed a disability discrimination claim and elected to pursue an administrative hearing
- Claimant repeatedly missed discovery deadlines set by the Hearing Officer, including some that had been extended at claimant's request
- Hearing Officer granted employing office's motion to dismiss with prejudice, and Board affirmed, because claimant failed to explain why he failed to meet so many deadlines

Questions?

<p>www.ocwr.gov</p> <p>(202) 724-9250</p> <p>110 2nd Street SE Room LA-200 Washington, DC 20540</p>	