SECTION 102(b) REPORT

Review and Report on the Applicability to the Legislative Branch of Federal Laws Relating to Terms and Conditions of Employment and Access to Public Services and Public Accommodations

Prepared by the Board of Directors of the Office of Compliance
Pursuant to Section 102(b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1302(b)

December 31, 1998

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GLOSSARY OF ACRONYMS AND DEFINED TERMS

The following acronyms and defined terms are used in this Report and Appendices:

1996 Section 102(b) Report — the first biennial report mandated by § 102(b) of the Congressional Accountability Act of 1995, which was issued by the Board of Directors of the Office of Compliance in December of 1996.

1998 Section 102(b) Report — this, the second biennial report mandated under § 102(b) of the Congressional Accountability Act of 1995, which is issued by the Board of Directors of the Office of Compliance on December 31, 1998.

ADA — Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

ADEA — Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

ADR — alternative dispute resolution.

AG — Attorney General.

Board — Board of Directors of the Office of Compliance.

CAA — Congressional Accountability Act of 1995, 2 U.S.C. § 1301 et seq.

CAA laws — the eleven laws, applicable in the federal and private sectors, that are made applicable to the legislative branch by the CAA and are listed in section 102(a) of that Act.

CG — Comptroller General.

Chapter 71 — Chapter 71 of title 5, United States Code.

DoL — Department of Labor.

EEO — equal employment opportunity.

EEOC — Equal Employment Opportunity Commission.

EPA — Equal Pay Act provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d).

EPPA — Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 et seq.

FLRA — Federal Labor Relations Authority.

FLSA — Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.

FMLA — Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 et seq.

GAO — General Accounting Office.

GAOPA — General Accounting Office Personnel Act of 1980, 31 U.S.C. § 731 et seq.

Glossary of Acronyms and Defined Terms (continued)

GC — General Counsel. Depending on the context, "GC" may refer to the General Counsel of the Office of Compliance or to the General Counsel of the GAO Personnel Appeals Board.

GPO — Government Printing Office.

Library — Library of Congress.

MSPB — Merit Systems Protection Board.

NLRA — National Labor Relations Act.

NLRB — National Labor Relations Board.

OC — Office of Compliance.

Office — Office of Compliance.

OPM — Office of Personnel Management.

OSH — occupational safety and health.

OSHAct — Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.

PAB — Personnel Appeals Board of the General Accounting Office.

PPA — Portal-to-Portal Act of 1947, 29 U.S.C. § 251 et seq.

RIF — reduction in force.

Section 230 Study — the study mandated by section 230 of the Congressional Accountability Act of 1995, which was issued by the Board of Directors of the Office of Compliance in December of 1996.

Title VII — Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

ULP — unfair labor practice.

USERRA — Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. chapter 43.

VEOA — Veterans Employment Opportunities Act of 1998, Pub. Law No. 105-339.

WARN Act — Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq.

EXECUTIVE SUMMARY

In this Report, issued under section 102(b) of the Congressional Accountability Act of 1995 ("CAA"), the Board of Directors of the Office of Compliance reviews new statutes or statutory amendments enacted after the Board's 1996 Report was prepared, and recommends that certain other inapplicable laws should be made applicable to the legislative branch. In the second part of this Report, the Board reviews inapplicable provisions of the private-sector laws generally made applicable by the CAA (the "CAA laws"),[1] and reports on whether and to what degree these provisions should be made applicable to the legislative branch. Finally, the Board reviews and makes recommendations on whether to make the CAA or another body of laws applicable to the General Accounting Office ("GAO"), the Government Printing Office ("GPO"), and the Library of Congress ("Library").

Part I

After reviewing all federal laws and amendments relating to terms and conditions of employment or access to public accommodations and services passed since October, 1996, the Board concludes that no new provisions of law should be made applicable to the legislative branch. Two laws relating to terms and conditions of employment were amended, but substantial provisions of each law have already been made applicable to the legislative branch. However, the provisions of private-sector law which the Board identified in 1996 in its first Section 102(b) Report as having little or no application in the legislative branch have not yet been made applicable, and the Board's experience in the administration and enforcement of the Act in the two years since that first report was submitted to Congress has raised several new issues.

Based on the work of the 1996 Section 102(b) Report, the Board makes the following two sets of recommendations.

(1) The Board resubmits the recommendations made in the 1996 Section 102(b) Report that the following provisions of laws be applied to employing offices within the legislative branch: Prohibition Against Discrimination on the Basis of Bankruptcy (11 U.S.C. § 525); Prohibition Against Discharge from Employment by Reason of Garnishment (15 U.S.C. § 1674(a)); Prohibition Against Discrimination on the Basis of Jury Duty (28 U.S.C. § 1875); Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(a) to 2000a-6, 2000b to 2000b-3) (prohibiting discrimination on the basis of race, color, religion, or national origin regarding the goods, services, facilities,

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[1] This report uses the term "CAA laws" to refer to the eleven laws, applicable in the federal and private sectors, made applicable to the legislative branch by the CAA and listed in section 102(a) of that Act.

privileges, advantages, and accommodations of any place of public accommodation as defined in the Act).

(2) After further study of the whistleblower provisions of the environmental laws (15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610) on which the Board had previously deferred decision, the Board now concludes that the better construction of these provisions is that they cover the legislative branch. However, because arguments could be made to the contrary, the Board recommends that language should be added to make clear that all entities within the legislative branch are covered by these provisions.

Based on its experience in the administration and enforcement of the Act and employee inquiry since the 1996 Report was issued, the Board makes the following two recommendations:

(1) Employee "whistleblower" protections, comparable to those generally available to employees covered by 5 U.S.C. § 2302(b)(8), should be made applicable to the legislative branch[2] to further the institutional and public policy interest in preventing reprisal or intimidation for the disclosure of information which evidences fraud, waste, or abuse or a violation of applicable statute or regulation.

(2) The Board has found that Congress has created a number of special-purpose study commissions in which some or all members are appointed by the Congress. These commissions are not listed as employing offices under the CAA and, in some cases, such commissions may not be covered by other, comparable protections. The Board therefore believes that the coverage of such special-purpose study commissions should be clarified.

Part II

Having reviewed all the inapplicable provisions of the private-sector CAA laws,[3] the Board focuses its recommendations on enforcement,[4] the area in which Congress

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[2] Such protections are already generally available to employees at GAO and GPO.

[3] The table of the private-sector provisions of the CAA laws not made applicable by the CAA, set forth in Appendix I to this Report, details these exceptions.

[4] The private-sector enforcement authority tables, set forth in Appendix II to this Report, summarize the enforcement authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA in those areas in which the CAA does not already grant enforcement authority to the Office.

made the most significant departures from the private-sector provisions of the CAA laws.

The Board makes the following specific recommendations of changes to the CAA:

(1) grant the Office the authority to investigate and prosecute violations of section 207 of the CAA, which prohibits intimidation or reprisal for opposing any practice made unlawful by the Act or for participation in any proceeding under the Act;

(2) clarify that section 215(b) of the CAA, which makes applicable the remedies set forth in section 13(a) of the Occupational Safety and Health Act of 1970 ("OSHAct"), gives the General Counsel the authority to seek a restraining order in district court in the case of imminent danger to health or safety; and

(3) make the record-keeping and notice-posting requirements of the private-sector laws applicable under the CAA.

The Board also makes the following general recommendations:

(4) extend the benefits of the model alternative dispute resolution system created by the CAA to the private and federal sectors to provide them with the same efficient and effective method of resolving disputes that the legislative branch now enjoys; and

(5) grant the Office the other enforcement authorities exercised by the agencies which implement those CAA laws for the private sector in order to ensure that the legislative branch experiences the same burdens as the private sector.

The Board further suggests that, to realize fully the goals of the CAA – to assure that "congressional employees will have the civil rights and social legislation that has ensured fair treatment of workers in the private sector" and to "ensure that Members of Congress will know firsthand the burdens that the private sector lives with"[5] – all inapplicable provisions of the CAA laws should, over time, be made applicable.

Part III

The Board identifies three principal options for coverage of the three instrumentalities:

(1) CAA Option – Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA (as the CAA would be modified by enactment of the recommendations made in Part II of this Report.)

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[5] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

(2) Federal-Sector Option – Coverage under the statutory and regulatory regime that applies generally in the executive branch of the federal sector, including the authority of executive-branch agencies as they administer and enforce the laws in the federal sector.

(3) Private-Sector Option – Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce the laws in the private sector.[6]

The Board compared these options with the current regimes at GAO, GPO, and the Library, identifying the significant effects of applying each option.[7]

The Board concludes that coverage under the private-sector regime is not the best of the options it considered. Members Adler and Seitz recommend that the three instrumentalities be covered under the CAA, with certain modifications, and Chairman Nager and Member Hunter recommend that the three instrumentalities be made fully subject to the laws and regulations generally applicable in the executive branch of the federal sector.

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The analysis and conclusions in this report are being made solely for the purposes set forth in section 102(b) of the Congressional Accountability Act of 1995. Nothing in this report is intended or should be construed as a definitive interpretation of any factual or legal question by the Office of Compliance or its Board of Directors.

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The Board of Directors of the Office of Compliance gratefully acknowledges the contributions of Lawrence B. Novey and Eugenie N. Barton for their work on this report.

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[6] The coverage described in each of the three options would supersede only provisions of law which provide substantive rights analogous to those provided under the CAA or which establish analogous administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights. Substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, would not be affected by the coverage described in the three options.

[7] The comparisons, which are presented in detail in tables set forth in Appendix III to this Report, cover the CAA, the laws made applicable by the CAA, analogous laws that apply in the federal sector and the private sector, and mechanisms for applying and enforcing them.

SECTION 102(b) REPORT

INTRODUCTION

Congress enacted the Congressional Accountability Act of 1995 ("CAA") so that there would no longer be "one set of protections for people in the private sector whose employees are protected by the employment, safety and civil rights laws, but no protection, or very little protection, for employees on Capitol Hill,"[8] and to "ensure that Members of Congress will know firsthand the burdens that the private sector lives with."[9] Thus, the CAA provides employees of the Congress and certain congressional instrumentalities with the protections of specified provisions of eleven federal employment, labor, and public access laws. (This Report refers to those laws as the "CAA laws").[10] Further, the Act generally applies the same substantive provisions and judicial remedies of the CAA laws as govern employment and public access in the private sector to ensure that Congress would live under the same laws as the rest of the nation's citizens.

However, the Act departed from the private-sector model in a number of significant respects. New institutional, adjudicatory, and rulemaking models were created. Concerns about subjecting itself to regulation, enforcement or administrative adjudication by executive-branch agencies led Congress to establish an independent administrative agency in the legislative branch, the Office of Compliance (the "OC" or the "Office"), to administer and enforce the Act. The Office's administrative and enforcement authorities differ significantly from those in place at the executive-branch

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[8] 141 CONG. REC. S622 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[9] *Id.* at S441.

[10] The nine private-sector laws made applicable by the CAA are: the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) ("FLSA"), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) ("Title VII"), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) ("ADA"), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) ("ADEA"), the Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.) ("FMLA"), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) ("OSHAct"), the Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 et seq.) ("EPPA"), the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) ("WARN Act"), and section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The two federal-sector laws made applicable by the CAA are: Chapter 71 of title 5, United States Code (relating to federal service labor-management relations) ("Chapter 71"), and the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.).

agencies which administer and enforce the eleven CAA laws for the private sector and/or the federal-sector. Most notably, the Act did not grant the OC independent investigation and prosecutorial authority comparable to that of analogous executive-branch agencies. Instead, the Act created new, confidential administrative dispute resolution procedures, including compulsory mediation, as a prerequisite to access to the courts. Finally, the Act granted the OC limited substantive rulemaking authority. Substantive regulations under the CAA are adopted by the Board of Directors (the "Board"). The House and Senate retained the right to approve those regulations, but the CAA provides that, in the absence of Board action and congressional approval, the applicable private-sector regulations or federal-sector regulations apply, with one exception involving labor-management relations.[11]

In terms of substantive law, the Act did not include some potentially applicable laws and made applicable only certain provisions of the CAA laws. Moreover, the Act applied the Federal Labor-Management Relations Act, 5 U.S.C. chapter 71 ("Chapter 71"), rather than the private-sector model, and gave the Board authority to create further exclusions from labor-management coverage if the Board found such exclusions necessary because of conflict of interest or Congress's constitutional responsibilities.[12]

Finally, the CAA was not made applicable throughout the legislative branch. The CAA only partially covered the three largest instrumentalities of the Congress, the General Accounting Office ("GAO"), the Government Printing Office ("GPO"), and the Library of Congress (the "Library"), which were already covered in large part by a variety of different provisions of federal-sector laws, administered by the three instrumentalities themselves and/or executive-branch agencies.

Congress left certain areas to be addressed later, after further study and recommendation, as provided for by sections 102(b) and 230 of the Act. To promote the continuing accountability of Congress, section 102(b) of the CAA required the Board to review biennially all provisions of federal law and regulations relating to the terms and conditions of employment and access to public services and accommodations; to report on whether or to what degree the provisions reviewed are applicable or inapplicable to the legislative branch; and to recommend whether those provisions should be made applicable to the legislative branch. Additionally, section 230 of the CAA mandated a study of the status of the application of the eleven CAA laws to GAO, GPO, and the Library, to "evaluate whether the rights, protections, and procedures, including administrative and judicial relief, applicable to [these instrumentalities]. . . are

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[11] With respect to the offices listed in § 220(e)(2) of the CAA, the application of rights under Chapter 71 shall become effective only after regulations regarding those offices are adopted by the Board and approved by the House and Senate. *See* §§ 220(f)(2), 411, of the CAA.

[12] *See* § 220(e) of the CAA.

comprehensive and effective . . . includ[ing] recommendations for any improvements in regulations or legislation."[13] These reports were to review aspects of legislative-branch coverage which required further study and recommendation to the Congress once the OC and its Board had gained experience in the administration of the Act and Congress had gained experience in living under the Act.

1996 Section 102(b) Report. In December of 1996, the Board completed its first biennial report mandated under section 102(b) of the CAA (the "1996 Section 102(b) Report"), which reviewed and analyzed the universe of federal law relating to labor, employment and public access, made the Board's initial recommendations, and set priorities for future reports.[14] To conduct its analysis, the Board organized the provisions of federal law in tabular form according to the kinds of entities to which they applied, and systematically analyzed whether and to what extent they were already applicable to the legislative branch or whether the legislative branch was already covered by other comparable legislation. This generated four tables: the first listed and reviewed those provisions of law generally applicable in the private sector and/or in state and local government that also are already applicable to entities in the legislative branch, a category which included nine of the laws made applicable by the CAA. The second table contained and reviewed those provisions of law that apply only in the federal sector, a category which included the two exclusively federal-sector laws applied to the legislative branch by the CAA. The third table listed and reviewed five private-sector and/or state- and local-government provisions of law that do not apply in the legislative branch, but govern areas in which Congress has already applied to itself other, comparable provisions of law. The last table listed and reviewed thirteen other private-sector laws which do not apply or have only very limited application in the legislative branch.

The Board then turned to its task of recommending which statutes should be applied to the legislative branch. In light of the large body of statutes that the Board had identified and reviewed, the Board determined that it could not make recommendations concerning every possible change in legislative-branch coverage, for "that would be the

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[13] 2 U.S.C. § 1371(c). Originally, the Administrative Conference of the United States was charged with carrying out the study and making recommendations for improvements in the laws and regulations governing the instrumentalities, but when the Conference lost its funding, the responsibility for the study was transferred to the Board.

[14] SECTION 102(b) REPORT: REVIEW AND REPORT OF THE APPLICABILITY TO THE LEGISLATIVE BRANCH OF FEDERAL LAW RELATING TO TERMS AND CONDITIONS OF EMPLOYMENT AND ACCESS TO PUBLIC SERVICES AND ACCOMMODATIONS (Dec. 31, 1996).

work of many years and many hands."[15] The Board further recognized that biennial nature of report, as well as the history and structure of the CAA, argued "for accomplishing such statutory change on an incremental basis."[16]

In setting its priorities for making recommendations from among the categories of statutes that the Board had identified for analysis and review, the Board sought to mirror the priorities of the CAA. Because legislative history suggested that highest priority of the CAA was the application of private-sector protections to congressional employees where those employees had little or no protection, the Board focused its recommendations in its first report on applying the private-sector laws not currently applicable to the legislative branch. The Board determined that, because of the CAA's focus on coverage of the Congress under private-sector laws, the Board's next priority should be to review the inapplicable provisions of the private-sector laws generally made applicable by the CAA.

The laws detailed in the other two tables were given a lower priority. Because determining whether and to what degree federal-sector provisions of law should be made applicable to the legislative branch "involve[s], in part, weighing the merits of the protections afforded by the CAA against those provided under other statutory schemes, the Board determined that, in . . . its first year of administering the CAA, [the Board determined that] it would be premature for the Board to make such comparative judgments."[17] Additionally, among the patchwork of federal-sector laws, which had come to cover some of the instrumentalities of the Congress, were laws the effectiveness and efficiency of which were then (and remain) under review by the Executive Branch. Similarly, the Board deferred consideration of laws that were not applicable, but where the Congress had applied a comparable provision, because the Board concluded that "as the Board gains rulemaking and adjudicatory experience in the application of the CAA to the legislative branch, the Board will be better situated to formulate recommendations about appropriate changes in those different statutory schemes."[18] In sum, the Board determined to follow the apparent priorities of the CAA itself, turning first to the application of currently inapplicable private-sector laws, and next in this, its second Section 102(b) Report, reviewing the omissions in coverage of the laws made applicable by the CAA and making recommendations for change.

Section 230 Study. At the same time as it completed its first report under section 102(b), the Board in its study mandated under section 230 of the CAA (the "Section 230

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[15] *Id.* at 3.

[16] *Id.*

[17] *Id.* at 4.

[18] *Id.*

Study")[19] analyzed the application of labor, employment and public access laws to GAO, GPO, and the Library, evaluating the statutory and regulatory regimes in place at these instrumentalities to determine whether they were "comprehensive and effective."[20] To do so, the Board had to establish a point of comparison, and determined that the CAA itself was the benchmark intended by Congress. Further, the Board gave content to the terms "comprehensive and effective," defining those terms according to the Board's statutory charge to examine the adequacy of "rights, protections, and procedures, including administrative and judicial relief."[21] Four categories were examined – substantive law; administrative processes and relief; judicial processes and relief; and substantive regulations – to determine whether the regimes at the instrumentalities were "comprehensive and effective" according to:

> (1) the nature of the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations; (2) the adequacy of administrative processes, including: *(a)* adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and *(b)* a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes; (3) the availability and adequacy of judicial processes and relief; and (4) the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria.[22]

The Board concluded that "overall, the rights, protections, procedures and [judicial and administrative] relief afforded to employees" were "comprehensive and effective when compared to those afforded to other legislative-branch employees under the CAA," but pointed out several gaps and a number of significant differences in coverage.[23] However, the Board explained that it was "premature" to make

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[19] SECTION 230 STUDY: STUDY OF LAWS, REGULATIONS, AND PROCEDURES AT THE GENERAL ACCOUNTING OFFICE, THE GOVERNMENT PRINTING OFFICE AND THE LIBRARY OF CONGRESS (DEC. 1996) at iii.

[20] 2 U.S.C. § 1371(c).

[21] *Id.*

[22] SECTION 230 STUDY at ii.

[23] *Id.*

recommendations at that "early stage of its administration of the Act,"[24] as to whether changes were necessary in the coverage applicable in these instrumentalities. The Board further stated that its ongoing reporting requirement under section 102(b) argued for accomplishing such statutory change on an incremental basis as the Board gained experience in the administration of the CAA. The conclusions in the Section 230 Study thus properly would serve at the appropriate time as "the foundation for recommendations for change" in a subsequent report under section 102(b) of the CAA.[25]

The time is now ripe for the Board to make recommendations for change in the coverage of the three instrumentalities which are appropriately included as part of this Report. The Board has had over three years' experience in the administration of the rights, protections and procedures made applicable to the legislative branch by the CAA. This experience in administering and enforcing the CAA and assessing its strengths and weaknesses in making recommendations respecting changes in the CAA to make the Act comprehensive and effective with respect to those parts of the legislative branch already covered under the CAA has augmented the structural foundation set down in the Section 230 Study. Thus, the Board has both the substantive and experiential bricks and mortar to model the options for changes in the regimes covering the three largest instrumentalities. Moreover, procedural rulemaking to extend the Procedural Rules of the Office of Compliance to cover proceedings commenced by GAO and Library employees alleging violations of sections 204-207 of the CAA raised questions as to the current status of substantive and procedural coverage of the instrumentalities under the Act, demonstrating an immediate need for Congress to clarify the relationship between the CAA and the instrumentalities.

Accordingly, this Report has three parts. In the first, the Board fulfills its general responsibility under section 102(b), by presenting a review of laws enacted after the 1996 Section 102(b) Report and recommendations as to which laws should be made applicable to the legislative branch. The second part analyzes which private-sector provisions of the CAA laws do not apply to the legislative branch and which should be made applicable. The third part reviews current coverage of GAO, GPO, and the Library of Congress under the laws made applicable by the CAA and presents the Board's recommendations for change.

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[24] *Id.*

[25] *Id.*

I. REVIEW OF LAWS ENACTED AFTER THE 1996 SECTION 102(b) REPORT, and REPORT RECOMMENDING THAT CERTAIN OTHER INAPPLICABLE LAWS SHOULD BE MADE APPLICABLE

A. Background

Section 102(b) of the CAA directs the Board of Directors of the Office of Compliance to –

> review 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.

And, on the basis of this review –

> Beginning on December 31,1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree the provisions described in paragraph (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.

In preparing this part of the 1998 Section 102(b) Report, all federal laws and amendments passed since October 1996 were reviewed to identify any new laws and changes in existing laws relating to terms and conditions of employment or access to public accommodations and services. The results of that review are reported here.[26] Further, in this part of the current Section 102(b) Report, the Board addresses the question of coverage of the legislative branch under the environmental whistleblower provisions which the Board deferred in the previous, 1996 Report. The Board also

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[26] As in the 1996 Section 102(b) Report, excluded from consideration were those laws that, although employment-related, (1) are specific to narrow or specialized industries or types of employment not found in the legislative branch (*e.g.*, employment in maritime or mining industries, or the armed forces, or employment in a project funded by federal grants or contracts); or (2) establish government programs of research, data-collection, advocacy, or training, but do not establish correlative rights and responsibilities for employees and employers (*e.g.*, statutes authorizing the Women's Bureau or the Bureau of Labor Statistics); or (3) authorize, but do not require, that employers provide benefits to employees, (*e.g.* so-called "cafeteria plans" authorized by 26 U.S.C. § 125).

notes that the provisions of private-sector law which the Board identified in that Section 102(b) Report as having little or no application in the legislative branch have not yet been made applicable, and the Board therefore also resubmits its recommendations regarding those provisions here. Based on experience in the administration and enforcement of the Act in the two year since that first report was submitted to Congress, the Board addresses two other areas – whistleblower protection and coverage of special study commissions – which, due to employee inquiry, the Board believes merit attention now.

B. Review and Report on Laws Passed Since October 1996

With two exceptions, the Congress did not pass a new law or significantly amend an existing law relating to terms and conditions of employment or access to public accommodations since the 1996 Section 102(b) Report. The first exception is the Postal Employees Safety Enhancement Act, Pub. L. No. 105-241, which amends the OSHAct to apply it to the United States Postal Service. The second exception is the Veterans Employment Opportunities Act of 1997 ("VEOA"), Pub. L. No. 105-339, which provides for expanded veteran's preference eligibility and retention in the executive branch and for those legislative-branch employees who are in the competitive service.

Both the OSHAct and the VEOA already apply to a substantial extent to the legislative branch. The OSHAct was made generally applicable to the legislative branch by section 215 of the CAA, and, in Parts II and III of this 1998 Section 102(b) Report, the Board has reviewed the extent to which specific provisions of the OSHAct apply within the legislative branch, and has made recommendations.

As to the VEOA, selected provisions of the Act apply to employees meeting the definition of "covered employee" under the CAA, excluding those employees whose appointment is made by a Member or Committee of Congress, and the VEOA assigns responsibility to the Board to implement veterans' preference requirements as to these employees. It is premature for the Board now, two months after enactment of the VEOA, to express any views about the extent to which veterans' preference rights do, or should, apply in the legislative branch, but the Board may decide to do so in a subsequent biennial report under section 102(b).

C. Report and Recommendations Respecting Laws Addressed in the 1996 Section 102(b) Report

1. Resubmission of Earlier Recommendations

The Board of Directors resubmits the following recommendations made in the 1996 Section 102(b) Report:

(a) Prohibition against discrimination on the basis of 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 that 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 Section 102(b) Report, the Board reports that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(b) Prohibition against discharge from employment by reason of 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 reason set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(c) Prohibition against discrimination on the basis of 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 reason set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(d) Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3). These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accommodations, it does not extend protection against discrimination based upon race, color, religion, or national origin with respect to access to public services and accommodations. For the reasons set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to employing offices within the legislative branch.

2. Employee Protection Provisions of Environmental Statutes

(a) Report. The Board adds a recommendation respecting coverage under the employee protection provisions of the environmental protection statutes. The employee

protection provisions in the environmental protection statutes (15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610) generally protect an employee from discrimination in employment because the employee commences proceedings under the applicable statutes, testifies in any such proceeding, or assists or participates in any way in such a proceeding or in any other action to carry out the purposes of the statutes. In the 1996 Report the Board reviewed and analyzed these provisions but "reserve[d] judgement on whether or not these provision should be made applicable to the legislative branch at this time" because, among other things, it was "unclear to what extent, if any, these provisions apply to entities in the legislative branch."[27]

Upon further review, applying the principles stated in the 1996 Report,[28] the Board has now concluded that there is sound reason to construe these provisions as applicable to the legislative branch. However, because it is possible to construe certain of these provisions as inapplicable, the Board recommends that Congress should adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

(b) Recommendation: Legislation should be adopted clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

D. Report and Recommendations in Areas Identified by Experience

1. Employee "Whistleblower" Protection

(a) Report. Civil service law[29] provides broad protection to "whistleblowers" in the executive branch and at GAO and GPO, but these provisions do not apply otherwise in the legislative branch. Employees subject to these provisions are generally protected against retaliation for having disclosed any information the employee reasonably believes evidences a violation of law or regulation, gross mismanagement or abuse of authority, or substantial danger to public health or safety. (In the private sector,

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[27] 1996 SECTION 102(b) REPORT at 6.

[28] The Board stated in the 1996 SECTION 102(b) REPORT: "The Board has generally followed the principle that coverage must be clearly and unambiguously stated." SECTION 102(b) REPORT at 2. Furthermore, as to private-sector provisions, the Board stated: "Because a major goal of the CAA was to achieve parity with the private sector, the Board has determined that, if our review reveals no impediment to applying the provision in question to the legislative branch, it should be made applicable." *Id*. at 4-5.

[29] *See, e.g.,* 5 U.S.C. § 2302(b)(8).

whistleblowers are also often protected by provisions of specific federal laws.[30]) The Office has received a number of inquiries from congressional employees concerned about protection against possible retaliation by an employing office for the disclosure of what the employee perceives to be such information. The absence of specific statutory protection such as that provided under 5 U.S.C. § 2302(b)(8) chills the disclosure of such information. Granting "whistleblower" protection could significantly improve the rights and protections afforded to legislative-branch employees in an area fundamental to the institutional integrity of the legislative branch.

(b) Recommendation: Congress should provide whistleblower protection to legislative-branch employees comparable to that provided to executive-branch employees under 5 U.S.C. § 2302(b)(8).

2. Coverage of Special-Purpose Study Commissions

(a) Report. The Office has been asked questions respecting the coverage of certain special-purpose study commissions that include members appointed by Congress or by officers of Congressional instrumentalities. Such commissions are not expressly listed in section 101(9) of the CAA in the definition of "employing offices" covered under the CAA, and in some cases it is unclear whether commission employees are covered under rights and protections comparable to those granted by the CAA. The Board believes that the coverage of such special-purpose study commissions should be clarified.

(b) Recommendation: Congress should specifically designate the coverage under employment, labor, and public access laws that it intends, both when it creates special-purpose study commissions that include members appointed by Congress or by legislative-branch officials, and for such commissions already in existence.

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[30] *See, e.g.,* 15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610 (the employee protection provisions of various environmental statutes), discussed on page 13 above. Other whistleblower protection may be provided through state statute or state common law, which are outside the scope of this Report.

II. REVIEW OF INAPPLICABLE PRIVATE-SECTOR PROVISIONS OF CAA LAWS AND REPORT ON WHETHER THOSE PROVISIONS SHOULD BE MADE APPLICABLE

A. Background

In its first Section 102(b) Report,[31] the Board determined that it should, in future section 102(b) reports, proceed incrementally to review and report on currently inapplicable provisions of law, and recommend whether these provisions should be made applicable, as experience was gained in the administration and enforcement of the Act. The next report to Congress would be an "in depth study of the specific exceptions created by Congress"[32] from the nine private-sector laws made applicable by the CAA[33] because the application of these private-sector laws was the highest priority in enacting the CAA.[34]

Part II of this second Section 102(b) Report considers these specific exceptions,[35] focusing on enforcement, the area in which Congress made the most significant departures from the private-sector provisions of the CAA laws. In this part of the Report, the Board reviews the remedial schemes provided under the CAA with respect to the nine private-sector laws made applicable, evaluates their efficacy in light of three years of experience in the administration and enforcement of the Act, and compares these CAA remedial schemes with those authorities provided for the vindication of the CAA laws in the private sector.[36] Based on this review and analysis and the Board's statutory charge to recommend whether inapplicable provisions of law "should be made

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[31] *See* 1996 SECTION 102(b) REPORT.

[32] *Id*. at 4.

[33] The private-sector laws made applicable by the CAA are listed in note 10, at page 5, above.

[34] *See* 1996 SECTION 102(b) REPORT at 3.

[35] The table of significant provisions of the private-sector CAA laws not yet made applicable by the CAA, set forth in Appendix I to this Report, details these exceptions.

[36] The private-sector enforcement authority tables, set forth in Appendix II to this Report, summarize the enforcement authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA in those areas in which the CAA does not already grant enforcement authority to the Office.

applicable to the legislative branch,"[37] the Board makes a number of recommendations respecting the application of these currently inapplicable enforcement provisions.

The statute provides no direct guidance to the Board in recommending whether a provision "should be made applicable."[38] The Board has therefore made these recommendations in light of its experience and expertise with respect to both the application of these laws to the private sector[39] and the administration and enforcement of the Act, as well as its understanding of the general purposes and goals of the Act. In particular, the Board intends that these recommendations should further a central goal of the CAA to create parity with the private sector so that employers and employees in the legislative branch would experience the same benefits and burdens as the rest of the nation's citizens.

B. Recommendations

The Board makes the following three specific recommendations of changes to the CAA respecting the application of these currently inapplicable enforcement provisions:[40]

1. **Grant the Office the authority to investigate and prosecute violations of § 207 of the CAA, which prohibits intimidation and reprisal.**

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[37] Section 102(b)(2)(B) of the CAA.

[38] Section 102(b) directs the Board to: "review 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." On the basis of this review, section 102(b) requires the Board biennially to: "report on (A) whether or to what degree the provisions described in paragraph (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."

[39] Section 301(d)(1) of the CAA requires that "[m]embers of the Board shall have training or experience in the application of the rights, protections, and remedies under one or more of the laws made applicable by [the CAA]."

[40] The Board also notes that several problems have been encountered in the enforcement of settlements requiring on-going or prospective action by a party. The Board does not, at this time, recommend legislative change because the Executive Director, as part of her plenary authority to approve settlements, can require a self-enforcing provision in certain cases and will now do so, as appropriate.

The Board recommends that the Office should be granted enforcement authority with respect to section 207 of the CAA because of the strong institutional interest in protecting employees against intimidation or reprisal for the exercise of the rights provided by the CAA or for participation in the CAA's processes. Investigation and prosecution by the Office would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes.

As the tables indicate, enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector.[41] In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court. Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive-branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that "congressional employees will have the civil rights and social legislation that ensure fair treatment of workers in the private sector"[42] is rendered illusory.

Therefore, in order to preserve confidence in the Act and to avoid chilling legislative branch-employees from exercising their rights or supporting others who do, the Board has concluded that the Congress should grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector by the implementing agency. Enforcement authority can be exercised in harmony with the alternative dispute resolution process and the private right of action provided by the CAA, and will further the purposes of section 207 of the Act.

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[41] The only exception is the WARN Act, which has no enforcement authorities.

[42] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

2. Clarify that § 215(b) of the CAA, which makes applicable the remedies set forth in § 13(a) of the OSHAct, gives the General Counsel the authority to seek a restraining order in district court in case of imminent danger to health or safety.

With respect to the substantive provisions for which the Office already has enforcement authority,[43] the Board's experience to date has illuminated a need to revisit only one area, section 215(b) of the CAA which provides the remedy for a violation of the substantive provisions of the OSHAct made applicable by the CAA.[44] Under section 215(b) the remedy for a violation of the CAA shall be a corrective order, "including such order as would be appropriate if issued under section 13(a)" of the OSHAct. Among other things, the OSHAct authorizes the Secretary of Labor to seek a temporary restraining order in district court in the case of imminent danger. The General Counsel of the Office of Compliance, who enforces the OSHAct provisions as made applicable by the CAA, takes the position that section 213(b), by its terms, gives him the same standing to petition the district court for a temporary restraining order in a case of imminent danger as the Labor Department has under the OSHAct. However, it has been suggested that the language of section 213(b) does not clearly provide that authority.

Although it has not yet proven necessary to resolve a case of imminent danger by means of court order because compliance with the provisions of section 5 of the OSHAct has been achieved through other means,[45] the express authority to seek preliminary injunctive relief is essential to the Office's ability promptly to eliminate all potential workplace hazards. If it should become necessary to prosecute a case of imminent danger by means of district court order, action must be swift and sure. Therefore, the Board recommends that the CAA be amended to clarify that the General Counsel has the standing to seek a temporary restraining order in federal district court and that the court has jurisdiction to issue the order.

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[43] The CAA provides enforcement authority with respect to two private-sector laws, the OSHAct and the provisions of the ADA relating to public services and accommodations. The CAA adopts much of the enforcement scheme provided under the OSHAct; it creates an enforcement scheme with respect to the ADA which is analogous to that provided under the private-sector provisions but is *sui generis*.

[44] Section 215(b) of the CAA reads as follows: "Remedy.–The remedy for a violation of subsection (a) shall be an order to correct the violation, including such order as would be appropriate if issued under section 13(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 662(a))."

[45] *See generally* GENERAL COUNSEL OF THE OFFICE OF COMPLIANCE, REPORT ON SAFETY & HEALTH INSPECTIONS CONDUCTED UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT (Nov. 1998).

3. Make applicable the record-keeping and notice-posting requirements of the private-sector CAA laws.

Experience in the administration of the Act leads the Board to recommend that all currently inapplicable record-keeping and notice-posting provisions be made applicable under the CAA. The Board recommends that the Office be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

As the tables illustrate,[46] most of the laws made generally applicable by the CAA authorize the enforcing agency to require the keeping of pertinent records and the posting of notices in the work place. Experience has demonstrated that where employing offices have voluntarily kept records, these records have greatly assisted in the speedy resolution of disputed matters. Especially where the law has not been violated, employing offices can more readily demonstrate compliance if adequate records have been made and preserved. Moreover, based upon its experience and expertise, the Board has concluded that effective record keeping is not only beneficial to the employer, but in many cases is necessary to the effective vindication of the rights of employees.

Additionally, living with the same record-keeping and notice-posting requirements as apply in the private sector will give Congress the practical knowledge of the costs and benefits of these requirements. Congress will be able to determine experientially whether the benefits of each record-keeping and notice-posting requirement outweigh the burdens. Application of the record-keeping and notice-posting requirements will thus achieve one of the primary goals of the CAA, that the legislative branch live under the same laws as the rest of the nation's citizens.

In addition to these specific recommendations, the Board makes the following two general recommendations which derive from the comparison between the CAA's remedial schemes and those authorities provided for the administration and enforcement of the CAA laws in the private sector:

4. Extend the benefits of the model alternative dispute resolution system created by the CAA to the private and the federal sectors.

The CAA largely replaces the enforcement schemes used to administer and enforce the CAA laws in the private sector with a model alternative dispute resolution system that mandates counseling and mediation prior to pursuing a claim before a hearing officer or in district court. Experience with this system has shown that most

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[46] *See generally* the tables of enforcement authorities set forth in Appendix II to this Report.

disputes under the CAA are resolved by means of counseling and mediation. There are substantial advantages in resolving disputes in their earliest stages, before litigation. Positions have not hardened; liability, if any, is generally at a minimum; and the maintenance of amicable workplace relations is most likely. Therefore, the Board recommends that Congress extend the alternative dispute resolution system created by the CAA to the private and federal sectors so that these sectors will have parity with the Congress in the use of this effective and efficient method of resolving disputes. The Board believes that the use of this alternative dispute resolution system can be harmonized with the administrative and enforcement regimes in place in both the federal and private sectors.

5. Grant the Office the other enforcement authorities exercised by the agencies that implement the CAA laws for the private sector.

To further the goal of parity, the Board also recommends that Congress grant the Office the remaining enforcement authorities that executive-branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector. As the tables show, the implementing agencies have investigatory and prosecutorial authorities with respect to all of the private-sector CAA laws, except the WARN Act.[47] Based on the experience and expertise of Members of the Board, granting the Office the same enforcement authorities as the agencies that administer and enforce these substantive provisions in the private sector would make the CAA more comprehensive and effective. The Office can harmonize the exercise of investigatory and prosecutorial authorities with the use of the model alternative dispute resolution system that the CAA creates. By taking these steps to live under full agency enforcement authority, the Congress will strengthen the bond that the CAA created between the legislator and the legislated: "This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests . . . without which every government degenerates into tyranny."[48]

C. Conclusion

The biennial reporting requirement of section 102(b) provides the opportunity for Congress to review the comprehensiveness and effectiveness of the CAA in light of the Board's recommendations and make the legislative changes it deems necessary. The CAA was enacted in the spirit of "the framers of our constitution" to take "care to

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[47] The particular authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA are summarized in the private-sector enforcement authority tables set forth in Appendix II to this Report.

[48] THE FEDERALIST NO. 57, at 42 (James Madison) (Franklin Library ed., 1984).

provide that the laws shall bind equally on all, especially those who make them."[49] Acknowledging that reaching that goal was to be a continuing process, section 102(b) mandated the periodic process of re-examination of which this Report and its recommendations are a part.

The CAA took a giant step toward achieving parity and providing comprehensive and effective coverage of the legislative branch by applying certain substantive provisions of law and by providing new administrative and judicial remedies. However, the Board's review of all the currently inapplicable provisions of the CAA laws, as set forth in the accompanying table,[50] has demonstrated that significant gaps remain in the laws made applicable, particularly with respect to the manner in which these laws are enforced under the CAA as compared with the private sector. Based on its expertise in the application of the CAA laws, its three years of experience in the administration and enforcement of the Act, and its understanding that the general purposes and goals of the Act were to achieve parity in the application of laws and to provide the legislative branch with comprehensive and effective protections, the Board recommends that Congress now take the steps of implementing the legislative changes discussed above. The Board further advises the Congress that to realize fully the goals of the CAA – to assure that "congressional employees will have the civil rights and social legislation that ensure fair treatment of workers in the private sector" and "to ensure that members of Congress will know firsthand the burdens that the private sector lives with"[51] – all inapplicable provisions of the CAA laws should, over time, be made applicable.

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[49] THOMAS JEFFERSON, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, *in* JEFFERSON'S PARLIAMENTARY WRITINGS 359 (Wilbur S. Howell ed., 1988) (2d ed. 1812).

[50] *See* table of the significant provisions of the CAA laws not yet made applicable by the CAA, set forth as Appendix I to this Report.

[51] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

III. LEGISLATIVE OPTIONS AND RECOMMENDATIONS ON THE APPLICATION OF LAWS TO GAO, GPO, AND THE LIBRARY OF CONGRESS

A. Background

Congress sought "to bring order to the chaos of the way the relevant laws apply to congressional instrumentalities"[52] when, in enacting the CAA, it applied the CAA to the smaller instrumentalities, but not to GAO, GPO, and the Library. Instead, the CAA clarified and extended existing coverage of the three largest instrumentalities in certain respects[53] and, in section 230, required the Board to conduct a study evaluating whether the "rights, protections, and procedures, including administrative and judicial relief" now in place at these instrumentalities were "comprehensive and effective" and to make "recommendations for any improvements in regulations or legislation."[54]

The legislative history explains why Congress covered some instrumentalities under the CAA but not others. Applying the CAA to the smaller instrumentalities and their employees would –

> extend to these employees, for the first time, the right to bargain collectively, and it will provide a means of enforcing compliance with these laws [made applicable by the CAA] that is independent from the management of these instrumentalities. . . . [B]y strengthening the enforcement mechanisms, the [CAA] attempts to transform the patchwork

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[52] 141 CONG. REC. S445 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[53] The CAA – *(i)* affirmed that GAO and GPO are covered under Title VII and the ADEA and extended coverage under those laws to additional employees at GPO; *(ii)* established new procedures for enforcing existing ADA rights at GAO, GPO, and the Library; *(iii)* removed GAO and the Library from coverage under FMLA provisions generally applicable in the federal sector and placed those instrumentalities under FMLA provisions generally applicable in the private sector; and *(iv)* affirmed that GPO is covered under the FLSA and extended coverage under that law to additional employees at GPO. *See* §§ 201(c), 202(c), 203(d), 210(g) of the CAA.

[54] Originally, the Administrative Conference of the United States was charged with conducting the study and making recommendations for improvements in the laws and regulations governing the three instrumentalities, but when Congress ceased funding the Conference, Congress also transferred its responsibility for the Study to the Board.

> of hortatory promises of coverage into a truly enforceable application of these laws.[55]

By contrast, GAO, GPO, and the Library –

> already have coverage and enforcement systems that are identical or closely analogous to the executive-branch agencies.
>
> Notably, employees in each of these agencies already have the right to seek relief in the Federal courts for violations of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Fair Labor Standards Act, and they are covered under the same provisions of the Family and Medical Leave Act as executive-branch employees.
>
> Employees in each of these instrumentalities also already are assured of the right to bargain collectively, with a credible enforcement mechanism to protect that right. For these three instrumentalities, [the CAA] clarifies existing coverage in certain respects, and expands coverage under the Americans with Disabilities Act.[56]

Furthermore, legislative history explained that extending the CAA to cover the smaller instrumentalities would have the advantage of "using the apparatus that will already be necessary to apply these [CAA] laws to the 20,000 employees of the House and Senate [to also apply these laws] to the remaining approximately 3,000 employees of the Architect [of the Capitol]" and other smaller instrumentalities.[57] On other hand, the CAA would "reduce the adjudicatory burden on the new office by excluding from its jurisdiction the approximately 15,000 employees of GAO, GPO and the Library of Congress."[58]

On December 30, 1996, the Board transmitted its study mandated by section 230 of the CAA to Congress. This Section 230 Study explained that, to fulfill the statutory mandate to assess whether the "rights, protections, and procedures, including administrative and judicial relief,"[59] at GAO, GPO, and the Library were "comprehensive and effective," the Board first had to establish a point of comparison, and the Board decided that the CAA itself was the appropriate benchmark. To give further content to

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[55] 141 CONG. REC. S445 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] § 230(c) of the CAA.

the term "comprehensive and effective," the Board identified four "key aspects of the current statutory and regulatory regimes,"[60] which the Board reviewed in evaluating the comprehensiveness and effectiveness of the rights, protections, and procedures at the three instrumentalities:

> (1) the nature of the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations;
>
> (2) the adequacy of administrative processes, including: (a) adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and (b) a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes;
>
> (3) the availability and adequacy of judicial processes and relief; and
>
> (4) the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria.[61]

After reviewing and analyzing the statutory and regulatory regimes in place at the three instrumentalities, the Board concluded that –

> overall, the rights, protections, procedures and relief afforded to employees at the GAO, the GPO and the Library under the twelve laws listed in section 230(b) are, in general, comprehensive and effective when compared to those afforded other legislative branch employees covered under the CAA.[62]

However, the Board also found –

> The rights, protections, procedures and relief applicable to the three instrumentalities are different in some respects from those afforded under the CAA, in part because employment at the instrumentalities is governed either directly under civil service statutes and regulations or under laws and regulations modeled on civil service law.[63]

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[60] SECTION 230 STUDY at ii.

[61] *Id.*

[62] *Id.*

[63] *Id.*

These civil-service provisions, which apply generally in the federal sector, apply at the three instrumentalities subject to numerous exceptions. In some instances where federal-sector provisions do not apply, these instrumentalities are covered under the CAA, and, in a few instances, under the statutory provisions that apply generally in the private sector. The result is what the Board called a "patchwork of coverages and exemptions."[64]

However, the Board decided that it would be "premature" at that "early stage of its administration of the Act"[65] to make recommendations as to whether changes were necessary in the statutory and regulatory regimes applicable in these instrumentalities.[66] The ongoing nature of its reporting requirement under section 102(b) argued for making recommendations for statutory change on an incremental basis as the Board gained experience in the administration of the CAA, and the conclusions in the Section 230 Study would serve at the appropriate time as "the foundation for recommendations for change" in a subsequent report under section 102(b) of the CAA.[67]

Pursuant to the CAA, several of its provisions became effective with respect to GAO and the Library on December 30, 1997, which was one year after the Section 230 Study was transmitted to Congress.[68] On October 1, 1997, in anticipation of the December 30 effective date, the Office of Compliance published a notice proposing to extend its Procedural Rules to cover claims alleging that GAO or the Library violated applicable CAA requirements.[69] Comments in response to this notice, and to a supplemental notice published on January 28, 1998,[70] raised questions as to whether the CAA authorizes GAO and Library employees to use the procedures established by the Act to

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64 *Id*. at iv.

65 *Id.*

66 The Board's institutional role, functions, and resources were also very different from those of the Administrative Conference, to which Congress originally assigned the task of preparing the study under section 230. *See* footnote 54 at page 23, above. The Conference in performing the study and making recommendations would have been acting in accordance with its institutional mandate to study administrative agencies and make recommendations for improvements in their procedures.

67 SECTION 230 STUDY at iii.

68 *See* §§ 204(d)(2), 205(d)(2), 206(d)(2), 215(g)(2) of the CAA.

69 143 CONG. REC. S10291 (daily ed. Oct. 1, 1997) (Notice of Proposed Rulemaking).

70 144 CONG. REC. S86 (daily ed. Jan. 28, 1998) (Supplementary Notice of Proposed Rulemaking).

seek remedies for alleged violations of sections 204-207 of the Act. (These sections apply the EPPA, WARN Act, and USERRA and prohibit retaliation for asserting CAA rights.) The Office decided to terminate the rulemaking and, instead, "to recommend that the Office's Board of Directors prepare and submit to Congress legislative proposals to resolve questions raised by the comments."[71]

The Board has decided that this Section 102(b) Report, focusing on omissions in coverage of the legislative branch under the laws made generally applicable by the CAA, provides the appropriate time and place to make recommendations regarding coverage of GAO, GPO, and the Library under those laws. As anticipated in the Section 230 Study, enough experience has now been gained in implementing the CAA to enable the Board to make recommendations for improvements in legislation applicable to these instrumentalities. Moreover, resolution of uncertainty as to whether employees alleging violations of sections 204-207 may use CAA procedures is an additional reason to include in this Report recommendations about coverage of the three instrumentalities.

B. Principal Options for Coverage of the Three Instrumentalities

On the basis of the findings and analysis in the Section 230 Study, the Board has identified three principal options for coverage of these instrumentalities:

C (1) CAA Option – Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA. (The Board here takes as its model the CAA as it would be modified by enactment of the recommendations made in Part II of this Report.)

C (2) Federal-Sector Option – Coverage under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce the laws in the federal sector.

C (3) Private-Sector Option – Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce the laws in the private sector.[72]

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[71] 144 CONG. REC. S4818, S4819 (daily ed. May 13, 1998) (Notice of Decision to Terminate Rulemaking).

[72] To be sure, other, hybrid models could be developed, based on normative judgments respecting particular provisions of law. Or, it would be possible to leave the "patchwork" of coverages and exemptions currently in place at the three instrumentalities and fill serious gaps in coverage on a piecemeal basis. However, presentation of such models would cloud the central question of which is the most

(continued...)

These options are compared with the current regimes at GAO, GPO, and the Library, identifying the significant effects of applying each option.

The comparisons are presented in tables set forth in Appendix III to this Report and are summarized and discussed in narrative form below. Insofar as federal-sector employers, private-sector employers, or the three instrumentalities are covered by laws affording substantive rights that have no analogue in the CAA, this Report does not discuss or chart these rights.[73] In defining the coverage described in the three options, the Board decided that, so as not to create duplicative rights and remedies, the application of the CAA or of analogous federal-sector or private-sector provisions should supersede existing provisions affording substantially similar substantive rights or establishing administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights. However, substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, would not be affected by the coverage described in the three options.

In comparing each option for coverage with the regime in place at each instrumentality, the Board has analyzed the differences under the four general categories used in the Section 230 Study: Substantive Rights, Administrative Remedial and Enforcement Processes, Judicial Processes and Relief, and Substantive Rulemaking Process. The narrative comparisons highlight the main differences in each area. The appended tables make a more detailed comparison of differences between each option and the existing regimes at the instrumentalities in each of the above-defined areas.

The examination of the consequences of applying the three options demonstrates that each has advantages and disadvantages with regard to "comprehensiveness" and

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[72] (...continued)
appropriate model for the instrumentalities.

[73] In evaluating these options, the Board is not considering the veterans' preference statutory provisions that apply generally in the federal sector and that, under the Veterans Employment Opportunity Act of 1998 ("VEOA"), were recently made applicable to certain employing offices of the legislative branch. Veterans' preference requirements, which were not made applicable by the CAA as enacted in 1995 or listed for study under section 230, were not analyzed in the Board's study under that section. Enacted on October 31, 1998, the VEOA assigned responsibility to the Board to implement veterans' preference requirements as to certain employing offices. It is premature for the Board now to express any views about the extent to which veterans' preference rights do, or should, apply to GAO, GPO, and the Library, but the Board may decide to do so in a subsequent biennial report under section 102(b).

"effectiveness," particularly in the area of administrative processes and enforcement. A particular administrative/enforcement scheme arguably may be more "comprehensive" than another because it includes more avenues for the redress of grievances, but the very multiplicity of avenues arguably may make that scheme less "effective" than a more streamlined system. Because all three options largely provide the same substantive rights, determining whether to advocate the option of applying the CAA, the federal-sector model, or the private-sector model depends largely on weighing the costs and benefits of administrative systems for resolving disputes either primarily through a single-agency alternative dispute resolution system, an internal-agency investigation and multi-agency adjudicatory system, or a multi-agency investigation and enforcement system.

The Board found that the question of which option to recommend is by no means simple. Sensible arguments support the application of each model. GAO, GPO, and the Library can be analogized to either the other employing offices in the legislative branch, of which these instrumentalities are by statute a part, the executive branch, to which GAO, GPO, and the Library have many functional similarities, or the private sector, which the legislative history of the CAA portrays as the intended workplace model for the legislative branch.

Arguably, the legislative-branch model of the CAA, administered and enforced by the Office of Compliance, is the most appropriate to the instrumentalities, in that Congress has already placed not only the employing offices of the House and Senate, but also the instrumentalities of the Office of the Architect of the Capitol, the Capitol Police, the Congressional Budget Office, and the Office of Compliance under the CAA. Furthermore, as the legislative history of the CAA makes clear, the authors of the Act expected the Board to use the CAA as the benchmark in evaluating the comprehensiveness and effectiveness of the regimes in place at GAO, GPO, and the Library. Moreover, GAO, GPO, and the Library are considered instrumentalities of the Congress for many purposes, and some offices of these instrumentalities work directly with Members and staff of Congress in the legislative process, which legislative functions some Members of Congress perceived as creating tension with executive-branch agency coverage.

On the other hand, federal-sector laws and regulations, administered and enforced in part by executive-branch agencies, are already in place at the three instrumentalities in many respects. In addition, the special circumstances attendant to Congressional offices that warranted administration and enforcement under the CAA by a separate legislative-branch office, and that justified certain limitations on rights and procedures under the CAA as compared to those generally available in the federal sector, are attenuated when applied to GAO, GPO, and the Library. Moreover, as noted in Part II above, the Board has advised that the Congress over time should make all currently inapplicable provisions of the federal- and private-sector CAA laws applicable to itself; thus the instrumentalities should not become subject to those exemptions from coverage attendant upon application of the CAA model.

Finally, the private-sector model arguably best serves the goal of the CAA of achieving parity with the private sector whenever possible. By so doing, those in the legislative branch would live under the same legal regime as the private citizen.

C. Comparison of the Options for Change

1. CAA Option: Bring the three instrumentalities fully under the CAA, including the authority of the Office of Compliance as it administers and enforces the Act.

(a) Substantive rights. Covering GAO, GPO, and the Library under the CAA would grant substantive rights that are generally the same as those now applicable at these instrumentalities. However, changes include: *(i)* GPO would become covered under the rights of the WARN Act and EPPA, which do not now apply at that instrumentality. *(ii)* Coverage under the CAA would afford a greater scope of appropriate bargaining units and collective bargaining than is now established at GAO under regulations issued by the Comptroller General under the GAO Personnel Act. *(iii)* Coverage under section 220(e)(2)(H) of the CAA would add a process by which the Board, with the approval of the House and Senate, can remove an office from coverage under labor-management provisions if exclusion is required because of conflict of interest or Congress's constitutional responsibilities; no such process applies now at the three instrumentalities. *(iv)* The CAA, applying private-sector FMLA rights, authorizes the employing office to recoup health insurance costs from a covered employee who does not return to work, to decline to restore "key" employees who take FMLA leave, and to elect whether an employee must use available paid annual or sick leave before taking leave without pay; GAO and the Library have already been granted these authorities, but coverage under the CAA would extend these authorities to GPO. *(v)* CAA provisions that apply FLSA rights would eliminate most use of compensatory time off, "credit hours," and compressed work schedules that may now be used at the three instrumentalities in lieu of FLSA overtime pay.

(b) Administrative and enforcement processes. In the Section 230 Study, the Board found that the three instrumentalities are subject to –

> a patchwork of coverages and exemptions . . . . The procedural regimes at the instrumentalities differ from one another, are different from the CAA and are different from that in the executive branch. . . . [T]he multiplicity of regulatory schemes means that, in some cases, employees have more procedural options available, and in some cases, fewer. Additional procedural steps may afford opportunities to employees in some cases, but may also be more time-consuming and inefficient.[74]

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[74] SECTION 230 STUDY at iv.

In a number of respects, coverage under the CAA would grant employees for the first time an avenue to have their claims resolved by an administrative entity outside of the employing instrumentality. Under present law, while employees of all the instrumentalities may seek a remedy for unlawful discrimination in federal district court, there are limitations on the administrative remedies available outside of their employing agency. At the Library, an employee alleging discrimination may pursue a complaint through internal Library procedures, but if the Librarian denies the complaint, the employee has no right of appeal to an outside administrative agency. Likewise, a GPO employee cannot appeal administratively from the Public Printer's decision on a complaint of discrimination on the basis of disability. The GAO Personnel Appeals Board ("PAB"), which hears GAO employee appeals, is administratively part of GAO, and its Members are appointed by the Comptroller General.

In the area of occupational safety and health, the CAA requires the General Counsel of the Office of Compliance to conduct inspections periodically and in response to charges and authorizes the prosecution of violations. Although these CAA provisions already cover GAO and the Library, they do not now cover GPO, where no outside agency has authority to inspect or prosecute occupational safety and health violations.

The application of the CAA would end the patchwork of administrative coverages and exemptions and extend an administrative mechanism for resolving complaints that is administered by an office independent of the employing instrumentalities. The counseling and mediation system of the Office provides a fair, swift, and independent mechanism for informally resolving disputes. The complaint and appeals process (along with the option of pursuing a civil action) provides an impartial method of adjudicating and appealing those disputes that cannot be resolved informally.

On the other hand, except in the areas of safety and health, labor-management, and public access, the investigatory and enforcement authorities now applicable at the three instrumentalities are more extensive than those under the CAA, especially without the authorities that the Board recommends should be added to the CAA in Part II of this Report. For example, internal procedures at the three instrumentalities provide for investigation of every discrimination complaint by the equal employment office of the employing agency and the results of those investigations are made available to the employee. Under the CAA, there is no agency investigation, and an employer is not required to disclose the results of any internal investigation to the employee. Applying the CAA to the three instrumentalities would not preclude continuing to make their internal administrative and investigative procedures available for employees who choose to use them, but employees might have to choose whether to forgo using the internal procedures and investigations in order to meet the time limits for administrative or judicial claims resolution under the CAA.

Furthermore, the PAB General Counsel for GAO and the Special Counsel for GPO provide for prosecution of discrimination and other violations under certain

circumstances. The CAA does not now provide for prosecution of discrimination or most other kinds of violations.

The Board also observes that the three instrumentalities are now covered under federal-sector provisions of Title VII and the ADEA that require equal employment opportunity programs and affirmative employment plans, and that GAO's programs and plans are reviewed by the PAB and GPO's programs and plans are reviewed by the Equal Employment Opportunity Commission ("EEOC"). The CAA contains no comparable provisions.

(c) Judicial processes and relief. Coverage under the CAA would grant a private right of action that is not now available to GPO employees to remedy FMLA and USERRA violations and would clarify that GAO and Library employees may use CAA judicial procedures to remedy EPPA, WARN Act, and USERRA violations. The CAA would also grant the right to a jury trial in all situations where it would be available in the private sector, whereas a jury trial may not be available now at the three instrumentalities in actions under the ADEA, FMLA, or FLSA.

On the other hand, while the right to judicial appeal to the Federal Circuit is largely the same under the CAA as it is under the provisions of labor-management law currently applicable at the three instrumentalities, the CAA does not allow the charging party to take appeals from unfair labor practice decisions and does not provide for appeal of arbitral awards involving adverse actions or performance-based actions.

(d) Substantive Rulemaking Process. GAO and the Library are already subject to substantive regulations promulgated by the Board under CAA provisions applying rights under the EPPA, WARN Act, and OSHAct, and the full application of CAA coverage would also subject these two instrumentalities to the Board's regulations implementing FLSA, FMLA, Chapter 71, and ADA public access rights, and would subject GPO to all substantive regulations under the CAA. Substantive regulations are issued under section 304 of the CAA, which authorizes the Board to issue regulations subject to approval by the House and Senate. These regulations under the CAA must generally be the same as those adopted by executive-branch agencies under the laws made applicable by the CAA for the private sector (or, under Chapter 71, for the federal sector), or, if regulations are not adopted by the Office and approved by the House and Senate, those executive-branch agency regulations themselves are applied under the CAA in most instances.[75] The regulatory requirements made applicable by the CAA are

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[75] To date, regulations have been adopted and submitted to the House and Senate but not approved in the following areas: OSHAct, public access under the ADA, application of labor-management rights to offices listed in § 220(e) of the CAA, and coverage of GAO and the Library under substantive regulations with respect to EPPA, WARN Act, and OSHAct. Regulations adopted by executive-branch

(continued...)

therefore established by regulatory agencies independent of the employers being regulated.

Currently, for the subject areas where the three instrumentalities are not now subject to CAA regulations, the substantive rights of employees at the three instrumentalities are defined in most respects by government-wide regulations adopted by executive-branch agencies. However, in a few areas, the heads of these instrumentalities are granted the authority to define and delimit rights for their employees by regulation. For example, the GAO Personnel Act authorizes the Comptroller General to establish a labor-management program "consistent" with Chapter 71, and GAO's order under this authority includes limits on appropriate bargaining units and on the scope of bargaining that are more restrictive than those in Chapter 71, as made applicable by the CAA. The Comptroller General and the Librarian of Congress have authority to promulgate substantive regulations under the FMLA. The Public Printer is not bound to apply the Labor Department's occupational safety and health standards, provided he provides conditions "consistent with" those standards. By contrast, if the CAA applied, these instrumentalities would become subject to regulatory requirements established by regulatory agencies independent of the instrumentalities.

2. <u>Federal-Sector Option</u>: Bring the three instrumentalities fully under federal-sector provisions of law, including the authority of executive-branch agencies as they administer and enforce those provisions.

(a) Substantive rights. The substantive rights now available at the three instrumentalities are mostly the same as those that would become available under federal-sector coverage. However, some changes would occur. For instance, *(i)* Under the federal-sector regime, GAO and the Library would no longer be covered under CAA provisions making applicable the rights under the EPPA or WARN Act. *(ii)* GAO and the Library would have coverage under the federal-sector provisions of the FMLA, which do not allow the employer to recoup health insurance costs from an employee who does not return to work; or to limit the application of FMLA restoration rights to "key" employees; or to elect whether an employee must use available paid annual or sick leave before taking leave without pay. *(iii)* Coverage under Chapter 71 would afford a greater scope of appropriate bargaining units and collective bargaining than is now provided at GAO under regulations issued by the Comptroller General under the GAO Personnel Act.

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[75] (...continued)
agencies therefore apply in all of these areas except § 220(e), because § 411 of the CAA excepts from the default provision regulations regarding the offices listed under § 220(e)(2). If the CAA covered the three instrumentalities, § 220(e) could affect them only if the Board adopted regulations, approved by the House and Senate, to exclude "such other offices that perform comparable functions," within the meaning of § 220(e)(2)(H).

(b) Administrative and enforcement processes. The administrative processes now in place at GAO, GPO, and the Library are similar to, and, in many instances, the same as, those in effect generally for the federal sector. Of the three, GPO has the most federal-sector coverage, being already subject, in most areas, to the authority of the EEOC, Merit Systems Protection Board ("MSPB"), and Special Counsel, which investigate, bring enforcement actions, and hear appeals arising out of executive-branch agencies, and the Office of Personnel Management ("OPM"), which promulgates government-wide regulations under the FLSA and FMLA and investigates and resolves FLSA complaints. Choosing the federal-sector option at GPO would extend this existing situation across the board. Furthermore, whereas GPO employees' ADA complaints are now investigated and resolved by GPO management without any right of appeal to, or investigation and prosecution by, any outside agency or office, federal-sector coverage would bring such complaints under the authority of executive-branch agencies. Also, regarding occupational safety and health at GPO, whereas no outside agency can now conduct inspections, consider employee complaints, require compliance, or resolve disputes regarding occupational safety and health, application of federal-sector coverage would cause these functions to be performed by the Department of Labor. In addition, while GPO, GAO, and the Library are currently required to have internal mechanisms for investigating and resolving public-access complaints under the ADA, applying the federal-sector regime would extend the Attorney General's authority under Executive Order 12250 to review the three instrumentalities' regulations, to coordinate implementation, and to bring enforcement actions.

GAO is not now subject to executive-branch agencies' authority in most respects, but was originally considered part of the executive branch and remained subject to the authority of the executive-branch agencies until the 1980 enactment of the GAO Personnel Act, which consolidated the appellate, enforcement, and oversight functions that in the executive branch are performed by the EEOC, the MSPB, and the Special Counsel into the function of the GAO PAB and its General Counsel.[76] Applying federal-sector coverage would, with respect to the CAA laws, restore the PAB's responsibilities to the EEOC, MSPB, and Special Counsel, which, unlike the PAB, are fully separate and independent from regulated employing agencies. GAO is already subject to OPM's government-wide regulations and claims-resolution authority under the FLSA.

The Library's internal claims processes are largely modeled on those required and applied by executive-branch employing agencies, but the Library has been exempted

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[76] Legislative history explains that the GAO Personnel Act was enacted to enable GAO to audit the executive-branch personnel programs and agencies established under the Civil Service Reform Act of 1978 without being subject to those same programs and agencies. S. Rep. No. 96-540, 96th Cong. (Dec. 20, 1979) (Governmental Affairs Committee), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 50-53.

from the authority of executive-branch agencies in most respects, with the principal exception being FLRA authority over labor-management relations.[77] Application of federal-sector coverage would, with respect to the CAA laws, extend the authority of the EEOC, MSPB, the Special Counsel, and OPM to include the Library and its employees.

(c) Judicial processes and relief. In most instances, employees at the three instrumentalities are already covered by the same judicial processes as federal-sector employees. However, whereas PAB decisions may be reviewed only by appeal to the Federal Circuit, federal-sector procedures would allow suit and trial *de novo* after exhausting all administrative remedies, even after decision on appeal to the EEOC or the MSPB. On the other hand, GAO and Library employees would no longer have a private right of action under FMLA, and, unlike the CAA, which now provides for judicial review of OSHAct decisions regarding GAO and the Library, final occupational safety and health decisions under the federal-sector scheme are made by the President.

(d) Substantive rulemaking process. In a number of areas, the three instrumentalities are already subject to the same government-wide regulations as are in place in the federal sector. GAO and GPO are subject to OPM's regulations under the FLSA, GPO is subject to OPM's regulations under the FMLA, and GPO and the Library are subject to FLRA's regulations under Chapter 71. However, in a number of instances the three instrumentalities are currently able to issue their own regulations without reference to the regulations in the federal sector, as described at page 33 above in the discussion of the substantive rulemaking process under the CAA option. Coverage by the federal-sector regime would subject the three instrumentalities to uniform government-wide regulations in all areas.

3. <u>Private-Sector Option</u>: Bring the three instrumentalities fully under private-sector provisions of law, including the authority of executive-branch agencies as they administer and enforce those provisions.

(a) Substantive rights. The substantive rights and responsibilities under the current regimes at the three instrumentalities are generally similar to what would be provided under private-sector provisions of law, with the notable exception of the area of labor-management relations where application of private-sector substantive law would grant to employees at the three instrumentalities certain rights, such as the right to strike, unavailable to other federal government employees. There are also a number of other differences between private-sector provisions and the substantive provisions of law currently applicable at the three instrumentalities. For example, the application of private-sector provisions of the FLSA would eliminate most use of compensatory time in lieu of overtime pay. Also, private-sector FMLA provisions would apply at GPO, which

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[77] In an another area that is significant, though not analogous to any of the laws made applicable by the CAA, the Library is also subject to OPM's authority over job classifications.

allow the employer to recoup health insurance costs from an employee who does not return to work; to limit the application of FMLA restoration rights to "key" employees; and to elect whether an employee must use available paid annual or sick leave before taking leave without pay. Finally, GPO, which is not now covered by WARN Act or EPPA rights, would become subject to those laws.

(b) Administrative processes. If provisions of private-sector law were applied, the greatest impact would be in the area of administrative processes. Under private-sector schemes generally, with the exception of occupational safety and health and labor-management relations, the agency's responsibility is limited to investigation and prosecution, without administrative adjudication and appeal.

The consequences of application of private-sector administrative schemes would be different at each instrumentality. The most significant change would be at the Library, where outside agencies now have little role in either investigation and prosecution or in administrative adjudication and appeals. If private-sector coverage applied, an agency outside of the Library would have authority to investigate and prosecute discrimination, FLSA, FMLA, and other laws. At GAO and GPO, the present adjudicatory and prosecutory schemes would be replaced by a new prosecutorial regime handled by agencies ordinarily responsible for private-sector enforcement. For example, FLSA and FMLA enforcement would be handled by the Labor Department in its investigatory and prosecutorial role, rather than OPM and the PAB at GAO and OPM and MSPB at GPO. However, under the currently applicable provisions of law and regulation that govern the federal sector with respect to the FLSA, OPM has authority to direct GPO and GAO to comply, whereas under the provisions of law and regulation that govern the private sector, the Labor Department would have to bring suit to enforce compliance. In the area of discrimination at GPO, rather than appeal rights to EEOC and MSPB, there would be investigation and prosecution by the EEOC, while at GAO, the PAB's role would be replaced by EEOC investigation and prosecution. In the area of occupational safety and health, the enforcement responsibilities for GAO and the Library would be transferred from the OC to the Labor Department, and the Labor Department would also assume these responsibilities for GPO, where currently no outside agency exercises these responsibilities.

(c) Judicial processes and relief. In the area of judicial processes and relief, if private-sector laws were applied, a private right of action would be added under a number of provisions where it does not currently exist. For example, GPO employees would gain a private right of action under FMLA and USERRA. GAO and Library employees would gain an unambiguous private right of action under WARN, USERRA, and EPPA. Moreover, punitive damages are part of the private-sector remedial scheme, whereas they are currently unavailable at the three instrumentalities.

(d) Adoption of substantive regulations. Application to the three instrumentalities of the substantive rulemaking process governing the private sector would resolve concerns respecting independent rulemaking authority under the regimes currently in

place at these instrumentalities. The agencies issuing regulations that govern the private sector have no employment relationship with the community they regulate, unlike the three instrumentalities themselves when they promulgate substantive rules. Moreover, a switch to private-sector coverage in the areas of OSHAct, WARN Act, and EPPA would remove GAO and the Library, which are currently subject to CAA substantive rules in those areas, from the section 304 process of adoption and issuance of substantive regulations.

The three instrumentalities are currently covered by a number of civil service and other protections which have no analogue in the CAA and which the Board does not undertake to review here. The Board determined that such substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, should not be affected by the coverage under any of the options. However, to avoid creating duplicative rights and remedies, the application of the CAA or of analogous federal-sector or private-sector provisions should supersede existing provisions affording substantially similar substantive rights or establishing administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights.

D. Recommendations

1. The current "patchwork of coverages and exemptions"[78] at GAO, GPO, and the Library should be replaced by coverage under either the CAA or the federal-sector regime.

In its Section 230 Study, the Board described the current systems in place at the instrumentalities, and stated:

> Congressional decisions made over many years in different statutes subject the three instrumentalities to the authorities of certain executive-branch agencies with respect to certain laws, but exempt them from executive-branch authority with respect to others. . . . The result is a patchwork of coverages and exemptions from the procedures afforded under civil service law and the authority of executive-branch agencies, and from the procedures afforded under the CAA and the authority of the Office of Compliance."[79]

In preparing this 1998 Report, the Board considered whether to recommend that serious gaps in coverage at the three instrumentalities be filled without fundamentally changing the regimes already in place at each instrumentality. However, the Board

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[78] SECTION 230 STUDY at iv.

[79] *Id*.

unanimously rejected that piecemeal approach. The "patchwork" nature of existing coverages and exemptions yields complexity and areas of legal uncertainty in coverage at the three instrumentalities. Furthermore, in several areas, the three instrumentalities are not now subject to the authority of any outside regulatory or personnel agency to promulgate regulations, resolve claims, or exercise enforcement authorities.

Accordingly, the Board unanimously concluded that this current system is less comprehensive and effective than, and should be replaced by, coverage under one of the options described in the previous section. The Board also agreed unanimously that coverage under the private-sector regime is not the best of the three options it considered. However, the Board did not reach a consensus as to whether the CAA or the laws and regulations applicable in the federal sector should be made applicable to GAO, GPO, and the Library. Instead, for the reasons stated below, Members Adler and Seitz concluded that the three instrumentalities should be covered under the CAA, with certain modifications, and Chairman Nager and Member Hunter concluded that the three instrumentalities should be made fully subject to the laws and regulations generally applicable in the federal sector.

2. Members Adler and Seitz have concluded that GAO, GPO, and the Library should be covered under the CAA, including the authority of the Office of Compliance, and that the CAA, as applied to these instrumentalities, should be modified – *(a)* to add Office of Compliance enforcement authorities as recommended in Part II of this Report and *(b)* to preserve certain rights now applicable at the three instrumentalities.

Members Adler and Seitz concluded that the three instrumentalities should be brought under the CAA primarily for two reasons. As noted above, the Board in the Section 230 Study decided that its statutory mandate was to evaluate the "comprehensiveness and effectiveness" of the existing statutory and regulatory regimes at the three instrumentalities by comparing them to the regime under the CAA. The application of the CAA to the three instrumentalities would assure that this standard of "comprehensiveness and effectiveness" is achieved throughout the legislative branch.

Second, all laws made applicable by the CAA are administered by a single Office. The advantages of this unified structure are that employees can turn to a single place for assistance; efficient and uniform procedures under a model administrative dispute resolution system have been established for various types of complaints; and a single body of substantive regulations and decisions, which is as internally consistent as possible within the constraints of applicable law, is being developed. Extending the jurisdiction of the Office to include GAO, GPO, and the Library for all of the laws made applicable by the CAA will foster such efficient and consistent administration of the laws at the three instrumentalities, and will put the expertise and resources of the Office of Compliance to full use throughout the legislative branch.

The conclusions of Members Adler and Seitz are premised and dependent upon the CAA's being applied to the three instrumentalities with certain modifications. First, the Act should be amended to enlarge the Office of Compliance's enforcement authorities as recommended above in Part II of this Report. The Board there described its determination that certain additional provisions of CAA laws should be made applicable to all employing offices of the legislative branch that are now covered under the CAA, and, for the reasons discussed above, such additional provisions should be made applicable to GAO, GPO, and the Library as well.

Second, the rights extended by the CAA in the House and Senate and the smaller instrumentalities are subject to certain limitations that do not apply under the regimes now at GAO, GPO, and the Library. These limitations appear to have been included in the CAA to preserve the independence of the House and Senate, to protect against publicity attendant to complaints or litigation that Congress believed might unduly affect the legislative and electoral processes, and to avoid labor activities that Congress was concerned might, in certain situations, engender conflict of interest or interfere with fulfillment by Congress of its constitutional responsibilities. However sound these reasons may have been with respect to Congressional offices for which the CAA was principally designed, these reasons have less force as to GAO, GPO, and the Library in view of their respective roles in the legislative process.

Members Adler and Seitz therefore believe that limitations such as those imposed by sections 220(c)(2)(H) and 416 of the CAA should not apply at GAO, GPO, and the Library. Section 220(c)(2)(H) of the CAA establishes a process by which the Board, with the approval of the House and Senate, may remove an office from coverage under some or all provisions of labor-management law if "required because of – (i) a conflict of interest or appearance of a conflict of interest; or (ii) Congress' constitutional responsibilities."[80] No such process applies under labor-management law now applicable at GAO, GPO, and the Library, and none should be made applicable to them under the CAA. Section 416 of the CAA makes the counseling, mediation, and administrative hearing processes of the CAA "confidential." The CAA, in being made applicable to these three instrumentalities, should not impose confidentiality requirements except to the same extent that confidentiality is imposed in proceedings by the executive-branch agencies implementing the CAA laws and to the extent necessary to facilitate effective counseling and mediation under §§ 402 and 403 of the CAA.[81]

3. Chairman Nager and Member Hunter have concluded that the federal-sector model should apply, including the authority of executive-branch

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[80] Section 220(e)(1)(B) of the CAA.

[81] *Cf.* 5 U.S.C. § 574 (duties of confidentiality in mediation or other proceedings under the Administrative Dispute Resolution Act).

personnel-management and regulatory agencies to implement and enforce the laws.

Chairman Nager and Member Hunter have concluded that GAO, GPO, and the Library should be brought under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce laws in the federal sector, for several reasons. Insofar as the present statutory scheme is not "comprehensive and effective" because it does not provide employees access to an outside regulatory entity to promulgate regulations and resolve claims, this problem could be solved by extending the authority of the executive-branch agencies over the three instrumentalities.

GAO, GPO, and the Library are already subject to many of the same personnel statutes that apply generally in the federal sector and, in some instances, to the authority of executive-branch agencies as well. Making the federal-sector regime fully applicable would be less disruptive to the three instrumentalities than replacing the coverage already in effect with either the CAA or private-sector coverage.

Furthermore, employment at these three instrumentalities is more akin to the large civilian departments and agencies of the executive branch, for which federal-sector laws and regulations were designed, than the employing offices of the House and Senate, for which the CAA was primarily designed. For example, substantive provisions of federal-sector statutes and regulations in such areas as overtime pay, family and medical leave, and advance notification of layoffs are designed to dove-tail with merit-based retention systems, position-classification systems, leave policies, and other personnel practices that are found generally in both the executive branch and the three large instrumentalities, but that are not common in either House and Senate offices or the private sector. Also, while federal-sector law in some respects limits the right to sue, it also affords administrative procedures and remedies that exceed what are available under the CAA or in the private sector. Such procedures have traditionally been seen as appropriate to avoid politicized employment and to provide for accountability in large, apolitical bureaucracies. In congressional staff, where political appointment is generally seen as proper and where accountability is achieved through the electoral process, these federal-sector procedures and remedies have been considered inappropriate. However, the three instrumentalities have traditionally been seen as having many of the attributes of the large, apolitical bureaucracy, and employment practices have largely followed the federal-sector model.

Placing GAO, GPO, and the Library under federal-sector coverage would also have the salutary effect of giving Congress the experience of living under the laws that it enacts for the executive branch. According to the authors of the CAA, a principal goal of that Act was to make Congress live under the laws that it enacts for the private sector, so that Congress can better understand the consequences of those laws. Congress might likewise better understand the consequences of the laws that it enacts for the executive branch if the large instrumentalities of Congress were fully subject to those laws.

APPENDIX I

INAPPLICABLE PRIVATE-SECTOR PROVISIONS OF THE LAWS MADE APPLICABLE BY THE CAA

This table describes significant statutory provisions that are contained in the laws made applicable by the CAA (the "CAA laws") and that apply in the private sector, but that do not apply fully to the legislative branch. "Apply" means that a provision is referenced and incorporated by the CAA, or a substantially similar provision is set forth in the CAA, or the provision applies to the legislative branch by its own terms without regard to the CAA. Whether provisions apply to GAO, GPO, and the Library of Congress is not discussed in this table, but is analyzed in the tables contained in Appendix III of this Report.

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C. OTHER AGENCY AUTHORITIES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII") and 42 U.S.C. §§ 1981, 1981a

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Employment discrimination against individuals employed by other employers. § 703(a)(1) of Title VII forbids employment discrimination by covered employers against "any individual." Courts have held that this prohibition extends beyond the immediate employer-employee relationship under certain circumstances, including where a defendant who does not employ an individual controls that individual's access to employment with another employer and denies access based on unlawful criteria.[1] Under the CAA, an employing office may only be charged with discrimination by a "covered employee," defined as an employee of the nine legislative-branch employers listed in § 101(3) of the CAA.	Secs. 703(a)(1) *42 U.S.C.* *§§ 2000e–2(a)(1)*
2. Publication of discriminatory notices or advertisements. Publication of discriminatory notices or advertisements is prohibited under § 704(b) of Title VII. Under the CAA, a notice or advertisement might be evidence of discriminatory animus, but § 704(b) of Title VII, which makes unlawful the mere publication of a discriminatory notice or advertisement, is not referenced by the CAA.	Sec. 704(b) *42 U.S.C.* *§ 2000e–3(b)*
3. Coverage of unions. Discrimination by private-sector unions is forbidden by §§ 703(c) and 704 of Title VII and is subject to enforcement under § 706. The CAA does not make these provisions applicable against unions discriminating against legislative branch employees, because § 201 of the CAA forbids discrimination only in "personnel actions" and §§ 401-408 of the CAA allow complaints only against employing offices. (Unlawful discrimination by a union may be an unfair labor practice under § 220 of the CAA, but the procedures and remedies under that section are very different from those under Title VII and under the CAA for violations of Title VII rights and protections.) A similar situation exists in the executive branch, where § 717 of Title VII does not cover discrimination by unions against executive branch employees, but courts and the EEOC are divided as to whether the private-sector provisions of Title VII and 42 U.S.C. § 1981 apply by their own terms to such discrimination. *See generally* II LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1320, 1575 (3d ed. 1996). Similarly, differing views might be expressed with respect to whether these private-sector provisions apply by their own terms to forbid discrimination by unions against legislative-branch employees.	Secs. 703(c), 704, 706 *42 U.S.C.* *§§ 2000e–2(c), 2000e–3, 2000e–5*

[1] *See, e.g., Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) ("nowhere are there words of limitation that restrict references in the Act to 'any individual' as comprehending only an employee of the employer," nor could the court perceive "any good reason to confine the meaning of 'any individual' to include only former employees and applicants for employment, in addition to present employees"); *Moland v. Bil-Mar Foods*, 994 F.Supp. 1061, 1075 (N.D. Iowa 1998) (interlocutory appeal certified) (trucking company's employee assigned to scale house on processing-plant premises could maintain sex discrimination complaint against processing company); *King v. Chrysler Corp.*, 812 F.Supp. 151, 153 (E.D. Mo. 1993) (cashier employed by cafeteria on automobile manufacturer's premises need not be employee of manufacturer to sue manufacturer under Title VII); *Pelech v. Klaff-Joss, L.P.*, 815 F.Supp. 260, 263 (N.D. Ill. 1993) (cleaning company and its chairman held potentially liable under Title VII for causing a high-rise building to fire a security guard).

4. Consideration of political party, domicile, or political compatibility. Under the CAA, § 502 provides that consideration of political party, domicile, or political compatibility by Members, committees, or leadership offices shall not be a violation of § 201, which is the section that makes applicable the rights and protections of Title VII. Under Title VII, there is no specific immunity for consideration of political party, domicile, or political compatibility.	Sec. 703 *42 U.S.C. § 2000e–2*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
5. Agency responsibility to investigate charges filed by an employee or Commission Member. Title VII requires the EEOC to investigate charges filed by either an employee or a Member of the Commission. The CAA neither references these provisions nor sets forth similar provisions authorizing agency investigation.	Sec. 706(b) *42 U.S.C. § 2000e–5(b)*
6. Agency responsibility to "endeavor to eliminate" the violation by informal conciliation. Title VII requires that, upon the filing of a charge, if the EEOC determines that "there is reasonable cause to believe that the charge is true," the agency must "endeavor to eliminate any such alleged unlawful employment practice" by informal conference, conciliation, and persuasion. The CAA does not reference these provisions; it requires the mediation of allegations of discrimination and requires approval of settlements by the Executive Director, but does not require any person involved in the mediation or in approving the settlement to "endeavor to eliminate" the alleged discrimination.	Sec. 706(b) *42 U.S.C. § 2000e–5(b)*
7. Agency authority to bring judicial enforcement actions. Title VII authorizes the EEOC to bring a civil action. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	Sec. 706(f)(1) *42 U.S.C. § 2000e–5(f)(1)*
8. Agency authority to intervene in private civil action of general public importance. Under Title VII, the EEOC may intervene in a private action of general public importance. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to intervene in private actions.	Sec. 706(f)(1) *42 U.S.C. § 2000e–5(f)(1)*
9. Agency authority to apply to court for enforcement of judicial orders. Title VII authorizes the EEOC to commence judicial proceedings to compel compliance with judicial orders. The CAA does not reference these provisions. § 407(a)(2) of the CAA enables the Office of Compliance to petition the Court of Appeals to enforce final orders of a hearing officer or the Board, but the CAA sets forth no provision enabling an agency to seek the enforcement of judicial orders.	Sec. 706(i) *42 U.S.C. § 2000e–5(i)*

10.	**Grant of subpoena power and other powers for investigations and hearings.** Title VII grants the EEOC powers to gain access to evidence, including subpoena powers, in support of its investigations and hearings. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA provisions do not subpoena powers for use in agency investigation.)	Secs. 709(a), 710 *42 U.S.C. §§ 2000e–8(a), 2000e–9*
11.	**Recordkeeping and reporting requirements.** Title VII requires employers in the private sector to make and preserve such records and make such reports therefrom as the EEOC shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for enforcement. The CAA does not reference these provisions, and the Board, in issuing substantive regulations with respect to several other laws, found that recordkeeping and reporting requirements under those laws were not made applicable by the CAA.	Sec. 709(c) *42 U.S.C. § 2000e–8(c)*
	ADMINISTRATIVE AND JUDICIAL PROCEDURES AND REMEDIES	
12.	**Suing individuals as agent; possibility of individual liability.** Because the definition of "employer" in Title VII includes "any agent," a plaintiff may choose to sue the employer by naming an appropriate individual in the capacity of agent. Furthermore, while many recent cases hold that individuals may not be held individually liable in discrimination cases, some cases hold to the contrary and the issue remains unresolved. *See generally* II LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1314-16 (3d ed. 1996). Under the CAA, individuals may be neither sued nor held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Sec. 701(b) *42 U.S.C. § 2000e(b)*
13.	**Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate.** Title VII authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive "any power of either the Senate or the House of Representatives under the Constitution," including under the "Journal of Proceedings Clause," and under the rules of either House relating to records and information.	Sec. 706(f)(1) *42 U.S.C. § 2000e–5(f)(1)*
14.	**Appointment of counsel and waiver of fees.** § 706(f)(1) of Title VII authorizes the court to appoint an attorney for the complainant in a private action and to waive costs. The CAA does not reference § 706(f)(1). In judicial proceedings under the CAA, the courts may exercise their general powers to authorize proceedings *in forma pauperis* and waive fees and costs and appoint counsel if a party is unable to pay. *See* 28 U.S.C. § 1915. In administrative proceedings under the CAA, there are no fees and costs to waive, but there is also no power to appoint counsel.	Sec. 706(f)(1) *42 U.S.C. § 2000e–5(f)(1)*

15. Agency authority to apply for TRO or preliminary relief. § 706(f)(2) of Title VII authorizes the EEOC to bring an action for a temporary restraining order ("TRO") or preliminary relief pending resolution of a charge. The CAA neither references § 706(f)(2) nor sets forth similar provisions authorizing TROs or preliminary relief, and the CAA does not allow a covered employee to commence an administrative complaint or civil action until after having completed periods of counseling and mediation and an additional period of at least 30 days.	Sec. 706(f)(2) *42 U.S.C. § 2000e–5(f)(2)*
16. Private right to sue immediately, without having exhausted administrative remedies. An employee alleging race or color discrimination who prefers not to pursue a remedy through the EEOC may choose to sue immediately under 42 U.S.C. § 1981. The CAA allows a covered employee to file an administrative complaint or commence a civil action only after having completed periods of counseling and mediation and an additional period of at least 30 days.	42 U.S.C. § 1981
DEFENSE	
17. Defense for good faith reliance on agency interpretations. § 713(b) of Title VII provides a defense for an employer who relies in good faith on an interpretation by the EEOC. The CAA does not specifically reference § 713(b), but the Board decided that a similar defense in the Portal-to-Portal Act ("PPA") was incorporated into § 203 of the CAA and applies where an employing office relies on an interpretation of the Wage and Hour Division.	Sec. 713(b) *42 U.S.C. § 2000e–12(b)*
PUNITIVE DAMAGES	
18. Punitive damages. 42 U.S.C. § 1981a(b)(1) authorizes punitive damages in cases under Title VII where malice or reckless indifference is demonstrated, and under 42 U.S.C. § 1981 punitive damages may be warranted in cases of race or color discrimination. However, § 1981a(b)(1) is not referenced by the CAA at all, and § 1981 is referenced by § 201(b)(1)(B) of the CAA with respect to the awarding of "compensatory damages" only; furthermore, § 225(c) of the CAA expressly precludes the awarding of punitive damages.	42 U.S.C. §§ 1981, 1981a(b)(1)
C. OTHER AGENCY AUTHORITIES	
19. Notice-posting requirements. Title VII requires employers, employment agencies, and unions to post notices prepared or approved by the EEOC, and establishes fines for violation. The CAA does not reference these provisions, and the Board, in issuing substantive regulations with respect to several other laws, found that notice-posting requirements under those laws were not incorporated by the CAA.	Sec. 711 *42 U.S.C. § 2000e–10*

20.	**Authority to issue interpretations and opinions.** § 713(b) of Title VII establishes a defense for good-faith reliance on "any written interpretation and opinion" of the EEOC, and the EEOC has established a process by which "[a]ny interested person desiring a written title VII interpretation or opinion from the Commission may make such a request." 29 C.F.R. § 1601.91 *et seq*. The CAA does not reference § 713(b) specifically. Furthermore, as noted on page 4, row 17, above, the Board decided that the defense for good-faith reliance stated in the PPA, which is similar to the defense in § 713(b), was incorporated into § 203 of the CAA; but the Board also then stated that "it seems unwise, if not legally improper, for the Board to set forth its views on interpretive ambiguities in the regulations outside of the adjudicatory context of individual cases," and "the Board would in the exercise of its considered judgment decline to provide authoritative opinions to employing offices as part of its 'education' and 'information' programs." 142 CONG. REC. S221, S222-S223 (daily ed. Jan. 22, 1996).	Sec. 713(b) *42 U.S.C.* *§ 2000e–12(b)*

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 ("ADEA")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Employment discrimination against individuals employed by other employers. § 4(a)(1) of the ADEA forbids employment discrimination by covered employers against "any individual." As discussed at page 1, row 1, above, courts have held that a Title VII provision forbidding discrimination against "any individual" extends beyond the immediate employer-employee relationship under certain circumstances, including where a defendant who does not employ an individual controls that individual's access to employment with another employer and denies access based on unlawful criteria. Under the CAA, an employing office may only be charged with discrimination by a "covered employee," defined as an employee of the nine legislative-branch employers listed in § 101(3).	Sec. 4(a)(1) *29 U.S.C. § 623(a)(1)*
2. Reduction of wages to achieve compliance. § 4(a)(3) of the ADEA forbids employers in the private sector to reduce the wage rate of any employee in order to comply with the ADEA. § 4(a)(3) is not referenced by the CAA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15.	Sec. 4(a)(3) *29 U.S.C. § 623(a)(3)*
3. Publication of discriminatory notices or advertisements. Publication of discriminatory notices or advertisements is prohibited by § 4(e) of the ADEA. Under the CAA, a notice or advertisement might be evidence of discriminatory animus, but § 4(e) of the ADEA, which makes unlawful the mere publication of a discriminatory notice or advertisement, is not referenced by the CAA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15.	Sec. 4(e) *29 U.S.C. § 623(e)*
4. Coverage of unions. § 4(c)-(e) of the ADEA forbids discrimination by unions in the private sector, and these provisions may be enforced against private-sector unions under § 7 of the ADEA. The CAA does not make these provisions applicable to unions discriminating against legislative branch employees, because § 201 of the CAA only forbids discrimination in "personnel actions" and §§ 401-408 allow complaints only against employing offices. (Unlawful discrimination by a union may be an unfair labor practice under § 220 of the CAA, but the procedures and remedies under that section are very different from those under the ADEA and under the CAA for violations of ADEA rights and protections.) As noted at page 1, row 3, above, a similar situation exists in the executive branch, where § 717 of Title VII does not cover discrimination by unions against executive branch employees, but courts and the EEOC are divided as to whether the private-sector provisions of Title VII and 42 U.S.C. § 1981 apply by their own terms to such discrimination. Similarly, differing views might be expressed with respect to whether the private-sector provisions of the ADEA apply by their own terms to forbid discrimination by unions against legislative-branch employees.	Secs. 4(c)-(e), 7 *29 U.S.C. §§ 623(c)-(e), 626*

5. Mandatory retirement for state and local police forces. § 4(j) of the ADEA allows age-based hiring and firing of state and local law enforcement officers. The CAA does not reference § 4(j) of the ADEA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15. Furthermore, the CAA does not contain any provisions similar to § 4(f) of the ADEA providing an exception for the Capitol Police. However, the Capitol Police Retirement Act ("CPRA"), 5 U.S.C. § 8425, imposes age-based mandatory retirement for Capitol Police Officer. The CAA does not state expressly whether it repeals the CPRA, but the Federal Circuit held that the application of ADEA rights and protections by the Government Employee Rights Act, a predecessor to the CAA that applied certain rights and protections to the Senate, did not implicitly repeal the CPRA. *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995).	Sec. 4(j) *29 U.S.C. § 623(j)*
6. State and local police officers' entitlement to job-performance testing to continue employment after retirement age. Under § 4(j) of the ADEA, after a study and rulemaking by the Labor Secretary are completed, state and local law enforcement officers who exceed mandatory retirement age will become entitled to an annual opportunity to demonstrate job fitness to continue employment. The CAA does not reference § 4(j) of the ADEA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15. (Whether the Capitol Police remain subject to mandatory retirement at all is discussed in row 5 above.)	Sec. 4(j) *29 U.S.C. § 623(j)*
7. Age-based mandatory retirement of executives and high policy-makers. § 12(c) of the ADEA allows aged-based mandatory retirement for *bona fide* executives and high policy-makers in the private sector. The CAA does not reference § 12(c) of the ADEA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15.	Sec. 12(c) *29 U.S.C. § 631(c)*
8. Consideration of political party, domicile, or political compatibility. Under the CAA, § 502 provides that consideration of political party, domicile, or political compatibility by Members, committees, or leadership offices shall not be a violation of § 201, which is the section that makes applicable the rights and protections of the ADEA. Under the ADEA, there is no specific immunity for consideration of political party, domicile, or political compatibility.	Sec. 4 *29 U.S.C. § 623*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
9. Grant of subpoena power and other powers for investigations and hearings. The ADEA grants the EEOC subpoena and other investigatory powers for use in investigations and hearings. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA provisions do not grant subpoena powers for use in agency investigation.)	Sec. 7(a) *29 U.S.C. § 626(a), referencing § 9 of FLSA, 29 U.S.C. § 209*

10.	**Authority to receive and investigate charges and complaints and to conduct investigations on agency's initiative.** Under authority of § 7 of the ADEA, the EEOC investigates employee charges of ADEA violations and initiates investigations on its own initiative. The CAA neither references these provisions nor sets forth similar provisions authorizing agency investigations.	Sec. 7(a), (d) *29 U.S.C. § 626(a), (d)*, *and referencing* § 11(a) of FLSA, *29 U.S.C. § 211(a)*
11.	**Recordkeeping and reporting requirements.** The ADEA empowers the EEOC to require the keeping of necessary and appropriate records in accordance with the powers in § 11 of the FLSA. That section requires employers in the private sector to make and preserve such records and make such reports therefrom as the agency shall prescribe by regulation or order as necessary or appropriate for enforcement. EEOC regulations specify the "payroll" records that employers must maintain and preserve for at least 3 years and the "personnel or employment" records that employers must maintain and preserve for at least 1 year. 29 C.F.R. § 1627.3. EEOC regulations further require that each employer "shall make such extension, recomputation or transcriptions of his records and shall submit such reports concerning actions taken and limitations and classifications of individuals set forth in records" as the EEOC or its representative may request in writing. 29 C.F.R. § 1627.7. The CAA does not reference these provisions, and the Board, in issuing substantive regulations with respect to several other laws, found that recordkeeping and reporting requirements under those laws were not made applicable by the CAA.	Secs. 7(a) *29 U.S.C. § 626(a)*, *referencing* § 11(c) of FLSA, *29 U.S.C. § 211(c)*
12.	**Agency authority to bring judicial enforcement actions.** The ADEA authorizes the EEOC to bring an action in district court seeking damages, including liquidated damages, and injunctive relief. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	Sec. 7(b) *29 U.S.C. § 626(a)*, *referencing* §§ 16(c), 17 of FLSA, *29 U.S.C. §§ 216(c), 217*
13.	**Agency responsibility to "seek to eliminate" the violation.** The ADEA requires that, upon receiving a charge, the EEOC must "seek to eliminate any alleged unlawful practice" by informal conference, conciliation, and persuasion, and, before instituting a judicial action, the agency must use such conciliation to "attempt to eliminate the discriminatory practice or practices and to effect voluntary compliance." The CAA does not reference these provisions; it requires the mediation of allegations of discrimination and requires approval of settlements by the Executive Director, but does not require any person involved in the mediation or in approving the settlement to determine "reasonable cause" or to "endeavor to eliminate" the alleged discrimination.	Sec. 7(b), (d) *29 U.S.C. § 626(b), (d)*
	ADMINISTRATIVE AND JUDICIAL PROCEDURES AND REMEDIES	
14.	**Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate.** The ADEA authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 7(b)-(c) *29 U.S.C. § 626(c)*, *referencing* § 16(b)-(c) of FLSA, *29 U.S.C. § 216(b)-(c)*

15. Suing individuals as agent; possibility of individual liability. Because the definition of "employer" in the ADEA includes any agent, a plaintiff may choose to sue the employer by naming an individual in the capacity of agent. Furthermore, as noted with respect to Title VII at page 3, row 12, above, while many recent cases hold that individuals may not be held individually liable in discrimination cases, some courts hold to the contrary and the issue remains unresolved. Under the CAA, however, individuals may be neither sued nor held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Sec. 11(b) *29 U.S.C. § 630(b)*
DEFENSE	
16. Defense for good faith reliance on agency interpretations. § 7(e) of the ADEA provides that § 10 of the Portal-to-Portal Act ("PPA") shall apply to actions under the ADEA, and § 10 of the PPA establishes a defense for an employer who relies in good faith on an interpretation by the EEOC. However, the CAA does not reference § 7(e) of the ADEA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of provisions outside of § 15. The ADEA thus differs from Title VII, as discussed at page 4, row 17, above, because the Title VII provisions referenced by the CAA contain no provision like ADEA § 15(f) precluding the application of other statutory provisions.	Sec. 7(e) *29 U.S.C. § 626(e)*, *referencing* § 10 of PPA, *29 U.S.C. § 259*
DAMAGES	
17. Liquidated damages for retaliation. § 4(d) of the ADEA forbids discrimination against employees for exercising ADEA rights, and § 7(b) of the ADEA provides that liquidated damages, in an amount equal to the amount otherwise owing because of a violation, shall be payable in cases of willful violations. Under the CAA, § 201(a)(2)(B) incorporates "such liquidated damages as would be appropriate if awarded under § 7(b) of [the ADEA]," but only for "a violation of subsection (a)(2)." § 201(a)(2) does not reference § 4(d) of the ADEA, but rather, § 201(a)(2) prohibits discrimination within the meaning of § 15 of the ADEA, 29 U.S.C. § 633a, and § 15 does not prohibit retaliation either expressly or by implication. *See Tomasello v. Rubin*, 920 F. Supp. 4 (D.D.C. 1996); *Koslow v. Hundt*, 919 F. Supp. 18 (D.D.C. 1995). Retaliation is prohibited by § 207(a) of the CAA, but the remedy under § 207(b) is "such legal or equitable remedy as may be appropriate," with no express authority to award liquidated damages.	Secs. 4(d), 7(b) *29 U.S.C. §§ 623(d), 626(b)*, *including reference* to § 16(b) of FLSA, *29 U.S.C. § 216(b)*

C. OTHER AGENCY AUTHORITIES	
18. **Authority to issue written interpretations and opinions.** § 7(e) of the ADEA, referencing § 10 of the PPA, establishes a defense for good-faith reliance on "any written administrative regulation, order, ruling, approval, or interpretation" of the EEOC, and the EEOC has established a process by which a request for an opinion letter may be submitted to the Commission. *See* 29 C.F.R. §§ 1626.17-1626.18. However, as noted at page 9, row 16, above, the CAA does not reference § 7(e). Furthermore, as discussed in connection with Title VII at page 5, row 20, above, the Board has decided that the PPA defense was incorporated into § 203 of the CAA, but that the Board would not provide authoritative interpretations and opinions outside of adjudicating individual cases.	Sec. 7(e) *29 U.S.C. § 626(e), referencing* § 10 of PPA, *29 U.S.C. § 259*
19. **Notice-posting requirements.** The ADEA requires employers, employment agencies, and unions to post notices prepared or approved by the EEOC. The CAA does not reference these provisions, and the Board, in issuing substantive regulations as to several other laws, found that notice-posting requirements under those laws were not incorporated by the CAA.	Sec. 8 *29 U.S.C. § 627*
20. **Substantive rulemaking authority.** Under § 9 of the ADEA, the EEOC promulgates substantive as well as procedural regulations applicable to the private sector. § 9 is not referenced by the CAA, and § 201 of the CAA, unlike most other CAA sections, does not require that the Board adopt implementing regulations. § 304 of the CAA, which establishes the process by which the Board adopts substantive regulations, specifies that such regulations "shall include regulations the Board is required to issue under title II [of the CAA]," but does not state explicitly whether the Board has authority to promulgate regulations, at its discretion, that the Board is not required to issue. Furthermore, § 201(a)(2) of the CAA references § 15 of the ADEA, which, in subsection (b), requires the EEOC to issue regulations, orders, and instructions applicable to the executive branch and requires each federal agency covered by § 15 to comply with them. The CAA does not state expressly whether the reference to § 15 makes subsection (b) of that section applicable, and, specifically, whether employing offices must comply with regulations, orders, and instructions promulgated by the EEOC under § 15(b), or whether the Board can exercise the authority of the EEOC under § 15(b) to issue regulations, orders, and instructions binding on employing offices.	Sec. 9 *29 U.S.C. § 628*
21. **Authority to grant "reasonable exemptions" in the "public interest."** With respect to the private sector, § 9 of the ADEA authorizes the EEOC to establish "reasonable exemptions" from the ADEA "as it may find necessary and proper in the public interest." § 9 is not referenced by the CAA, and § 15 of the ADEA, which is referenced by § 201(a)(2) of the CAA, contains a subsection (f) that specifically precludes the application of any provision outside of § 15. However, § 15(b) of the ADEA authorizes the EEOC to establish "[r]easonable exemptions" for the executive branch upon determining that age is a BFOQ. The CAA does not state expressly whether the reference to § 15 makes subsection (b) of that section applicable, and, specifically, whether any BFOQs granted by the EEOC under § 15(b) would apply to employing offices, or whether the Board can exercise the authority of the EEOC under § 15(b) to issue BFOQs applicable to employing offices.	Sec. 9 *29 U.S.C. § 628*

AMERICANS WITH DISABILITIES ACT OF 1990 ("ADA")

TITLE I — EMPLOYMENT	
A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Employment discrimination against an individual employed by another employer. § 102(a) of the ADA forbids employment discrimination by covered employers against "a qualified individual with a disability." As discussed at page 1, row 1, above, courts have held that a Title VII provision forbidding discrimination against "any individual" extends, under certain circumstances, beyond the immediate employer-employee relationship, including where a defendant who does not employ an individual controls that individual's access to employment with another employer and denies access based on unlawful criteria. Under the CAA, an employing office may only be charged with discrimination by a "covered employee," defined as an employee of the nine legislative-branch employers listed in § 101(3).	Sec. 102(a) *42 U.S.C. § 12112(a)*
2. Coverage of unions. § 102 of the ADA forbids discrimination by unions in the private sector, and these provisions may be enforced against private-sector unions under § 107(a) of the ADA. The CAA does not make these provisions applicable to unions discriminating against legislative branch employees, because § 201 of the CAA only forbids discrimination in "personnel actions" and §§ 401-408 allow complaints only against employing offices. (Unlawful discrimination by a union may be an unfair labor practice under § 220 of the CAA, but the procedures and remedies under that section are very different from those under the ADA and under the CAA for violations of ADA rights and protections.) As noted at page 1, row 3, above, a similar situation exists in the executive branch, where § 717 of Title VII does not cover discrimination by unions against executive branch employees, but courts and the EEOC are divided as to whether the private-sector provisions of Title VII and 42 U.S.C. § 1981 apply by their own terms to such discrimination. Similarly differing views might be expressed with respect to whether the ADA applies by its own terms to forbid discrimination by unions against legislative-branch employees.	Secs. 102, 107(a) *42 U.S.C. §§ 12112, 12117(a)*
3. Consideration of political party, domicile, or political compatibility. Under the CAA, § 502 provides that consideration of political party, domicile, or political compatibility by Members, committees, or leadership offices shall not be a violation of § 201, which is the section that makes applicable the rights and protections of title I of the ADA. Under the ADA, there is no specific immunity for consideration of political party, domicile, or political compatibility.	Secs. 102-103 *42 U.S.C. § 12112-12113*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
4. Agency responsibility to investigate charges filed by an employee or Commission Member. The ADA requires the EEOC to investigate charges brought by an employee or by a Member of the Commission. The CAA neither references these provisions nor sets forth similar provisions authorizing agency investigation.	Sec. 107(a) *42 U.S.C. § 12117(a)*, *referencing* § 706(b) of Title VII, *42 U.S.C. § 2000e–5(b)*

AMERICANS WITH DISABILITIES ACT OF 1990 ("ADA") (continued)

5. Agency responsibility to determine "reasonable cause" and to "endeavor to eliminate" the violation by informal conciliation. The ADA requires that, upon the filing of a charge, the EEOC must determine whether "there is reasonable cause to believe that the charge is true" and "endeavor to eliminate any such alleged unlawful employment practice" by informal conference, conciliation, and persuasion. The CAA does not reference these provisions; it requires the mediation of allegations of discrimination and requires approval of settlements by the Executive Director, but does not require any person involved in the mediation or in approving the settlement to determine "reasonable cause" or to "endeavor to eliminate" the alleged discrimination.	. . . *referencing* § 706(b) of Title VII, *42 U.S.C. § 2000e–5(b)*
6. Agency authority to bring judicial enforcement actions. The ADA authorizes the EEOC to bring a civil action. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	. . . *referencing* § 706(f)(1) of Title VII, *42 U.S.C. § 2000e–5(f)(1)*
7. Agency authority to intervene in private civil action of general public importance. Under the ADA, the EEOC may intervene in a private action of general public importance. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to intervene in private actions.	. . . *referencing* § 706(f)(1) of Title VII, *42 U.S.C. § 2000e–5(f)(1)*
8. Agency authority to apply to court for enforcement of judicial orders. The ADA authorizes the EEOC to commence judicial proceedings to compel compliance with judicial orders. The CAA does not reference these provisions. § 407(a)(2) of the CAA enables the Office of Compliance to petition the Court of Appeals to enforce final orders of a hearing officer or the Board, but the CAA sets forth no provision enabling an agency to seek the enforcement of judicial orders.	. . . *referencing* § 706(i) of Title VII, *42 U.S.C. § 2000e–5(i)*
9. Grant of subpoena power and other general powers for investigations and hearings. The ADA grants the EEOC access to evidence, including subpoena powers, in support of its investigations and hearings. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA provisions do not grant subpoena powers for use in agency investigation.)	. . . *referencing* §§ 709(a), 710 of Title VII, *42 U.S.C. §§ 2000e–8(a), 2000e–9*
10. Recordkeeping and reporting requirements. The ADA incorporates Title VII provisions requiring private-sector employers to make and preserve such records and make such reports therefrom as the EEOC shall prescribed by regulation or order, after public hearing, as reasonable, necessary, or appropriate for enforcement. EEOC regulations require that all personnel or employment records generally be preserved for 1 year and reserve the agency's right to impose special reporting requirements on individual employers or groups of employers. 29 C.F.R. § 1602.11. The CAA does not reference these provisions, and the Board, in issuing substantive regulations with respect to several other laws, found that recordkeeping and reporting requirements under those laws were not incorporated by the CAA.	. . . *referencing* § 709(c) of Title VII, *42 U.S.C. § 2000e–8(c)*

ADMINISTRATIVE AND JUDICIAL PROCEDURES AND REMEDIES	
11. Suing individuals as agent; possibility of individual liability. Because the definition of "employer" under the ADA includes any agent, a plaintiff may choose to sue the employer by naming an individual in the capacity of agent. Furthermore, as noted with respect to Title VII at page 3, row 12, above, while many recent cases hold that individuals may not be held individually liable in discrimination cases, some courts hold to the contrary and the issue remains unresolved. Under the CAA, individuals may be neither sued nor held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Sec. 101(5)(A) *42 U.S.C. § 12111(5)(A)*
12. Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate. The ADA authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 107(a) *42 U.S.C. § 12117(a), referencing* § 706(f)(1) of Title VII, *42 U.S.C. § 2000e–5(f)(1)*
13. Appointment of counsel and waiver of fees. The ADA authorizes the court to appoint an attorney for the complainant in a private action and to waive costs. The CAA does not reference these provisions. In judicial proceedings under the CAA, the courts may exercise their general powers to authorize proceedings *in forma pauperis* and waive fees and costs and appoint counsel if a party is unable to pay. *See* 28 U.S.C. § 1915. In administrative proceedings under the CAA, there are no fees and costs to waive, but there is also no power to appoint counsel.	. . . *referencing* § 706(f)(1) of Title VII, *42 U.S.C. § 2000e–5(f)(1)*
14. Agency authority to apply for TRO or preliminary relief. § 107(a) of the ADA, which references § 706(f)(1) of Title VII, authorizes the EEOC to bring an action for a TRO or preliminary relief pending resolution of a charge. The CAA neither references § 107(a) of the ADA nor sets forth similar provisions authorizing TROs or preliminary relief, and the CAA does not allow a covered employee to commence an administrative complaint or civil action until after having completed periods of counseling and mediation and an additional period of at least 30 days.	. . . *referencing* § 706(f)(2) of Title VII, *42 U.S.C. § 2000e–5(f)(2)*
PUNITIVE DAMAGES	
15. Punitive damages. Punitive damages are available in cases of malice or reckless indifference brought under title I of the ADA. The CAA does not reference this provision, and § 225(c) of the CAA expressly precludes the awarding of punitive damages.	42 U.S.C. § 1981a(b)(1)

C. OTHER AGENCY AUTHORITIES	
16. Notice-posting requirements. The ADA requires employers, employment agencies, and unions and joint labor-management committees to post notices prepared or approved by the EEOC. The CAA does not reference these provisions, and the Board, in issuing substantive regulations with respect to several other laws, found that notice-posting requirements under those laws were not incorporated by the CAA.	Sec. 105 *42 U.S.C. § 12115*
17. Substantive rulemaking authority. Under § 106 of the ADA, the EEOC promulgates both procedural and substantive regulations. § 106 is not referenced by the CAA, and § 201, unlike most other sections of title II of the CAA, contains no requirement that the Board adopt implementing regulations. § 304 of the CAA, which establishes the process by which the Board adopts substantive regulations, specifies that such regulations "shall include regulations the Board is required to issue under title II," but does not state explicitly whether other regulations, which the Board is not required to issue, may be issued at the Board's discretion.	Sec. 106 *42 U.S.C. § 12116*
TITLE II — PUBLIC SERVICES	
ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
18. Agencies must investigate any alleged violation, even if not charged by a qualified person with a disability. Title II of the ADA affords the remedies, procedures, and rights set forth in § 505 of the Rehabilitation Act of 1973 to "any person alleging discrimination." The regulations of the Attorney General ("AG") implementing title II require that, if any "individual who believes that he or she or a specific class of individuals" has been subject to discrimination files a complaint, then the appropriate federal agency must investigate the complaint. 28 C.F.R. §§ 35.170(a), 35.172(a). Under the CAA, § 210(d)(1), (f) provides express authority for the General Counsel to investigate only when "[a] qualified person with a disability, . . . who alleges a violation[,] . . . file[s] a charge" and in "periodic inspections" that are "[o]n a regular basis, and at least once each Congress."	Sec. 203 *42 U.S.C. § 12133*, *referencing* § 505 of Rehabilitation Act of 1973, *29 U.S.C. § 794a*

19.	**Agencies must issue "Letter of Findings" and endeavor to "secure compliance by voluntary means."** Title II of the ADA affords the remedies, procedures, and rights of § 505 of the Rehabilitation Act, and § 505 incorporates the remedies, procedures and rights of titles VI and VII of the Civil Rights Act of 1964 ("CRA"). § 602 in title VI of the CRA provides that enforcement action may be taken only if the federal agency concerned "has determined that compliance cannot be secured by voluntary means." The AG's regulations implementing title II of the ADA require that the Federal agency investigating a compliant must issue a Letter of Findings, 28 C.F.R. § 35.172, and, if noncompliance is found, the agency must initiate negotiations "to secure voluntary compliance" and any compliance agreement must specify the action that will be taken "to come into compliance" and must "[p]rovide assurance that discrimination will not recur," 28 C.F.R. § 35.173. The CAA does not reference these provisions. Under the CAA, § 210(d)(2) authorizes the General Counsel to request mediation between the charging individual and the responsible entity, and the CAA requires approval of any settlement by the Executive Director. However, the General Counsel is specifically forbidden to participate in the mediation, and the CAA does not require any person involved in the mediation or in approving the settlement to make findings as to compliance or noncompliance or to endeavor "to secure voluntary compliance."	Sec. 203 *42 U.S.C. § 12133*, *referencing* § 602 of title VI of the CRA, *42 U.S.C. § 2000d–1*
20.	**Attorney General's authority to bring enforcement proceeding without a charge by a qualified person with a disability.** Under title II of the ADA and under regulations of the AG, if a federal agency receives a complaint from any individual who believes there has been discrimination and is unable to secure voluntary compliance, the agency may refer the matter to the AG for enforcement. 28 C.F.R. § 35.174; *see U.S. v. Denver*, 927 F. Supp. 1396, 1399-1400 (D. Col. 1996). Under the CAA, § 210(d)(3) authorizes the General Counsel to file an administrative complaint only after "[a] qualified person with a disability, . . . who alleges a violation[,] . . . file[s] a charge."	Sec. 203 *42 U.S.C. § 12133*
21.	**Attorney General's authority to bring enforcement action in federal district court.** The AG enforces against a violation of ADA title II by filing an action in federal district court. Under the CAA, § 210(d)(3) authorizes the General Counsel to enforce by filing an administrative complaint, but not by commencing an action in court.	Sec. 203 *42 U.S.C. § 12133*
	JUDICIAL PROCEDURES AND REMEDIES	
22.	**Private right of action.** Under title II of the ADA, both employees and non-employees of a public entity may sue a public entity for discrimination on the basis of disability. Under the CAA, non-covered-employees have no right to sue or bring administrative proceedings under § 210 or any other section of the CAA. (As discussed at page 16, row 23, below, covered employees may sue or bring administrative complaints under § 201 and §§ 401-408 of the CAA..)	Sec. 203 *42 U.S.C. § 12133*

23. Private right to sue immediately, without having exhausted administrative remedies. Both employees and non-employees of a non-federal public entity may sue under title II of the ADA immediately, regardless of whether administrative remedies have been exhausted.[2] Under the CAA, covered employees may not file an administrative complaint or commence a civil action until after having completed periods of counseling and mediation and an additional period of at least 30 days. (As discussed at page 15, row 22, above, non-covered-employees have no private right of action.)	Sec. 203 *42 U.S.C. § 12133*
DAMAGES	
24. Monetary damages. § 203 of the ADA incorporates the remedies of titles VI and VII of the CRA, as noted in page 15, row 19, above. Title VII does not provide for damages other than back pay under § 706(g)(1) in connection with hiring or reinstatement, but, under title VI, courts have inferred a private right to recover damages for an intentional violation. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70, 112 S.Ct. 1028, 1035 (1992). Under the CAA, § 210(c) incorporates the remedies under § 203 of the ADA. However, a court has held that the Federal Government is immune, under sovereign immunity principles, against the implied right to recover damages under title VI as incorporated by § 505 of the Rehabilitation Act. *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994).	Sec. 203 *42 U.S.C. § 12133*, *referencing* title VI and §§ 706(f)-(k), 716 of the CRA, *42 U.S.C. §§ 2000d* et seq.*, 2000e–5(f)-(k), 2000e–16.*
TITLE III — PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES	
ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
25. Attorney General may investigate whenever there is reason to believe there may be a violation, even if not charged by a qualified person with a disability. Title III of the ADA requires the AG to investigate alleged violations and to undertake periodic compliance reviews. The AG's regulations implementing title III specify that "[a]ny individual who believes that he or she or a specific class of persons" has been subject to discrimination may request an investigation, and that, whenever the AG "has reason to believe" there may be a violation, the AG may initiate a compliance review. 28 C.F.R. § 36.502. The CAA does not reference these provisions, and § 210(d)(1), (f) of the CAA provides express authority for the General Counsel to investigate only when "[a] qualified person with a disability, . . . who alleges a violation[,] . . . file[s] a charge" and in "periodic inspections" that are "[o]n a regular basis, and at least once each Congress."	Sec. 308(b)(1)(A)(i) *42 U.S.C. § 12188((b)(1)(A)(i)*

[2] *See Tyler v. Manhattan*, 857 F. Supp. 800, 812 (D. Kan. 1994); *Ethridge v. Alabama*, 847 F. Supp. 903, 907 (M.D. Ala. 1993); *Noland v. Wheatley*, 835 F. Supp. 476, 482 (N.D. Ind. 1993); *Petersen v. University of Wisconsin*, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993); *Bledsoe v. Palm Beach County Soil and Water Conserv. Dist*., 133 F.3d 816, 824 (11th Cir. 1998) (dictum).

26.	**Attorney General's authority to bring enforcement action without a charge by a qualified person with a disability.** Under title III of the ADA, if the AG has reasonable cause to believe that there is discrimination that constitutes a pattern or practice of discrimination or that raises an issue of general public importance, the AG may commence a civil action. These provisions are not referenced by the CAA. § 210(d)(3) of the CAA authorizes the General Counsel to file an administrative complaint only in response to a charge filed by a qualified person with a disability who alleges a violation.	Sec. 308(b)(1)(B) *42 U.S.C.* *§ 12188(b)(1)(B)*
27.	**Attorney General's authority to bring enforcement action in federal district court.** The AG brings enforcement actions, as noted at page 17, row 26, above, by filing an action in federal district court. These provisions are not referenced by the CAA. § 210(d)(3) of the CAA authorizes the General Counsel may bring an enforcement action by filing an administrative complaint, but not by commencing an action in court.	Sec. 308(b)(1)(B) *42 U.S.C.* *§ 12188(b)(1)(B)*
	JUDICIAL PROCEDURES AND REMEDIES	
28.	**Private right of action.** A private right of action is available for violations of title III of the ADA. The CAA neither references these provisions nor sets forth similar provisions establishing a private right to commence either an administrative or judicial proceedings.	Sec. 308(a) *42 U.S.C. § 12188(a)*
	DAMAGES AND PENALTIES	
29.	**Monetary damages.** § 308(b)(2)(B) of the ADA provides that, when the AG brings a civil action, he or she may ask the court to award monetary damages to the person aggrieved. The CAA does not reference § 308(b)(2)(B), but, rather, § 210(c) of the CAA references the remedies under §§ 203 and 308(a) of the ADA. § 203 of the ADA references the remedies of titles VI and VII of the CRA, as noted in row 19 above, and § 308(a) of the ADA references the remedies of title II of the CRA, 42 U.S.C. §§ 2000a–3(a). Neither title II nor title VII of the CRA provides for damages, other than back pay under § 706(g)(1) of title VII in connection with hiring or reinstatement. Courts have inferred a private right to recover damages under title VI of the CRA, but, as discussed at page 16, row 24, above, the Federal Government may be immune. Furthermore, the remedies of title VI of the CRA are referenced by § 203 of title II of the ADA, not by § 308(a) of title III of the ADA, and might therefore not be available for a violation of title III rights and protections as made applicable by § 210 of the CAA.	Sec. 308(b)(2)(B) *42 U.S.C.* *§ 12188(b)(2)(B)*
30.	**Civil penalties.** In a civil action brought by the Attorney General under title III of the ADA, the court may assess a civil penalty. The CAA does not reference this provision and § 225(c) of the CAA specifically disallows the assessment of civil penalties.	Sec. 308(b)(2)(C) *42 U.S.C.* *§ 12188(b)(2)(C)*

TITLE V — MISCELLANEOUS PROVISIONS	
SUBSTANTIVE RIGHTS AND PROTECTIONS	
31. Retaliation against employees of other employers. § 503 of the ADA protects "any individual" against retaliation for asserting, exercising, or enjoying rights under the ADA. Employers' obligations under this section are not expressly limited to their own employees, and, in the context of the retaliation provision in the OSHAct, the Labor Department has construed the term "any employee" to forbid employers to retaliate against employees of other employers, as discussed at page 32, row 1, below. § 503 is not referenced by the CAA, and § 207 of the CAA, which sets forth provisions prohibiting retaliation, applies by its terms to covered employees only.	Sec. 503 *42 U.S.C. § 12203*
32. Retaliation against non-employees exercising rights with respect to public entities or public accommodations. § 503 of the ADA protects any individual against retaliation for asserting, exercising, or enjoying rights under the ADA. Such individuals may include non-employees who exercise or enjoy rights with respect to public entities under title II of the ADA or public accommodations under title III of the ADA. § 503 is not referenced by the CAA, and § 207 of the CAA, which sets forth provisions establishing retaliation protection, applies by its terms to covered employees only.	Sec. 503 *42 U.S.C. § 12203*

FAMILY AND MEDICAL LEAVE ACT OF 1993 ("FMLA")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Duties owed by "secondary" employers to employees hired and paid by temp agencies and another "primary" employers. The FMLA defines "employer" to include any person "who acts, directly or indirectly, in the interest of an employer"; makes it unlawful for any employer to interfere with the exercise of FMLA rights; and forbids employers and other persons from retaliating against "any individual." The Labor Secretary, citing this statutory authority, promulgated regulations on "joint employment" that prohibit "secondary employers" from interfering with the exercise of FMLA rights by employees hired and paid by a "primary" employer, *e.g.*, by a temporary help or leasing agency. 29 C.F.R. § 825.106(f); 60 FED. REG. 2180, 2183 (Jan. 8, 1995). Under the CAA, individuals who are not employees of the nine legislative-branch employers in § 101(3) are outside the definition of "covered employee" and are not covered by family and medical leave protection under § 202(a) or by retaliation protection under § 207(a), regardless of whether an employing office would be considered the "secondary employer" within the meaning of the Labor Secretary's regulations. The Board, in promulgating its implementing regulations, stated specifically that employees of temporary and leasing agencies are not covered by the CAA. 142 CONG. REC. S196, S198 (daily ed. Jan. 22, 1996).	Secs. 101(4)(A)(ii)(I), 105(a)(1)-(2), (b) *29 U.S.C. §§ 2611(4)(A)(ii)(I), 2615(a)(1)-(2), (b)*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
2. Agency's general authority to investigate to ensure compliance, and responsibility to investigate complaints of violations. § 106(a) of the FMLA authorizes the Labor Secretary generally to make investigations to ensure compliance, and § 107(b)(1) specifically requires the Labor Secretary to receive, investigate, and attempt to resolve complaints of violations. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to conduct investigations.	Sec. 106(a), 107(b)(1) *29 U.S.C. §§ 2616(a), 2617(b)(1)*
3. Grant of subpoena and other investigatory powers. The FMLA grants the Labor Secretary subpoena and other investigatory powers for any investigations. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA provisions do not grant subpoena powers for use in agency investigation.)	Sec. 106(a), (d) *29 U.S.C. § 2616(a), (d)*

4. Recordkeeping and reporting requirements. The FMLA requires private-sector employers to make and preserve records pertaining to compliance in accordance with § 11(c) of the FLSA and in accordance with regulations issued by the Labor Secretary. § 11(c) of the FLSA requires every employer to make and preserve such records and to make such reports therefrom as the Wage and Hour administrator shall prescribe by regulation or order. The Secretary's FMLA regulations specify the records regarding payroll, benefits, and FMLA leave and disputes that employers must maintain and preserve for 3 years, and indicate that employers must submit records specifically requested by a Departmental official and must prepare extensions or transcriptions of information in the records upon request. 29 C.F.R. § 825.500(a)-(b). The CAA does not reference these statutory provisions, and the Board, in adopting implementing regulations under § 202 of the CAA, found that the CAA explicitly did not make these requirements applicable.	Sec. 106(b)-(c) *29 U.S.C. § 2616(b)-(c), referencing* § 11(c) of the FLSA, *29 U.S.C. § 211(c)*
5. Agency authority to bring judicial enforcement actions. The FMLA authorizes the Labor Secretary to bring a civil action to recover damages, and grants the district courts jurisdiction, upon application of the Labor Secretary, to restrain violations and to award other equitable relief. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	Sec. 107(b)(2), (d) *29 U.S.C. § 2617(b)(2), (d)*
JUDICIAL PROCEDURES AND REMEDIES	
6. Individual liability. Because the definition of "employer" under the FMLA includes any person who "acts, directly or indirectly, in the interest of an employer," the weight of authority is that individuals may be held individually liable in an action under § 107 of the FMLA.[3] Under the CAA, individuals may not be held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Secs. 101(4)(A)(ii)(I), 107 *29 U.S.C. §§ 2611(4)(A)(ii)(I), 2617*
7. Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate. The FMLA authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 107(a)(2) *29 U.S.C. § 2617(a)(2)*

[3] *See Beyer v. Elkay Manufacturing Co.*, 1997 WL 587487 (N.D. Ill. Sept. 19, 1997) (No. 97-C-50067) (holding that the term "employer" in the FMLA should be construed the same as "employer" in the FLSA, which allows individual liability); *Knussman v. Maryland*, 935 F.Supp. 659, 664 (D. Md. 1996); *Johnson v. A.P. Products, Ltd.*, 934 F.Supp. 625 (S.D.N.Y. 1996); *Freeman v. Foley*, 911 F.Supp. 326, 330-32 (N.D. Ill. 1995); 29 C.F.R. § 825.104(d) (Labor Department regulations). *Contra Frizzell v. Southwest Motor Freight, Inc.*, 906 F.Supp. 441, 449 (E.D. Tenn. 1995) (holding that the term "employer" in FMLA should be construed the same as "employer" in Title VII, which does not allow individual liability).

8. Private right to sue immediately, without having exhausted administrative remedies. An employee who alleges an FMLA violation may choose to sue immediately, without exhausting any administrative remedies. The CAA allows a covered employee to file an administrative complaint or commence a civil action only after having completed periods of counseling and mediation and an additional period of at least 30 days.	Sec. 107(a) *29 U.S.C. § 2617(a)*
9. Two- or 3-year statute of limitations. A civil action may be brought under the FMLA within two years after the violation ordinarily, or, in the case of a willful violation, within three years. Proceedings under the CAA must be commenced within 180 days after the alleged violation.	Sec. 107(c) *29 U.S.C. § 2617(c)*
C. OTHER AGENCY AUTHORITIES	
10. Notice-posting requirements. The FMLA requires employers to post notices prepared or approved by the Labor Secretary, and establishes civil penalties for a violation. The CAA does not reference these provisions, and, in adopting implementing regulations, the Board found that the CAA explicitly did not incorporate these requirements.	Sec. 109 *29 U.S.C. § 2619*

FAIR LABOR STANDARDS ACT OF 1938 ("FLSA")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
Prohibition against compensatory time off. Under the FLSA, employers generally may neither require nor allow employees to receive compensatory time off in lieu of overtime pay. § 203 of the CAA makes this prohibition generally applicable, but provisions of the CAA and other laws establish exceptions:	Sec. 7(a) *29 U.S.C. § 207(a)*
1. Coverage of Capitol Police officers. § 203(c)(4) of the CAA, as amended, allows Capitol Police officers to elect time off in lieu of overtime pay.	
2. Coverage of employees whose work schedules directly depend on the House and Senate schedules. § 203(c)(3) of the CAA requires the Board to issue regulations concerning overtime compensation for covered employees whose work schedule depends directly on the schedule of the House and Senate, and § 203(a)(3) provides that, under those regulations, employees may receive compensatory time off in lieu of overtime pay.	
3. Coverage of salaried employees of the Architect of the Capitol. 5 U.S.C. § 5543(b) provides that the Architect of the Capitol may grant salaried employees compensatory time off for overtime work. The CAA does not state expressly whether it repeals this authority.	
Interns are not covered. § 203(a)(2) of the CAA excludes "interns," as defined in regulations issued by the Board, from the coverage of all rights and protections of the FLSA:	
4. Minimum wage. Interns are excluded from coverage under the entitlement to the minimum wage.	Sec. 6(a) *29 U.S.C. § 206(a)*
5. Entitlement to overtime pay. Interns are excluded from coverage under the entitlement receive overtime pay.	Sec. 7(a) *29 U.S.C. § 207(a)*
6. Equal Pay Act provisions. Interns are excluded from coverage under Equal Pay provisions, prohibiting sex discrimination in the payment of wages.	Sec. 6(d) *29 U.S.C. § 206(d)*
7. Child labor protections. Interns are excluded from coverage under child labor protections.	Sec. 12(c) *29 U.S.C. § 212(c)*

8. Coverage of unions under Equal Pay provisions. The Equal Pay provisions at § 6(d)(2) of the FLSA forbid unions in the private-sector to cause or attempt to cause an employer to discriminate on the basis of sex in the payment of wages, and these provisions may be enforced against private-sector unions under § 16(b) of the FLSA. Under the CAA, § 203(a)(1) makes the rights and protections of § 6(d) of the FLSA applicable to covered employees, but no mechanism is expressly provided for enforcing these rights and protections against unions, because §§ 401-408 of the CAA allow complaints only against employing offices. (Unlawful discrimination by a union may be an unfair labor practice under § 220 of the CAA, but the procedures and remedies under that section are very different from those under the FLSA and under the CAA for violations of Equal Pay rights and protections.) As noted at page 1, row 3, above, a similar situation exists in the executive branch, where § 717 of Title VII does not cover discrimination by unions against executive branch employees, but courts and the EEOC are divided as to whether the private-sector provisions of Title VII and 42 U.S.C. § 1981 apply by their own terms to such discrimination. Similarly, differing views might be expressed with respect to whether §§ 6(d)(2) and 16(b) of the FLSA apply by their own terms to prohibit discrimination by unions against legislative-branch employees.	Secs. 6(d)(2), 16(b) *29 U.S.C. §§ 206(d), 216(b)*
9. Prohibition of retaliation by "persons," including unions, not acting as employers. § 15(a)(3) of the FLSA forbids retaliation by any "person" against an employee for exercising rights under the FLSA, and § 3(a) defines "person" broadly to include any "individual" and any "organized group of persons." This definition is broad enough to include a labor union, its officers, and members. *See Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943). The CAA does not reference § 15(a)(3) of the FLSA, and § 207 of the CAA forbids retaliation only by employing offices.	Sec. 15(a)(3) *29 U.S.C. § 215(a)(3)*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
10. Grant of subpoena and other powers for use in investigations and hearings. § 9 of the FLSA grants the Labor Secretary subpoena and other investigatory powers for use in investigations and hearings. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA provisions do not grant subpoena powers for use in agency investigation.)	Sec. 9 *29 U.S.C. § 209*
11. Agency authority to investigate complaints of violations and to conduct agency initiated investigations. Under authority of § 11(a) of the FLSA, the Wage and Hour Division investigates complaints of violations and also conducts agency-initiated investigations. The CAA neither references these provisions nor sets forth similar provisions. authorizing agency investigation.	Sec. 11(a) *29 U.S.C. § 211(a)*

12.	**Recordkeeping and reporting requirements.** The FLSA requires employers in the private sector to make and preserve such records and to make such records therefrom as the Wage and Hour Administrator shall prescribe by regulation or order as necessary or appropriate for enforcement. Labor Department regulations specify the "payroll" and other records that must be preserved for at least 3 years and the "employment and earnings" records that must be preserved for at least 2 years, and require each employer to make "such extension, recomputation, or transcription" of required records, and to submit such reports concerning matters set forth in the records, as the Administrator may request in writing. 29 C.F.R. §§ 516.5 -516.8. As to the Equal Pay provisions, EEOC regulations require employers to keep records in accordance with The CAA does not reference these provisions, and, in adopting implementing regulations, the Board found that the CAA explicitly did not made these requirements applicable.	Sec. 11(c) *29 U.S.C. § 211(c)*
13.	**Agency authority to bring judicial enforcement actions.** The FLSA authorizes the Labor Secretary to bring an action in district court to recover unpaid minimum wages or overtime compensation, and an equal amount of liquidated damages, and civil penalties, as well as injunctive relief. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	Secs. 16(c), 17 *29 U.S.C. §§ 216(c), 217*
	JUDICIAL PROCEDURES AND REMEDIES	
14.	**Individual liability.** Because the definition of "employer" under the FLSA includes any person who "acts, directly or indirectly, in the interest of an employer," individuals may be held individually liable in an action under § 16(b) of the FLSA.[4] Under the CAA, individuals may not be held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Secs. 3(d), 16(b) *29 U.S.C. §§ 203(d), 216(b)*
15.	**Private right to sue immediately, without having exhausted administrative remedies.** An employee who alleges an FLSA violation may sue immediately, without exhausting any administrative remedies. The CAA allows a covered employee to file an administrative complaint or commence a civil action only after having completed periods of counseling and mediation and an additional period of at least 30 days.	Sec. 16(b) *29 U.S.C. § 216(b)*
16.	**Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate.** The FLSA authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 16 *29 U.S.C. § 216*

[4] *See, e.g., U.S. Dep't of Labor v. Cole Enterprises*, 62 F.3d 775, 778 (6th Cir. 1995); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 329 (5th Cir. 1993); *Brock v. Hamad*, 867 F.2d 804, 809 n.6 (4th Cir. 1989); *Riordan v. Kempiners*, 831 F.2d 690, 694-95 (7th Cir. 1987); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983).

17.	**Injunctive relief.** § 17 of the FLSA grants jurisdiction to the district courts, upon the complaint of the Labor Secretary, to restrain violations. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to seek injunctive relief or granting a court or other tribunal jurisdiction to grant it.	Sec. 17 *29 U.S.C. § 217*
18.	**Two- or 3-year statute of limitations.** A civil action under the FLSA may be brought within two years after the violation ordinarily, or, in the case of a willful violation, within three years. Proceedings under the CAA must be commenced within 180 days after the alleged violation.	Secs. 6-7 of the Portal-to-Portal Act ("PPA") *29 U.S.C. §§ 255-256*
19.	**Remedy for a child labor violation.** §§ 16(a), (e), and 17 of the FLSA provide for enforcement of child labor requirements through agency enforcement actions for civil penalties or injunction and by criminal prosecution. The CAA does not reference §§ 16(a), (e), or 17 of the FLSA. § 203(b) of the CAA references only the remedies of § 16(b) of the FLSA, and § 16(b) makes employers liable for: *(1)* damages if the employer violated minimum-wage or overtime requirements of the FLSA, and *(2)* legal or equitable relief if the employer violated the anti-retaliation requirements of the FLSA. The CAA thus does not expressly reference any FLSA provision establishing remedies for child labor violations.	Secs. 16(a), (e), 17 *29 U.S.C. §§ 216(a), (e), 217*
	LIQUIDATED DAMAGES; CIVIL AND CRIMINAL PENALTIES	
20.	**Criminal penalties.** The FLSA makes fines and imprisonment available for willful violations. The CAA neither references these provisions nor sets forth similar provisions imposing criminal penalties.	Sec. 16(a) *29 U.S.C. § 216(a)*
21.	**Liquidated damages for retaliation.** § 15(a)(3) of the FLSA prohibits discrimination against an employee for exercising FLSA rights, and § 16(b) provides that an employer who violates § 15(a)(3) is liable for legal or equitable relief and "an additional equal amount as liquidated damages." Under the CAA, § 203(b) incorporates the remedies of § 16(b) of the FLSA and explicitly includes "liquidated damages," but only "for a violation of subsection (a)," and § 203(a) does not reference § 15(a)(3) of the FLSA or otherwise prohibit retaliation. Retaliation is prohibited by § 207(a) of the CAA, but the remedy under § 207(b) is "such legal or equitable remedy as may be appropriate," with no express authority to award liquidated damages.	Sec. 16(b) *29 U.S.C. § 216(b)*
22.	**Civil penalties.** The FLSA authorizes the Labor Secretary or the court to assess civil penalties for child labor violations or for repeated or willful violations of the minimum wage or overtime requirements. The CAA does not reference these provisions, and § 225(c) of the CAA expressly precludes the awarding of civil penalties under the CAA.	Sec. 16(e) *29 U.S.C. § 216(e)*

C. OTHER AGENCY AUTHORITIES	
23. **Agency issuance of interpretative bulletins.** The Wage and Hour Administrator has issued a number of interpretative bulletins and advisory opinions, and § 10 of the PPA, 29 U.S.C. § 259, in establishing a defense for good-faith reliance, refers to the "written administrative regulation, order, ruling, approval, or interpretation" of the Administrator. Under the CAA, in adopting regulations implementing § 203, the Board stated that the Wage and Hour Division's legal basis and practical ability to issue interpretive bulletins and advisory opinions arises from its investigatory and enforcement authorities, and that, absent such authorities, "it seems unwise, if not legally improper, for the Board to set forth its views on interpretive ambiguities in the regulations outside of the adjudicatory context of individual cases," and, further, that the Board "would in the exercise of its considered judgment decline to provide authoritative opinions" as part of its education and information programs. 142 CONG. REC. S221, S222-S223 (daily ed. Jan. 22, 1996).	Secs. 9, 11, 16-17 *29 U.S.C. § 209, 211, 216-217*
24. **Requirements to post notices.** Although the FLSA does not expressly require the posting of notices, the Labor Secretary promulgated regulations requiring employers to post notices informing employees of their rights. 29 C.F.R. § 516.4. In so doing, the Secretary relied on authority under § 11, which deals generally with the collection of information. 29 C.F.R. part 516 (statement of statutory authority). In adopting implementing regulations, the Board found that the CAA explicitly did not incorporate these notice-posting requirements.	Sec. 11 *29 U.S.C. § 211*

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988 ("EPPA")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Coverage of Capitol Police. The EPPA applies to any employer in commerce, with no exception for private-sector police forces. Under the CAA, § 204(a)(3) authorizes the Capitol Police to use lie detectors in accordance with regulations issued by the Board under § 204(c), and the Board's regulations exempt the Capitol Police from EPPA requirements with respect to Capitol Police employees.	Secs. 2(1)-(2), 3(1)-(3), 7 *29 U.S.C. §§ 2001(1)-(2), 2002(1)-(3), 2006*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
2. Authority to make investigations and inspections. The EPPA authorizes the Labor Secretary to make investigations and inspections. The CAA neither references these provisions nor sets forth similar provisions authorizing investigations or inspections by an agency.	Sec. 5(a)(3) 29 U.S.C. § 2004(a)(3)
3. Recordkeeping requirements. The EPPA authorizes the Labor Secretary to require the keeping of records necessary or appropriate for the administration of the Act. Labor Department regulations specify the records regarding any polygraph use that employers and examiners must maintain and preserve for 3 years. 29 C.F.R. § 801.30. The CAA does not reference these provisions, and, in adopting implementing regulations, the Board found that the CAA explicitly did not make these requirements applicable.	Sec. 5(a)(3) *29 U.S.C. § 2004(a)(3)*
4. Grant of subpoena and other powers for investigations and hearings. The EPPA grants the Labor Secretary subpoena and other investigatory powers for use in investigations and hearings. The CAA neither references these provisions nor sets forth similar provisions granting an agency investigatory powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA authorities do not grant subpoena powers for use in agency investigation.)	Sec. 5(b) *29 U.S.C. § 2004(b)*
5. Agency authority to bring judicial enforcement actions. The EPPA authorizes the Labor Secretary to bring an action in district court to restrain violations or for other legal or equitable relief. The CAA neither references these provisions nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	Sec. 6(a)-(b) *29 U.S.C. § 2005(a)-(b)*
JUDICIAL PROCEDURES AND REMEDIES	
6. Individual liability. The definition of "employer" under the EPPA includes any person who "acts, directly or indirectly, in the interest of an employer." This definition is substantially the same as that in the FLSA and the FMLA. As discussed in connection with these laws at page 20, row 6, and page 24, row 14, above, individuals may be held individually liable under the FLSA, and, by the weight of authority, under the FMLA. Under the CAA, individuals may not be held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 of the CAA and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Secs. 2(2), 6 *29 U.S.C. §§ 2001(2), 2005*

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988 ("EPPA") (continued)

7. Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate. The EPPA authorizes civil actions in which courts exercise their ordinary subpoena authority. The CAA also authorizes civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 6(c)(2) *29 U.S.C. § 2005(c)(2)*
8. Private right to sue immediately, without having exhausted administrative remedies. An employee who alleges an EPPA violation may sue immediately, without having exhausted any administrative remedies. The CAA allows a covered employee to file an administrative complaint or commence a civil action only after having completed periods of counseling and mediation and an additional period of at least 30 days.	Sec. 6(c)(2) *29 U.S.C. § 2005(c)(2)*
9. Three-year statute of limitations. A civil action under the EPPA may be brought within three years after the alleged violation. Proceedings under the CAA must be commenced within 180 days after the alleged violation.	Sec. 6(c)(2) *29 U.S.C. § 2005(c)(2)*
CIVIL PENALTIES	
10. Civil penalties. The EPPA authorizes the assessment by the Labor Secretary of civil penalties for violations. The CAA does not reference these provisions, and § 225(c) of the CAA expressly precludes the awarding of civil penalties under the CAA.	Sec. 6(a) *29 U.S.C. § 2005(a)*
C. OTHER AGENCY AUTHORITIES	
11. Requirement to post notices. The EPPA requires employers to post notices prepared and distributed by the Labor Secretary. The CAA does not reference these provisions, and, in adopting implementing regulations, the Board found that the CAA explicitly did not incorporate these requirements.	Sec. 4 *29 U.S.C. § 2003*

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN Act")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Notification of state and local governments. The WARN Act requires the employer to notify not only affected employees, but also the state dislocated worker unit and the chief elected official of local government. Although § 205(a)(1) of the CAA references § 3 of the WARN Act for the purpose of incorporating the "meaning" of office closure and mass layoff, that section of the CAA sets forth provisions requiring notification of employees, but not of state and local governments.	Secs. 3(a), 5(a)(3) *29 U.S.C. §§ 2102(a), 2104(a)(3)*
B. ENFORCEMENT	
JUDICIAL PROCEDURES AND REMEDIES	
2. Representative of employees may bring civil action. The WARN Act allows a representative of employees to sue to enforce liability. The CAA does not reference these provisions, and §§ 401-408 of the CAA provide only for the commencement or proceedings by covered employees.	Sec. 5(a)(5) *29 U.S.C. § 2104(a)(5)*
3. Unit of local government may bring civil action. The WARN Act allows a unit of local government to sue to enforce liability. The CAA does not reference these provisions, and §§ 401-408 of the CAA provide only for the commencement or proceedings by covered employees.	Sec. 5(a)(5) *29 U.S.C. § 2104(a)(5)*
4. Private right to sue immediately, without having exhausted administrative remedies. An employee, union, or local government that alleges a WARN Act violation may sue immediately, without exhausting any administrative remedies. The CAA allows a covered employee to file an administrative complaint or commence a civil action only after having completed periods of counseling and mediation and an additional period of at least 30 days.	Sec. 5(a)(5) *29 U.S.C. § 2104(a)(5)*
5. Limitations period borrowed from state law. The WARN Act does not provide a limitations period for the civil actions authorized by § 5, and the Supreme Court has held that limitations periods borrowed from state law should be applied to WARN Act claims. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 115 S.Ct. 1927 (1995). Courts have generally applied state limitations periods to WARN Act claims ranging between one and six years. *See id.*; 29 U.S.C.A. § 2104 notes of decisions (Note 17 – Limitations) (1997 suppl. pamphlet). Under the CAA, proceedings must be commenced within 180 days after the alleged violation.	Sec. 5(a)(5) *29 U.S.C. § 2104(a)(5)*

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

ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
1. Agency authority to bring judicial enforcement action. Under USERRA, if a private-sector employee files a complaint with the Labor Secretary, and if the Labor Secretary refers the complaint to the Attorney General, the Attorney General may commence an action in court on behalf of the employee. However, while the USERRA provisions establishing substantive rights and protections generally extend, by their own terms, to the legislative branch, the Attorney General's authority under USERRA does not. Furthermore, the CAA neither references the Attorney General's authority under the USERRA nor sets forth similar provisions authorizing an agency to bring enforcement proceedings.	38 U.S.C. § 4323(a)(1)
2. Grant of subpoena and other investigatory powers. Under USERRA, the Labor Secretary may receive and investigate complaints from private-sector employees, and may issue enforceable subpoenas in carrying out such an investigation. However, while the USERRA provisions authorizing the Secretary to receive and investigate complaints extend, by their own terms, to the legislative branch, the Secretary's power to issue subpoenas does not. Furthermore, the CAA neither references the Secretary's authority and powers under USERRA nor sets forth provisions granting an agency investigatory authority and powers. (§ 405(f) of the CAA grants subpoena powers to hearing officers, and § 408 authorizes civil actions in which courts may issue subpoenas, but these CAA authorities do not grant subpoena powers for use in agency investigation.)	38 U.S.C. § 4326(b)-(d)
JUDICIAL PROCEDURES AND REMEDIES	
3. Individual liability. Because 38 U.S.C. § 4303(4)(A)(1) defines an "employer" in the private sector to include a "person . . . to whom the employer has delegated the performance of employment-related responsibilities," two courts have held that individuals may be held individually liable in an action under 38 U.S.C. § 4323. *Jones v. Wolf Camera, Inc.*, Civ. A. No. 3:96-CV-2578-D, 1997 WL 22678, at *2 (N.D. Tex., Jan. 10, 1997); *Novak v. Mackintosh*, 919 F.Supp. 870, 878 (D.S.D. 1996). However, the USERRA provisions that authorize civil actions and damages do not, by their own terms, extend to the legislative branch. Under the CAA, while § 206(b) authorizes damages, individuals may not be held individually liable, because only an employing office may be named as respondent or defendant under §§ 401-408 of the CAA and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a) of the CAA.	38 U.S.C. §§ 4303(4)(A)(1), 4323

4. Private right to sue immediately, without having exhausted administrative remedies. A private-sector employee alleging a USERRA violation may sue immediately, without exhausting any administrative remedies. However, USERRA does not, by its own terms, entitle legislative branch employees to either file an administrative complaint or commence a civil action. Under the CAA, a covered employee may file an administrative complaint or commence a civil action, but only after having completed periods of counseling and mediation and an additional period of at least 30 days.	38 U.S.C. § 4323(a)(2), (b)
5. Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate. USERRA authorizes civil actions against private-sector employees in which courts exercise their ordinary subpoena authority. As noted in row 4 above, USERRA does not, by its own terms, entitle legislative branch employees to either file an administrative complaint or commence a civil action. The CAA does authorize civil actions, as well as administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	38 U.S.C. § 4323(a)(2), (b)
6. Four-year statute of limitation. USERRA states that no state statute of limitations shall apply, but otherwise provides no statute of limitations. Under 28 U.S.C. § 1658, statutes like USERRA enacted after December 1, 1990, have a 4-year statute of limitations unless otherwise provided by law. As noted in row 4 above, USERRA does not entitle legislative branch employees to either file an administrative complaint or commence a civil action. Under the CAA, proceedings must be commenced within 180 days after the alleged violation.	38 U.S.C. § 4323(c)(6)
DAMAGES	
7. Liquidated damages. Under USERRA, 38 U.S.C. § 4323(c)(1)(A)(iii) grants the district courts jurisdiction to require a private-sector employer to pay not only compensatory damages, but also an equal amount of liquidated damages. This provision does not, by its own terms, extend to the legislative branch. Under the CAA, § 206(b) provides that the remedy for a violation of § 206(a) of the CAA shall include such remedy as would be appropriate if awarded under 38 U.S.C. § 4323(c)(1). However, the CAA does not state specifically whether the liquidated damages authorized by subparagraph (A)(iii) of § 4323(c)(1) are included among the remedies incorporated by § 206(a). By contrast, in the two other instances where a law made generally applicable by the CAA provides for liquidated damages, the CAA states specifically that the liquidated damages are incorporated. *See* § 201(b)(2)(B) of the CAA (authorizing the award of "such liquidated damages as would be appropriate if awarded under section 7(b) of [the ADEA]"); § 203(b) of the CAA (authorizing the award of "such remedy, including liquidated damages, as would be appropriate if awarded under section 16(b) of the [FLSA]").	38 U.S.C. § 4323(c)(1)(A)(iii)

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 ("OSHAct")

A. SUBSTANTIVE RIGHTS AND PROTECTIONS	
1. Employers may not retaliate against employees of other employers. § 11(c) of the OSHAct forbids retaliation against "any employee" for exercising rights under the OSHAct, and Labor Department regulations state that "because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator." 29 C.F.R. § 1977.5(b). Under the CAA, an employing office may be charged with retaliation under § 207 only by a "covered employee," defined as an employee of the nine legislative-branch employers listed in § 101(3).	Sec. 11(c) *29 U.S.C. § 660(c)*
2. Unions and other "persons" not acting as employers may not retaliate. § 11(c) of the OSHAct forbids retaliation against an employee by any "person," and § 3(4) defines "person" broadly to include "one or more individuals" or "any organized group of persons." Regulations of the Labor Secretary explain: "A person may be chargeable with discriminatory action against an employee of another person. § 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee." 29 C.F.R. § 1977.5(b). Under the CAA, § 207 forbids retaliation only by an employing office.	Secs. 3(4), 11(c) *29 U.S.C. §§ 652(4), 660(c)*
B. ENFORCEMENT	
AGENCY ENFORCEMENT AUTHORITIES	
3. Authority to conduct *ad hoc* inspections without a formal request by an employing office or covered employee. § 8(a) of the OSHAct authorizes the Labor Secretary to conduct inspections in the private sector at any reasonable times. Under the CAA, § 215(c)(1), (e)(1) references § 8(a) of the OSHAct, but only for the purpose of authorizing the General Counsel to exercise the Secretary's authority in making inspections. However, § 215(c)(1), (e) only provides express authority to inspect "[u]pon written request of any employing office or covered employee" or in "periodic inspections" that are "[o]n a regular basis, and at least once each Congress."	Sec. 8(a) *29 U.S.C. § 657(a)*
4. Grant of investigatory powers. The OSHAct empowers the Labor Secretary, in conducting an inspection or investigation, to compel the production of evidence under oath. The CAA neither references § 8(b) nor sets forth similar provisions granting compulsory process in the context of inspections and investigations. (§ 405(f) of the CAA grants subpoena powers to hearing officers, but these CAA authorities do not grant subpoena powers for use in agency inspection or investigation.)	Sec. 8(b) *29 U.S.C. § 657(b)*

5. Authority to require recordkeeping and reporting of general work-related injuries and illnesses. The OSHAct requires employers to make and preserve such records as the Labor Secretary, in consultation with the HHS Secretary, may prescribe by regulation as necessary or appropriate for enforcement, and to file such reports as the Secretary may prescribe by regulation. Employers must also maintain records and make periodic reports on work-related deaths, injuries, and illnesses, and maintain records of employee exposure to toxic materials. The CAA does not reference these provisions, and the Board, in adopting implementing regulations, determined that these requirements were not made applicable by the CAA. 143 CONG. REC. S64 (Jan. 7, 1997). However, the Board did incorporate into its regulations several employee-notification requirements with respect to particular hazards that are contained in specific Labor Department standards.	Secs. 8(c), 24(e) *29 U.S.C. §§ 657(c), 673(e)*
6. Agency enforcement of the prohibition against retaliation. Under the OSHAct, an employee who has suffered retaliation may file a complaint with the Labor Secretary, who shall conduct an investigation and, if there was a violation, shall sue in district court. The CAA does not reference these provisions and no provision of the CAA sets forth similar provisions authorizing an agency to investigate a complaint of retaliation or to bring an enforcement proceeding.	Sec. 11(c)(2) *29 U.S.C. § 660(c)(2)*
ADMINISTRATIVE AND JUDICIAL PROCEDURES AND REMEDIES	
7. Individual liability for retaliation. Because § 11(c) of the OSHAct forbids retaliation by "any person," an employee's officer responsible for retaliation may be sued and, in appropriate circumstances, be held liable. *See Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1425 (E.D.N.Y. 1984) ("We cannot rule out the possibility that damages might under some circumstances be appropriately imposed upon an employer's officer responsible for a discriminatory discharge.") The CAA does not reference § 11(c) of the OSHAct, and individuals may be neither sued nor held liable under the CAA because § 207 forbids retaliation only by an employing office, only an employing office may be named as respondent or defendant under §§ 401-408, and all awards and settlements must generally be paid out of an account of the Office of Compliance under § 415(a).	Sec. 11(c) *29 U.S.C. § 660(c)*
8. Employer's burden to contest a citation within 15 days. The OSHAct provides that the employer has the burden of contesting a citation within 15 days, or else the citation becomes final and unreviewable. The CAA does not reference these provisions, and § 215(c)(3) of the CAA places the burden of initiating proceedings on the General Counsel.	Sec. 10(a) *29 U.S.C. § 659(a)*
9. Employees' right to challenge the abatement period. The OSHAct gives employees or their representatives the right to challenge, in an adjudicatory hearing, the period of time fixed in a citation for the abatement of a violation. The CAA neither references these provisions nor sets forth similar provisions establishing a process by which employees or their representatives may challenge the abatement period.	Sec. 10(c) *29 U.S.C. § 659(c)*

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 ("OSHAct") (continued)

10.	**Employees' right to participate as parties in hearings on citations.** The OSHAct gives affected employees or their representatives the right to participate as parties in hearings on a citation. The CAA neither references these provisions nor sets forth similar provisions allowing employees or their representatives to participate as parties.	Sec. 10(c) *29 U.S.C. § 659(c)*
11.	**Employees' right to take appeal from administrative orders on citations.** The OSHAct gives "any person adversely affected or aggrieved" by an order on a citation the right to appeal to the U.S. Courts of Appeals. The CAA does not reference these provisions, and § 215 (c)(3), (5) sets forth authority for the employing office and the General Counsel to bring or participate in administrative or judicial appeals on a citation only.	Sec. 11(a) *29 U.S.C. § 660(a)*
12.	**Enforceability of subpoenas for information or documents within the jurisdiction of the House or Senate.** The OSHAct grants subpoena power to the Occupational Safety and Health Review Commission, which holds adjudicatory hearings under the OSHAct. The CAA also authorizes administrative adjudications, but such authorization is subject to § 413 of the CAA, by which the House and Senate decline to waive certain powers relating to records and information, as discussed in connection with Title VII at page 3, row 13, above.	Sec. 12(h)-(i) *29 U.S.C. § 661(h)-(i)*
13.	**Court jurisdiction, upon petition of the agency, to restrain imminent danger.** § 13(a) of the OSHAct grants jurisdiction to the district courts, upon petition of the Labor Secretary, to restrain an imminent danger. Under the CAA, § 215(b) references § 13(a) of the OSHAct to the extent of providing that "the remedy for a violation" shall be "an order to correct the violation, including such order as would be appropriate if issued under section 13(a)." However, the only process set forth in the CAA for the granting of remedies is the citation procedure under §§ 215(c)(2)-(3) and 405, culminating when the hearing officer issues a written decision that shall "order such remedies as are appropriate pursuant to title II [of the CAA]." Thus, the CAA does not expressly grant jurisdiction to courts to issue restraining orders authorized under § 215(b) and does not expressly authorize the General Counsel to petition for such restraining orders. However, § 4.12 of the Procedural Rules of the Office of Compliance states that, if the General Counsel's designee concludes that an imminent danger exists, "he or she shall inform the affected employees and the employing offices . . . that he or she is recommending the filing of a petition to restrain such conditions or practices . . . in accordance with section 13(a) of the OSHAct, as applied by section 215(b) of the CAA."	Sec. 13(a) *29 U.S.C. § 662*
14.	**Employees' right to sue for mandamus compelling the Labor Secretary to seek a restraining order against an imminent danger.** The OSHAct gives employees at risk or their representatives the right to sue for a writ of mandamus to compel the Secretary to seek a restraining order and for further appropriate relief. The CAA neither references these provisions nor sets forth similar provisions authorizing employees or their representatives to seek to compel an agency to act.	Sec. 13(d) *29 U.S.C. § 662(d)*

CIVIL AND CRIMINAL PENALTIES	
15. Civil penalties for violation. Civil penalties may be assessed for violations of the OSHAct, graded in terms of seriousness and willfulness of the violation. The CAA does not reference these provisions, and § 225(c) of the CAA specifically precludes the awarding of civil penalties.	Sec. 17(a)-(d), (i)-(*l*) *29 U.S.C. § 666(a)-(d), (i)-(l)*
16. Criminal penalties for willful violation causing death. Under the OSHAct, fines and imprisonment may be imposed for a willful violation causing death. The CAA neither references these provisions nor sets forth similar provisions imposing criminal penalties.	Sec. 17(e) *29 U.S.C. § 666(e)*
17. Criminal penalties for giving unauthorized advance notice of inspection. Under the OSHAct, fines and imprisonment may be imposed for giving unauthorized advance notice of an inspection. The CAA does not reference these provisions or otherwise provide for criminal penalties. § 4.06 of the Procedural Rules of the Office of Compliance forbids giving advance notice of inspections except as authorized by the General Counsel in specified circumstances, but applicable penalties are not specified.	Sec. 17(f) *29 U.S.C. § 666(f)*
18. Criminal penalties for knowingly making false statements. Under the OSHAct, fines and imprisonment may be imposed for knowingly making false statements in any application, record, or report under the OSHAct. The CAA neither references these provisions nor sets forth similar provisions imposing criminal penalties.	Sec. 17(g) *29 U.S.C. § 666(g)*
C. OTHER AGENCY AUTHORITIES	
19. Requirement that citations be posted. § 9(b) of the OSHAct requires that each citation be posted at or near the place of violation, as prescribed by "regulations issued by the Secretary." The Secretary may enforce this requirement under §§ 9 and 17 of the OSHAct, which include authority to issue citations and to assess or seek civil and criminal penalties for a violation of any "regulations prescribed pursuant to" the OSHAct. Under the CAA, § 215(c)(2) references § 9 of the OSHAct, but only to the extent of granting the General Counsel the authorities of the Secretary "to issue" a citation or notice, and the CAA does not expressly state whether the employing office has a duty to post the citation. § 4.13 of the Procedural Rules of the Office of Compliance directs employing offices to post citations, but the Procedural Rules are issued under § 303 of the CAA, which authorizes the adoption of rules governing "the procedures of the Office [of Compliance]." Furthermore, as to whether a requirement to post citations is enforceable under the CAA, the only enforcement mechanism stated in § 215 is set forth in subsection (c)(2), which authorizes the General Counsel to issue citations "to any employing office responsible for correcting a violation of subsection (a)"; but subsection (a) does not expressly reference either § 9(b) of the OSHAct or the Office's Procedural Rules.	Sec. 9(b) *29 U.S.C. § 658(b)*

APPENDIX II

ENFORCEMENT REGIMES OF CERTAIN LAWS MADE APPLICABLE BY THE CAA

The tables in this Appendix show the elements of private-sector enforcement regimes for nine of the laws made applicable by the CAA: Title VII, ADEA, EPA, ADA title I, FMLA, FLSA, EPPA, WARN Act, and USERRA. (Because ADA title I incorporates powers and procedures from Title VII, these two laws are combined in a single table.) These nine are the laws for which the CAA does not grant investigatory or prosecutory authority to the Office of Compliance. ADA titles II-II, the OSHAct, and Chapter 71, for which the CAA does grant such enforcement authority to the Office of Compliance, are not included in these tables.

In each of the tables, agency enforcement authority is described in the following six categories:

1. Initiation of agency investigation, whether by receipt of a charge by an affected individual or by agency initiative.

2. Investigatory powers of the agency, including authority to conduct on-site investigations and power to issue and enforce subpoenas.

3. Authority to seek compliance by informal conference, conciliation, and persuasion.

4. Prosecutory authority, including power of an agency to commence civil actions, the remedies available, and the authority to seek fines or civil penalties.

5. Authority of the agency to issue advisory opinions.

6. Recordkeeping and reporting requirements.

TITLE VII and AMERICANS WITH DISABILITIES ACT (title I)

The ADA (title I) incorporates by reference the enforcement powers, remedies, and procedures of Title VII,[1] and is therefore summarized here in the same chart as Title VII.

1. Initiation of investigation. *Individual charges.* When an individual claimant files a charge, Title VII and the ADA require the EEOC to serve notice of the charge on the respondent and to investigate.[2] *Commissioner charges.* Title VII and the ADA also require the EEOC to serve notice and to investigate any charge filed by a Member of the EEOC.[3] Commissioner charges are ordinarily based on leads developed by EEOC field offices.

2. Investigatory powers.

On-site investigation. In connection with the investigation of an individual charge or a Commissioner charge, Title VII and the ADA authorize the EEOC and its representatives to "have access to, for purposes of examination, and the right to copy any evidence."[4] According to the EEOC Compliance Manual, this authority includes interviewing witnesses.[5]

Subpoenas. *Issuance.* Title VII and the ADA grant the EEOC the power to issue subpoenas, relying on authorities under the NLRA,[6] and EEOC regulations specify that subpoenas may be issued by any Commission member or any District Directors and certain other agency Directors and "any representatives designated by the Commission."[7] *Petitions for revocation or modification.* Under EEOC regulations, Title VII and ADA subpoenas may be challenged by petition to the Director who issued the subpoena, who shall either grant the petition in its entirety or submit a proposed determination to the Commission for final determination.[8] *Enforcement.* Title VII and the ADA also empower the EEOC to seek district court enforcement of such subpoenas under authorities of the NLRA,[9] and EEOC regulations specify that the General Counsel or his or her designee may institute such proceedings.[10]

3. "Reasonable cause" determination; Conciliation. Title VII and the ADA provide that, if the EEOC determines after investigation that there is "reasonable cause to believe that the charge is true," then the EEOC must "endeavor to eliminate any such alleged unlawful employment practice" by informal "conference, conciliation, and persuasion"; otherwise, the EEOC must dismiss the charge and send notice to the parties, including a right-to-sue letter to the person aggrieved.[11]

4. Prosecutory authority.

Civil enforcement actions. *Generally.* The EEOC has the authority to prosecute alleged private-sector Title VII and ADA violations in district court, after the Commission has found "reasonable cause" and has been unable to resolve the case through "conference, conciliation, and persuasion."[12] The EEOC General Counsel brings such civil actions on behalf of the EEOC. *Remedies.* The agency may request Title VII remedies (injunction, with or without back pay);[13] compensatory or punitive damages may be granted only in an "action brought by a complaining party."[14] Title VII and the ADA also authorize the EEOC to ask the district courts for temporary or preliminary relief.[15]

Relation with private right of action. If the EEOC sues, Title VII specifically authorizes the person aggrieved to intervene.[16] If the EEOC dismisses the charge, or fails to either enter into a conciliation agreement including the person aggrieved or commence a civil action within 180 days after the charge is filed, the EEOC must issue a right-to-sue letter to the person aggrieved, who may then sue; and the EEOC may then intervene if the case is of "general public importance."[17]

Fine for notice-posting violation. Title VII (though not the ADA) imposes a fine of not more than $100 for a willful violation of notice-posting requirements.[18] The EEOC Compliance Manual states that the EEOC district or area office can levy such a fine, and, if a respondent is unwilling to pay, "The Regional Attorney should be notified."[19]

5. Advisory opinions. *Title VII.* Title VII establishes a defense for good-faith reliance on "any written interpretation or opinion of the Commission."[20] EEOC regulations specify that the following may be relied upon as such: *(i)* an "opinion letter" of the Legal Counsel or the General Counsel approved by the Commission, *(ii)* a Federal Register publication designated as an "interpretation or opinion," or *(iii)* an "interpretation or opinion" included in a Commission determination of no reasonable cause.[21] *ADA.* Unlike the other discrimination laws, the ADA does not establish a defense for good-faith reliance on advisory opinions, and EEOC regulations do not provide for their issuance. Nevertheless, the EEOC appended "interpretive guidance" to its substantive regulations, stating that "the Commission will be guided by it when resolving charges of employment discrimination."[22]

6. Recordkeeping/reporting. Title VII and the ADA require employers to make and preserve records, and to make reports, as the EEOC shall prescribe "by regulation or order, after public hearing."[23] *Record-keeping.* EEOC regulations require employers to preserve for one year "[a]ny personnel or employment record,"[24] and also reserve the right to impose specific recordkeeping requirements on individual employers or group of employers.[25] The EEOC's Title VII "Uniform Guidelines on Employee Selection Procedures" require that records be maintained by users of such procedures.[26] *Reporting.* EEOC regulations require employers having 100 or more employees to file an annual Title VII "Employer Information Report EEO-1,"[27] and also reserve the right to impose special or supplementary reporting requirements on individual employers or groups of employers under either Title VII or the ADA.[28] *Enforcement.* The EEOC may ask district courts to order compliance with Title VII and the ADA recordkeeping and reporting requirements.[29]

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The ADEA is a procedural hybrid, modeling some of its procedures on Title VII, and incorporating other procedures from the FLSA. The ADEA was originally implemented and enforced by the Labor Department; the Secretary's functions were transferred to the EEOC by the Reorganization Plan in 1978,[30] and ADEA procedures were conformed in some respects to those of Title VII by the Civil Rights Act of 1991.

1. Initiation of investigation. *Individual charges.* Upon receiving any ADEA complaint, the EEOC must notify the respondent.[31] Unlike Title VII and the ADA, the ADEA does not specifically require the EEOC to investigate complaints, but the EEOC applies a uniform policy for all discrimination laws, conducting an investigation appropriate to each particular charge.[32] *Directed investigations.* Unlike Commissioner charges under Title VII or the ADA, directed investigations under the ADEA may be commenced without action by an EEOC Member or notice to the respondent.

2. Investigatory powers. The ADEA grants the EEOC broad investigatory power by reference to the FLSA.[33] With respect to subpoenas, the FLSA relies, in turn, on authorities of the FTC Act.[34]

On-site investigation. The EEOC and its representatives are authorized to investigate and gather data, enter and inspect an employer's premises and records, and question employees to "determine whether any person has violated" the ADEA or which may "aid in . . . enforcement."[35]

Subpoenas. *Issuance.* The ADEA, relying on authorities of the FTC Act, grants to the EEOC the power to issue subpoenas.[36] EEOC regulations, citing the agency's power to delegate under the ADEA, delegate subpoena power to agency Directors and the General Counsel or their designees.[37] Unlike under Title VII and the ADA, there is no procedure for asking the EEOC to reconsider or review a subpoena under the ADEA.[38] *Enforcement.* The ADEA authorizes the EEOC to invoke the aid of Federal courts to enforce subpoenas under authorities of the FTC Act,[39] and the EEOC Compliance Manual specifies that the Office of General Counsel and the Regional Attorneys may institute such proceedings.[40]

3. "Reasonable cause" determination; Conciliation. The ADEA provides that, upon receiving a charge, the EEOC must "seek to eliminate any alleged unlawful practice" by informal "conference, conciliation, and persuasion."[41] The ADEA, unlike Title VII and the ADA, does not require the Commission to make a "reasonable cause" determination as a prerequisite to conciliation, but EEOC regulations state that informal conciliation will be undertaken when the Commission has a "reasonable basis to conclude" that a violation has occurred or will occur.[42]

4. Prosecutory authority.

Civil actions. *Generally.* The EEOC has authority to prosecute alleged ADEA violations in district court if the EEOC is unable to "effect voluntary compliance" through informal conciliation.[43] The EEOC General Counsel brings such civil actions on behalf of the EEOC. *Remedies.* The agency may request amounts owing under the ADEA, including liquidated damages in case of willful violations, and an order restraining violations, including an order to pay compensation due.[44]

Relation with private right of action. An individual may bring a civil action 60 days after a charge is filed[45] and must sue within 90 days after receiving notice from the EEOC that the charge has been dismissed or proceedings otherwise terminated.[46] Thus, in contrast to Title VII and the ADA, the ADEA does not require that the EEOC issue a right to sue letter before an individual may sue.[47] As is the case under the FLSA, the EEOC's commencement of a suit on the individual's behalf terminates the individual's unexercised right to sue,[48] but most cases hold that an EEOC suit filed after an individual has commenced a suit does not terminate the individual's suit.[49]

5. Advisory opinions. The ADEA establishes a defense for good-faith reliance on "any written administrative regulation, order, ruling, approval, or interpretation" of the EEOC.[50] EEOC regulations specify that the following may be relied upon as such: *(i)* an "opinion letter" of the Legal Counsel or the General Counsel approved by the Commission, or *(ii)* a Federal Register publication designated as an "interpretation or opinion";[51] and the EEOC has codified a body of its ADEA interpretations in the Code of Federal Regulations.[52]

6. Recordkeeping/reporting. The ADEA empowers the EEOC to require the keeping of necessary and appropriate records in accordance with the powers in section 11 of the FLSA. *Recordkeeping.* EEOC regulations specify the "payroll" records that employers must maintain and preserve for at least 3 years and "personnel or employment" records that employers must maintain and preserve for at least 1 year.[53] *Reporting.* Although the ADEA does not specifically require employees to submit reports, it references FLSA provisions requiring every employer "to make such reports" from required records]" as the Administrator shall prescribe.[54] EEOC regulations require each employer to make "such extension, recomputation, or transcription" of records and to submit "such reports concerning actions taken and limitations and classifications of individuals set forth in records" as the EEOC or its representative may request in writing.[55]

EQUAL PAY ACT

The enforcement regime for the Equal Pay Act ("EPA") is a hybrid between the FLSA model and the Title VII mode. The EPA legislation in 1963 added a new section 6(d) to the FLSA establishing substantive rights and responsibilities,[56] and relied on the existing FLSA provisions establishing enforcement powers, remedies, and procedures. The EPA was, at first, implemented and enforced by the Labor Department with the rest of the FLSA; the Secretary's EPA functions were transferred to the EEOC by the Reorganization Plan in 1978, [57] and the EEOC has conformed its EPA enforcement processes with those for Title VII in some respects.

1. Initiation of investigation. *Individual complaints*. Unlike the other discrimination laws, the FLSA, as amended by the EPA, does not require the EEOC to notify the respondent or to investigate complaints. However, the EEOC applies a uniform policy for all discrimination laws, conducting an investigation appropriate to each particular charge.[58] *Directed investigations*. Unlike Commissioner charges under Title VII and the ADA, directed investigations under the ADEA may be commenced without action by an EEOC Member or notice to the respondent.

2. Investigatory powers. The FLSA, of which the EPA is a part, grants the EEOC broad investigatory authority.[59] With respect to subpoenas, the FLSA relies, in turn, on authorities of the FTC Act.[60]

On-site investigation. The FLSA, as amended by the EPA, authorizes the EEOC and its representatives to investigate and gather data, enter and inspect an employer's premises and records, and question employees to "determine whether any person has violated" the EPA or which may "aid in . . . enforcement" of the EPA[61]

Subpoenas. Under the FLSA, as amended by the EPA, the EEOC can issue and enforce subpoenas, relying on the authorities of the FTC Act.[62] *Issuance*. The power under the FLSA to issue subpoenas may not be delegated,[63] and EEOC regulations provide that subpoenas may be issued by any Member of the Commission.[64] *Enforcement*. The FLSA, as amended by the EPA, authorizes the EEOC to invoke the aid of Federal courts to enforce subpoenas,[65] and the EEOC Compliance Manual specifies that the Office of General Counsel and the Regional Attorneys may institute such proceedings.[66]

3. "Reasonable Cause" Determination; Conciliation. The FLSA, as amended by the EPA, does not require the EEOC to issue a written determination on each case or to undertake conciliation efforts. However, it is EEOC's uniform policy to issue "reasonable cause" letters for all laws, once a case has been found to meet the reasonable cause standard, [67] and EEOC office directors are granted discretion to invite a respondent to engage in conciliation negotiations when a "reasonable cause" letter is issued.[68]

4. Prosecutory authority.

Civil proceedings. *Generally*. The EEOC has the authority to prosecute alleged EPA violations in district court.[69] Unlike other discrimination laws, the FLSA, as amendment by the EPA, authorizes the EEOC to sue without first having undertaken conciliation efforts. The EEOC General Counsel brings such civil actions on behalf of the EEOC. *Remedies*. The agency may request back wages, plus an equal amount in liquidated damages on behalf of aggrieved persons, and may also seek an injunction in federal district court restraining violations, including an order to pay compensation due, plus interest.[70]

Relation with private right of action. Unlike the other discrimination laws, the FLSA, as amended by the EPA, does not require an individual to first file a charge with the EEOC and await conciliation efforts before bringing a civil action.[71] If the EEOC first commences suit on the individual's behalf, the individual's right to bring suit terminates.[72]

5. Advisory opinions. The Portal-to-Portal Act ("PPA") establishes a defense for good-faith reliance on the "written administrative regulation, order, ruling, approval, or interpretation" of the Administrator.[73] The EEOC has published procedures for requesting opinion letters under the EPA, and has specified that the following may be relied upon as such: *(i)* an "opinion letter" of the Legal Counsel or the General Counsel approved by the Commission, or *(ii)* a Federal Register publication designated as an "interpretation or opinion."[74]

6. Recordkeeping/reporting. Under the FLSA, as amended by the EPA, every employer must make and preserve such records, and "make such reports therefrom," as the EEOC shall prescribe "by regulation or order."[75] *Recordkeeping*. The EEOC regulations adopt by reference the Labor Department's FLSA regulations specifying the "payroll" and other records that employers must maintain and preserve for at least 3 years and the "employment and earnings" records that employers must maintain and preserve for at least 2 years.[76] In addition, EEOC regulations require employers to preserve for 2 years any records made in the ordinary course of business that describe or explain any differential in wages paid to members of the opposite sex in the same establishment. [77] *Reporting*. The Labor Department's regulations, which are adopted by reference by EEOC's regulations, also require each employer to make "such extension, recomputation, or transcription" of required records, and to submit "such reports," as may be "require[d] in writing."[78]

FAMILY AND MEDICAL LEAVE ACT OF 1993

The FMLA incorporates much of the investigative authority set forth in the FLSA[79] and establishes prosecutorial powers modeled on those in the FLSA.[80] Furthermore, the FMLA specifically requires the Secretary to "receive, investigate, and attempt to resolve" complaints of violations "in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of [FLSA] violations."[81]

1. Initiation of investigation. *Individual complaints*. The FMLA requires that complaints be received and investigated in the same manner as FLSA complaints, even though the FLSA itself does not require the receipt and investigation of individual complaints. In practice, as the Wage and Hour Division receives and accepts complaints, which it analyzes and investigates on a worst-first priority basis,[82] the Division is required to do the same for FMLA complaints. *Directed investigations*. The FMLA references the investigatory power as the FLSA,[83] under which authority the Division conducts directed investigations.[84]

2. Investigatory powers.

On-site investigation. The FMLA references the investigatory power of the FLSA,[85] which affords authority to the Administrator and his representatives to investigate and gather data, enter and inspect an employer's premises and records, and question employees to "determine whether any person has violated" the FLSA or which may "aid in . . . enforcement" of the FLSA.[86]

Subpoenas. The FMLA incorporates the subpoena power set forth in the FLSA, under which the Secretary and the Administrator can issue and enforce subpoenas, relying on the authorities of the FTC Act.[87] *Issuance*. The power of the Secretary and the Administrator to issue subpoenas under the FLSA may not be delegated.[88] *Enforcement*. The FLSA authorizes the Secretary and the Administrator to invoke the aid of Federal courts to enforce subpoenas,[89] and the such civil litigation on behalf of the Department is handled by the Solicitor of Labor and the Regional Solicitors.

3. Conciliation. The FMLA requires the Secretary to "attempt to resolve" FMLA complaints in the same way as FLSA complaints, even though the FLSA does not require conciliation. In practice, however, where the FLSA violation appears to be minor and to involve only a single individual, the investigator will ask the employee for permission to use of his or her name and will then telephone the employer to ask for a response to the charge, and, if there appears to be a violation, will close the matter upon the payment of back wages.[90]

4. Prosecutory authority.

Civil proceedings. *Generally*. The Secretary has the authority to prosecute alleged FMLA violations in district court.[91] The FMLA specifies that the Solicitor of Labor may represent the Secretary in any such litigation.[92] *Remedies*. The agency may seek: *(i)* damages, including liquidated damages, owing to an employee, and *(ii)* an order restraining violations, including an order to pay compensation due, or other equitable relief.[93]

Relation with private right of action. Unlike the discrimination laws, but like the FLSA, the FMLA does not require an individual to first file a charge with the agency and await conciliation efforts before bringing a civil action.[94] However, if the Labor Department first commences suit on the individual's behalf, the individual's right to bring suit terminates.[95]

Administrative assessment of civil penalties. Civil penalties for violation of notice-posting requirements[96] may be assessed, according to the Secretary's regulations, by any Labor Department representative, subject to appeal to the Wage and Hour Regional Administrator, and subject to judicial collection proceeding commenced by the Solicitor of Labor.[97]

5. Advisory opinions. Although the FMLA establishes a defense against liquidated damages for good-faith violations where the employer had reasonable cause to believe the conduct was not a violation,[98] the Act does not refer specifically to reliance on interpretations or opinions of the Secretary or the Administrator, and the Secretary's regulations contain neither FMLA interpretations or opinions designated as such nor procedures for requesting interpretations or opinions.

6. Recordkeeping/reporting. *Recordkeeping*. The FMLA requires employers to make, keep, and preserve records in accordance with regulations of the Secretary,[99] and those regulations specify the records regarding payroll, benefits, and FMLA leave and disputes that employers must maintain and preserve for 3 years.[100] *Reporting*. The FMLA references the recordkeeping authorities under the FLSA, which include the requirement that employers shall make "reports therefrom [from required records]" as the Administrator shall "prescribe by regulation or order."[101] The FMLA further provides that the Secretary may not require an employer to submit to the Secretary any books or records more than once in 12 months, unless the Secretary has reasonable cause to believe there may be a violation or is investigating an employee charge.[102] The Secretary's FMLA regulations indicate that employers must submit records "specifically requested by a Departmental official" and must prepare "extensions or transcriptions" of information in the records "upon request."[103]

FAIR LABOR STANDARDS ACT OF 1938

1. Initiation of investigation. *Individual complaints*. Unlike Title VII, the FLSA does not specifically require the investigation of individual complaints, but the Wage and Hour Division receives and accepts complaints, which it analyzes and investigates on a worst-first priority basis.[104] *Directed investigations*. The FLSA has no counterpart to the Commissioner charges under Title VII. Instead, the Division can conduct directed investigations without formal approval by the head of the agency, developing leads from a variety of sources.[105] The Division also conducts periodic compliance surveys, reviewing wages paid to a statistical sampling of employees at a random sample of employers, and may initiate a directed investigation when a violation is evident.[106]

2. Investigatory powers.

On-site investigation. The FLSA authorizes the Administrator and his representatives to investigate and gather data, enter and inspect an employer's premises and records, and question employees to "determine whether any person has violated" the FLSA or which may "aid in . . . enforcement" of the FLSA.[107]

Subpoenas. Under the FLSA, the Secretary and the Administrator can issue and enforce subpoenas, relying on the authorities of the FTC Act.[108] *Issuance*. The power of the Secretary and the Administrator to issue subpoenas under the FLSA may not be delegated.[109] *Enforcement*. The FLSA authorizes the Secretary and the Administrator to invoke the aid of Federal courts to enforce subpoenas,[110] and such civil litigation on behalf of the Department is handled by the Solicitor of Labor and the Regional Solicitors.

3. Conciliation. Unlike Title VII, the FLSA does not require "reasonable cause" determinations or conciliation. In practice, where the violation appears to be minor and to involve only a single individual, the investigatory will ask the employee for permission to use of his or her name and will then telephone the employer to ask for a response to the charge, and, if there appears to be a violation, will close the matter upon the payment of back wages.[111]

4. Prosecutory authority.

Civil proceedings. *Generally*. The Secretary has the authority to prosecute alleged FLSA violations in district court.[112] The Solicitor of Labor and Regional Solicitors are responsible for bringing litigation on behalf of the Administrator. *Remedies*. The agency may seek: *(i)* unpaid minimum wages or overtime compensation and liquidated damages owing to an employee, *(ii)* civil penalties, and *(iii)* an order restraining violations, including an order to pay compensation due.[113]

Relation with private right of action. Unlike the discrimination laws, the FLSA does not require an individual to first file a charge with the agency and await conciliation efforts before bringing a civil action.[114] However, if the Labor Department first commences suit on the individual's behalf, the individual's right to bring suit terminates.[115]

Administrative assessment of civil penalties; criminal proceedings. Civil penalties for repeated or willful violations or for child labor violations are assessed initially by the Secretary, and, if the respondent takes exception, are decided through adjudication before an ALJ, subject to appeal to the Labor Secretary and judicial review in federal district court.[116] The FLSA also imposes fines and imprisonment for willful violations.[117]

5. Advisory opinions. The Portal-to-Portal Act establishes a defense for good-faith reliance on the "written administrative regulation, order, ruling, approval, or interpretation" of the Administrator.[118] The Administrator has issued interpretative bulletins and advisory opinions "to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties."[119]

6. Recordkeeping/reporting. The FLSA requires every employer to make and preserve such records, and "to make such reports therefrom," as the Wage and Hour Administrator shall prescribe "by regulation or order."[120] *Recordkeeping*. Labor Department regulations specify the "payroll" and other records that employers must maintain and preserve for at least 3 years and the "employment and earnings" records that employers must maintain and preserve for at least 2 years.[121] *Reporting*. These regulations also require each employer to make "such extension, recomputation, or transcription" of required records, and to submit "such reports," as the Administrator may "request in writing."[122]

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

The enforcement regime under the EPPA is similar to that under the FLSA in some respects, and in other respects is *sui generis*.

1. Initiation of investigation. *Individual complaints*. Like the FLSA and unlike Title VII, the EPPA does not specifically require the investigation of individual complaints. However, the Labor Secretary's regulations provide that the Wage and Hour Division will receive reports of violations from any person.[123] *Directed investigations*. Like the FLSA and unlike Title VII, the EPPA authorizes the Labor Department to conduct directed investigations without formal approval by the head of the agency.[124]

2. Investigatory powers.

On-site investigation. The EPPA authorizes the Secretary to make "necessary or appropriate" investigations and inspections.[125]

Subpoenas. Under the EPPA, as under the FLSA, the Secretary can issue and enforce subpoenas, relying on the authorities of the FTC Act.[126] The EPPA authorizes the Secretary to invoke the aid of Federal courts to enforce subpoenas,[127] and civil litigation on behalf of the Department is handled by the Solicitor of Labor.[128]

3. Conciliation. Like the FLSA and unlike Title VII, the EPPA does not require "reasonable cause" determinations or conciliation.

4. Prosecutory authority.

Civil proceedings. *Generally*. The EPPA authorizes the Labor Secretary to prosecute in alleged EPPA violations in district court.[129] The Solicitor of Labor may represent the Secretary in such litigation.[130] *Remedies*. The agency may seek temporary or permanent restraining orders and injunctions to require compliance, including incidental relief such as reinstatement and back pay and benefits.[131]

Relation with private right of action. Unlike the discrimination laws, and like the FLSA, the EPPA does not require an individual to first file a charge with the agency and await conciliation efforts before bringing a civil action.[132] However, unlike both the discrimination laws and the FLSA, the EPPA does not state that the individual's right to bring suit to terminates upon the filing of an enforcement action by the Secretary.[133]

Administrative assessment of civil penalties. Civil penalties for violations are assessed initially by the Secretary. Applying the procedures of the Migrant and Seasonal Agricultural Worker Protection Act, the EPPA provides that, if the respondent takes exception, the validity of the assessment is decided through adjudication before an ALJ, who renders an initial decision subject to modification by the Labor Secretary, and subject to judicial review in federal district court.[134]

5. Advisory opinions. Unlike both Title VII and the FLSA, the EPPA establishes no defense for good-faith reliance on agency advisory opinions, and the Labor Secretary's EPPA regulations contain neither EPPA interpretations or opinions designated as such nor procedures for requesting interpretations or opinions. However, the regulations contain provisions that the Secretary characterized as "interpretations regarding the effect of . . . the Act on other laws and collective bargaining agreements."[135]

6. Recordkeeping/reporting. *Recordkeeping*. The EPPA requires the keeping of records "necessary or appropriate for the administration" of the EPPA.[136] Labor Department regulations specify the records regarding any polygraph use that employers and examiners must maintain and preserved for 3 years.[137] *Reporting*. The EPPA and Labor Department regulations do not impose any reporting requirements.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The WARN Act establishes no agency investigative or enforcement authority, and is enforced solely through the private right of action.

1. Initiation of investigation. None.
2. Investigatory powers. None**.**
3. Conciliation. The WARN Act makes no provision for conciliation.
4. Prosecutory authority. None.
5. Advisory opinions. The WARN Act makes no provision for advisory opinions.
6. Recordkeeping/reporting. None.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

1. Initiation of investigation. *Individual complaints*. When an employee files a complaint with the Secretary of Labor, the Secretary is required to investigate.[138] *Directed investigations*. The USERRA does not authorize investigations without an employee complaint.

2. Investigatory powers.

On-site investigation. In connection with the investigation of any complaint, USERRA authorizes the Secretary's "duly authorized representatives" to interview witnesses and to examine and copy any relevant documents.[139]

Subpoenas. *Issuance*. The Secretary can issue subpoenas under the USERRA.[140] *Enforcement*. The USERRA authorizes the Attorney General, upon the request of the Secretary, to invoke the aid of Federal courts to enforce subpoenas.[141]

3. Finding that violation occurred; conciliation. If the Secretary determines that the action alleged in a complaint occurred, the USERRA requires the Secretary to "attempt to resolve the complaint by making reasonable efforts to ensure" compliance.[142] If the Secretary's is unable to resolve the complaint in this manner, the Secretary shall so notify the complaining employee.[143]

4. Prosecutory authority.

Civil proceedings. *Generally*. A complaining employee who receives notification that the Secretary could not resolve the complaint may ask the Secretary to refer the matter to the Attorney General, who, if reasonably satisfied that the complaint is meritorious, may prosecute the alleged USERRA violation in district court on behalf of the employee.[144] *Remedies*. The Attorney General may seek the same remedies as a private individual under USERRA: injunctions and orders requiring compliance, compensation for lost wages and benefits, and, for willful violations, liquidated damages.[145]

Relation with private right of action. Unlike the discrimination laws, the USERRA does not require an employee to first file an administrative complaint and await conciliation efforts before bringing a civil action.[146] If the employee does choose to file an administrative complaint, the employee may sue upon notification that the Secretary could not resolve the complaint informally, and may sue as well if the employee asks the Attorney General to take the case but the Attorney General declines.[147] If the employee asks the Attorney General to pursue the case and the Attorney General does so, the individual may not also pursue a private action.

5. Advisory opinions. The USERRA establishes no defense for good-faith reliance on agency advisory opinions, and the Labor Secretary has not promulgated in the Federal Register any interpretations or opinions designated as such nor procedures for requesting interpretations or opinions.

6. Recordkeeping/reporting. The USERRA imposes no recordkeeping or reporting requirements.

ENDNOTES

NOTES REGARDING TABLE 1 – TITLE VII & ADA (title I)

1. § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of §§ 705-707, 709, and 710 of Title VII, 42 U.S.C. §§ 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9).

2. § 706(b) of Title VII, 42 U.S.C. § 2000e–5(b).

   § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

3. § 706(b) of Title VII, 42 U.S.C. § 2000e–5(b).

   § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

4. § 709(a) of Title VII, 42 U.S.C. § 2000e–8(a).

   § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

5. 1 EEOC COMPLIANCE MANUAL, Vol. 1 – Investigative Procedures § 25.1 (BNA) 25:0001 (6/87).

6. § 710 of Title VII, 42 U.S.C. § 2000e–9 (applying authorities under § 11 of the NLRA, including paragraph (1) thereof, 29 U.S.C. § 161(1)).

   § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

7. 29 C.F.R. § 1601.16(a).

8. 29 C.F.R. § 1601.16(b).

9. § 710 of Title VII, 42 U.S.C. § 2000e–9 (applying § 11 of the NLRA, including paragraph (2) thereof, 29 U.S.C. § 161(2)).

   § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

10. 29 C.F.R. § 1601.16(d).

11. § 706(b) of Title VII, 42 U.S.C. § 2000e–5(b).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

12. § 706(f)(1) of Title VII, 42 U.S.C. § 2000e–5(f)(1).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

13. § 706(g)(1) of Title VII, 42 U.S.C. § 2000e–5(g)(1).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

14. 42 U.S.C. § 1981a(a)(1)-(2).

15. § 706(f)(2) of Title VII, 42 U.S.C. § 2000e–5(f)(2).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

16. § 706(f)(1) of Title VII, 42 U.S.C. § 2000e–5(f)(1).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

17. § 706(f)(1) of Title VII, 42 U.S.C. § 2000e–5(f)(1).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

18. § 711(b) of Title VII, 42 U.S.C. § 2000e–10(b).

19. 2 EEOC COMPLIANCE MANUAL, Vol. 2 – Interpretive Manual § 25.1 (BNA) 632:0019 (1/87).

20. § 713(b) of Title VII, 42 U.S.C. § 2000e–12(b).

21. 29 C.F.R. § 1601.93 *et seq*.

22. 29 C.F.R. part 1630 Appendix.

23. § 709(c) of Title VII, 42 U.S.C. § 2000e–8(c).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

24. 29 C.F.R. § 1602.14.

25. 29 C.F.R. § 1602.12.

26. 29 C.F.R. §§ 1607.4, 1607.15.

27. 29 C.F.R. § 1602.7.

28. 29 C.F.R. § 1602.11.

29. § 709(c) of Title VII, 42 U.S.C. § 2000e–8(c).

    § 107(a) of the ADA, 42 U.S.C. § 12117(a) (applying the powers, remedies, and procedures of Title VII).

NOTES REGARDING TABLE 2 – ADEA

30. Reorganization Plan No. 1 of 1978, § 2, set out in 5 U.S.C. Appendix 1.

31. § 706(b) of Title VII, 42 U.S.C. § 2000e–5(b).

32. EEOC, *Priority Charge Handling Procedures* (June 20, 1995), *reprinted in* 3 EEOC COMPLIANCE MANUAL (BNA) N.3069, N.3070 (10/95).

33. § 7(a) of the ADEA, 29 U.S.C. § 626(a) (granting the power to make investigations, in accordance with the powers and procedures provided in §§ 9 and 11 of the FLSA, 29 U.S.C. §§ 209, 211).

34. § 9 of the FLSA, 29 U.S.C. § 209 (referencing §§ 9-10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49-50.)

35. §11(a) of the FLSA, 29 U.S.C. § 211(a) (referenced by § 7(a) of the ADEA, 29 U.S.C. § 626(a)).

36. § 7(a) of the ADEA, 29 U.S.C. § 626(a) (applying powers of § 9 of the FLSA, 29 U.S.C. § 209, which applies powers of § 9 of the FTC Act, 15 U.S.C. § 49).

37. 29 C.F.R. § 1626.16(b) (citing general authority to delegate under § 6(a) of the ADEA, 29 U.S.C. § 625(a)).

38. 29 C.F.R. § 1626.16(c).

39. § 7(a) of the ADEA, 29 U.S.C. § 626(a) (applying powers of § 9 of the FLSA, 29 U.S.C. § 209, which applies powers of §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50).

40. 1 EEOC COMPLIANCE MANUAL, Vol. 1 – Investigative Procedures § 24.13 (BNA) 24:0009 (2/88).

41. § 7(b) of the ADEA, 29 U.S.C. § 626(b).

42. 29 C.F.R. § 1626.15(b).

43. § 7(b) of the ADEA, 29 U.S.C. § 626(b).

44. *Id.*

45. § 7(d) of the ADEA, 29 U.S.C. § 626(d).

46. § 7(e) of the ADEA, 29 U.S.C. § 626(e).

47. *See Crossman v. Crosson*, 905 F.Supp. 90, 93 n.1 (E.D.N.Y. 1995), *aff'd on other grounds*, 101 F.3d 684 (2nd Cir. 1996).

48. § 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1).

49. *See* I LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 574 (3d ed. 1996).

50. § 7(e) of the ADEA, 29 U.S.C. § 626(e), referencing § 10 of the Portal to Portal Act, 29 U.S.C. § 259.

51. 29 C.F.R. § 1626.18.

52. 29 C.F.R. § 1625.1 *et seq.*

53. 29 C.F.R. § 1627.3(a)-(b).

54. Sec. 11(c) of the FLSA, 29 U.S.C. § 211(c).

55. 29 C.F.R. § 1627.7.

NOTES REGARDING TABLE 3 – EQUAL PAY ACT

56. § 6(d) of the FLSA, 29 U.S.C. § 206(d), as added by Pub. L. 88-38, § 3, 77 Stat. 56 (June 10, 1963).

57. Reorganization Plan No. 1 of 1978, § 2, set out in 5 U.S.C. Appendix 1.

58. EEOC, *Priority Charge Handling Procedures* (June 20, 1995), *reprinted in* 3 EEOC COMPLIANCE MANUAL (BNA) N.3069, N.3070.

59. §§ 9 and 11 of the FLSA, 29 U.S.C. §§ 209, 211.

60. § 9 of the FLSA, 29 U.S.C. § 209 (referencing §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50.)

61. §11(a) of the FLSA, 29 U.S.C. § 211(a).

62. § 9 of the FLSA, 29 U.S.C. § 209 (referencing §§ 9-10 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. §§ 49-50.)

63. *See Cudahy Packing Co. of Louisiana, Ltd., v. Holland,* 315 U.S. 357 (1942).

64. 29 C.F.R. § 1620.31.

65. § 9 of the FLSA, 29 U.S.C. § 209 (applying the powers of §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50.)

66. 1 EEOC COMPLIANCE MANUAL, Vol. 1 – Investigative Procedures § 24.13 (BNA) 24:0009 (2/88).

67. 1 EEOC COMPLIANCE MANUAL, Vol. 1 – Investigative Procedures § 40.1 (BNA) 40:0001 (2/88).

68. 1 EEOC COMPLIANCE MANUAL, Vol. 1 – Investigative Procedures § 60.3(c) (BNA) 60:0001 - 60:0002 (2/88).

69. §§ 16(c), (e)(2), 17 of the FLSA, 29 U.S.C. §§ 216(c), (e)(2), 217.

70. *Id.*

71. § 16(b) of the FLSA, 29 U.S.C. § 216(b).

72. *Id.*

73. § 10 of the Portal-to-Portal Act, 29 U.S.C. § 259.

74. 29 C.F.R. § 1621.4.

75. § 11(c) of the FLSA, 29 U.S.C. § 211(c).

76. 29 C.F.R. § 1620.32 (adopting by reference the Labor Department's regulations at 29 C.F.R. part 516).

77. 29 C.F.R. § 1620.32 (b)-(c).

78. 29 C.F.R. § 516.8.

NOTES REGARDING TABLE 4 – FMLA

79. § 106(a)-(b), (d) of the FMLA, 29 U.S.C. § 2616(a)-(b), (d) (referencing the investigatory authority of § 11(a), the recordkeeping requirements of § 11(c), and the subpoena authority of § 9 of the FLSA, 29 U.S.C. §§ 209, 211(a), (c)).

80. § 107 of the FMLA, 29 U.S.C. § 2617.

81. § 107(b)(1) of the FMLA, 29 U.S.C. § 2617(b)(1).

82. *See* SCHNEIDER & STINE, WAGE & HOUR LAW: COMPLIANCE AND PRACTICE (Clark, Boardman, Callaghan, 1995), § 19:02.

83. § 106(a) of the FMLA, 29 U.S.C. § 2616(a) (referencing investigatory authority of § 11(a), of the FLSA, 29 U.S.C. § 211(a)).

84. *See* SCHNEIDER & STINE, WAGE & HOUR LAW: COMPLIANCE AND PRACTICE (Clark, Boardman, Callaghan, 1995), § 19:02.

85. § 106(a) of the FMLA, 29 U.S.C. § 2616(a).

86. *See* § 11(a) of the FLSA, 29 U.S.C. § 211(a).

87. *See* § 9 of the FLSA, 29 U.S.C. § 209 (referencing §§ 9-10 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. §§ 49-50.)

88. *See Cudahy Packing Co. of Louisiana, Ltd., v. Holland,* 315 U.S. 357 (1942).

89. *See* § 9 of the FLSA, 29 U.S.C. § 209 (applying the powers of §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50.)

90. *See* STATE AND FEDERAL WAGE AND HOUR COMPLIANCE GUIDE, *supra*, ¶ 10.02[2][b], at 10-6.

91. § 107(b)(2)-(3), (d) of the FMLA, 29 U.S.C. § 2617(b)(2)-(3), (d).

92. § 107(e) of the FMLA, 29 U.S.C. § 2617(e).

93. § 107(b)(2)-(3), (d) of the FMLA, 29 U.S.C. § 2617(b)(2)-(3), (d).

94. § 107(a) of the FMLA, 29 U.S.C. § 2617(a).

95. § 107(a)(4) of the FMLA, 29 U.S.C. § 2617(a)(4).

96. § 109(b) of the FMLA, 29 U.S.C. § 2619(b).

97. 29 C.F.R. §§ 825.402 - 825.404.

98. § 107(a)(1)(A)(iii) of the FMLA, 29 U.S.C. § 2617(a)(1)(A)(iii).

99. § 106(b) of the FMLA, 29 U.S.C. § 2616(b).

100. 29 C.F.R. § 825.500.

101. § 106(b) of the FMLA, 29 U.S.C. § 2616(b) (referencing § 11(c) of the FLSA, 29 U.S.C. § 211(c)).

102. *See* § 106(c) of the FMLA, 29 U.S.C. § 2616(c).

103. 29 C.F.R. § 825.500(a) - (b).

NOTES REGARDING TABLE 5 – FLSA

104. *See* SCHNEIDER & STINE, WAGE & HOUR LAW: COMPLIANCE AND PRACTICE (Clark, Boardman, Callaghan, 1995), § 19:02.

105. *See id.*

106. *See* STATE AND FEDERAL WAGE AND HOUR COMPLIANCE GUIDE (Warren, Gorham & Lamont, 1996), ¶ 10.02[1][d], page 10-5.

107. §11(a) of the FLSA, 29 U.S.C. § 211(a).

108. § 9 of the FLSA, 29 U.S.C. § 209 (referencing §§ 9-10 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. §§ 49-50.)

109. *See Cudahy Packing Co. of Louisiana, Ltd., v. Holland* , 315 U.S. 357 (1942).

110. § 9 of the FLSA, 29 U.S.C. § 209 (applying the powers of §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50.)

111. *See* STATE AND FEDERAL WAGE AND HOUR COMPLIANCE GUIDE, *supra*, ¶ 10.02[2][b], at 10-6.

112. §§ 16(c), (e)(2), 17 of the FLSA, 29 U.S.C. §§ 216(c), (e)(2), 217.

113. *Id.*

114. § 16(b) of the FLSA, 29 U.S.C. § 216(b).

115. *Id.*

116. § 16(e) of the FLSA, 29 U.S.C. § 216(e); 29 C.F.R. § 580.13; 5 U.S.C. §§ 701-706.

117. § 16(a) of the FLSA, 29 U.S.C. § 216(a).

118. § 10 of the PPA, 29 U.S.C. § 259.

119. 29 C.F.R. § 775.1.

120. § 11(c) of the FLSA, 29 U.S.C. § 211(c).

121. 29 C.F.R. §§ 516.5 - 516.7.

122. 29 C.F.R. § 516.8.

NOTES REGARDING TABLE 6 – EPPA

123. 29 C.F.R. § 801.7(d).

124. § 5(a)(3) of the EPPA, 29 U.S.C. § 2004(a)(3).

125. *Id.*

126. § 5(b) of the EPPA, 29 U.S.C. § 2004(b) (applying the powers of §§ 9-10 of the FTC Act, 15 U.S.C. §§ 49-50.).

127. *Id.*

128. § 6(b) of the EPPA, 29 U.S.C. § 2005(b).

129. *Id.*

130. *Id.*

131. *Id.*

132. § 6(c) of the EPPA, 29 U.S.C. § 2005(c).

133. *Id.*

134. § 6(a) of the EPPA, 29 U.S.C. § 2005(a) (referencing penalty collection procedures of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1853(b)-(e)); 5 U.S.C. §§ 701-706.

135. 29 C.F.R. § 801.1(b).

136. § 5(a)(3) of the EPPA, 29 U.S.C. § 2004(a)(3).

137. 29 C.F.R. § 801.30.

NOTES REGARDING TABLE 8 – USERRA

138. 38 U.S.C. § 4322(a)-(d).

139. 38 U.S.C. § 4326(a).

140. 38 U.S.C. § 4326(b).

141. 38 U.S.C. § 4326(b)-(c).

142. 38 U.S.C. § 4322(d).

143. 38 U.S.C. § 4322(e).

144. 38 U.S.C. § 4323(a)(1).

145. 38 U.S.C. § 4323(c)(1).

146. 38 U.S.C. § 4323(a)(2)(A).

147. 38 U.S.C. § 4323(a)(2)(B)-(C).

APPENDIX III

COMPARISON OF OPTIONS: PLACING GAO, GPO, AND THE LIBRARY UNDER CAA COVERAGE, FEDERAL-SECTOR COVERAGE, OR PRIVATE-SECTOR COVERAGE

The tables in this Appendix detail the principal differences among the three options for coverage of GAO, GPO, and the Library analyzed in Part III of this Report:

(1) CAA Option – Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA. (The Board takes as its model the CAA as it would be modified by enactment of the recommendations made in Part II of this Report.)

(2) Federal-Sector Option – Coverage under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce those laws in the federal sector.

(3) Private-Sector Option – Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce those laws in the private sector.

To make these comparisons, the tables use four side-by-side columns. The first column shows the current regime at each instrumentality, described in four categories: *(a)* substantive rights, *(b)* administrative processes, *(c)* judicial procedures, and *(d)* substantive rulemaking processes, if any. The other three columns compare the current regime with the CAA option, the federal-sector option, and the private-sector option.

Items in the charts are marked with the following codes:

"=" indicates rights and procedures now applicable at the instrumentality that would remain substantially the same if alternative provisions were applied.

"+" indicates rights and procedures not now applicable at the instrumentality that would apply if alternative provisions were applied.

"–" indicates rights and procedures now applicable at the instrumentality that would no longer apply if alternative provisions were applied.

"~" indicates other changes in rights and procedures that would result if alternative provisions were applied.

"*{ }*" indicates the amendments to the CAA proposed in the Board's three specific recommendations set forth in Part II of this Report, which are –

(1) Grant the Office the authority to investigate and prosecute violations of section 207 of the CAA, which prohibits intimidation and reprisal. *(2)* Clarify that section 215(b) of the CAA, which makes applicable the remedies set forth in section 13(a) of the OSHAct, gives the General Counsel the authority to seek a restraining order in district court in case of imminent danger to health or safety. *(3)* Make applicable the record-keeping and notice-posting requirements of the private-sector CAA laws.[1]

The comparisons in these tables address the substantive rights afforded by the CAA or by the provisions of CAA laws[2] and other analogous provisions that apply to federal-sector employers, private-sector employers, or the three instrumentalities. Furthermore, in defining coverage under each option, the Board decided that the application of the CAA or of analogous federal-sector or private-sector provisions should supersede existing provisions affording substantially similar substantive rights or establishing processes and procedures to implement, remedy, or enforce such rights. Applicable provisions affording substantive rights having no analogue in the CAA, and processes to implement, remedy, or enforce such rights, would not be affected by the coverage described in the three options.

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[1] In Part II of the Report, in addition to these three specific recommendations, the Board also made two general recommendations, *see* Sections B.4 and B.5 of Part II, which are not described in the tables in this Appendix. Also not described in the tables are: the modifications that Members Adler and Seitz believe should be made to the CAA, as applied to GAO GPO, and the Library, in order to preserve certain rights now applicable at those instrumentalities, *see* Section D.2 of Part III of this Report; and the recommendations made in Part I of the Report, *see* Sections C.1, C.2.(b), D.1.(b), and D.2.(b) of Part I of the Report.

[2] The term "CAA laws" refers to the eleven laws, applicable in the federal and private sectors, made applicable to the legislative branch by the CAA. The nine private-sector CAA laws are: the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) ("FLSA"), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) ("Title VII"), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) ("ADA"), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) ("ADEA"), the Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.) ("FMLA"), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) ("OSHAct"), the Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 et seq.) ("EPPA"), the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) ("WARN Act"), and section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The two federal-sector CAA laws are: Chapter 71 of title 5, United States Code (relating to federal service labor-management relations) ("Chapter 71"), and the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.).

GENERAL ACCOUNTING OFFICE

TITLE VII, ADEA, and EPA

APPENDIX III, TABLE 1

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Federal-sector provisions of Title VII (§ 717) and the ADEA (§ 15), as well as the EPA, apply to GAO. ***Administrative processes:*** GAO management investigates and decides complaints initially. GAO employees may appeal to the PAB, where the PAB General Counsel may investigate and prosecute the action on behalf of employees. GAO must maintain claims-resolution and affirmative-employment programs, which the PAB evaluates. PAB is administratively part of GAO. Its Members are appointed by the Comptroller General ("CG"); and its General Counsel is selected by, and serves at the pleasure of, the PAB Chair, but is formally appointed by the CG.[1] ***Judicial procedures:*** Title VII and ADEA allow suit and trial *de novo* after exhaustion of administrative remedies, provided the employee has not appealed to the PAB. (The employee may sue either after a final GAO decision or if there is no such decision 180 days after the complaint.) EPA allows suit without administrative remedies having been exhausted. Jury trials are not available for ADEA and EPA claims.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at GAO. ***Administrative processes:*** + Use of model ADR process under CAA is prerequisite to proceeding with complaint. + Administrative processes are more streamlined under the CAA. + The OC would adjudicate claims and appeals. GAO now does this through the PAB; see earlier reference to the institutional structure of the PAB within GAO (in "current regime" column). – The CAA does not provide for investigation and prosecution, which GAO and the PAB now conduct, *{but should do so as to retaliation}*. *{The CAA should require recordkeeping and notice posting}.* ~ CAA confidentiality rules would apply. ~ The CAA does not require EEO programs, including affirmative employment, which are now required of GAO. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA affords jury trials allowed under all laws, including ADEA and EPA.	***Substantive rights:*** = Substantive rights under federal-sector provisions are generally the same as those at GAO. ***Administrative processes:*** = The processes at GAO are modeled generally on those in the federal sector. + EEOC, MSPB, and Special Counsel hear appeals and prosecute violations in the federal sector. GAO now does this through the PAB; see earlier reference to the institutional structure of the PAB within GAO. + GAO would be required to follow EEOC regulations governing agencies' internal claims-resolution procedures and affirmative-employment programs. ***Judicial procedures:*** + Whereas PAB decisions may be reviewed only by appeal to the Federal Circuit, federal-sector procedures allow suit and trial *de novo* even after decision on appeal to the EEOC or MSPB.	***Substantive rights:*** = Substantive rights under private-sector provisions are generally the same as those at GAO. ***Administrative processes:*** + The EEOC investigates and prosecutes in the private sector. GAO now does this through the PAB; see earlier reference to the institutional structure of the PAB within GAO. – The EEOC may be unable to provide timely investigation of all individual charges. – Private-sector provisions do not provide for administrative adjudication and appeal. ~ Employers in the private sector are not required to have claims-resolution or affirmative-employment programs. ***Judicial procedures:*** + Jury trials are available under private-sector procedures for all discrimination laws, including ADEA and EPA. ~ In the private sector, the EEOC can prosecute in district court, whereas prosecution under the GAOPA is before the PAB.

1 *See generally* Section 230 Report at 27-29.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive rights of the ADA apply to GAO, under § 509 of the ADA. ***Administrative processes:*** GAO management investigates and decides complaints initially. The GAOPA provides that GAO employees may appeal discrimination cases to the PAB, where the PAB GC would again investigate and prosecute the action on behalf of the employee; however, the CAA added a provision to the ADA assigning appellate authority to the Comptroller General, and this provision appears inconsistent with the GAOPA provision assigning appellate authority to the PAB.[1] ***Judicial procedures:*** § 509 of the ADA allows suit and trial *de novo* after exhaustion of administrative remedies, provided the employee has not appealed to the PAB. (The employee may sue either after a final GAO decision or if there is no such decision 180 days after the complaint.) Jury trials and compensatory damages are arguably not available in disability suits against GAO.[2]	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at GAO. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The OC would adjudicate claims and appeals. The GAOPA provides that this be done through the PAB; but see discussion in the "current regime" column on the apparent inconsistency between the ADA and the GAOPA regarding the PAB's appellate authority; see also the discussion in Table 1 on the institutional structure of the PAB within GAO. + Administrative processes are more streamlined under the CAA. – The CAA does not provide for investigation and prosecution, which GAO and, arguably, the PAB now conduct, *{but the CAA should do so as to retaliation}.* *{The CAA should require recordkeeping and notice posting}*. ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA allows jury trials and compensatory damages, which are arguably not afforded at GAO.	***Substantive rights:*** = Substantive rights under federal-sector provisions of the Rehabilitation Act, 29 U.S.C. § 791, are generally the same as those at GAO. ***Administrative processes:*** = The processes at GAO are modeled generally on those in the federal sector. + Federal sector provisions authorize EEOC, MSPB, and Special Counsel to hear appeals and prosecute; see earlier discussions regarding the PAB's appellate authority and the institutional structure of the PAB within GAO. ~ Unlike ADA provisions now applicable at GAO, federal-sector provisions require affirmative-employment programs. ***Judicial procedures:*** + Jury trials and compensatory damages, arguably not available in disability suits against GAO, are afforded under federal-sector provisions.	***Substantive rights:*** = Substantive rights under private-sector provisions of the ADA are generally the same as those at GAO. ***Administrative processes:*** + The EEOC investigates in the private sector; see earlier discussions regarding the PAB's appellate authority and the institutional structure of the PAB within GAO. – The EEOC may be unable to provide timely investigation of all individual charges. – Private-sector provisions do not provide for administrative adjudication and appeal. ***Judicial procedures:*** + Jury trials and compensatory damages, arguably not available in disability suits against GAO, are afforded under private-sector provisions. + EEOC prosecutes private-sector violations in district court; as to GAO, there is no prosecution in district court, and it is uncertain whether the authority for prosecutions of ADA violations to be brought before the PAB is preserved in statute.

1 The GAOPA provides, among other things, that the PAB will exercise the same authorities over appeals matters as are exercised by the EEOC. *See* 31 U.S.C. § 732(f)(2); *see also* § 3(g)(3) of Pub. Law No. 96-191, 94 Stat. 28-29 (Feb. 15, 1980) (GAOPA as enacted). However, § 509(a) of the ADA, 42 U.S.C. § 12209(a), as added by § 201(c)(5) of the CAA, generally assigns authority for administrative appeals to the "chief official of the instrumentality of Congress." GAO, in comments submitted to assist the Board in preparing its Section 230 Study, noted this apparent statutory inconsistency and recommended that the relevant language of the ADA should be rescinded.

2 42 U.S.C. § 1981a(a)(2), which generally authorizes jury trials and compensatory damages in disability suits, does not reference § 509(a) of the ADA, 42 U.S.C. § 12209(a), as added by § 201(c)(5) CAA, which extends a private right of action for disability discrimination to GAO employees.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: FMLA provisions for the private sector, 29 U.S.C. § 2611 *et seq.*, apply to GAO. ***Administrative processes:*** The FMLA provides no administrative procedures, but requires the Comptroller General ("CG") to exercise DoL's authority to investigate and prosecute FMLA violations. Under the GAOPA, if a dispute is otherwise appealable (*e.g.*, involving an "adverse action" or "prohibited personnel practice"), the PAB may remedy an FMLA violation, and the PAB GC will investigate and prosecute the complaint. ***Judicial procedures:*** GAO employees may sue for FMLA violations, and are granted liquidated or other damages specified in the private-sector statute. Jury trials, not being expressly provided by the FMLA, are arguably not allowed against the Federal government. PAB decisions may be appealed to the Federal Circuit. ***Substantive rulemaking process:*** The CG exercises DoL's authority under the FMLA to adopt substantive regulations.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at GAO. + Eligibility would be portable if an employee transferred between GAO and another employing office covered under the CAA, but is not now portable to or from GAO. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + Any FMLA complaint may be adjudicated under the CAA, whereas violations may now be remedied by the PAB only in adverse actions otherwise appealable. Also, *see* discussion of PAB in Table 1. ~ The CAA does not provide for investigation and prosecution, which the PAB GC conducts for cases before the PAB, *{but the CAA should do so as to retaliation}*. ~ CAA does not require recordkeeping and notice posting, which are now required at the GAO, *{but the CAA should do so}*. ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides jury trials, which are arguably not available now against GAO. ***Substantive rulemaking process:*** + The OC Board adopts regulations, ordinarily the same as DoL's, for all employing offices; GAO is responsible currently for issuing its own regulations.	***Substantive rights:*** + Federal-sector provisions establish different employer prerogatives than do the private-sector provisions now applicable at GAO.[1] + Eligibility would be portable if an employee transferred between GAO and another employing agency under federal-sector coverage, but is not now portable to or from GAO. ***Administrative processes:*** + The MSPB remedies FMLA violations implicated in appealable adverse actions in the federal sector. Processes before the PAB are modeled on those at the MSPB, but see discussion in Table 1 on the institutional structure of the PAB within GAO. ***Judicial procedures:*** – Federal-sector employees, unlike those at GAO, cannot sue under the FMLA, and can only obtain appellate judicial review of MSPB decisions in the Federal Circuit. – Federal-sector employees cannot recover liquidated or other damages specified in private-sector statute, as can GAO employees. ***Substantive rulemaking process:*** + OPM's regulations apply Government-wide, whereas GAO is responsible for issuing its own FMLA regulations.	***Substantive rights:*** = Substantive FMLA provisions for the private sector apply at GAO. ***Administrative processes:*** + DoL receives complaints and investigates FMLA violations in the private sector. Now, GAO is responsible for exercising DoL's FMLA authorities for itself. – No administrative adjudication is afforded in the private sector. Now at GAO, the PAB adjudicates allegations of FMLA violation if the adverse action is appealable.[2] ~ Private-sector FMLA provisions require DoL to attempt to resolve complaints while they are under investigation, but does not establish a process of administrative adjudication, such as is provided by the PAB. ***Judicial procedures:*** + Jury trials, arguably not available against GAO, are allowed in the private sector. + DoL prosecutes violations in court; now GAO may exercise DoL's authorities for itself. ***Substantive rulemaking process:*** + Regulations are issued by DoL for all private-sector employers, whereas GAO is responsible for issuing its own regulations.

1 Under private-sector provisions applicable at GAO, but not under federal-sector provisions: *(1)* the employer may deny restoration to an employee who is a high-salary "key" employee; *(2)* an employer can make a binding election as to whether an employee taking FMLA leave must consume any available paid annual or sick leave or must, instead, to take unpaid leave; and *(3)* the employer can recoup health insurance costs from an employee who does not return to work after FMLA leave.

2 This table assumes that, under the private sector option, the PAB's authority to remedy FMLA violations would not be retained, because administrative adjudication and appeal are not provided under private-sector laws.

GAO: FAIR LABOR STANDARDS ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: GAO is covered by the FLSA and by OPM's FLSA regulations. GAO is also covered by civil service statutes that authorize compensatory time off, credit hours, and compressed work schedules ("comp time") in exception to FLSA overtime pay. ***Administrative processes:*** A GAO employee who alleges an FLSA violation may submit a complaint to OPM, either immediately or after having first complained under GAO's administrative grievance procedures. GAO must provide any information requested by OPM and is legally bound by OPM's administrative decision. ***Judicial procedures:*** GAO employees may sue. Jury trials, not being expressly provided by the FLSA, are arguably not allowed against the Federal government. ***Substantive rulemaking process:*** GAO is subject to OPM's Government-wide substantive regulations implementing the FLSA and civil service provisions allowing comp time in lieu of FLSA pay.	***Substantive rights:*** ~ The CAA would preclude receipt of comp time in lieu of FLSA overtime pay. ~ DoL's regulatory requirements would apply in lieu of OPM's, which are more specific and tailored to the federal civil service. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. ~ Complaints may be submitted for administrative adjudication, unlike present FLSA complaints against GAO decided by OPM without adjudication. – Under the CAA, information is developed only through the parties' discovery; now OPM can request necessary information from GAO. *{The CAA should provide for investigation and prosecution as to retaliation.}* *{The CAA should require recordkeeping and notice posting.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Jury trials are provided, which are arguably not now available against GAO. ***Substantive rulemaking process:*** ~ CAA substantive regulations are adopted for the legislative branch by the OC Board, subject to House and Senate approval; whereas GAO is now subject to regulations promulgated primarily for the executive branch by OPM, which is overseen by the President.[1]	= GAO is covered by generally the same substantive, administrative, and judicial statutory provisions and OPM regulations and authorities as apply in the federal sector.	***Substantive rights:*** ~ Private-sector employers are not covered by civil service provisions authorizing receipt of comp time in lieu of FLSA overtime pay.[2] ~ Under private sector provisions, GAO would become subject to DoL's substantive regulations in lieu of OPM's, which are more specific and tailored to the federal civil service. ***Administrative processes:*** – Whereas GAO is now bound by OPM's administrative decisions, private-sector employers are not bound by DoL's determinations unless DoL sues and prevails in court. ***Judicial procedures:*** + Jury trials, which are arguably not now available against GAO, are available under private-sector procedures. ***Substantive rulemaking process:*** ~ For the private sector, regulations are promulgated by DoL; whereas GAO is now subject to regulations promulgated by OPM.

1 The head of OPM is appointed by, and serves at the pleasure of, the President, and acts for the President in many of OPM's personnel functions.

2 This table assumes that, under the private-sector option, the receipt of comp time in lieu of overtime pay would generally not be allowed. Although the same FLSA provisions apply in the federal sector and the private sector, the civil service statutes that authorize the use of comp time apply only in the federal sector.

GAO: EMPLOYEE POLYGRAPH PROTECTION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: § 204 of the CAA extends the substantive rights of the EPPA to GAO. ***Administrative processes:*** There is disagreement as to whether GAO employees alleging a violation of § 204 may use CAA administrative procedures. There is disagreement whether GAO employees may seek a remedy for a § 204 violation from the PAB even when the adverse action is appealable under the GAOPA. ***Judicial procedures:*** There is disagreement as to whether GAO employees may sue under the CAA. If an employee seeks a remedy from the PAB in the case of an appealable adverse action, there may be disagreement whether the decision may be appealed to the Federal Circuit. ***Substantive rulemaking process:*** The OC Board has issued EPPA regulations, substantially similar to those promulgated by DoL, and has extended the regulations to cover GAO, but the extension has not been approved by the House and Senate. Accordingly, § 411 of CAA would apply "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding."	***Substantive rights:*** = GAO is covered under EPPA substantive rights as applied by the CAA. ***Administrative processes:*** + If CAA procedures applied, use of model ADR process would be prerequisite to proceeding with complaint. + Applying CAA procedures would allow administrative adjudication by the OC and appeal to its Board, whereas adjudication and appeal by the PAB are permitted, if at all, only in an adverse action otherwise appealable. – The CAA does not provide for investigation or prosecution, whereas the PAB GC now arguably can do so for cases appealable to the PAB, *{but the CAA should provide for investigation and prosecution as to retaliation}*. *{The CAA should require recordkeeping.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant GAO employees the right to sue and, if pursuing an administrative claim, to obtain appellate judicial review. ***Substantive rulemaking process:*** = Substantive regulations under the CAA are now promulgated by the same process for GAO as for other employing offices.	– EPPA rights do not apply generally in the federal sector.[1]	***Substantive rights:*** = GAO is covered under EPPA substantive rights as applied by the CAA. ***Administrative processes:*** + Under private-sector procedures, DoL would receive complaints from GAO employees and investigate violations. – Private-sector provisions do not provide for administrative adjudication and appeal. Now there is disagreement whether these are available under the CAA, and whether the PAB may adjudicates CAA charges in appealable adverse actions.[2] ***Judicial procedures:*** + Applying private-sector procedures would enable GAO employees to sue, whereas the right to sue under the CAA now is subject to dispute. + DoL can prosecute private-sector violations in court. Even if CAA or PAB procedures apply, they would not include prosecution in court. ***Substantive rulemaking process:*** ~ Regulations are promulgated by DoL for all private-sector employers; regulations now applicable to GAO, which must generally be the same as DoL's regulations, are adopted by the OC Board for all employing offices, subject to House and Senate approval.

1 To our knowledge, the only federal-sector application of EPPA and WARN Act rights, other than under the CAA, is under the Presidential and Executive Office Accountability Act, 3 U.S.C. § 401 et seq., which generally covers Presidential and Vice Presidential offices. Administrative and judicial procedures and rulemaking processes with respect to EPPA and WARN Act rights under this law are similar to those under the CAA, except regulations are issued by the President or the President's designee, and administrative adjudication is before the MSPB.

2 This table assumes that, under the private-sector option, the PAB would not have authority to remedy EPPA violations, since administrative adjudication and appeal are not provided under laws that apply in the private sector.

GAO: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: § 205 of the CAA extends the substantive rights of the WARN Act to GAO. In addition, GAO regulations under the GAOPA require 60 days' advance notice to GAO employees affected by a RIF.[1] ***Administrative processes:*** There is disagreement as to whether GAO employees alleging a violation of § 205 may use CAA administrative procedures. There is disagreement whether GAO employees may seek a remedy for a § 205 violation from the PAB even when the adverse action is appealable under the GAOPA. ***Judicial procedures:*** There is disagreement whether GAO employees may sue under the CAA. ***Substantive rulemaking process:*** The OC Board issued WARN Act regulations, substantially similar to those promulgated by DoL, and extended them to cover GAO, but the extension has not been approved by the House and Senate. Accordingly, § 411 of CAA would apply "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding."	***Substantive rights:*** = GAO is covered under WARN Act substantive rights as applied by the CAA. ***Administrative processes:*** + If CAA procedures applied, use of model ADR process would be prerequisite to proceeding with complaint. + Applying CAA procedures would allow administrative adjudication by the OC and appeal to its Board, whereas there is disagreement whether the PAB may adjudicate any CAA violation. – The CAA does not provide for investigation or prosecution, whereas the PAB GC now arguably could do so for cases appealable to the PAB, *{but the CAA should provide for investigation and prosecution of retaliation}*. ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant GAO employees the right to sue and, if they pursue an administrative claim, to obtain appellate judicial review. ***Substantive rulemaking process:*** = Substantive regulations under the CAA are now promulgated by the same process for GAO as for other employing offices.	– WARN Act rights do not apply generally in the federal sector.[2] (Federal-sector employees in the competitive service are entitled to 60 days' notice of a RIF, pursuant to applicable civil service statutes and regulations. However, this table makes no assumptions as to whether GAO's existing regulations and remedies involving RIFs would be retained, or whether general civil service statutes and regulations governing RIFs would be applied to GAO. *See generally* footnote 1.)	***Substantive rights:*** = GAO is covered under WARN Act substantive rights as applied by the CAA. ***Administrative processes:*** – Private-sector provisions do not provide for administrative adjudication and appeal. Now there is disagreement whether these are available under the CAA, and whether the PAB may adjudicate CAA complaints.[3] ***Judicial procedures:*** + Applying private-sector procedures would enable GAO employees to sue, whereas the right to sue under the CAA now is subject to dispute. ***Substantive rulemaking process:*** ~ Regulations are promulgated by DoL for all private-sector employers; regulations now applicable to GAO, which must generally be the same as DoL's regulations, are adopted by the OC Board for all employing offices, subject to House and Senate approval.

1 A GAO employee alleging defective notice under GAO's regulations may seek a remedy from the PAB, and the PAB GC will investigate and pursue the employee's complaint. There is no right to sue, but PAB decisions are appealable to the Federal Circuit. This table assumes that under either the CAA option or private-sector option, existing procedures for remedying violations of GAO's RIF regulations need not be changed. Notice rights under GAO's RIF regulations seem sufficiently distinct from WARN Act rights that the existing GAO procedures need not be superseded by application of WARN Act rights under the CAA or under the WARN Act itself.

2 To our knowledge, the only federal-sector coverage other than the CAA is under the Presidential and Executive Office Accountability Act. *See* Table 5, note 1, above.

3 This table assumes that, under the private-sector option, the PAB would not have authority to remedy WARN Act violations, since administrative adjudication and appeal are not provided under laws that apply in the private sector.

GAO: VETERANS EMPLOYMENT AND REEMPLOYMENT

APPENDIX III, TABLE 7

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: GAO employees, like all other public- and private-sector employees, are covered by USERRA. In addition, § 206 of the CAA extends the substantive rights of USERRA to GAO. ***Administrative processes:*** Under USERRA, GAO employees may: *(1)* file a complaint with DoL, which investigates and informally seeks compliance, *(2)* ask the Special Counsel to prosecute the case, and/or *(3)* submit the case to the MSPB for adjudication. There is disagreement as to whether a GAO employee alleging a § 206 violation may use CAA administrative procedures. ***Judicial procedures:*** USERRA does not authorize Federal employees, including those at GAO, to sue, but MSPB decisions are appealable to the Federal Circuit. There is disagreement as to whether GAO employees may sue under the CAA.	***Substantive rights:*** = GAO is covered under USERRA rights as applied by the CAA, as well as under USERRA itself, which applies substantially the same rights as the CAA. ***Administrative processes:*** + If CAA procedures applied, use of model ADR process would be a prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication administered by the OC, *{and the CAA should also provide for investigation and prosecution of retaliation}*. = These CAA procedures would be in addition to those under USERRA, by which GAO employees may now file claims seeking DoL investigation and may request prosecution by the Special Counsel and/or adjudication before the MSPB.[1] ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA judicial procedures would grant GAO employees the right to sue for § 206 violations; GAO employees are not afforded a private right of action under USERRA.	***Substantive rights:*** = GAO is covered under the same substantive USERRA provisions as apply generally to the federal sector, and is also covered under the CAA, which makes applicable substantially the same rights as the USERRA applies in the federal sector. ***Administrative processes:*** = GAO employees may use the same USERRA procedures as used by federal-sector employees to file complaints seeking DoL investigation and ask the Special Counsel to prosecute and/or ask MSPB to adjudicate the case. – However, it is arguable that GAO employees may also now use CAA counseling, mediation, and adjudicatory procedures, which are not available generally in the federal sector. ***Judicial procedures:*** – There is no private right of action for federal-sector employees, whereas GAO employees may, at least arguably, sue under the CAA.	***Substantive rights:*** = Substantive USERRA provisions that apply to the private sector also apply to GAO, and generally the same rights are also made applicable to GAO by the CAA. ***Administrative processes:*** = Private-sector employees, as well as GAO employees, may submit complaints to DoL, which investigates and informally seeks compliance. – Private-sector provisions do not provide for administrative adjudication of complaints. Now GAO employees may ask the Special Counsel to prosecute the complaint before the MSPB, and there is disagreement whether administrative adjudication and appeal are available under the CAA. ***Judicial procedures:*** + Applying private-sector procedures would enable GAO employees to sue, whereas the right of GAO employees to sue under the CAA is now subject to dispute. + Private-sector employees may ask the Attorney General to prosecute the complaint in court; now the Special Counsel may prosecute only before the MSPB.

1 This table assumes that, under the CAA option, the existing remedial procedures under the USERRA would be retained. § 225(d) of the CAA states that a covered employee "may also utilize any provisions of . . . [USERRA] that are applicable to that employee."

GAO: ADA TITLES II-III

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive rights of the ADA, including those involving public access, apply to GAO, under § 509 of the ADA. ***Administrative processes:*** GAO must maintain administrative procedures under which members of the public can seek redress for ADA violations. GAO investigates complaints and provides for appeal within the agency. There is no administrative appeal to an entity outside of GAO, nor other outside agency oversight of compliance by GAO. ***Judicial procedures:*** After having exhausted administrative remedies, members of the public can sue and have a trial *de novo*. (An individual may sue either after a final GAO decision or if there is no such decision 180 days after the complaint.) ***Substantive rulemaking process:*** Substantive regulations promulgated by executive branch agencies under titles II-III of the ADA are not made applicable.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as the public-access rights now at GAO under the ADA. – The prohibition against retaliation, which applies now at GAO under the ADA to all individuals, is not granted under the CAA to members of the public. ***Administrative processes:*** + The CAA provides for mediation and adjudication administered by the OC; now, as to allegations against GAO, no such procedures are provided under authority of an entity outside of GAO. + The CAA establishes an enforcement-based process, under which an administrative proceeding may be commenced only by the GC of the OC after receiving a charge. Enforcement at GAO now is by private action only. ~ CAA confidentiality rules would apply to mediations, hearings, and deliberations. ***Judicial procedures:*** – The charging individual may not sue under the CAA. However, such individual, having intervened in the CAA administrative proceeding, may appeal to the Federal Circuit. ***Substantive rulemaking process:*** + The OC Board promulgates regulations, generally the same as executive-branch agency regulations for the private sector, subject to House and Senate approval.[1] No entity outside of GAO now issues regulations applicable to GAO.	***Substantive rights:*** = For the federal sector, § 504 of the Rehabilitation Act applies substantive rights that are generally the same as the public-access rights now applicable to GAO under the ADA. ***Administrative processes:*** = In the federal sector, as at GAO, agencies have established internal procedures for investigating and resolving public-access complaints. + The Attorney General is responsible under E.O. 12250 (reproduced at 42 U.S.C. § 2000d–1 note) for reviewing agency regulations and otherwise coordinating implementation and enforcement; now, as to GAO, no such authority has been granted to an entity outside of GAO. ***Judicial procedures:*** = In the federal sector, as at GAO, members of the public alleging public-access violations by agencies may sue. ***Substantive rulemaking process:*** = In the federal sector, as at GAO, substantive regulations promulgated by executive branch agencies under titles II-III of the ADA are not made applicable.	***Substantive rights:*** = For the private sector, title III of the ADA applies generally the same substantive rights involving public access as are applicable to GAO under the ADA. ***Administrative processes:*** + Under title III of the ADA, the Attorney General investigates alleged violations in the private sector; now, as to allegations against GAO, no such authority has been granted to an entity outside of GAO. ***Judicial procedures:*** = In the private sector, as now at GAO, members of the public alleging public-access violations may sue. + The Attorney General may prosecute title III violations in court, whereas no agency may do so now as to GAO. ***Substantive rulemaking process:*** + Private-sector employers are subject to substantive regulations promulgated by the Attorney General. No entity outside of GAO now promulgates regulations for GAO.

1 Because the regulations have not been approved, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Section 215 of the CAA extends the substantive rights of the OSHAct to GAO, and requires compliance with occupational safety and health ("OSH") standards as established by DoL. ***Administrative processes:*** The administrative procedures of § 215 of the CAA apply fully to GAO. Requirements to keep records and report to DoL are imposed by the OSHAct and civil service law. ***Judicial procedures:*** The judicial procedures of § 215 of the CAA apply fully to GAO. ***Substantive rulemaking process:*** The OC Board has adopted substantive OSH regulations incorporating DoL's OSH standards, and has adopted an amendment extending those regulations to cover GAO. However, neither the regulations nor the amendment has been approval by the House and Senate. Accordingly, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.	= GAO is fully subject to the substantive, administrative, and judicial provisions of the CAA with respect to occupational safety and health, including the process for imposing regulatory requirements. ~ *{The CAA should include recordkeeping and reporting requirements administered by the OC},* whereas law now applicable to GAO requires recordkeeping and reporting to DoL. *{The CAA should provide for investigation and prosecution of retaliation.}*	***Substantive rights:*** = E.O. 12196 (reproduced at 5 U.S.C. § 7902 note) requires executive branch agencies to comply with the same DoL standards as are made applicable to employing offices, including GAO, under the CAA. ***Administrative processes:*** ~ E.O. 12196 requires DoL to inspect and consider employee complaints; the CAA is administered for all employing offices, including GAO, by the OC. Unlike the CAA, the E.O. also requires each agency to establish its own OSH program.[1] ~ If DoL and the employing agency disagree, there is no adjudicatory or other formal dispute resolution process under the E.O., as there is under the CAA. Rather, the disagreement is submitted to the President. ***Judicial procedures:*** – There is no judicial review of actions or decisions under the E.O., unlike the CAA, which provides for appellate judicial review of administrative decisions. ***Substantive rulemaking process:*** ~ The E.O was issued for the executive branch by the President; CAA regulations, which are applicable to GAO, are adopted by the OC Board, subject to approval by the House and Senate.	***Substantive rights:*** = In the private sector, the OSHAct applies the same DoL standards as are made applicable to employing offices, including GAO, under the CAA. ***Administrative processes:*** = Administrative processes for the private sector are generally the same as those made applicable for employing offices, including GAO, by the CAA. ~ DoL administers the OSHAct in the private sector; the CAA is administered for employing offices, including GAO, by OC. ***Judicial procedures:*** = Judicial review procedures in the private sector are generally the same as those made applicable for employing offices, including GAO, under the CAA. ~ DoL investigates and prosecutes private-sector retaliation. The CAA, which now covers GAO, grants no such authority, *{but it should}*; employees alleging retaliation can sue under the CAA, but cannot under private-sector provisions. ***Substantive rulemaking process:*** ~ DoL promulgates standards for all private-sector employers. The OC Board adopts CAA regulations, generally the same as DoL regulations, but, as the House and Senate have not approved the Board's OSHAct regulations, § 411 of CAA would cause "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" to be applied.

1 The program must include periodic inspections, responding to employee reports of hazard, preventing retaliation, and creating a joint labor-management Occupational Safety and Health Committee.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: The GAOPA requires the Comptroller General to adopt a labor-management-relations program for GAO that assures each employee's right to join, or to refrain from joining, a union, and is otherwise "consistent" with Chapter 71. ***Administrative processes:*** Under the GAOPA and the CG's implementing regulations, the PAB has authority to hear cases arising from representation matters, unfair labor practices ("ULPs"), and exceptions from arbitral awards under negotiated grievance procedures. ***Judicial procedures:*** PAB decisions on matters other than representation may be appealed to the Federal Circuit. Any person aggrieved, including an individual employee, may bring an appeal. ***Substantive rulemaking process:*** The CG, by order, established the substantive terms of GAO's labor-management relations program. The GAOPA requires generally that the program must be "consistent" with Chapter 71.	***Substantive rights:*** + The CAA affords greater scope to collective bargaining than GAO's order.[1] – The CAA empowers the Board, with House and Senate approval, to exclude offices from coverage under labor-management relations provisions if exclusion is required because of conflict of interest or Congress's constitutional responsibilities; the GAOPA has no such provision. ***Administrative processes:*** = The OC Board under the CAA exercises a role generally similar to that of the PAB. + See discussion in Table 1 on institutional structure of the PAB within GAO. – Under the CAA, unlike under the GAOPA, employees may not pursue ULP claims individually. – The CAA, unlike the GAOPA, affords no administrative (or judicial) review of arbitral awards involving adverse or unacceptable-performance actions. ~ CAA confidentiality rules would apply to hearings and deliberations. ***Judicial procedures:*** – The CAA, unlike the GAOPA, precludes the charging party from appealing a ULP decision. ***Substantive rulemaking process:*** + The OC Board adopts CAA regulations, ordinarily the same as the FLRA's regulations, for all employing offices; whereas GAO issues regulations for itself, "consistent" with Chapter 71.	***Substantive rights:*** + Chapter 71 affords greater scope to collective bargaining than the GAO regulations. *See* footnote 1. ***Administrative processes:*** + The FLRA administers Chapter 71 in the federal sector. *See* discussion in Table 1 on institutional structure of the PAB within GAO. ~ Chapter 71, unlike the GAOPA, provides that arbitral awards involving adverse agency actions may not be appealed administratively, but must be appealed directly to the Federal Circuit. ***Judicial procedures:*** = Chapter 71 provides for judicial appeal to the Federal Circuit generally, as does the GAOPA. + Chapter 71, unlike the GAOPA, authorizes the FLRA to seek restraining orders. ***Substantive rulemaking process:*** + Under Chapter 71, substantive provisions applicable in the executive branch are established mostly by statute, and to a limited extent by FLRA regulation, which must conform to Chapter 71. GAO issues labor-management regulations for itself, which need be only "consistent" with Chapter 71.	***Substantive rights:*** + Private-sector employees, covered by the National Labor Relations Act ("NLRA"), have the right to strike. ~ Unions and employers in the private sector may enter into union security agreements. ~ Unions in the private sector, if the employer agrees, may obtain exclusive recognition by card majority (*i.e.*, without secret ballot election). ***Administrative processes:*** ~ Grievance procedures are not a required provision of any bargaining agreement in the private sector, as they are at GAO. ~ Awards under binding arbitration are not ordinarily subject to review, as they are under the GAOPA. ***Judicial procedures:*** ~ NLRB decisions are appealable to the D.C. Circuit or the Circuit where the employer is located; under the GAOPA, PAB decisions are appealable to the Federal Circuit. ***Substantive rulemaking process:*** + The NLRB has authority to issue substantive regulations for the private sector; GAO issues labor-management regulations for itself, which need be only "consistent" with Chapter 71.

1 For example, the following restrictions apply at GAO: *(a)* exclusion of pay and hours from bargaining, even insofar as the employer has statutory discretion, *(b)* exclusion from negotiated grievance procedures of disputes involving Title VII, ADEA, and ADA violations, or involving actions for unacceptable performance, and *(c)* pre-determined, broadly-drawn bargaining units.

GOVERNMENT PRINTING OFFICE

TITLE VII, ADEA, and EPA

APPENDIX III, TABLE 11

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Federal-sector provisions of Title VII (§ 717) and the ADEA (§ 15), as well as the EPA, apply to GPO. ***Administrative processes:*** GPO management investigates and decides complaints initially. The EEOC and MSPB hear appeals, and the Special Counsel may investigate and prosecute against unlawful discrimination and retaliation that is a "prohibited personnel practice." Negotiated grievance procedures (binding arbitration and review by the FLRA or the Federal Circuit) may also be used. GPO is subject to EEOC regulations governing claims-resolution and affirmative-employment programs, and EEOC evaluates GPO's performance. ***Judicial procedures:*** Title VII and ADEA allow suit and trial *de novo* after exhausting administrative remedies. (The employee may sue either after a final GPO decision, or after a final EEOC decision on appeal, or if there is no such decision 180 days after the complaint or appeal.)[1] EPA allows suit without having exhausted administrative remedies. Jury trials are not available for ADEA and EPA claims.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at GPO. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. ~ CAA claims are handled administratively by the OC, rather than by GPO management, EEOC, MSPB, and Special Counsel. + Administrative processes are more streamlined under the CAA. – The CAA does not provide for investigation and prosecution, which GPO and Special Counsel now conduct, *{but should do so as to retaliation}*. *{The CAA should require recordkeeping and notice posting}*. ~ CAA confidentiality rules would apply. ~ The CAA does not require EEO programs, including affirmative employment, which are now required at GPO. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA allows jury trials under all laws, including ADEA and EPA.	= The same substantive, administrative, and judicial provisions that apply generally in the federal sector cover GPO, and the authority of the EEOC, MSPB, and the Special Counsel extend to GPO.	***Substantive rights:*** = Substantive rights under private sector provisions are generally the same as those at GPO. ***Administrative processes:*** – The EEOC may be unable to provide timely investigation of all individual charges. – Private-sector provisions do not provide for administrative adjudication and appeal. ~ Employers in the private sector are not required to have claims resolution or affirmative-employment programs. ***Judicial procedures:*** + Jury trials are available under private-sector procedures for all discrimination laws, including ADEA and EPA. ~ In the private sector, the EEOC can prosecute in court, whereas prosecution now at GPO is before the MSPB only.

1 An employee asserting a "mixed case" complaint may also sue either if there is no GPO decision 120 days after the complaint, or after a final decision by the MSPB on appeal, or if there is no decision by the MSPB 120 days after an appeal to the MSPB.

GPO: ADA TITLE I and REHABILITATION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive rights of the ADA apply to GPO, under § 509 of the ADA. ***Administrative processes:*** GPO management investigates and decides complaints. There is generally no administrative appeal from the Public Printer's final decision (apart from negotiated grievance procedures.). Negotiated grievance procedures (binding arbitration and review by the FLRA or the Federal Circuit) may also be used. ***Judicial procedures:*** § 509 of the ADA allows suit and trial *de novo* after exhausting administrative remedies. (The employee may sue either after a final GPO decision or if there is no such decision 180 days after the complaint.) Jury trials and compensatory damages are arguably not available in disability suits against GPO.[1]	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at GPO. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The CAA provides for adjudication and appeal administered by the OC. Currently as to allegations against GPO, there is no administrative appeal to an entity outside of GPO. + Administrative processes are more streamlined under the CAA. ~ The CAA does not provide for investigation and prosecution, whereas GPO now investigates charges, *{but the CAA should provide for investigation and prosecution of retaliation}*. *{The CAA should require recordkeeping and notice posting}*. ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA provides jury trials and compensatory damages in disability suits, which are arguably not afforded against GPO.	***Substantive rights:*** = Substantive rights under federal-sector provisions of the Rehabilitation Act, 29 U.S.C. § 791, are generally the same as those at GPO. ***Administrative processes:*** = The processes at GPO are modeled generally on those in the federal sector. + Federal sector provisions authorize EEOC, MSPB, and Special Counsel to hear appeals and prosecute. Currently as to allegations against GPO, no such authorities have been granted to an entity outside of GPO. ~ Federal-sector provisions, unlike ADA provisions now applicable to GPO, require affirmative-employment programs. ***Judicial procedures:*** = The right to sue GPO is generally the same as in the federal sector. + Jury trials and compensatory damages, which are arguably not available in disability suits against GPO, are afforded under federal-sector provisions.	***Substantive rights:*** = Substantive rights under private-sector provisions of the ADA are generally the same as those at GPO. ***Administrative processes:*** + Private-sector provisions authorize the EEOC to investigate and prosecute. Now, as to allegations against GPO, no such authorities have been granted to an entity outside of GPO. – The EEOC may be unable to provide timely investigation of all individual charges. – Private-sector provisions do not provide for administrative adjudication. ***Judicial procedures:*** + Jury trials and compensatory damages, arguably not available in disability suits against GPO, are afforded under private-sector provisions. + In the private sector, the EEOC can prosecute in court.

1 42 U.S.C. § 1981a(a)(2), which generally authorizes jury trials and compensatory damages in disability suits, does not reference § 509(a) of the ADA, 42 U.S.C. § 12209(a), as added by § 201(c)(5) of the CAA, which extends a private right of action for disability discrimination to GPO employees.

GPO: FAMILY AND MEDICAL LEAVE ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: FMLA provisions for the federal sector, 5 U.S.C. § 6381 *et seq.*, as well as OPM's substantive FMLA regulations, apply. ***Administrative processes:*** The FMLA provides no administrative remedy, but GPO employees may seek a remedy through GPO's administrative grievance procedure, or from the MSPB if the agency action is appealable under civil service law (*e.g.*, involving an "adverse action" or "performance-based action" or "prohibited personnel practice"). Negotiated grievance procedures may also be used. ***Judicial procedures:*** Applicable FMLA provisions do not provide the right to sue and do not grant liquidated or other damages specified in the FMLA for private sector employees. Decisions of the MSPB are appealable to the Federal Circuit under general civil service law. ***Substantive rulemaking process:*** GPO is subject to OPM's Government-wide substantive regulations implementing the federal-sector FMLA provisions.	***Substantive rights:*** – The CAA establishes different employer prerogatives than the federal-sector provisions now at GPO.[1] ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + CAA provides adjudication of any FMLA complaint, whereas now at GPO, the MSPB remedies FMLA violations only if the agency action is otherwise appealable. – Retaliation by GPO is now investigated and prosecuted by the Special Counsel. The CAA does not now provide for investigation and prosecution of retaliation, *{but it should}.* *{The CAA should require recordkeeping and notice posting.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA affords a private right of action, which is not available now at GPO. ***Substantive rulemaking process:*** ~ CAA substantive regulations are adopted for the legislative branch by the OC Board, subject to House and Senate approval; whereas GPO is now subject to regulations adopted primarily for the executive branch by OPM, which is overseen by the President. (On OPM, *see* footnote at page 4, note 1, above.)	= With respect to FMLA rights, GPO is under the same substantive, administrative, and judicial statutory provisions as are executive branch agencies, and is subject to the authority of MSPB like executive-branch agencies.	***Substantive rights:*** – Private-sector law establishes different employer prerogatives than the federal-sector provisions now at GPO (*see* footnote 1). ***Administrative processes:*** ~ Under private-sector provisions, DoL receives complaints and investigates FMLA violations, but does not afford administrative adjudication of complaints; whereas now the MSPB adjudicates alleged FMLA violations at GPO, but only if the adverse action is otherwise appealable under civil service law.[2] ***Judicial procedures:*** + Private-sector provisions afford a private right of action, which is not available now at GPO. + DoL prosecutes violations in court. No agency does so now as to allegations of violation in the federal sector, including at GPO. ***Substantive rulemaking process:*** ~ For the private sector, regulations are promulgated by DoL, which is overseen by the President; whereas GPO is now subject to regulations promulgated by OPM, which is also overseen by the President. (*See* Table 4, footnote 1, on OPM.)

1 Under private-sector provisions made applicable under the CAA, but not under federal-sector provisions at GPO: *(1)* the employer may deny restoration to an employee who is a high-salary "key" employee; *(2)* an employer can make a binding election as to whether an employee taking FMLA leave must consume any available paid annual or sick leave or must, instead, take unpaid leave; and *(3)* the employer can recoup health insurance costs from an employee who does not return to work after FMLA leave.

2 This table assumes that, under private-sector coverage, the MSPB would not retain authority to remedy FMLA violations at GPO, because the MSPB has no such authority in the private sector.

GPO: FAIR LABOR STANDARDS ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: GPO is covered by the FLSA and by OPM's substantive FLSA regulations. The Kiess Act, 44 U.S.C. § 305(b), allows GPO to pay salaried employees compensatory time off for overtime work. GPO is also covered by civil service statutes authorizing credit hours and compressed work schedules in exception to FLSA overtime pay. ***Administrative processes:*** A GPO employee alleging a violation may complain to OPM, either immediately or after having first complained under GPO's administrative grievance process. GPO must provide any information requested by OPM, and is legally bound by OPM's administrative decision. Bargaining unit members must use negotiated grievance procedures. ***Judicial procedures:*** GPO employees may sue for FLSA violations. Jury trials, not being expressly provided by the FLSA, are arguably not allowed against the Federal government. ***Substantive rulemaking process:*** GPO is subject to substantive regulations promulgated by OPM implementing the FLSA Government-wide.	***Substantive rights:*** + The CAA would withdraw GPO's authority to require earning of comp time. ~ The CAA would also preclude the receipt of comp time in lieu of FLSA overtime pay. ~ DoL's regulatory requirements would apply in lieu of OPM's, which are more specific and tailored to the federal civil service. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. ~ The CAA provides counseling, mediation, and adjudication administered by the OC, unlike complaints now against GPO, decided by OPM without adjudication. – Under the CAA, information is developed only through the parties' discovery; OPM can currently request necessary information from GPO. *{The CAA should provide for investigation and prosecution as to retaliation.}* *{The CAA should require recordkeeping and notice posting.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides for jury trials, which are arguably not now available against GPO. ***Substantive rulemaking process:*** ~ CAA substantive regulations are adopted for the legislative branch by the OC Board, subject to House and Senate approval; GPO is subject to regulations issued primarily for the executive branch by OPM, which the President oversees. (*See* Table 4, note 1, on OPM.)	***Substantive rights:*** = GPO is covered by generally the same FLSA substantive statutory provisions and OPM's regulations and authorities as apply in the federal sector. + Federal-sector employers cannot require employees to receive comp time in lieu of overtime pay, as GPO can do under the Kiess Act. ***Administrative processes:*** = GPO employees are covered under the same statutory and regulatory provisions governing OPM's receipt and resolution of complaints as federal-sector employees. ***Judicial procedures:*** = GPO employees are covered under the same provisions establishing a private right of action as federal-sector employees. ***Substantive rulemaking process:*** = GPO is covered by generally the same OPM regulations implementing the FLSA as apply in the federal sector. + However, federal-sector employees are also subject to OPM's Government-wide regulations implementing civil service provisions authorizing comp time in lieu of FLSA overtime pay, whereas GPO can issue its own regulations on that subject.	***Substantive rights:*** + Private-sector employers cannot require employees to receive comp time in lieu of overtime pay, as GPO can do. ~ Private-sector employers are not covered by civil service provisions authorizing flexible schedules in exception to FLSA overtime pay requirements.[1] ~ Private-sector provisions would apply DoL's implementing regulations in lieu of OPM's, which are more specific and tailored to the Federal civil service.. ***Administrative processes:*** ~ Whereas GPO is now bound by OPM's administrative decisions on individual complaints, employers under private-sector provisions are not bound by DoL's administrative decisions on complaints unless DoL sues and prevails in court. ***Judicial procedures:*** + Jury trials, which are arguably not now available against GPO, are available under private-sector procedures. ***Substantive rulemaking process:*** ~ For the private sector, regulations are promulgated by DoL; whereas GPO is now subject to regulations promulgated by OPM.

1 This table assumes that, under the private-sector option, the receipt of comp time in lieu of overtime pay would be generally not allowed, because civil service statutes that authorize the use of comp time in exception to FLSA requirements apply only in the federal sector.

GPO: EMPLOYEE POLYGRAPH PROTECTION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
GPO is not covered under EPPA, under §204 of the CAA, or under any other law making applicable the rights of the EPPA.	***Substantive rights:*** + Application of the CAA would extend EPPA substantive rights to GPO. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication administered by the OC. *{The CAA should provide for investigation and prosecution of retaliation.}* *{The CAA should require recordkeeping.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant GPO employees the right to sue and, if they pursue an administrative claim, to obtain appellate judicial review of a final administrative decision. ***Substantive rulemaking process:*** + Under the CAA, substantive regulations would be promulgated for GPO under the same rulemaking process as for other employing offices.	= The rights of the EPPA do not apply generally in the executive branch.[1]	***Substantive rights:*** + The substantive rights of the EPPA apply generally in the private sector. ***Administrative processes:*** + Applying private-sector procedures would authorize DoL to receive complaints from GPO employees and to investigate violations. ***Judicial procedures:*** + Applying private-sector procedures would enable GPO employees to sue. + DoL can prosecute in court. ***Substantive rulemaking process:*** + Applying private-sector provisions would extend substantive regulations issued by DoL to cover GPO.

1 To our knowledge, the only federal-sector coverage other than the CAA is under the Presidential and Executive Office Accountability Act. *See* Table 5, note 1, above.

GPO: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
GPO is not covered under the WARN Act, under § 205 of the CAA, or under any other law making applicable the rights of the WARN Act. (Most GPO employees are "competitive service" employees covered by OPM's RIF regulations and/or are members of bargaining units under collective bargaining agreements, both of which require 60 days' advance notice to employees affected by RIFs.[1]) **Substantive rights:** + Application of the CAA would extend WARN Act substantive rights to GPO. **Administrative processes:** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication administered by the OC. *{The CAA should provide for investigation and prosecution of retaliation.}* ~ CAA confidentiality rules would apply. **Judicial procedures:** + Applying CAA procedures would grant GPO employees the to sue and, if they pursue an administrative claim, to obtain appellate judicial review. **Substantive rulemaking process:** = Under the CAA, substantive regulations would be promulgated for GPO under the same rulemaking process as for other employing offices.	– WARN Act rights do not apply generally in the federal sector.[2] (Federal-sector employees, like GPO employees, in the competitive service are entitled to 60 days' notice of a RIF, pursuant to applicable civil service statutes and regulations.)	**Substantive rights:** + The substantive rights of the WARN Act apply generally in the private sector. **Administrative processes:** = Private-sector provisions do not provide for either investigation, prosecution, or administrative adjudication of complaints. **Judicial procedures:** + Applying private-sector procedures would enable GPO employees to sue. **Substantive rulemaking process:** + Applying private-sector provisions would extend substantive regulations issued by DoL to cover GPO.

1 A GPO employee alleging defective notice under RIF regulations may seek a remedy from the MSPB. There is no right to sue, but MSPB decisions are appealable to the Federal Circuit. Bargaining unit members may seek a remedy through negotiated grievance procedures. This table assumes that, under either the CAA option or the private-sector option, the existing procedures for remedying violations of civil service RIF regulations need not be changed. Notice rights under civil service regulations seem sufficiently distinct from WARN Act rights that the existing procedures for remedying RIF notice violations need not be superseded by application of either the CAA or the private-sector provisions.

2 To our knowledge, the only federal-sector coverage other than the CAA is under the Presidential and Executive Office Accountability Act. *See* Table 5, note 1, above.

GPO: VETERANS EMPLOYMENT AND REEMPLOYMENT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: GPO employees, like all other public- and private-sector employees, are covered by USERRA. GPO is not covered under § 206 of the CAA, which makes applicable the rights and protections of USERRA. ***Administrative processes:*** Under USERRA, GPO employees may file a complaint with DoL, which investigates and informally seeks compliance. A GPO employee may seek a remedy through GPO's administrative grievance procedures or, if the agency action is appealable under civil service law, from the MSPB. Negotiated grievance procedures may also be used. ***Judicial procedures:*** USERRA does not authorize Federal employees, including those at GPO, to sue, but MSPB decisions are appealable under civil service law to the Federal Circuit.	***Substantive rights:*** = Substantive rights under § 206 of the CAA are substantially similar to those applicable to GPO under the USERRA. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication administered by the OC*;* whereas a GPO employee may now complain to the MSPB only if the agency action is otherwise appealable. *{The CAA should provide for investigation and prosecution of retaliation.}* = CAA procedures would apply in addition to the right to file a claim with DoL under USERRA.[1] ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant GPO employees the right to sue, which they may not now do under the USERRA.	***Substantive rights:*** = GPO is covered under the same substantive USERRA provisions as apply generally to the federal sector. ***Administrative processes:*** = Employees under federal-sector provisions of USERRA, including GPO employees, may complain to DoL, which investigates and informally seeks compliance. + USERRA generally authorizes federal-sector employees, but not GPO employees, to: *(1)* request the Special Counsel to pursue a case on the employee's behalf, and *(2)* have any alleged USERRA violation adjudicated by the MSPB. ***Judicial procedures:*** = Federal-sector employees, like GPO employees, may not sue.	***Substantive rights:*** = GPO is covered under the same substantive USERRA provisions as private-sector employers. ***Administrative processes:*** = Private-sector employees, like GPO employees, may submit complaints to DoL, which investigates and informally seeks compliance. – Private-sector provisions do not provide for administrative adjudication of complaints, whereas now GPO employees may complaint to the MSPB in an adverse action appealable under civil service law. ***Judicial procedures:*** + Applying private-sector procedures would grant GPO employees the right to sue, which they do not now have. + Private-sector employees, but not GPO employees, may ask the Attorney General to prosecute the violation in court.

1 This table assumes that, under the CAA option, the existing remedial procedures under USERRA would be retained. § 225(d) of the CAA states that a covered employee "may also utilize any provisions of . . . [USERRA] that are applicable to that employee."

GPO: ADA TITLES II-III

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive rights of the ADA, including those involving public access, apply to GPO, under § 509 of the ADA. ***Administrative processes:*** GPO must maintain administrative procedures under which members of the public can seek redress for ADA violations. GPO investigates complaints and provides for appeal within the agency. There is no administrative appeal to an entity outside of GPO, nor other outside agency oversight of compliance by GPO. ***Judicial procedures:*** After having exhausted administrative remedies, members of the public can sue and have a trial *de novo*. (An individual may sue either after a final GPO decision or if there is no such decision 180 days after the complaint.) ***Substantive rulemaking process:*** Substantive regulations promulgated by executive branch agencies under titles II-III of the ADA are not made applicable.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as the public-access rights now at GPO under the ADA. – The prohibition against retaliation, which applies now at GPO under the ADA to all individuals, is not granted under the CAA to members of the public. ***Administrative processes:*** + The CAA provides for mediation and adjudication administered by the OC; now, as to allegations against GPO, no such procedures are provided under authority of an entity outside of GPO. + The CAA establishes an enforcement-based process, under which an administrative proceeding may be brought only by the OC GC, upon receiving a charge. Enforcement at GPO now is by private action only. ~ CAA confidentiality rules would apply to mediations, hearings, and deliberations. ***Judicial procedures:*** – The charging individual may not sue under the CAA. However, such individual, having intervened in the CAA administrative proceeding, may appeal to the Federal Circuit. ***Substantive rulemaking process:*** + The OC Board adopts CAA regulations, generally the same as executive-branch agency regulations for the private sector, subject to House and Senate approval.[1] No entity outside of GPO now issues regulations applicable to GPO.	***Substantive rights:*** = For the federal sector, § 504 of the Rehabilitation Act applies substantive rights that are generally the same as the public-access rights applicable to GPO under the ADA. ***Administrative processes:*** = In the federal sector, as at GPO, agencies have established internal procedures for investigating and resolving public-access complaints. + The Attorney General is responsible under E.O. 12250 (reproduced at 42 U.S.C. § 2000d–1 note) for reviewing agency regulations and otherwise coordinating implementation and enforcement; now, as to allegations against GPO, no such authorities have been granted to an entity outside of GPO. ***Judicial procedures:*** = In the federal sector, as at GPO, members of the public alleging public-access violations by agencies may sue. ***Substantive rulemaking process:*** = In the federal sector, as at GPO, substantive regulations promulgated by executive branch agencies for the private sector are not made applicable.	***Substantive rights:*** = For the private sector, title III of the ADA applies generally the same substantive rights involving public access as are applicable to GPO under the ADA. ***Administrative processes:*** + Under title III of the ADA, the Attorney General investigates alleged violations in the private sector; now, as to allegations against GPO, no such authority has been granted to an agency outside of GPO. ***Judicial procedures:*** = In the private sector, as now at GPO, members of the public alleging public-access violations may sue. + The Attorney General may prosecute title III violations in court, whereas no agency may do so now as to GPO. ***Substantive rulemaking process:*** + Private-sector employers are subject to substantive regulations promulgated by the Attorney General. No entity outside of GPO now promulgates regulations applicable to GPO.

1 Because the Board's public access regulations have not been approved, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: § 19(a)(1) of the OSHAct requires all Federal agencies, including GPO, to provide safe and healthful conditions of employment "consistent with" DoL's OSH standards. GPO is not subject to either § 215 of the CAA or E.O. 12196 (reproduced at 5 U.S.C. § 7902 note), which establishes the executive branch occupational safety and health ("OSH") program. The Public Printer has adopted OSH standards that he has determined are "consistent." ***Administrative processes:*** No agency outside of GPO has authority to inspection or require GPO compliance with OSH standards. GPO has established its own compliance procedures, including procedures for responding to employee complaints and regular inspections. Requirements to keep records and report to DoL are imposed by the OSHAct and civil service law (5 U.S.C. § 7902). ***Judicial procedures:*** No judicial procedures apply to GPO with respect to OSHAct compliance. ***Substantive rulemaking process:*** The Public Printer has issued health and safety standards in the form of "instructions."	***Substantive rights:*** + The CAA generally makes DoL's OSH standards applicable. Although GPO applies OSH standards that are generally the same as DoL's standards, present law only requires GPO to provide conditions "consistent with" those standards. ***Administrative processes:*** + The OC would adopt exceptions and variances, conduct inspections, enforce, and resolve disputes; no such authority is now granted to an entity outside of GPO. ~ *{The CAA should require recordkeeping and reporting administered by the OC},* law now applicable to GPO requires recordkeeping and reporting to DoL. *{The CAA should provide for investigation and prosecution of retaliation.}* ~ CAA confidentiality rules would apply to deliberations of hearing officers and the Board. ***Judicial procedures:*** + The CAA provides judicial review by the Federal Circuit and authorizes judicial compliance orders under some circumstances, whereas there is now no judicial review or enforcement at GPO. ***Substantive rulemaking process:*** + CAA regulations, generally the same as DoL's OSH standards, are issued by the OC Board subject to House and Senate approval.[1] GPO issues OSH standards for itself, and must afford conditions "consistent" with DoL's standards.	***Substantive rights:*** + E.O. 12196 requires executive-branch agencies to comply with DoL's OSH standards. Although GPO in fact applies OSH standards that are generally the same as DoL's standards, present law only requires GPO to provide conditions "consistent with" those standards. ***Administrative processes:*** + E.O. 12196 requires each covered agency to establish its own OSH compliance program, requires DoL to inspect and consider employee complaints, and, if DoL and the employer disagree, the President decides. At GPO, no agency outside of GPO is authorized to inspect, consider employee complaints, require compliance, or resolve disputes. ***Judicial procedures:*** = In the federal sector, as at GPO, there is no judicial enforcement or review. ***Substantive rulemaking process:*** + E.O. 12196, adopted by the President for the entire executive branch, applies DoL's OSH standards, whereas GPO issues OSH standards for itself and must provide conditions "consistent" with DoL's OSH standards.	***Substantive rights:*** + The OSHAct requires private-sector employers and employees to abide by DoL's OSH standards. Although GPO in fact applies OSH standards that are generally the same as DoL's standards, present law only requires GPO to provide conditions "consistent with" those standards. ***Administrative processes:*** + The OSHAct authorizes DoL to adopt exceptions and variances, conduct inspections, enforce compliance, and resolve disputes; whereas now no entity outside of GPO has such authority. ***Judicial procedures:*** + The OSHAct provides for appellate judicial review and authorizes judicial compliance orders under some circumstances. Now, as to GPO, there is no judicial review or enforcement. ***Substantive rulemaking process:*** + DoL promulgates OSH standards for the entire private sector; whereas GPO issues OSH standards for itself and must provide conditions "consistent" with DoL's OSH standards.

1 Because the Board's OSHAct regulations have not been approved, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: GPO is covered by Chapter 71 and by the FLRA's regulations thereunder. ***Administrative processes:*** Under Chapter 71, the FLRA hears cases arising from representation matters and unfair labor practices ("ULPs") at GPO. Exceptions from arbitral awards may be taken to the FLRA (except for awards involving adverse or unacceptable-performance actions, which are subject to judicial review). Under the Kiess Act, the Joint Committee on Printing approves any wage agreement and, in case of impasse, decides on wages.[1] ***Judicial procedures:*** FLRA decisions on matters other than representation or exceptions from arbitral awards may be appealed to the Federal Circuit. Any person aggrieved, including a GPO employee, may appeal. FLRA decisions on exceptions to arbitral awards may not be further appealed unless they involve a ULP. Arbitral awards involving adverse or unacceptable-performance actions, which may not be appealed to the FLRA, may be appealed to the Federal Circuit. ***Substantive rulemaking process:*** GPO is subject to substantive regulations promulgated by the FLRA.	***Substantive rights:*** = The CAA affords generally the same substantive rights as apply now at GPO under Chapter 71. –The CAA empowers the Board, with House and Senate approval, to exclude offices from coverage under labor-management relations provisions if exclusion is required because of conflict of interest or Congress's constitutional responsibilities; Chapter 71 has no such provision. ***Administrative processes:*** = The OC Board under the CAA exercises a role generally similar to that of the FLRA. ~ CAA confidentiality rules would apply to hearings and deliberations. ***Judicial procedures:*** – A charging party may not appeal a ULP decision. – The CAA, unlike Chapter 71, affords no judicial review of arbitral awards involving adverse or unacceptable-performance actions (nor, under the CAA, is there administrative review of such actions). – The CAA, unlike Chapter 71, affords no authority for the OC to seek temporary relief or a restraining order. ***Substantive rulemaking process:*** ~ The OC Board adopts CAA regulations, ordinarily the same as FLRA regulations, subject to House and Senate approval; GPO is subject to regulations issued for the federal sector by the FLRA.	= The same substantive, administrative, and judicial statutory provisions of Chapter 71 apply generally in the federal sector as apply now at GPO, and agencies in the federal sector are generally subject to the authority of the FLRA as is GPO.	***Substantive rights:*** + Private-sector employees, covered by the National Labor Relations Act ("NLRA"), have the right to strike. ~ Unions and employers in the private sector may enter into union security agreements. ~ Unions in the private sector, if the employer agrees, may obtain exclusive recognition by card majority (*i.e.*, without secret ballot election). ***Administrative processes:*** ~ Grievance procedures are not a required provision of any bargaining agreement in the private sector, as they are under Chapter 71. ~ Awards under binding arbitration are not ordinarily subject to review, as they are under Chapter 71. ***Judicial procedures:*** ~ NLRB decisions are appealable to the D.C. Circuit or the Circuit where the employer is located; under Chapter 71, FLRA decisions are appealable to the Federal Circuit. ***Substantive rulemaking process:*** ~ The NLRB has authority to issue substantive regulations for the private sector, as does the FLRA for the federal sector, including GPO.

1 This table assumes that the Joint Committee's authority under this provision of the Kiess Act, 44 U.S.C. § 305(a), would not be displaced by coverage under any of the three coverage options.

LIBRARY OF CONGRESS

TITLE VII, ADEA, and EPA

APPENDIX III, TABLE 21

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Federal-sector provisions of Title VII (§ 717) and the ADEA (§ 15), as well as the EPA, apply to the Library. ***Administrative processes:*** Library management investigates and decides complaints. There is no administrative appeal from the Librarian's final decision (apart from negotiated grievance procedures). Negotiated grievance procedures (binding arbitration and review by the FLRA or the Federal Circuit) may also be used. The Library must maintain claims-resolution and affirmative-employment programs. ***Judicial procedures:*** Title VII and ADEA allow suit and trial *de novo* after exhausting administrative remedies. (Employees may sue either after a final Library decision or if there is no such decision 180 days after the complaint.) EPA allows suit without having exhausted administrative remedies. Jury trials are not available for ADEA and EPA claims.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at the Library. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The CAA provides for counseling, mediation, and adjudication administered by the OC. Now, as to allegations against the Library, no entity outside of the Library has such authorities. + Administrative processes are more streamlined under the CAA. ~ The CAA does not provide for investigation and prosecution, whereas the Library now investigates charges, *{but the CAA should provide for investigation and prosecution of retaliation.}* *{The CAA should require recordkeeping and notice posting}*. ~ CAA confidentiality rules would apply. ~ The CAA does not require EEO programs, including affirmative employment, which are now required of the Library. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA allows jury trials under all laws, including ADEA and EPA.	***Substantive rights:*** = Substantive rights in the federal sector are generally the same as those at the Library. ***Administrative processes:*** = The processes at the Library are modeled generally on those in the federal sector. + Federal sector provisions provide for EEOC, MSPB, and Special Counsel to hear appeals and prosecute violations. Now, as to allegations against the Library, no entity outside of the Library has such authorities. ~ The Library would be required to follow EEOC regulations governing agencies' internal claims-resolution procedures and affirmative-employment programs. Now the Library must maintain such programs, but no outside entity oversees or regulates the Library's performance. ***Judicial procedures:*** = Judicial remedies in the federal sector are the same as those at the Library.	***Substantive rights:*** = Substantive rights under private-sector provisions are generally the same as those at the Library. ***Administrative processes:*** + Private sector provisions provide for the EEOC to investigate and prosecute. Now, as to allegations against the Library, no entity outside of the Library has such authorities. – The EEOC may be unable to provide timely investigation of all individual charges. ~ Employers in the private sector are not required to have claims-resolution or affirmative-employment programs. ***Judicial procedures:*** + Jury trials are available under private-sector procedures for all discrimination laws, including ADEA and EPA. + In the private sector, the EEOC can prosecute in court.

LIBRARY: ADA TITLE I and REHABILITATION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive employee rights of the ADA apply to the Library, under § 509 of the ADA. ***Administrative processes:*** The Library management investigates and decides complaints. There is generally no administrative appeal from the Librarian's final decision (apart from negotiated grievance procedures). Negotiated grievance procedures (binding arbitration and review by the FLRA or the Federal Circuit) may also be used. ***Judicial procedures:*** § 509 of the ADA allows suit and trial *de novo* after exhausting administrative remedies. (The employee may sue either after a final Library decision or if there is no such decision 180 days after the complaint.) Jury trials and compensatory damages are arguably not available in disability suits against the Library.[1]	***Substantive rights:*** = Substantive rights under the CAA are generally the same as those at the Library. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The CAA provides for adjudication and appeal administered by the OC. Now, as to allegations against the Library, there is no right to appeal to an agency outside of the Library. + Administrative processes are more streamlined under the CAA. – The CAA does not provide for investigation and prosecution, whereas the Library now investigates charges, *{but the CAA should provide for investigation and prosecution of retaliation}.* *{The CAA should require recordkeeping and notice posting.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides shorter deadlines for exhaustion of administrative remedies and access to the courts. + The CAA affords jury trials and compensatory damages in disability suits, which are arguably not available against the Library.	***Substantive rights:*** = Substantive rights under federal-sector provisions of the Rehabilitation Act, 29 U.S.C. § 791, are generally the same as those at the Library. ***Administrative processes:*** = The processes at the Library are modeled generally on those in the federal sector. + Federal sector provisions authorize EEOC, MSPB, and Special Counsel to hear appeals and prosecute violations. Now, as to allegations against the Library, no such authorities have been granted to an agency outside of the Library. ~ Federal-sector provisions, unlike ADA provisions now applicable to the Library, require affirmative-employment programs. ***Judicial procedures:*** = The right to sue the Library is generally the same as in the federal sector. + Jury trials and compensatory damages, which are arguably not available in disability suits against the Library, are afforded under federal-sector provisions.	***Substantive rights:*** = Substantive rights under private-sector provisions of the ADA are generally the same as those at the Library. ***Administrative processes:*** + Private sector provisions provide for an the EEOC to investigate and prosecute; now, as to allegations against the Library, no such authorities have been granted to an agency outside of the Library. – The EEOC may be unable to provide timely investigation of all individual charges. – Private-sector provisions do not provide for administrative adjudication. ***Judicial procedures:*** + Jury trials and compensatory damages, arguably not available in disability suits against the Library, are afforded under private-sector provisions.

1 42 U.S.C. § 1981a(a)(2), which generally authorizes jury trials and compensatory damages in disability suits, does not refer to § 509(a) of the ADA, 42 U.S.C. § 12209(a), as added by § 201(c)(5) of the CAA, which extends a private right of action for disability discrimination to Library employees.

LIBRARY: FAMILY AND MEDICAL LEAVE ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: FMLA provisions for the private sector, 29 U.S.C. § 2611 *et seq.*, apply to the Library. ***Administrative processes:*** There is no administrative appeal to an entity outside of the Library. FMLA provides no administrative procedures, but requires the Librarian to exercise DoL's authority to investigate and prosecute FMLA violations. ***Judicial procedures:*** Library employees may sue for FMLA violations, and are granted liquidated or other damages specified in the private-sector statute. However, jury trials, not being expressly provided by the FMLA, are arguably not allowed against the Federal government. ***Substantive rulemaking process:*** The Librarian exercises DoL's authority under the FMLA to adopt substantive regulations.	***Substantive rights:*** = Substantive rights under the CAA generally are the same as those at the Library. + Eligibility would be portable in transfers between the Library and other employing offices covered under the CAA, but is not now portable to or from the Library. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The CAA provides for adjudication and appeal administered by the OC. Now, as to allegations against the Library, there is no right to appeal to an agency outside of the Library. ~ The CAA does not provide for agency investigation or prosecution, whereas DoL's authorities to investigate and prosecute are exercised by the Librarian, *{but the CAA should provide investigation and prosecution of retaliation}.* ~ The CAA does not require recordkeeping and notice posting, which are now required at the Library, *{but the CAA should do so}.* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides for jury trials, which are arguably not available at the Library. ***Substantive rulemaking process:*** +The OC Board adopts regulations, ordinarily the same as DoL's, for all employing offices; the Library is responsible currently for issuing its own regulations.	***Substantive rights:*** + Federal-sector provisions establish different employer prerogatives than do the private-sector provisions now applicable at the Library.[1] + Eligibility would be portable if an employee transferred between the Library and another employing agency under federal-sector coverage, but is not now portable to or from GAO. ***Administrative processes:*** + The MSPB remedies FMLA violations implicated in appealable adverse actions in the federal sector, whereas now the Library is responsible for exercising DoL's enforcement and other authorities with respect to itself. ***Judicial procedures:*** – Federal-sector employees, unlike those at the Library, cannot sue under the FMLA, and can only obtain appellate judicial review of MSPB decisions in the Federal Circuit. – Federal-sector employees cannot recover liquidated or other damages specified in private-sector statute, as can Library employees. ***Substantive rulemaking process:*** + OPM's FMLA regulations apply Government-wide, whereas the Library is responsible for issuing its own FMLA regulations.	***Substantive rights:*** = Substantive FMLA provisions for the private sector apply at the Library. ***Administrative processes:*** – Under private-sector provisions, DoL receives complaints and investigates FMLA violations; now the Library is responsible for exercising DoL's FMLA authorities with respect to itself. ***Judicial procedures:*** + Provisions applicable in the private sector provide for jury trials, which are arguably not now available against the Library. + DoL prosecutes violations; now the Library is responsible for exercising this authority with respect to itself. ***Substantive rulemaking process:*** + Regulations for the private sector are issued by DoL for all employing offices, whereas the Library is responsible for issuing its own FMLA regulations.

1 Under private-sector provisions applicable at GAO, but not under federal-sector provisions: *(1)* the employer may deny restoration to an employee who is a high-salary "key" employee; *(2)* an employer can make a binding election as to whether an employee taking FMLA leave must consume any available paid annual or sick leave or must, instead, to take unpaid leave; and *(3)* the employer can recoup health insurance costs from an employee who does not return to work after FMLA leave.

LIBRARY: FAIR LABOR STANDARDS ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: The Library is covered by the FLSA, and by DoL's substantive FLSA regulations. The Library is also covered by civil service statutes allowing compensatory time off, credit hours, and compressed work schedules ("comp time") in exception to FLSA overtime requirements. ***Administrative processes:*** A Library employee who alleges an FLSA violation may submit a complaint to the Librarian through administrative grievance procedures. OPM can resolve claims for damages, but not other FLSA complaints, under its general claims-settlement authority. ***Judicial procedures:*** Library employees may sue. Jury trials, not being expressly provided by the FLSA, are arguably not allowed against the Federal government. ***Substantive rulemaking:*** The Library is subject to OPM's substantive regulations implementing the FLSA Government-wide. However, the Library is subject to its own regulations implementing exceptions from FLSA pay under civil service laws.	***Substantive rights:*** ~ The CAA would preclude receipt of comp time in lieu of FLSA overtime pay. ***Administrative processes:*** + Use of model ADR process under CAA is a prerequisite to proceeding with complaint. + The CAA provides for mediation and adjudication administered by the OC for all FLSA complaints, whereas OPM may now resolve complaints against the Library only for settlement of damages. + CAA procedures provide for administrative adjudication, whereas OPM can settle money claims without administrative adjudication and has no jurisdiction as to non-monetary FLSA claims at the Library. *{The CAA should provide for investigation and prosecution of retaliation.}* *{The CAA should require recordkeeping and notice posting.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + The CAA provides for jury trials, which are arguably not available against the Library. ***Substantive rulemaking:*** ~ CAA substantive regulations are adopted by the OC Board, subject to approval of House and Senate; whereas the Library is now subject to regulations promulgated primarily for the private sector by DoL, which is overseen by the President.	***Substantive rights:*** ~ Federal-sector provisions would apply OPM's implementing regulations, which are more specific and tailored to the federal civil service that DoL's FLSA regulations, which now apply. ***Administrative processes:*** + OPM receives and resolves any FLSA complaints against federal-sector employers, whereas it may only settle claims against the Library for damages. + Federal-sector employers are subject to government-wide OPM regulations on the use of comp time in exception to FLSA requirements, whereas the Library now issues its own regulations on that subject. ***Judicial procedures:*** = Library employees are covered under the federal-sector provisions establishing a private right of action. ***Substantive rulemaking:*** + Federal-sector employees are subject to OPM's Government-wide regulations implementing civil service provisions authorizing comp time in lieu of FLSA overtime pay, whereas the Library issues its own regulations on that subject.	***Substantive rights:*** = The Library is covered by generally the same FLSA substantive statutory provisions and DoL regulations as apply in the private sector. ~ Private-sector employers are not covered by the civil service provisions authorizing comp time in exception to FLSA pay.[1] ***Administrative processes:*** + DoL investigates and prosecutes alleged FLSA violations in the private sector, whereas OPM now receives complaints against the Library only for settlement of damages. ***Judicial procedures:*** + Jury trials, which are arguably not now available against the Library, are available under private sector procedures. ***Substantive rulemaking:*** = The Library is covered by generally the same DoL regulations implementing the FLSA as apply in the private sector.

1 This table assumes that, under the private-sector option, the receipt of comp time in lieu of overtime pay would generally not be allowed, because civil service statutes authorizing the use of comp time in exception to FLSA requirements apply only to the federal sector.

LIBRARY: EMPLOYEE POLYGRAPH PROTECTION ACT

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: § 204 of the CAA extends the substantive rights of the EPPA to the Library. ***Administrative processes:*** There is disagreement as to whether Library employees alleging a violation of § 204 may use CAA procedures. There may be disagreement as to whether Library employees may seek a remedy for a § 204 violation using the Library's administrative grievance procedures, or negotiated grievance procedures at the Library. ***Judicial procedures:*** There is disagreement as to whether Library employees may sue under the CAA. ***Substantive rulemaking process:*** The OC Board has issued EPPA regulations, substantially similar to those promulgated by DoL, and has extended the regulations to cover the Library, but the extension has not been approved by the House and Senate. Accordingly, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.	***Substantive rights:*** = The Library is covered under EPPA substantive rights as applied by the CAA. ***Administrative processes:*** + If CAA procedures applied, use of model ADR process would be prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication and appeal administered by the OC. Now no such procedures are provided under authority of an agency outside of the Library, unless under the CAA. *{The CAA should provide for investigation and prosecution of retaliation.}* *{The CAA should require recordkeeping.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant Library employees the right to sue and, if they pursue an administrative claim, to obtain appellate judicial review. ***Substantive rulemaking process:*** = Substantive regulations under the CAA are now promulgated by the same process for the Library as for other employing offices.	– EPPA rights do not apply generally in the federal sector.[1]	***Substantive rights:*** = The Library is covered under EPPA substantive rights as applied by the CAA. ***Administrative processes:*** + Applying private-sector procedures would authorize DoL to receive complaints from Library employees and to investigate violations. – Private-sector provisions do not provide for administrative adjudication and appeal. Now there is disagreement whether these are available under the CAA. ***Judicial procedures:*** + Applying private-sector procedures would enable Library employees to sue, whereas the right to sue under the CAA now is subject to dispute. + DoL can prosecute private-sector violations in court. Even if CAA procedures apply, they would not include prosecution in court. ***Substantive rulemaking process:*** = The CAA provides that the Library shall be subject to generally the same regulatory requirements as under DoL's regulations for the private sector. ~ Regulations are promulgated by DoL for all private-sector employers, whereas regulations now applicable to the Library, which must generally be the same as DoL's regulations, are adopted by the OC Board for all employing offices, subject to approval by the House and Senate.

1 To our knowledge, the only federal-sector coverage other than the CAA is under the Presidential and Executive Office Accountability Act. *See* Table 5, note 1, above.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: § 205 of the CAA extends the substantive rights of the WARN Act to the Library. In addition, Library regulations and collective bargaining agreements require 90 days' advance notice to employees affected by a RIF.[1] ***Administrative processes:*** There is disagreement whether Library employees alleging § 205 violations may use CAA administrative procedures. ***Judicial procedures:*** There is disagreement whether Library employees may sue under the CAA. ***Substantive rulemaking process:*** The OC Board has issued WARN Act regulations, substantially similar to those promulgated by DoL, and has extended the regulations to cover the Library, but the extension has not been approved by the House and Senate. Accordingly, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.	***Substantive rights:*** = The Library is covered by WARN Act rights as applied by the CAA. ***Administrative processes:*** + If CAA procedures applied, use of model ADR process would be prerequisite to proceeding with complaint. + Applying CAA procedures would provide counseling, mediation, and adjudication administered by the OC. Now no such procedures are provided under authority of an agency outside of the Library, unless under the CAA. *{The CAA should provide for investigation and prosecution of retaliation.}* ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant Library employees the right to sue and, if they pursue an administrative claim, to obtain appellate judicial review of a final administrative decision. ***Substantive rulemaking process:*** = Substantive regulations under the CAA are now promulgated by the same process for the Library as for other employing offices.	– WARN Act rights do not apply generally in the federal sector.[2] (Federal-sector employees in the competitive service are entitled to 60 days' notice of a RIF, pursuant to applicable civil service statutes and regulations. However, this table makes no assumptions as to whether the Library's existing regulations and remedies involving RIFs would be retained, or whether general civil service statutes and regulations governing RIFs would be applied to GAO. *See generally* footnote 1.)	***Substantive rights:*** = The Library is covered under WARN Act substantive rights as applied by the CAA. ***Administrative processes:*** – Private-sector provisions do not provide for either investigation, prosecution, or administrative adjudication of complaints, whereas now there is disagreement whether counseling, mediation, and administrative adjudication are available under the CAA. ***Judicial procedures:*** + Applying private-sector procedures would enable Library employees to sue, where-as the right to sue under the CAA now is subject to dispute. ***Substantive rulemaking process:*** ~ Regulations are promulgated by DoL for all private-sector employers; regulations now applicable to the Library, which must generally be the same as DoL's regulations, are adopted by the OC Board for all employing offices, subject to approval by the House and Senate.

1 This table assumes that, under either the CAA option or the private-sector option, the existing procedures for remedying violations of the Library's RIF regulations and collective bargaining agreements need not be changed. The notice rights under the Library's RIF regulations seem sufficiently distinct from WARN Act rights that the existing procedures for seeking a remedy for RIF notice violations need not be superseded by application of either the CAA or the private-sector provisions.

2 To our knowledge, the only federal-sector coverage other than the CAA is under the Presidential and Executive Office Accountability Act. *See* Table 5, note 1, above.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Library employees, like all other public- and private-sector employees, are covered by USERRA. In addition, § 206 of the CAA extends substantive rights of USERRA to the Library. ***Administrative processes:*** Under USERRA, Library employees may file a complaint with DoL, which investigates and informally seeks compliance. There is disagreement as to whether Library employees alleging a § 206 violation may use CAA administrative procedures. ***Judicial procedures:*** USERRA does not authorize Federal employees, including those at the Library, to sue. There is disagreement whether Library employees alleging a § 206 violation may sue under the CAA.	***Substantive rights:*** = The Library is covered under USERRA rights as applied by the CAA, as well as under the USERRA itself, which applies substantially the same rights as the CAA. ***Administrative processes:*** + Applying CAA procedures would make the use of model ADR process a prerequisite to proceeding with complaint. + Applying the administrative procedures of the CAA would provide counseling, mediation, and adjudication administered by the OC. *{The CAA should provide for investigation and prosecution of retaliation.}* = These CAA procedures would apply in addition to the right to file a claim with DoL under USERRA.[1] ~ CAA confidentiality rules would apply. ***Judicial procedures:*** + Applying CAA procedures would grant Library employees the right to sue for § 206 violations; Library employees are not afforded a private right of action under USERRA.	***Substantive rights:*** = The Library is covered under the same substantive USERRA provisions as apply generally to the federal sector, and is also covered under the CAA, which makes applicable substantially the same rights as the USERRA applies in the federal sector. ***Administrative processes:*** = Employees under federal-sector provisions of USERRA, including Library employees, may complain to DoL, which investigates and informally seeks compliance. + USERRA generally authorizes federal-sector employees, but not Library employees, to: *(1)* request the Special Counsel to pursue a case on the employee's behalf, and *(2)* have an alleged USERRA violation adjudicated by the MSPB. ***Judicial procedures:*** = Federal-sector employees, like Library employees, may not sue.	***Substantive rights:*** = The Library is covered under the same substantive USERRA provisions as private-sector employers. ***Administrative processes:*** = Private-sector employees, like Library employees, may submit complaints to DoL, which investigates and informally seeks compliance. ***Judicial procedures:*** + Applying private-sector procedures would afford Library employees the right to sue, whereas the right of Library employees to sue under the CAA is now subject to dispute. + Private-sector employees may ask the Attorney General to prosecute the violation in court.

1 This table assumes that, under the CAA option, the existing remedial procedures under USERRA would be retained. § 225(d) of the CAA states that covered employees "may also utilize any provisions of . . . [USERRA] that are applicable to that employee."

LIBRARY: ADA TITLES II-III

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: All substantive rights of the ADA, including those involving public access, apply to the Library, under § 509 of the ADA. ***Administrative processes:*** The Library must maintain administrative procedures under which members of the public can seek redress for ADA violations. The Library investigates complaints and provides for appeal within the agency. There is no administrative appeal to an entity outside of the Library, nor other outside agency oversight of compliance by the Library. ***Judicial procedures:*** After having exhausted administrative remedies, members of the public can sue and have a trial *de novo*. (An individual may sue either after a final GAO decision or if there is no such decision 180 days after the complaint.) ***Substantive rulemaking process:*** Substantive regulations promulgated by executive branch agencies under titles II-III of the ADA are not made applicable.	***Substantive rights:*** = Substantive rights under the CAA are generally the same as the public-access rights now at the Library under the ADA. – The prohibition against retaliation, which applies now at the Library under the ADA, is not granted under the CAA to members of the public. ***Administrative processes:*** + The CAA provides for mediation and adjudication administered by the OC; now, there is no administrative appeal to an entity outside of the Library. + The CAA establishes an enforcement-based process, under which an administrative proceeding may be brought only by the GC of the OC after receiving a charge. Enforcement at the Library is by private action only. ~ CAA confidentiality rules would apply to mediations, hearings, and deliberations. ***Judicial procedures:*** – The charging individual may not sue under the CAA; but such individual, having intervened in the administrative proceeding, may appeal to the Federal Circuit. ***Substantive rulemaking process:*** + The OC Board adopts regulations, generally the same as executive-branch agency regulations for the private sector, subject to House and Senate approval.[1] No entity outside of the Library now issues regulations applicable to the Library.	***Substantive rights:*** = For the federal sector, § 504 of the Rehabilitation Act applies substantive rights that are generally the same as the public-access rights applicable to the Library under the ADA. ***Administrative processes:*** = In the federal sector, as at the Library, agencies have generally established internal procedures for investigating and resolving public-access complaints. + The Attorney General is responsible under E.O. 12250 (reproduced at 42 U.S.C. § 2000d–1 note) for reviewing agency regulations and otherwise coordinating implementation and enforcement; as to the Library, no entity outside of the Library exercises such functions. ***Judicial procedures:*** = In the federal sector, as at the Library, members of the public alleging public-access violations by agencies may sue. ***Substantive rulemaking process:*** = In the federal sector, as at the Library, substantive regulations promulgated by executive branch agencies under titles II-III of the ADA are not made applicable.	***Substantive rights:*** = For the private sector, title III of the ADA applies generally the same substantive rights involving public access as are applicable to the Library under the ADA. ***Administrative processes:*** + Under title III of the ADA, the Attorney General investigates alleged violations in the private sector; as to the Library, no entity outside of the Library now investigates. ***Judicial procedures:*** = In the private sector, as now at the Library, members of the public alleging public-access violations may sue. + The Attorney General may prosecute title III violations in court, whereas no agency may do so now as to the Library. ***Substantive rulemaking process:*** + Private-sector employers are subject to substantive regulations promulgated by the Attorney General. No entity outside of the Library now promulgates regulations applicable to the Library.

1 Because the Board's public access regulations have not been approved, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: Section 215 of the CAA extends the substantive rights of the OSHAct to the Library and requires compliance with occupational safety and health ("OSH") standards as established by DoL. ***Administrative processes:*** The administrative procedures of § 215 of the CAA apply fully to the Library. Requirements to keep records and report to DoL are now imposed under OSHAct and civil service law. ***Judicial procedures:*** The judicial procedures of § 215 of the CAA apply fully to the Library. ***Substantive rulemaking process:*** The OC Board has adopted substantive regulations incorporating DoL's standards, and has adopted an amendment extending those regulations to cover the Library. However, neither the regulations nor the amendment has been approval by the House and Senate. Accordingly, "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding" would be applied, pursuant to § 411 of CAA.	= The Library is fully subject to the substantive, administrative, and judicial provisions of the CAA with respect to occupational safety and health, including the process for establishing any regulatory requirements. ~ *{Recordkeeping and reporting requirements should be applied, administered by the OC};* whereas law now applicable to the Library requires recordkeeping and reporting to DoL. *{The CAA should provide for investigation and prosecution of retaliation.}*	***Substantive rights:*** = E.O. 12196 (reproduced at 5 U.S.C. § 7902 note) requires executive-branch agencies to comply with the same DoL standards as are made applicable to employing offices, including the Library, under the CAA. ***Administrative processes:*** ~ E.O. 12196 requires DoL to inspect and consider employee complaints; the CAA is administered for employing offices, including the Library, by the OC. Unlike the CAA, the E.O. also requires each agency to establish its own OSH program.[1] ~ If DoL and the employing agency disagree, there is no adjudicatory or other formal dispute resolution process under the E.O., as there is under the CAA. Rather, the disagreement is submitted to the President. ***Judicial procedures:*** – There is no judicial review of actions or decisions under the E.O., unlike the CAA, which provides for appellate judicial review of administrative decisions. ***Substantive rulemaking process:*** ~ The E.O. was issued for the executive branch by the President; CAA regulations, which are applicable to the Library, are adopted by the OC Board, subject to approval by the House and Senate.	***Substantive rights:*** = In the private sector, the OSHAct applies the same DoL standards as are made applicable to employing offices, including the Library, under the CAA. ***Administrative processes:*** = Administrative processes for the private sector are generally the same as those made applicable for employing offices, including the Library, by the CAA. ~ DoL administers the OSHAct in the private sector; the OC administers the CAA for employing offices, including the Library. ***Judicial procedures:*** = Judicial review procedures in the private sector are generally the same as those made applicable for employing offices, including the Library, under the CAA. ~ DoL investigates and prosecutes private-sector retaliation. The CAA, which now covers the Library, has no such authority, *{but it should}*; employees alleging retaliation can sue under the CAA, but could not under private-sector OSHAct. ***Substantive rulemaking process:*** ~ DoL promulgates standards for all private-sector employers. The OC Board adopts CAA regulations, generally the same as DoL regulations. As the House and Senate have not approved, § 411 of CAA would apply "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding."

1 The program must include periodic inspections, responding to employee reports of hazard, preventing retaliation, and creating a joint labor-management Occupational Safety and Health Committee.

Current Regime	— *Compared to* CAA Coverage	— *Compared to* Federal-Sector Coverage	— *Compared to* Private-Sector Coverage
Substantive rights: The Library is covered by Chapter 71 and by the FLRA's regulations thereunder. ***Administrative processes:*** Under Chapter 71, the FLRA hears cases arising from representation matters and unfair labor practices ("ULPs") at the Library. Exceptions from arbitral awards may be taken to the FLRA (except for awards involving adverse and unacceptable-performance actions, which are subject to judicial review). ***Judicial procedures:*** FLRA decisions on matters other than representation or exceptions from arbitral awards may be appealed to the Federal Circuit. Any person aggrieved, including a Library employee, may appeal. FLRA decisions on exceptions to arbitral awards may not be further appealed unless they involve a ULP. Arbitral awards involving adverse or unacceptable-performance actions, which may not be appealed to the FLRA, may be appealed to the Federal Circuit. ***Substantive rulemaking process:*** The Library is subject to substantive regulations promulgated by the FLRA.	***Substantive rights:*** = The CAA affords generally the same substantive rights as apply now at the Library under Chapter 71. –The CAA empowers the Board, with House and Senate approval, to exclude offices from coverage under labor-management relations provisions if exclusion is required because of conflict of interest or Congress's constitutional responsibilities; Chapter 71 has no such provision. ***Administrative processes:*** = The OC Board under the CAA exercises a role generally similar to that of the FLRA. ~ CAA confidentiality rules would apply to hearings and deliberations. ***Judicial procedures:*** – A charging party may not appeal a ULP decision. – The CAA, unlike Chapter 71, affords no judicial review of arbitral awards involving adverse or unacceptable-performance actions (nor, under the CAA, is there administrative review of such actions). – The CAA, unlike Chapter 71, affords no authority to the OC to seek temporary relief or a restraining order. ***Substantive rulemaking process:*** – The OC Board adopts CAA regulations, ordinarily the same as FLRA regulations, subject House and Senate approval; the Library is subject to regulations adopted for the federal sector by the FLRA.	= The same substantive, administrative, and judicial statutory provisions of Chapter 71 apply generally in the federal sector as apply now at the Library, and agencies in the federal sector are generally subject to the authority of the FLRA as is the Library.	***Substantive rights:*** + Private-sector employees, covered by the National Labor Relations Act ("NLRA"), have the right to strike. ~ Unions and employers in the private sector may enter into union security agreements. ~ Unions in the private sector, if the employer agrees, may obtain exclusive recognition by card majority (*i.e.*, without secret ballot election). ***Administrative processes:*** ~ Grievance procedures are not a required provision of any bargaining agreement in the private sector, as they are under Chapter 71. ~ Awards under binding arbitration are not ordinarily subject to review, as they are under Chapter 71. ***Judicial procedures:*** ~ NLRB decisions are appealable to the D.C. Circuit or the Circuit where the employer is located; under Chapter 71, FLRA decisions are appealable to the Federal Circuit. ***Substantive rulemaking process:*** = NLRB has authority to issue substantive regulations, as does the FLRA for the federal sector, including the Library, under Chapter 71.