



Recommendations for Improvements to the Congressional Accountability Act

The Biennial Report of the Board of Directors of the Office of Congressional Workplace Rights

Required by Section 102(b) of the Congressional Accountability Act Issued at the Conclusion of the 116th (2019-2020) Congress for Consideration by the 117th Congress





STATEMENT FROM THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS TO THE 117TH CONGRESS

With its enactment of the Congressional Accountability Act (CAA) in 1995, Congress first applied to the legislative branch the same laws regarding workplace rights and the employment relationship as governed the executive branch and private sector, including those addressing discrimination, workplace safety and health, wages and hours, accessibility, and collective bargaining and labor-management relations. Passage of the CAA in the opening days of the 104th Congress with nearly unanimous approval reflected a Congressional promise to the American public that it would hold itself accountable to the same federal workplace and accessibility standards as apply to private sector employers and executive branch agencies.

This commitment is not meant to be static. Rather, the CAA provides for an ongoing, vigilant review of federal law to ensure that Congress continues to apply to itself—where appropriate—the labor, employment, health, and safety laws that it enacts. To further this goal, section 102(b) of the CAA tasks the Board of Directors of the Office of Congressional Workplace Rights (OCWR) to review federal legislation and regulations to ensure that workplace protections in the legislative branch are on par with those applicable to private sector and executive branch agencies. Accordingly, every Congress, the Board reports on:

whether or to what degree [provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees; and (B) access to public services and accommodations]...are applicable or inapplicable to the legislative branch, and (2B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch.

This section of the CAA also requires that the presiding officers of the House of Representatives and the Senate cause our Report to be printed in the *Congressional Record* and refer the report to Committees of the House and Senate with jurisdiction.

In past Reports, the Board has taken a broad approach in presenting its recommendations to amend the CAA. In this Report, we highlight key recommendations that the Board has made in past Section 102(b) Reports that have not yet been implemented, as well as additional recommendations to amend the CAA to increase transparency, discourage protracted administrative proceedings at the taxpayers' expense, and enjoin unlawful conduct.

While recognizing the enormous importance of many of the other issues faced today by the 117th Congress, the Board is hopeful that issuance of this Section 102(b) Report will result in legislative action necessary to implement these recommendations so that the CAA remains current with the employment needs of the legislative branch. Without action on the Board's recommendations, the worthy goals of the CAA gradually may be eroded.

The Board welcomes an opportunity to further discuss these recommendations and asks for careful consideration of the requests by the 117th Congress.

Sincerely,



Barbara Childs Wallace,
Chair, Board of Directors



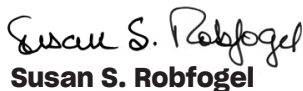
Barbara L. Camens



Alan V. Friedman



Roberta L. Holzwarth



Susan S. Robfogel



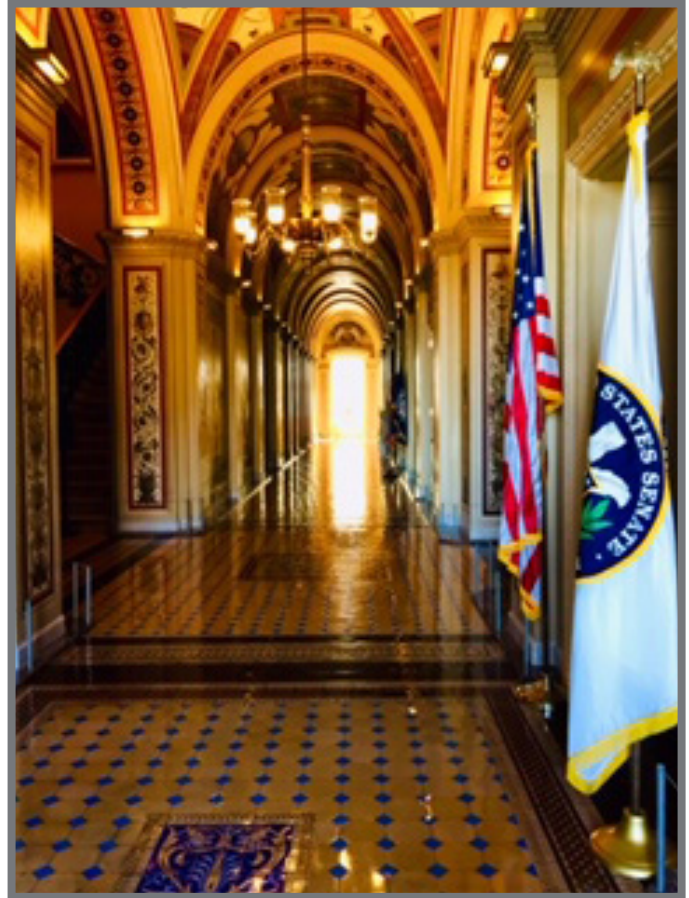
RECOMMENDATIONS FOR THE 117TH CONGRESS

Amend the CAA to Allow the OCWR Board of Directors to Authorize the OCWR General Counsel to Seek Appropriate Temporary Relief after Filing an Unfair Labor Practice (ULP) Charge

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

The CAA, however, does not currently incorporate the provisions of 5 U.S.C. § 7123(d), pursuant to which parties to ULP proceedings in the executive branch may request the FLRA General Counsel to seek appropriate temporary relief, including issuance of a temporary restraining order. Specifically, section 7123(d) provides:

The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.



This important statutory provision in the FSLMRS allows the FLRA General Counsel to seek, in appropriate cases when a ULP Complaint is filed, temporary relief in any United States District Court when it would be just and proper to do so and the record establishes probable cause that an ULP is being committed.

Incorporating the provisions 5 U.S.C. § 7123(d) into the CAA would allow the OCWR Board to authorize the OCWR General Counsel to seek appropriate temporary relief in the same manner and under the same circumstances. In the Board's view, the grant of authority to the OCWR General Counsel to seek appropriate temporary relief under the CAA would, as has proven to be in the executive branch, operate as a strong disincentive for parties in the legislative branch to engage in protracted administrative proceedings at the taxpayers' expense while continuing to engage in ULPs.¹

¹The Board has long advocated for legislation granting the OCWR General Counsel the authority to investigate and prosecute complaints of discrimination, harassment, and reprisal in order to assist victims and to improve the adjudicatory process under the CAA. On December 21, 2018, as we were in the process of finalizing the Section 102(b) Report for the 116th Congress, the CAA of 1995 Reform Act, S. 3749, was signed into law. As discussed in that Report, the Reform Act establishes new procedures that are also clearly intended to further these policy goals. Under these circumstances, the Board believes that the best course of action is to continue to evaluate the efficacy of the new Reform Act procedures before revisiting the issue of whether the OCWR General Counsel should be granted such investigatory and prosecutorial authority. Accordingly, this recommendation is not discussed further in this Report.

Amend the Confidentiality Provisions of the CAA to Exclude Proceedings under the FSLMRS and the Public Access Provisions of the Americans with Disabilities Act (ADA) (CAA Sections 210 and 220)

The general confidentiality provisions of the CAA that govern administrative hearings and deliberations are set forth at section 416 of the Act. 2 U.S.C. § 1416. They currently provide in relevant part that “all proceedings and deliberations of hearing officers and the Board, including any related records, shall be confidential. This subsection shall not apply to proceedings under section 1341 of this title [concerning proceedings under the Occupational Safety and Health Act of 1970 (OSHAct)], but shall apply to the deliberations of hearing officers and the Board under that section.” Congress excluded proceedings under the OSHAct from these confidentiality provisions because it determined that the public interest in transparency concerning safety and health proceedings on Capitol Hill outweighed any value in keeping them confidential.

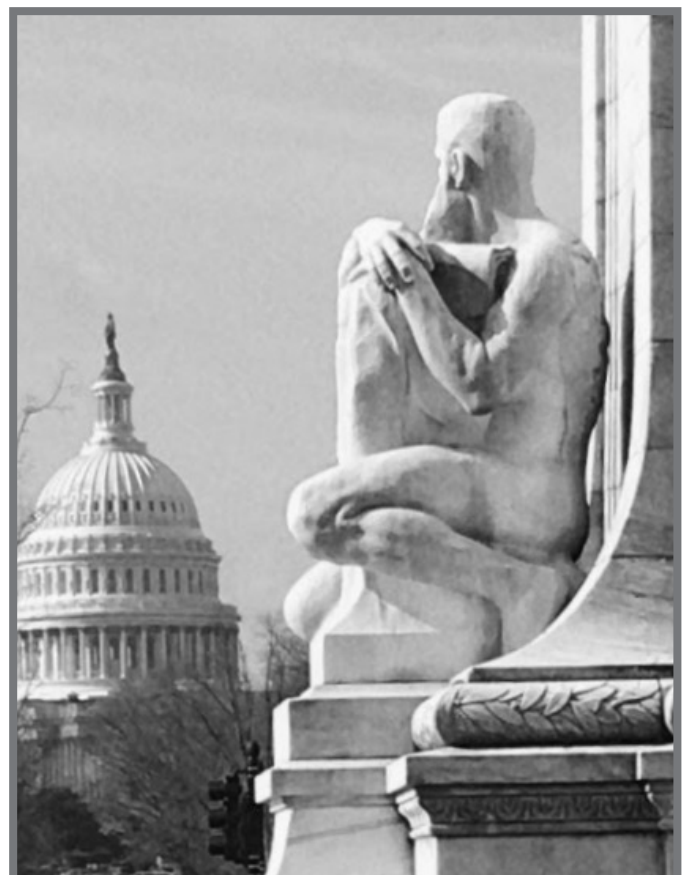
The Board believes that the public interest in transparency outweighs any value in confidentiality for proceedings under the ADA public access provisions and the labor-management provisions of the CAA. 2 U.S.C. §§ 1331, 1351. Unlike the individual employment matters covered by Part A of subchapter II of the CAA where there is undoubtedly value in keeping individual personnel disputes confidential, the matters covered by Parts B (ADA public access), C (occupational safety and health), and D (labor-management relations) primarily involve institutional and public concerns with maintaining facilities, policies, and programs that are safe, healthful, accessible, and free from ULPs. The current lack of transparency undermines the public’s confidence that those statutory mandates are being fully enforced, encourages protracted litigation at taxpayer expense, and discourages voluntary compliance.

Accordingly, the Board recommends that section 416 of the CAA be amended to exclude from its confidentiality provisions, proceedings under the FSLMRS and the public access provisions of the ADA. This could be accomplished by amending the second sentence in CAA section 416(b) as follows: “This subsection shall not apply to proceedings under sections 1331, 1341, and 1351 of this title, but shall apply to deliberations of hearing officers and the Board under these sections.”

Amend the Voluntary Mediation Provisions of the CAA’s Administrative Dispute Resolution (ADR) Procedures to Require Mediation upon Request of the Claimant

Prior to the CAA Reform Act, the CAA’s ADR procedures required, among other things, that an employee file a request for mediation with the OCWR as a jurisdictional prerequisite to filing a complaint with the OCWR or in the U.S. District Court. Further, the CAA provided that the mediation period “shall be 30 days,” which could be extended upon the joint request of the parties.

As a result of the CAA Reform Act amendments, however, mediation is no longer mandatory—rather, mediation takes place only if requested and only if both parties agree. 2 U.S.C. § 1403. This change from mandatory to voluntary mediation was enacted amid concerns that the mandatory mediation process could serve to delay the availability of statutory relief for victims of harassment or other conduct prohibited by the CAA. Concerns were also expressed that employees could view the mandatory mediation process as intimidating—especially those who are unrepresented by counsel in mediation but who face an employing office represented by legal counsel. The amendment was also enacted amid consensus that mediation is most successful when claimants feel comfortable and adequately supported in the process.



The Board continues to view mediation as a valuable option available to settle disputes under the CAA. The OCWR's experience over many years has been that a large percentage of controversies have been successfully resolved without formal adversarial proceedings, due in large part to its mediation processes. Mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also gives the parties an opportunity to explore resolving the dispute themselves without having a result imposed upon them. Furthermore, OCWR mediators are highly skilled professionals who have the sensitivity, expertise, and flexibility to customize the mediation process to meet the concerns of the parties. In short, the effectiveness of mediation as a tool to resolve workplace disputes cannot be understated.

The Board is concerned, however, that the CAA Reform Act amendments requiring the consent of both parties to mediation effectively gives the employing offices a veto over claimants who wish to attempt to settle their claims with the assistance of an OCWR mediator. None of the concerns expressed at the time the CAA Reform Act was passed warrant such a result. Moreover, none of the policies underlying mediation are furthered when an employee's request for mediation is effectively denied by the employing office. Further, there is no indication that an employing office would be adversely affected if it were required to participate in mediation when it is requested by the claimant. Requiring mediation upon the request of a claimant will maximize the chances of achieving a voluntary settlement that best meets the needs of all parties to the dispute.

Accordingly, the Board recommends that the CAA be amended to provide that mediation take place if requested by the claimant, or if requested by the employing office and agreed to by the claimant.

Protect Employees Who Serve on Jury Duty (28 U.S.C. § 1875)

Section 1875 of title 28 of the U.S. Code provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch

employment. For the reasons set forth in the 1996, 1998, 2000, 2006, and 2019 Section 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

Protect Employees and Applicants Who Are or Have Been In Bankruptcy (11 U.S.C. § 525)

Section 525(a) of title 11 of the U.S. Code provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. Reiterating the recommendations made in the 1996, 1998, 2000, 2006, and 2019 Section 102(b) Reports, the Board advises that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

Prohibit Discharge of Employees Who Are or Have Been Subject to Garnishment (15 U.S.C. § 1674(a))

Section 1674(a) of title 15 of the U.S. Code prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000, 2006, and 2019 Section 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to covered employees and employing offices within the legislative branch.

Provide Whistleblower Protections to the Legislative Branch

Civil service law provides broad protection to whistleblowers in the executive branch to safeguard workers against reprisal for reporting violations of laws, rules, or regulations, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. In the private sector, whistleblowers also are often protected by provisions of specific federal laws. However, these provisions do not apply to the legislative branch.

"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 by uncovering waste and fraud and safeguarding the budget."

The OCWR has received a number of inquiries from congressional employees concerned about their lack of whistleblower protections. The absence of specific statutory protection against reprisal such as that provided under 5 U.S.C. § 2302(b)(8) chills the disclosure of vital information in the public interest to guard against legislative branch mismanagement and abuse. 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 by uncovering waste and fraud and safeguarding the budget.

The Board has recommended in its previous Section 102(b) Reports and continues to recommend that Congress provide whistleblower reprisal protections to legislative branch employees comparable to that provided to executive branch employees under 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 1221. Additionally, the Board recommends that the Office be granted investigatory and prosecutorial authorities over whistleblower reprisal complaints, by incorporating into the CAA the authority granted to the Office of Special Counsel, which investigates and prosecutes claims of whistleblower reprisals in the executive branch.

Provide Subpoena Authority to Obtain Information Needed for and Health Investigations and Require Records to Be Kept of Workplace Injuries and Illnesses

The CAA applies the broad protections of section 5 of the OSHAct to the congressional workplace. The OCWR enforces the OSHAct in the legislative branch much in the same way the Secretary of Labor enforces the OSHAct in the private sector.



Under the CAA, the OCWR is required to conduct safety and health inspections of covered employing offices at least once each Congress and in response to any request, and to provide employing offices with technical assistance to comply with the OSHAct's requirements. But Congress and its agencies are still exempt from critical OSHAct requirements imposed upon American businesses. Under the CAA, employing offices in the legislative branch are not subject to investigative subpoenas to aid in inspections as are private sector employers under the OSHAct.

Similarly, Congress exempted itself from the OSHAct's recordkeeping requirements pertaining to workplace injuries and illnesses that apply to the private sector.

The Board continues to recommend that legislative branch employing offices be subject to the investigatory subpoena provisions contained in OSHAct section 8(b) and that legislative branch employing offices be required to maintain records of workplace injuries and illnesses under OSHAct section 8(c), 29 U.S.C. § 657(c), in the interests of the safety and health of legislative branch employees.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

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

Approve the Board's Pending ADA Public Access Regulations

The CAA directs the OCWR Board to promulgate regulations implementing the CAA to keep Congress current and accountable to the workplace laws that apply to private and public employers. The Board is required to issue substantive regulations to achieve parity, unless there is good cause shown to deviate from the private sector or executive branch regulations. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for proposing and approving substantive regulations provides that: (1) the Board of Directors proposes substantive regulations and publishes a general notice of proposed rulemaking in the *Congressional Record*; (2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; (3) after consideration of comments by the Board of Directors, the Board adopts regulations and transmits notice of such action (together with the regulations and a recommendation regarding the method for congressional approval of the regulations) to the Speaker of the House and President Pro Tempore of the Senate for publication in the *Congressional Record*; (4) there be committee referral and action on the proposed regulations by resolution in each House, concurrent resolution, or by joint resolution; and (5) there be final publication of the approved regulations in the *Congressional Record*, with an effective date prescribed in the final publication.

The Board recommended in its 2019 Section 102(b) Report to the 116th Congress that Congress approve the Board's pending regulations that would implement titles II and III of the ADA in the legislative branch. The Board again recommends in this Report that Congress approve its adopted regulations.

Public access to Capitol Hill and constituent access to district and state offices have long been congressional hallmarks of our democracy. The Board's ADA regulations, which await congressional approval, further ensure that continued access. First, the Board's ADA regulations clarify which title II and title III regulations apply to the legislative branch. This knowledge will undoubtedly save taxpayers money by ensuring pre-construction review of construction projects for ADA compliance—rather than providing for only post-construction inspections and costly redos when the access is not adequate. Second, under the regulations adopted by the Board, all leased spaces must meet some basic accessibility requirements that apply to all federal facilities that are leased or constructed. In this way, Congress will remain a model for ADA compliance and public access. Under the authority of the landmark CAA, the OCWR has made significant progress toward making Capitol Hill more accessible for persons with disabilities. Our efforts to improve access to the buildings and facilities on the campus are consistent with the priority guidance in the Board's ADA regulations, which it adopted in February 2016. Congressional approval of those regulations would reaffirm its commitment to provide barrier-free access to the Capitol Hill complex for the visiting public.

Approve the Board's Pending FMLA and USERRA Regulations When They Are Resubmitted to Congress

The Board also recommended in its Section 102(b) Report to the 116th Congress that Congress approve its pending regulations to implement the Family and Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). As discussed below, however, further legislative developments, including the enactment of the CAA of 1995 Reform Act of 2018, Pub. L. No. 115-397, and Federal Employee Paid Leave Act (FEPLA) (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020,



Public Law 116-92, December 20, 2019), have and will necessitate further amendments of these regulations, which the Board will resubmit to Congress for approval.

The Board's FMLA Regulations

On June 22, 2016, the Board adopted and submitted for publication in the *Congressional Record* additional amendments to its substantive regulations regarding the FMLA. 162 Cong. Rec. H4128-H4168, S4475-S4516 (daily ed. June 22, 2016). The 2016 amendments provided needed clarity on certain aspects of the FMLA. First, they added the military leave provisions of the FMLA, enacted under

the National Defense Authorization Acts for Fiscal Years 2008 and 2010, Pub. L. 110-181, Div. A, Title V 585(a)(2), (3)(A)-(D) and Pub. L. 111-84, Div. A, Title V 565(a)(1)(B) and (4), which extended the availability of FMLA leave to family members of the regular armed forces for qualifying exigencies arising out of a servicemember's deployment. They also defined those deployments covered under these provisions, extended FMLA military caregiver leave for family members of current servicemembers to include an injury or illness that existed prior to service and was aggravated in the line of duty while on active duty, and extended FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. Second, the amendments set forth the revised definition of "spouse" under the FMLA in light of the Department of Labor's February 25, 2015 Final Rule on the definition of spouse, and the United States Supreme Court's decision in *Obergefell, et al., v. Hodges*, 135 S. Ct. 2584 (2015), which requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Congress has not yet acted on the Board's request for approval of these 2016 amendments. However, on December 20, 2019, it enacted the FEPLA, which further amended the FMLA to allow most civilian federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son

or daughter with an employee for adoption or foster care. Further modifications of the Board's substantive regulations are therefore necessary in order to bring existing legislative branch FMLA regulations (issued April 19, 1996) in line with these recent statutory changes.

Accordingly, on November 16, 2020, the OCWR Board issued a Notice of Proposed Rulemaking and request for comments from interested parties, which concerns additional proposed amendments to the Board's substantive FMLA regulations to implement FEPLA. The Board also proposed to amend these regulations to update references to the OCWR's current administrative dispute resolution procedures, which were significantly amended by the CAA of 1995 Reform Act of 2018. The comment period ended 30 days from the date of publication of the Board's notice in the *Congressional Record*, i.e., on December 17, 2020. The Board is currently reviewing the comments it received and is preparing its Notice of Adopted Rulemaking for publication in the *Congressional Record*. The Board's Notice of Adopted Rulemaking will also constitute the resubmission for congressional approval of its 2016 amendments to its substantive FMLA regulations discussed above. Congressional approval of the Board's adopted FMLA regulations when they are resubmitted will be critical to implementing these expanded family and medical leave protections in the legislative branch.

The Board's USERRA Regulations

On December 3, 2008, the OCWR Board of Directors adopted USERRA regulations to apply to the legislative branch. These regulations support our nation's veterans by requiring continuous health care insurance and job protections for the men and women of the armed services who have supported our country's freedoms. They signal a commitment to anti-discrimination, anti-retaliation, and job protections under USERRA.

Those regulations, transmitted to Congress over 10 years ago, have not yet been approved. As with the Board's FMLA regulations, however, it has become necessary to make additional amendments to these regulations to update references to the OCWR's current administrative dispute resolution procedures that were significantly amended by the CAA of 1995 Reform Act of 2018.

Approving the USERRA regulations when they are resubmitted for approval will assist servicemembers in attaining and retaining

a job despite the call to duty. Approving USERRA regulations would signal congressional encouragement to veterans to seek work in the legislative branch where veteran employment levels have historically been well below the percentage in the executive branch, or even in the private sector, which is not under a mandate to provide a preference in hiring to veterans. Indeed, many reports have put the level of veteran employees on congressional staffs at 2-3 percent or less.

Congress has long focused on issues concerning the health, welfare, accessibility, and employment status of veterans on Capitol Hill. For example, the Veterans Congressional Fellowship Caucus, started in 2014, has supported efforts to bridge the gap between military service and legislative work. In addition, the Wounded Warrior Fellowship Program exists in the office of the Chief Administrative Officer of the U.S. House of Representatives where Members can hire veteran Fellows for 2-year terms. In the Senate, the Armed Forces Internship Program exists to provide on-the-job training for returning veterans with disabilities. Further, Public Law No. 115-364, signed into law in 2018, makes clear that disabled veterans in the legislative branch are covered under the provisions of the Wounded Warrior Act. As such, they may receive wounded warrior leave during their first year in the workforce for treatment for their service-connected disabilities.

An extension of these laudable efforts in support of our veterans should include the long-delayed passage of the Board's adopted USERRA regulations, which implement protections for initial hiring and protect against discrimination based on military service. Congress can lead by example by applying the USERRA law encompassed in the CAA.

Approving the three sets of Board-adopted regulations outlined above would not only signify a continued congressional commitment to the laws of the CAA—which passed in 1995 with nearly unanimous bicameral and bipartisan support—but would ensure the effective implementation of the laws' workplace protections and benefits on behalf of the legislative branch workforce.