

OFFICE OF COMPLIANCE

THREE YEAR REPORT

May 1999

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OVERVIEW

The passage of the Congressional Accountability Act (CAA or the Act) on January 23, 1995 marked an historic change for the legislative branch. In the words of Senator Grassley, one of the bill's primary sponsors: No longer would there 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."

The CAA established the Office of Compliance (Office) as a neutral and independent agency within the legislative branch, to administer and enforce the Act, and applied for the first time, the rights and protections of provisions of the following eleven labor and employment laws (the CAA laws) to more than 20,000 congressional employees and employing offices:

- The Fair Labor Standards Act of 1938 ("FLSA")
- Title VII of the Civil Rights Act of 1964 ("Title VII")
- The Americans with Disabilities Act of 1990 ("ADA")
- The Age Discrimination Act of 1967 ("ADEA")
- The Family and Medical Leave Act of 1993 ("FMLA")
- The Occupational Safety and Health Act of 1970 ("OSHAct")
- The Employee Polygraph Protection Act of 1988 ("EPPA")
- The Worker Adjustment and Retraining Notification Act ("WARN Act")
- Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")
- "Chapter 71" of title 5, United States Code (Relating to Federal Service Labor-Management relations)
- The Rehabilitation Act of 1973

The centerpiece of the CAA is the model alternative dispute resolution (ADR) process – counseling, mediation and adjudicative hearings and appeals – which Congress provided for legislative branch employees. The Office is charged with administering the ADR process and with informing and educating Members of Congress, employing offices, and employees of the legislative branch of their rights and responsibilities under the CAA. Responsibility for the enforcement of the sections of the CAA dealing with unfair labor practices, safety and health, and disability access is lodged with the Office of the General Counsel (OGC). The OGC investigates and prosecutes claims under these sections, and conducts periodic inspections to ensure compliance.

In May 1995, the joint leadership of the 104th Congress appointed the first Board of Directors of the Office of Compliance. As required by the Act, the members of the Board – Glen D. Nager, Chairman, Virginia A. Seitz, James N. Adler, Jerry M. Hunter, and Lawrence Z. Lorber – were experienced in labor and employment law. The Chairman, with the approval of the Board, then appointed the four statutory officers to carry out the responsibilities of the Office: Ricky Silberman, Executive Director; Pamela Talkin, Deputy Executive Director for the Senate; James Stephens, Deputy Executive Director for the House; and Dennis Duffy, General Counsel. In December 1997, Gary Green was appointed to serve as General Counsel, succeeding Mr. Duffy.

Since the passage of the CAA in 1995, the vision of the enacting Congress has been realized. The Office has been established and the regulations mandated by the Act promulgated. A comprehensive education and information program ensures that both the employing offices and covered employees know their rights and responsibilities under the Act. The confidential, timely, and neutral dispute resolution and adjudication process has efficiently and effectively resolved the vast majority of workplace disputes arising under the CAA. Labor representation elections have been conducted and unfair labor practice claims resolved; safety and health inspections and disability access inspections have been conducted and mandated reports on these inspections issued. A comprehensive study of the labor and employment laws in place at the Library of Congress (LOC), the General Accounting Office (GAO), and the Government Printing Office (GPO), and other mandated reports on the application of federal labor and employment laws to the legislative branch have been issued including recommendations called for by the Act for further legislation. In sum, the system created by the CAA has been implemented and has demonstrated its worth.

STATUTORY RESPONSIBILITIES

REGULATION WRITING

The CAA provides that the Board adopt, and Congress approve, substantive regulations implementing sections of the CAA that apply certain rights and protections of the FLSA, FMLA, EPPA, WARN, Titles II and III of the ADA, OSHA, and the FLRA. Additionally, the Executive Director, subject to Board approval, is required to adopt rules governing the procedures of the Office.

In 1995, the procedural rules which govern the Office were adopted by the Executive Director and approved by the Board. In early 1996, substantive regulations for sections 202-205 of the Act (FLSA, FMLA, EPPA, WARN) were adopted by the Board and approved by Congress. Later in 1996, regulations concerning labor-management relations, section 220(d) of the Act, were similarly adopted and approved. In 1997, regulations for Titles II and III of the ADA, and OSHA, as applied by the Act, were adopted by the Board. However, they await

congressional approval, as do regulations approved by the Board under section 220(e) of the Act, as well as the substantive regulations the Board adopted in connection with the extension of EPPA, WARN, and OSHA to the GAO and the LOC.

The procedural regulations applying OSHA and ex parte communications rules were adopted and approved in 1998. Additionally, procedural rules applying EPPA, WARN, USERRA, OSHA and retaliation provisions to the GAO and LOC were proposed, but the rulemaking was terminated in 1998.

EDUCATION AND INFORMATION

Section 301(h) of the CAA mandates that the Office of Compliance provide education and information to Congress, other employing offices of the legislative branch, and covered employees. The Office informs employees and employing offices of their rights, protections and responsibilities under the CAA through the use of printed materials, briefings, an Internet website, and individual counseling and referral for employees and employing offices by phone and in person.

In the fall of 1995, the Office published a reference manual, *A Guide to the Congressional Accountability Act*, which contained summaries of the laws applied by the CAA, a question and answer section for each law, and a complete set of the Office's procedural and substantive rules. Initially, over 1,000 copies of the manual were distributed to all employing offices in the Senate, House of Representatives and covered instrumentalities. All members of the 105th Congress and new members of the 106th Congress received two copies. The *Guide* is regularly updated and supplemental information on the Act or Office of Compliance procedures sent to all employing offices. The Office produced a brochure summarizing the rights and protections under the first eight laws applied by the newly passed CAA which, as required by the Act, was mailed to the residences of 20,000 covered employees. On October 1, 1996, the three remaining laws applied by the CAA took effect and a brochure describing the new rights and responsibilities was produced and mailed to all covered employees. These brochures are mailed on a monthly basis to all new employees, reaching over 15,500 additional individuals.

In 1996, as part of the education and information program, the Deputy Executive Director for the House and the General Counsel of the Office of Compliance, conducted briefings for House employing offices to provide information on the rights, protections, and responsibilities under the new law. The briefings were video taped, and copies are distributed to all new members. Regularly scheduled monthly briefings by the Office counselor and the Deputy Executive Director for the House are conducted for House employing office staff. These briefings focus on specific areas of the CAA, including Office of Compliance dispute resolution procedures, the Fair Labor Standards Act, and the Family and Medical Leave Act. Presentations

are made to new Senate employees twice a month to familiarize them with the CAA and the Office of Compliance.

In 1997, the Office began publication of the *CAAnews*. This quarterly newsletter, containing articles on various aspects of the CAA and the Office of Compliance, is mailed to the homes of all covered employees, as provided in section 301(h)(2) of the Act. The newsletter focuses on topics of concern to employees such as the rights provided by the Fair Labor Standards Act and Family and Medical Leave Act provisions of the CAA. To inform legislative branch employees about the model ADR process provided by the CAA, a special mediation brochure was published, along with a procedural rules booklet that explains the dispute resolution procedures of the Office. FMLA fact sheets and certification forms were distributed to all employing offices to assist them in complying with section 202 of the Act. Notices and posters advising employees of their rights under the Act and notifying them of upcoming union representation elections were produced, and translated into Spanish, as needed.

The Office maintains an interactive telephone information line to provide callers with recorded information on the CAA and the Office. In 1997, the Office went “on-line” with its world wide website, *www.compliance.gov*, which is updated on a regular basis, and includes the 400-page *Guide to the Congressional Accountability Act*; the employee rights and protections brochures; regulations promulgated by the Board of Directors; decisions by the Board; reports and studies issued by the Board; information on ADA public access and accommodations; and information on OSHA compliance.

DISPUTE RESOLUTION

The Alternative Dispute Resolution Process: In the CAA, Congress provides legislative branch employees with a neutral, efficient, and confidential ADR process for resolving workplace disputes. Employees and employing offices may, at any time, seek informal advice and information on the procedures of the Office and the rights, protections, and responsibilities afforded under the CAA. The Office responds to all inquiries on a confidential basis, and tracks both the number and the nature of the inquiries.

Before filing a formal complaint alleging a violation under the CAA, employees must request counseling and mediation which are provided under the auspices of the Office in a neutral, confidential setting. During the 30-day counseling period, the counselor evaluates the alleged violation, advises the employee of his or her rights and responsibilities under the CAA, and, where appropriate, facilitates a resolution to the problem. If counseling does not resolve the employee’s concerns, the Office provides neutral, trained mediators to assist the parties in resolving the dispute. The period for mediation is generally 30 days, but may be extended at the request of the parties.

As reflected in the section 301(h) studies appended to this Report, most inquiries do not proceed to formal counseling, mediation, and adjudication. An overwhelming majority of those that do are resolved by the end of the mediation period. For example, in 1996, of the 95 counseling requests received, 26 closed after counseling but before mediation. Of the 40 requests for mediation received, only 13 complaints were filed in the reporting period. Because ADR has efficiently and effectively resolved the vast majority of disputes arising under the CAA, the Board has recommended that Congress extend the benefits of ADR to the private and public sectors.

If the dispute remains unresolved after counseling and mediation, the employee may choose to pursue the claim through the Office's adjudicative hearing process or file suit in Federal District Court. An employee who elects the adjudicative procedures files a formal complaint with the Office. The Executive Director then appoints an independent Hearing Officer to consider the case and render a written decision, which may be appealed to the Office's Board of Directors. The written decision of the Board may be appealed to the United States Court of Appeals for the Federal Circuit. This administrative hearing process offers speedier resolution and confidentiality, while providing the same remedies as civil action.

Decisions of the Board of Directors: Over the three-year period covered in this Report, the Board of Directors has rendered decisions in 13 cases appealed from Hearing Officer decisions. The Board's decisions are generally publicly available and are posted on the Office's website, at www.compliance.gov. Section 302(c) of the Act provides that the General Counsel is responsible for "representing the Office in any judicial proceeding under this Act." The General Counsel has represented the Office in federal court and the Court upheld the Board's decision.

LABOR-MANAGEMENT RELATIONS

Under the Labor-Management Relations provisions of section 220(c)(1) of the Act, effective October 1, 1996, the Office carries out the Board's investigative authorities. These responsibilities involve determining the appropriateness of units for labor organization representation, the duty to bargain, and exceptions to arbitrators' awards.

From October 1, 1996 until December 30, 1998, 8 representation petitions for elections have been filed, and 3 pre-election investigatory hearings have been held. In addition, three Board Decisions and Directions of Election have been issued, and one election agreement has been entered into by the parties and approved by the Executive Director on behalf of the Board. As a result, 4 elections and one run-off election, have been held. In one instance, the Board set aside an election due to a finding of objectionable conduct by the employing office, and ordered a rerun election, but the labor organization withdrew its petition before the scheduled rerun election was held. In response to clarification petitions, the Board has also issued decisions clarifying the composition of previously certified units.

INSPECTIONS, TECHNICAL ASSISTANCE AND INVESTIGATIONS

Occupational Safety and Health: The CAA requires the General Counsel of the Office of Compliance to inspect facilities of the legislative branch for compliance with safety and health standards at least once each Congress, and report the findings to Congress. Inspections of Congressional facilities were conducted during both the 104th and 105th Congress. These inspections covered approximately 20 million square feet of space, including the Capitol Power Plant, and numerous carpentry, paint finishing, and metal shops. In addition, questionnaires were used to survey the safety and health conditions of more than 1000 District Offices throughout the country.

The report to the 105th Congress highlighted a number of problems in areas such as fire safety, inadequate emergency planning, the absence of an effective safety program to address the very high rate of injuries experienced by employees of the Architect of the Capitol, and the need for remedial measures to stem the growth of Legionella bacteria in the Capitol Power Plant's cooling towers. In addition, the report identified more than 100 hazardous conditions that were found by the inspectors not to comply with safety and health standards. Employing offices were informed of any deficiencies so that hazards could be corrected as soon as possible. The OGC monitored the remedial action undertaken for these problems and nearly all of the hazards were fully abated by the end of 1998.

The CAA's safety and health provisions give covered employees the right to request the inspection of possible hazardous conditions in work areas. When the Office of the General Counsel receives a request for inspection, a copy is forwarded to the employing office, with a request for information in response. In some cases, responsive action by the employing office resolves the problem. In other cases, an on-site investigation by the Office of the General Counsel is needed to assess the situation, after which the Office of the General Counsel prepares a detailed report which describes the conditions found, reports the results of any tests performed, and explains any steps needed to remedy the problem. During the period covered in this report, the OGC received 46 requests for inspections.

Citations can be issued for conditions that violate safety and health standards. Two serious safety and health hazards resulted in the issuance of citations: the improper storage of flammable liquids and unsafe conditions in the trash sorting and recycling areas. These conditions were corrected after citations were issued.

Like OSHA, the OGC has responsibility for providing compliance assistance to employing offices and covered employees. The OGC also provides interpretations of OSHA standards to employing offices upon request, as well as information about proposed OSHA regulations that affect their operations.

During the period covered in this report the OGC responded to 113 requests for technical assistance on workplace safety and health concerns. The requests concerned such issues as the need for respirators to protect against exposure to harmful chemicals, building evacuation plans, and questions concerning OSHA's proposed new requirements to control the spread of tuberculosis.

Public Services and Accommodations under the Americans with Disabilities Act:

Pursuant to section 210 of the CAA, the Office of the General Counsel inspects congressional facilities at least once each Congress for compliance with the public access provisions of the ADA. Since only areas open to the public are subject to this provision of the CAA, an estimated 8 million square feet is inspected. Reports on the status of compliance were issued to the 104th Congress in June 1996 and to the 105th Congress in December 1998.

The CAA directs the OGC to provide employing offices with technical advice to assist them in complying with disability access requirements. In addition, the OGC routinely answers questions from, and provides information to, Congressional offices on disability access laws. In 1997 and 1998 the Office responded to more than 70 requests for information and technical assistance. Requests included questions on the appropriate accessibility language in notices of town meetings; the type of auxiliary aids that Congressional offices are required to make available upon request; and whether disability access laws require District Offices to be located, or relocated, in accessible buildings. In addition, the OGC prepared and distributed materials to the Congressional offices that explained the disability access requirements that typically apply to their activities.

Unfair Labor Practices: Under section 220 of the CAA the General Counsel is responsible for receiving, filing, investigating and, where appropriate, prosecuting complaints of unfair labor practices. During the period covered in this report the General Counsel answered 30 requests for assistance or information about labor-management relations, and investigated 32 charges of unfair labor practices. Fortunately, successful negotiations obviated the need for prosecution.

STUDIES AND REPORTS

Section 102(b) Report: Section 102(b)(2) of the CAA requires that the Board biennially review all provisions of federal law and regulations relating to the terms and conditions of employment and access to public services and accommodations, report on whether these provisions are applicable to the legislative branch, and recommend whether they should be made applicable.

In its first Section 102(b) Report, submitted to Congress on December 30, 1996, the Board focused on the private-sector laws not applicable to the legislative branch and

recommended that the following provisions be made applicable: (a) Prohibition against discrimination on the basis of bankruptcy (11 U.S.C. § 525); (b) Prohibition against discharge from employment by reason of garnishment (15 U.S.C. § 1674(a)); (c) Prohibition against discrimination on the basis of jury duty (28 U.S.C. § 1875); (d) Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3).

In its second Section 102(b) Report, issued on December 31, 1998, the Board reviewed new statutes or statutory amendments enacted since the 1996 Report and found that coverage was adequate. Based on its experience under the Act since the 1996 Report, the Board recommended that Congress: (1) provide employee “whistleblower” protections, comparable to those generally available to federal employees under title 5, to the legislative branch; (2) clarify the coverage of members of special-purpose study commissions appointed by the Congress who may not be covered by the CAA or comparable statutes; (3) amend 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) to make clear that all entities within the legislative branch are covered by these provisions.

In this Report, the Board also reviewed inapplicable provisions of the private-sector laws generally made applicable by the CAA. Focusing on enforcement, the Board recommended that Congress: (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, gives the General Counsel the authority to seek a restraining order in district court in the case of imminent danger to health or safety; (3) make the record-keeping and notice-posting requirements of the private-sector laws applicable under the CAA; and (4) 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 recommended that Congress 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. The Board also suggested “that, to realize fully the goals of the CAA . . . all inapplicable provisions of the CAA laws should, over time, be made applicable.”

Finally, the Board reviewed and made recommendations on whether to make the CAA, federal-sector, or private-sector labor and employment laws applicable to the GAO, the GPO, and the Library of Congress. Two Members recommended that the three instrumentalities be covered under the CAA, with modifications, and two Members recommended that the three instrumentalities be made fully subject to the laws and regulations generally applicable in the executive branch of the federal sector.

Section 210 and 215 Reports: Sections 210(f)(2) and 215(e)(2) of the CAA require the General Counsel of the Office to submit a report to Congress and the Office of the Architect of the Capitol at least once every Congress. The report must contain the results of the periodic inspections required by the CAA for public access and occupational safety and health compliance. These studies must note any violations, outline the steps necessary to remedy each violation, describe the consequences of each violation, and estimate the cost and time needed to correct the violation.

In June 1996, two reports were submitted to Congress: “Initial Inspections of Facilities for Compliance with Americans with Disabilities Act Standards under Section 210” and “Initial Inspections of Facilities for Compliance with Occupational Safety and Health Standards under Section 215.” In December 1998, the “105th Congress Section 215 Report on Occupational Safety and Health Compliance” and “105th Congress Section 210 Report on ADA Public Services and Accommodations Compliance” were submitted to Congress.

Section 230 Study: Section 230 of the CAA mandates a study of the application of the eleven employment and labor laws made applicable by the CAA to the General Accounting Office (GAO), the Government Printing Office (GPO), and the Library of Congress. Originally, the Administrative Conference of the United States was charged with carrying out the study, but, when the Conference lost its funding, Congress transferred responsibility for the study to the Board of Directors of the Office of Compliance. In December 1997, the Board submitted the Section 230 Study of GAO, GPO, and the Library of Congress.” In this study the Board evaluated the statutory and regulatory regimes in place at these instrumentalities to determine whether they were “comprehensive and effective” as required by the Act. 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. However, the Board determined that it was “premature” to make recommendations on the coverage applicable in these instrumentalities at such an “early stage of its administration of the Act.” The conclusions of the Section 230 Study served as “the foundation for recommendations for change” in a subsequent report issued in 1998 under section 102(b) of the CAA.

Section 301(h) Report: Section 301(h)(3) requires annual reports presenting statistics on the use of the Office of Compliance by covered employees, including the number and type of contacts made with the Office, the reason for such contacts, and the number of covered employees who initiated proceedings with the Office under the Act and the result of such proceedings. The report also must include statistics on the number of covered employees who filed a complaint, the basis for the complaint, and the action taken on the complaint. The three 301(h) reports prepared and submitted to Congress for each calendar year are appended.

APPENDICES

SECTION 301(H) REPORTS TO CONGRESS:

**APPENDIX I.....Section 301(h) Report dated
January 1, 1998-December 31, 1998**

**APPENDIX II.....Section 301(h) Report dated
January 1, 1997-December 31, 1997**

**APPENDIX III.....Section 301(h) Report dated
January 23, 1996-December 31, 1996**