

United States Senate

OFFICE OF THE SECRETARY

DISBURSING OFFICE

WASHINGTON, DC 20510-7104

December 17, 2020

Ms. Susan Tsui Grundmann
Executive Director
Office of Congressional Workplace Rights
110 Second Street, S.E., Room LA-200
Washington, D.C. 20540-1999

via fax: (202) 426-1913
via email: Alexander.Ruvinsky@ocwr.gov

Re: Comments on Proposed Amendments to the Rules of Procedures

Dear Ms. Grundmann:

We appreciate the opportunity to submit comments to the proposed legislative branch FMLA substantive regulations (“Proposed Regulations”) of the Office of Congressional Workplace Rights (“OCWR”). These comments relate specifically to Sections 825.208 and 825.505 of the proposed Regulations as they relate to the role of the Senate Disbursing Office and Financial Clerk of the Senate as the payroll administrator for the Senate (designated by the Secretary of the Senate). Where the Proposed Regulations permit retroactive substitution of paid leave for unpaid leave under certain conditions, they would effectively require retroactive changes in rates of compensation, which could be inconsistent with current law, depending on the timing and total rate of compensation.

The compensation and adjustment of compensation of Senate employees is regulated by statute. Of relevance to this comment, Title 2, United States Code, Section 4575, regulates both the maximum rate of compensation available to a Senate employee, as well as the method, timing and nature of any change in such rates of compensation. Specifically, when an employee’s rate of compensation is changed, other than as a new or transferred employee, then the change in the rate of compensation may only take place

on the first day of the month in which such certification [of the changed rate of compensation] is received (if such certification is received within the first ten days of such month), on the first day of the month after the month in which such certification is received (if the day on which such certification is received is after the twenty-fifth day of the month in which it is received), and on the sixteenth day of the month in which such certification is received (if such certification is received after the tenth day and before the twenty-sixth

day of such month). Notwithstanding the preceding sentence, if the certification for a changed rate of compensation for an employee specifies an effective date of such change, such change shall become effective on the date so specified, but only if the date so specified is the first or sixteenth day of a month and is after the effective date prescribed in the preceding sentence...

2 U.S.C. §4575(a)(2).

Changes in rates of compensation, as described in the statute, are the method by which an employee would be placed on unpaid leave and to reinstate an employee's paid status upon returning to work. Were an employee to elect to substitute, retroactively, paid leave for unpaid leave pursuant to Sections 825.208 and 825.505 of the Proposed Regulations, the method of granting their request must be a certification of a change in the rate of compensation. As described above, however, the period of retroactivity is limited by statute to, at most, 9 days at any given time, and that amount depends on when the request for retroactive change is made and processed. The Senate Disbursing Office is without legal authority to effect any other retroactive changes in an employee's rate of compensation in the circumstances contemplated by the Proposed Regulations.

One way an office may attempt to address an employee's desire for substitution without violating the prohibition on retroactive changes is to temporarily increase the rate of compensation prospectively, in an attempt to provide the compensation that the employee missed when they were incapacitated and on unpaid leave as indicated in the Proposed Regulations. However this attempt to comply with the Proposed Regulations may also lead to a violation. This is because the maximum rate of compensation that any Senate employee may be paid at any given time is set in the same statute, 2 U.S.C. 4575 §§(d)(2), (e) and (f) (currently \$173,900 for most Senate employees). In addition, while the Senate is permitted by statute to pay an employee a lump sum for accrued annual leave upon termination, that authority is limited to payment upon termination. 2 U.S.C. §4580(a).

Due to such constraints, no employee may earn, during a single pay period, a rate of pay that would be annualized to a greater rate than the statutory maximum rate. Should an office wish to accomplish a retroactive increase by increasing an employee's prospective rate of pay, therefore, they would only be able to effect such a temporary change to the extent that the increase does not exceed the Senate maximum rate of compensation in the aggregate.

For example, consider an employee whose regular rate of compensation is \$100,000 but has their rate of compensation reduced due to unpaid FMLA leave for two pay periods. Should the employee, for the reasons specified in the Proposed Regulations, then elect to retroactively substitute available paid sick leave, two problems could arise. First, the statute would prevent the employee's office from changing their rate of compensation back to \$100,000 for the previous two pay periods, because that falls outside the required timeline for certifying changes in rates of compensation. Second, the statute also prevents the employee's prospective rate of compensation from being effectively doubled for two pay periods. This is because by doubling each paycheck

for two pay periods, the employee would be earning a rate of compensation of \$200,000 each pay period, which unlawfully exceeds the Senate maximum

At its most problematic, should an employee who regularly earns the Senate maximum wish to make up compensation for a retroactive substitution, there is nothing the Disbursing Office may do within the law to make up for the periods of unpaid leave, because no prospective increase in compensation is possible.

Because of the potential for retroactive, or even immediately prospective changes in rates of compensation to violate law, the Senate Disbursing Office may not be able to comply with the Proposed Regulations in certain instances. Instead, we recommend language that permits prospective changes in rates of compensation in lieu of retroactive substitutions, and only to the extent they do not violate statutory maximums for Senate rates of compensation.

Thank you for the opportunity to submit these comments. We would be happy to speak further with your office or appropriate staff about these issues.

Very truly yours,



Ted Ruckner

Financial Clerk of the Senate

cc: United States Senate Committee on Rules and Administration
Julie E. Adams, Secretary of the Senate