



**BROWN BAG**

**Fair Chance Act  
and Other Updates**

Office of Congressional  
Workplace Rights

Office of the  
General Counsel

February 23, 2022

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




**Welcome**

**Topics**

- Fair Chance Act – statute, regulatory process, interim procedures
- COVID-19 – Supreme Court decision staying ETS; current guidance
- Labor-Management – D.C. Circuit decisions; unionization of congressional staff

**Presenters**

- Hillary Benson, Deputy General Counsel
- Gony Goldberg, Associate General Counsel
- Dynah Haubert, Senior Attorney

# Fair Chance Act

## Overview

- Fair Chance to Compete for Jobs Act of 2019 (“Fair Chance Act” / “FCA” / “Ban the Box”)
- Passed as part of NDAA, December 2019
- Became effective in legislative branch December 20, 2021
- CAA section 207, 2 U.S.C. § 1316b
- Prohibits requesting information from most applicants about their criminal history prior to extending a conditional offer of employment
- Purpose: level the playing field for applicants with criminal histories to find employment in the federal government
- OCWR must wait for OPM to issue regulations
- OCWR has issued Interim Procedures for FCA claims

**Statutory Restrictions** – 2 U.S.C. § 1316b(b); 5 U.S.C. §§ 9101(a), 9201(4), 9202

- An employee of an employing office may not request, orally or in writing, that an applicant for employment as a covered employee disclose criminal history record information, prior to extending a conditional offer
- “Criminal history record information”
  - Arrests, indictments, informations, or other criminal charges
  - Any disposition arising therefrom, sentencing, correction, supervision, release
  - Includes sealed or expunged information
  - Includes equivalent juvenile delinquency information
- “Conditional offer” – an offer of employment as a covered employee that is conditioned upon the results of a criminal history inquiry

**Statutory Exceptions** – 2 U.S.C. § 1316b(b)(1)(A); 5 U.S.C. § 9202(c)

- Positions requiring a determination of eligibility for:
  - access to classified information
  - assignment to or retention in sensitive national security duties or positions
- Positions as federal law enforcement officer (as defined in 18 U.S.C. § 115(c))
- Positions for which consideration of criminal history record information prior to a conditional offer is otherwise required by law
- Other positions identified in regulations issued to implement the FCA

**Statutory Remedy** – 2 U.S.C. § 1316b(c); 5 U.S.C. § 9204

- Applicants may file claims with OCWR alleging violations and use OCWR ADR procedures
- No right to file civil action in federal district court
- No judicial review of OCWR Board decisions on FCA claims
- Remedy is essentially the same as 5 U.S.C. § 9204
  - Employee who violated the FCA receives warning for first violation, progressive discipline for subsequent violations, including suspensions and civil penalties
  - Employee is entitled to notice and a hearing on the record
- No relief available to applicant

**What the FCA Doesn't Do**

- The FCA does not prohibit employing offices from:
  - acquiring criminal history record information about applicants through other means
  - requesting disclosure of criminal history record information after extending a conditional offer
  - considering lawfully acquired criminal history record information in determining whether to hire an applicant (but beware potential disparate impact or intentional discrimination claims)
- The FCA does not provide any remedy to the applicant if the claim is determined to be meritorious

### Status of Regulations

- The FCA directs OPM to issue regulations for the executive branch
- The OCWR Board must adopt regulations that are the same as the OPM regulations, “except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections” of the FCA in the legislative branch – 2 U.S.C. § 1316b(d)(2)
- OPM has proposed regulations for the executive branch, but they are still pending review with OMB, so the OCWR Board cannot yet propose regulations for the legislative branch

### Regulatory Process

- CAA section 304, 2 U.S.C. § 1384
- Notice of Proposed Rulemaking published in the Congressional Record
- Public comments received and reviewed by the OCWR Board
- Board adopts regulations and publishes them in the Congressional Record
- Regulations become effective after approved by Congress, then issued by the OCWR and published in the Congressional Record
- Congressional approval can be accomplished by a one-house resolution, a joint resolution, or a concurrent resolution
  - If only one house approves the regulations, they apply only to that house

### Interim Procedures

- Special claim form for FCA claims only – available as PDF on web site
- Claimant may not file civil action in district court; all FCA claims must proceed through OCWR ADR process
- Notice to employing office and applicant, including mediation information
- Notice to employee alleged to have violated the FCA, including notice that employee may be subject to discipline and information about intervening in the claim
- No preliminary review; claim is considered as request for hearing
- Employee has the right to respond, produce evidence, be represented, have a hearing on the record, and receive written decision
- Decision of Merits Hearing Officer may be appealed to the OCWR Board
- No judicial review of OCWR Board decisions on FCA claims

### OCWR FCA Resources

- FAQs: <https://www.ocwr.gov/employee-rights-legislative-branch/ban-the-box/>
- FCA Claim Form: <https://www.ocwr.gov/fca-forms/ocwr-fair-chance-to-compete-for-jobs-act-fca-claim-form/>
- Interim Procedures: <https://www.ocwr.gov/uncategorized/ocwr-interim-procedures-for-claims-arising-under-the-fair-chance-to-compete-for-jobs-act-fca/>

## COVID-19 Updates

### ***Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022)***

- Did OSHA exceed its authority in promulgating a rule mandating that employers with at least 100 employees require covered workers to receive a COVID-19 vaccine or else wear a mask and be subject to weekly testing?
- On January 13, 2022, the Supreme Court stayed OSHA's emergency temporary standard (ETS)
- SCOTUS issued three opinions: an unsigned per curiam decision of the Court as a whole granting the applications for stay; a concurring opinion by Justice Gorsuch (joined by Justices Thomas and Alito); and a dissenting opinion by Justices Breyer, Sotomayor, and Kagan



### **Per Curiam Opinion**

- Petitioners are likely to succeed on the merits of their claim that the ETS exceeded OSHA/Department of Labor's statutory authority
  - Congress is expected to speak clearly when authorizing an agency to exercise powers of vast economic and political significance
  - OSH Act empowers Secretary of Labor to set workplace safety standards, not broad public health measures; although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most, and COVID-19 can and does spread anywhere people gather
  - Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible
- Equities do not justify withholding interim relief

### **Concurrence (Gorsuch, joined by Alito and Thomas)**

- ETS does not pass muster under the "major questions doctrine" (where Congress expects an agency to make a decision of vast economic and political significance, it must clearly indicate its intention to do so)
- If the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority

### **Dissent (Breyer, Sotomayor, and Kagan)**

- OSHA's rule perfectly fits the language of the applicable statutory provision, which commands OSHA to issue an ETS whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1)
- Nothing in statutory text supports the majority's limitation on OSHA's regulatory authority; OSHA Act authorizes regulation to protect employees from all hazards present in the workplace, and does not require that employees are exposed to those dangers only while on the workplace clock
- Balance of harms and the public interest favor the ETS

### **Now What?**

- OSHA has withdrawn the ETS
- OCWR OGC will continue to investigate COVID-19 related concerns under the General Duty Clause unless an existing standard applies
- Employing offices are strongly encouraged to maintain precautions
  - Telework
  - Masks
  - Social distancing
  - Vaccines

### Current Guidance and Resources

- OCWR Approved Guidance for Use of N95 & KN95 Masks to Protect Against COVID-19 in Legislative Branch Workplaces: <https://www.ocwr.gov/covid-19-and-the-legislative-branch/ocwr-approved-guidance-use-of-n95-kn95-masks-to-protect-against-covid-19/>
  - For employing offices without an existing respiratory protection program, and whose employees are wearing N95/KN95 masks only for purposes of COVID-19 protection, the OCWR OGC will consider distribution of this guidance to all employees to satisfy the employing office's obligations under the respiratory protection standard
- OCWR COVID-19 resources page: <https://www.ocwr.gov/coronavirus/>
- OSHA Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace: <https://www.osha.gov/coronavirus/safework>

## Labor-Management Case Law Updates

***AFGE v. FLRA*, 2022 WL 258588 (D.C. Cir. Jan. 28, 2022)**

- Review of FLRA policy decision in *U.S. Office of Personnel Mgmt.*, 71 F.L.R.A. 977 (Sept. 30, 2020), that zipper clauses are a mandatory topic of bargaining, and therefore parties may bargain to impasse regarding both reopener and zipper clauses
- On appeal, the D.C. Circuit held that the FLRA's policy was arbitrary and capricious
- The D.C. Circuit's decision restores federal-sector unions' statutory right to midterm bargaining, and removes zipper clauses from the scope of mandatory bargaining

***AFGE v. FLRA*, 2022 WL 287906 (D.C. Cir. Feb. 1, 2022)**

- Review of FLRA policy decision in *U.S. Dep't of Educ. & U.S. Dep't of Agric.*, 71 F.L.R.A. 977 (Sept. 30, 2020) (then-Member DuBester dissenting), which replaced the "de minimis" standard for a management-initiated change with a "substantial impact" test for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain
- On appeal, the D.C. Circuit held that the FLRA's policy was arbitrary and capricious
- The D.C. Circuit's decision restores federal-sector unions' statutory right to bargain when management initiates a de minimis change to a condition of employment

## Unionization Under the CAA

### Overview

- CAA section 220, 2 U.S.C. § 1351, applies certain sections of the Federal Service Labor-Management Relations Statute (FSLMRS) to the legislative branch
- Includes all covered employees as defined in section 101(a)(3) of the CAA, 2 U.S.C. § 1301(a)(3), except Library of Congress employees
- *However*, only some of the covered employees have unionization rights currently, while others will only have such rights after Congress approves regulations for those employees issued by the OCWR Board

## CAA Section 220(d) – General Implementation

### (d) Regulations to implement section

#### (1) In general

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

#### (2) Agency regulations

Except as provided in subsection (e), the regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority to implement the statutory provisions referred to in subsection (a) except-

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or

(B) as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest.

## CAA Section 220(e)(1) – Specific Regulations for Certain Offices

### (e) Specific regulations regarding application to certain offices of Congress

#### (1) Regulations required

The Board shall issue regulations pursuant to section 1384 of this title on the manner and extent to which the requirements and exemptions of chapter 71 of title 5 should apply to covered employees who are employed in the offices listed in **paragraph (2)**. The regulations shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71 of title 5 and of this chapter, and shall be the same as substantive regulations issued by the Federal Labor Relations Authority under chapter 71 of title 5, except –

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; and

(B) that the Board shall exclude from coverage under this section any covered employees who are employed in offices listed in paragraph (2) if the Board determines that such exclusion is required because of –

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.

### **CAA Section 220(e)(2) – Offices Subject to Specific Regulations**

- Members' personal offices
- House, Senate, or joint committees
- Offices of various House and Senate leaders
- Certain offices within the Office of the Secretary of the Senate
- Certain offices within the Office of the Clerk of the House of Representatives
- Offices of the Senate Legislative Counsel and Legal Counsel, House Legislative Counsel and General Counsel, Parliamentarian of the House, and Law Revision Counsel
- Offices of any caucus or party organization
- Congressional Budget Office, Office of Technology Assessment, and OCWR
- Others identified by the Board in its regulations that "perform comparable functions"
- See 2 U.S.C. § 1351(e)(2) for complete list

### **Regulatory History Under Section 220(e)**

- Process is set forth in CAA section 304, 2 U.S.C. § 1384
- Advanced Notice of Proposed Rulemaking was published in the Congressional Record in March 1996, followed by Notice of Proposed Rulemaking in May 1996
- Comments were received and reviewed by the Board
- The Board adopted regulations in August 1996, which were published in the Congressional Record in September 1996
- Congress has not yet approved the regulations under section 220(e)
- Regulations would be effective after approved by Congress, then issued by the OCWR Board and published in the Congressional Record

### **Effective Date of Labor-Management Rights**

- For employing offices not listed in section 220(e), their rights under section 220 became effective on October 1, 1996
- However, “With respect to the offices listed in subsection (e)(2), to the covered employees of such offices, and to representatives of such employees, subsections (a) and (b) shall be effective on the effective date of regulations under subsection (e).” 2 U.S.C. 1351(f)(2)
- Thus, congressional staff and others listed in section 220(e) have no labor-management rights under the CAA because they have not yet been approved by Congress

### **House Resolution to Approve Pending 220(e) Regulations**

- H. Res. 915 – 117th Congress – Second Session
- Introduced by Rep. Andy Levin on February 9, 2022
- Official Short Title: Approving certain regulations to implement provisions of the Congressional Accountability Act of 1995 relating to labor-management relations with respect to employees of the House of Representatives covered under section 220(e), and for other purposes



### What Happens If H. Res. 915 Passes?

- House staff would have the right to discuss unionizing in their workplaces
- House staff would be protected from retaliation for exercising their rights under the FSLMRS as applied by the CAA
- If a Petition for Representation is filed with supporting documentation:
  - OCWR will evaluate the showing of interest and the appropriate unit
  - House staff will be allowed to vote for union representation
- Note: the House Resolution would *not* provide labor rights or protections to employees of any office within the Senate, joint offices of the House and Senate, or other non-House offices listed in section 220(e)


### Letter from CHA and Response from OCWR Board

- On February 8, 2022, Committee on House Administration Chairperson Rep. Zoe Lofgren sent a letter to the OCWR Board, requesting that the Board review the 1996 regulations under section 220(e)
- On February 22, 2022, the OCWR Board replied to Chairperson Lofgren, stating that “The Board has conducted a thorough review and now unanimously endorses the regulations adopted by the 1996 Board and urges Congress to approve these regulations.”
- The Board’s letter notes that the CAA Reform Act did not affect section 220, and that the applicable sections of the FSLMRS have not changed significantly since 1996, so substantive changes to the 1996 regulations are unnecessary
- Both letters are available on the OCWR website at <https://www.ocwr.gov/labor-management/cha-board-letters-collective-bargaining-february-2022/>

**For more information:**

- FAQs will be coming soon to the OCWR web site
- Please contact Gony with any other questions
- LMR info on OCWR web site: <https://www.ocwr.gov/employee-rights-legislative-branch/collective-bargaining-and-unionization/>

**Questions?**

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| <p><a href="http://www.ocwr.gov">www.ocwr.gov</a></p> <p>(202) 724-9250</p> <p>110 2<sup>nd</sup> Street SE<br/>Room LA-200<br/>Washington, DC 20540</p> |  |
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