

AMENDING TITLE 5, UNITED STATES CODE, TO MODIFY PROBATIONARY PERIODS WITH RESPECT TO POSITIONS WITHIN THE COMPETITIVE SERVICE AND THE SENIOR EXECUTIVE SERVICE, AND FOR OTHER PURPOSES

MARCH 23, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3023]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 3023) to amend title 5, United States Code, to modify probationary periods with respect to positions within the competitive service and the Senior Executive Service, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Committee Statement and Views .....	2
Section-by-Section .....	3
Explanation of Amendments .....	3
Committee Consideration .....	4
Roll Call Votes .....	4
Application of Law to the Legislative Branch .....	7
Statement of Oversight Findings and Recommendations of the Committee .....	7
Statement of General Performance Goals and Objectives .....	7
Duplication of Federal Programs .....	7
Disclosure of Directed Rule Makings .....	7
Federal Advisory Committee Act .....	7
Unfunded Mandate Statement .....	7
Earmark Identification .....	8
Committee Estimate .....	8
Budget Authority and Congressional Budget Office Cost Estimate .....	8
Changes in Existing Law Made by the Bill, as Reported .....	9
Minority Views .....	15

## COMMITTEE STATEMENT AND VIEWS

## PURPOSE AND SUMMARY

H.R. 3023 modifies the probationary periods for positions within the competitive service and the Senior Executive Service.

## BACKGROUND AND NEED FOR LEGISLATION

In general, an appointment in the competitive service is not considered final until completion of a one-year probationary period, although there are exceptions requiring longer periods. The probationary period provides the government with an opportunity to evaluate an employee's job performance to determine if an appointment to the civil service should become final. Before an appointment becomes final, an employee has limited job protections and, in general, an employee on probation may not appeal a removal action. After an appointment to the civil service is final, an employee receives considerable job protections under the federal merit system, including appeal rights to the Merit Systems Protection Board. In order to provide adequate time to evaluate an employee's job performance, H.R. 3023 establishes a two-year probationary period before an appointment in the competitive service or an initial appointment as a supervisor or manager becomes final.

There are a number of positions in the federal government that are unique and extremely complex. For example, the federal government has positions that require months or years of training or specific licensing or certification requirements. The current one-year probationary period does not provide adequate time for supervisors to properly assess the performance of an employee and to make informed conclusions about employee performance for positions that have additional training or licensing requirements. For federal government positions with training or licensing requirements, H.R. 3023 requires that the probationary period will be the two-year period beginning on the date such formal training is completed or the date such license or certification is granted.

H.R. 3023 also extends the probationary period from one year to two years for career appointees to the Senior Executive Service. The Senior Executive Service leads the federal workforce. As leaders, the nature of the work required of the Senior Executive Service can take longer to assess in order to ensure adequate job performance.

Finally, H.R. 3023 requires agencies to ensure vacancy announcements clearly state the terms and conditions of the probationary period and to provide employees with the requirements needed to successfully complete the probationary period. Agencies are also required to certify that an employee successfully completes the probationary period.

## LEGISLATIVE HISTORY

H.R. 3023, to amend title 5, United States Code, to modify probationary periods with respect to positions within the competitive service and the Senior Executive Service, was introduced on July 10, 2015, by Rep. Ken Buck (R-CO) and referred to the Committee on Oversight and Government Reform. On January 12, 2016, the

Committee ordered H.R. 3023 favorably reported without amendment by a record vote of 20 to 16.

#### SECTION-BY-SECTION

##### *Section 1. Extension of probationary period for positions within the competitive service*

Amends section 3321 of title 5 of the United States Code to establish that the length of a probationary period, before an appointment in the competitive service becomes final, and initial appointment as a supervisor or manager becomes final, shall not be less than a period of two years. For positions that require formal training or completion of a license, the two-year probationary period begins on the date formal training is completed or a license is granted.

Provides the probationary period for a preference eligible, with an appointment or initial appointment to a position that exists on the effective date of this bill, shall be the probationary period that was in effect prior to the effective date of this bill. For a preference eligible with an appointment or initial appointment to a position that does not exist on the effective date of this bill, the probationary period shall be the length of time as the President establishes consistent with the purposes of this bill.

Defines “formal training” as any position that requires a training program by law, rule, regulation, or agency requirement.

Defines “license” as a license, certification or other grant of permission to engage in a particular activity.

Ensures that agencies include in vacancy announcements, and offers of appointment, the terms and conditions of the probationary period. Also, ensures that agencies provide individuals, who are required to complete probationary periods, timely notice of the requirements to successfully complete the probationary period, and that agencies provide certification that the probationary period was successfully completed.

##### *Section 2. Extension of probationary period for positions within the Senior Executive Service*

This section amends Title 5 of the United States Code section 3393(d) to establish that an appointment as a career appointee in the Senior Executive Service shall become final only after serving a two year probationary period.

##### *Section 3. Appeals from adverse actions*

This section amends Title 5 of the United States Code section 7501(a) from one year to two years to establish when an employee becomes entitled to appeal adverse actions.

#### EXPLANATION OF AMENDMENTS

Ranking Member Elijah Cummings (D-MD) offered an amendment in the nature of a substitute that would insert a provision requiring the Government Accountability Office to conduct a study on federal agencies that have lengthened the employee probationary period from one to two years. The amendment was not adopted by a record vote of 14 to 20.

Congresswoman Brenda Lawrence (D-MI) offered an amendment in the nature of a substitute that would insert a provision requiring that an appointment to competitive service shall not become final until the agency head has made an affirmative decision, in writing, 30 days before the end of the probationary period that the individual's performance is acceptable. However, if a written decision is not made, the appointment still becomes final.

In addition, the amendment provides that appointment as a career appointee shall become final after a one year probationary period and that such appointment shall not become final until the agency head has made an affirmative decision, in writing, 30 days before the end of the probationary period that the individual's performance is acceptable. However, if a written decision is not made, the appointment still becomes final. The amendment was not adopted by voice vote.

#### COMMITTEE CONSIDERATION

On January 12, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 3023, by a record vote of 20 to 16, a quorum being present.

## COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

114TH CONGRESS

## ROLL CALL

Vote #: 1

Vote on: H.R. 3023 – Cummings Amendment Date: 1-12-16

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) <i>(Chairman)</i>		X		MR. CUMMINGS (MD) <i>(Ranking)</i>	X		
MR. MICA (FL)		X		MRS. MALONEY (NY)	X		
MR. TURNER (OH)				MS. NORTON (DC)	X		
MR. DUNCAN (TN)				MR. CLAY (MO)	X		
MR. JORDAN (OH)		X		MR. LYNCH (MA)	X		
MR. WALBERG (MI)		X		MR. COOPER (TN)			
MR. AMASH (MI)		X		MR. CONNOLLY (VA)	X		
MR. GOSAR (AZ)				MR. CARTWRIGHT (PA)	X		
MR. DesJARLAIS (TN)		X		MS. DUCKWORTH (IL)			
MR. GOWDY (SC)				MS. KELLY (IL)	X		
MR. FARENTHOLD (TX)				MS. LAWRENCE (MI)	X		
MRS. LUMMIS (WY)		X		MR. LIEU (CA)	X		
MR. MASSIE (KY)		X		MRS. COLEMAN (NJ)	X		
MR. MEADOWS (NC)		X		MS. PLASKETT (VI)			
MR. DeSANTIS (FL)		X		MR. DeSAULNIER (CA)	X		
MR. MULVANEY (SC)		X		MR. BOYLE (PA)	X		
MR. BUCK (CO)		X		MR. WELCH (VT)			
MR. WALKER (NC)		X		MR. LUJAN GRISHAM (NM)	X		
MR. BLUM (IA)		X					
MR. HICE (GA)		X					
MR. RUSSELL (OK)		X					
MR. CARTER (GA)		X					
MR. GROTHMAN (WI)		X					
MR. HURD (TX)		X					
MR. PALMER (AL)		X					

Roll Call Totals: Ayes: 14 Nays: 20 Present:

Passed: \_\_\_\_\_ Failed:   X

## COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

114TH CONGRESS

## ROLL CALL

Vote #: 2

Vote on: H.R. 3023 – Report to House

Date: 1-12-16

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) <i>(Chairman)</i>	X			MR. CUMMINGS (MD) <i>(Ranking)</i>		X	
MR. MICA (FL)	X			MRS. MALONEY (NY)		X	
MR. TURNER (OH)				MS. NORTON (DC)		X	
MR. DUNCAN (TN)				MR. CLAY (MO)		X	
MR. JORDAN (OH)	X			MR. LYNCH (MA)		X	
MR. WALBERG (MI)	X			MR. COOPER (TN)			
MR. AMASH (MI)	X			MR. CONNOLLY (VA)		X	
MR. GOSAR (AZ)				MR. CARTWRIGHT (PA)		X	
MR. DesJARLAIS (TN)	X			MS. DUCKWORTH (IL)		X	
MR. GOWDY (SC)				MS. KELLY (IL)		X	
MR. FARENTHOLD (TX)				MS. LAWRENCE (MI)		X	
MRS. LUMMIS (WY)	X			MR. LIEU (CA)		X	
MR. MASSIE (KY)	X			MRS. COLEMAN (NJ)		X	
MR. MEADOWS (NC)	X			MS. PLASKETT (VI)		X	
MR. DeSANTIS (FL)	X			MR. DeSAULNIER (CA)		X	
MR. MULVANEY (SC)	X			MR. BOYLE (PA)		X	
MR. BUCK (CO)	X			MR. WELCH (VT)			
MR. WALKER (NC)	X			MR. LUJAN GRISHAM (NM)		X	
MR. BLUM (IA)	X						
MR. HICE (GA)	X						
MR. RUSSELL (OK)	X						
MR. CARTER (GA)	X						
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						

Roll Call Totals: Ayes: 20 Nays: 16 Present:

Passed: X Failed: \_\_\_\_\_

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill strengthens the management and implementation of Equal Employment Opportunity programs in federal agencies. As such this bill does not relate to employment or access to public services and accommodations.

#### STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of the bill is to amend title 5, United States Code, to modify probationary periods with respect to positions within the competitive service and the Senior Executive Service.

#### DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. § 551.

#### FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

#### UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

## EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

## COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

*H.R. 3023—A bill to amend title 5, United States Code, to modify probationary periods with respect to positions within the competitive service and the Senior Executive Service, and for other purposes*

H.R. 3023 would extend the probationary period for members of the senior executive service from one year to two years and would require at least a two-year probationary period for most members of the civil service. The bill also would require that federal agencies add certain notifications regarding the terms of probationary periods to job postings and to information provided to employees in such periods.

H.R. 3023 would not generally change the number of employees in the federal government. Furthermore, the necessary tracking and administrative procedures regarding probationary periods are already in place. Therefore, CBO estimates that implementing the legislation would have no net budgetary effect.

Because enacting H.R. 3023 would not affect direct spending or revenues, pay-as-you-go procedures do not apply. CBO estimates that, enacting H.R. 3023 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year period beginning in 2027.

H.R. 3023 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Dan Ready. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

## TITLE 5, UNITED STATES CODE

\* \* \* \* \*

## PART III—EMPLOYEES

\* \* \* \* \*

## SUBPART B—EMPLOYMENT AND RETENTION

\* \* \* \* \*

CHAPTER 33—EXAMINATION, SELECTION, AND  
PLACEMENT

\* \* \* \* \*

SUBCHAPTER I—EXAMINATION, CERTIFICATION, AND  
APPOINTMENT

\* \* \* \* \*

**§ 3321. Competitive service; probationary period**

(a) **[The President]** *Subject to subsections (c) and (d), the President* may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—

(1) before an appointment in the competitive service becomes final; and

(2) before initial appointment as a supervisor or manager becomes final.

(b) An individual—

(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

(2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section,

shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted. Nothing in this section prohibits an agency from taking an action against an individual serving a probationary period under subsection (a)(2) of this section for cause unrelated to supervisory or managerial performance.

(c)(1) *Except as provided in paragraph (2), the length of a probationary period established under paragraph (1) or (2) of subsection (a) shall be—*

(A) *with respect to any position that requires formal training, a period of 2 years beginning on the date that such formal training is completed;*

(B) with respect to any position that requires a license, a period of 2 years beginning on the date that such license is granted; and

(C) with respect to any position not covered by subparagraph (A) or (B), not less than 2 years.

(2) The length of a probationary period established under paragraph (1) or (2) of subsection (a) in the case of a preference eligible shall be not longer than—

(A) if the appointment (as referred to in subsection (a)(1)) or the initial appointment (as referred to in subsection (a)(2)) is to a position that exists on the effective date of this subsection, the length of the probationary period which applies to such position as of such effective date; or

(B) if the appointment (as referred to in subsection (a)(1)) or the initial appointment (as referred to in subsection (a)(2)) is to a position that does not exist on the effective date of this subsection, such length of time as the President may establish, consistent with the purposes of this subparagraph.

(3) In paragraph (1)—

(A) the term “formal training” means, with respect to any position, a training program required by law, rule, or regulation, or otherwise required by the employing agency, to be completed by the employee before the employee is able to successfully execute the duties of the applicable position; and

(B) the term “license” means a license, certification, or other grant of permission to engage in a particular activity.

(d) The head of each agency shall, in the administration of this section, take appropriate measures to ensure that—

(1) any announcement of a vacant position within such agency and any offer of appointment made to any individual with respect to any such position shall clearly state the terms and conditions of the probationary period applicable to such position;

(2) any individual who is required to complete a probationary period under this section shall receive timely notice of the performance and other requirements which must be met in order to successfully complete the probationary period; and

(3) upon successful completion of a probationary period under this section, certification to that effect shall be made, supported by a brief statement of the basis for that certification, in such form and manner as the President may by regulation prescribe.

[(c) Subsections (a) and (b)] (e) Subsections (a) through (d) of this section shall not apply with respect to appointments in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, or any individual covered by section 1599e of title 10.

\* \* \* \* \*

SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

\* \* \* \* \*

**§ 3393. Career appointments**

(a) Each agency shall establish a recruitment program, in accordance with guidelines which shall be issued by the Office of Personnel Management, which provides for recruitment of career appointees from—

(1) all groups of qualified individuals within the civil service;  
or

(2) all groups of qualified individuals whether or not within the civil service.

(b) Each agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency or commissioned officers of the uniformed services serving on active duty in such agency. The boards shall, in accordance with merit staffing requirements established by the Office, conduct the merit staffing process for career appointees, including—

(1) reviewing the executive qualifications of each candidate for a position to be filled by a career appointee; and

(2) making written recommendations to the appropriate appointing authority concerning such candidates.

(c)(1) The Office shall establish one or more qualifications review boards, as appropriate. It is the function of the boards to certify the executive qualifications of candidates for initial appointment as career appointees in accordance with regulations prescribed by the Office. Of the members of each board more than one-half shall be appointed from among career appointees. Appointments to such boards shall be made on a non-partisan basis, the sole selection criterion being the professional knowledge of public management and knowledge of the appropriate occupational fields of the intended appointee.

(2) The Office shall, in consultation with the various qualification review boards, prescribe criteria for establishing executive qualifications for appointment of career appointees. The criteria shall provide for—

(A) consideration of demonstrated executive experience;

(B) consideration of successful participation in a career executive development program which is approved by the Office; and

(C) sufficient flexibility to allow for the appointment of individuals who have special or unique qualities which indicate a likelihood of executive success and who would not otherwise be eligible for appointment.

(d) An individual's initial appointment as a career appointee shall become final only after the individual has served a [1-year] 2-year probationary period as a career appointee. The preceding sentence shall not apply to any individual covered by section 1599e of title 10.

(e) Each career appointee shall meet the executive qualifications of the position to which appointed, as determined in writing by the appointing authority.

(f) The title of each career reserved position shall be published in the Federal Register.

(g) A career appointee may not be removed from the Senior Executive Service or civil service except in accordance with the applica-

ble provisions of sections 1215, 3592, 3595, 7532, or 7543 of this title.

\* \* \* \* \*

**CHAPTER 35—RETENTION PREFERENCE, VOLUNTARY SEPARATION INCENTIVE PAYMENTS, RESTORATION, AND REEMPLOYMENT**

\* \* \* \* \*

**SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE**

\* \* \* \* \*

**§ 3592. Removal from the Senior Executive Service**

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

(1) during the **[1-year]** *2-year* period of probation under section 3393(d) of this title, or

(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

except that in the case of a removal under paragraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

(b)(1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily removed—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to remove the career appointee.

(2) Paragraph (1) of this subsection does not apply with respect to—

(A) any removal under section 4314(b)(3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

(c) A limited emergency appointee, limited term appointee, or noncareer appointee may be removed from the service at any time.

\* \* \* \* \*

**SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS**

\* \* \* \* \*

## CHAPTER 75—ADVERSE ACTIONS

### SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS

#### § 7501. Definitions

For the purpose of this subchapter—

(1) “employee” means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or, except as provided in section 1599e of title 10, who has completed **[1 year]** *not less than 2 years* of current continuous employment in the same or similar positions under other than a temporary appointment limited to **[1 year]** *2 years* or less; and

(2) “suspension” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

\* \* \* \* \*

### SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

#### § 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) “employee” means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) except as provided in section 1599e of title 10, who has completed **[1 year]** *not less than 2 years* of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed **[2 years]** *not less than 2 years* of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) “suspension” has the same meaning as set forth in section 7501(2) of this title;

(3) “grade” means a level of classification under a position classification system;

(4) “pay” means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

- (5) “furlough” means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.
- (b) This subchapter does not apply to an employee—
- (1) whose appointment is made by and with the advice and consent of the Senate;
  - (2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—
    - (A) the President for a position that the President has excepted from the competitive service;
    - (B) the Office of Personnel Management for a position that the Office has excepted from the competitive service;or
  - (C) the President or the head of an agency for a position excepted from the competitive service by statute;
  - (3) whose appointment is made by the President;
  - (4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;
  - (5) who is described in section 8337(h)(1), relating to technicians in the National Guard;
  - (6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;
  - (7) whose position is within the Central Intelligence Agency or the Government Accountability Office;
  - (8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter’s applicability;
  - (9) who is described in section 5102(c)(11) of this title; or
  - (10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.
- (c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

\* \* \* \* \*

## MINORITY VIEWS

Democrats strongly oppose H.R. 3023, which would extend the probationary period from one year to two years for federal employees in the competitive service and the Senior Executive Service.

During the probationary period, federal employees essentially have no due process or appeal rights if disciplinary action is taken against them. They may be fired without notice, they have limited rights to an attorney or representative, and they generally may not appeal their removals.

The bill would double the amount of time during which federal employees are essentially at-will employees. Due process protections are critical to ensuring the integrity of the federal civil service by preventing its politicization and protecting whistleblowers from retaliation.

The Majority would take the drastic step of doubling the probationary period with no evidence that there is a problem that needs to be addressed. The Committee has held no hearings on whether federal agencies need a blanket one-year extension of the probationary period for every federal job in the competitive and senior executive service. This legislation appears to be a solution in search of a problem.

A two-year probationary period for Department of Defense civilian employees was recently enacted in the National Defense Authorization Act for fiscal year 2016. However, the Defense Department did not indicate a need for this change or request it in its fiscal year 2016 legislative proposal. Democratic Members sent a letter to the House and Senate Committees on Armed Services raising concerns that such an extension would undermine due process rights, harm whistleblower protections, and degrade recruitment and retention.

Even after the existing probationary period ends, agencies may still dismiss poor performers after providing employees a chance to improve and ensuring appropriate due process, including 30 days' notice, an opportunity to respond, and appeal rights.

These due process protections are necessary to protect against arbitrary agency actions, including retaliation against whistleblowers, which the Committee has documented as a very real danger in the past.

Before damaging due process and whistleblower rights, the Committee should first determine whether an extension of the probationary period is needed and, if so, whether it is appropriate for all federal service occupations or only certain occupations.

Committee Democrats offered two amendments to address the concerns raised by the bill, which were defeated on party-line votes. An amendment in the nature of a substitute was offered by Ranking Member Cummings which would have required the Government Accountability Office to conduct a study of federal agencies

that have lengthened the employee probationary period from one to two years for certain occupations. It also would have required GAO to analyze the impact of an increased probationary period on each agency's ability to deal with poor performers, improve employee productivity, promote recruitment and retention, and accomplish its mission.

Since Congress recently increased the Defense Department's probationary period for civilian employees from one to two years, the amendment would have required GAO to examine the Defense Department as one case study. Gathering this data is a necessary first step before deciding to change the law, especially since such changes could have damaging effects on civil service protections and whistleblower disclosures.

Rep. Lawrence also offered an amendment which would have struck the provisions in the underlying bill and required each employing agency to make an affirmative decision in writing near the end of an employee's probationary period stating that the individual's performance is acceptable. The Office of Personnel Management considers the use of an affirmative decision to be a leading or best practice in managing the performance of employees.

ELIJAH E. CUMMINGS,  
*Ranking Member.*

