

Calendar No. 615

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
114-344 }

TO AMEND TITLE 5, UNITED STATES CODE,
TO EXPAND LAW ENFORCEMENT
AVAILABILITY PAY TO EMPLOYEES OF U.S.
CUSTOMS AND BORDER PROTECTION'S AIR
AND MARINE OPERATIONS

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2970



SEPTEMBER 6, 2016.—Ordered to be printed

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114TH CONGRESS } 2d Session }	SENATE	{ REPORT 114-344
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TO AMEND TITLE 5, UNITED STATES CODE, TO EXPAND
LAW ENFORCEMENT AVAILABILITY PAY TO EMPLOYEES
OF U.S. CUSTOMS AND BORDER PROTECTION'S AIR AND
MARINE OPERATIONS

SEPTEMBER 6, 2016.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2970]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2970) to amend title 5, United States Code, to expand law enforcement availability pay to employees of the Air and Marine Operations of U.S. Customs and Border Protection, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 2970 is to expand law enforcement availability pay (LEAP) to all law enforcement employees of the Air and Marine Operations (AMO) of U.S. Customs and Border Protection (CBP). This bill will allow all CBP AMO law enforcement employees to be compensated for overtime hours worked under the same pay system, creating a more efficient and equitable system for overtime pay.

II. BACKGROUND AND THE NEED FOR LEGISLATION

CBP AMO is a Federal law enforcement organization that provides “advanced aeronautical and maritime capabilities . . . to detect, sort, intercept, track and apprehend criminals in diverse environments at and beyond U.S. borders.”¹ The organization of CBP AMO has evolved since the creation of the Department of Homeland Security (DHS), with each new formation affecting the compensation structure for overtime hours worked by CBP AMO employees.

Prior to the establishment of DHS, AMO employees operated under the Air and Marine Interdiction Division of the Department of Treasury.² The majority of AMO employees were eligible for overtime compensation through LEAP.³ When the Air and Marine Interdiction Division transitioned to DHS Immigration and Customs Enforcement (ICE), the office was renamed the Office of Air and Marine Operations.⁴ At ICE, those same employees remained under the LEAP overtime pay system.⁵

In 2005, DHS completed the transfer of the Office of Air and Marine Operations to CBP, where it currently remains.⁶ As a result of this transfer, CBP AMO employees’ General Schedule (GS) pay scale levels were converted from the GS-1811 criminal investigation series to the GS-1801 general inspection, investigation, enforcement, and compliance series.⁷ This GS level conversion disqualified many CBP AMO law enforcement agents from LEAP pay, which is only available for employees classified as criminal investigators or customs pilots.⁸ Instead, these CBP AMO employees were eligible for Administratively Uncontrollable Overtime (AUO) compensation.⁹

On October 31, 2013, the Office of Special Counsel (OSC) issued a letter and investigative report to the President on abuse of AUO payments in DHS.¹⁰ Such payments are meant to be limited to occasional overtime work that cannot be predicted or controlled, but the Special Counsel found that in many instances it was being used for routine and predictable assignments.¹¹

¹*Air and Marine Operations Fact Sheet*, U.S. Customs and Border Protection, https://www.cbp.gov/sites/default/files/documents/FS_2015_AMO_0.pdf.

²*Air and Marine: A Rich and Varied History of Service*, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/air-sea/air-and-marine-rich-and-varied-history-service>.

³See 5 U.S.C. § 5545(a). Created by the Law Enforcement Availability Pay Act of 1994, LEAP pay allows criminal investigators to receive 25 percent of basic pay for unscheduled duty hours worked in excess of the basic 40-hour work week. See Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-329, § 633, 108 Stat. 2425 (1994); see also U.S. Customs and Border Protection Office of Air and Marine, Briefing with Comm. staff on premium pay reform (Apr. 14, 2016).

⁴*Air and Marine: A Rich and Varied History of Service*, *supra* note 2.

⁵Briefing with Comm. staff on premium pay reform, *supra* note 3.

⁶*Air and Marine: A Rich and Varied History of Service*, *supra* note 2.

⁷Briefing with Comm. staff on premium pay reform, *supra* note 3.

⁸*Id.* See also 5 U.S.C. § 5545(a).

⁹Memorandum from U.S. Customs and Border Protection Office of Air and Marine Human Resources on AUO Decertification (Oct. 15, 2014).

¹⁰Letter from Carolyn N. Lerner, Special Counsel, Off. of Special Counsel, to President Barack Obama, OSC File No. DI-13-0002 (Oct. 31, 2013) (with enclosed report).

¹¹*Id.* See 5 C.F.R. §§ 550.151, 550.153. Several whistleblowers alleged that at least some of the time compensated with AUO was not spent performing work-related activities. Letter from Carolyn N. Lerner, Special Counsel, Off. of Special Counsel, to President Barack Obama, OSC File No. DI-13-0002 (Oct. 31, 2013) (with enclosed report). Although the allegations of employees being compensated for not performing work related activities were not confirmed, in many instances the Special Counsel found that it was not proper to pay AUO for this work because the work was routine and predictable.

In response to the Special Counsel's findings, DHS and CBP modified and reduced the number and types of employees eligible for AUO compensation.¹² In 2014, CBP AMO law enforcement employees in headquarters, training, and some supervisory positions were decertified from receiving AUO pay.¹³ As a result of this change, CBP AMO must utilize several different overtime pay structures for its employees:¹⁴ CBP AMO pilots are authorized by statute for LEAP pay;¹⁵ CBP AMO non-supervisory marine interdiction agents and non-supervisory aviation enforcement agents are still eligible for AUO compensation;¹⁶ and some first-line supervisory oversight employees within CBP AMO receive AUO while others are compensated through the Federal Employees Pay Act.¹⁷

According to CBP AMO officials, the current status of having employees with different compensation systems working side-by-side "has led to inefficiencies and inequities and can be problematic in managing operations."¹⁸ Officials believe these pay differences "may contribute to morale issues and retention and recruitment challenges."¹⁹ Additionally, since each overtime system is required to be budgeted and reported differently, "there can be an operational impact to the mission if, due to budget constraints, overtime is not authorized and an aircraft or vessel is required to return to base for a crew change."²⁰ Having all CBP AMO law enforcement employees on a single overtime pay system would "alleviat[e] such scenarios where unpredictable budgets inherent to other compensation systems can cause an operation to be suspended."²¹

III. LEGISLATIVE HISTORY

S. 2970, a bill to amend title 5, United States Code, to expand law enforcement availability pay to employees of the Air and Marine Operations of U.S. Customs and Border Protection, was introduced on May 23, 2016, by Chairman Ron Johnson and Senators Heidi Heitkamp and Tammy Baldwin. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2970 at a business meeting on May 25, 2016. The legislation was passed by voice vote with Senators Johnson, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters present.

On June 21, 2016, the companion to S. 2970, H.R. 4902, sponsored by Representatives Will Hurd, Gerald Connolly, Blake Farenthold, Michelle Lujan Grisham, Michael McCaul, and Martha

¹²Memorandum from Randolph D. Alles, Assistant Commissioner, U.S. Customs and Border Protection Office of Air and Marine, on Ensuring Compliance with the Rules Governing Administratively Uncontrollable Overtime (Sept. 19, 2014). *See also* Memorandum from Alejandro N. Mayorkas, Deputy Sec., Dep't of Homeland Sec., on Improving AUO Administration in the Department of Homeland Security (May 23, 2014).

¹³October 15, 2014, Memorandum, *supra* note 10.

¹⁴Memorandum from Randolph D. Alles, Assistant Commissioner, U.S. Customs and Border Protection Office of Air and Marine, on Pay Compensation Authorities Compliance Plan (Oct. 17, 2014).

¹⁵5 U.S.C. § 5545a(i).

¹⁶October 15, 2014, Memorandum, *supra* note 10.

¹⁷*See* 5 C.F.R. § 550.111.

¹⁸Letter from M. Tia Johnson, Assistant Secretary for Legislative Affairs, U.S. Dep't of Homeland Sec., to Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs (Feb. 29, 2016) (on file with Comm. staff).

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

McSally, passed the House of Representatives by a voice vote and was referred to the Committee.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Law enforcement ability pay for employees of the Air and Marine Operations of U.S. Customs and Border Protection

This section modifies title 5 of the United States Code so that all CBP AMO law enforcement employees, not just CBP AMO pilots, are authorized to receive LEAP pay to compensate for overtime hours worked.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 14, 2016.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2970, a bill to amend title 5, United States Code, to expand law enforcement availability pay to employees of the Air and Marine Operations of U.S. Customs and Border Protection.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

KEITH HALL.

Enclosure.

S. 2970—A bill to amend title 5, United States Code, to expand law enforcement availability pay to employees of the Air and Marine Operations of U.S. Customs and Border Protection

S. 2970 would change the system for determining overtime compensation for certain employees of Air and Marine Operations in U.S. Customs and Border Protection (CBP). Based on information from CBP, CBO estimates that implementing S. 2970 would reduce costs by about \$2 million annually or \$10 million over the 2017–2021 period, assuming future appropriations are reduced consistent with the bill's provisions. Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 2970 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

Under current law, about 500 law enforcement officers in Air and Marine Operations are eligible for overtime compensation under three different schedules: the Administratively Uncontrollable Overtime (AUO), the Fair Labor Standards Act (FLSA), and the Federal Employee Pay Act (FEPA). Total overtime costs for those officers, including pay and benefits, totaled \$18 million in 2015. Their total base pay was \$46 million in that year.

Under S. 2970, law enforcement officers in Air and Marine Operations would no longer be eligible for overtime compensation under AUO or the FLSA. The bill would make them eligible for Law Enforcement Availability Pay, and they would remain eligible for FEPA overtime pay. Costs would decline under S. 2970 mostly because the affected officers would no longer receive compensation required under the FLSA. According to CBP, if the overtime pay system in S. 2970 had been implemented for fiscal year 2015, total overtime costs for the affected officers would have been about \$16 million, or about \$2 million lower than the actual overtime expense for that year for those officers.

S. 2970 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.

On May 16, 2016, CBO transmitted a cost estimate for H.R. 4902, a bill to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations, as ordered reported by the House Committee on Oversight and Government Reform on April 14, 2016. The two bills are similar and CBO's estimates of their budgetary effects are the same.

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

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart D—Pay and Allowances

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CHAPTER 55—PAY ADMINISTRATION

* * * * *

Subchapter V—Premium Pay

* * * * *

SEC. 5545a. AVAILABILITY PAY FOR CRIMINAL INVESTIGATORS

(a) * * *

* * * * *

(i) The provisions of subsections (a)–(h) providing for availability pay shall apply to a [pilot employed by the United States Customs Service] *apply to any employee of the Air and Marine Operations of U.S. Customs and Border Protection, or any successor thereto*, who is a law enforcement officer as defined under section 5541(3). For the purpose of this section, section 5542(d) of this title and section 13(a)(16) and (b)(30) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(16) and (b)(30)), [such pilot] *such employee* shall be deemed to be a criminal investigator as defined in this section. The Office of Personnel Management may prescribe regulations to carry out this subsection.

* * * * *