

ENSURING A QUALIFIED CIVIL SERVICE ACT OF 2017

NOVEMBER 16, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOWDY, 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. 4182]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4182) 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.

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## COMMITTEE STATEMENT AND VIEWS

## PURPOSE AND SUMMARY

H.R. 4182, the Ensuring a Qualified Civil Service Act of 2017, or the EQUALS Act of 2017, extends the probationary period for appointments to the competitive service and initial appointments as supervisors and managers to two years after the conclusion of formal training or upon receipt of any applicable formal license. The bill also requires a certification by agencies at the completion of the probationary period to confirm the appointment should be final, extends the probationary period for Senior Executive Service members to two years, and makes changes to eligibility for employee appeal rights to conform to the longer probationary period.

## BACKGROUND AND NEED FOR LEGISLATION

Under current law, most new hires in the competitive service and initial appointments of managers require a probationary period before such appointments become final.<sup>1</sup> Probationary periods normally last for one year after appointment.<sup>2</sup> This time provides probationary employees with an opportunity to understand the requirements of the position for which they have been conditionally selected and undergo proper assessment before becoming a career employee. The probationary period also 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.

During the probationary period, probationers may be removed for unsatisfactory performance or conduct via a more expedient process. In general, all that is required for an employing agency to remove a probationer is a written notice of termination, including an explanation as to why the agency deems the employee's performance or conduct to be inadequate.<sup>3</sup> Agencies do not have to follow the complex and time-consuming removal procedures as they would for non-probationary employees, and generally probationers may not appeal a removal action.<sup>4</sup>

Once an appointment becomes final, an employee is covered by significant legal protections under the merit system, including full appeal rights for removal to the Merit Systems Protection Board.<sup>5</sup> A 2015 Government Accountability Office (GAO) report found that under this formal process, removal actions for poorly performing employees can take six months to a year.<sup>6</sup> Thus, it is important for agencies to remove individuals not suited to Federal service during the probationary period. GAO found that in each year from 2004 to 2013, most employee dismissals for performance took place during the probationary period.<sup>7</sup>

<sup>1</sup> 5 U.S.C. § 3321.

<sup>2</sup> 5 C.F.R. § 315.802.

<sup>3</sup> 5 C.F.R. § 315.804.

<sup>4</sup> There are limited circumstances in which a probationer can appeal a removal action. See 5 C.F.R. § 315.806(b), (d); 29 C.F.R. pt. 1617; and 5 U.S.C. §§ 1214(a)(3), 1221(b).

<sup>5</sup> 5 U.S.C. §§ 7513, 7701.

<sup>6</sup> Gov't Accountability Office, GAO-15-191, Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance Cover Page (2015) [hereinafter "GAO Probationary Period Report"].

<sup>7</sup> *Id.*, at 22.

The probationary period can be a powerful tool for Federal managers to ensure qualified individuals are being appointed to Federal service. However, one year is not sufficient for employees to demonstrate, and for supervisors to observe and assess, all critical aspects of increasingly complex Federal positions. GAO found three specific instances in which the one-year probationary period was insufficient, including:

1. Complex occupations where individuals on a probationary period spend much of the first year in training before beginning work in their assigned areas;
2. Occupations that are project-based and where individuals on a probationary period may not have an opportunity to demonstrate all of the skills associated with the position; and
3. Instances in which individuals on a probationary period often rotate through various offices in the agency and supervisors have only a limited opportunity to assess their performance.<sup>8</sup>

GAO's findings have been supported by other groups. In a congressional hearing earlier this year, the president of the Federal Managers Association testified, "[n]ew employees must often master broad and complex policies and procedures to meet their agencies' missions, necessitating several months of formal training followed by long periods of on-the-job instruction. . . . In occupations where training takes substantial time, supervisors may only have a few months of work to judge employees' performance."<sup>9</sup>

In addition, GAO's internal human capital officer has increased the length of the probationary period for new analysts hired to the agency. This allows new hires to show their work skills on different jobs and at different phases of each job, which include designing an audit, conducting an audit, and writing the report after the audit is complete.<sup>10</sup>

The bill also addresses the concern that the current probationary period is not being used for its intended purpose. Federal regulations provide, "The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment."<sup>11</sup> GAO found, however, that supervisors are often not making performance-related decisions about an individual's future likelihood of success with the agency during the probationary period. This is in part due to supervisors being unaware that an employee's probationary period is expiring.<sup>12</sup>

The EQUALS Act addresses both of these problems. It extends the probationary period for competitive service appointments and supervisors to two years after any required formal training or licensure process is complete. This ensures that agencies have enough time to assess the performance of new employees and managers before making their appointments final. It also allows new

<sup>8</sup> *Id.*, at 12.

<sup>9</sup> *Empowering Managers—Ideas for a More Effective Federal Workforce: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 115th Cong. 9 (2017) (written statement of Renee Johnson, Nat'l President, Fed. Managers Ass'n).

<sup>10</sup> Email from Tim Minelli, Assistant Dir. for Cong. Relations, Gov't Accountability Office, to Majority staff, H. Comm. on Oversight and Gov't Reform (July 12, 2017, 9:07 a.m.) (on file with the Committee).

<sup>11</sup> 5 C.F.R. § 315.803(a).

<sup>12</sup> GAO Probationary Period Report, *supra* note 6, at 11.

hires more time to show improvement based on performance feedback.

The bill helps improve agency use of the probationary period by requiring supervisors to be notified 30 days in advance of the scheduled completion of a probationary period. Agencies are also required to certify that an employee successfully completes the probationary period. Together, these provisions will help supervisors make better use of the probationary period to remove individuals not fit for Federal service.

Finally, H.R. 4182 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.

#### LEGISLATIVE HISTORY

On October 31, 2017, Representative James Comer (R-KY) introduced H.R. 4182, the *Ensuring a Qualified Civil Service Act of 2017*, with Representative Mark Meadows (R-NC) and Representative Jody Hice (R-GA). H.R. 4182 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 4182 at a business meeting on November 2, 2017, and ordered the bill favorably reported by a recorded vote of 19 to 17.

In the 114th Congress, Representative Ken Buck (R-CO) introduced a similar bill, H.R. 3023. On January 12, 2016, the Committee ordered H.R. 3023 favorably reported by a recorded vote of 20 to 16. The text of H.R. 3023 was subsequently added as Title III of H.R. 4361, the *Government Reform and Improvement Act of 2016*, which passed the House by a recorded vote of 241 to 181 on July 7, 2016.

Also in the 114th Congress, S. 1118, the *National Defense Authorization Act for Fiscal Year 2016*, contained a provision extending the probationary period for new hires in the Department of Defense to two years. On November 25, 2015, then-President Barack Obama signed S. 1118 into law.<sup>13</sup>

#### SECTION-BY-SECTION

##### *Section 1. Short title*

Section 1 establishes the short title of the bill.

##### *Section 2. Extension of probationary period for positions within the competitive service*

Section 2 amends section 3321 of title 5, United States Code, to extend the probationary period for appointments in the competitive service and initial appointments as a manager or supervisor to two years after the completion of required training and licensing.

In addition, changes made to title 5 under this section require agencies to: (1) clearly explain the probationary period in any job posting or offer of employment; (2) tell employees in probationary positions the expectations in order to be retained after the probationary period; (3) notify supervisors 30 days before the end of a

<sup>13</sup>Pub. L. No. 114-92 (2015), 129 Stat. 1023, § 1105.

probationary period; and (4) certify satisfactory completion of probationary periods for employees agencies retain after the end of the period.

The section takes effect one year after enactment and applies only to appointments made after the provision takes effect.

*Section 3. Extension of probationary period for positions within the Senior Executive Service*

Section 3 amends section 3393(d) of title 5, United States Code, to extend the probationary period for initial Senior Executive Service career appointments to two years. As with Section 2, the section takes effect one year after enactment and applies only to appointments made after the provision takes effect.

*Section 4. Adverse actions*

Section 4 amends section 7501(1) and 7511(a)(1) of title 5, United States Code, to clarify an individual in the competitive service must both (1) complete a probationary or trial period, and (2) complete two years of current continuous employment in the same position or similar positions, except a temporary appointment of one year or less, to be covered by adverse action procedures for misconduct. In the excepted service, a preference eligible must complete two years of current continuous employment in the same or similar positions. A non-preference eligible must complete a probationary period and complete two years of current continuous service in the same or similar positions, except a temporary appointment limited to two years or less. Section 4 also amends section 4303(f) of title 5, United States Code, to clarify individuals are not entitled to appeal a removal or reduction in grade based on unacceptable performance to the Merit Systems Protection Board until they have completed those requirements. The section takes effect one year after enactment and applies only to individuals whose periods of continuous service commence after the section takes effect.

*Section 5. Regulations required*

Section 5 requires the Director of the Office of Personnel Management to issue regulations to implement the requirements of the bill.

EXPLANATION OF AMENDMENTS

During Committee consideration of the bill, Representative Gerald Connolly (D-VA) offered an amendment in the nature of a substitute to require the Comptroller General of the United States to conduct a study on extended probationary periods. The Connolly amendment was rejected by voice vote.

COMMITTEE CONSIDERATION

On November 2, 2017, the Committee met in open session and, with a quorum being present, ordered the bill favorably reported by a record vote of 19 to 17.

ROLL CALL VOTES

There was one roll call vote conducted during Committee consideration of H.R. 4182.

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
115TH CONGRESS  
RATIO 24-18  
ROLL CALL

Vote on: H.R. 4182 Favorably Report to House

Date: 11-2-17

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. GOWDY (SC) <i>(Chairman)</i>				MR. CUMMINGS (MD) <i>(Ranking)</i>		X	
MR. DUNCAN (TN)	X			MRS. MALONEY (NY)		X	
MR. ISSA (CA)				MS. NORTON (DC)			
MR. JORDAN (OH)	X			MR. CLAY (MO)		X	
MR. SANFORD (SC)	X			MR. LYNCH (MA)		X	
MR. AMASH (MI)	X			MR. COOPER (TN)		X	
MR. GOSAR (AZ)	X			MR. CONNOLLY (VA)		X	
MR. DesJARLAIS (TN)				MS. KELLY (IL)		X	
MR. FARENTHOLD (TX)	X			MS. LAWRENCE (MI)		X	
MS. FOXX (NC)	X			MS. WATSON-COLEMAN (NJ)		X	
MR. MASSIE (KY)				MS. PLASKETT (VI)		X	
MR. MEADOWS (NC)	X			MS. DEMINGS (FL)		X	
MR. DeSANTIS (FL)	X			MR. KRISHNAMOORTHY (IL)		X	
MR. ROSS (FL)	X			MR. RASKIN (MD)		X	
MR. WALKER (NC)	X			MR. WELCH (VT)		X	
MR. BLUM (IA)	X			MR. CARTWRIGHT (PA)		X	
MR. HICE (GA)	X			MR. DeSAULNIER (CA)		X	
MR. RUSSELL (OK)	X			MR. GOMEZ (CA)		X	
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						
MR. COMER (KY)	X						
MR. MITCHELL (MI)	X						
MR. GIANFORTE (MT)	X						

Roll Call Totals: Ayes: 19 Nays: 17 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 amends title 5, United States Code, to modify probationary periods within the competitive service and the Senior Executive Service. As such, this bill does not relate to employment or access to public services and accommodations in the legislative branch.

#### 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 this 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

In accordance with clause 2(c)(5) of rule XIII 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

Section 5 bill directs the Director of the Office of Personnel Management to issue such regulations as are necessary to carry out the requirements of the bill.

#### 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 Section 5(b) of the appendix to title 5, United States Code.

#### UNFUNDED MANDATES STATEMENT

Pursuant to section 423 of the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. 113–67) the Committee has included a letter received from the Congressional Budget Office below.

## 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 of the House of Representatives.

## COMMITTEE ESTIMATE

Pursuant to clause 3(d)(2)(B) of rule XIII of the Rules of the House of Representatives, the Committee includes below a cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE  
COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402 of the Congressional Budget Act of 1974 is as follows:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 13, 2017.*

Hon. TREY GOWDY,  
*Chairman, Committee on Oversight and Government Reform,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4182, the Ensuring a Qualified Civil Service Act of 2017.

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

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*H.R. 4182—Ensuring a Qualified Civil Service Act of 2017*

H.R. 4182 would extend the probationary period for members of the senior executive service from one year to two years and would require a probationary period of at least two years for most members of the civil service. The bill also would increase to two years the amount of time civil servants must be employed before being afforded certain prerogatives when being disciplined, including advance notice of the following actions: suspensions, pay reductions, furloughs, or removals. In addition, agencies would be required to provide certain notifications regarding the terms of probationary periods to job postings, employees in their probationary period, and their supervisor.

Enacting the bill 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 significant budgetary effect.



Enacting H.R. 4182 would not affect direct spending or revenues; therefore pay-as-you-go procedures do not apply.

CBO estimates that, enacting H.R. 4182 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 4182 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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) The length of a probationary period established under paragraph (1) or (2) of subsection (a) shall—*

*(A) with respect to any position that requires formal training, begin on the date of appointment to the position and end on the date that is 2 years after the date on which such formal training is completed;*

*(B) with respect to any position that requires a license, begin on the date of appointment to the position and end on the date that is 2 years after the date on which such license is granted; and*

*(C) with respect to any position not covered by subparagraph (A) or (B), be a period of 2 years beginning on the date of the appointment to the position.*

*(2) 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 the agency and any offer of appointment made to any individual with respect to any such position clearly states the terms and conditions of any applicable probationary period, including any formal training period and any license requirement;*

*(2) any individual who is required to complete a probationary period under this section receives timely notice of any requirements, including performance requirements, that must be met in order to satisfactorily complete such period;*

*(3) any supervisor or manager of an individual who is required to complete a probationary period under this section receives notification of the end date of such period not less than 30 days before such date; and*

*(4) if the head decides to retain an individual after the completion of a probationary period under this section, the head submits a certification to that effect, supported by a brief statement of the basis for the 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 EXECU-  
TIVE 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 applicable provisions of sections 1215,, 3592, 3595, 7532, or 7543 of this title.

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**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.

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**SUBPART C—EMPLOYEE PERFORMANCE**

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**CHAPTER 43—PERFORMANCE APPRAISAL**

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**SUBCHAPTER I—GENERAL PROVISIONS**

\* \* \* \* \*

**§ 4303. Actions based on unacceptable performance**

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other nota-

tion of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is—

- (1) a preference eligible;
- (2) in the competitive service; or
- (3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to—

- (1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,
- (2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed **[1 year of current]** *2 years of current* continuous employment under other than a temporary appointment limited to 1 year or less,
- (3) the reduction in grade or removal of an employee in the excepted service who has not completed **[1 year]** *2 years* of current continuous employment in the same or similar positions, or
- (4) any removal or demotion under section 714 of title 38.

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

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**CHAPTER 75—ADVERSE ACTIONS**

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**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]** *and, except* as provided in section 1599e of title 10, who has completed **[1 year of current]** *2 years of current* continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and
- (2) “suspension” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

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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]; *and*
      - (ii) except as provided in section 1599e of title 10, who has completed [1 year] *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] *2 years* 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]; *and*
      - (ii) who has completed 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;

(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.

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## MINORITY VIEWS

Democrats strongly oppose H.R. 4182, 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 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.

During Committee consideration of the bill, Rep. Connolly offered an amendment in the nature of a substitute that 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, whistleblower disclosures, and lead to the potential politicization of the federal workforce.

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