

Calendar No. 236

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-167 }

TO AMEND TITLE 5, UNITED STATES CODE,
TO REQUIRE THAT THE OFFICE OF
PERSONNEL MANAGEMENT SUBMIT AN
ANNUAL REPORT TO CONGRESS RELATING
TO THE USE OF OFFICIAL TIME BY
FEDERAL EMPLOYEES

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1293



OCTOBER 5, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

79-010

WASHINGTON : 2017

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

JOHN MCCAIN, Arizona

ROB PORTMAN, Ohio

RAND PAUL, Kentucky

JAMES LANKFORD, Oklahoma

MICHAEL B. ENZI, Wyoming

JOHN HOEVEN, North Dakota

STEVE DAINES, Montana

CLAIRE McCASKILL, Missouri

THOMAS R. CARPER, Delaware

JON TESTER, Montana

HEIDI HEITKAMP, North Dakota

GARY C. PETERS, Michigan

MAGGIE HASSAN, New Hampshire

KAMALA D. HARRIS, California

CHRISTOPHER R. HIXON, *Staff Director*

GABRIELLE D'ADAMO SINGER, *Chief Counsel*

COURTNEY J. ALLEN, *Counsel*

MARGARET E. DAUM, *Minority Staff Director*

STACIA M. CARDILLE, *Minority Chief Counsel*

CHARLES A. MOSKOWITZ, *Minority Senior Legislative Counsel*

THOMAS J.R. RICHARDS, *Minority Professional Staff Member*

LAURA W. KILBRIDE, *Chief Clerk*

Calendar No. 236

115TH CONGRESS } 1st Session }	SENATE	{ REPORT 115-167
-----------------------------------	--------	------------------------

TO AMEND TITLE 5, UNITED STATES CODE, TO REQUIRE THAT THE OFFICE OF PERSONNEL MANAGEMENT SUBMIT AN ANNUAL REPORT TO CONGRESS RELATING TO THE USE OF OFFICIAL TIME BY FEDERAL EMPLOYEES

OCTOBER 5, 2017.—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 H.R. 1293]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1293), to amend title 5, United States Code, to require the Office of Personnel Management to submit an annual report to Congress relating to the use of official time by Federal employees, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

I. Purpose and Summary	Page 1
II. Background and Need for the Legislation	2
III. Legislative History	6
IV. Section-by-Section Analysis	6
V. Evaluation of Regulatory Impact	7
VI. Congressional Budget Office Cost Estimate	7
VII. Changes in Existing Law Made by the Act, as Reported	8

I. PURPOSE AND SUMMARY

The purpose of H.R. 1293 is to require the Office of Personnel Management (OPM) to submit an annual report to Congress on the use of official time by Federal employees.

II. BACKGROUND AND THE NEED FOR LEGISLATION

The Civil Service Reform Act of 1978 (Civil Service Reform Act), codified the right of Federal employees to organize, voluntarily join, and participate in labor unions.¹ The Civil Service Reform Act requires labor unions with exclusive representation of a bargaining unit within a Federal agency to represent all the unit's employees, regardless of the employees' union membership status.² In consideration of the possible resources expended by the labor unions to represent Federal employees who are not members of the union, the Civil Service Reform Act permits Federal employees to be compensated under "official time."³ Official time is when a Federal employee conducts representational activities for the union during regular work hours instead of performing regularly assigned duties.⁴ Employees working on official time are compensated by the Federal Government at their regular salaries and benefits while performing representational activities for the union in lieu of regularly assigned duties.⁵

Management of official time can vary within and between agencies for a number of reasons. For example, agencies and unions can negotiate the use of official time at the department, component, bureau, operating administration, facility, or local level, and the results of those negotiations can vary.⁶ Additionally, use of official time must be authorized by the agency, or otherwise agreed upon between a manager and his or her employees.⁷

Official time is permitted when Federal employees participate in collective bargaining agreement negotiations,⁸ in proceedings before the Federal Labor Relations Authority (FLRA),⁹ and other activities that are deemed "reasonable, necessary, and in the public interest."¹⁰ The FLRA has interpreted reasonable, necessary and in the public interest as constituting activities such as participation in labor-management working groups, representation of bargaining unit employees in meetings with management, negotiation of contracts, representation of employees in grievances and disciplinary actions.¹¹ Federal agencies develop internal controls and negotiate provisions in collective bargaining agreements to monitor the use of official time.¹²

Federal law prohibits the use of official time for internal union business, "including the solicitation of membership, elections of labor organization officials, and collection of dues."¹³ However, the FLRA has ruled that official time can be used by Federal employ-

¹ Civil Service Reform Act 701, Pub. L. No. 95-454, 92 Stat. 1191 (1978). *See also* 5 U.S.C. § 71.

² 5 U.S.C. § 7114(a)(1).

³ 5 U.S.C. § 7131. *See also* Off. of Personnel Mgmt., Official Time Usage in the Federal Government: Fiscal Year 2014, 1, *available at* <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2014-official-time-usage-in-the-federal-government.pdf>.

⁴ *Id.*

⁵ S. Gov't Accountability Office, GAO-15-9, Labor Relations Activities: Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time 1 (Oct. 2014), *available at* <http://www.gao.gov/assets/670/666619.pdf>.

⁶ *Id.*

⁷ 5 C.F.R. § 9701.523

⁸ 5 U.S.C. § 7131(a).

⁹ 5 U.S.C. § 7131(c).

¹⁰ 5 U.S.C. § 7131(d). *See also* 5 C.F.R. § 9701.523(d).

¹¹ Off. of Personnel Mgmt., *supra* note 3 at 2.

¹² *Supra* note 5 at 23.

¹³ 5 U.S.C. § 7131(b).

ees to lobby Congress about legislation concerning the union members' conditions of employment.¹⁴

There is no requirement under law that Federal agencies have to report on the use of official time by Federal employees. As a result, agency monitoring and reporting on its employees' use of official time has been inconsistent and infrequent since the enactment of the Civil Service Reform Act.¹⁵ In 1979, the General Accounting Office, now known as the Government Accountability Office (GAO), reported that over 70 percent of agency Federal employee units failed to keep records on the use of official time.¹⁶ GAO recommended that the Office of Personnel Management (OPM):

revise the recordkeeping requirement [for representational functions] to include all official time used for collective bargaining negotiations, direct agency compliance with the recordkeeping requirement, require agencies to prepare reports on all official time authorized for this purpose to provide greater accountability . . . [and] require annual reports from agencies on [official] time . . .¹⁷

OPM issued a Federal Personnel Manual letter in 1981 directing Federal agencies to establish a recordkeeping system to record the use of official time by Federal employees for union activities.¹⁸ This OPM letter did not require agencies to report annually on the use of official time by their employees.¹⁹ When the Federal Personnel Manual was abolished in 1994, the recordkeeping requirements on official time were rescinded.²⁰

GAO reported in 1996 that the total amount and costs of official time for union activities were unknown and that "no reporting requirement exists for agencies to generate comprehensive data on their support of union activities."²¹ GAO advised that:

If decisionmakers hope to resolve the question of the extent to which federal taxpayers subsidize the activities of federal employee unions, better data are needed on (1) the amount and cost of the hours used for union activities, as well as the number of employees using those hours; (2) the types of activities covered by the hours used; and (3) the overall costs of agencies' support for union activities.²²

In 1997, the U.S. House of Representatives Committee on Appropriations directed OPM to report by October 1, 1998, on the use of official time by Federal agencies for the first six months of fiscal

¹⁴*Am. Fed'n of Gov't Employees, Local 12, and U.S. Dep't of Labor*, 61 FLRA 40, 209–16 (2005). See also *U.S. Dep't of Health and Human Services, U.S. Social Security Admin., and Am. Fed'n of Gov't Employees, Local 3231*, 11 FLRA 7 (1983); *Off. of the Adj. Gen., N.H. Nat'l Guard, and Granite State Chapter Ass'n of Civilian Technicians*, 54 FLRA 301 (1998).

¹⁵See U.S. Gov't Accountability Office, *supra* note 5 at 6–7. See e.g. U.S. Off. of Personnel Mgmt., Reports on Official Time, available at <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=appendix4> 2002.

¹⁶U.S. Gen. Accounting Office, GAO-FPCD-79-77, *Inadequate Recordkeeping on Official Time Used for Representational Functions* (Sept. 17, 1979), available at <http://www.gao.gov/assets/130/127702.pdf>.

¹⁷*Id.* at 6.

¹⁸U.S. Gov't Accountability Office, *supra* note 5 at 6.

¹⁹*Id.*

²⁰*Id.*

²¹U.S. Gen. Accounting Office, *Federal Labor Relations: Official Time Used for Union Activities*, GAO/T-GGD-96-191, 8, Sept. 11, 1996, available at <http://www.gao.gov/assets/110/106634.pdf>.

²²*Id.* at 1.

year 1998.²³ The House committee requested that OPM include a description of the benefits and disadvantages of official time; the specific activities conducted by Federal employees on official time; the total number of hours spent on official time; the number of employees who used official time; the valuation in terms of salary spent on official time activities; and the valuation of Federal office space, equipment and other materials provided for official time activities.²⁴

OPM began reporting on the use of official time on a more regular annual basis after a June 17, 2002, memorandum to all Federal agencies instructed annual reporting on the use of official time.²⁵ In this memorandum, OPM noted that “[e]stablishing a clear set of reporting requirements for official time sends a strong signal that labor and management understand their joint obligation to use public funds wisely.”²⁶ From 2002 to 2012, OPM collected data from Federal agencies and issued voluntary annual fiscal year reports on the use of official time in the Federal Government.²⁷ OPM did not issue a report for fiscal year 2013, but did so for fiscal year 2014.²⁸ In early 2015, then-OPM Director Katherine Archuleta decided to limit the issuance of an official time report to every two years.²⁹

There is no requirement regarding the type of information that must be collected by agencies to inform these annual reports to OPM;³⁰ instead, OPM issues guidance to agencies for collecting and reporting information on official time usage.³¹ Under this guidance, Federal agencies report to OPM on the total number of union employees in the agency, the total amount of official time hours used by agency employees, an explanation for any unusually high or low usage of official time compared to prior years, and the total number of official time hours used in each of the following categories: term negotiations, mid-term negotiations, dispute-resolution, and general labor-management relations.³² If an agency reports corrections to the data provided to OPM’s human resource database system, the agency must also report on the cause of the data discrepancy, efforts to correct the data, and actions to improve the quality of the data.³³

Once the data is collected and corrected, OPM includes in its report the total number of official time hours, the rate of official time per bargaining unit employee, a cost estimate of official time, and the percentage of change from one year to the next, as well as a brief narrative explanation for the changes, for each agency and governmentwide.³⁴ In 2014, GAO questioned the reliability of

²³ H. Rep. No. 105–240, at 89–90 (1997).

²⁴ *Id.*

²⁵ Memorandum from U.S. Off. of Personnel Mgmt. on Official Time for Labor-Management Relations (June 17, 2002), *available at* <https://www.chcoc.gov/content/official-time-labor-management-relations>.

²⁶ *Id.*

²⁷ U.S. Off. of Personnel Mgmt., Reports on Official Time, *available at* https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=appendix4_2002.

²⁸ U.S. Off. of Personnel Mgmt., *supra* note 3.

²⁹ Telephone Conversation with Off. of Personnel Management representative and Committee Majority staff (Sept. 6, 2017).

³⁰ *Id.*

³¹ U.S. Off. of Personnel Mgmt., Guidance for Reporting Union Official Time Fiscal Year 2016, 2 (on file with Committee staff).

³² *Id.*

³³ *Id.*

³⁴ *Supra* note 27.

OPM's cost estimate for official time usage noting that "OPM's cost estimate is not reliable because it lacks assurance of its accuracy and also lacks adequate documentation."³⁵ OPM produces a cost estimate by multiplying an agency's total reported official time hours by the average salary for bargaining unit employees.³⁶ GAO used an alternative methodology to calculate the cost estimate of official time for six agencies in fiscal year 2012 by multiplying the official time reported by a union employee by the actual salary data of the employee.³⁷ GAO's alternative cost estimate for the agencies was \$5 million more than OPM's cost estimate, and led GAO to recommend that OPM "consider other approaches to developing its cost estimate."³⁸

GAO also reported that only four of the ten selected agencies for the 2014 report collected data on non-payroll costs of official time, including travel expenses, office space, telephone service, or other related costs.³⁹ One agency that did collect such non-payroll costs reported \$700,000 in travel and per diem expenses, \$1.1 million for office space, telephones, and supplies, and \$200,000 in interest and arbitration expenses.⁴⁰ Another agency told GAO that "it [is] useful to track administrative costs attributable to official time-union office space and travel cost to support agency proposals when negotiating with the union, and for responding to outside inquiries."⁴¹

GAO made two other recommendations that would help provide greater transparency and oversight of official time. GAO recommended that OPM should work with agencies to make better use of existing human resources data tracking systems for collecting and reporting on official time and OPM should use existing governmentwide forums to share best practices among agencies for monitoring and reporting on the use of official time.⁴² OPM partially concurred with the three recommendations noting some limitations of human resources data systems and limitations on OPM's authority to require other agencies to take certain actions.⁴³

OPM does not require agencies to report on the number of union employees that work solely on official time. In the 2014 GAO report, eight of the ten selected Federal agencies reported having Federal employees who spend 100 percent of their time as a Federal employee working on official time doing union activities.⁴⁴ At the Department of Veterans Affairs, 346 union employees worked solely on official time in fiscal year 2015.⁴⁵ The IRS reported 201 employees spending all their work on official time in 2012.⁴⁶

OPM also does not require agencies to collect or report with specificity on activities conducted on official time. Instead, OPM guid-

³⁵ *Id.*

³⁶ *Id.* at 16 (emphasis supplied).

³⁷ *Id.*

³⁸ *Id.* at 18.

³⁹ *Id.* at 18.

⁴⁰ *Id.* at 18-19.

⁴¹ *Id.* at 19.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 14.

⁴⁵ U.S. Gov't Accountability Office, GAO-17-105, Union Activities: VA Could Better Track the Amount of Official Time Used by Employees 13 (Jan. 2017), available at <https://www.gao.gov/assets/690/682250.pdf>.

⁴⁶ Letter from Bertrand Tzeng, HQ Disclosure FOIA and Program Operations, Internal Revenue Service, to William Wilson, Americans for Limited Government (June 6, 2013), available at http://alfoiafiles.com/images/5/5b/IRS_Cover_Letter_w_06.06.13.PDF and http://alfoiafiles.com/images/a/ad/IRS_Responsive_Records_w_06.06.13.PDF.

ance instructs agencies to report the number of official time hours used within four categories: term negotiations, mid-term negotiations, dispute-resolution, and general labor-management relations.⁴⁷ For fiscal year 2014, 78 percent of official time charged by union employees fell under the general labor-management relations category.⁴⁸ Under OPM's guidance, general labor-management relations includes "time used for activities not included in the [other] three categories.

The Committee believes annual reporting on Federal employees' use of official time promotes government transparency and accountability. H.R. 1293 achieves this by implementing standardized requirements for agencies to report annually with detailed information about official time. In these annual reports, Federal agencies, unions, Congress, and taxpayers will be better informed on the extent to which official time is used, the estimated amount of taxpayer dollars spent on the salaries and non-payroll costs for official time, the number of Federal employees working exclusively on official time, and the type of activities conducted on official time.

III. LEGISLATIVE HISTORY

H.R. 1293 was introduced on March 1, 2017, by Rep. Dennis Ross (R-FL-15). The bill as amended was passed by the House of Representatives on May 24, 2017, by voice vote. The Act was received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs on May 25, 2017.

The Committee considered H.R. 1293 at a business meeting on July 26, 2017. No amendments were offered. The legislation was passed by voice vote with Senators Johnson, Portman, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present. Senators Hassan and Harris were recorded as voting "no" for the record.

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

Section 1. Reporting Requirement

This section requires OPM to submit an annual report to Congress on Federal employees' use of official time no later than March 31 of each calendar year. Each Federal agency is required to provide information for each fiscal year to OPM no later than December 31 of each calendar year so that it can be included in OPM's annual report.

The annual report must include the following: the total amount of official time granted to Federal employees; the average amount of official time expended per bargaining unit employee; the activities or purposes for which official time was granted and the effects of the official time on agency operations; the total amount of compensation provided to employees in connection with official time activities; the total amount of official time spent representing non-bargaining unit employees; the total number of Federal employees who solely conduct union activities under official time; and the description of the use of Federal properties for official time activities.

⁴⁷ U.S. Off. of Personnel Mgmt., *supra* note 27 at 1.

⁴⁸ U.S. Off. of Personnel Mgmt., *supra* note 3 at 8.

This report is required to provide information about each Federal agency's use of official time.

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 Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act 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

AUGUST 4, 2017.

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 H.R. 1293, an act to amend title 5, United States Code, to require that the Office of Personnel Management submit an annual report to Congress relating to the use of official time by federal employees.

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

Sincerely,

KEITH HALL.

Enclosure.

H.R. 1293—An act to amend title 5, United States Code, to require that the Office of Personnel Management submit an annual report to Congress relating to the use of official time by federal employees

H.R. 1293 would require the Office of Personnel Management (OPM) to provide annual reports to the Congress on the use of official time by federal employees who also serve as union officers. Official time is paid time off from assigned government duties to represent a labor union. The act would require the OPM report to include the purpose for the use of official time, the amount of compensation paid for official time, and the locations where the official time duty occurs.

OPM collects some information on the use of official time. CBO expects that information currently collected would be combined with other aggregate and estimated information to prepare the report for the Congress. Thus, CBO estimates that any additional costs would be less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 1293 could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting the legislation would not affect revenues.

CBO estimates that enacting H.R. 1293 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1293 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On March 17, 2017, CBO transmitted a cost estimate for H.R. 1293 as ordered reported by the House Committee on Oversight and Government Reform on March 8, 2017. The two versions of legislation are identical and CBO's estimates of the budgetary effects are the same.

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

VII. CHANGES IN EXISTING LAW MADE BY THE ACT, 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 F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

* * * * *

CHAPTER 71—LABOR-MANAGEMENT RELATIONS

* * * * *

SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

* * * * *

SEC. 7131. OFFICIAL TIME.

(a) * * *

* * * * *

(e)

(1)

(A) Not later than March 31 of each calendar year, the Office of Personnel Management, in consultation with the

Office of Management and Budget, shall submit to each House of Congress a report on the operation of this section during the fiscal year last ending before the start of such calendar year.

(B) Not later than December 31 of each calendar year, each agency (as defined by section 7103(a)(3)) shall furnish to the Office of Personnel Management the information which such Office requires, with respect to such agency, for purposes of the report which is next due under subparagraph (A).

(2) Each report by the Office of Personnel Management under this subsection shall include, with respect to the fiscal year described in paragraph (1)(A), at least the following information:

(A) The total amount of official time granted to employees.

(B) The average amount of official time expended per bargaining unit employee.

(C) The specific types of activities or purposes for which official time was granted, and the impact which the granting of such official time for such activities or purposes had on agency operations.

(D) The total number of employees to whom official time was granted, and, of that total, the number who were not engaged in any activities or purposes except activities or purposes involving the use of official time.

(E) The total amount of compensation (including fringe benefits) afforded to employees in connection with activities or purposes for which they were granted official time.

(F) The total amount of official time spent by employees representing Federal employees who are not union members in matters authorized by this chapter.

(G) A description of any room or space designated at the agency (or its subcomponent) where official time activities will be conducted, including the square footage of any such room or space.

(3) All information included in a report by the Office of Personnel Management under this subsection with respect to a fiscal year—

(A) shall be shown both agency-by-agency and for all agencies; and

(B) shall be accompanied by the corresponding information (submitted by the Office in its report under this subsection) for the fiscal year before the fiscal year to which such report pertains, together with appropriate comparisons and analyses.

(4) For purposes of this subsection, the term “official time” means any period of time, regardless of agency nomenclature—

(A) which may be granted to an employee under this chapter (including a collective bargaining agreement entered into under this chapter) to perform representational or consultative functions; and

*(B) during which the employee would otherwise be in a
duty status.*

* * * * *

○