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115-189

TEMPORARY AND TERM APPOINTMENTS
ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1886

TO AMEND SUBCHAPTER 1 OF CHAPTER 31 OF TITLE 5, UNITED STATES CODE, TO AUTHORIZE AGENCIES TO MAKE NON-COMPETITIVE TEMPORARY AND TERM APPOINTMENTS IN THE COMPETITIVE SERVICE



DECEMBER 1, 2017.—Ordered to be printed

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TEMPORARY AND TERM APPOINTMENTS ACT OF 2017

DECEMBER 1, 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 S. 1886]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1886) to amend subchapter I of chapter 31 of title 5, United States Code, to authorize agencies to make noncompetitive temporary and term appointments in the competitive service, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 1886, the Temporary and Term Appointments Act of 2017, is to provide flexibility for Federal agencies to hire employees to temporary or term appointments when a permanent employee for the position is not needed. This bill would also allow Federal agencies to extend these appointments if needed, as well as to make noncompetitive temporary or term appointments if there is a critical hiring need for the position.

II. BACKGROUND AND THE NEED FOR LEGISLATION

When a Federal agency is seeking to hire an employee for a certain position, unless there is an exception in statute, the agency must hire the employee through the competitive service process.¹ The competitive service process is open to all individuals who apply for a Federal employment position, and to be hired, an individual must pass an examination that is “practical in character and as far as possible relate[s] to matters that fairly test the relative capacity and fitness of the applicants for the [position] sought.”² If an individual is hired to a competitive service position, unless otherwise notified, the position is for a permanent career appointment after the employee has completed three years of continuous service.³

While Federal employees are, generally, intended to be hired in the competitive service to career appointments, Federal law and regulations allow Federal agencies to make exceptions to competitive service hiring.⁴ One such exception allows agencies to make a noncompetitive appointment when there is a critical hiring need or severe shortage of highly qualified candidates.⁵ Another exception is for temporary or term appointments.⁶ Agencies can make temporary or term appointments on a competitive or noncompetitive basis.⁷ Federal regulation allows an agency to make a temporary appointment to fill a short-term position that is not expected to last longer than one year, to meet an employment need that is scheduled to end within two years, or to fill positions on a temporary basis when the positions are expected to be needed for placement of permanent employees who would otherwise be displaced from other parts of the agency.⁸

Agencies can also make and extend temporary appointments for intermittent or seasonal work.⁹ If a position was previously filled by a temporary appointment for an aggregate of two years within the previous three-year period, then the agency cannot use a temporary appointment to fill that position.¹⁰ In fiscal year 2014, 8,344 individuals were serving under temporary appointments based on prior temporary service, and 1,688 individuals were serving under noncompetitive temporary appointments in positions with a critical hiring need, with a time limitation of 30 days with one 30-day extension permitted.¹¹

Federal regulation also allows agencies to make term appointments when the need for the position is not permanent.¹² Agencies can use term appointments when a position is for work on a specific project or to assist with an extraordinary workload; when the position is scheduled to be subject to termination, reorganization, or contracted out; when there is uncertainty regarding future funding for the position; or there is a need to maintain permanent posi-

¹ 5 U.S.C. § 2102.

² 5 U.S.C. § 3304(a)(1). *See also* 5 C.F.R. § 332.

³ 5 U.S.C. § 3304a. *See also* 5 C.F.R. § 315.201.

⁴ 5 U.S.C. § 3302.

⁵ 5 U.S.C. § 3304(a)(3).

⁶ *See* 5 C.F.R. § 316.

⁷ 5 C.F.R. § 316.302; 5 C.F.R. § 316.402.

⁸ 5 C.F.R. § 316.401.

⁹ 5 C.F.R. § 316.401(d)(1).

¹⁰ 5 C.F.R. § 316.401(c)(2).

¹¹ U.S. Gov't Accountability Office, Federal Hiring: OPM Needs to Improve Management and Oversight of Hiring Authorities, GAO-16-521, 9, 11 (Aug. 2016), available at <http://www.gao.gov/assets/680/678814.pdf>.

¹² 5 C.F.R. § 316.301(a).

tions for the placement of employees who would otherwise be displaced from other parts of the agency.¹³ Term appointments must be for a period of more than one year but not more than four years.¹⁴ The Office of Personnel Management may authorize an agency to extend a term appointment past the four-year time limit.¹⁵

Department of Defense (DOD) personnel were granted statutory authority to make temporary and term appointments in 2016.¹⁶ Congress provided this authority “to allow the [DOD] to develop more strategic outreach efforts to recruit the talent needed to address a critical hiring need.”¹⁷ This authority allows DOD to make a temporary appointment for up to one year and a term appointment for at least one year and no more than five years, unless a longer time period is authorized by the Secretary of DOD.¹⁸ DOD is also authorized to make noncompetitive temporary and term appointments for no more than 18 months when there is a critical hiring need.¹⁹

This bill would codify the Federal regulations that allow agencies Government-wide to hire individuals for temporary or term appointments when there is no permanent need for the job position, putting the rest of the Government on par with the DOD. This bill would also extend the time periods currently permitted under regulation for temporary appointments up to three years total and up to five years total for term appointments. Agencies would be able to make these appointments on a noncompetitive basis when there is critical hiring need for a non-permanent position.

III. LEGISLATIVE HISTORY

S. 1886, the Temporary and Term Appointments Act of 2017, was introduced on September 28, 2017, by Senator James Lankford. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 1886 at a business meeting on October 4, 2017.

During the business meeting, Senator Lankford offered a modified substitute amendment that increased the time period limits for extensions to appointments made under this authority. The Committee adopted the amendment by voice vote and ordered the bill, as amended, reported favorably by voice vote *en bloc* with Senators Johnson, Lankford, Daines, McCaskill, Tester, Heitkamp, Hassan, and Harris present. Senators Harris and Hassan were recorded as voting “no” for the record.

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

Section 1. Short title

This section establishes the short title of the bill as the “Temporary and Term Appointments Act of 2017”.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at § 301(b).

¹⁶National Defense Authorization Act of 2017, Pub. L. No. 114–328, § 1105, 130 Stat. 2000, 2447 (2016).

¹⁷S. Rep. 114–255, at 293 (2016).

¹⁸National Defense Authorization Act of 2017, Pub. L. No. 114–328, § 1105, 130 Stat. 2000, 2447 (2016).

¹⁹*Id.* at § 1105(b).

Section 2. Noncompetitive temporary and term appointments in the competitive service

This section allows agencies to make temporary or term appointments when there is no permanent need for the position. A temporary appointment is defined as an appointment in the competitive service for a period of not more than one year. A term appointment is defined as an appointment in the competitive service for a period of more than one year and not more than five years.

Under this section, a temporary appointment may be extended in increments of not more than one year, up to a total of three years of service. A term appointment may be extended in increments determined by the agency up to a total of six years of service. This section also permits agencies to make noncompetitive temporary or term appointments for a period of not more than 18 months to positions with a critical hiring need.

The Director of the Office of Personnel Management may prescribe regulations for making these temporary and term appointments.

This section also clarifies that the authority provided by this bill does not affect any authority previously given to DOD to make temporary and term appointments.

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

OCTOBER 27, 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 S. 1886, the Temporary and Term Appointments Act of 2017.

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.

S. 1886—Temporary and Term Appointments Act of 2017

S. 1886 would provide agencies with flexible hiring authorities for non permanent positions including time-limited employees (those who work for less than a year) and term appointments (employees who would work between one and five years). Agencies could use those authorities to staff projects and assignments with

limited durations. Because those authorities are already available to agencies under the Code of Federal Regulations and guidance from the Office of Personnel Management, CBO estimates there would be no budgetary effect from implementing S. 1886.

Enacting S. 1886 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 1886 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1886 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Matthew Pickford. This 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

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

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Subpart B—Employment and Retention

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CHAPTER 31—AUTHORITY FOR EMPLOYMENT

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Subchapter I—Employment Authorities

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SEC. 3115. TEMPORARY AND TERM APPOINTMENTS.

(a) **DEFINITIONS.**—*In this section:*

(1) **DIRECTOR.**—*The term “Director” means the Director of the Office of Personnel Management.*

(2) **TEMPORARY APPOINTMENT.**—*The term “temporary appointment” means an appointment in the competitive service for a period of not more than 1 year.*

(3) **TERM APPOINTMENT.**—*The term “term appointment” means an appointment in the competitive service for a period of more than 1 year and not more than 5 years.*

(b) **APPOINTMENT.**—

(1) **IN GENERAL.**—*The head of an agency may make a temporary appointment or term appointment to a position in the competitive service when the need for the services of the employee services is not permanent.*

(2) **EXTENSION.**—*Under conditions prescribed by the Director, the head of an agency may—*

(A) *extend a temporary appointment made under paragraph (1) in increments of not more than 1 year; up to a maximum of 3 total years of service; and*

(B) *extend a term appointment made under paragraph (1) in increments determined appropriate by the head of the agency, up to a maximum of 6 total years of service.*

(c) **APPOINTMENTS FOR CRITICAL HIRING NEEDS.**—*Under conditions prescribed by the Director, the head of an agency may make a noncompetitive temporary appointment, or a noncompetitive term appointment for a period of not more than 18 months, to a position in the competitive services for which a critical hiring need exists, without regard to the requirements of sections 3327 and 3330. An appointment made under this subsection may not be extended.*

(d) **REGULATIONS.**—*The Director may prescribe regulations to carry out this section, but is not required to promulgate regulations prior to implementation of this section.*

(e) **SPECIAL PROVISION REGARDING THE DEPARTMENT OF DEFENSE.**—*Nothing in this section shall preclude the Secretary of Defense from making temporary and term appointments in the competitive service pursuant to section 1105 of the National Defense Authorization Act for Fiscal Year 2017 (10 U.S.C. note prec. 1580; Public Law 114-328; 130 Stat. 2447), and any regulations prescribed by the Director for the administration of this section shall not apply to the Secretary of Defense for the administration in the exercise of the authorities granted under such section 1105.*

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