

VA EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR
MODERNIZATION ACT

MAY 17, 2021.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. TAKANO, from the Committee on Veterans' Affairs,
submitted the following

R E P O R T

[To accompany H.R. 2788]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 2788) to amend title 38, United States Code, to eliminate the cap on full-time employees of the Department of Veterans Affairs who provide equal employment opportunity counseling, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

The purpose of H.R. 2788 is to remove a statutory limit on the number of Equal Employment Opportunity counselors at the Department of Veterans Affairs (VA). Under 39 U.S.C. § 516 (g) the Department is limited to no more than 40 full-time equivalents for such counselors. The bill also requires VA to report within 60 days on the effect of removing this statutory limit.

BACKGROUND AND NEED FOR LEGISLATION

Under federal law, an employee, former employee, or applicant for employment, who believes that discrimination occurred on the basis of race, color, sex, sexual orientation, transgender orientation, national origin, age (40 and over), disability, genetic information, or retaliation for Equal Employment Opportunity (EEO) activities, may initiate a complaint of discrimination.¹ This complaint goes through an informal stage, where counseling occurs, and then, if elected by the complainant, a formal stage where the Department processes and investigates a formal complaint.²

Within VA, the Office of Resolution Management, Diversity and Inclusion is responsible for providing EEO complaint processing services, including confidential counseling, mediation, and investigation. Specifically, EEO counselors, who are placed in 6 district offices across the country, help process complaints in coordination with case managers and investigators that are also a part of the Office of Resolution Management, Diversity and Inclusion.³

VA is one of the largest federal agencies with over 400,000 employees and has among the most EEO complaints and counseling instances in the federal government. The Department currently has 38 full-time EEO counselors—or less than 1 counselor for every 10,000 employees. In 1998, the year after the statutory limit for counselors was enacted, VA had about 238,000 employees. Twenty years later, in 2018, VA reported having over 390,000 employees. With this significant growth, each counselor at VA serves significantly more employees and has a higher workload when compared to other cabinet-level departments in recent years. According to Equal Employment Opportunity Commission data from 2018, VA had 5,796 formal EEO complaints and provided 4,597 counseling sessions to employees.⁴

VA officials testified in the Subcommittee on Oversight and Investigations legislative hearing that “VA’s EEO counselors are a forward-facing team who engage individuals at the most sensitive time of their conflict or complaint. When staffed, properly, EEO counselors are instrumental in timely resolution of conflicts at the

¹Federal workplace anti-discrimination laws include, but are not limited to, *Title VII of the Civil Rights Act of 1964*, *The Equal Pay Act of 1963*, *The Pregnancy Discrimination Act*, *The Age Discrimination in Employment Act of 1967*, and *Title I of the Americans with Disabilities Act of 1990*.

²Department of Veterans Affairs, Office of Resolution Management (ORM), *Filing an EEO Complaint*, https://www.va.gov/ORMDI/docs/Filing_An_EEO_Complaint1.docx (accessed May 12, 2021).

³Government Accountability Office, *Sexual Harassment: VA Needs to Better Protect Employees*, GAO-20-654T, Washington, D.C.: Jul. 22, 2020), <https://www.gao.gov/products/gao-20-654t>, (accessed May 12, 2021), 5.

⁴U.S. Equal Employment Opportunity Commission, *Annual Report on the Federal Workforce: Form 462 and MD-715 Data Tables for FY 2017 and FY 2018*, <https://www.eeoc.gov/federal-sector/reports/annual-report-federal-workforce-form-462-and-md-715-data-tables-fy-2017-and> (accessed May 12, 2021).

informal stage before they escalate into formal complaints.”⁵ According to VA data provided to the Committee, the resolution of informal contacts by counselors in 2020, before they became formal complaints, was responsible for avoiding over \$46 million in potential costs for investigating and litigating formal EEO complaints.

Officials from VA’s Office of Resolution Management, Diversity and Inclusion told Committee staff that current counselor staffing levels, as constrained by statute, are not sufficient to provide adequate and timely support to employees via EEO counseling activities.

HEARINGS

On April 21, 2021, the Subcommittee on Oversight and Investigations conducted a legislative hearing on various bills introduced during the 117th Congress, including a discussion draft of H.R. 2788. The following witnesses testified: Mr. Jeffrey R. Mayo, Acting Assistant Secretary, Human Resources and Administration/Operations, Security, and Preparedness (HRA/OSP), U.S. Department of Veterans Affairs; Mr. Hansel Cordeiro, Acting Assistant Secretary, Office of Accountability and Whistleblower Protection (OAWP), U.S. Department of Veterans; Mr. Ed Murray, Principal Deputy Assistant Secretary and Deputy Chief Financial Officer, Office of Management (OM), U.S. Department of Veterans; Ms. Jessica Bonjorni, Chief, Human Capital Management (HCM), Veterans Health Administration (VHA), U.S. Department of Veterans; Mr. Christopher Wilber, Counsel to the Inspector General, Office of the Inspector General, U.S. Department of Veterans Affairs.

SUBCOMMITTEE CONSIDERATION

A discussion draft of H.R. 2788 was considered before the Subcommittee on Oversight and Investigations on April 21, 2021. The bill was subsequently considered by the Full Committee on May 4, 2021.

COMMITTEE CONSIDERATION

On May 4, 2021, the full Committee met in an open session, a quorum being present, to consider H.R. 2788. The Committee ordered that H.R. 2788 be ordered favorably reported to the House of Representatives.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. The results of the record vote on an amendment or motion to transmit, together with the names of those voting for and against, are printed below.

⁵ *Statement of Jeffrey R. Mayo, Acting Assistant Secretary Human Resources and Administration/Operations, Security, and Preparedness, Department of Veterans Affairs (VA) Before the Committee on Veterans’ Affairs Subcommittee on Oversight and Investigations, U.S. House of Representatives*, April 21, 2021, <https://docs.house.gov/meetings/VR/VR08/20210421/111431/HHRG-117-VR08-Wstate-MayoJ-20210421.pdf> (accessed May 12, 2021), 11.

Veterans' Affairs Committee record vote No. 3

A motion to favorably report the en bloc package to the U.S. House of Representatives, agreed to by a roll call vote 22-6. The vote was as follows:

Majority Members	Vote	Minority Members	Vote
Mr. Takano	Aye	Mr. Bost	Aye
Ms. Brownley	Aye	Ms. Radewagen
Mr. Lamb	Aye	Mr. Bergman
Mr. Levin	Aye	Mr. Banks	Nay
Mr. Pappas	Aye	Mr. Roy	Nay
Ms. Luria	Aye	Mr. Murphy	Aye
Mr. Mrvan	Aye	Mr. Mann	Nay
Mr. Sablan	Aye	Mr. Moore	Nay
Ms. Underwood	Aye	Ms. Mace	Aye
Mr. Allred	Aye	Mr. Cawthorn	Aye
Ms. Frankel	Aye	Mr. Nehls	Nay
Mr. Brown	Aye	Mr. Rosendale	Nay
Ms. Slotkin	Aye	Ms. Miller-Meeks	Aye
Mr. Trone	Aye		
Ms. Kaptur	Aye		
Mr. Ruiz	Aye		
Mr. Gallego	Aye		

SECTION-BY-SECTION DESCRIPTION

Section 1—Short title

This act may be cited as the “VA Equal Employment Counselor Modernization Act.”

Section 2—Elimination of cap on full-time employees of the Department of Veterans Affairs who provide equal employment opportunity counseling

Subsection (a) of the bill will remove the FTE limit by striking 39 U.S.C. § 516 (g), which states: “The number of employees of the Department whose duties include equal employment opportunity counseling functions as well as other, unrelated functions may not exceed 40 full-time equivalent employees. Any such employee may be assigned equal employment opportunity counseling functions only at Department facilities in remote geographic locations (as determined by the Secretary). The Secretary may waive the limitation in the preceding sentence in specific cases.”

Subsection (b) of the bill requires the Secretary of VA to submit a report within 60 days regarding the effect of the amendment in subsection (a).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate for H.R. 2788 provided by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

H.R. 2788 would remove the limit on the number of Equal Employment Opportunity (EEO) counselors employed by the Department of Veterans Affairs (VA). CBO estimates that VA would hire 40 additional EEO counselors. Using salary information from VA, CBO estimates those counselors would be paid an average of \$131,000 annually. Accounting for gradual hiring, CBO estimates

those counselors would cost \$26 million over the 2021–2026 period; such spending would be subject to the availability of appropriated funds.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 13, 2021.

Hon. MARK TAKANO,
*Chairman, Committee on Veterans' Affairs,
House of Representatives Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2788, the VA Equal Employment Opportunity Counselor Modernization Act.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 2788, VA Equal Employment Opportunity Counselor Modernization Act			
As ordered reported by the House Committee on Veterans' Affairs on May 4, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	1	26	not estimated
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

Under current law, the Department of Veterans Affairs (VA) is prohibited from employing more than 40 counselors to provide Equal Employment Opportunity (EEO) counseling and dispute resolution services. H.R. 2788 would remove that limit.

Businesses, government agencies, and other entities are prohibited from discriminating against job applicants or employees based on the person's race, color, religion, sex, national origin, age, disability or genetic information. EEO counselors at VA are responsible for reviewing complaints that may be related to such discrimination. Counselors support aggrieved parties and facilitate dispute resolution between affected parties, generally before formal complaints are filed with the Equal Employment Opportunity Commission, a federal agency charged with enforcing federal laws that prohibit employment discrimination.

The current limit of 40 EEO counselors was set in 1997. Since then, VA's workforce has nearly doubled. As a result, CBO estimates that VA would hire 40 additional EEO counselors. Using salary information from VA, CBO estimates those counselors would be

paid an average of \$131,000 annually. Accounting for gradual hiring, CBO estimates those counselors would cost \$26 million over the 2021–2026 period; such spending would be subject to the availability of appropriated funds.

The costs of the legislation, detailed in Table 1, fall within budget function 700 (veterans’ benefits and services).

TABLE 1.—ESTIMATED INCREASES IN SPENDING SUBJECT TO APPROPRIATION UNDER H.R. 2788

	By fiscal year, millions of dollars—						2021–2026
	2021	2022	2023	2024	2025	2026	
EEO Counselors							
Estimated Authorization	1	4	5	5	5	6	26
Estimated Outlays	1	4	5	5	5	6	26

EEO = Equal Employment Opportunity

The CBO staff contact for this estimate is Logan Smith. The estimate was reviewed by Leo Lex, Deputy Director of Budget Analysis.

COMMITTEE OVERSIGHT FINDINGS

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.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Article I, section 8 of the United States Constitution, H.R. 2788 is authorized by Congress’ power to “provide for the common Defense and general Welfare of the United States.”

EARMARK STATEMENT

H.R. 2788 does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates regarding H.R. 2788 prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act would be created by H.R. 2788.

PERFORMANCE GOALS

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee’s performance goals and objectives are to improve the Department of Veterans Affairs’ ability to provide and effectively manage Equal Employment Opportunity related services to Department employees, former employees, and applicants for employment.

SUPPLEMENTAL, ADDITIONAL, DISSENTING, AND MINORITY VIEWS

There were no supplemental, additional, dissenting and minority views filed with this report.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that H.R. 2788 does not relate to the terms and condition of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

STATEMENT ON DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee finds that no provision of H.R. 2788 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.

RAMSEYER SUBMISSION

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 italics, and existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 5—AUTHORITY AND DUTIES OF THE SECRETARY

SUBCHAPTER I—GENERAL AUTHORITIES

* * * * *

§ 516. Equal employment responsibilities

(a) The Secretary shall provide that the employment discrimination complaint resolution system within the Department be established and administered so as to encourage timely and fair resolution of concerns and complaints. The Secretary shall take steps to ensure that the system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective.

(b) The Secretary shall provide—

(1) that employees responsible for counseling functions associated with employment discrimination and for receiving, investigating, and processing complaints of employment discrimination shall be supervised in those functions by, and report to, an Assistant Secretary or a Deputy Assistant Secretary for complaint resolution management; and

(2) that employees performing employment discrimination complaint resolution functions at a facility of the Department shall not be subject to the authority, direction, and control of the Director of the facility with respect to those functions.

(c) The Secretary shall ensure that all employees of the Department receive adequate education and training for the purposes of this section and section 319 of this title.

(d) The Secretary shall, when appropriate, impose disciplinary measures, as authorized by law, in the case of employees of the Department who engage in unlawful employment discrimination, including retaliation against an employee asserting rights under an equal employment opportunity law.

(e)(1)(A) Not later than 45 days after the end of each calendar quarter, the Assistant Secretary for Human Resources and Administration shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report summarizing the employment discrimination complaints filed against the individuals referred to in paragraph (2) during such quarter.

(B) Subparagraph (A) shall apply in the case of complaints filed against individuals on the basis of such individuals' personal conduct and shall not apply in the case of complaints filed solely on the basis of such individuals' positions as officials of the Department.

(2) Paragraph (1) applies to the following officers and employees of the Department:

(A) The Secretary.

(B) The Deputy Secretary of Veterans Affairs.

(C) The Under Secretary for Health and the Under Secretary for Benefits.

(D) Each Assistant Secretary of Veterans Affairs and each Deputy Assistant Secretary of Veterans Affairs.

(E) The Under Secretary of Veterans Affairs for Memorial Affairs.

(F) The General Counsel of the Department.

(G) The Chairman of the Board of Veterans' Appeals.

(H) The Chairman of the Board of Contract Appeals of the Department.

(I) The director and the chief of staff of each medical center of the Department.

(J) The director of each Veterans Integrated Services Network.

(K) The director of each regional office of the Department.

(L) Each program director of the Central Office of the Department.

(3) Each report under this subsection—

(A) may not disclose information which identifies the individuals filing, or the individuals who are the subject of, the complaints concerned or the facilities at which the discrimination identified in such complaints is alleged to have occurred;

(B) shall summarize such complaints by type and by equal employment opportunity field office area in which filed; and

(C) shall include copies of such complaints, with the information described in subparagraph (A) redacted.

(4) Not later than April 1 each year, the Assistant Secretary shall submit to the committees referred to in paragraph (1)(A) a report on the complaints covered by paragraph (1) during the preceding year, including the number of such complaints filed during that year and the status and resolution of the investigation of such complaints.

(f) The Secretary shall ensure that an employee of the Department who seeks counseling relating to employment discrimination may elect to receive such counseling from an employee of the Department who carries out equal employment opportunity counseling functions on a full-time basis rather than from an employee of the Department who carries out such functions on a part-time basis.

[(g) The number of employees of the Department whose duties include equal employment opportunity counseling functions as well as other, unrelated functions may not exceed 40 full-time equivalent employees. Any such employee may be assigned equal employment opportunity counseling functions only at Department facilities in remote geographic locations (as determined by the Secretary). The Secretary may waive the limitation in the preceding sentence in specific cases.]

[(h) (g) The provisions of this section shall be implemented in a manner consistent with procedures applicable under regulations prescribed by the Equal Employment Opportunity Commission.

* * * * *