

VA CORRECT COMPENSATION ACT OF 2023

JULY 18, 2024.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOST, from the Committee on Veterans’ Affairs,
submitted the following

R E P O R T

[To accompany H.R. 6538]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans’ Affairs, to whom was referred the bill (H.R. 6538) to amend title 38, United States Code, to provide for a definition of “establishment, determination, or adjustment of employee compensation” for purposes of the collective bargaining of certain Department of Veterans Affairs employees, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 6538, the “VA *Correct Compensation Act of 2023*,” was introduced by Representative Mark Takano of California on November 30, 2023. The bill would define what establishment, determination, or adjustment of employee compensation means within 38 United States Code (U.S.C.) § 7422 to make clear Title 38 Department of Veterans Affairs (VA) employees, including physicians, registered nurses, physician assistants, and other medical professionals, could collectively bargain and grieve compensation issues where VA does not follow law, rule, regulation, or binding agreement, but not collectively bargain or grieve pay rates.

BACKGROUND AND NEED FOR LEGISLATION

Section 1: Short title

This Act may be cited as the “VA *Correct Compensation Act of 2023*.”

Section 2: Definition of “Establishment, Determination, or Adjustment of Employee Compensation” for Purposes of the Collective Bargaining of Certain Department of Veterans Affairs Employees

Under 38 U.S.C. § 7422, VA has authority to deny collective bargaining and grievance right to certain Title 38 employees, that are otherwise available to VA employees. Specifically, 38 U.S.C. § 7422 prevents these medical professionals from collectively bargaining or grieving issues related to direct patient care, clinical competence, peer review, and the establishment, determination, or adjustment of employee compensation. The Committee believes VA has often interpreted the “establishment, determination, or adjustment of employee compensation” language broadly, denying Title 38 employees the right to grieve situations where VA has consistently failed to pay salaries and overtime required by law. The Committee has identified numerous cases where VA failed to pay Title 38 employees the correct amount as required by law, which has often put these employees in financial distress, lowered morale, and harmed VA employee retention efforts.

For example, although an arbitrator ruled in favor of American Federation of Government Employees (AFGE), which filed a grievance on behalf of operating rooms nurses of the Asheville North Carolina VA Medical Center after the nurses failed to receive night and weekend differential pay, VA decided per 38 U.S.C. § 7422 the arbitrator’s decision concerned the establishment, determination, or adjustment of employee compensation.¹ As such, VA denied the grievance and the nurses were never correctly paid. Similarly, VA failed to accurately pay overtime to VA employees who volunteered to work weekends at the Olean Community Based Outpatient Clinic (CBOC) near the Buffalo New York VA Medical Center. Al-

¹ *Legis. Hearing on: H.R. 6452, Veterans Scam and Fraud Evasion Act; H.R. 6531, TRAIN VA Employees Act; H.R. 6538, VA Correct Compensation Act; H.R. 6874, VA WEB Act; H.R. 6947, Veterans Affairs Centennial and Heritage Act; H.R. 7342, Veterans Accessibility Advisory Committee Act; H.R. XXXX, VA Security Screening Pilot Program Act; H.R. XXXX, Required Notation of Investigation in Personnel Record File Act; and H.R. XXXX, Reporting Performance Plans for VA Political Appointees Act*, Before the H. Comm. on Veterans’ Affairs Subcomm. on Oversight and Investigations, 118th Cong. (2024) (statement of Mrs. Joycelyn Westbrook, Secretary-Treasurer AFGE Local 1633, American Federation of Government Employees, AFL-CIO).

though a grievance was filed, VA found the grievance was excluded from collective bargaining as a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422. Thus, VA denied the grievance and never correctly paid the employees the pay they were owed under law.²

This section would address this issue by defining exactly what compensation components Title 38 employees can negotiate. This section would amend 38 U.S.C. § 7422 to make clear Title 38 employees can collectively bargain or grieve compensation issues where VA does not follow law, rule, regulating, or binding agreement. At the same time, this section would make clear rates of pay cannot be collectively bargained or grieved. These changes were broadly supported at the March 21, 2024, Oversight and Investigations Subcommittee legislative hearing on H.R. 6538. The Committee believes this section would prevent VA from failing to correctly compensate Title 38 employees by making clear these employees can collectively bargain or grieve issues where VA fails to follow law, rule, regulation, or binding agreement. The Committee believes this clarification would prevent VA from citing 38 U.S.C. § 7422 as the reason to deny grievances like the Asheville North Carolina VA Medical Center operating room nurses' grievance and the grievance stemming from employees volunteering to work weekends at the Olean CBOC. The Committee also believes the section would prevent Title 38 employees from trying to collectively bargain or grieve rates of pay by making clear "establishment, determination or adjustment of employee compensation" under 38 U.S.C. § 7422 means setting a rate of pay as required by law, rule, or regulation.

HEARINGS

On Thursday, March 21, 2024, the Subcommittee on Oversight and Investigations held a legislative hearing on H.R. 6538 and other bills that were pending before the subcommittee.

The following witnesses testified:

Mr. John W. Boerstler, Chief Veterans Experience Office, Office of Human Resources and Administration-Operations, Security, and Preparedness (HRA/OSP), U.S. Department of Veterans Affairs; Ms. Tracey Therit, Chief Human Capital Officer, HRA/OSP, U.S. Department of Veterans Affairs; Mr. David Perry, Chief Officer, Workforce Management and Consulting, Veterans Health Administration, U.S. Department of Veterans Affairs; Mr. Charles Worthington, Chief Technology Officer, Office of Information Technology, U.S. Department of Veterans Affairs; and Ms. Joycelyn Westbrook, Registered Nurse, Secretary-Treasurer, AFGE Local 1633, U.S. Department of Veterans Affairs.

The following individuals and organizations submitted statements for the record:

American Association of Nurse Anesthesiology, NFFE, SEIU, PVA, Representative Brandon Williams (NY-22), Senior Executives Association, Representative Mike Turner (OH-10),

²*Id.*

and United Nurses Association of California-Union of Health Care Professionals.

SUBCOMMITTEE CONSIDERATION

On Wednesday, April 17, 2024, the Subcommittee on Oversight and Investigations held a markup on pending legislation including H.R. 6538. There were no amendments to H.R. 6538 during the Subcommittee markup. A motion by Representative Mrvan to report H.R. 6538 as part of an en bloc was favorably forwarded to the full Committee.

COMMITTEE CONSIDERATION

On Wednesday, May 1, 2024, the Full Committee met in open markup session, a quorum being present, and ordered H.R. 6538 be reported favorably to the House of Representatives by voice vote. During consideration of the bill, no amendments were filed. A motion by Ranking Member Takano to report H.R. 6538 favorably to the House of Representatives was agreed to by voice vote.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, no recorded votes were taken on amendments or in connection with ordering H.R. 6538 reported to the House.

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.

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 goals and objectives of H.R. 6538 are to hold VA accountable by making clear Title 38 VA Employees can collectively bargain and grieve compensation issues where VA fails to follow law, rule, regulation, or binding agreement.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 6538 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.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate on H.R. 6538 prepared by the Director of the Congressional Budget Office.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

H.R. 6538, VA Correct Compensation Act of 2023			
As ordered reported by the House Committee on Veterans' Affairs on May 1, 2024			
By Fiscal Year, Millions of Dollars	2024	2024-2029	2024-2034
Direct Spending (Outlays)	not estimated	not estimated	not estimated
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	not estimated	not estimated	not estimated
Spending Subject to Appropriation (Outlays)	not estimated	not estimated	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2035?	No	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2035?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

H.R. 6538 would expand the conditions of employment that are subject to collective bargaining for certain employees of the Department of Veterans Affairs (VA). Under current law, the Secretary of Veterans Affairs has broad authority to regulate the hours and conditions of employment for physicians, dentists, podiatrists, optometrists, chiropractors, registered nurses, physician assistants, and dental assistants employed by the Veterans Health Administration (VHA). Those employees are prohibited from collectively bargaining over matters pertaining to professional conduct or competence, peer review, and compensation. Under the bill, those employees could collectively bargain over compensation and challenge decisions affecting their compensation.

According to VA, approximately 31,000 biennial compensation reviews and 6,000 locality pay reviews could be subject to negotiation, challenge, and arbitration. However, neither the department nor CBO can predict which of those actions would be subject to negotiation under the bill, nor can we anticipate the effect of those negotiations on personnel compensation.

Compensation for VHA personnel is funded with discretionary appropriations and with funds from the Toxic Exposures Fund, a mandatory appropriation. Some economic research indicates that collective bargaining increases compensation. In addition, administrative costs could increase if collective bargaining negotiations with employees require more resources than interactions that would unfold under current law. Although implementing H.R. 6538 could increase VHA's personnel costs, CBO has no basis upon which to estimate the likelihood or potential magnitude of those effects.

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

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

FEDERAL MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, Public Law (P.L.) 104–4 is inapplicable to H.R. 6538.

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. 6538.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that H.R. 6538 does not relate to the terms and conditions 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 no provision of H.R. 6538 would establish or reauthorize 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 P.L. 111–39, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1: Short title

This section would establish the short title of the bill as the “VA Correct Compensation Act of 2023.”

Section 2: Definition of “establishment, determination, or adjustment of employee compensation” for purposes of the collective bargaining of certain Department of Veterans Affairs employees

This section would amend 38 U.S.C. § 7422(c). First, this section would make technical changes to 38 U.S.C. § 7422(c) by labeling 38 U.S.C. § 7422(c) as “In this section” and creating two subsections, section 7422(c)(1) and section 7422(c)(2).

Section 7422(c)(1) would define the term “professional conduct or competence” to mean any of the following: “(A) Direct Patient Care. (B) Clinical Competence.” This definition would be the same as the definition of “professional conduct or competence” currently in 38 U.S.C. § 7422.

Section 7422(c)(2) would add a new definition to 38 U.S.C. § 7422(c). This section would define the term “establishment, determination, or adjustment of employee compensation” as “setting a rate of pay as required by applicable law, rule and regulation” and make clear the term does not include “a grievance challenging whether an employee described in 38 U.S.C. § 7422(b) has received the correct compensation as required by law, rule, regulation, or binding agreement.”

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 proposed is shown in roman):

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

* * * * *

PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

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CHAPTER 74—VETERANS HEALTH ADMINISTRATION—PERSONNEL

* * * * *

SUBCHAPTER II—COLLECTIVE BARGAINING AND PERSONNEL ADMINISTRATION

* * * * *

§ 7422. Collective bargaining

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

[(c) For purposes of this section, the term “professional conduct or competence” means any of the following:

[(1) Direct patient care.

[(2) Clinical competence.]]

(c) *In this section:*

(1) *The term “professional conduct or competence” means any of the following:*

(A) *Direct patient care.*

(B) *Clinical competence.*

(2) *The term “establishment, determination, or adjustment of employee compensation”—*

(A) means setting a rate of pay as required by applicable law, rule, or regulation; and

(B) does not include a grievance challenging whether an employee described in section 7421(b) of this title has received the correct compensation as required by law, rule, regulation, or binding agreement.

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

(e) A petition for judicial review or petition for enforcement under section 7123 of title 5 in any case involving employees described in section 7421(b) of this title or arising out of the applicability of chapter 71 of title 5 to employees in those positions, shall be taken only in the United States Court of Appeals for the District of Columbia Circuit.

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