

# Introduction to the Office of Employee Advocacy

## **Fireside Chat and Q&A**

**- 118<sup>th</sup> Congress -**



*The information provided in this presentation does not, and is not intended to, constitute legal advice. Instead, all information and content in this presentation is for general informational purposes only. Information in this presentation may not constitute the most up-to-date legal information depending on when the reader accesses the presentation.*

*House employees should contact the Office of Employee Advocacy to obtain advice with respect to any particular legal matter. No House employee should act or refrain from acting based on information in this presentation without first seeking legal advice from Employee Advocacy. Access to this presentation does not create an attorney-client relationship between the reader and Employee Advocacy or any of its attorneys.*



# Our Mission

Employee Advocacy provides House employees with quality legal counsel, advice and representation in matters covered by the Congressional Accountability Act of 1995 to promote a productive Congressional workplace by upholding employee rights, minimizing distractions from personnel issues, and creating an environment free of harassment and discrimination.



# Workplace Rights Laws Under The CAA

**The CAA makes 14 workplace rights statutes applicable to House employees.**

- Rehabilitation Act of 1973
- Americans with Disabilities Act of 1990 (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Employee Polygraph Protection Act of 1988 (EPPA)
- Fair Labor Standards Act of 1938 (FLSA)
- Family and Medical Leave Act of 1993 (FMLA)
- Federal Service Labor-Management Relations Statute
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Occupational Safety and Health Act of 1970 (OSHA)
- Title VII of the Civil Rights Act of 1964 (Title VII)
- Worker Adjustment and Retraining Notification Act of 1989 (WARN Act)
- Chapter 43 of Title 38 of the United States Code / Uniformed Services Employment & Reemployment Rights Act
- Veterans Employment Opportunities Act of 1998 (VEOA)
- Fair Chance to Compete for Jobs Act of 2019



# Employee Advocacy Assists in Many Ways

---

**Employee Advocacy attorneys are dedicated to identifying the optimal resolution of matters, which can take many forms.**

- ❖ Consultation (information)
- ❖ Advice
- ❖ Ghost-writing
- ❖ Guidance for difficult discussions
- ❖ Informal negotiations
- ❖ Preparing claims for trial or administrative proceeding
- ❖ Litigating the claim before the Office of Congressional Workplace Rights
- ❖ Filing ethics complaints

**We offer our services at no charge, and they are confidential and privileged.**





# Ethics Matters



**Employee Advocacy can assist with complaints to the Committee on Ethics or the Office of Congressional Ethics on any matter that touches on the Congressional Accountability Act.**

# Title VII of the Civil Rights Act of 1964 (Title VII)



Title VII provides that an employer cannot discriminate against an employee because of the employee's race, color, religion, sex (including sexual orientation, gender identity, and pregnancy and related conditions), and/or national origin.

- These characteristics are often known as “protected classes.”
- Title VII prohibits discrimination that causes an employee to suffer an adverse employment action, as well as discrimination that creates a hostile work environment.

# Disparate Treatment and Disparate Impact Discrimination

- Title VII prohibits both “disparate treatment” and “disparate impact” discrimination.
- **Disparate treatment** is treatment that is discriminatorily motivated and adversely affects an employee.
  - An employer, for example, may not demote, fire, or take any other adverse employment action against an employee because they are a particular race.
- **Disparate impact** discrimination occurs when employer practices that appear facially neutral nevertheless disproportionately impact one or more protected classes, and such disproportionate impact cannot be justified by a business necessity.
  - For example, if an employer mandates an employment test, and the testing results in disproportionate amounts of men receiving promotions over women, this may violate Title VII.



# Hostile Work Environment and Quid Pro Quo Harassment

- Title VII also prohibits workplace **harassment** that creates a **hostile work environment**. A hostile work environment may exist when an employee, based on their protected class(es), is subjected to unwelcome conduct that either:
  - becomes a condition of continued employment, or
  - is severe or pervasive enough to create a work environment that a reasonable person would find intimidating, hostile, or abusive.
    - Unwelcome sexual advances, for example, may create a hostile work environment.
- A sexual harassment claim may also arise as a case of “**quid pro quo**” harassment, if a supervisor subjects an employee to an adverse employment action, such as a pay-cut, because they refused to submit to that supervisor’s sexual demands.





# Retaliation

- Title VII also forbids employers from **retaliating** against employees who complain about Title VII discrimination in the workplace, participate in a complaint of discrimination, or oppose employment practices that they reasonably believe violate Title VII.
- An employer violates Title VII if, in retaliation, that employer:

subjects an  
employee to an  
**adverse  
employment  
action**, such as  
demotion or  
firing

**AND/OR**

subjects an  
employee to a  
**hostile work  
environment.**

# Age Discrimination in Employment Act (ADEA)

The ADEA prohibits employers from discriminating against employees based on age. It provides protections only to employees **40 years of age and older**.

The ADEA protects against  
**3 categories of violations:**

1. Discrete acts of discrimination based on age
2. Hostile work environments based on age
3. Retaliation



# Age Discrimination – Discrete Act

**Discrete Act of Discrimination:** A discrete act of discrimination is a single actionable discriminatory employment action taken because an employee is 40 years of age or over. Examples of discrete acts include:

- Failure to hire
- Failure to promote
- Demotion
- Termination/constructive discharge

# Age Discrimination – Hostile Work Environment

**Hostile Work Environment**: A hostile work environment exists under the ADEA where the workplace is permeated with discriminatory intimidation, ridicule, and insult because of an employee's age. The harasser can be a supervisor, a co-worker, and, in some circumstances, even an individual who does not work for the employer (e.g., a constituent or another Member). Examples of harassment based on age include:

- Derogatory ageist remarks about the victim or others
- Age-based insults, jokes, or slurs
- Remarks reflecting a preference for younger workers
- Treating the victim differently or less favorably from younger employees



# Retaliation

The ADEA prohibits employing offices from punishing or harassing employees for having reported or complained about discriminatory treatment.



- Example: A high-performing employee complains to HR that his supervisor asked him how old he is and when he is planning to retire. Two weeks later, he is terminated.

# **The Americans with Disabilities Act (ADA):** **This valuable law protects persons with disabilities from discrimination in the workplace.**



**Disability Discrimination** occurs if a person experiences the following in relation to or as a result of their disability or perceived disability:

- ❖ denied the ability to apply for a position
- ❖ not hired for a position
- ❖ denied a promotion or upward mobility
- ❖ terminated from their position

**To Prove Discrimination Under the ADA**, the employee must establish:

- ❖ They are a qualified employee;
- ❖ They have a disability under the definition of the ADA; and
- ❖ They have suffered an adverse employment action as a result of their disability.

The employer can then assert it has a “legitimate business reason” for its actions.

The employee must show the business explanation is untrue.

# Definitions Under the ADA

**Qualified Employee** - an employee who is qualified for the position and able to perform the essential functions of the position with or without a reasonable accommodation

**Disability** - a physical or mental impairment that substantially limits one or more major life activities (walking, sitting, seeing, hearing, breathing, concentrating, etc.)\*

**Reasonable Accommodation** - an alteration to the hiring process, the way the job is done, policies or practices, or the work environment that allows a person with a disability who is qualified for the job to perform the essential functions of the job

\*For the purposes of the ADA, “disability” is defined broadly, and many ailments, including short-term and long-term ailments, can qualify as a disability.

# Reasonable Accommodations and the Interactive Process

You can **request an accommodation** by asking for a workplace adjustment **verbally or in writing.**



The employer will then engage in the “**interactive process**” and may ask for supporting healthcare documentation.



## Examples:

- Adjusted work schedule
- Telework
- Leave
- Breaks
- A service or comfort animal
- A deviation from standard office policy or procedure
- Modifications to workspace and/or building assignments
- Special equipment (e.g., ergonomic chair, computer blue light, etc.)

Employer can **accept** your request, **suggest** a different accommodation (e.g., because of “undue hardship”), or **deny** the request.

An **undue hardship** creates significant difficulty or expense for the employer.



# The Family and Medical Leave Act (FMLA)

The FMLA entitles eligible employees to take unpaid, job-protected leave for specified family and medical reasons.

- **Eligible employees:** Employed for the prior 12 months **AND** worked 1,250 hours in the past 12 months.
- **Eligible employees are provided:** 12 weeks of job-protected leave within one year



## Qualifying reasons:

- Employee's serious health condition (employee is unable to perform the essential function of their job)
- Qualifying family member's health condition (parent, spouse, child)
- Child – birth, placement, or adoption
- Caring for wounded servicemember (26 weeks of leave)



**CAO**  
CHIEF ADMINISTRATIVE OFFICER

**Use of leave** - continuous blocks of time, intermittent, or a combination

## Notifying Employers:

- 30 days' Notice, if possible
- Information tells the employer the reason for the leave.

**Pay Status** – FMLA is generally **unpaid**

➤ **EXCEPT** when:

- Employer elects to pay all or part of the FMLA leave
- Employee elects to use accrued leave concurrently with FMLA leave
- Employee is receiving paid parental leave under the Federal Employee Paid Leave Act (FEPLA)

## Job Protections:

- Employer **CANNOT** discourage or interfere with the employee's leave (FMLA Interference)
- Employer **MUST** restore employee to the same or similar position
- Employer **MUST** maintain the benefits of employment (e.g., seniority, pay level, health insurance, etc.)



# Federal Employee Paid Leave Act (FEPLA)

Under FEPLA, employees can substitute **paid parental leave** for regular FMLA leave for the purpose of ***bonding with a newly born, placed or adopted child.***

- Employees are eligible for FEPLA leave at the time they begin employment
- 12 weeks of **PAID** leave
- Job-protections of <sup>19</sup>FMLA apply





# FMLA Interference

**During an employee's FMLA leave, an employer may not ask the employee to do “substantive” work. If the employer does so, the employee may have a claim for FMLA interference.**

- **Substantive Work** – tasks that require preparation, attention, and time, such as taking calls, attending meetings, drafting documents, etc.
- **Not Substantive Work** – the Office is asking for assistance with something incidental or administrative, such as obtaining contact information for individuals, asking for help locating a computer file or a physical document, or forwarding an email only received by the employee





# Protections Under the Fair Labor Standards Act (FLSA)

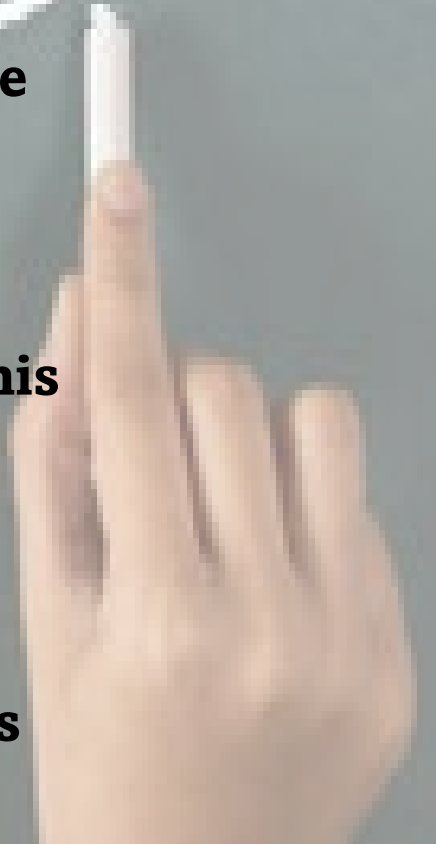
## Employer is required to:

- Pay “non-exempt” employees' **overtime** for all hours worked over 40 hours in any one week.
  - **Overtime** = one and one-half the regular rate of pay.
- Give women and men **equal pay for equal work**.
- Provide **break time** AND a **private place** for **nursing mothers** to express milk.

# Who is Protected Under the FLSA?

## KNOW THE RULES!

- Hourly vs. Salary pay is *irrelevant* to determining protections under the FLSA.
- “Non-exempt” employees are protected by FLSA.
- Many employees are *incorrectly* labeled as “exempt” employees, but this label does NOT determine if the FLSA protections apply.
- Job duties determine whether you are “non-exempt” or “exempt.”
  - ❖ For example, an employee who does NOT have any supervisory responsibilities AND handles confidential personnel information, is probably “non-exempt,” that is, protected under the FLSA.



# Call Employee Advocacy so that we can help you protect your rights under the FLSA!



If you work over 40 hours in one week and are not getting overtime

.....

If you think you are being paid differently because of your gender

.....

If you need to determine with your employer a time and place to express milk

.....

# House Employees Have Rights Under the Federal Service Labor-Management Relations Statute.

***Employees have the right to organize a union and collectively bargain with their employer.***

The right to organize a union includes employees of:

- Members' personal offices,
- Committees, and
- Leadership offices.



Labor Union





# *What Unionization Rights Do House Employees Have under the Statute?*

- Employees have a right to unionize free from interference or coercion.
- Employees can petition for a union election after 30% or more of the eligible staff indicate they wish to hold an election.
- If a majority of employees in an office vote in favor of a union, the employer is required to bargain in good faith over the terms and conditions of employment.

For more information, contact Employee Advocacy to discuss your unionization rights as a House employee.

# Current Status of Right to Unionize for House Employees

In May 2022, the House approved OCWR's regulations laying out the processes for an office to request recognition of a union in order to collectively bargain and to conduct proceedings related to unionization: [https://www.ocwr.gov/wp-content/uploads/2022/05/LMR-FAQs\\_June-2022.pdf](https://www.ocwr.gov/wp-content/uploads/2022/05/LMR-FAQs_June-2022.pdf)

Several Congressional offices have petitioned OCWR to hold union elections, and OCWR has conducted union elections in several offices.

In its adoption of the House Rules for the 118th Congress, the House declared that the regulations adopted in May 2022 would not be in effect for the present Congress. What this means for unionization efforts is not clear.

# Uniformed Services Employment and Reemployment Rights Act (USERRA)

USERRA protects employees who serve in the military service or are veterans from employment discrimination based on their service and allows them to regain their civilian jobs following a period of uniformed service.

Employers cannot:

- Deny initial employment, continued employment, promotion, reemployment, or any benefit of employment based on membership or performing service in the uniformed services.
- Retaliate against employees who exercise a right provided by USERRA or otherwise engage in protected activity under USERRA.



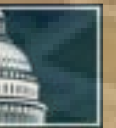
# USERRA Eligibility

- To be eligible for reinstatement following service, employees must:
  - Give advance notice of service.
  - Spend 5 years or less of cumulative service with the same employer.
  - Return to work within a certain period depending on length of service.
  - Must not be dishonorably discharged.



# USERRA Rights

- During their period of service, employees are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable nonmilitary leaves of absence.
- Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.
- Reemployed service members must be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.





# The Fair Chance to Compete for Jobs Act (FCA)

The FCA prohibits employing offices from requesting that applicants for most jobs disclose information on arrest and conviction history before a conditional job offer is extended to the applicant.

- An employing office may inquire about criminal history at any stage of the process if:
  - Consideration of criminal history prior to a conditional offer is required by law.
  - The position requires a determination of eligibility for access to classified information or assignment to or retention in sensitive national security duties or positions.
  - The applicant is applying for a position as law enforcement officer.

# The FCA in Practice

The FCA does not bar employing offices from using information resulting from background checks.



- However, the use of an individual's criminal history in making employment decisions may violate the anti-discrimination provisions of the CAA.
- For example, it would be unlawful to reject applicants with a criminal record for a job based on their ethnicity or race but to hire other applicants with the same criminal record because they are of a different ethnicity or race.



# Occupational Safety and Health Act

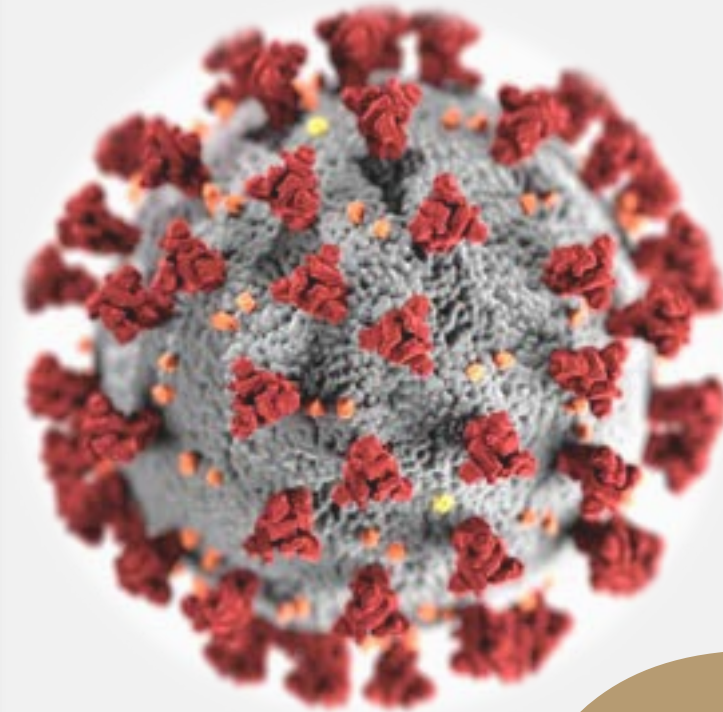
**OSHA was enacted to assure safe and healthful working conditions.**

❖ **Request for Inspection**

❖ **No monetary remedy, but resolution through improved safety measures**



**OSHA:** Employee Advocacy can help when there are concerns about hazards, appropriate safety measures, or threats to your health at work.







# OSHA and Workplace Violence (examples)

A supervisor who is erratic and expresses anger physically (e.g., throwing office items or punching walls when upset) can be dangerous.

A constituent who makes threats creates the potential for harm.

A coworker who talks about weapons and how he may use them against those who cross him can pose a threat.





# - Office of Employee Advocacy - Multiple Avenues to Obtain Services

- **Telephone:** 202-225-8800
- **Facsimile:** 202-225-8802
- **E-Mail:** [Employee.Advocacy@mail.house.gov](mailto:Employee.Advocacy@mail.house.gov)
- **Mail or Hand Delivery:** H2-377, Ford House Office Building
- **In-Person Consultation:** H2-377, Ford House Office Building
  - **By appointment to promote confidentiality**



# Conclusion

The Office of Employee Advocacy is pleased to serve the House to achieve the best resolution of matters to provide Members and their staff with a civil and productive work environment.

## Questions?

*The information provided in this presentation does not, and is not intended to, constitute legal advice. Instead, all information and content in this presentation is for general informational purposes only. Information in this presentation may not constitute the most up-to-date legal information depending on when the reader accesses the presentation.*

*House employees should contact the Office of Employee Advocacy to obtain advice with respect to any particular legal matter. No House employee should act or refrain from acting based on information in this presentation without first seeking legal advice from Employee Advocacy. Access to this presentation does not create an attorney-client relationship between the reader and Employee Advocacy or any of its attorneys.*

