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Federal Workforce Flexibility Act of 2003: S. 129 (108th Congress)

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Summary

As in the previous Congress, management of the federal workforce continues to be an issue of interest to the Senate and the House of Representatives in the 108th Congress. S. 129, the Federal Workforce Flexibility Act of 2003, passed the Senate with an amendment by unanimous consent on April 8, 2004. In the House, the Subcommittee on Civil Service and Agency Organization forwarded S. 129 to the House Committee on Government Reform on May 18, 2004, after amending it by voice vote. On June 24, 2004, the House committee ordered the bill to be reported to the House of Representatives, after amending it, by voice vote. The bill was introduced by Senator George Voinovich on January 9, 2003. A similar bill, H.R. 1601, the Federal Workforce Flexibility Act of 2003, was introduced in the House by Representative Jo Ann Davis on April 3, 2003.

S. 129, as passed by the Senate and as ordered to be reported to the House, would amend current law provisions on critical pay, civil service retirement system computation for part-time service, agency training, and annual leave. The bill also would amend current law provisions on recruitment and relocation bonuses and retention allowances (which would be renamed bonuses). As ordered to be reported to the House, S. 129 would amend the current 5 U.S.C. §§5753 and 5754 language on such bonuses and allowances. As passed by the Senate, it would add new sections 5754a and 5754b on recruitment, relocation, and retention bonuses to Title 5 *United States Code*. Therefore, if S. 129 as passed by the Senate were enacted, agencies would be able to use the current law provisions on recruitment and relocation bonuses and retention allowances at 5 U.S.C. §§5753 and 5754 and the enhanced authority for recruitment, relocation, and retention bonuses proposed at 5 U.S.C. §§5754a and 5754b.

S. 129, as ordered to be reported to the House, would amend current law provisions on pay administration. These amendments were included in S. 129 as introduced, but they were dropped during Senate committee markup and are not included in the Senate-passed version of the bill. Provisions that would amend current law on retirement service credit for cadet or midshipman service and compensatory time off for travel were added to S. 129 during Senate committee markup and are included in the legislation as passed by the Senate and as ordered to be reported to the House. Added during Senate Committee markup as well were provisions on Senior Executive Service authority for the White House Office of Administration that are in the Senate-passed bill, but are not in the legislation as ordered to be reported to the House. Other provisions that would have amended current law provisions relating to contributions to the Thrift Savings Plan, annuity commencement dates, and retirement for air traffic controllers were included in S. 129 as forwarded by the House Civil Service and Agency Organization Subcommittee to the House Government Reform Committee, but were removed during the full committee markup.

This report, which will be updated as needed, discusses each of the provisions in S. 129, as passed by the Senate and as ordered to be reported to the House.

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Federal Workforce Flexibility Act of 2003: S. 129 (108th Congress)

Background

Discussions on the federal workforce since the late 1990s have focused on the management of human capital. The term “human capital” refers to “a concept that views employees as assets in the same sense as financial capital ... [and] presupposes that an investment in human potential will yield significant returns for the organization.”¹ Human capital also “describe[s] what an organization gains from the loyalty, creativity, effort, accomplishments, and productivity of its employees.”² The economist Lester C. Thurow defined human capital as:

an individual’s productive skills, talents, and knowledge. It is measured in terms of the value (price multiplied by quantity) of goods and services produced. Since consumption is the ultimate goal of our economic system, the value of a man’s capital is the same as the value of the consumption goods and services which he directly or indirectly produces. When the value of goods and services rises, the value of human capital rises. When the value of goods and services falls, the value of human capital falls.³

To the General Accounting Office (GAO), human capital is “an organization’s people,” “its most critical asset in managing for results,” and “assets to be valued.”⁴ In January 2001, GAO added strategic human capital management to its list of high-risk areas in the federal government. According to GAO, human capital challenges met the three criteria for high risk: they “are evident at multiple agencies”; they “affect a significant portion of the government’s total budget or other resources”; and they “should be monitored and addressed through individual agency actions as well as through OMB [Office of Management and Budget] and OPM [Office of Personnel Management] initiatives, legislative action, and/or congressional oversight.” GAO found that federal workforce reductions were conducted without sufficient planning for their effects on agency performance. Agencies also reduced investments in performance rewards, enabling technologies, and training and professional development programs. GAO also determined that many agencies anticipate rapid

¹ Jay M. Shafritz, *The Facts on File Dictionary of Personnel Management and Labor Relations*, 2nd ed. (New York: Facts on File, Inc., 1985), p. 187.

² William R. Tracey, *The Human Resources Glossary* (New York: American Management Association, 1991), p. 157.

³ Lester C. Thurow, *Investment in Human Capital* (Belmont, CA: Wadsworth Publishing Co., Inc., 1970), p. 1.

⁴ U.S. General Accounting Office, *High-Risk Series An Update*, GAO Report GAO-01-263 (Washington: Jan. 2001), p. 71.

turnover of top leadership and managers. About 45% of the career Senior Executive Service will become eligible to retire by FY2005 and are expected to retire.⁵

In a January 2003 update of the high risk designation, GAO acknowledged the administration's placement of strategic management of human capital at the top of the President's management agenda and the authority for a new personnel system and additional governmentwide personnel flexibilities enacted in P.L. 107-296, the Homeland Security Act of 2002. "Nevertheless, despite building momentum for comprehensive and systematic reforms," according to GAO, "[t]he basic problem, which continues today, has been the long-standing lack of a consistent strategic approach to marshaling, managing, and maintaining the human capital needed to maximize government performance and assure its accountability.... [T]he problem is a set of policies that are viewed by many as outdated, overregulated, and not strategic."⁶

As the 106th Congress was drawing to a close, the then-chairman of the Senate Committee on Governmental Affairs, Senator Fred Thompson, and the then-chairman of the Senate Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Senator George Voinovich, published committee and subcommittee reports that included recommendations to address challenges in managing the federal government and its human capital, given the possibility that a significant number of federal employees would be eligible to retire by 2004.⁷

The Administration of President George W. Bush submitted a legislative proposal entitled The Managerial Flexibility Act of 2001 to Congress on October 15, 2001. OMB described the proposal as "a key component of the Bush Administration's 'Freedom to Manage' initiative ... to eliminate legal barriers to effective management."⁸ The proposal included provisions on personnel management flexibilities, including voluntary separation incentive payments, voluntary early retirement, recruitment and retention bonuses and relocation allowances, academic degrees, the Senior Executive Service, personnel management demonstration projects, and direct hire.

⁵ Ibid, pp. 71-96.

⁶ U.S. General Accounting Office, *High Risk Series Strategic Human Capital Management*, GAO Report GAO-03-120 (Washington: Jan. 2003), pp. 3-4.

⁷ U.S. Congress, Senate Committee on Governmental Affairs, *Report of Senator Fred Thompson on Management Challenges Facing the New Administration*, 106th Cong., 2nd sess., S.Prt. 106-62 (Washington: GPO, 2000). U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, *Report to the President: The Crisis in Human Capital*, 106th Cong., 2nd sess., subcommittee rept. prepared by Sen. George V. Voinovich, Chairman (unpublished: 2000).

⁸ U.S. Office of Management and Budget, OMB News Release 2001-47, "President Bush Proposes Legislation to Improve Management of Federal Agencies," Oct. 15, 2001, available at [<http://www.whitehouse.gov/omb/pubpress/2001-47.html>], visited June 30, 2004.

Provisions similar to those in the President's proposal were part of legislation to change various policies related to managing the federal workforce that were considered in the Senate and the House of Representatives in the 107th Congress. Senator Voinovich introduced S. 1603, the Federal Human Capital Act of 2001, on October 31, 2001, and S. 1639, the Federal Employee Management Reform Act of 2001, on November 6, 2001. Senator Thompson introduced S. 1612, the Managerial Flexibility Act of 2001, on November 1, 2001.⁹ The bills were referred to the Senate Committee on Governmental Affairs. The committee's Subcommittee on International Security, Proliferation, and Federal Services conducted two days of hearings on the legislation on March 18 and 19, 2002, taking testimony from the Office of Personnel Management, the General Accounting Office, employee organizations, and several scholars who have studied federal workforce issues.¹⁰ Representative Constance Morella introduced H.R. 4580, the Good People, Good Government Act, on April 24, 2002, and it was referred to the House Committee on Government Reform.

Senator Daniel Akaka, chairman of the subcommittee, said that the hearings "continue[d] the dialogue on what needs to be done to make government service more attractive to young people and to inspire and compensate those who have chosen government as their job choice." He stated that "[t]here must be a commitment from the highest levels of government and a willingness to allocate the resources necessary to achieve a strong and vibrant workforce."¹¹ During his testimony before the subcommittee on March 19, 2002, Paul C. Light of the Brookings Institution noted that "[p]ast efforts to restore the luster of federal service have been hampered by a lack of interest in incremental action." He commented that the pending legislation "would clearly increase government's ability to compete for talent" and should be "viewed as first, not final, steps in what will ultimately amount to an historic restructuring of the federal government's human capital system."¹²

Following the Senate committee hearings, Senator Voinovich, joined by Senators Fred Thompson and Thad Cochran, revised some of the provisions in S. 1603 and S. 1639, as introduced, and merged them into one bill, S. 2651, the Federal Workforce Improvement Act of 2002, introduced on June 20, 2002. Several of the S. 2651 provisions, including those on agency Chief Human Capital Officers, alternative ranking and selection procedures, voluntary separation incentive payments, the repeal of recertification requirements for the Senior Executive Service, academic degree training, and modifications to the National Security Education

⁹ For a discussion of the provisions of S. 1603, S. 1639, and S. 1612, see CRS Memorandum, *Civil Service Reform Proposals*, coordinated by Sharon S. Gressle, available from CRS.

¹⁰ U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on International Security, Proliferation, and Federal Services, *The Federal Workforce: Legislative Proposals for Change*, hearing, 107th Cong., 2nd sess., Mar. 18 and 19, 2002 (Washington: GPO, 2003). (Hereafter referred to as Senate Subcommittee Hearing on the Federal Workforce.)

¹¹ *Ibid.*, p. 2.

¹² *Ibid.*, p. 203.

Program, were enacted in P.L. 107-296, The Homeland Security Act of 2002, signed by President George Bush on November 25, 2002, and are applicable government-wide.¹³ The Office of Personnel Management (OPM) is currently crafting a new human resources management system for the department. No further action was taken on any of the other 107th Congress bills.

In the 108th Congress, S. 129, the Federal Workforce Flexibility Act of 2003, passed the Senate with an amendment by unanimous consent on April 8, 2004. Senator Voinovich introduced S. 129 on January 9, 2003, and the bill was referred to the Senate Committee on Governmental Affairs. On October 22, 2003, the committee ordered the bill to be reported with an amendment in the nature of a substitute, after agreeing by voice vote to an amendment offered by Senator Akaka making political appointees ineligible for the enhanced recruitment, relocation, and retention bonuses and adding reporting requirements on the bonuses. S. 129 was reported on January 27, 2004.¹⁴ The committee substitute, as amended, was agreed to by the Senate by unanimous consent on April 8, 2004. In the House of Representatives, the Subcommittee on Civil Service and Agency Organization of the House Committee on Government Reform marked up S. 129 on May 18, 2004. Before forwarding the legislation to the full committee, the subcommittee agreed by voice vote to an amendment in the nature of a substitute offered by Representative Jo Ann Davis and en bloc amendments offered by Representative Danny Davis. The en bloc amendments related to making political appointees ineligible for the enhanced recruitment, relocation, and retention bonuses and adding reporting requirements on the bonuses. On June 24, 2004, the House committee ordered the bill to be reported to the House of Representatives by voice vote, after agreeing, by voice vote, to an amendment in the nature of a substitute offered by Representative Jo Ann Davis.

Another bill related to management of the federal workforce was introduced in the House of Representatives on April 3, 2003. Representative Jo Ann Davis introduced H.R. 1601, the Federal Workforce Flexibility Act of 2003, and it was referred to the House Committee on Government Reform. As introduced, S. 129 and H.R. 1601 were identical except for one provision relating to personnel demonstration projects.¹⁵ Both bills include a number of the provisions that were in S. 2651 (107th Congress).

S. 129, as passed by the Senate and as ordered to be reported to the House, would amend current law provisions on critical pay, civil service retirement system computation for part-time service, agency training, and annual leave. The bill also

¹³ For a discussion of these provisions, see CRS Report RL31500, *Homeland Security: Human Resources Management*, by Barbara L. Schwemle.

¹⁴ U.S. Congress, Senate Committee on Governmental Affairs, *Federal Workforce Flexibility Act of 2003*, report to accompany S. 129, 108th Cong., 2nd sess., S.Rept. 108-223 (Washington: GPO, 2004). Hereafter referred to as S.Rept. 108-223.

¹⁵ Under S. 129, as introduced, OPM would have submitted a recommendation to Congress as to whether a demonstration project should be made permanent before the end of five years. This provision was dropped from the bill during markup by the Senate Committee on Governmental Affairs on October 22, 2003.

would amend current law provisions on recruitment and relocation bonuses and retention allowances (which would be renamed bonuses). As ordered to be reported to the House, S. 129 would amend the current 5 U.S.C. §§5753 and 5754 language on such bonuses and allowances. As passed by the Senate, it would add new sections 5754a and 5754b on recruitment, relocation, and retention bonuses to Title 5 *United States Code*. Therefore, if S. 129 as passed by the Senate were enacted, agencies would be able to use the current law provisions on recruitment and relocation bonuses and retention allowances at 5 U.S.C. §§5753 and 5754 and the enhanced authority for recruitment, relocation, and retention bonuses proposed at 5 U.S.C. §§5754a and 5754b.¹⁶

S. 129, as ordered to be reported to the House, would amend current law provisions on pay administration. These amendments were included in S. 129 as introduced, but they were dropped during Senate committee markup and are not included in the Senate-passed version of the bill. Provisions that would amend current law on retirement service credit for cadet or midshipman service and compensatory time off for travel were added to S. 129 during Senate committee markup and are included in the legislation as passed by the Senate and as ordered to be reported to the House. Added during Senate Committee markup as well were provisions on Senior Executive Service authority for the White House Office of Administration that are in the Senate-passed bill, but are not in the legislation as ordered to be reported to the House (the provisions were removed from the House version of the bill during the full House committee markup). Other provisions that would have amended current law provisions relating to contributions to the Thrift Savings Plan, annuity commencement dates, and retirement for air traffic controllers were included in S. 129, as forwarded by the House Civil Service and Agency Organization Subcommittee to the House Government Reform Committee, but were removed during the full committee markup.

The Congressional Budget Office (CBO) estimates that if S. 129 were enacted, direct spending would increase by \$4 million in 2004, \$71 million over the 2004-2008 period, and \$233 million over the 2004-2013 period. Revenues would increase by less than \$500,000 annually starting in 2005, according to CBO. For various administrative requirements, assuming that the necessary appropriations are provided, CBO estimates that the cost of implementing the legislation would be \$351 million over the 2004-2008 period and \$756 million over the 2004-2013 period.¹⁷

On April 8, 2003, the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the Senate Committee on Governmental Affairs, and the Subcommittee on Civil Service and Agency Organization of the House Committee on Government Reform, conducted a joint

¹⁶ According to staff of the Senate Committee on Governmental Affairs, the current authority at 5 U.S.C. §§5753 and 5754 allows political appointees to be eligible for recruitment and relocation bonuses and retention allowances. S. 129 would provide enhanced recruitment, relocation, and retention bonuses, but political appointees would be excluded from being eligible for the enhanced bonuses.

¹⁷ S.Rept. 108-223, pp. 15-19.

hearing on the federal government's human capital challenge.¹⁸ The Members took testimony on S. 129 and H.R. 1601 and suggestions for additional legislation. (Comments related to the former are included under the relevant provisions of the bills.) With regard to the latter, a professor of public management at Harvard University, Steven Kelman, suggested that three additional provisions be included in the pending legislation: establishment of a version of the Presidential Management Intern program for mid-career professionals to increase their options for entry into government service, an amendment to 5 U.S.C. §201 to add that a candidate's "accomplishments" be considered with his or her "knowledge, skills, and abilities" as a basis for hiring and promotion decisions, and extension of the Outstanding Scholar hiring authority from the current GS-7 level to the GS-9 level to make graduates of master's degree programs eligible.¹⁹

A February 11, 2004, hearing conducted by the House Subcommittee on Civil Service and Agency Organization included a discussion of H.R. 1601.²⁰ Subcommittee Chairwoman JoAnn Davis stated that H.R. 1601, along with other initiatives, seeks "to address the very real pay, benefit and personnel issues that keep potential employees from joining the civil service and sometimes drive our best employees and managers away."²¹ In his statement, Representative Danny Davis cautioned that "[g]ranting federal agencies flexibilities that do not address well-documented problems or are not clear solutions to these problems is a disservice to federal employees and the taxpayers."²² Carl DeMaio, President of The Performance Institute, a private think tank, recommended that the personnel flexibilities be accompanied by a plan to coordinate all human capital activities.²³ The National President of the American Federation of Government Employees (AFGE), John Gage, testified that his union strongly prefers S. 129 because it does not include the demonstration project authorities included in H.R. 1601. He also recommended that the exercise of any of the enhanced flexibilities be predicated on the full implementation of the pay comparability provisions of the Federal Employees Pay Comparability Act.²⁴

¹⁸ U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia and House Committee on Government Reform, Subcommittee on Civil Service and Agency Organization, *The Human Capital Challenge: Offering Solutions and Delivering Results*, hearing, 108th Cong., 1st sess., Apr. 8, 2003 (Washington: GPO, 2003). (Hereafter referred to as Joint Senate/House Subcommittee Committee Hearing on Human Capital Challenge.)

¹⁹ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Steven Kelman, pp. 3-4.

²⁰ U.S. Congress, House Committee on Government Reform, Subcommittee on Civil Service and Agency Organization, *Esprit de Corps: Recruiting and Retaining America's Best for the Federal Civil Service*, hearing, 108th Cong., 2nd sess., Feb. 11, 2004 (unpublished). (Hereafter referred to as House Subcommittee Hearing on Esprit de Corps.)

²¹ *Ibid.*, statement of Representative JoAnn Davis.

²² *Ibid.*, statement of Representative Danny K. Davis.

²³ *Ibid.*, statement of Carl DeMaio, pp. 2-3.

²⁴ *Ibid.*, statement of John Gage, p. 2.

The National Commission on the Public Service, in its report to Congress issued on January 7, 2003, characterized the personnel provisions enacted in P.L. 107-296, the Homeland Security Act of 2002, as “promising approaches to personnel reform.” Among its proposals, the commission recommended that operating agencies develop more flexible personnel management systems to meet their special needs and that Congress and OPM continue efforts to simplify and accelerate the recruitment of federal employees.²⁵

This report discusses each of the provisions in S. 129, as passed by the Senate and as ordered to be reported to the House. Comments from the 107th Congress Senate subcommittee hearings, the 107th Congress section analyses that accompanied S. 2651 and S. 1612, and the 108th Congress joint Senate and House subcommittee hearing and the House subcommittee hearing are included under the discussions of relevant provisions of the bills. For a comparison of each of the provisions in S. 129 with current law, see CRS Report RL31516, *Federal Workforce Flexibilities: A Side-by-Side Comparison of S. 129 (108th Congress) with Current Law*.

Patrick Purcell, Specialist in Social Legislation, Domestic Social Policy Division, Congressional Research Service (CRS), prepared the text on provisions relating to retirement. L. Elaine Halchin, Analyst in American National Government, Government and Finance Division, CRS, prepared the text on provisions relating to Senior Executive Service Authority for the White House Office of Administration. Barbara Schwemle, Analyst in American National Government, Government and Finance Division, CRS, prepared all other text.

Title I — Reforms Relating to Federal Human Capital Management

Enhanced authority for federal agencies to pay recruitment and relocation bonuses and retention allowances (sometimes referred to as “the three Rs”) is among the changes proposed in Title I of S. 129, as passed by the Senate and as ordered to be reported to the House. First enacted as part of the Federal Employees Pay Comparability Act of 1990 (P.L. 101-509), bonuses and allowances of up to 25% of basic pay were viewed as an additional cash incentive to help make agencies more successful in the competitive job market. A 1999 OPM evaluation of the use of the three Rs found that limited funding and limited recruitment because of downsizing contributed to restricted agency use. Several of the proposed changes (allowing flexibility in the methods of payment and raising the maximum amounts) were suggested by agencies responding to OPM’s study.²⁶

²⁵ The National Commission on the Public Service, *Urgent Business for America; Revitalizing the Federal Government for the 21st Century* ([Washington], Jan. 2003), pp. 26-30. See also Joint Senate/House Subcommittee Hearing on Human Capital Challenge, Statement of Hannah S. Sistare, April 8, 2003.

²⁶ U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, *Report of a Special Study; The 3Rs: Lessons Learned from Recruitment*, (continued...)

Recruitment and Relocation Bonuses

Section 101(a) of S. 129, as ordered to be reported to the House, would amend various provisions of current law at 5 U.S.C. §5753 on recruitment and relocation bonuses. S. 129, as introduced, would have done the same at Section 201(a). During Senate committee markup, S. 129 was amended at Section 101(a) to add a new section 5754a on recruitment and relocation bonuses to Title 5 *United States Code*, and these provisions are in the bill as passed by the Senate. Therefore, if the Senate-passed S. 129 were enacted, agencies would be able to use the current law provisions on recruitment and relocation bonuses at 5 U.S.C. §5753 and the enhanced authority for recruitment and relocation bonuses proposed at 5 U.S.C. §5754a.

Reason for Paying Bonuses. Current law authorizes the payment of recruitment and relocation bonuses if OPM determines that the agency would be likely, in the absence of bonuses, to encounter difficulty in filling certain positions. S. 129 would continue this provision (5 U.S.C. §5754a(b)(1) and 5 U.S.C. §5753(b)(1)).

Eligible Employees. Currently, recruitment bonuses may be paid to employees who are newly appointed under the General Schedule (GS). Relocation bonuses may be paid to employees under the GS or any other pay authority in the executive, legislative, and judicial branches who must relocate to accept GS positions. S. 129 would provide that the bonuses would be paid only to employees covered by the GS pay system (except as discussed below, under “extending coverage to other employees”) who are newly appointed (recruitment); or who are current federal employees who move to new positions in the same geographic areas, under circumstances OPM would describe in regulations; or are current federal employees who must relocate to accept positions in different geographic areas (relocation) (5 U.S.C. §5754a(b)(2) and 5 U.S.C. §5753(a)(1)(A) and (b)(2)).

Service Agreement. Current law requires an employee who receives a recruitment or relocation bonus to enter into an agreement with the agency to complete a period of employment. The required period of service is determined by OPM regulations. Repayment of a bonus on a pro rata basis is required if an employee voluntarily fails to complete the service period or is separated for cause on charges of misconduct or delinquency before completing the service period. S. 129 would amend current law to provide that an employee would be required to enter into a written service agreement to complete a period of employment with the agency, not to exceed four years. OPM regulations could prescribe a minimum service period. The service agreement would include the length of the required service period; the amount of the bonus; the method of payment; and other terms and conditions under which the bonus would be payable, including the conditions under which the agreement could be terminated before the service period had been completed, and the effect of the termination. The agreement would be effective upon employment with the agency or movement to a new position or geographic area, as applicable. A service agreement for a recruitment bonus could be effective at a later date under

²⁶ (...continued)

Relocation, and Retention Incentives (Washington: OPM, 1999), p. 33.

circumstances that OPM would describe in regulations, such as an initial period of formal basic training (5 U.S.C. §5754a(c) and 5 U.S.C. §5753(c)).

Limitations on, Payment, and Nature of Bonus. Current law limits the bonus to 25% of the annual basic pay rate and provides for lump sum payment. Basic pay does not include locality pay. The bonus is not part of basic pay and can be paid before a newly hired employee enters on duty. S. 129 (subsection 5 U.S.C. §5754a(d)) and reordered subsections of 5 U.S.C. §5753) would amend current law to provide that a bonus could not exceed 25% of the employee's annual basic pay rate at the beginning of the service period, multiplied by the number of years (or fractions thereof) in the service period, not to exceed four years. A bonus could be paid as an initial lump sum, in installments, as a final lump sum upon completion of the full service period, or in a combination of these forms. S. 129 does not include the current law provision excluding locality pay from basic pay; this would mean that the bonus could be calculated on the basis of the basic General Schedule rate, with locality pay included. The current law provisions stating that a bonus is not part of basic pay and that a bonus can be paid before a newly hired employee enters on duty are included, but "eligible individual" would be substituted for "newly hired" employee.

Waiver of the Limitation. S. 129 would add new text to provide that OPM regulations could authorize an agency head to waive the 25% limitation based on a critical agency need. Under a waiver, the amount of the bonus could be up to 50% of the employee's annual basic pay rate at the beginning of the service period, multiplied by the number of years (or fractions thereof) in the service period, not to exceed 100% of the employee's annual basic pay rate at the beginning of the service period (5 U.S.C. §5754a(e) and 5 U.S.C. §5753(e)).

Plans for Paying Bonuses. S. 129 would add a new subsection to provide that OPM regulations would require that agencies establish plans for paying recruitment and relocation bonuses before paying such bonuses (5 U.S.C. §5754a(f) and 5 U.S.C. §5753(f)).

Regulations. Current law authorizes OPM to prescribe regulations. S. 129 would amend current law by requiring that OPM would prescribe regulations to administer the section, including regulations on repayment of a recruitment or relocation bonus in appropriate circumstances when the service period had not been completed (5 U.S.C. §5754a(g) and 5 U.S.C. §5753(g)).

Extending Coverage to Other Employees. Current law authorizes the President to apply the section to employees otherwise not covered. S. 129 would amend current law by providing that OPM could extend coverage to categories of employees who otherwise would not be covered at the request of the head of an executive agency (5 U.S.C. §5754a(h)(1) and 5 U.S.C. §5753(a)(1)(B)).

Political Appointees Not Eligible for Bonuses. A bonus could not be paid to an individual who is appointed to, or who holds a position to which he or she was appointed by the President, by and with the advice and consent of the Senate; a noncareer appointee position in the Senior Executive Service (SES); or a position that has been excepted from the competitive service by reason of its confidential,

policy-making, or policy-advocating character (5 U.S.C. §5754a(h)(2) and 5 U.S.C. §5753(a)(2)). According to staff of the Senate Committee on Governmental Affairs, the current authority at 5 U.S.C. §5753 allows political appointees to be eligible for recruitment and relocation bonuses. This provision would exclude political appointees from being eligible for the enhanced recruitment and relocation bonuses authorized in S. 129.

Reporting Requirement. OPM would submit to the Senate Committee on Governmental Affairs and the House Committee on Government Reform an annual report on bonuses paid. The House version would provide that the annual report would be submitted for each of the first five years that the bonuses were paid. Under the Senate version, each report would include the use by each agency of recruitment and relocation bonuses, including, with respect to each agency and each type of bonus, the number and amount of bonuses by grade, including the General Schedule, SES, and Executive Schedule positions. Under the House version, each report would include a description of how the authority to pay recruitment and relocation bonuses was used by the respective agencies, including, with respect to each such agency and each type of bonus, the number and dollar amount of bonuses paid to individuals holding positions within each pay grade, pay level, or other pay classification; and if applicable, to individuals who moved between positions that were in different agencies but the same geographic area (including the names of the agencies involved). The report also would include a determination of the extent to which such bonuses furthered the purposes of the statute authorizing them (5 U.S.C. §5754a(i) and Section 101(c)(1)).

Applying the Statute. The Senate version would provide that an individual could not be paid a recruitment or relocation bonus under the proposed Section 5754a and a recruitment or relocation bonus under 5 U.S.C. §5753 (5 U.S.C. §5754a(j)).

Definitions. Under current law, the terms “agency” and “employee” are defined. “Agency” means an executive agency, the Library of Congress, the Botanic Garden, the Government Printing Office, the Office of the Architect of the Capitol, and the government of the District of Columbia (5 U.S.C. §5102(a)(1)).²⁷ S. 129 does not include a definition of “agency.”

Currently, “employee” means an individual employed in or under an agency (5 U.S.C. §5102(a)(2)). S. 129 (5 U.S.C. §5754a(a) and 5 U.S.C. §5753(a)(3)) would amend current law by providing that “employee” would mean (except as otherwise provided by 5 U.S.C. §2105 or when specifically modified):

an officer and an individual who is (1) appointed in the civil service by the President; Member(s) of Congress, or the Congress, a member of a uniformed service, an individual who is an employee under 5 U.S.C. §2105, the head of a government controlled corporation, or an adjutant general; (2) engaged in the performance of a federal function under authority of law or an executive act; and

²⁷ The term does not include a government controlled corporation, the Tennessee Valley Authority, the Central Intelligence Agency, the National Security Agency, the General Accounting Office, the Defense Intelligence Agency, or the National Imagery and Mapping Agency (5 U.S.C. §5102(a)(1)).

(3) subject to the supervision of an individual named under (1) above while engaged in the performance of the duties of his or her position. Certain individuals employed at the United States Naval Academy also are covered by the term (5 U.S.C. §2105).

Retention Allowances

Section 101(a) of S. 129, as ordered to be reported to the House, also would amend various sections of current law (5 U.S.C. §5754) on retention allowances. S. 129, as introduced, would have done the same at Section 201(a). During Senate committee markup, S. 129 was amended at Section 101(a) to add a new section 5754b on retention bonuses to Title 5 *United States Code*, and these provisions are in the bill as passed by the Senate. Therefore, if S. 129 as passed by the Senate were enacted, agencies would be able to use the current law provisions on retention allowances at 5 U.S.C. §5754 and the enhanced authority for retention bonuses proposed at 5 U.S.C. §5754b. S. 129 would amend current law by renaming the allowances as bonuses.

Reason for Paying Bonuses. Current law authorizes allowances for employees whose unusually high or unique qualifications or the agency's special need for their services makes it essential to retain them. Additionally, the agency must determine that the employee would be likely to leave in the absence of an allowance. S. 129 would add, as another reason for paying the bonuses, an agency determination that, in the absence of a bonus, an employee would likely leave federal service or take a different federal position under conditions which OPM would describe in regulations (5 U.S.C. §5754b(b) and 5 U.S.C. §5754(b)).

Eligible Employees. Current law (5 U.S.C. §5754(a)) authorizes allowances for General Schedule (GS) employees. S. 129 would provide that the bonuses would be paid only to employees covered by the GS pay system (except as discussed under "extending coverage to other employees" below) (5 U.S.C. §5754b(d) and 5 U.S.C. §5754(a)(1)(A)). The bills would add new text (5 U.S.C. §5754b(c) and 5 U.S.C. §5754(c)) to provide that OPM could authorize an agency head to pay retention bonuses to a group of employees in one or more categories of positions in one or more geographic areas, subject to 5 U.S.C. §5754b(b)(1) and 5 U.S.C. §5754(b)(1), and regulations, if there were a high risk that a significant portion of employees in the group would be likely to leave in the absence of bonuses.

Service Agreement. Currently, a service agreement is not required for payment of a retention allowance. S. 129 would provide that the employee would have to enter into a written service agreement to complete a period of employment with the agency. The service agreement would include the length of the required service period; the amount of the bonus; the method of payment; and other terms and conditions under which the bonus would be payable, including the conditions under which the agreement could be terminated before completion of the service period and the effect of the termination. A written service agreement would not be required if the retention bonus were paid in biweekly installments with the payment set at the full bonus percentage rate established for the employee with no portion of the bonus deferred. In this case, if the agency decided to terminate the payments, the agency would inform the employee in writing of that decision. Except as OPM would

provide in regulations, the employee would continue to be paid the bonus through the end of the pay period in which the notice would be provided. A bonus could not be based on any period of service which was the basis for a recruitment or relocation bonus (5 U.S.C. §5754b(e) and 5 U.S.C. §5754(d)).

Limitations on Payment and Nature of Bonus. Current law limits the allowance to 25% of the annual basic pay rate (excluding locality pay) and provides for payment at the same time and in the same manner as basic pay. The allowance is not part of basic pay. Any action to reduce or eliminate the allowance is not appealable. S. 129 would amend current law by providing that a retention bonus would be stated as a percentage of the employee's basic pay for the service period associated with the bonus, and could not exceed 25% of the employee's basic pay if paid to the employee individually or 10% of the employee's basic pay if paid to the employee as part of a group. A bonus could be paid in installments after completion of specified periods of service or in a single lump sum at the end of the full period of service required by the agreement. An installment payment could not exceed the product derived by multiplying the amount of basic pay earned in the installment period by a percentage not to exceed the bonus percentage rate established for the employee. If the installment payment percentage were less than the bonus percentage rate, the accrued but unpaid portion of the bonus would be payable as part of the final installment payment after completion of the full service period under the terms of the service agreement (5 U.S.C. §5754b(f) and 5 U.S.C. §5754(e)).

As in current law, a retention bonus would not be part of an employee's basic pay. The current 5 U.S.C. §5754(b)(2) provision stating that reduction or elimination of the allowance is not appealable would be deleted.

Waiver of the Limitation. S. 129 would provide that OPM, upon request of an agency head, could waive the 25% or 10% limitations and permit the agency head to pay bonuses of up to 50% of basic pay based on a critical agency need (5 U.S.C. §5754b(g) and 5 U.S.C. §5754(f)).

Plans for Paying Bonuses. The bill provides that OPM regulations would require that agencies establish a plan for paying retention bonuses before paying such bonuses (5 U.S.C. §5754b(h) and 5 U.S.C. §5754(g)).

Regulations. Current law authorizes OPM to prescribe regulations. S. 129 and H.R. 1601 would continue the policy (5 U.S.C. §5754b(i) and 5 U.S.C. §5754(h)).

Extending Coverage to Other Employees. Current law authorizes the President to apply the section to employees otherwise not covered. S. 129 would amend current law by providing that OPM could extend coverage to categories of employees who otherwise would not be covered at the request of the head of an executive agency (5 U.S.C. §5754b(j)(1) and 5 U.S.C. §5754(a)(1)(B)).

Political Appointees Not Eligible for Bonuses. A bonus could not be paid to an individual appointed by the President, by and with the advice and consent of the Senate; a noncareer appointee position in the Senior Executive Service (SES); or a position which has been excepted from the competitive service by reason of its

confidential, policy-making, or policy-advocating character (5 U.S.C. §5754b(j)(2) and 5 U.S.C. §5754(a)(2)). According to staff of the Senate Committee on Governmental Affairs, the current authority at 5 U.S.C. §5754 allows political appointees to be eligible for retention allowances. This provision would exclude political appointees from being eligible for the enhanced retention bonuses authorized in S. 129.

Reporting Requirement. OPM would submit to the Senate Committee on Governmental Affairs and the House Committee on Government Reform an annual report on bonuses paid. Under the House version, the annual report would be submitted for each of the first five years that bonuses were paid. Under the Senate version, each report would include each agency's use of recruitment and relocation bonuses, including, with respect to each agency and each type of bonus, the number and amount of bonuses by grade, including General Schedule, SES, and Executive Schedule positions. Under the House version, each report would include a description of how the authority to pay retention bonuses was used by the respective agencies, including, with respect to each such agency, the number and dollar amount of bonuses paid to individuals holding positions within each pay grade, pay level, or other pay classification; and if applicable, how the authority was used to prevent individuals from moving between positions that were in different agencies but the same geographic area (including the names of the agencies involved). The report also would include a determination of the extent to which such bonuses furthered the purposes of the statute authorizing them (5 U.S.C. §5754b(k) and Section 101(c)).

The House version at Section 101(a)(3) also includes a provision which would provide that it is the sense of Congress that the OPM Director would, each time a bonus was paid to recruit or relocate a federal employee from one government agency to another within the same geographic area or to retain a federal employee who might otherwise leave one government agency for another within the same geographic area, be notified of that payment within 60 days after the date on which the bonus was paid. The OPM Director would monitor the payment of such bonuses to ensure that they were an effective use of the federal government's funds and had not adversely affected the ability of those government agencies that lost employees to other government agencies (in such circumstances) to carry out their missions.

Applying the Statute. The Senate version would provide that an individual could not be paid a retention bonus under the proposed Section 5754b and a retention allowance under 5 U.S.C. §5754 (5 U.S.C. §5754b(1)).

Definitions. Under current law, the terms "agency" and "employee" are defined. "Agency" means an executive agency, the Library of Congress, the Botanic Garden, the Government Printing Office, the Office of the Architect of the Capitol, and the government of the District of Columbia (5 U.S.C. §5102(a)(1)).²⁸ S. 129 does not include a definition of "agency."

²⁸ The term does not include a government controlled corporation; the Tennessee Valley Authority; the Central Intelligence Agency; the National Security Agency; the General Accounting Office; the Defense Intelligence Agency; or the National Imagery and Mapping Agency (5 U.S.C. §5102(a)(1)).

Currently, “employee” means an individual employed in or under an agency (5 U.S.C. §5102(a)(2)). S. 129 (5 U.S.C. §5754b(a) and 5 U.S.C. §5754(a)(3)) would amend current law by providing that “employee” would mean (except as otherwise provided by 5 U.S.C. §2105 or when specifically modified):

an officer and an individual who is (1) appointed in the civil service by the President; Member(s) of Congress, or the Congress, a member of a uniformed service, an individual who is an employee under 5 U.S.C. §2105, the head of a government controlled corporation, or an adjutant general; (2) engaged in the performance of a federal function under authority of law or an executive act; and (3) subject to the supervision of an individual named under (1) above while engaged in the performance of the duties of his or her position. Certain individuals employed at the United States Naval Academy also are covered by the term (5 U.S.C. §2105).

Effective Date

Section 101(b) of S. 129, as passed by the Senate, and Section 101(d)(1) of S. 129, as ordered to be reported to the House, would provide that the provisions of the section would become effective on the first day of the first applicable pay period beginning on or after 180 days after the act’s enactment. The House version of the bill also would provide that a recruitment or relocation bonus service agreement that was authorized under 5 U.S.C. §5753 before the act’s effective date would continue, until its expiration, to be subject to 5 U.S.C. §5753 as in effect on the day before the act’s effective date (Section 101(d)(2)). Payment of a retention allowance that was authorized under 5 U.S.C. §5754 before the act’s effective date would continue, subject to 5 U.S.C. §5754 as in effect on the day before the act’s effective date, until the retention allowance was reauthorized or terminated (but no longer than one year after the act’s effective date) (Section 101(d)(3)).²⁹

Discussion of the Provisions

The proposed amendments would give agencies more flexibility in implementing recruitment, relocation, and retention bonuses. For instance, the reasons for using the bonuses would be expanded; the methods for making the payments would be several (lump sum at the beginning or end of the service period or in installments); and the size of the bonuses could be increased by using waiver authority. The section analysis which accompanied S. 2651 (107th Congress) stated that the changes would enable agencies to use the bonuses “in more strategic ways that enhance their desired effect” and “help federal agencies be more competitive in recruiting and retaining” the workforces they require.³⁰

By including a more specific service requirement for receipt of recruitment and relocation bonuses and by adding such a service requirement for receipt of retention bonuses, agencies would more directly tie an employee’s service to the bonus

²⁹ Section 201(c) of S. 129, as introduced, included the same provisions, but they were dropped during markup by the Senate Committee on Governmental Affairs.

³⁰ Section Analysis of S. 2651, pp. 6-7.

payments. The amendments do not address agency funding of the bonuses, as Colleen M. Kelley of the National Treasury Employees Union (NTEU) commented during her testimony before the Senate subcommittee hearing. “As this Committee knows, federal agencies have a wealth of flexibilities available to them,” she said, but:

Unfortunately, in December of 1999, [OPM] reported that overall, only 0.14% of all Executive Branch employees received recruitment, retention or relocation incentives in Fiscal Year 1998. Recruitment bonuses were given 0.3% of the time. Relocation bonuses were given to 1.0% of employees and 0.09% of employees received retention allowances. Less than 1/4 of 1% of the federal workforce received any form of recruitment, retention or relocation incentive in Fiscal Year 1998. When agencies were asked why they did not use the incentives available to them, more often than not, they cited budgetary constraints. Agencies simply are not being given the resources necessary to fund the very programs and incentives that might actually help put them on the road to solving their human capital crises Expanding the availability of these incentives makes little sense if agencies are not provided with the resources to accomplish the goal. And with agencies slated to receive a 1% reduction in their discretionary spending accounts for 2003, it is difficult to see how increasing and expanding recruitment and retention allowances will in any way translate into more of these flexibilities actually being offered to either prospective or current federal employees.³¹

Ms. Kelley, in testifying before the April 8, 2003 joint subcommittee hearing, emphasized the critical importance of the committee ensuring “that appropriate funding will be forthcoming before giving false hope to agencies that additional bonus options are available to them.”³² She reiterated this view at the House subcommittee hearing.³³

Expressing his views before the Senate subcommittee on March 18, 2002, Bobby L. Harnage, Sr., national president of the American Federation of Government Employees (AFGE), reiterated those of Ms. Kelley and commented: “Implicitly, the assumption appears to be that bonus payments to select individuals would be paid from existing salary accounts. That is, agencies would only be able to use the broadened authority in the draft proposal to provide bonuses if they paid for them through the elimination of jobs or the denial of other salary adjustments for those not selected for a bonus.” He stated the opinion that limiting the bonuses to General Schedule employees ignores the “equally acute” human capital crisis affecting blue collar workers under the Federal Wage System. Finally, Mr. Harnage observed that “Bonuses of any size are not a replacement for competitive salaries and benefits.”³⁴ Mr. Harnage expressed similar viewpoints at the April 8, 2003 joint subcommittee hearing and questioned the lack of “a separate, supplemental funding mechanism for

³¹ Senate Subcommittee Hearing on the Federal Workforce, pp. 120-121.

³² Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Colleen M. Kelley, p. 5.

³³ House Subcommittee Hearing on Esprit de Corps, statement of Colleen M. Kelley, p. 12.

³⁴ Senate Subcommittee Hearing on the Federal Workforce, pp. 133-135.

either the payment of bonuses, or the expansion of critical pay authority” in S. 129 and H.R. 1601.³⁵

The Federal Managers Association (FMA) representative, John Priolo, recommended a separate line item in the budget for recruitment at the March 18, 2002 Senate subcommittee hearing.³⁶ Max Stier, representing the Partnership for Public Service at the April 8, 2003 joint subcommittee hearing, urged Congress to commit the resources necessary to meet the challenges of managing the federal workforce and to “[f]ollow the lead of private sector companies who have increasingly come to realize that success in workforce management feeds success in every other area of organizational activity.”³⁷ At the same hearing, Comptroller General David Walker recommended that “Congress should consider capping the number or percentage of employees in an agency who would be eligible for” recruitment bonuses and retention allowances.³⁸

Carl DeMaio of The Performance Institute testified before the House subcommittee hearing that, “[a]t the very least, in exchange for bonuses, a system for measuring individual performance should be integrated into the provisions for granting those bonuses, thereby requiring results-based goals and milestones.” He also recommended that a written service agreement be required for bonuses paid in biweekly installments.³⁹ At the same hearing, John Gage of AFGE stated that the proposed legislation does not provide funding for the bonuses and questioned whether such bonuses would improve recruitment and retention. According to him, “Bonus payments do not count as basic pay for purposes of retirement or other salary adjustments” and “[t]hey are a poor substitute for ... competitive salaries and regular salary increases.”⁴⁰ Mr. Gage also expressed views similar to those stated by Colleen Kelley of NTEU at the Senate subcommittee hearing discussed above. In his testimony before the House subcommittee, Ronald Sanders, Associate Director for Strategic Human Resources Policy at OPM, stated that, “[e]xcept for its extension of [recruitment and retention] authorities to political appointees, [OPM] would prefer [H.R. 1601], which simply replaces existing flexibilities with the new ones, without adding any new reporting requirements.”⁴¹

³⁵ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Bobby L. Harnage, p. 5.

³⁶ Senate Subcommittee Hearing on the Federal Workforce, p. 181.

³⁷ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Max Stier, p. 15.

³⁸ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of David M. Walker, p. 11.

³⁹ House Subcommittee Hearing on Esprit de Corps, statement of Carl DeMaio, p. 2.

⁴⁰ House Subcommittee Hearing on Esprit de Corps, statement of John Gage, p. 7.

⁴¹ House Subcommittee Hearing on Esprit de Corps, statement of Ronald Sanders, p. 2.

Relocation Payments for Law Enforcement Officers (LEOs)

Section 301(b) of S. 129, as ordered to be reported to the House, would repeal the current law provision at 5 U.S.C. §5305 that authorizes relocation payments for LEOs. S. 129, as introduced, included the same provision at Section 201(b), but it was dropped during markup by the Senate Committee on Governmental Affairs and is not included in the Senate-passed bill. Currently, an LEO whose basic pay rate is less than \$60,000 may receive a relocation payment of up to \$15,000. For other federal employees, the amount of a recruitment or relocation bonus cannot exceed 25% of the annual basic pay rate of the position to which the employee is being appointed or relocated.

The analysis which accompanied the introduction of S. 1612 (107th Congress) stated that repeal “would simplify administration of the bonus authority and make treatment of all employees more consistent and equitable.” LEOs “could still be paid a bonus of \$15,000 ... by extending the service period to cover more than one year.”⁴²

Streamlined Critical Pay Authority

Section 102 of S. 129, as passed by the Senate and as ordered to be reported to the House, would amend the critical pay provisions of 5 U.S.C. §5377. Under current law,⁴³ the Office of Management and Budget (OMB), in consultation with OPM, may, upon the request of an agency head, grant authority to fix the rate of basic pay for one or more critical positions in such agency at not less than the rate that would otherwise be payable for the position, but not greater than the rate payable for Level I of the Executive Schedule (\$175,700, as of January 2004), except upon the President’s written approval. Each of these positions must require an extremely high level of expertise in a scientific, technical, professional, or administrative field and be critical to an agency’s successful accomplishment of an important mission. The

⁴² Section Analysis of S. 1612, p. 9. Provided to CRS by the Senate Committee on Governmental Affairs.

⁴³ Another related provision on critical pay that would not be amended provides that, when the Secretary of the Treasury seeks a grant of critical pay authority for one or more positions at the Internal Revenue Service (IRS), OMB may fix the basic pay rate at any rate up to the Vice President’s salary (\$203,000, as of January 2004) (5 U.S.C. §9502). Additionally, the Secretary of the Treasury is authorized to establish, fix the compensation of, and appoint individuals to designated critical technical and professional positions in the IRS for 10 years. The positions require expertise of an extremely high level in a technical or professional field and are critical to the IRS’s successful accomplishment of its mission. Exercise of the authority is necessary to recruit or retain an individual exceptionally well qualified for the position. The number of critical positions may not exceed 40 at any one time. The Secretary of the Treasury approves the designation of critical positions. The terms of such appointments may not exceed four years. Appointees to critical positions may not have been IRS employees prior to June 1, 1998. Total annual compensation (salary and cash benefits) for critical positions may not exceed the Vice President’s salary. Critical positions are excluded from the collective bargaining unit. Individuals appointed to critical positions are not covered by the Title 5 provisions on removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less (5 U.S.C. §9503).

authority may be granted or exercised only to the extent necessary to recruit or retain an exceptionally well qualified individual for the position. S. 129 would amend current law to provide that this authority could be granted by OPM in consultation with OMB.

Current law specifies that the authority for critical pay terminates whenever OMB determines that one or more of the requirements for critical pay are no longer met. S. 129 would amend this provision to authorize OPM to make the determination.

Under current law, OMB may authorize the exercise of this authority for up to 800 positions government-wide at any time. Of this number, no more than 30 of the positions at any time could be positions whose pay rate would otherwise be determined according to the Executive Schedule (EX). (Positions on the EX schedule include cabinet secretaries, deputy secretaries, administrators, board chairmen, assistant secretaries, and under secretaries.) S. 129 would amend this provision to provide that OPM would authorize the exercise of this authority and be held to the same limitations on the number of positions.

The roles of OMB and OPM would be exchanged in other policy areas. For example, OPM would consult with OMB before prescribing regulations or making any decision to grant or terminate any authority for critical pay. OPM would be required to report to the House Committee on Government Reform and the Senate Committee on Governmental Affairs annually and in writing on the operation of the pay authority for critical positions.

Annual reports to Congress on use of the authority are required under current law. S. 129 does not include this provision.

Discussion of the Provisions. S. 129 would shift oversight and reporting authority for critical pay positions from OMB to OPM. The section analysis that accompanied S. 2651 (107th Congress) stated that the provision's objective "is to encourage [the] increased application of this underutilized authority as a means of attracting talented individuals to critical positions in the federal government for short periods of time."⁴⁴ OPM staff do not anticipate a need for a significant increase in staff resources were the agency to assume responsibility for administering the critical pay provisions.⁴⁵

The critical pay provisions in current law were enacted to recognize the disparity between government and private sector salary structures, particularly at the senior level, and to streamline the process for appointing individuals to designated critical positions. This authority does not address pay and salary issues of members of the Executive Schedule, Senior Executive Service, and senior-level positions. Colleen M. Kelley of NTEU stated at the Senate subcommittee hearing that she does not "think it is possible to solve the human capital crisis without addressing" federal

⁴⁴ Section Analysis of S. 2651, p. 6. Provided to CRS by the Senate Committee on Governmental Affairs on June 20, 2002.

⁴⁵ Telephone message from OPM staff, Apr. 23, 2002.

pay.⁴⁶ Expressing similar viewpoints at the April 8, 2003, joint subcommittee hearing, Ms. Kelley stated that “[p]roperly compensating the federal workforce would make further critical pay authority unnecessary.”⁴⁷ Carl DeMaio of The Performance Institute recommended pay based on the market “that focuses more on non-profit pay comparisons rather than private-sector ones” at the House subcommittee hearing.⁴⁸ During the same hearing, John Gage of AFGE expressed concern that the proposed legislation does not provide funding for the expansion of critical pay authority and testified in support of adequate and competitive salaries for all employees rather than “for a lucky few.”⁴⁹

During the period 1991 through 2000, OMB received 55 requests for critical pay, and 37 of these were approved. Twenty-nine authorizations were later cancelled because the positions remained vacant for an extended period of time.⁵⁰ As of December 2003, OPM’s Central Personnel Data File showed that five employees were being paid under the critical pay authority at 5 U.S.C. §5377. Among the positions approved for critical pay are these: the Director of the National Institutes of Health; the Director of the Richland, WA, Operations Office of the Department of Energy, Office of Environmental Management; the Distinguished Chief Scientist for Information Technology at the Ames Research Center, National Aeronautics and Space Administration; the Commissioner for Education Research, the Commissioner for Education Evaluation and Regional Assistance, and the Commissioner for Education Statistics at the Department of Education; the Commissioner of the Food and Drug Administration; and the Executive Director and Managing Directors of the National Transportation Safety Board.⁵¹ Neither the section analysis that accompanied S. 2651 (107th Congress) nor the Senate subcommittee hearing testimony provided information on how widely the authority might be used or for which types of positions.

Senior Executive Service Authority for White House Office of Administration

If enacted, Section 105(1) of S. 129, as passed by the Senate, would amend 3 U.S.C. §107(b) to give the President authority to employ senior executives in the White House Office of Administration, and would require that any permanent Senior Executive Service (SES) positions established be career reserved positions. The provision was added to S. 129 during markup by the Senate Committee on Governmental Affairs at the request of OPM. The SES includes two types of appointees, career and noncareer. Only career appointees may fill career reserved positions.

⁴⁶ Senate Subcommittee Hearing on the Federal Workforce, p. 114.

⁴⁷ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Colleen M. Kelley, p. 5.

⁴⁸ House Subcommittee Hearing on Esprit de Corps, statement of Carl DeMaio, p. 2..

⁴⁹ House Subcommittee Hearing on Esprit de Corps, statement of John Gage, p. 7.

⁵⁰ Telephone conversation with OMB and OPM staff, Apr. 18, 2002.

⁵¹ Information received by electronic mail from OPM staff, Apr. 28, 2004.

Employment of individuals as senior executives would be carried out in accordance with 5 U.S.C. §3132 and related provisions. Other provisions in Title 5 applicable to the SES include Chapter 31, Subchapter II (authority for employment); Chapter 33, Subchapter VIII (appointment, reassignment, transfer, and development in the SES); Chapter 35, Subchapter V (removal, reinstatement, and guaranteed placement in the SES); Chapter 43, Subchapter II (performance appraisal in the SES); Chapter 45, Subchapter I (awards for superior accomplishments); Chapter 53, Subchapter VIII (pay for the SES); and Chapter 75 (adverse actions). For the Office of Administration to hire individuals as senior executives, OPM would have to allocate SES positions to the White House Office of Administration.⁵² The hiring process for career appointees, which is a merit-based selection process, involves a recruitment program and requires candidates to demonstrate they have the requisite executive qualifications.⁵³

Current law at 3 U.S.C. §114 establishes a limitation on basic pay for an employee of the Vice President appointed under 3 U.S.C. §106, the White House Office, the Executive Residence at the White House, the Domestic Policy Staff, or the Office of Administration. That limitation is set at a rate no less than 120% of GS-15, step 1 (\$104,927, as of January 2004), and not greater than level IV of the Executive Schedule (\$136,900, as of January 2004).

Section 105(2) of S. 129, as passed by the Senate, would amend current law to provide that the limitation on basic pay would be GS-15, step 10 (\$113,674, as of January 2004) and that the limitation would not apply to senior executives.

These provisions are not included in S. 129, as ordered to be reported to the House.

Title II — Reforms Relating to Federal Employee Career Development and Benefits

Several provisions related to agency training are included in Title II of S. 129, as passed by the Senate and as ordered to be reported to the House. Training is a discretionary account in agency budgets and is usually one of the first items reduced when funding is needed to pay for fixed or mandatory expenditures such as pay and benefit increases or other programs. A May 2000 Senate hearing on training in the federal government found that “most agencies spread their training dollars throughout their budget” in an effort “to make it difficult for OMB or the appropriations subcommittees to identify training money and reprogram it.” The hearing also found that “[s]everal of the agencies are unable to provide information on their training budgets from previous years because their record-keeping is poor or

⁵² 5 U.S.C. §3133.

⁵³ 5 U.S.C. §3393. See U.S. Office of Personnel Management, “Qualifications,” available at [<http://www.opm.gov/ses/qualify.html>], visited June 30, 2004.

nonexistent.”⁵⁴ The changes proposed in S. 129 are designed to help agencies better plan their training activities.

Training to Accomplish Performance Plans and Strategic Goals

Section 201(a) of S. 129, as passed by the Senate and as ordered to be reported to the House, would amend current law at 5 U.S.C. §4103 by adding language on agency training plans.⁵⁵ Currently, agency heads are required to establish, operate, maintain and evaluate a plan, or plans, for training employees to assist in achieving the agency’s mission and performance goals by improving employee and organizational performance. S. 129 would require agency heads to evaluate each training program or plan with respect to accomplishing specific performance plans and strategic goals in performing the agency mission and to modify such program or plan to accomplish those plans and goals. The House version of the provision specifies that the evaluation would be on a regular basis.

Discussion of the Provision. This requirement would tie training activities to the accomplishment of agency missions. Proponents believe it will help to ensure that the federal government’s training monies are used to optimal advantage. According to Comptroller General David Walker,

Agreeing on expected results and associated performance measures at the outset for training and development efforts can also help ensure that credible evaluation results will be available to provide feedback on performance. A systematic evaluation of training and development efforts can help show how such efforts contribute to individual and organizational performance and suggest opportunities for further improvement.⁵⁶

Agency Training Officer and Specific Training Programs

Section 201(b) of S. 129, as passed by the Senate and as ordered to be reported to the House, would add new provisions to Chapter 41 of Title 5 relating to agency training.⁵⁷ (The Senate version would add two new sections and the House version would add one new section.) There are no similar provisions in current law. Under the Senate-passed version of S. 129, each agency would be required to appoint or designate a training officer who would be responsible for developing, coordinating, and administering training for the agency. Both the Senate and House versions of the legislation would provide that, in consultation with OPM, each agency head would establish a comprehensive management succession program to train employees to

⁵⁴ U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, *Training Federal Employees to Be Their Best*, hearing, 106th Cong., 2nd sess., May 18, 2000 (Washington: GPO, 2000), p. 3. (Hereafter referred to as Senate Subcommittee Hearing on Training.)

⁵⁵ This provision was Section 301(a) of S. 129, as introduced.

⁵⁶ Senate Subcommittee Hearing on the Federal Workforce, pp. 108-109.

⁵⁷ This provision was Section 301(b) of S. 129, as introduced.

develop agency managers, and a program to train managers on actions, options, and strategies a manager could use in relating to employees with unacceptable performances, mentoring employees and improving performance and productivity, and (in the House version only) conducting employee performance appraisals.

Discussion of the Provisions. Establishing the position of training officer is intended to help ensure efficient and effective use of agency training monies. According to the section analysis that accompanied S. 2651 (107th Congress), the training officer “could be the same person” as the Chief Human Capital Officer.⁵⁸ More than a decade ago, Congress required OPM to report annually on training expenditures in the executive branch, but this requirement was dropped as downsizing at OPM resulted in a reallocation of staff and resources. Congress has not received this information since the mid 1980s. NTEU’s Colleen M. Kelley stated during the Senate subcommittee hearing, “While the legislation draws long overdue attention to the need to properly train employees, again, it does nothing to address the resource problems that have prevented agencies from adequately training their employees in the past.”⁵⁹ At the House subcommittee hearing, she advocated for Congress to ensure that training is funded.⁶⁰ John Priolo, representing the Federal Managers Association, recommended to the Senate subcommittee that “a separate line item on training [be included] in agency budgets to allow Congress to better identify the allocation of training funds each year.”⁶¹

The managerial training program requirement would respond to agency comments, most recently presented at a Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia hearing in May 2000, that “their employee training budgets were inadequate and that they could use additional training funds.”⁶² Ronald Sanders of OPM testified before the House subcommittee that appointment of training officers in federal agencies is unnecessary as training and development are among the principal responsibilities of the agency Chief Human Capital Officers.⁶³

Annual Leave Enhancements

Accrual of Leave for Newly Hired Federal Employees with Qualified Experience. Under current law at 5 U.S.C. §6303, employees with less than three years of federal service accrue annual leave at four hours per biweekly pay period. Six and eight hours of annual leave are accrued every two weeks by employees with three but less than 15 years of service and with 15 or more years of service, respectively. Individuals newly hired in the federal government begin at the four-hour rate.

⁵⁸ Section Analysis of S. 2651, p. 10.

⁵⁹ Senate Subcommittee Hearing on the Federal Workforce, p. 122.

⁶⁰ House Subcommittee Hearing on Esprit de Corps, statement of Colleen M. Kelley, p. 12.

⁶¹ Senate Subcommittee Hearing on the Federal Workforce, p. 182.

⁶² Senate Subcommittee Hearing on Training.

⁶³ House Subcommittee Hearing on Esprit de Corps, statement of Ronald Sanders, p. 3.

Section 202(a) of S. 129, as passed by the Senate and as ordered to be reported to the House, would amend 5 U.S.C. §6303 by adding new text that would allow an agency head to count prior service, not with the federal government, for purposes of annual leave accrual. The Senate version of the provision would authorize an agency head to deem “a period of qualified non-federal career experience” as “a period of service performed as an employee” for the purpose of annual leave accrual.⁶⁴ Credit would be allowed for service that was performed in a position with duties directly related to the duties of the position that the individual holds in the agency and that meets other such conditions as OPM regulations would prescribe. The authority would become effective 120 days after the act’s enactment and would apply only to an individual hired on or after the effective date.

Under the House version of the provision, OPM would prescribe regulations governing the granting of credit for annual leave accrual of a newly hired employee not later than 180 days after enactment of the amendment. Credit would be granted for the employee’s prior service, not otherwise creditable for such purposes, if the service were performed in a position the duties of which directly related to the position the employee had been appointed to and met such other requirements as OPM might prescribe. Further, the agency head would have to decide that application of the provision was necessary to achieve an important agency mission or performance goal. The service would be creditable as of the effective date of the employee’s appointment and would continue to be so creditable unless the employee failed to complete a full year of continuous service with the agency. An employee who held a position in the Civil Service within 90 days before the appointment’s effective date would not be eligible to have his or her nongovernmental service credited for the purposes of annual leave accrual.

The proposed change would allow newly hired employees to accrue more than four hours of annual leave immediately upon beginning their employment with the federal government. For example, an individual hired by the federal government who has 12 years of “qualified non-federal service,” as determined by the agency head, might be credited with 12 years of federal service and thus earn six hours of annual leave per pay period. Increasing the number of hours of leave newly hired employees may accrue is viewed by some as an effective recruiting tool, particularly for mid-level employees. In her testimony before the House subcommittee hearing, Colleen M. Kelley of NTEU stated that, “if annual leave limits are in fact a barrier to hiring, the entire leave system should be reviewed.”⁶⁵

Annual Leave Enhancements for Senior Level Employees. Currently, a federal employee must have at least 15 years of service to accrue eight hours of annual leave per biweekly pay period. In amending 5 U.S.C. §6303, Section 202(b) of S. 129, as passed by the Senate and as ordered to be reported to the House, would allow certain categories of senior level employees to accrue a full day of

⁶⁴ This provision was Section 302(a) of S. 129, as introduced.

⁶⁵ House Subcommittee Hearing on Esprit de Corps, statement of Colleen M. Kelley, p. 13.

annual leave for each pay period regardless of how many years of service they have.⁶⁶ Employees in positions classified above GS-15 or in scientific or professional positions established under 5 U.S.C. §3104, members of the Senior Executive Service, and employees in an equivalent category for which the minimum rate of basic pay is greater than the rate for GS-15, step 10 (the House version states this as employees in an equivalent category as determined by OPM), would be eligible to accrue eight hours of annual leave every two weeks. This provision would take effect 120 days after the act's enactment date, and would require OPM to prescribe implementing regulations not later than 120 days after the act's enactment. Under the House version, the amendments would not apply to an employee appointed to a position before the effective date of the regulations implementing the provision.

Targeting senior level employees for this benefit is viewed by some as an effective tool for recruitment and retention. To the extent that most senior executives continue to be drawn from government ranks, and that these individuals may have already reached, or are about to reach, 15 years of service by the time they enter the ranks of the SES, this provision's effect might be limited. To the extent that it attracts more outside managers to the federal ranks, it might have a positive effect on recruitment.

Compensatory Time Off for Travel

Under current law at 5 U.S.C. §5542(b)(2), the time that an employee spends in a travel status away from his or her official duty station is not considered to be hours of employment unless specific requirements are met. The requirements are that (1) the time spent is within the days and hours of the employee's regularly scheduled administrative workweek, including regularly scheduled overtime hours; or (2) the travel involves the performance of work while traveling, is incident to travel that involves the performance of work while traveling, is carried out under arduous conditions, or results from an event that could not be scheduled or controlled administratively (including travel to an event and return from an event to the official-duty station).

Section 203 of S. 129, as passed by the Senate and as ordered to be reported to the House, would amend current law by adding a new Section 5550b to Chapter 55, Subchapter V of Title 5 *United States Code*. The section would provide that, notwithstanding current law, an employee could be granted compensatory time off from his or her scheduled tour of duty for time spent in officially authorized travel status, away from his or her official duty station, that is not otherwise compensable. An employee who has any hours treated as hours of work or employment for purposes of compensatory time would not be entitled to payment for any such hours that are unused as compensatory time. OPM would prescribe regulations to implement the provision not later than 30 days after enactment of the section.

If the provision were enacted, federal employees who traveled outside of the normal business hours to meetings, training, and other official activities would no longer need to use their own personal time for such travel. This provision was added

⁶⁶ This provision was Section 302(b) of S. 129, as introduced.

to S. 129 during markup by the Senate Committee on Governmental Affairs at the request of Senator Akaka. During the House subcommittee hearing, Colleen M. Kelley of NTEU expressed strong support for compensatory time off for travel as an effective recruitment and retention tool.⁶⁷ At the same hearing, Ronald Sanders of OPM stated that the personnel agency does not support the provision, because “there is no compelling business case”; the benefit is “not typically found in the private sector”; and “such a benefit has a significant cost ... in terms of lost productivity.”⁶⁸

Provisions Relating to Retirement⁶⁹

Civil Service Retirement System Computation for Part-Time Service. Employees covered by the Civil Service Retirement System (CSRS) who work part-time can experience disproportionately large cuts in their retirement annuities as the result of a regulation adopted by OPM in response to the *Comprehensive Omnibus Budget Reconciliation Act of 1986* (P.L. 99-272). Current law (5 U.S.C. §8339(p)) requires retirement annuities for a federal worker whose career includes part-time employment to be based on the rate of pay that would be paid for full-time service, with the employee’s service time prorated for the actual number of hours worked. In its regulation, however, OPM adopted an interpretation of this statute that also applies a lower rate of pay than would be applied if part-time employees had worked full-time for their entire careers. Some Members of Congress who sponsored the relevant sections of P.L. 99-272 have stated that the OPM regulation unfairly penalizes part-time work by making larger reductions in these workers’ retirement annuities than were intended by Congress.⁷⁰

Section 103 of S. 129, as passed by the Senate, and Section 211 of S. 129, as ordered to be reported to the House, would amend current law to clarify that CSRS retirement annuities based in whole or in part on part-time service should be prorated for the period of service that was performed on a part-time basis.⁷¹

Retirement Service Credit for Cadet or Midshipman Service. Under current law at 5 U.S.C. §8331(13) and 5 U.S.C. §8401(31), a federal employee who served in the armed forces can count his or her military service toward a civilian retirement annuity, provided that the employee makes a deposit to the Civil Service Retirement and Disability Fund equal to the amount that would have been withheld from his or her military pay (plus applicable interest) if military service had been covered under the civilian retirement system.

⁶⁷ House Subcommittee Hearing on Esprit de Corps, statement of Colleen Kelley, p. 11.

⁶⁸ House Subcommittee Hearing on Esprit de Corps, statement of Ronald Sanders, p. 4.

⁶⁹ Patrick Purcell, Specialist in Social Legislation, Domestic Social Policy Division, Congressional Research Service, prepared the text on the provisions on retirement.

⁷⁰ Letter from Rep. William D. Ford to the U.S. Office of Personnel Management, Feb. 19, 1987. At the time, the Member was chairman of the House Committee on Post Office and Civil Service.

⁷¹ This provision was Sec. 203 of S. 129, as introduced.

Section 104 of S. 129, as passed by the Senate, and Section 212 of S. 129, as ordered to be reported to the House, would amend current law to include service as a cadet at the U.S. Military Academy, the U.S. Air Force Academy, or the U.S. Coast Guard Academy, or as a midshipman at the U.S. Naval Academy in the definition of “military service” that can be creditable under the Civil Service Retirement System or the Federal Employees’ Retirement System.

The provision was added to S. 129 during markup by the Senate Committee on Governmental Affairs at the request of OPM.

Title III — Provisions Relating to Pay Administration

Corrections Related to Pay Administration

Section 301 of S. 129, as ordered to be reported to the House, would amend various sections of Chapter 53 of Title 5 on administering special pay rates. S. 129, as introduced, included the same provisions at Section 204, but they were dropped during markup by the Senate Committee on Governmental Affairs and are not included in the Senate-passed bill. The provisions would become effective on the first day of the first applicable pay period beginning on or after the 180th day after the act’s enactment. Conversion rules would apply as follows. Subject to any regulations OPM could prescribe, an employee under the General Schedule, a prevailing rate schedule, or a special occupational pay system who, on the day before the effective date of Section 301 was receiving a retained rate under 5 U.S.C. §5363, or was receiving under similar authority a rate of basic pay greater than the maximum rate of basic pay payable for the grade of the employee’s position, would have that rate converted as of the effective date of Section 301, and the employee would be considered to be receiving a retained rate under 5 U.S.C. §5363 (as amended by Section 301). The newly applicable retained rate would equal the formerly applicable retained rate as adjusted to include any applicable locality-based comparability payment.

Discussion of the Provisions. The section analysis which accompanied S. 2651 (107th Congress) explained that “The changes would correct a variety of pay administration anomalies associated with special rates and pay retention that resulted from the introduction of locality pay under the GS [General Schedule] pay system,” and that “No current employee would lose pay because of these changes.” Further, the section analysis stated that “The proposed changes would go a long way toward reinvigorating the special rates program as a useful recruitment and retention tool and would thereby help to relieve pressure for authority to set pay outside the GS system.”⁷² Identical proposed changes also were included as Section 124(a) and (c) of S. 1612 (107th Congress).

⁷² Section Analysis of S. 2651, p. 7.

Under current law at 5 U.S.C. §5304(g)(2)(A), Executive Schedule level III (\$145,600, as of January 2004) is the maximum total pay allowable for senior-level, Senior Executive Service (SES), Federal Bureau of Investigation and Drug Enforcement Administration SES, and administrative law judge (ALJ) positions. Section 302 of S. 129, as ordered to be reported to the House, would amend current law to exclude ALJ positions from coverage under the provision.

Conclusion

Congressional interest in legislative reforms to improve the management of the federal government's workforce continues in the 108th Congress. The National Commission on the Public Service, in its report to Congress submitted on January 7, 2003, recommended the development of more flexible personnel management systems by operating agencies and continued efforts to simplify and accelerate federal recruitment processes. The Department of Homeland Security and the Department of Defense, respectively, are currently working with the Office of Personnel Management to craft new human resources management systems for their employees, and personnel management flexibilities likely will be a focus of the discussions surrounding these efforts, as well as of congressional oversight of the new systems. A representative of the Federal Managers Association, Karen Heiser, testifying before the April 8, 2003, joint subcommittee hearing said that those in government service must continually ask such questions as "Do employees receive the training they need? Are they receiving the proper incentives to do a good job? In short, is the government investing in its people?" in contemplating "a world-class and resilient Civil Service."⁷³

⁷³ Joint Senate/House Subcommittee Hearing on Human Capital Challenge, statement of Karen Heiser, p. 28. The questions that she stated were first asked by Senator George Voinovich in U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, *Report to the President: The Crisis in Human Capital*, 106th Cong., 2nd sess., subcommittee rept. prepared by Sen. George V. Voinovich, chairman (unpublished: 2000).