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A BILL

THE MODERN SYSTEM, MS.1

[Real Civil Service Reform]

Radical? Yes. Nuts? No!

This is an outline for new legislation that would repeal title 5 of the U.S. Code in its entirety, repeal portions of other codified and uncodified laws dealing with federal employees, and replace all of them with a shorter, simpler, faster and cheaper civil service system for all civil service employees of all three branches of the federal government. This presentation contains only the views of our law firm and not the views of any of our clients, any federal agency, any federal employees or any labor organizations that represent federal employees.

THE PROBLEM

In 1978, Congress enacted the Civil Service Reform Act (CSRA) in an effort at a comprehensive overhaul of the laws governing federal civilian employment. The goal was to make employee and labor relations in the federal sector simpler and fairer for federal agencies and for federal employees.

It didn't work. Civil service law is as "hyper-technical" as it ever was, with a host of different agencies having overlapping jurisdiction over issues that are sometimes insignificant and no jurisdiction over issues that are sometimes very significant. Each agency has its own "fiefdom"- MSPB, FLRA, FSIP, EEOC, labor arbitrators, DOL, OPM, OSC, to name a few. Although federal employers prevail in most grievances, complaints and appeals filed by federal employees, the process is frustrating, time consuming and expensive for federal agencies. While federal employees get plenty of "due process" for most grievances, complaints and appeals they file, the end result is frustrating, time consuming and expensive.

THE OPTIONS

There are 4 logical choices. The first choice is to do nothing. Congress and a succession of Democratic and Republican administrations have done this for 27 years and have done it very well. It hasn't helped. The problems caused by the 1978 CSRA have only become worse.

The second choice is to abolish the entire civil service system. However, unless the U.S. Constitution itself is abolished, it is impossible for employment in the federal

government to be “employment at will.” Most federal employees are also American citizens and, like their fellow citizens, are entitled to seek legal redress when the Government interferes with or deprives them of their Constitutional rights. It is also undeniable that the Government can, and should, be held to the rules it has imposed on itself. Long before the Civil Service Reform Act of 1978, federal employees were filing, and winning, lawsuits based on violations by federal agencies of federal statutes and regulations affecting their conditions of employment. The Government cannot be expected to stop making and revising laws, rules and regulations that affect federal employees. Abolishing the civil service system would do nothing more than open the floodgates to the federal courts for lawsuits by federal employees.

The third choice is the “Frankenstein” approach. This is the approach championed by the present administration. It involves taking the dead corpse of the 1978 CSRA, adding a few missing body parts, taking some away, and then proclaiming “It’s Alive!” – after which it will ransack and destroy what’s left of the merit-based civil service system. Two of these monsters have already been created- a law authorizing the Department of Homeland Security (DHS) to opt-out of title 5 of the U.S. Code and create its own personnel system, and a law authorizing the Department of Defense (DOD) to do the same. The first was jolted into animation in December 2004 with final regulations called MAX^{HR} but key parts of the regulations were enjoined by a federal judge on August 12, 2005. The second is called NSPS and is all wired up and waiting for a lightning storm. Still on the table are drafts of bills with names like “The Civil Service Modernization Act” and the “Working for America Act” that would leave the first two monsters free to roam the DHS and DOD countryside, but which would be created in

their image and unleashed on the rest of the federal government. The "Frankenstein" approach is history repeating itself: the Civil Service Reform Act of 1978 was also a patchwork of new laws and old laws engrafted onto a patchwork system that was never fair nor efficient in its best days.

The best option is to start again, and get it right this time. All federal employees have the same boss: the American people, whose taxes pay their salaries. The American people express their collective will on public policy for federal employees through a "board of directors" called Congress and a "CEO" called the President who is sworn to implement that policy. Ever since the "spoils system," under which all government jobs were doled out on the basis of political patronage, was abandoned in the 1880's Congress has set the basic rules for a merit-based civil service system, including hiring practices, basic pay, hours of work, veterans' preference, a retirement program, a labor relations program, an appeals system, and other conditions of employment. The solution is not to surrender this power to each federal agency so it can create its own "Frankenstein's monster" every time there is a new occupant in the White House. The solution is to establish a new and simpler set of basic personnel policies that will apply in the same way to all federal employees and that will be enforced by a single federal agency, while at the same time allowing each agency to fill in the details that best suit its own operations. We call our suggestion "The Modern System, MS.1"

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A BILL

THE MODERN SYSTEM, MS.1

[Real Civil Service Reform]

Outline/ Summary/ Comments

This Act repeals or transfers every law in title 5 of the U.S. Code and every law in other statutes related to federal employment.

This Act contains "transition" provisions to assure current federal employees that they can retain their current pay, accrued benefits and workers compensation and retirement entitlements on the date they transfer to the new personnel system.

This Act resurrects the name, "Civil Service Commission," but it is a very different agency than the Civil Service Commission that was abolished in 1978.

Title 5, U.S. Code: Federal Employees

Chapter 1: Definitions and Coverage:

A. Definitions

1. Employee: common law definition of employee where the employer is the federal government.
2. Agency: An executive agency, an independent establishment (including the U.S. Postal Service), a Government corporation, the Congress, and the Judicial Branch.
3. Supervisor: same definition as 5 USC 7103(a)(10).
4. Manager: same definition as 5 USC 7103(a)(11).
5. Collective bargaining: same definition as 5 USC 7106(a)(12) (with minor modifications to make it consistent with this Act).
6. Conditions of employment: "Personnel policies, practices and matters, whether established by rule, regulation or otherwise, affecting working conditions."
7. Labor organization: same definition as 5 USC 7103(a)(4).

B. Coverage: Entire executive branch, including independent establishments, including the U.S. Postal Service, including Government Corporations, including the legislative branch and including the judicial branch.

Exclusions:

1. Persons who are elected to office and persons whose appointment to office requires the nomination of the President and the consent of the

Senate.

2. Persons or organizations whose exclusion is required under Constitutional "separation of powers" principles as interpreted by the courts.

3. Persons or organizations employed by the Legislative Branch, the Executive Branch, or the Judicial Branch that the Congress, the President or the Supreme Court, respectively, decide to exclude. The Act should contain criteria for such exclusions that are as narrow as possible, consistent with "separation of powers" principles.

Comments:

This title applies to every employee of an agency except those excluded from coverage by this title. Every employee means every civilian employee of every agency no matter how or from what source the agency receives its funding.

Chapter 2: Rights and Responsibilities of Federal Employees:

A. Merit system principles, 5 USC 2101, 5 CFR 300.102 and 103, 5 CFR 335.103(b), 5 USC 7211, 5 USC 7102.

B. Prohibited personnel practices, copy or adapt 5 USC 2302.

C. Basic pay policy:

"equal pay for equal work" [from 5 USC 2301(b)(3) and 5 USC 5101]

requires some form of compensation for regular and irregular hours of work in excess of the normal hours of the work day and in excess of 40 hours a week.

Requires agencies to establish procedures for agencies to collect money debts owed to the Government by employees, and establishes policies on waiver of debts when collection would be against equity and good conscience. (model

language, 5 USC 5514, 5 USC 5584).

D. Veterans' rights and Veterans' preferences (including "preference eligibles").

E. Minimum standards for occupational safety and health (reference the regulations issued by the Department of Labor under the Occupational Health and Safety Act).

F. Minimum standards of conduct and ethical behavior (reference the regulations issued by the Office of Government Ethics).

G. "Hatch Act" rules on political activity by federal employees, from 5 USC 1501-1508.

H. "Due process" An agency shall not suspend, demote or remove an employee from employment except for such cause as promotes the efficiency of the service, and not without 30 days prior notice of the charge against the employee, an explanation of the agency's evidence and an opportunity to reply before the effective date of the suspension, demotion or removal. An agency may elect to place an employee in a non-duty status without loss of pay or accrued leave until the effective date of such action.

Comments:

This chapter is NOT intended to create any new rights or responsibilities that do not already exist under current law and government-wide regulations. It is designed to bring all of the most fundamental rights and responsibilities into one place, and to make them enforceable in the same manner by the same agency, the Civil Service Commission (CSC).

The current version of title 5 U.S.Code, Part I, which for the most part contains laws not solely applicable to federal employees, such as the Administrative Procedure Act, the Privacy Act, the Freedom of Information Act, the "Open Meetings" Act, etc., should be relocated to another title of the U.S. Code.

Note that the civil rights laws are all contained in 5 USC 2302(b)(1), which is incorporated in the Act. The use of this particular section as a model is deliberate, because a "personnel action" is a jurisdictional requirement for an employee to file an appeal. As set forth later in the Chapter on "appeals," federal employees will be able to make an irrevocable election at the time they file an appeal between the procedures available to them under title 42 of the U.S. Code, which allow for the filing of "EEO

complaints" that may ultimately lead to a jury trial, and the procedures available to them under this Act. There will be no "mixed cases," "reviews," "appeals" or "overlap" between these two sets of procedures.

The rights and responsibilities in this chapter ARE intended to be legally binding and legally enforceable, not "horatory," not "guiding principles," not "aspirational" and not "recommendations." A section needs to be included in this chapter which makes this clear.

Chapter 3: Conditions of Employment

A. Each agency shall by regulation propose, establish and from time to time amend or revise conditions of employment for its employees.

B. No condition of employment established by an agency shall conflict with a law or a final decision or regulation issued by the Civil Service Commission (CSC).

C. Each agency shall be required to adopt a program to provide benefits to its employees who retire. The pay policies of Chapter 2 apply to each retirement plan. [Provide for oversight and review of retirement plan management, investments and solvency by DOL Pension Benefit Guarantee Corporation].

Comments:

What's happened to the laws applicable to federal employee working conditions: the Fair Labor Standards Act, the laws in title 5 of the U.S. Code on premium pay, differentials and allowances, the laws on performance ratings and awards, the laws authorizing pay demonstration projects, the laws authorizing DHS and DOD to design and implement their own personnel systems, the laws on training, the laws on hours of work and scheduling, the laws on within-grade increases and cost of living allowances, the laws on layoffs, the laws on health insurance, life insurance and workers compensation?

They are all eliminated. Except as otherwise provided by law or in this Act, no condition of employment is required or prohibited. An agency need not even adopt a workers compensation system for occupational injuries or illnesses (unless one is negotiated into a collective bargaining agreement) if it prefers claims of this nature to be governed by the Federal Tort Claims Act.

Chapter 4: The Civil Service Commission (CSC)

A. CSC consists of 9 members nominated by the President and confirmed by the Senate. CSC is authorized to issue final decisions in panels of 3 randomly selected members.

B. CSC is subject to all the provisions of this Act. The Act should include special procedures to handle issues affecting CSC employees in order to mitigate or eliminate any conflict of interest.

C. Each division of the CSC shall by regulation propose, establish and from time to time revise or amend such regulations as may be necessary and appropriate to carry out its mission.

D. The Divisions of the CSC:

1. Appeals. (see chapter 5)

2. Office of Government Ethics. (same as current OGE; issues regulations, advisory opinions)

3. Office of Special Counsel. OSC has the authority to prosecute alleged violations of Chapter 2 of this title by filing appeals with the CSC. OSC shall prosecute only those appeals that involve serious violations or that will clarify the meaning or application of any provision of Chapter 2. OSC may be a party to any appeal pending before the CSC if the existing parties consent or if CSC agrees. No action by OSC, nor any action that OSC has the power to take, shall pre-empt or supersede any right or procedure provided in this Act. OSC has the authority to seek from CSC all remedies that CSC may grant to a party. OSC is the sole authority other than the employing agency that has the power to seek the suspension, demotion or removal of an employee.

4. Office of Policy. (this is the Government's "think tank" for human resources management; it would issue "model" non-binding rules and regulations for consideration by agencies, as well as undertake studies, reports and surveys of human relations issues in the Government).

5. Office of Travel and Relocation Standards. (this office would be responsible for the issuance and revision of all regulations on employee travel and relocation reimbursement for all agencies). [Disputes over debt collection and waivers of debts fall within the definition of an "appeal" and can be processed under Chapter 5.]

6. Office of Contracting. (this office would have the sole authority to "privatize" work performed by federal employees. The Act would need to reference the laws governing contracting-out). Any affected person or entity shall have the right to appeal a decision to contract-out, or a decision not to contract-out, directly to the U.S. Court of Appeals for the District of Columbia, which shall decide all such appeals within 90 days of filing.

E. This chapter shall be effective one year from the date of enactment of this Act.

Comments:

Note that the CSC is <u>not</u> authorized to issue government-wide regulations on conditions of employment.

The enactment of this legislation would eliminate FLRA, MSPB, OPM and any other entity that now has the power to entertain employment-related claims from federal employees, such as the GSBCA. Federal agencies with jurisdiction over federal sector as well as private sector employment would lose their jurisdiction over federal employment issues, such as DOL and FMCS.

The EEOC would remain an option for federal employees who elect to file an EEO complaint using the EEOC's procedures.

Chapter 5: Appeals.

A. Defines an appeal basically the same way a "grievance" is now defined in 5 USC 7103(a)(9): any complaint by an employee, or by a labor organization representing an employee or group of employees, or by an agency, about any alleged violation of law, regulation or a collective bargaining agreement if the violation concerns or affects conditions of employment. There would be no exclusions except as

specifically provided by law.

B. Pre-emption and Election of Remedies: Except as otherwise expressly provided in this Act, the rights, remedies and procedures available to an agency, an employee or a labor organization shall be the sole rights, remedies and procedures available for any matter falling within the definition of an "appeal." A collective bargaining agreement may provide for grievance and arbitration procedures over a matter falling within the definition of an appeal. Final decisions resulting issued under negotiated grievance and arbitration procedures are appealable directly to the CSC.

C. Time to file an appeal: 180 days from date of the occurrence that is the basis for the appeal, or 180 days from date the appellant discovered or should have discovered the occurrence in the exercise of ordinary diligence. CSC may excuse where good cause shown and the interest of justice so requires.

D. No employee is entitled to file an appeal challenging the employee's removal from employment without having completed 2 years of continuous civilian service with an agency or combination of agencies on or before the date the appeal is filed. Nothing in this section affects the power of OSC to file an appeal on behalf of any employee or to request and obtain from the CSC any remedy authorized for employees under this title.

E. Each appeal will be referred to an established CSC regional office for adjudication. It is crucial for Congress to ensure that CSC employs a sufficient number of qualified adjudicators, investigators and attorney-advisors, who will work in teams. CSC regulations shall provide for pre-hearing discovery. Any appeal may, after prior notice and an opportunity to respond, be decided without a hearing if there is no genuine dispute of material fact. An in-person hearing is required in all appeals where there is a genuine dispute of material fact. Testimony given outside the presence of the hearing officer and the parties and their representatives may be accepted only with the consent of the parties, or on the order of the hearing officer under extraordinary circumstances.

F. The decision of the hearing officer on an appeal shall be final and binding on all parties unless appealed to CSC Headquarters within 30 days of the date the decision is received by the person or entity desiring to appeal.

G. CSC shall prescribe by regulation the conditions under which it may issue a stay or provide interim relief for the benefit of any party at any stage of the appeal process.

H. CSC shall make the final administrative decision on all appeals, and it may issue decisions in randomly chosen panels of three CSC members. The CSC shall reconsider a final decision if a request to reconsider is received by the CSC within 30 days of the date the final decision was issued from a party to the appeal or the Office of Special Counsel (OSC), or if a majority of the members of the CSC vote within this period to reconsider the decision. Each reconsideration decision shall be decided by a vote of the majority of the members of the CSC and shall be the final administrative decision.

I. Any party is entitled to appeal the final administrative decision of the CSC to the U.S. Court of Appeals for the Circuit in which a party resides or has its headquarters office, or to the U.S. Court of Appeals for the District of Columbia Circuit. The standard of review shall be the "Administrative Procedure Act" standard ("contrary to law, arbitrary or capricious or unsupported by substantial evidence").

J. [Requirements for Alternative Dispute Resolution (ADR) procedures in the processing of appeals.]

K. Remedies: The CSC is authorized to grant any legal or equitable remedy not prohibited by law. This includes all actual money damages that can be calculated with reasonable certainty that are attributable to the violation of law, regulation or collective bargaining agreement found by the CSC. This includes interest. This does not include money damages to an agency, damages for physical pain or mental or emotional injury, fines, penalties, criminal punishment or punitive or exemplary damages. Money damages may not extend to a date earlier than 6 years prior to the date the appeal was filed. No collective bargaining agreement may provide for remedies different than the remedies provided in this Chapter.

L. Attorney's Fees: A prevailing party other than a federal agency shall be awarded reasonable attorney's fees unless special circumstances render such an award unjust. A prevailing party shall include, in addition to a party who substantially prevails through an order or an enforceable agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

Comments:

The principal goal of this chapter is to ensure that almost all disputes involving federal employees are resolved by one agency under one set of rules. Judicial review would be available only "on the record" under "APA" review standards, but a party seeking judicial review would have a choice as to the Circuit Court of Appeals. The Federal Circuit's involvement with federal employment issues would be eliminated.

The provision on remedies is intended to be an express waiver of sovereign immunity for the remedies it provides, eliminating arguments over whether certain types of money payments are or are not allowed to federal employees (e.g., interest, medical expenses, insurance co-payments, trip cancellation fees, parking fees, license and certification fees, etc.)

Chapter 6: Labor Relations:

A. Any employee may chose to be represented by a labor organization in any proceeding under this Act.

B. Any employee may choose to join a labor organization.

C. Any employee who joins a labor organization shall have the membership dues of the labor organization withheld from his or her pay on a bi-weekly basis by the agency and promptly transmitted to the labor organization, without charge to the labor organization. An employee may elect to terminate membership dues withholdings one time each year, at the end of the first regular pay period after the anniversary date on which his or her dues withholding began.

D. If a labor organization has been found by the CSC to have members on membership dues withholding who comprise 20 percent or more of the

eligible employees of an agency, then the agency shall be required to engage in collective bargaining with the labor organization. If more than one labor organization is found to represent 20 percent or more of the eligible employees of the agency, the agency shall be required to engage in collective bargaining with the labor organizations with the most members who are eligible employees, up to a maximum of 5 labor organizations.

E. "Eligible employees" means all employees who are not supervisors or managers or not otherwise excluded from the definition of an "employee" under this title. Nothing in this title shall prohibit an agency from engaging in collective bargaining with any labor organization whose members are "eligible employees" of the agency on a voluntary basis under such regulations as the agency may prescribe.

F. No collective bargaining agreement shall apply to any employee unless the employee is a member of the labor organization that is a party to the agreement and unless the employee has been a member of that labor organization for at least one year.

G. No collective bargaining agreement may be effective for more than 6 years, unless extended in whole or in part by the CSC in increments of 1 year on a finding that such extension is needed to prevent injustice, unreasonable costs, inefficiencies or disruptions to the operations of the agency.

H. If any agency regulation issued pursuant to chapter 3 of this title conflicts with or is inconsistent with a provision of a collective bargaining agreement, the provision of the collective bargaining agreement shall control.

I. The CSC shall have sole authority to mediate and to make a final decision on any impasse reached by an agency and a labor organization in collective bargaining. The final decision of the CSC is not subject to further review in any manner in any forum.

J. Any collective bargaining agreement and any final decision of the CSC resolving an impasse resulting from collective bargaining may be nullified, in whole or in part, by an Executive Order issued by the President for employees of the executive branch, independent establishments and government corporations, by a resolution adopted by majority vote in both houses of Congress for employees of the legislative branch, or by majority vote of the Supreme Court for employees of the judicial branch.

K. All decisions which the CSC, an agency regulation, or a collective bargaining agreement may authorize any person or entity to make under this title shall be appealable directly to CSC Headquarters, and shall result in CSC issuing a final decision on such appeal. The standard of review by the CSC of such decisions shall be the same standard that applies to judicial review of CSC decisions. Final decisions of the CSC on any such appeal are judicially reviewable in the same manner as the final decision of the CSC on any appeal.

Comments:

What's happened to "appropriate units" for bargaining, FLRA-supervised elections, the descriptions of unfair labor practices, the requirement for a grievance and arbitration procedure in a labor contract, the list of "management's rights," the concept of "negotiability," "impact and implementation bargaining," "official time," "agency-head review" of labor contracts, etc?

They are all eliminated. Rather than micro-manage what an agency and a labor organization can negotiate about and agree to, the Act leaves it to the agency and the labor organization to do this themselves, with the intervention of the CSC to make a final, non-appealable decision if necessary. It is most unlikely that a federal agency and a labor organization will agree to anything which endangers the public interest or undermines the effective conduct of public business, or that the CSC will impose anything on an agency, a labor organization or employees which has this effect. But there must be a "safety valve." The Act allows each branch of the Government to nullify part or all of any collective bargaining agreement without providing any reason for doing so. It is an extraordinary step, so the Act requires such nullification to be effected by the President, the Congress or the Supreme Court, as the case may be.

The concept of a collective bargaining agreement that applies only to employees who are voluntary members of the union is novel, but not impractical. There is an argument that the CSC should be able to consider the level of union membership in an agency or in an organizational unit in the course of resolving bargaining impasses. However, this would create too strong a temptation to impose all, none or just a part of a collective bargaining agreement on an agency or an organizational unit. Some labor contract provisions, like provisions on investigative interviews or provisions on employee discipline, are easy to apply on an employee-by-employee basis. Other provisions, like those concerning flexitime or compressed work weeks, are not as easy to apply to some rather than all employees of a given organization. It is hard to imagine any provision of a collective bargaining agreement that absolutely could not be applied solely to union members. There is one impediment that may have to be addressed,

however: what if a given office or installation contains members of all 5 labor organizations who could be empowered to engage in collective bargaining? This

would be impossible or unreasonably difficult to administer. There are a number of possible solutions the drafters could consider, such as a requirement for all the union members with a given activity to be required to choose one of the unions, or a requirement that activities having employees who are union members of more than one union with collective bargaining rights be allowed to mandate joint negotiations with all of the unions on a single labor contract. The solution needs to be carefully crafted so it applies only to specific organizational units and not to an entire agency or an entire national component of an agency, which would lead to one union having a monopoly on federal employee representation sooner or later.

Chapter 7: Repeals, Transitional Provisions and Effective Dates

A. The Act must specifically cite every codified or uncodified law concerning conditions of employment of federal employees and repeal it. This is going to take some work, since not only title 5 of the U.S. Code in its existing form is being repealed, but also provisions of other titles that apply to federal employees generally, such as the Fair Labor Standards Act, and provisions of other titles that apply to employees of specific agencies, such as title 38 of the U.S. Code (employees of the Department of Veterans Affairs), title 39 of the U.S. Code (employees of the Postal Service), title 47 of the U.S. Code (employees of the Federal Aviation Administration), and uncodified laws such as section 704 of the Civil Service Reform Act of 1978, which "grandfathered" pay bargaining for employees of certain agencies, and even obsure laws like the Presidio Trust Act, which authorizes the Presidio Trust to establish its own personnel system, and laws authorizing "special rates" for various employees.

B. This Act does not affect the civil rights acts for federal employees in title 29 and title 42 of the U.S. Code. This would be a good time to repeal 29 USC 206(d) and 29 USC 633a and simply incorporate the prohibitions on sex-based pay disparities and age discrimination into the civil rights provisions in title 42 of the U.S. Code.

C. No employee of an agency or retired employee of an agency shall, as a result of this Act, experience a reduction or elimination of the employee's basic pay, accrued leave, service credit, retirement annuity, or entitlement to compensation for a workers compensation claim approved on or before the

effective date of the Act.

D. All administrative appeals which have been filed and are pending on or before the effective date of the Act shall continue to be governed by the law and regulations as they existed before the effective date of the Act, unless all parties to an appeal agree otherwise.

E. This Act shall be effective on the fourth anniversary date after the date of enactment, except that it shall be effective to the CSC one year after the date of enactment, and except that any agency may in its sole discretion decide to apply this entire Act to the agency on any date during the period between one year and four years after the effective date of this Act.