

Civil Service Modernization Act of 2005

Purpose of the Bill: The bill's purpose is to balance additional authority with greater accountability for the management of Federal employees. This system should not waive or modify (according to the draft bill):

1. Public employment principles of merit and fitness
2. Prohibited personnel practices (this includes veterans' preference)
3. Prohibited personnel practices relating to discrimination, whistle blowing, and the exercise of appeals rights.
4. Equal opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the public service.

Pay for Performance

- The General Schedule, the Federal Wage System, and the System for senior-level and scientific or professional employees (SL/ST) would be replaced by a "Strategic Compensation System."
- The agency can choose the effective date of coverage for any category of eligible employees, provided that coverage is extended to all eligible employees no later than the first day of the first pay period beginning on or after January 1, 2010. The conversion may not cause a reduction in an employee's rate of basic pay.
- OPM is responsible for administering and prescribing the rules governing conversion of positions and employees into a strategic compensation system.
- Supervisors and managers are responsible for clearly communicating performance requirements and expectations and holding employees responsible for accomplishing them. The new system makes distinctions between "performance expectations" and "performance requirements." The latter are broadly defined duties, responsibilities, and competencies. The former is more specific and include the particular contributions that an employee's supervisor expects from the employee as he or she carries out specific assignments.
- Performance requirements, which are more general than performance expectations, must be communicated in writing. Performance expectations may take any form as long as it is reasonable to assume that the employee will understand the performance that is expected. Supervisors are required to monitor the performance of their employees and the organization and to provide timely feedback to employees on the actual performance with respect to their performance requirements and expectations, including one or more interim performance reviews during each appraisal period.

- Requires supervisor to involve employees, “insofar as practicable,” in the development of their performance requirements and expectations, but reserves final decisions to the sole and exclusive discretion of management. There is a bar on collective bargaining regarding all aspects of any classification of any pay system established under the authority of the chapter.
- Requires an appropriate rating official to prepare and issue a rating of record after the completion of the appraisal period as a basis for a pay determination, awards, eligibility for promotion, or such other action that the agency considers appropriate or OPM requires by regulation.
- When a determination has been made that an employee’s performance is unacceptable, a supervisor can recommend: remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action including a reduction in rate of basic pay or a demotion.
- Employees can grieve a rating of record through an administrative or negotiated grievance procedure. An arbitrator that hears the grievance is not allowed to conduct an independent evaluation of an employee’s performance or otherwise substitute his or her judgment for the supervisor’s judgment.
- The new pay-for-performance system prohibits the imposition of a fixed numeric or percentage limit on the assignment of summary rating levels, otherwise known as fixed distribution. (I’m unclear how this provision can realistically be enforced if the government faces financial or budgetary restrictions. If employees are not paid through fixed distribution then employees will ultimately receive raises, awards and bonuses that are significantly reduced.)

Classification System

- Performance-based pay must be linked to an employee’s rating of record. The agency is barred from paying a covered employee an annual rate of basic pay in excess of the rate for level III of the Executive Schedule unless a higher rate is approved under the critical pay authority.
- Requires OPM to establish a 16-member Federal Pay Council, with 1 official of OPM serving as the Chair, 3 experts, 6 employee representatives, and 6 management representative appointed from among members of the Chief Human Capital Officers council. This council will provide the Directors with views and recommendations regarding setting and adjusting broad rate ranges, establishing and modifying local market areas, and the methodology for determining the amounts of local market supplements. {Draft is silent about who will appoint/ pick the three experts but states that they should be

“generally recognized for their impartiality, knowledge, and experience in the fields of pay, performance, or labor relations policy.”}

- OPM is required to define career/occupation groups, subgroups, and associated bands (levels of work) for those groups in conformance with standards published by or coordinated with OPM. Each career/occupational group may include, but is not limited to the following bands:
 1. Entry/Developmental
 2. Full Performance
 3. Senior Expert
 4. Supervisory
- OPM is authorized to review an agency’s classification of positions and to order corrective action, where necessary, with respect to the placement of one or more positions in the appropriate series, occupational group, and band, and may limit, revoke, or suspend an agency’s authority to classify positions if they are not in conformance with the standards. OPM may restore the agency’s authority to classify positions whenever it is satisfied that the agency’s subsequent classification action will be in conformance with, or consistent with, published standards.
- The employee(s) is allowed to request reconsideration of the classification of the employee’s official position of record with respect to the assigned pay system, career/occupational group, subgroup, occupational series, or band. Reconsideration may be filed with the agency or with OPM. The decision of OPM is final and not subject to further review or appeal.

Pay Structure

- OPM establishes ranges of basic pay for bands (work levels) and is allowed to consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and other relevant factors in doing so. In adjusting rate ranges, OPM may consider the same factors.
- OPM is required to make a determination annually regarding whether to adjust rate ranges and by what amount, if any. OPM must consult with OMB in reaching such a decision.
- Employees with a fully successful performance rating are entitled to a basic pay increase equal to the percentage increase in the minimum rate. Employees with a performance rating below fully successful are prohibited from receiving a pay increase. An employee who does not have a rating of record for the appraisal period most recently completed will be treated as though he or she had a fully successful rating of record for that period.
- Employees who are denied an increase because of performance below the fully successful level requires OPM to:

- Initiate action within 90 days to demote or remove the employee or
- If the employee demonstrates fully successful or higher performance within 90 days, issue a new rating or record and provide a prospective pay increase.

Local and Special Market Supplements

- Local market supplements are similar to locality-based comparability payments that are currently paid to GS employees. The supplements apply only to employees whose official duty station is located in a particular local market area. These supplements are treated as basic pay- for example, retirement, life insurance, and premium pay.
- Special market supplements provide higher pay levels for specified categories of employees if OPM determines that such supplements are warranted by current or anticipated recruitment or retention needs, or both. A special market supplement is treated as basic pay for the same purpose as a local market supplement and for the purpose of computing cost-of-living allowances and post differential in un-foreign areas.

Performance-based pay

- Employees in a full performance or higher band are eligible for within-band performance-based pay increase. Based on performance ratings of record, employees will be assigned performance shares, which represent shares or units of pay pool funds. A higher rating must receive a greater number of shares. Agencies are required to determine the value of one performance share, expressed as a percentage of the employee's rate of basic pay or as a fixed dollar amount, based on the value of the pay pool and the distribution of shares among pay pool employees. Paying shares cannot cause the employee's rate to exceed the maximum of the employee's band rate range. At the agency discretion, performance pay increase may be paid out as a lump-sum payment (not part of employee's basic pay increases-This ultimately affects their retirement as well).
- For the first five years after converting to a pay-for performance system agencies must allocate an amount for performance pay increases equal to the Government wide historical average value of within-grade and quality step increases under the General Schedule, as well as the estimated average amount that otherwise would have been spent on promotions between GS grades that are placed in the same band.
- Allows an agency to reduce an employee's rate of basic pay within a band for unacceptable performance or conduct. Such a reduction may not exceed 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employees' band rate range.

- Permits an agency to provide special within-band basic pay increases for employees within a full performance or higher band who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment, or in other circumstances determined by the agency. Revoking this increase can not be considered an adverse action and does not create an entitlement to pay retention.

Special Payments

- Authorizes certain special payments for special skills or assignments and for situations where agencies are experiencing recruitment and/or retention problems. Also authorizes certain special payments (differential or lump sums) that are not basic pay for any purpose. These special payments may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

Pay Administration

- Each agency is required to issue implementing directives regarding the setting of starting rates of pay for employees who are newly placed in a band.
- Upon promotion, an employee is entitled to a pay increase of at least 8 percent.
- Permits each agency to issue implementing directives regarding the setting of an employee's rate of basic pay upon demotion to a lower band. These directives must distinguish between demotions under adverse action procedures and other reductions in band or pay.
- Permits each agency to issue implementing directives regarding the setting of an employee's rate of basic pay
- Employees who return to service with restoration rights after performing service in the uniformed services must receive credit for any applicable intervening rate range adjustments and performance pay increases based on the employee's last rating of record or on the modal rating received. The same standard is used for those receiving workers compensation.

Labor Management Relations

- The new definition of grievance is "any claimed violation, misinterpretation or misapplication of any law, rule, and regulation, issued for the purpose of affecting conditions of employment including an employee's pay," except those that involve the exercise of a manager's discretion or judgment in such determinations.
- The Chairman must use a single, integrated process to resolve all matters associated with bargaining disputes. Authorizes the Chairman to direct the

General Counsel of the Authority, the Federal Service Impasses Panel, or both, to submit a case pending before them to the Authority for appropriate action. Resolve disputes in a streamlined “one-stop” fashion.

- Limits the Authority’s ability to impose a status quo ante remedy. Such a remedy may not be imposed where there has been a finding that the agency has committed an unfair labor practice (relating to refusal to consult or negotiate in good faith or failure or refusal to cooperate in impasse procedures) and the remedy would adversely impact the agency’s or activity’s mission or budget, or the public interest.
- Management has the explicit authority to prepare for, practice for, or prevent any emergency and prevent any fiscal or budgetary exigency.
- The right of a union to be represented at formal discussion by providing that unions do not have an right to attend a meeting where a conversation between management and bargaining unit employees constitutes a reiteration or application of one or more existing personnel policies, practices, or working conditions; is incidental or otherwise peripheral to the announced purpose of the meetings; or doesn’t result in an announcement of a change to a or a promise to change, one or more existing personnel policies, practices, or working conditions. (Supersedes all rights established in “Weingarten”)
- The right of a union to be represented at grievance applies only to those grievances filed under the negotiated grievance procedure. Unions can be present during an investigatory examination but not those examinations conducted by OIG and other independent agency organizations that mission include the conduct of criminal investigation.
- Requires release to an exclusive representative of information when it is normally maintained, reasonably available, and requested by the exclusive representatives; a particularized need has been demonstrated; and the disclosure is not prohibited by law.
- An agency and a labor organization are obligated to bargain or consult over a subject that is otherwise negotiable only if the change will affect the bargaining union (or a portion of the bargaining unit) in a way that is foreseeable, substantial, and significant in terms of both its impact and duration.
- An aggrieved employee may raise matters appealable to the Merit Systems Protection Board under an applicable appellate procedure or under the negotiated grievance procedure, but not both. An aggrieved employee who is permitted to elect only one of the remedies is considered to have elected whichever option he or she elected first.

- An employee may appeal a performance rating of record that has not been appealed. Once an employee raises an issue involving a rating of record any pending grievance or arbitration concerning that rating of record will be dismissed with prejudice.
- An arbitrator may cancel a rating of record when he or she finds that the agency applied the employee's established performance requirements or expectation in violation of the applicable law, agency rule or regulation, or provision of a collective bargaining agreement in a manner prejudicial to the grievant using the "but for" standard (the employee would have received a different rating but for the violation). When an arbitrator is unable to determine what the employee' rating would have been if the violation had not occurred, the arbitrator must remand the case to the agency for re-valuation. An arbitrator may not independently evaluate the employee's performance or otherwise substitute his or her judgment for ht supervisor's judgment.
- Either party to arbitration may file an exception to any arbitration award—except an award issued in connection with a matter appealable to the MSPB or a similar matter arising under other personnel systems-which is considered equivalent to a decision of a Board administrative judge and is subject to a full Board review.

Adverse Actions

- Modify the definition of an employee who is entitled to procedural due process when suspended for 14 days or less. This definition would exclude an individual who is serving a probationary period under an initial appointment and an individual who is serving under a time-limited appointment of unspecified duration.

Appeals

- Relating to appellate procedures, the scope of a hearing would be limited, or eliminated if it is determined that some or all of the facts are not in genuine dispute. A single standard of proof (preponderance of the evidence) will apply to all actions.
- Provides that an agency's determination regarding the penalty imposed in an action may not be modified unless it is totally unwarranted in light of all the relevant factors. In evaluation the appropriateness of a penalty, the Board is compelled to give primary consideration to the impact of the agency or an activity, as determined by the agency.
- Remove the discretion of the Court of Appeals to grant or deny a petition for judicial review. Concerning the MSPB, the Chairman of the Board may delegate any of the Board's administrative function under title 5 to any employee of the Board.

Authorities of OPM of Personnel Management; Miscellaneous authorities relating to federal human capital management:

- Chairing the Chief Human Capital Officers Council. Requires the council to meet periodically to advise and coordinate the activities of the agencies of its member; requires the Council to ensure that representatives of Federal employee labor organization are present at a minimum of one meeting of the Council Each year. Such representatives cannot be members of the Council; requires the council to submit a report on the activities of the Council to the Congress each year.

Additional compensation amendments

- Certain senior level employees and employees in scientific and technical positions will be pushed into a category to be known as “senior professionals”. The amendments would in effect remove these senior professionals from provisions entitling them to locality-based comparability payments; this amendment also has the effect of limiting their basic pay, including those locality-based payments, to the rate for level III of the Executive schedule.
- Aggregate limitation on pay: Back pay is excluded from the aggregate limitation on pay only to the extent that it was awarded for a period in a previous calendar year. Back pay for a period in the current calendar year would appropriately count toward the aggregate limitation.
- Provides agencies with discretionary authority to provide a promotion pay increase for employees who leave a non-GS Federal pay system to take a higher-level position in the GS pay system.
- Eliminates the requirement for reapproving locality pay extension for non-GS employees each year. Instead an extension of locality pay would remain in effect until terminated by the President. The President is no longer required to send a detailed report to Congress providing justification for the extension of locality pay to categories of non-GS employees in more than one agency.
- Increases the ceiling on the rate of basic pay for senior professional positions from level IV to level III of the Executive Schedule.
- Defines the minimum rate of basic pay for members of the SES as the rate that is 85 percent of the rate for level V of the Exec Schedule. Under current law, the SES minimum rate is set at the minimum rate for senior-level and scientific or professional employees.
- Provides that all employees paid above the rate for level II of the Executive Schedule are excluded from severance pay eligibility. This does not affect SES eligibility for severance pay.

- Excludes from severance pay eligibility all employees serving under a time-limited appointment.
- An involuntary movement from a permanent appointment to a time-limited appointment without a break in service is considered an involuntary separation for severance pay purposes.
- Payments of severance pay are temporarily suspended, not terminated, during any time-limited appointment.
- Replace “Senior Executive Service” with a reference to “Senior Civil Service”. This makes senior professionals subject to the higher (90-day) limitation on accumulation of annual leave that currently applies only to senior executives.
- Amend the Civil Service Retirement law and the Federal Employees’ Retirement law to permit an employee who is contributing to the Thrift Saving Fund from his or her basic pay to also contribute to the Fund all or any part of an award, bonus, or lump-sum payment. No employee would be entitled to any matching funds from his or her employing agency based on any contributions authorized by these amendments.

Staffing Modernization

- Broadens the current authority of OPM relating to the establishment and revision of the maximum number of positions for carrying out research and development function by specially qualified scientific and professional personnel. Combine ST and SL position into one category referred to as “senior professionals”
- Authorizes the noncompetitive appointment of a disabled veteran who has a compensable service-connected disability of 30 percent or more.
- Authorizes OPM to establish standard for classifying SES positions.
- Retains the President’s authority for classifying SES positions in the Federal Bureau of Investigation and Drug Enforcement Administration and to determine the maximum number of these positions.
- Experts and consultants hired by the Pinkerton Detective Agency will be appointed as Federal employees rather than providing services by contract. These consultants may be paid on an hourly or daily basis. Their pay is raised from the maximum rate for GS-15 to the rate for level III of the Executive Schedule. The requirement that agencies provide special annual reports on experts and consultants to OPM is also eliminated.

Examination Selection and Placement: Modernize Provisions Relating to the Federal Hiring Process

- Bars an individual who is considering or appointing an applicant for employment in the competitive civil service from receiving or considering a recommendation by a Senator or Representative, except regarding the applicant's character or residence.
- The individual's appointment must be the type of position they applied for and for which they were examined and public notice was given.
- The applicant has the right to appeal to the hiring agency his or her rating resulting from a competitive examination.
- Authorizes the Director of OPM to establish, by regulation, their terms and conditions for considering applicants for competitive service positions. Regulations would bar any preference based on service in the legislative or judicial branch.
- Grants the director of OPM the authority to establish, and subsequently revoke if necessary, appointing authorities for the competitive and excepted services to meet agency human resource needs. Currently, this authority is reserved for the president and the Congress.
- Allows agency head in coordination with OPM to eliminate to remove a minimum age for entry into a position as a law enforcement officer or firefighter but allows them to set maximum entry ages for law enforcement officers, firefighters, and Air traffic controller positions. (Age Discrimination?)
- Permits agencies to prescribe probationary periods of one to three years for employees appointed under career appointments. Currently by regulation, probationary periods are one year.
- Requires employees in the excepted service to serve probationary periods consistent with the requirements of the competitive service.
- Authorizes OPM to establish qualifications review boards which would certify the qualification of individual applying for initial appointments as senior professionals.
- Prescribes a 1-year probationary period for new career appointees in the Senior Executive Service. The amendment would allow extensions of such probationary period, not to exceed 2 years.