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REPORT
114–600

AMENDING TITLE 5, UNITED STATES CODE, TO EXPAND LAW ENFORCEMENT AVAILABILITY PAY TO EMPLOYEES OF U.S. CUSTOMS AND BORDER PROTECTION'S AIR AND MARINE OPERATIONS

MAY 31, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 4902]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4902) to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 4902 amends title 5, United States Code, to expand law enforcement availability pay to law enforcement officers of the U.S. Customs and Border Protection's Air and Marine Operations.

BACKGROUND AND NEED FOR LEGISLATION

U.S. Customs and Border Protection's (CBP) Air and Marine Operations (AMO) is a federal law enforcement organization with over 1,200 federal agents, 250 aircraft, and over 280 marine vessels operating from 91 locations throughout the United States and Puerto Rico. AMO law enforcement officers utilize aircraft and marine vessels to serve and protect the American people at, and beyond, the borders of the United States.

AMO law enforcement officers are often required to work long, unpredictable hours and are compensated through a number of different premium pay systems to account for their overtime. For instance, AMO pilots are covered by Law Enforcement Availability Pay (LEAP), but other AMO law enforcement officers, such as Air Enforcement and Marine Agents, are covered by administratively uncontrollable overtime.

Under the current system, two law enforcement officers working together can be compensated under different premium pay systems, presenting challenges for the CBP when administering multiple pay systems, as well as for shift planning and budgeting purposes.

H.R. 4902 addresses these problems by standardizing premium pay and expanding LEAP applicability so that it covers all AMO law enforcement officers. To ensure pay is standardized swiftly, the legislation would require that the change come into force on the first day of the pay period that begins at least 14 days after the date of enactment. Finally, it is also important to note that this legislation is supported both by the CBP and by the Federal Law Enforcement Officers Association.

LEGISLATIVE HISTORY

H.R. 4902 was introduced on April 12, 2016, by Congressman Will Hurd (R–TX) and referred to the Committee on Oversight and Government Reform. Congressman Gerald Connolly (D–VA), Congressman Michael McCaul (R–TX), Congresswoman Michelle Lujan Grisham (D–NM), Congressman Blake Farenthold (R–TX), and Congresswoman Martha McSally (R–AZ) are original cosponsors.

On April 14, 2016, the Committee ordered H.R. 4902 favorably reported, without amendment, by voice vote, a quorum being present.

SECTION-BY-SECTION

Section 1. Law enforcement availability pay for employees of Customs and Border Protection's Air and Marine Operations

Amends 5 U.S.C. 5545a(i) by providing for availability pay for any employee of the U.S. Customs and Border Protection's Air and Marine Operations, or any successor organization, who is a law enforcement officer.

Requires that the amendments made by this subsection take effect on the first day of the first applicable pay period beginning on or after the date that is 14 days after date of enactment.

EXPLANATION OF AMENDMENTS

No amendments were offered during Full Committee consideration of H.R. 4902.

COMMITTEE CONSIDERATION

On April 14, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 4902, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 4902.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill expands law enforcement availability pay to law enforcement officers of the U.S. Customs and Border Protection's Air and Marine Operations. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal and objective of the bill is to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 16, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4902, a bill to amend title 5, United States Code, to expand law enforcement availability pay

to employees of U.S. Customs and Border Protection's Air and Marine Operations.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 4902—A bill to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations

H.R. 4902 would change the system for determining overtime compensation for certain employees of Air and Marine Operations in U.S. Customs and Border Protection (CBP). Based on information from CBP, CBO estimates that implementing H.R. 4902 would reduce costs by about $2 million annually or $10 million over the 2017–2021 period, assuming future appropriations are reduced consistent with the bill's provisions. Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 4902 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

Under current law, about 500 law enforcement officers in Air and Marine Operations are eligible for overtime compensation under three different schedules: the Administratively Uncontrollable Overtime (AUO), the Fair Labor Standards Act (FLSA), and the Federal Employee Pay Act (FEPA). Total overtime costs for those officers, including pay and benefits, totaled $18 million in 2015. Their total base pay was $46 million in the same year.

Under H.R. 4902, law enforcement officers in Air and Marine Operations would no longer be eligible for overtime compensation under AUO or the FLSA. The bill would make them eligible for Law Enforcement Availability Pay, and they would remain eligible for FEPA overtime pay. Costs would decline under H.R. 4902 mostly because the affected officers would no longer receive compensation required under the FLSA. According to CBP, if the overtime pay system in H.R. 4902 had been implemented for fiscal year 2015, total overtime costs for the affected officers would have been about $16 million, or about $2 million lower than the actual overtime expense for that year for those officers.

H.R. 4902 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART D—PAY AND ALLOWANCES

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CHAPTER 55—PAY ADMINISTRATION

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SUBCHAPTER V—PREMIUM PAY

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§ 5545a. Availability pay for criminal investigators

(a) For purposes of this section—

(1) the term "available" refers to the availability of a criminal investigator and means that an investigator shall be considered generally and reasonably accessible by the agency employing such investigator to perform unscheduled duty based on the needs of an agency;

(2) the term "criminal investigator" means a law enforcement officer as defined under section 5541(3) (other than an officer occupying a position under title II of Public Law 99-399, subject to subsection (k)) who is required to—

(A) possess a knowledge of investigative techniques, laws of evidence, rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure, and related issues;

(B) recognize, develop, and present evidence that reconstructs events, sequences and time elements for presentation in various legal hearings and court proceedings;

(C) demonstrate skills in applying surveillance techniques, undercover work, and advising and assisting the United States Attorney in and out of court;

(D) demonstrate the ability to apply the full range of knowledge, skills, and abilities necessary for cases which are complex and unfold over a long period of time (as distinguished from certain other occupations that require the use of some investigative techniques in short-term situations that may end in arrest or detention);

(E) possess knowledge of criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States, including—

(i) knowledge of the elements of a crime;

(ii) evidence required to prove the crime;

(iii) decisions involving arrest authority;

(iv) methods of criminal operations; and

(v) availability of detection devices; and

(F) possess the ability to follow leads that indicate a crime will be committed rather than initiate an investigation after a crime is committed;

(3) the term "unscheduled duty" means hours of duty a criminal investigator works, or is determined to be available for work, that are not—

(A) part of the 40 hours in the basic work week of the investigator; or

(B) overtime hours paid under section 5542; and

(4) the term "regular work day" means each day in the investigator's basic work week during which the investigator works at least 4 hours that are not overtime hours paid under section 5542 or hours considered part of section 5545a.

(b) The purpose of this section is to provide premium pay to criminal investigators to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour work week based on the needs of the employing agency.

(c) Each criminal investigator shall be paid availability pay as provided under this section. Availability pay shall be paid to ensure the availability of the investigator for unscheduled duty. The investigator is generally responsible for recognizing, without supervision, circumstances which require the investigator to be on duty or be available for unscheduled duty based on the needs of the agency. Availability pay provided to a criminal investigator for such unscheduled duty shall be paid instead of premium pay provided by other provisions of this subchapter, except premium pay for regularly scheduled overtime work as provided under section 5542, night duty, Sunday duty, and holiday duty.

(d)(1) A criminal investigator shall be paid availability pay, if the average of hours described under paragraph (2)(A) and (B) is equal to or greater than 2 hours.

(2) The hours referred to under paragraph (1) are—

(A) the annual average of unscheduled duty hours worked by the investigator in excess of each regular work day; and

(B) the annual average of unscheduled duty hours such investigator is available to work on each regular work day upon request of the employing agency.

(3) Unscheduled duty hours which are worked by an investigator on days that are not regular work days shall be considered in the calculation of the annual average of unscheduled duty hours worked or available for purposes of certification.

(4) An investigator shall be considered to be available when the investigator cannot reasonably and generally be accessible due to a status or assignment which is the result of an agency direction, order, or approval as provided under subsection (f)(1).

(e)(1) Each criminal investigator receiving availability pay under this section and the appropriate supervisory officer, to be designated by the head of the agency, shall make an annual certification to the head of the agency that the investigator has met, and is expected to meet, the requirements of subsection (d). The head of a law enforcement agency may prescribe regulations necessary to administer this subsection.

(2) Involuntary reduction in pay resulting from a denial of certification under paragraph (1) shall be a reduction in pay for purposes of section 7512(4) of this title.

(f)(1) A criminal investigator who is eligible for availability pay shall receive such pay during any period such investigator is—

(A) attending agency sanctioned training;

(B) on agency approved sick leave or annual leave;

(C) on agency ordered travel status; or

(D) on excused absence with pay for relocation purposes.

(2) Notwithstanding paragraph (1)(A), agencies or departments may provide availability pay to investigators during training which is considered initial, basic training usually provided in the first year of service.

(3) Agencies or departments may provide availability pay to investigators when on excused absence with pay, except as provided in paragraph (1)(D).

(g) Section 5545(c) shall not apply to any criminal investigator who is paid availability pay under this section.

(h) Availability pay under this section shall be—

(1) 25 percent of the rate of basic pay for the position; and

(2) treated as part of the basic pay for purposes of—

(A) sections 5595(c), 8114(e), 8331(3), and 8704(c); and

(B) such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe.

(i) The provisions of subsections (a)-(h) providing for availability pay shall [apply to a pilot employed by the United States Customs Service] *apply to any employee of the U.S. Customs and Border Protection's Air and Marine Operations, or any successor organization,* who is a law enforcement officer as defined under section 5541(3). For the purpose of this section, section 5542(d) of this title, and section 13(a)(16) and (b)(30) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(16) and (b)(30)), [such pilot] *such employee* shall be deemed to be a criminal investigator as defined in this section. The Office of Personnel Management may prescribe regulations to carry out this subsection.

(j) Notwithstanding any other provision of this section, any Office of Inspector General which employs fewer than 5 criminal investigators may elect not to cover such criminal investigators under this section.

(k)(1) For purposes of this section, the term "criminal investigator" includes a special agent occupying a position under title II of Public Law 99-399 if such special agent—

(A) meets the definition of such term under paragraph (2) of subsection (a) (applied disregarding the parenthetical matter before subparagraph (A) thereof); and

(B) such special agent satisfies the requirements of subsection (d) without taking into account any hours described in paragraph (2)(B) thereof.

(2) In applying subsection (h) with respect to a special agent under this subsection—

(A) any reference in such subsection to "basic pay" shall be considered to include amounts designated as "salary";

(B) paragraph (2)(A) of such subsection shall be considered to include (in addition to the provisions of law specified therein) sections 609(b)(1), 805, 806, and 856 of the Foreign Service Act of 1980; and

(C) paragraph (2)(B) of such subsection shall be applied by substituting for "Office of Personnel Management" the following: "Office of Personnel Management or the Secretary of State (to the extent that matters exclusively within the jurisdiction of the Secretary are concerned)".

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