

Union Organizing Rights on Capitol Hill

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Introduction

In mid-July 2022, Congressional staffers in the House of Representatives won rights under the Congressional Accountability Act (CAA) to engage in activity to select a union to represent them in their workplace. Most staffers enjoying these new rights are in political positions, but a good number are in House support offices like the Clerk, the Sergeant at Arms, the Chief Administrative Officer, and other House support offices.

Employees in Congressional agencies like the US Capitol Police and the Architect of the Capitol have enjoyed CAA labor rights for years and have the security and benefits of a contract. Other Congressional agencies like the Government Accountability Office and the Library of Congress have had collective bargaining rights as well under similar, but separate, laws.

This report discusses how House staffers select a union representative and the value of collective bargaining in House offices, including what a contract might guarantee.¹

About Us

Kevin Mulshine served as deputy general counsel for the Architect of the Capitol. He previously served as Senior Advisor and Counsel on the first staff of the Office of Compliance /Office of Congressional Workplace Rights (OCWR). Mulshine was a staff assistant for a House Member from New Jersey, then graduated from the Howard University School of Law. He was a senior attorney to the National Labor Relations Board General Counsel where he was a union steward. Member of the DC Bar (inactive).

Demand Progress Education Fund is a 501(c)3 charitable organization that educates the public on the impacts of concentrated power over our economy and democracy.

For more information, contact Daniel Schuman, policy director, Demand Progress Education Fund at daniel@demandprogress.org.

This report contains general information and is not legal advice or counsel. For these reasons, please consult with the Office of Congressional Workplace Rights or an attorney for counsel. Having legal resources on hand is important as Congressional Accountability Act coverage is newly expanded to staffers. All opinions expressed here are of the author, Kevin Mulshine.

¹ For more background, see *A Brief Recent History of Unionization in Congress*, Demand Progress Education Fund (Sept. 2020), <https://firstbranchforecast.com/2020/09/29/a-brief-recent-history-of-unionization-in-congress/>.

Table of Contents

| | |
|--|---|
| Introduction | 2 |
| About Us | 2 |
| Table of Contents | 3 |
| What is a bargaining agent and what are the benefits of a collective bargaining agreement? | 4 |
| What specifically can a union propose and insist that an employing office bargain about? | 4 |
| What else would a collective bargaining agreement include? | 5 |
| On the issue of pay and overtime, what can a union achieve for staffers? | 6 |
| What other provisions might be negotiated? | 7 |
| Can my office change the existing terms and conditions of employment before our union starts bargaining? | 7 |
| What is the role of the Office of Congressional Workplace Rights? | 7 |

What is a bargaining agent and what are the benefits of a collective bargaining agreement?

A “bargaining agent” is an organization that acts or bargains on behalf of a group of employees. The bargaining agent or union, after OCWR certification, has guaranteed, statutory protections to demand bargaining with the employing office at reasonable times over terms and conditions of employment. The employing office, in turn, has a legal obligation to meet and bargain in good faith.

To establish a bargaining agent, a majority of staffers within the bargaining unit must have voted in a secret ballot election for the union and the OCWR has to have certified the union to represent their interests in the workplace. A bargaining agent may simply be a local union with an appointed member, known as a chief union steward, from within a Congressional office. Alternatively, a bargaining agent may be affiliated with a larger employee group with a team of negotiators and stewards.

The benefits of bargaining by a bargaining agent include required disclosure of information to the bargaining agent on staffer wages and benefits, the ability to make demands in a workplace that may be difficult if a single staffer raises them, and the power to encourage uniformity in terms and conditions of employment. A bargaining agent may file a grievance, and work to resolve grievances, on an individual or group basis for matters affecting employment. The terms of an agreement will specify how grievances are to be resolved.

What specifically can a union propose and insist that an employing office bargain about?

A union may raise *any topic* related to terms and conditions of employment *that are not set or mandated by law*. The bottom line rule in collective bargaining is that a union will not win anything in bargaining if it does not make a demand for it.

What is not bargainable. Management determinations of the office’s mission, budget, number of employees, and so on are within the rights of the employing office and so are not bargainable. Of course, federal health insurance, life insurance, and retirement benefits are among the few terms of employment that are established by law and so are limited as topics of discussion at the bargaining table. Still, the manner in which these benefits are applied to employees may be negotiated, where an employing office has discretion in that application. A union, however, may seek to bargain over the impact of changes in law or regulations on unit members.

What is bargainable. Pay rates, bonuses, leave allowances, and terms other than those listed above for House staffers are not set by law and thus may be bargained over.² In fact, a union may bargain over all aspects of compensation. Existing minimum and maximum rates of pay, such as those authorized by order of the House Speaker, may provide a floor and a ceiling to determine the levels of compensation; what scale exists between those pay levels is not set by law.³ Cost of living increases (COLAs), bonuses and awards can be topics of bargaining.

A refusal to bargain on those topics or employing office proposals that start below that floor might be seen as bad faith bargaining and an unfair labor practice. The law provides a process to remedy such violations and to resolve disputes that amount to good faith impasses in the parties' bargaining.

The labor agreements negotiated in the Library of Congress and the GAO illustrate the matters that can be negotiated.⁴ In the Library, the Congressional Research Employees Association (CREA) has a long-standing history as a collective bargaining agent. Since the law was passed in the late 1970s, the Library has been covered directly by the federal labor management law applied in the federal sector. Included within their pact are such topics as: promotion policies, overtime, and flexible work schedules, along with many other detailed provisions. In the GAO, the employees union is affiliated with an international union, the International Federation of Professional and Technical Engineers (IFPTE, Local 1921). Their contract restates anti-discrimination protections that exist under law and covers topics such as promotion policies, compressed work schedules, and other benefits. It also references the pay banding scale that applies to employees under a separate legal framework.⁵

What else would a collective bargaining agreement include?

By law, an agreement must contain a binding grievance-arbitration provision by which contract terms may be enforced. Such a provision would provide an expedited process in which to resolve disagreements between managers and employees, either through mediation or arbitration. An arbitration award may be enforced by the OCWR.

² In a unanimous Supreme Court opinion in 1990, Justice Scalia wrote that a federal employer was legally required to bargain over wages where there was no law governing wage rates. *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990). <https://supreme.justia.com/cases/federal/us/495/641/> As the CRS has recognized in a report, "Members of Congress have broad discretion to set the terms and conditions of employment in their offices, including staff pay." See [Inflation-Adjusted House Member Office Staff Pay Levels](https://www.everycrsreport.com/files/2022-04-27_IN11918_082d65efb338b7c2c1246b27142af0403f47ddcc.pdf), Congressional Research Service, IN11918 (April 2022).

https://www.everycrsreport.com/files/2022-04-27_IN11918_082d65efb338b7c2c1246b27142af0403f47ddcc.pdf

³ *Dear Colleague to All Members on Increasing Congressional Staff Salaries*, Speaker Pelosi (May 6, 2022), <https://www.speaker.gov/newsroom/5622>.

⁴ See Master Collective Bargaining Agreement between the Library of Congress and CREA, https://creaunion.org/wp-content/uploads/2020/12/CREA_Agreement.pdf; Master Collective Bargaining Agreement between GAO and IFPTE (July 14, 2021), https://www.gaoemployees.org/uploads/3/1/3/4/31346281/collective_bargaining_agreement_2021.pdf.

⁵ See 31 USC § 731, <https://www.law.cornell.edu/uscode/text/31/731>.

While staffers are protected against specified forms of discrimination, sexual harassment, and reprisal under different sections of the CAA, a contract may also include protections against that unlawful conduct. In that way, prohibited conduct may be addressed and resolved both under the contract and directly under the CAA provisions.

Further, the final agreement will state how its text is published or printed for staffers and others to refer to. As noted above, the Library and the GAO have chosen to make their CBAs available on public websites.

On the issue of pay and overtime, what can a union achieve for staffers?

First, the law requires the payment of time and a half for overtime exceeding 40 hours in a workweek for staffers covered by the Fair Labor Standards Act (FLSA) provision of the CAA. This section, unique among federal sector labor laws, prohibits the payment of overtime through “compensatory time.” In other words, eligible employees may not receive time off in lieu of overtime pay, and instead must be paid at the appropriate rate.

The CAA was enacted to ensure that employees in the legislative branch are covered by the same laws that apply to the private sector. Like in the private sector, many nonsupervisory employees are covered by the 40-hour overtime provision in the FLSA. There are exemptions that may apply; the OCWR has adopted standards that update these exemptions from the 1996 regulations, which are currently in effect.⁶ Congress has not yet approved those adopted regulations, so the new regulations are not in place.

A union might ensure that covered staffers are properly classified under the FLSA standards and are paid for all of the time that they work over 40 hours in a workweek. In other words, if employees have been misclassified, they may be entitled to back pay at the appropriate rate. Work hours may include “on the clock” service attending hearings and floor proceedings, even if remote, if that work is in the service of the employing office. Those overtime payments may amount to significant additional compensation for staffers.

As noted above, there is precedent that holds that a union may demand bargaining over pay rates that are not fixed by law. Such proposals might include higher pay for demanding work duties, such as night and Sunday or holiday differentials or hazardous duty pay. Given the January 6 events, hazards for House employment have escalated and a staffer union might press for improved pay while engaged in certain duties.

⁶ See Fair Labor Standards Act – Pending Substantive Regulations, Office of Congressional Workplace Rights, <https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/pending-substantive-regulations/fair-labor-standards-act-pending-substantive-regulations/>.

In addition, a proposal might seek the rotation of overtime assignments when the House remains in session overnight, along with proper payment for those hours when the FLSA applies. As noted above, the law does not allow for the substitution of compensatory time; in most cases, overtime must be paid in cash.

What other provisions might be negotiated?

Additional provisions that a union might propose negotiating include:

- performance appraisals
- student loan repayment benefits
- parental leave
- limitations on required overtime work

Collective bargaining agreements typically cover these topics so that employees have a predictable, secure work environment. *The range of proposals that are available is wide and comprehensive.* Congress has historically reserved for itself a good measure of flexibility in terms and conditions of employment. That flexibility allows for many proposals that employees in the federal sector (and even in the Library of Congress) can not consider.

Can my office change the existing terms and conditions of employment before our union starts bargaining?

After certification of a union and as bargaining begins, the established terms and conditions (the “status quo”) will continue. *An employing office may not make unilateral changes in terms and conditions of employment without notice and bargaining once a union is certified.*

For example, if an office regularly closes during certain periods and gives staffers leave, that office may not terminate that benefit unilaterally or in reprisal for union organizing activity. Also, reductions in benefits to discourage union organizing activity among employees would likely be an unfair labor practice and may violate the law.

Staffers who experience unilateral changes in terms and conditions of employment should contact the OCWR general counsel at LMR@ocwr.gov or their own legal or union counsel to learn their protections and options to seek a remedy. Having legal resources on hand is important as the CAA coverage is expanded to staffers.

What is the role of the Office of Congressional Workplace Rights?

The Congressional Accountability Act requires the OCWR to provide leadership in establishing policies and guidance related to the labor law under the CAA. The OCWR enforces the CAA and holds exclusive authority to conduct an election and certify a union.

The independent OCWR general counsel investigates charges alleging that the law has been violated and issues a complaint addressing any unfair labor practices. GC complaints are heard by independent judges in the OCWR, appointed by the OCWR executive director. The OCWR has been administering and enforcing labor law rights for other Congressional offices for years, but has not been at the forefront of efforts to ensure staffers enjoy labor and organizing rights.

Questions should be directed to the OCWR for information about its procedures, as well as covered employee rights and protections.⁷ As the CAA rights now are fully implemented, long-standing case precedents of federal courts and the Federal Labor Relations Authority can be relied on for interpreting the CAA labor section and directing OCWR case handling activities.

Similar labor rights agencies in the federal and private sectors publish case-handling manuals so all parties know what to expect before filing a representation petition or unfair labor practice charge. The OCWR and its general counsel have not done so yet, but they should.

⁷ See the website of the Office of Congressional Workplace Rights, <https://www.ocwr.gov/>.