

The Congressional Accountability Act of 1995 Reform Act: An Overview

December 11, 2019

Amid increased legislative and public attention to issues relating to harassment, the [Congressional Accountability Act of 1995 Reform Act](#) (CAA Reform Act) passed [both chambers of Congress](#) by unanimous consent and was [signed into law](#) on December 21, 2018. As the one-year-mark of the Act’s passage approaches—and with an annual report required of the [Office of Congressional Workplace Rights](#) soon due in January 2020—this Legal Sidebar provides background on the Congressional Accountability Act of 1995 (CAA), and an overview of several key changes resulting from the CAA Reform Act.

Scope of the Congressional Accountability Act

The CAA, codified at 2 U.S.C. 1301 *et seq.*, generally makes [certain labor and antidiscrimination protections](#) applicable to [the legislative branch](#), including [Title VII of the Civil Rights Act of 1964](#) (Title VII), [Title I of the Americans with Disabilities Act of 1990](#) (ADA), the [Age Discrimination in Employment Act of 1967](#) (ADEA), and the [Fair Labor Standards Act](#) of 1938 (FLSA), among others. The CAA also has an [anti-retaliation provision](#) that prohibits reprisal or intimidation of an employee for reporting unlawful conduct under the CAA. With respect to these protections, the CAA identifies [“employees”](#) covered under the Act. The CAA also enumerates legislative branch employers, or “employing offices,” subject to the CAA’s requirements.

In addition to employees already covered under the CAA (such as House and Senate employees), the CAA Reform Act expanded the definition to include [applicants for employment and former employees](#). Individuals who carry out official duties of an employing office but are unpaid—such as interns, fellows, or individuals detailed to an employing office—are now also protected under the CAA from discrimination based on race, color, religion, sex, national origin, age, or disability.

The Administrative Resolution Process

The CAA Reform Act made significant changes to the process by which covered employees can administratively resolve their CAA claims, including creating a new position of “confidential advisor” to assist covered employees, and making mediation a voluntary—rather than compulsory—part of the process. The [Office of Congressional Workplace Rights](#) (OCWR), an “independent office within the

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legislative branch,” administers the administrative resolution process. The office was previously known as the Office of Compliance.

Under the CAA Reform Act, [confidential advisors](#) within OCWR may inform, consult, advise, and assist covered employees, “on a privileged and confidential basis,” on matters such as: their rights under the CAA; potential claims an employee might have under the CAA; the drafting of a claim, and procedural options available to the employee after a claim is filed. Confidential advisors may not, however, act as a legal representative for covered employees in a proceeding under the CAA, before a congressional committee, or in federal court. ([House Resolution 724](#), passed by the House in February 2018, provides for, among other things, legal representation for House employees in certain proceedings under the CAA.)

Other staff of OCWR includes [a Chair, a Board of Directors](#), an [Executive Director, Deputy Executive Directors, a General Counsel](#), and attorneys. OCWR also has [hearing officers](#), whom the Executive Director may appoint from a master list of attorneys and retired judges, or hire as OCWR employees. OCWR and the Board are subject to oversight by the Senate Committee on Rules and Administration and the Committee on Homeland Security and Governmental Affairs, and the Committee on House Administration in the House of Representatives.

Steps in the OCWR Administrative Process

Though the CAA previously provided for an administrative resolution process for covered employees, the CAA Reform Act substantively modified or added new components to the process. The following is a brief overview of the [OCWR administrative resolution process](#) leading up to a hearing officer’s decision on a CAA claim, under the CAA Reform Act.

- **Filing a claim:** A covered employee formally initiates the OCWR process [by timely filing a claim](#) in writing, the content and form of which is subject to certain requirements. In general, claims must be filed no later than 180 days from the date of the alleged CAA violation.
- **Intake:** Upon receiving a claim, OCWR initiates intake, including transmitting a copy of the claim to the employing office. OCWR must also notify the employee and employing office about the [availability of a voluntary mediation](#) process.
- **Preliminary Review:** Within seven days of OCWR’s transmission of the claim to the employing office, a hearing officer must [preliminarily review](#) the claim, including to determine whether it was timely filed, whether the claimant is a “covered employee,” whether the office at issue is an “employing office,” and the potential for settlement of the claim without a hearing.
- **Hearing Officer Report:** Within 30 days of when the claim was filed, the hearing officer must submit a report on the preliminary review to the claimant and the employing office.
- **Hearing:** If, after receiving that report, an employee makes a timely request for a hearing, the Executive Director of OCWR must appoint a hearing officer (other than the hearing officer that conducted the preliminary review) to [conduct a hearing](#), in closed session on the record, and render a decision. The hearing may be preceded by “[r]easonable prehearing discovery,” at the hearing officer’s discretion.
- **Decision:** Within 90 days of the hearing’s conclusion, the hearing officer must issue a written decision that includes, among other things, a legal determination as to whether a CAA violation occurred, and if so, an order of remedies. OCWR must transmit the written decision to the parties.

In addition to the above-mentioned steps, the OCWR process has other components, including [mediation](#), which the CAA Reform Act changed from a [mandatory](#) phase to a voluntary option for claimants and

employing offices. The CAA, as before, continues to provide claimants an opportunity to appeal decisions rendered by OCWR's [hearing officers](#) or [Board](#), as well as the ability to file [a civil action](#) in federal court, subject to certain requirements. For covered employees who work outside the Washington, D.C. area, the CAA Reform Act provides that such employees shall also [have "equitable" access](#) to OCWR resources and services. While [other versions of related legislation](#) had contemplated an investigation to be completed by OCWR's General Counsel, the CAA Reform Act does not include such a process.

Harassment Claims against Members and Mandatory Reimbursement

Another change to the CAA relates to the payment of [settlements and awards](#) that resolve claims alleging harassment based on race, color, religion, sex, national origin, age, disability, or veteran status—as well as retaliation for reporting these types of harassment—committed by a Member of Congress.

As a general matter, awards and settlements that resolve a CAA claim are paid from an account in the U.S. Treasury that receives appropriations for that purpose. Originally under the CAA, the payment of awards and settlements resolving harassment claims against Members were also paid out of this account—a [subject](#) that [drew substantial public scrutiny](#). Under the CAA Reform Act, Members of Congress must now [reimburse](#) the Treasury account for the amount of an award or settlement that resolves a claim alleging that he or she personally committed harassment based on race, color, religion, sex, national origin, age, disability, or veteran status—or retaliation for reporting the aforementioned harassment—while a Member of Congress at the time of the act(s).

If a Member fails to reimburse the Treasury account within 90 days of the date a payment is made from the account for this category of claims, the CAA Reform Act authorizes the payroll administrator to withhold from a Member's compensation amounts as necessary for reimbursement. The CAA now also provides for additional sources of reimbursement, if a Member fails to reimburse the account for the entire reimbursable portion within certain time frames, including transfers from a Member's Thrift Savings Fund plan, wage garnishment, or social security withholding.

Requisite Findings for Reimbursement

With respect to an award resulting from an OCWR decision or a court, the reimbursement requirement is triggered only by a "separate finding" by the hearing officer or court that the violation(s) described above occurred, and was committed by an individual who, at the time of the act(s), was a Member of Congress. Though the reimbursement requirement generally applies to both Members of the House and the Senate, the CAA Reform Act provides for [an additional process](#) that must be satisfied before a Senator is required to reimburse the Treasury account for a *settlement* resolving such claims. In the case of a Senator, the Senate Select Committee on Ethics, pursuant to 2 U.S.C. § 1416(d)(3), upon reviewing the settlement agreement, must determine that the covered claim being resolved in settlement involved an "actual" violation committed personally by a Senator. Only upon making such a determination will the Committee notify OCWR's Executive Director to request reimbursement of the settlement amount by the Senator, and include the settlement in the reporting required under [Section 1381\(l\)](#) of the CAA.

Right to Intervene

In light of this new reimbursement requirement, a Member now has a right under Section 1415(d)(8) of the amended CAA to intervene in any mediation, hearing, or civil action concerning whether an award or settlement should be made on such claims, and the amount of any such award or settlement.

OCWR Reports on Payments and Resolutions

The CAA Reform Act requires that OCWR submit to Congress—and publish on OCWR’s public website—an [annual report concerning payments](#) made from the Treasury account used to resolve claims alleging a violation of certain categories of CAA claims, including violations of [Title VII](#), a federal statute that generally prohibits discrimination in the workplace. As a general matter, the report must include the amount of payments for these covered claims, “information on the employing office involved,” and identify the CAA provisions that were the subject of the claims. For 2020, and thereafter, OCWR must submit the report by January 31 of that year, with the report reflecting payments made in the previous calendar year. The OCWR report may not disclose the identity or position of any claimant.

Meanwhile, the House Administration Committee and the Senate Committee on Rules and Administration are responsible for determining the format and content of OCWR reports with respect to payments resolving covered claims against the personal office of a Member, a House or Senate Committee, “or any other office headed by a person with the final authority” over certain enumerated personnel decisions relating to House or Senate employees. The House Administration Committee, for example, issued [Committee Resolution 116-11](#) in June 2019, requiring that, in addition to the information already required by the CAA, the report must clearly indicate whether a Member has reimbursed the entirety of the reimbursable portion of that covered payment.

The CAA and Congressional Ethics Committees

The House Committee on Ethics and the Senate Select Committee on Ethics “[retain full power](#)” pursuant to the authority given to them by the Senate and the House to discipline Members, officers, and employees for violating Senate and House rules on workplace discrimination. Relatedly, the amended CAA requires certain notifications to, and permits access to certain information by, both congressional ethics committees at different points in OCWR’s administrative resolution process.

Under [Section 1402a\(e\)](#) of the amended CAA, for example, an OCWR hearing officer must transmit a report to the House Committee on Ethics (in the case of a House Member, Delegate, or Resident Commissioner to Congress) or the Senate Select Committee on Ethics (in the case of a Senator), of the preliminary review of any claim alleging harassment (or retaliation for reporting harassment) committed personally by a Member. In addition, [Section 1416\(d\)\(1\)](#) of the amended CAA requires that OCWR refer to the respective ethics committee all settlement agreements and final decisions from a hearing officer, the Board, or a federal court that resolve claims of harassment, or retaliation for reporting harassment, committed by a Member or senior staff of the House of Representatives or Senate. Upon such referral, OCWR must provide the respective ethics committee access to the records of any preliminary reviews, hearings, decisions, and information relating to an award or settlement responsive to such claims.

Climate Surveys and Training

By December 21, 2019, and every two years thereafter, the CAA Reform Act requires that OCWR conduct a [survey of employing offices](#) on “workplace environment,” that includes questions relating to attitudes regarding sexual harassment. In addition, OCWR must “carry out a program of education” for Members of Congress on the requirements of the CAA and a program that informs individuals of their rights under the CAA, including new employees. All other covered employing offices must [develop and implement a training program](#) to educate covered employees on rights and protections under the CAA.

Considerations for Congress

Since the passage of the CAA Reform Act, legislative activity continues on issues relating to workplace harassment, including proposals to further amend the CAA and other statutes. [Several recent bills](#), for example, have proposed prohibiting or limiting the use of nondisclosure or non-disparagement clauses in certain agreements or contracts. Other [bills](#) have proposed changes to [legal standards](#) governing harassment claims, including the scope of employer liability for harassment committed by supervisors in response to [Supreme Court decisions](#) on that issue. Should Congress pass amendments or standalone antidiscrimination measures that are signed into law, Congress may consider whether and to what extent the CAA should likewise be amended to make such requirements applicable to the legislative branch.

Meanwhile, with respect to civil actions seeking relief under the CAA, at least [some federal courts](#) have considered whether CAA claims may go forward at all given that the evidence in such cases could implicate privileged information shielded by the Constitution's [Speech or Debate Clause](#). In *Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, for example, an employing office argued that the plaintiff's CAA claims should be dismissed, on the basis that she would be not be able to prove her race discrimination and retaliation claims without inquiring into legislative acts or communications protected by the Clause. Though a panel of the U.S. Court of Appeals for the D.C. Circuit allowed the claims to proceed to discovery, the majority acknowledged that the plaintiff would be limited in what evidence she could present by the "strictures of the Speech or Debate Clause," which would "bar her from inquiring into legislative motives or question conduct part of or integral to the legislative process." Notably, appellate court judge—now Supreme Court Justice—Brett Kavanaugh dissented and would have granted the motion to dismiss the CAA claims outright on Speech or Debate Clause grounds. Judge Kavanaugh instead emphasized the administrative resolution process available under the CAA, which did not raise Speech or Debate Clause concerns because that process takes place within Congress. Such case law developments may be relevant for Congress to consider, should future legislation propose amendments to the CAA concerning how covered employees may seek relief under the Act.

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