

April 10, 2020

## **Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136): Selected Provisions on Federal Hiring**

In response to Coronavirus Disease 2019 (COVID-19), Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted as P.L. 116-136 on March 27, 2020. The law establishes new hiring authorities for several federal executive branch departments and agencies: the Department of Housing and Urban Development (HUD), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Department of Commerce, and the Department of Health and Human Services (HHS). The law also authorizes a Special Inspector General and a Congressional Oversight Commission and provides authorities for establishing those entities with needed personnel. For information on federal pay flexibilities, see CRS In Focus IF11489, *Federal Executive Agencies: Selected Pay Flexibilities for COVID-19 Response*.

### **HUD, SEC, and CFTC**

Division A, Title IV, Subtitle A, Section 4010 of the law authorizes the Secretary of HUD, the SEC, and the CFTC to recruit and appoint candidates directly to selected positions without regard to existing veterans' preference requirements, standards for rating and ranking applicants, and "rule of three" (selection from highest three eligible candidates) procedures codified at 5 U.S.C. §3309 through §3318. This new hiring authority may be used to fill temporary and term appointments when a determination is made that the expedited procedures are necessary and appropriate to enable the agencies to prevent, prepare for, or respond to COVID-19. The authority became effective on the act's enactment date and will end on either the termination date of the national emergency concerning COVID-19 or December 31, 2020, whichever is sooner.

The authority provided by Section 4010 is a direct-hire authority that expedites hiring. Using direct-hire, an agency may hire any qualified applicant without regard to 5 U.S.C. §3309 through §3318. Public notice must be given for positions an agency seeks to fill. U.S. Office of Personnel Management (OPM) regulations that are prescribed at Part 337, Subpart B of Title 5 of the *Code of Federal Regulations* (C.F.R.) provide the requirements related to direct-hire. For additional information on these requirements, see CRS In Focus IF11468, *Federal Executive Agencies: Hiring Flexibilities for Emergency Situations*.

### **Department of Commerce, Economic Development Administration**

Division B, Title II of P.L. 116-136 authorizes the Secretary of Commerce to appoint such temporary personnel as may be necessary to implement specified requirements of the law to positions in the Economic Development

Administration after serving continuously for two years. The individuals are to be appointed in the same manner that competitive service employees with competitive status are considered for transfer, reassignment, or promotion to such positions. They would become career-conditional employees unless the requirements for career tenure have already been completed.

Competitive status provides an individual with basic eligibility for noncompetitive assignment to a competitive position in the Civil Service. It is acquired by a career or career-conditional employee upon satisfactory completion of a probationary period.

### **Department of Health and Human Services (HHS)**

Division B, Title VIII, Section 18108 of the law authorizes the Secretary of HHS to use appropriated funds to appoint candidates directly to positions performing critical work related to COVID-19 without regard to existing veterans' preference requirements, standards for rating and ranking applicants, "rule of three" procedures, and category rating procedures codified at 5 U.S.C. §3309 through §3319. Category rating allows an appointing official to select any applicant in the highest quality category or, if fewer than three candidates have been assigned to the highest quality category, in a merged category consisting of the highest and the second highest quality categories. Public notice of the positions the department seeks to fill must be given to use this direct hire authority. The Secretary must also have determined that a public health threat exists.

Section 302 of P.L. 116-123, the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, as enacted on March 6, 2020, provides a similar authority to the HHS Secretary.

### **Special Inspector General**

Division A, Title IV, Subtitle A, Section 4018 of P.L. 116-136 establishes a new Office of the Special Inspector General (IG) for Pandemic Recovery. The IG is authorized to "select, appoint, and employ such officers and employees as may be necessary" to carry out the IG's duties under existing 5 U.S.C. procedures for competitive service appointments, position classification (5 U.S.C. Chapter 51) and General Schedule (GS) pay (5 U.S.C. Chapter 53, Subchapter III). The competitive service appointment process may consist of a written test, an evaluation of an individual's education and experience, and an evaluation of other attributes necessary for successful performance of a position. In addition, the IG may obtain the services of experts and consultants, in accordance with 5 U.S.C. §3109,

at “daily rates not to exceed the equivalent rate prescribed for grade GS–15.”

### **Appointments Under 5 U.S.C. §3109, as Referenced in Section 4018**

5 U.S.C. §3109 permits an agency head to procure the services of experts and consultants on a temporary (not to exceed one year) or intermittent (without a regularly scheduled tour of duty) basis when authorized by an appropriation or other statute. The section requires an agency retaining such individuals to report annually to OPM on the number of days each expert or consultant was employed and the total amount paid to each for work performed.

OPM regulations identify who are to be considered “experts” and “consultants.” The agency’s regulations also define the terms “consultant position” and “expert position.”

A “consultant” is a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience.

A “consultant position” is one that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a Federal official.

An “expert” is a person who is specially qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity.

An “expert position” is one that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary and/or intermittent basis assigned by a Federal official.

(5 C.F.R. §304.102(b)–(e)).

The authority provided by 5 U.S.C. §3109 may not be used to appoint an expert or consultant in the following situations:

- To a position requiring presidential appointment.
- To a Senior Executive Service (SES) position.

- To perform managerial or supervisory work (although an expert may act as team leader or director of the specific project for which he/she is hired), to make final decisions on substantive policies, or to otherwise function in the agency chain of command (e.g., to approve financial transactions, personnel actions).

- To do work performed by the agency’s regular employees.

- To fill in during staff shortages.

- Solely in anticipation of giving that individual a career appointment.

(5 C.F.R. §304.103(b))

The following factors are to be considered in setting an expert’s or consultant’s initial basic pay rate: the level and difficulty of the work to be performed; the individual’s qualifications; pay rates of comparable individuals performing similar work in the federal or nonfederal sectors; and the availability of qualified candidates (5 C.F.R. §304.104(b)). Unless specifically authorized by an appropriation or other statute, an expert or consultant shall not be paid for any biweekly pay period an aggregate amount of pay (including basic pay, locality pay, and premium pay) in excess of the biweekly rate of pay for GS-15, step 10 (excluding locality pay or any other additional pay). The biweekly rate is computed by dividing the annual GS-15, step 10, rate by 2,087 hours to find the hourly rate of pay and by multiplying the hourly rate of pay by 80 hours (5 C.F.R. §304.105(b)).

### **Congressional Oversight Commission**

Division A, Title IV, Subtitle A, Section 4020 of the law establishes a new Congressional Oversight Commission in the legislative branch. The commission is intended to conduct oversight of the work of the Department of the Treasury and the Federal Reserve System Board of Governors to provide economic stability as a result of COVID-19. It is authorized to appoint and fix the pay of personnel needed to conduct its work, including experts and consultants to perform temporary and intermittent services under 5 U.S.C. §3109(b). In addition, upon the commission’s request, a federal agency head may detail, on a reimbursable basis, personnel to assist the commission with its work.

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