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FEW Washington Legislative Update January 1-15, 2021

In Congress:

Congress has formally affirmed President-elect Joe Biden's 2020 victory, completing a final step in the electoral process after a mob breached the US Capitol on Wednesday, January 6, and forced lawmakers to evacuate both the House and Senate chambers.

Vice President Mike Pence, who presided over the count conducted by a joint session of Congress, announced that Biden had won the Electoral College vote early Thursday (January 7) after the House and Senate defeated the objections lodged against the votes sent by two states, Arizona and Pennsylvania.

The late-night session was anything but the normal routine for counting Electoral College votes, after the proceedings were halted for more than five hours while lawmakers were forced into lockdown by rioters that overran US Capitol Police.

But lawmakers vowed to finish what they had started, and the Senate reconvened just after 8 p.m. Eastern Time (ET) Wednesday, January 6, nearly six hours after it abruptly recessed.

A week later, the House voted on Wednesday, January 13, for impeachment. The House voted 232 to 197 to impeach President Trump.

FEW Washington Legislative Update – January 1-15, 2021 Tier I

Diversity Training and Schedule F:

Following a court ruling, the Labor Department has suspended parts of the administration's order restricting the content of diversity and inclusiveness type training.

The action affects requirements under the order that agencies monitor such training administered by their grantees and contractors with the potential for making them ineligible for violations of the order. It also affects a hotline that had been set up by the Labor Department to receive allegations of violations.

The suspension follows an injunction issued by a federal district court in California in one of many suits against the order, which bars training that involves what it calls race or sex stereotyping or scapegoating. The order applied to the federal and military workplaces as well, resulting in a general suspension of such training pending a review by Office of Personnel Management (OPM) of the training materials used.

Agency Inspector Generals (IGs) have issued a series of reports in recent weeks on agency compliance with the order, generally finding that they have revised internal policies accordingly.

However, the order is one of many of the current administration initiatives that the incoming administration is expected to overturn.

Sourced from [FEDWeek](#).

Federal Employee Policy:

As the administration enters its eleventh hour, disputes over federal personnel policies that have marked its tenure are continuing, with employee organizations still watchful for what might happen at virtually the last moment.

Just within recent days, the AFGE union has filed complaints against several agencies that recently have imposed workplace policies (on their own) on matters that previously had been covered by contracts.

Unions also are objecting to a vote last week by the Equal Employment Opportunity Commission (EEOC) to change a longstanding policy of always allowing federal employees who are union officials to use official time—paid working hours—to represent employees in equal employment opportunity cases. Under the new policy, official time for that purpose is to be negotiable at each agency.

Also being watched are potential steps to carry out the executive order that could switch potentially tens of thousands of competitive service positions into a new excepted service Schedule F. That order meanwhile would revoke bargaining and appeal rights and eliminate the requirement for competition in hiring, making those career positions essentially the same in those ways as political appointees.

That has raised concerns about potential widespread firings of current employees and their replacement at the last minute with political appointees. While the new administration in theory could use the same powers to remove those people and rehire those who had been displaced—or persons of its own choosing—the situation could quickly grow complex and legally fraught.

The order told agencies to present lists of positions that could be converted to OPM by next Tuesday (January 19), the day before Inauguration Day. Several agencies, including Office of Management and Budget (OMB) and OPM itself, reportedly have completed such lists but so far there has been no sign of employees actually being converted.

OPM also recently issued proposed rules to raise the value of performance ratings in reduction in force (RIF) retention over Veterans preference and length of service but the comment period will not end until ([December 31](#), as reported earlier) leaving OPM little time to issue final rules showing that it considered those comments.

Those rules arose out of a set of three executive orders from May 2018 that President-elect Biden is expected to cancel quickly after taking office, along with the separate order on Schedule F. However, once policies are put into rules—as happened late in 2020 with rules carrying out policies under those orders giving management a stronger hand in disciplinary actions—a new rule-making process would be needed to revoke them.

Sourced from [FEDWeek](#).

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Tier II

Annual Leave:

Following is guidance from OPM on the authority for federal employees to carry into 2021 twenty-five percent more annual leave than typically is allowed (in most cases, allowing an additional 60 hours) under Section 1111 of the Defense Department budget bill that became law when Congress overrode President Trump's veto.

A. Background

1. For most employees, any annual leave in excess of 240 hours is forfeited at the beginning of the leave year. Certain employees have higher annual leave carryover limits: 360 hours for certain employees stationed outside the United States and 720 hours for members of the Senior Executive Service and certain other senior officials. *(See 5 U.S.C. 6304(a), (b), and (f).) Certain employees have temporary personal leave carryover limits (5 U.S.C. 6304(c)).*
2. A new leave year begins on the first day of the first pay period beginning on or after January 1. For employees on the standard biweekly pay period cycle, the 2021 leave year begins on January 3, 2021.
3. Annual leave that is forfeited due to application of the applicable carryover limit may be restored under certain conditions (5 U.S.C. 6304(d)).

4. Section 1111 provides the Director of the Office of Personnel Management (OPM) with authority to establish a higher annual leave carryover limit to be applied at the beginning of the 2021 leave year. Application of the higher annual leave carryover limit under section 1111 will prevent forfeiture of any annual leave that is subject to the higher limit.

See section C for discussion of differences between restored leave and section 1111 excess leave. See section D for policies regarding how the restored leave provisions work in conjunction with section 1111 excess leave.

B. Coverage

1. The policy established by the OPM Director under section 1111 must be applied for leave year 2021 to any employee identified as eligible for coverage under section 1111, if the employee would otherwise have annual leave forfeited on January 3, 2021, and not restored under the annual leave carryover limit provisions that normally apply to the employee. The OPM Director policy must be applied retroactive to January 3, 2021, after an agency has applied the regular leave restoration rules, as described in section D.
2. An employee is eligible for coverage under section 1111 if he or she occupies a position in the civil service (as defined in 5 U.S.C. 2101(1)) in the executive branch of the Federal Government, excluding any individual occupying a position that is classified at or above the level of a Senior Executive Service position or the equivalent thereof.
 - a. An employee of the United States Postal Service and Postal Regulatory Commission is eligible for coverage under section 1111 (since the employee holds a position in the civil service) and is mandatorily covered by the OPM policy established under section 1111. (See section E.) b. An employee of a non-appropriated fund instrumentality (NAFI) described in 5 U.S.C. 2105(c) is not eligible for coverage under section 1111, since section 2105(c) provides that such an employee is deemed not to be an employee for the purpose of laws administered by the Office of Personnel Management, except as specifically provided in law, and since OPM is responsible for administering section 1111.
 - b. An employee appointed under 38 U.S.C. chapter 74 is eligible for coverage under section 1111 and is mandatorily covered by the OPM policy established under section 1111, notwithstanding section 7421(a), section 7425(b), or any other provision of chapter 74. (See section 1111(c)(2)(A)(ii); see also section E.) d. An employee of the Federal Aviation Administration or the Transportation Security Administration is eligible for coverage under section 1111 and is mandatorily covered by the OPM policy established under section 1111. (See section E.) e. Any employee serving in an executive branch position identified in 5 U.S.C. 6304(f)(1) is considered to be occupying a position that is classified at or above the level of a Senior Executive Service position or the equivalent thereof. An executive branch agency that administers an annual leave program under an

authority other than 5 U.S.C. chapter 63 is authorized to determine what senior positions are equivalent in terms of classification level to a Senior Executive Service position.

C. Differences Between the Treatment of Section 1111 Excess Leave and Restored Leave under 5 U.S.C. 6304(d)

1. Section 1111 does not eliminate the annual leave restoration rules in 5 U.S.C. 6304(d), which are applied after annual leave hours in excess of the normally applicable annual leave carryover limit are forfeited. The guidance in section D addresses this issue by requiring application of the regulation leave restoration rules before application of section 1111.

D. Policies for Employees Covered by Annual Leave System under 5 U.S.C. Chapter 63

1. Coverage. The policies in this section D apply to executive branch employees who are covered by the annual leave system established under 5 U.S.C. chapter 63, if they are identified as eligible for coverage under section 1111. (See section B.)
2. Carryover Limits. The higher annual leave carryover limit established under section 1111 applies to an employee if the employee would otherwise have annual leave forfeited and not restored under the annual leave carryover limit provisions that normally apply to the employee (5 U.S.C. 6304(a) and (b)).

Sequencing of Rules. At the beginning of the 2021 leave year (January 3, 2021, for most employees), each agency with employees covered by the policies established by OPM under section 1111 must first apply regular leave restoration rules and then apply section 1111 to any remaining annual leave that would otherwise be forfeited under the normal carryover limit.

- a. First, for each employee, apply all applicable leave restoration rules, including the national emergency rules in 5 CFR 630.310.
 - b. Second, if any employee has any remaining annual leave (after applying leave restoration rules) that would otherwise be forfeited under the normal carryover limit (240-hour limit for most employees), apply the higher 125 percent carryover limit under the section 1111 authority to prevent forfeiture to the extent possible under the higher limit. Any annual leave in excess of the higher limit would be forfeited.
 - c. In applying the section 1111 carryover limit, hours of newly restored leave would be excluded. In other words, add the otherwise forfeited leave remaining after applying leave restoration rules to the leave carried over under the normal limit and compare that sum to the 125 percent limit.
4. Personal Leave Ceilings. Section 1111 does not affect the determination of an employee's personal leave ceiling under 5 U.S.C. 6304(c). However, if an employee's

personal leave ceiling is below the applicable section 1111 limit, the employee may be credited with excess leave under section 1111.

5. Use in Leave Year 2021. Any excess annual leave—i.e., annual leave in excess of the normal carryover limit that is carried over into leave year 2021 under the section 1111 authority—is “for use in leave year 2021” (section 1111(a)). In other words, the section 1111 excess leave must be used by the employee-recipient by taking the leave during leave year 2021, or it will be forfeited at the beginning of leave year 2022 (January 2, 2022, for employees on the standard biweekly payroll cycle).
 - a. Section 1111 excess leave may not be included in a lump-sum annual leave payment under 5 U.S.C. 5551-5552. (See section 1111(b).)
 - b. Section 1111 excess leave may not be donated under a leave transfer program. If an employee wishes to donate annual leave, he or she must draw from the employee’s regular annual leave account. (We note that an employee may donate extra hours of annual leave before the end of leave year 2020, since the extra hours are not converted to section 1111 excess leave until the beginning of leave year 2021.)
6. Sequencing of Annual Leave Usage. During leave year 2021, an employee must use section 1111 excess annual leave before using any other annual leave available to the employee—i.e., annual leave accrued in a past year, annual leave accrued during leave year 2021, advanced annual leave, donated annual leave, and restored leave.
7. Account Administration. Employing agencies must establish methods of tracking section 1111 excess leave accounts to ensure that statutory and policy requirements are met—for example, the requirements that excess leave be used during the 2021 leave year or forfeited and that excess leave is not included in any lump-sum annual leave payment.

E. Delegation of Authority

By delegation from the OPM Director under 5 U.S.C. 1104(a)(2), the heads of executive branch agencies who administer annual leave programs under an authority other than 5 U.S.C. chapter 63 are required to apply section 1111 by establishing policies that are parallel to those set forth in section D to the maximum extent practicable. This delegated authority does not prevent an agency head from providing a greater benefit under the agency head’s independent leave system authority.

Sourced from [FEDWeek](#).

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Tier III

COVID-19 and Federal Employees:

President-elect Biden on Thursday, January 14, unveiled his \$1.9 trillion economic and coronavirus relief package, which would provide federal employees with additional access to paid leave.

The plan renews two paid leave programs initially enacted as part of the Families First Coronavirus Response Act last March 2020. The first of these programs provides up to two weeks of paid sick leave at full pay, if an employee is unable to work due to a self-isolation order from the government or their health care provider, or is experiencing COVID-19 symptoms, capped at \$1,400 per week.

It also provides a ten-week bank of partial paid leave for employees unable to work due to the need to care for a child whose school or childcare provider is closed due to the pandemic, or if they must care for a dependent with COVID-19 symptoms. These programs were not renewed as part of the omnibus spending bill signed into law last month.

Under President-elect Biden's plan, each of these programs would be renewed and expanded to apply to all federal workers. The partial paid leave program would grow to offer up to fourteen weeks rather than ten. Under Biden's plan, the paid leave programs would be available until September 30, 2021.

"While the December down payment extended the Families First employer tax credits through March 2021, it did not renew the requirement that employers provide leave," a summary of the plan stated. "[This] measure will provide paid leave protections to approximately two million Americans who work for the federal government."

If enacted, this extra leave would complement a provision of the 2021 National Defense Authorization Act, which became law last month, increasing the cap on the amount of unused annual paid leave that federal workers could carry into 2021 by twenty-five percent. According to guidance from OPM, some federal employees directly working on COVID-19 response efforts could see all of their unused leave from 2020 carried over into this year. Those employees also would have longer to use the leave, and if they exit federal service, it would be included in lump sum payments for unused paid leave.

President-elect Biden's COVID-relief plan also calls on private sector employers to provide hazard pay to essential frontline employees, and to apply it retroactively to the start of the pandemic.

House members included a provision in the Health and Economic Recovery Omnibus Emergency Solutions Act that would have instructed agencies to provide hazard pay to essential federal employees unable to work remotely during the pandemic, but that bill

stalled in the Senate. The Biden transition team did not respond to a request for comment about whether the President-elect's COVID-relief plan would grant essential federal workers hazard pay alongside their private sector counterparts.

Sourced from [GovernmentExecutive](#).

FEW receives information from the following sources and contacts: Federal News Network, GovernmentExecutive, CNN, FedWeek, and CNBC.