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115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-270 }

U.S. CUSTOMS AND BORDER PROTECTION
HIRING AND RETENTION ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1305

TO PROVIDE U.S. CUSTOMS AND BORDER PROTECTION WITH
ADEQUATE FLEXIBILITY IN ITS EMPLOYMENT AUTHORITIES



JUNE 7, 2018.—Ordered to be printed

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Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1305]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1305) to provide U.S. Customs and Border Protection with adequate flexibility in its employment authorities, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 1305, the U.S. Customs and Border Protection Hiring and Retention Act, or CBP HiRe Act, is to provide the U.S. Customs and Border Protection (CBP) with sufficient hiring and pay flexibilities to help it recruit and retain employees in rural or remote areas.

II. BACKGROUND AND THE NEED FOR LEGISLATION

CBP is the nation's border security enforcement agency that ensures individuals and cargo entering the United States complies with agricultural, criminal, immigration, and trade laws.¹ CBP maintains a workforce of over 60,000 employees,² including officers stationed at 328 land, air, and sea ports of entry.³ Since President Trump took office in January 2017, there have been a number of initiatives to increase the number of CBP agents and officers, including Executive Order 13767, issued on January 25, 2017, which directed CBP to hire 5,000 additional Border Patrol officers.⁴

To fulfill the requirements of the Executive Order, the Office of Personnel Management (OPM) authorized CBP to exercise direct hire authority for "8,721 personnel to fill mission critical positions at various grade levels at all geographic locations along the Southern Border as well as Florida and Caribbean duty stations."⁵ Direct hire authority allows agencies to hire individuals outside of the normal competitive service process if there is a severe shortage of qualified candidates or if there is a critical hiring need for a position.⁶ Agencies must obtain approval from OPM to exercise direct hire authority.⁷ The direct hire authority authorized by OPM for CBP hiring on the southern border expires on April 5, 2019.⁸

Nevertheless, CBP struggles to maintain adequate staffing levels, particularly in remote locations.⁹ To incentivize individuals to work in remote locations, CBP has sometimes used recruitment, relocation, and retention bonuses.¹⁰ Under current law, OPM can approve an agency to offer a recruitment or a relocation bonus if a position "is likely to be difficult to fill in the absence of such a bonus."¹¹ OPM may approve a retention bonus if:

the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee; and the agency determines that, in the absence of a retention bonus, the employee would be likely to leave the Federal service or for a different position in the Federal service.¹²

If the agency requests to award retention bonuses because an employee is likely to leave for a different position in the Federal service, the agency must demonstrate "a special need for the employee's services that makes it essential to retain the employee in his or her current position during a period of time before the clo-

¹ U.S. Customs and Border Protection, About CBP, *available at* <https://www.cbp.gov/about>.

² *Id.*

³ U.S. Customs and Border Protection, Border Security at Ports of Entry, *available at* <https://www.cbp.gov/border-security/ports-entry>.

⁴ Exec. Order. No. 13767, 82 Fed. Reg. 8793, 8795 (2017).

⁵ U.S. Dep't of Homeland Security Off. of Inspector General, OIG-17-98-SR, Special Report: Challenges Facing DHS in its Attempt to Hire 15,000 Border Patrol Agent and Immigration Officers 2 (July 27, 2017), *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-98-SR-Jul17.pdf>.

⁶ 5 C.F.R. § 337.201

⁷ *Id.*

⁸ U.S. Dep't of Homeland Security Off. of Inspector General, *supra* note 5.

⁹ *Improving Pay Flexibilities in the Federal Workforce: Hearing Before the S. Subcomm. on Regulatory Affairs and Fed. Mgmt of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 114-139 (2015) (statement of Linda Jacksta, Assistant Commissioner, Office of Human Resources Management, U.S. Customs and Border Protection).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 5753(b)(1).

¹² 5 U.S.C. § 5754(b).

sure or relocation of the employee’s office, facility, activity, or organization.”¹³ Recruitment, relocation, and retention bonuses cannot exceed 25 percent of an employee’s basic pay for the service period associated with the bonus.¹⁴ Retention bonuses cannot exceed 10 percent of basic pay if the bonus is awarded to a group of employees.¹⁵ Agencies can only offer retention bonuses to employees with a performance appraisal rating of at least “fully successful” or its equivalent.¹⁶

Despite use of these incentives, CBP continues to have difficulty retaining employees in remote locations.¹⁷ In a 2015 hearing before the Committee’s Subcommittee on Regulatory Affairs and Federal Management, Linda Jacksta, Assistant Commissioner in the CBP Office of Human Resources Management, testified that many CBP areas of responsibility are in remote locations.¹⁸ Ms. Jacksta explained:

CBP faces additional challenges in staffing hard-to-fill and remote locations. For the purposes of this testimony, I have characterized hard-to-fill and remote locations as being a significant distance from amenities and services such as medical care, child care and schools, and employment options for spouses. Geographically remote locations are often accompanied by challenging environmental factors, such as harsh weather conditions. Difficulty in staffing these locations may also be impacted by a lack of affordable housing choices, consumer goods and services, and local infrastructure. In addition, both hard-to-fill and geographically remote locations are sometimes associated with a higher cost of living. The challenges CBP faces regarding hard-to-fill and remote locations include a limited pool of qualified and suitable candidates interested in working and residing in these localities. This is compounded by funding and regulatory limitations, which limit our efforts to incentivize individuals to apply for, relocate to, or remain at these locations.

For example, one regulatory limitation for retention bonuses prohibits CBP from giving such a bonus to an employee who is likely to transfer to another location within CBP since the employee is not leaving Federal service.¹⁹ The 25 percent cap may also not be meaningful enough to incentivize employees to work in its remote locations.²⁰

Ms. Jacksta added that “[s]taffing these locations, both with new hires and existing, experienced personnel, is critical to meeting the operational requirements involved with securing the Nation’s border against a variety of different threats and adversaries.”²¹

¹³ 5 C.F.R. § 575.314(a)(1)(i).

¹⁴ 5 U.S.C. § 5753(d); 5 U.S.C. 5754(e)(1)(A).

¹⁵ 5 U.S.C. § 5754(e)(1)(B).

¹⁶ 5 C.F.R. § 575.305(d).

¹⁷ *Improving Pay Flexibilities in the Federal Workforce*, *supra* note

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

To further address staffing challenges in remote locations, CBP can also seek to offer special salary rates.²² OPM can authorize agencies to offer an increased minimum salary rate for a category of employees “whenever [OPM] finds that the Government’s recruitment or retention efforts with respect to [one] or more occupations in [one] or more areas or locations are, or are likely to become, significantly handicapped due to [certain] circumstances.”²³ The circumstances under which OPM can authorize special salary rates are:

rates of pay offered by non-Federal employers being significantly higher than those payable by the Government within the area, location, occupational group, or other class of positions under the pay system involved; the remoteness of the area or location involved; the undesirability of the working conditions or the nature of the work involved. . . .; or any other circumstances which the [OPM] . . . considers appropriate.

While the special salary rate is available to request from OPM, the request and approval process can be lengthy.²⁴ Brenda Roberts, Deputy Associate Director for Pay and Leave in OPM’s Office of Employee Services, explained to the Subcommittee that “[b]efore deciding whether to approve an agency’s request, OPM coordinates with other agencies that employ people in similar occupations or in the same geographic area to ensure that increasing pay for one group of employees will not create competition among agencies with similarly situated workforces.”²⁵ According to CBP, the OPM approval process for special salary rates for polygraph examiners was over two years, and the process for CBP employees stationed in Pembina, North Dakota, took more than one year.²⁶

According to CBP, another challenge in onboarding CBP employees in a timely manner is the polygraph examination process.²⁷ In 2010, Congress passed the Anti-Border Corruption Act, which requires “all job applicants for law enforcement positions at [CBP] to receive a polygraph examination and a background investigation before being offered employment.”²⁸ Although most Federal law enforcement officers, including the Federal Bureau of Investigations, the U.S. Secret Service, the Drug Enforcement Administration, the U.S. Postal Inspection Service, and U.S. Marshal Service, among others, as well as many state and local law enforcement agency applicants undergo polygraph examinations during the hiring process as a matter of policy, the Act made CBP the only Federal law enforcement agency with a statutory requirement that all law en-

²² *Improving Pay Flexibilities in the Federal Workforce*, supra note 9.

²³ 5 U.S.C. § 5305. See also 5 C.F.R. § 530.304.

²⁴ Telephone conversation between U.S. Customs and Border Protection representative and Committee staff (Sept. 25, 2017).

²⁵ *Improving Pay Flexibilities in the Federal Workforce*, supra note 9 (statement of Brenda Roberts, Deputy Associate Director, Pay and Leave, Employee Services, U.S. Office of Personnel Management).

²⁶ Telephone conversation between U.S. Customs and Border Protection representative and Committee staff (Sept. 25, 2017).

²⁷ *Keeping Pace with Trade, Travel, and Security: How Does CBP Prioritize and Improve Staffing and Infrastructure?: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Sec.*, 114th Cong. (2016) (joint statement of Eugene Schied, Assistant Commissioner, Office of Admin., U.S. Customs and Border Protection, Linda Jacksta, Assistant Commissioner, Office of Human Resources Mgmt., U.S. Customs and Border Protection, and John Wagner, Deputy Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection).

²⁸ Anti-Border Corruption Act of 2010, Pub. L. No. 111–376, § 2, 123 Stat. 4104 (Jan. 4, 2011).

forcement applicants undergo a polygraph examination.²⁹ According to CBP and CBP union officials, the polygraph examination is a primary obstacle in hiring CBP officers.³⁰ According to Border Patrol Agent Jon Anfinson, “the Border Patrol is failing approximately two out of every three applicants, which is double the rate most law enforcement agencies see. There is clearly a problem with how we are administering the polygraph. . . . Ironically, many of these applicants later get hired by state, local, or other federal law enforcement agencies, sometimes passing another polygraph.”³¹ It is unclear what is causing the unusually high failure rate among CBP applicants.

While failing a polygraph examination as a CBP applicant does not prohibit an individual from applying for a position at different Federal law enforcement agencies, these agencies can learn of the polygraph examination results by requesting the status of the individual’s application process with CBP.³² With the reputation for high polygraph examination failure rates, CBP’s release of examination results with other Federal law enforcement agencies may also be deterring individuals from applying for positions with CBP.

This bill would provide DHS with hiring and pay resources to recruit and maintain CBP staff in rural or remote locations experiencing hiring and retention challenges due to the nature of the locations. For these locations, DHS would be able to directly hire CBP applicants in order to expedite the onboarding process and offer a special salary rate for employment. DHS would also be authorized to issue recruitment, relocation, and retention bonuses to CBP applicants and employees serving in these rural or remote locations. CBP is required under this bill to report to Congress and to OPM on the effectiveness of these authorities on hiring and retention in rural or remote locations. The DHS OIG is also required to review the use of the hiring and pay authorities provided in this bill. These hiring and pay authorities will expire five years after enactment of this bill.

This bill also provides additional tools to facilitate hiring and retention at CBP. DHS is required under this bill to implement a hiring strategy and educational outreach program to inform CBP human resources officials of the available hiring authorities, incentives, and other tools to improve hiring and retention in rural or remote locations.

Finally, this bill will require CBP to report on the number of requests from other Federal agencies for the polygraph examination results of CBP applicants.

²⁹ *Keeping Pace with Trade, Travel, and Security*, *supra* note 27 (testimony of Linda Jacksta, Assistant Commissioner, Office of Human Resources Mgmt., U.S. Customs and Border Protection).

³⁰ *Id.*

³¹ *On the Line: Border Security From an Agent and Officer Perspective: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Sec.*, 115th Cong. (2018) (statement of Jon Anfinson, President of Local 2366, National Border Patrol Council.) See also Associated Press, *Two out of three Border Patrol job applicants fail polygraph test, making hiring difficult*, Los Angeles Times, Jan. 13, 2017, available at <http://www.latimes.com/local/lanow/la-me-border-patrol-lies-20170113-story.html>; Tim Steller, *New polygraph exam could be Border Patrol solution*, Arizona Daily Star, Apr. 15, 2017, available at http://tucson.com/news/local/columnists/steller/steller-new-polygraph-exam-could-be-border-patrol-solution/article_51a239cc-0ba2-5552-acbc-226aa51de346.html.

³² U.S. Customs and Border Protection, Polygraph Exam FAQs, available at <https://www.cbp.gov/careers/car/poly>.

III. LEGISLATIVE HISTORY

S. 1305, the U.S. Customs and Border Protection Hiring and Retention Act, was introduced on June 7, 2017, by Senators Jeff Flake and Heidi Heitkamp. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 1305 at a business meeting on October 4, 2017.

During the business meeting, Senator Heitkamp offered a modified substitute amendment that changed the definition for rural or remote areas, changed requirements regarding polygraph examinations, and incorporated technical assistance from relevant Federal agencies. The Committee adopted the amendment by voice vote and ordered the bill, as amended, reported favorably by voice vote *en bloc* with Senators Johnson, Lankford, Daines, McCaskill, Tester, Heitkamp, Hassan, and Harris present. Senator Harris voted “no” for the record.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the U.S. Customs and Border Protection Hiring and Retention Act of 2017, or the CBP HiRe Act.

Section 2. Flexibility in employment authorities

This section creates a new section 9702 in Title 5, United States Code, which would allow DHS to exercise certain pay and hiring authorities for CBP employees located in rural or remote areas.

Subsection (a) defines the terms “CBP employee”, “Commissioner”, “Director”, “rural or remote area”, and “Secretary”.

Subsection (b) requires the DHS Secretary to determine which CBP positions in rural or remote areas are eligible for the pay and hiring authorities provided under this bill. For eligibility, the Secretary must determine that there is a critical hiring need in the area and there is a direct relationship between the rural or remote nature of the area and difficulty in recruiting and retaining CBP employees in the area.

Subsection (c) allows the Secretary to use direct hire authority for CBP positions determined to be eligible under subsection (b). The direct hire authority may be used if the Secretary determines there is a critical hiring need and a severe shortage of qualified candidates in the area due to the direct relationship between the rural and remote nature of the area and difficulty in recruiting and retaining CBP employees in the area. Positions filled using this direct hire authority must be made public.

The Secretary may also provide recruitment, relocation, and retention bonuses under this subsection if the Secretary determines the CBP positions to be eligible under subsection (b). CBP employees accepting a recruitment or relocation bonus must enter into a written agreement of employment at the CBP position for at least two years. The amount of a recruitment or relocation bonus may not exceed 100 percent of the annual rate of basic pay of the CBP employee as of the beginning of the agreed-upon employment period. To provide a retention bonus, the Secretary must determine that, in the absence of a retention bonus, the CBP employee would likely leave Federal service or transfer to a different position in the

Federal service, including to a different DHS component. CBP employees receiving a retention bonus must enter into a written agreement of employment in that position for at least two years. The amount of a retention bonus may not exceed 50 percent of the annual rate of basic pay of the CBP employee as of the beginning of the agreed-upon employment period. Bonuses paid under this subsection are not considered part of a CBP employee's basic pay for any purpose.

Subsection (d) allows the OPM Director to establish special rates of pay for CBP employees upon a finding that the Secretary's recruitment or retention efforts in rural or remote areas are, or are likely to become, significantly handicapped because of the direct relationship determined by the Secretary in subsection (b).

Subsection (e) requires the Secretary to annually review the use of the authorities provided under this bill to determine the impact of these authorities in addressing hiring and retention challenges in the rural or remote CBP locations, whether these challenges still exist, and whether these locations still necessitate these hiring and pay flexibilities. This review must consider whether any CBP employee accepted a bonus or special pay rate and then transferred to another CBP location or resigned from CBP and the length of time such an employee stayed at the rural or remote location before transferring or resigning. Each review conducted under this section must be submitted to Congress.

Subsection (f) requires the Secretary, in conjunction with the DHS Chief Human Capital Officer, to develop and implement a strategy to improve education on hiring and human resources flexibilities for all DHS employees involved in recruiting, hiring, assessing, or selecting candidates for positions located in a rural or remote area. This strategy will include training and educational materials on these flexibilities; regular training sessions for personnel responsible for filling open positions in these areas; pilot or other programs to address hiring challenges in these areas; strategic recruiting efforts; an examination of existing spousal and family assistance programs for employees in these locations; feedback from employees stationed or newly hired to positions in these areas; and an evaluation of DHS internship programs' role in filling open positions in these locations. The Secretary must implement this strategy within 180 days of enactment of this bill and annually evaluate the effectiveness of this strategy improving hiring and retention in rural or remote areas.

Subsection (g) requires the DHS Inspector General to review the use of the direct hire authority, bonuses, and special pay rate authority authorized by this bill to determine whether these flexibilities helped meet hiring and retention needs in rural or remote areas.

Subsection (h) requires the Secretary to submit a report to Congress on the number of requests the Secretary receives from any other Federal agency for the file of an applicant for a CBP position that includes a polygraph examination.

Subsection (i) clarifies that the exercise of authority under subsection (c) is subject to the sole and exclusive discretion of the Secretary or CBP Commissioner. The Secretary may delegate any authority provided under this bill to the CBP Commissioner. Any de-

termination made under subsection (b) must be approved by the Secretary.

Subsection (j) clarifies that nothing in this bill may be construed to exempt the Secretary or the OPM Director from the merit system principles when carrying out the authorities provided under this bill.

Subsection (k) establishes a sunset date for the hiring and pay authorities under subsections (c) and (d) that is five years after enactment of this bill.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 1, 2018.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1305, the CBP HiRe Act.

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,
Director.

Enclosure.

S. 1305—CBP HiRe Act

S. 1305 would authorize Customs and Border Protection (CBP) in the Department of Homeland Security to offer bonus pay to individuals who agree to fill certain job openings in remote locations or to remain in such positions; this authority would expire five years after the bills enactment. CBP can pay such bonuses under current law with prior approval from the Office of Personnel Management.

Under current law, CBP anticipates offering bonuses to hundreds of current or prospective employees during each of the next several years. CBO expects the agency to spend tens of millions of dollars on bonuses over that time period. On that basis CBO estimates that any additional costs resulting from enacting S. 1305 would be insignificant.

Enacting S. 1305 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 1305 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 1305 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart I—Miscellaneous

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CHAPTER 97—DEPARTMENT OF HOMELAND SECURITY

* * * * *

Table of Sections.

Sec.

9701. Establishment of human resources management system.

9702. *U.S. Customs and Border Protection employment authorities.*

* * * * *

SEC. 9702. U.S. CUSTOMS AND BORDER PROTECTION EMPLOYMENT AUTHORITIES.

(a) *DEFINITIONS.—In this section—*

(1) *the term “CBP employee” means an employee of U.S. Customs and Border Protection;*

(2) *the term “Commissioner” means the Commissioner of U.S. Customs and Border Protection;*

(3) *the term “Director” means the Director of the Office of Personnel Management;*

(4) *the term “rural or remote area” means an area within the United States that is not within an area defined and designated as an urbanized area by the Bureau of the Census in the most recently completed decennial census; and*

(5) *the term “Secretary” means the Secretary of Homeland Security.*

(b) *DEMONSTRATION OF RECRUITMENT AND RETENTION DIFFICULTIES IN RURAL OR REMOTE AREAS.—*

(1) *IN GENERAL.*—For purposes of subsections (c) and (d), the Secretary shall determine, for a rural or remote area, whether there is—

(A) a critical hiring need in the area; and

(B) a direct relationship between—

(i) the rural or remote nature of the area; and

(ii) difficulty in the recruitment and retention of CBP employees in the area.

(2) *FACTORS.*—To inform the determination of a direct relationship under paragraph (1)(B), the Secretary may consider evidence—

(A) that the Secretary—

(i) is unable to efficiently and effectively recruit individuals for positions as CBP employees, which may be demonstrated with various types of evidence, including—

(I) evidence that multiple positions have been continuously vacant for significantly longer than the national average period for which similar positions in the U.S. Customs and Border Protection are vacant; and

(II) recruitment studies that demonstrate the inability of the Secretary to efficiently and effectively recruit CBP employees for positions in the area; or

(ii) experiences a consistent inability to retain CBP employees that negatively impacts agency operations at a local or regional level; or

(B) of any other inability, directly related to recruitment or retention difficulties, that the Secretary determines sufficient.

(c) *DIRECT HIRE AUTHORITY; RECRUITMENT AND RELOCATION BONUSES; RETENTION BONUSES.*—

(1) *DIRECT HIRE AUTHORITY.*—

(A) *IN GENERAL.*—The Secretary may appoint, without regard to any provision or sections 3309 through 3319, candidates to positions in the competitive service as CBP employees, in a rural or remote area, if the Secretary—

(i) determines that—

(I) there is a critical hiring need; and

(II) there exists a severe shortage of qualified candidates because of the direct relationship identified by the Secretary under subsection (b)(1)(B) of this section between—

(aa) the rural or remote nature of the area; and

(bb) difficulty in the recruitment and retention of CBP employees in the area; and

(ii) has given public notice for the positions.

(B) *PRIORITIZATION OF HIRING VETERANS.*—If the Secretary uses the direct hiring authority under subparagraph (A), the Secretary shall apply the principles of preference for the hiring of veterans established under subchapter I of chapter 33.

(2) *RECRUITMENT AND RELOCATION BONUSES.*—*The Secretary may pay a bonus to an individual (other than an individual described in subsection (a)(2) of section 5723) if—*

(A) *the Secretary determines that—*

(i) *conditions consistent with the conditions described in paragraphs (1) and (2) of subsection (b) of such section 5753 are satisfied with respect to the individual (without regard to any other provision of that section); and*

(ii) *the position to which the individual is appointed or to which the individual moves or must relocate—*

(I) *is a position as a CBP employee; and*

(II) *is in a rural or remote area for which the Secretary has identified a direct relationship under subsection (b)(1)(B) of this section between—*

(aa) *the rural or remote nature of the area; and*

(bb) *difficulty in the recruitment and retention of CBP employees in the area; and*

(B) *the individual enters into a written service agreement with the Secretary—*

(i) *under which the individual is required to complete a period of employment as a CBP employee of not less than 2 years; and*

(ii) *that includes—*

(I) *the commencement and termination dates of the required service period (or provisions for the determination thereof);*

(II) *the amount of the bonus; and*

(III) *other terms and conditions under which the bonus is payable, subject to the requirements of this subsection, including—*

(aa) *the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and*

(bb) *the effect of a termination described in item (aa).*

(3) *RETENTION BONUSES.*—*The Secretary may pay a retention bonus to a CBP employee (other than an individual described in subsection (a)(2) of section 5754) if—*

(A) *the Secretary determines that—*

(i) *a condition consistent with the condition described in subsection (b)(1) of such section 5754 is satisfied with respect to the CBP employee (without regard to any other provision of that section);*

(ii) *the CBP employee is employed in a rural or remote area for which the Secretary has identified a direct relationship under subsection (b)(1)(B) of this section between—*

(I) *the rural or remote nature of the area; and*

(II) *difficulty in the recruitment and retention of CBP employees in the area; and*

(iii) *in the absence of a retention bonus, the CBP employee would be likely to leave—*

(I) *the Federal service; or*

(II) for a different position in the Federal service, including a position in another agency or component of the Department of Homeland Security; and
 (B) the individual enters into a written service agreement with the Secretary—

(i) under which the individual is required to complete a period of employment as a CBP employee of not less than 2 years; and

(ii) that includes—

(I) the commencement and termination dates of the required service period (or provisions for the determination thereof);

(II) the amount of the bonus; and

(III) other terms and conditions under which the bonus is payable, subject to the requirements of this subsection, including—

(aa) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

(bb) the effect of a termination described in item (aa).

(4) RULES FOR BONUSES.—

(A) MAXIMUM BONUS.—A bonus paid to an employee under—

(i) paragraph (2) may not exceed 100 percent of the annual rate of basic pay of the employee as of the commencement date of the applicable service period; and

(ii) paragraph (3) may not exceed 50 percent of the annual rate of basic pay of the employee as of the commencement date of the applicable service period.

(B) RELATION TO BASIC PAY.—A bonus paid to an employee under paragraph (2) or (3) shall not be considered part of the basic pay of the employee for any purpose.

(5) OPM OVERSIGHT.—The Director shall, to the extent practicable—

(A) set aside a determination of the Secretary under this subsection if the Director finds substantial evidence that the Secretary abused the discretion of the Secretary in making the determination; and

(B) oversee the compliance of the Secretary with this subsection.

(d) SPECIAL PAY AUTHORITY.—In addition to the circumstances described in subsection (b) of section 5305, the Director may establish special rates of pay in accordance with that section if the Director finds that the recruitment or retention efforts of the Secretary with respect to positions for CBP employees in an area or location are, or are likely to become, significantly handicapped because the positions are located in a rural or remote area for which the Secretary has identified a direct relationship under subsection (b)(1)(B) of this section between—

(1) the rural or remote nature of the area; and

(2) difficulty in the recruitment and retention of CBP employees in the area.

(e) REGULAR CBP REVIEW.—

(1) *ENSURING FLEXIBILITIES MEET CBP NEEDS.*—Each year, the Secretary shall review the use of hiring flexibilities under subsections (c) and (d) to fill positions at a location in a rural or remote area to determine—

(A) *the impact of the use of those flexibilities on solving hiring and retention challenges at the location;*

(B) *whether hiring and retention challenges still exist at the location; and*

(C) *whether the Secretary needs to continue to use those flexibilities at the location.*

(2) *CONSIDERATION.*—In conducting the review under paragraph (1), the Secretary shall consider—

(A) *whether any CBP employee accepted an employment incentives under subsection (c) or (d) and then transferred to a new location or left U.S. Customs and Border protection; and*

(B) *the length of time that each employee identified under subparagraph (A) stayed at the original location before transferring to a new location or leaving U.S. Customs and Border Protection.*

(3) *DISTRIBUTION.*—The Secretary shall submit to Congress a report on each review required under paragraph (1).

(f) *IMPROVING CBP HIRING AND RETENTION.*—

(1) *EDUCATION OF CBP HIRING OFFICIALS.*—Not later than 180 days after the date of enactment of the U.S. Customs and Border Protection Hiring and Retention Act of 2017, and in conjunction with the Chief Human Capital Officer of the Department of Homeland Security, the Secretary shall develop and implement a strategy to improve education regarding hiring and human resources flexibilities (including hiring and human resources flexibilities for locations in rural or remote areas) for all employees, serving in agency headquarters or field offices, who are involved in the recruitment, hiring, assessment, or selection of candidates for locations in a rural or remote area, as well as the retention of current employees.

(2) *ELEMENTS.*—Elements of the strategy under paragraph (1) shall include the following:

(A) *Developing or updating training and educational materials on hiring and human resources flexibilities for employees who are involved in the recruitment, hiring, assessment, or selection of candidates, as well as the retention of current employees.*

(B) *Regular training sessions for personnel who are critical to filling open positions in rural or remote areas.*

(C) *The development of pilot programs or other programs, as appropriate, to address identified hiring challenges in rural or remote areas.*

(D) *Developing and enhancing strategic recruiting efforts through relationships with institutions of higher education, as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), veterans transition and employment centers, and job placement program in regions that could assist in filling positions in rural or remote areas.*

(E) Examination of existing agency programs on how to most effectively aid spouses and families of individuals who are candidates or new hires in a rural or remote area.

(F) Feedback from individuals who are candidates or new hires at locations in a rural or remote area, including feedback on the quality of life in rural or remote areas for new hires and their families.

(G) Feedback from CBP employees, other than new hires, who are stationed at locations in a rural or remote area, including feedback on the quality of life in rural or remote areas for those CBP employees and their families.

(H) Evaluation of Department of Homeland Security internship programs and the usefulness of those programs in improving hiring by the Secretary in rural or remote areas.

(3) EVALUATION.—

(A) IN GENERAL.—Each year, the Secretary shall—

- (i) evaluate the extent to which the strategy developed and implemented under paragraph (1) has improved the hiring and retention ability of the Secretary; and
- (ii) make any appropriate updates to the strategy under paragraph (1).

(B) INFORMATION.—The evaluation conducted under subparagraph (A) shall include—

- (i) any reduction in the time taken by the Secretary to fill mission-critical positions in rural or remote areas;
- (ii) a general assessment of the impact of the strategy developed and implemented under paragraph (1) on hiring challenges in rural or remote areas; and
- (iii) other information the Secretary determines relevant.

(g) INSPECTOR GENERAL REVIEW.—Not later than 2 years after the date of enactment of the U.S. Customs and Border Protection Hiring and Retention Act of 2017, the Inspector General of the Department of Homeland Security shall review the use of hiring flexibilities by the Secretary under subsections (c) and (d) to determine whether the use of those flexibilities is helping the Secretary meet hiring and retention needs in rural and remote areas.

(h) REPORT ON POLYGRAPH REQUESTS.—The Secretary shall report to Congress on the number of requests the Secretary receives from any other Federal agency for the file of an applicant for a position in U.S. Customs and Border Patrol that includes the results of a polygraph examination.

(i) EXERCISE OF AUTHORITY.—

(1) SOLE DISCRETION.—The exercise of authority under subsection (c) shall be subject to the sole and exclusive discretion of the Secretary (or the Commissioner, as applicable under paragraph (2) of this subsection), notwithstanding chapter 71.

(2) DELEGATION.—

(A) IN GENERAL.—Subject to subparagraph (B), the Secretary may delegate any authority under this section to the Commissioner.

(B) OVERSIGHT.—The Commissioner may not make a determination under subsection (b)(1) unless the Secretary approves the determination.

(j) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to exempt the Secretary or the Director from the applicability of the merit system principles under section 2301.

(k) SUNSET.—The authorities under subsections (c) and (d) shall terminate on the date that is 5 years after the date of enactment of the U.S. Customs and Border Protection Hiring and Retention Act of 2017.

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