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Continuation of Employment Benefits for Senate Restaurant Employees

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Continuation of Employment Benefits for Senate Restaurant Employees

Summary

The Senate Committee on Rules and Administration is reportedly considering contracting the Senate restaurant system to a private vendor. On July 17, 2008, President George W. Bush signed a bill that continues employment benefits for current Senate restaurant employees should the restaurants be contracted to a private vendor. P.L. 110-279, introduced as S. 2967, "provide[s] for certain Federal employee benefits to be continued for certain employees of the Senate Restaurants after operations of the Senate Restaurants are contracted to be performed by a private business concern, and for other purposes." P.L. 110-279 provides for the continuation of Senate restaurant employees' salary, health benefits, accrued sick and annual leave, transit benefits, and retirement accounts. In addition, P.L. 110-279 provides severance pay to covered employees and an early retirement option for employees who meet criteria set out in the legislation. These issues are similar to those faced by the House of Representatives when its restaurant system was contracted to a private vendor in 1986.

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Restaurant Operations

Since August 1, 1961, Senate restaurant operations have been under the jurisdiction of the Architect of the Capitol. Pursuant to P.L. 87-822, management of the Senate restaurants was transferred from the Committee on Rules and Administration to the Architect. At that time, the Architect was given authority to "prescribe for the operation and the employment of necessary assistance for the conduct of said restaurants by such business methods as may produce the best results consistent with economical and modern management, subject to the approval of the Senate Committee on Rules and Administration as to matters of general policy."[1]

Pursuant to 2 U.S.C. § 2042, by the adoption of a resolution the Committee on Rules and Administration can remove the restaurants from the Architect's jurisdiction.

> That the management of the Senate Restaurants by the Architect of the Capitol shall cease and the restaurants revert from the jurisdiction of the Architect of the Capitol to the jurisdiction of the Senate Committee on Rules and Administration upon adoption by that committee of a resolution ordering such transfer of jurisdiction at any time hereafter.[2]

Under the Architect's management of the Senate restaurants, restaurant workers have been employees of the Architect of the Capitol since 1961 and are afforded all benefits associated with federal government employment. Should the Committee on Rules and Administration decide to contract Senate restaurant operations to a private contractor, restaurant employees could lose their federal government benefits. On May 1, 2008, Senator Dianne Feinstein and cosponsors introduced S. 2967 "to provide for certain Federal employee benefits to be continued for certain employees of the Senate Restaurants after operations of the Senate Restaurants are contracted to be performed by a private business concern."[3] In recent media reports a spokesman for Senator Feinstein indicated that the Committee on Rules and Administration is moving toward privatizing the Senate restaurants and that the Senate will use the same vendor, Restaurant Associates,[4] that currently operates the restaurants in the

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[1] 2 U.S.C. § 2042.

[2] Ibid.

[3] S. 2967 (110th Congress), introduced May 1, 2008.

[4] Elizabeth Brotherton, "Senate Cafeterias Set to Be Privatized," *Roll Call*, Mar. 6, 2008 (continued...)

House of Representatives[5] and is under contract to operate the dining facilities in the Capitol Visitor Center. On June 3, 2008, S. 2967 passed the Senate, without amendment, by unanimous consent.[6] On July 10, 2008, S. 2967 passed the House by voice vote.[7] On July 17, 2008, S. 2967 was signed by President George W. Bush as P.L. 110-279.[8]

The process used in the House of Representatives to contract restaurant operations to a private vendor and how the House continued benefits for employees during the transition might be illustrative of issues that may pertain to Senate restaurant employees. Before the House restaurants were operated by a private vendor, all employees of the House restaurants were paid through the restaurant's revolving fund, which was administered by the Architect of the Capitol,[9] and were covered by the federal retirement program.[10] When Service America Corporation assumed day-to-day management of the House Restaurant System in 1986, the restaurants' employees were no longer considered legislative branch employees. However, the 1986 contract guaranteed employment for certain restaurant employees and continued the employees' benefits. As explained in a General Accounting Office report, Service America Corporation was required to

> provide the right to work for 2 years to the House food service employees of the Architect who were displaced as a result of conversion to contractor operations. It was also required by law to (1) pay the federal payroll retirement and savings benefits of those employees it hired who elected to retain their CSRS [Civil

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[4] (...continued)
[http://www.rollcall.com/issues/1_1/latest_news/22442-1.html?type=pf], accessed May 20, 2008; and Emily Yehle, "Feinstein Warns Cafeteria Prices Could Rise," *Roll Call*, May 12, 2008, [http://www.rollcall.com/issues/53_135/news/23557-1.html], accessed May 20, 2008.

[5] U.S. Congress, House of Representatives, Chief Administrative Officer, "House Cafeteria to Undergo Major Menu, Operational Changes in December," press release, Nov. 13, 2007 [http://cao.house.gov/press/cao-20071113.shtml], accessed Feb. 4, 2008. Food service in the Ford Cafeteria is scheduled to transition from the current vendor, the Skenteris family, to Restaurant Associates in September 2008.

[6] Sen. Barbara Boxer, "Providing for Certain Federal Employee Benefits," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (June 3, 2008), pp. S4986-S4988.

[7] Rep. Robert Brady, "Providing for Continued Benefits for Certain Senate Restaurant Employees," remarks in the House, *Congressional Record*, daily edition, vol. 154 (July 10, 2008), pp. H6378-6380.

[8] P.L. 110-279, 122 Stat. 2604, July 17, 2008.

[9] Telephone conversation between the author and Charles Howell, chief counsel, Committee on House Administration, Feb. 6, 2008.

[10] U.S. General Accounting Office, *House Restaurant System: Response to Questions on Service America Corporation's Operations of House Food Services*, GAO/AIMD-94-32, Apr. 1994, p. 4. The General Accounting Office is now the Government Accountability Office. Restaurant employees were eligible for either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), depending on their federal service start date. For further discussion on the development of both federal retirement systems and eligible employees, see CRS Report 98-810EPW, *Federal Employees' Retirement System: Benefits and Financing*, by Patrick Purcell.

> Service Retirement System] or the FERS [Federal Employees Retirement System] coverage and (2) process those benefits in accordance with federal retirement program regulations promulgated by the Office of Personnel Management (OPM) and the federal TSP [Thrift Savings Plan] regulations issued by the Federal Retirement Thrift Investment Board.[11]

In 1991, the Committee on House Administration resumed control of the restaurants on a temporary basis. As a result of the House Administration Committee's operation of the restaurant system, restaurant employees, for the first time, became House employees.[12] In 1994, the Committee on House Administration again sought a private contractor to operate the House restaurants and contracted with Thompson Hospitality and Marriott to operate the restaurants.[13] At that time, employees were transferred back to the private sector.

If the Senate contracts the operation of its restaurants, at least some of the restaurants' personnel would likely become employees of the vendor. Following the House model,[14] to continue some of the benefits that restaurant employees now have as federal government employees, the Senate passed S. 2967 by unanimous consent without amendment.[15]

Provisions of P.L. 110-279

In the event that the operation of the Senate restaurants is contracted to a private vendor, Senator Feinstein, along with Senator Robert Bennett and Senator Harry Reid, introduced S. 2967 "to provide for certain Federal employee benefits to be continued for certain employees of the Senate Restaurants after operations of the Senate Restaurants are contracted to be performed by a private business concern."[16] As enacted, P.L. 110-279 defines covered employees, provides benefit and pay continuation for current employees, creates a voluntary separation incentive plan, and provides for early retirement for qualified employees. The following is a summary of each of these provisions.

Definitions. P.L. 110-279 provides definitions of employees who are covered by its provisions.

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[11] Ibid.

[12] U.S. Congress, Committee on House Administration, *Report on the Activities of the Committee on House Administration of the House of Representatives During the One Hundred Second Congress*, 102nd Cong., 2nd sess., H.Rept. 102-1083 (Washington: GPO, 1992), p. 21.

[13] Ibid, p. 67.

[14] P.L. 99-591, 100 Stat. 3341-348-349, Oct. 30, 1986. The House offered its employees the option of retaining their federal retirement benefits. If an employee elected to retain federal benefits, the contractor was treated as a federal employer and made appropriate payments to the federal retirement system on the employee's behalf.

[15] Sen. Barbara Boxer, "Providing for Certain Federal Employee Benefits," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (June 3, 2008), pp. S4986-S4988.

[16] S. 2967 (110th Congress), introduced May 1, 2008.

Covered Employees. As defined by Section 1(a)(2)(A), employees who would be eligible for benefits upon transfer to a private contractor are current Senate restaurant employees of the Architect of the Capitol as of the date of enactment. These include the following:

- permanent employees (full or part time);
- temporary employees (full or part time); and
- employees included under 2 U.S.C. § 2048 (Director of Food Services, Assistant Director of Food Services, Manager of Special Functions, and the Administrative Officer).

Continuous Service. As defined by Section 1(c)(2)(A), an employee who chooses to continue his or her federal government benefits would be credited with continuous service for time employed by the food service contractor or a successor contractor. The employee would continue to accrue the benefits he or she enjoyed as an employee of the Architect of the Capitol for the length of employment with the food service contractor or successor contractor.

Benefit and Pay Continuation. As defined by Section 1(c), six benefits currently provided to Senate restaurant employees would continue for those employees who elected to continue federal government benefits. The eligible benefits are as follow:

- retirement (including eligibility for the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS) and for the Thrift Savings Plan (TSP)),
- life insurance,
- pay,
- health insurance,
- leave accrued (annual and sick), and
- transit subsidies.

Election of Coverage. Pursuant to Section 1(b), employees would be required to elect to continue to receive federal government benefits after they are transferred to a private contractor. To elect coverage, the employee must submit a request to the Office of Human Resources of the Architect of the Capitol not later than the day before the private contractor assumes management of the Senate restaurants. Without election of coverage, the employee would forgo federal government benefits.

Voluntary Separation Incentive Plan. Pursuant to Section 1(e), the Architect of the Capitol would be required to submit a plan, under 2 U.S.C. § 60q,[17] within 30 days of enactment to provide a voluntary separation program for eligible employees who are not of retirement age, and wish not to be transferred to a private

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[17] 2 U.S.C. § 60q governs the creation of voluntary separation programs and specifies who is authorized to offer payments, the amount and administration of payments, the requirement of a plan for making payments, who are eligible employees, and repayment of funds disbursed for individuals who return to federal government employment in the future.

contractor. This benefit would also be available to any employee who becomes eligible and accepts the offer during the 90-day period following the transfer of restaurant operations to a private vendor.

Early Retirement. Pursuant to Section 1(f), employees of the Senate restaurants who voluntarily retire on or after the date of enactment and prior to the date of transfer to a private contractor would be eligible for early retirement if they meet the following criteria:

- had completed 25 years of service as defined by 5 U.S.C. § 8331(12) or 5 U.S.C. § 8401(26), or
- had completed 20 years of service and were at least 50 years old, and
- had not been terminated for cause.

Analysis

Proponents of P.L. 110-279 see advantages in the continuation of employee benefits to current restaurant employees following the contracting of restaurant functions to a private vendor. Contracting with the firm that currently operates the restaurants in the House, and is contracted to operate the food services venues in the Capitol Visitor Center, could provide certain efficiencies, according to supporters.

Opponents of P.L. 110-279 may have objected because they oppose privatization efforts in general and believe that the Senate should continue to operate the restaurants. They may have also argued that P.L. 110-279 does not provide strong enough protections for current employees. Additionally, opponents could have argued that existing programs continue benefits for workers in both the public and private sector. For example, the Federal Employees Health Benefits Program (FEHB) continues health coverage for federal government employees[18] and the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continues health coverage for private sector employees.[19] In each case, potential opponents did not publicly articulate their positions.[20]

Collective Bargaining. The House privatization experience in 1986 suggests that the unionization of restaurant employees following their transfer could be an important issue.

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[18] 5 U.S.C. §§ 8901-8914. See also 5 C.F.R. §§ 890.101-890.1308; 5 C.F.R. §§ 891.101-891.50; and U.S. Office of Personnel Management, "Federal Employees Health Benefits Program: The FEHB Program" [http://www.opm.gov/insure/health/about/fehb.asp], accessed May 20, 2008.

[19] P.L. 99-272, 100 Stat. 82, Apr. 7, 1986. For more information on COBRA and other federal programs available to unemployed workers, see CRS Report RL30626, *Health Insurance Continuation Coverage Under COBRA*, by Heidi G. Yacker; and CRS Report RL34251, *Federal Programs Available to Unemployed Workers*, by Julie M. Whittaker and Blake Alan Naughton.

[20] Emily Yehle, "Feinstein Warns Cafeteria Prices Could Rise," *Roll Call*, May 12, 2008, [http://www.rollcall.com/issues/53_135/news/23557-1.html], accessed May 20, 2008.

Prior to 1995, legislative branch employees did not have the right to unionize. Both the National Labor Relations Act of 1935 and the Civil Service Reform Act of 1978 exempted the legislative branch from collective bargaining and unionization. The National Labor Relations Act and the Civil Service Reform Act apparently prevented unionization in the House of Representatives prior to the contracting of services to private vendors.

The National Labor Relations Act of 1935, as amended,[21] exempted the federal government or any government corporation, as employers, from employee collective bargaining and unionization requirements.

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[22]

The Civil Service Reform Act of 1978[23] established the right of executive branch employees to unionize. The Civil Service Reform Act also specifically grants collective bargaining and unionization rights to the Library of Congress and the Government Printing Office, while not including specific language regarding employees of the House of Representatives or the Senate.

> (3) "agency" means an Executive agency (including a non-appropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution, but does not include — (A) the General Accounting Office; (B) the Federal Bureau of Investigation; (C) the Central Intelligence Agency; (D) the National Security Agency; (E) the Tennessee Valley Authority; (F) the Federal Labor Relations Authority; (G) the Federal Service Impasses Panel; or (H) the United States Secret Service and the United States Secret Service Uniformed Division.[24]

In June 1984, two years before the House restaurants were privatized, restaurant employees began seeking the right to unionize and bargain collectively.[25] At the time, the Architect of the Capitol, George White, maintained that he did not have the authority to "recognize or bargain with a union" because the House was exempt from the National Labor Relations Act. White argued that his position was supported by

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[21] 29 U.S.C. §§ 151-169 (49 Stat. 449, July 5, 1935; and 61 Stat. 136, June 23, 1947).

[22] 29 U.S.C. §152(2), as amended.

[23] P.L. 95-454, 92 Stat. 1111, Oct. 13, 1978.

[24] 5 U.S.C. § 7103(3).

[25] "Treatment Afforded Employees in the House of Representatives' Cafeteria Is Intolerable, Unfair, and Unusual,"*Congressional Record*, vol. 132, part 9 (May 22, 1986), p. 11934.

the National Labor Relations Act, which exempted the United States as an employer.[26]

The Congressional Accountability Act of 1995,[27] as enacted, applied 11 laws to the legislative branch, from which it had previously been exempt:

- Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.),
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.),
- Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.),
- Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.),
- Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.),
- Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.),
- Title 5, Chapter 71 of the United States Code (federal service labor-management relations),
- Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 et seq.),
- Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.),
- Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), and
- Title 38, Chapter 43 of the United States Code (veterans' employment and re-employment).[28]

The Congressional Accountability Act extended the application of Chapter 71 of Title 5, United States Code, to legislative branch employees.[29] As a result, employees of the Architect of the Capitol, including Senate restaurant workers, were allowed to organize.[30]

The application of the National Labor Relations Act to employees of the House Restaurant System, however, occurred after their transfer to the private sector. Should restaurant workers again be made House or legislative branch employees, they would

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[26] Democratic Study Group, *Fact Sheet: Caucus Vote on Cafeteria Union Dispute*, 99th Cong., 2nd sess., June 9, 1986, p. 1.

[27] P.L. 104-1, 109 Stat. 3, Jan. 23, 1995.

[28] 2 U.S.C. § 1302.

[29] Section 220(e)(2) of the Congressional Accountability Act provides exemptions for numerous offices in Congress, including but not limited to: employees of the personal office of any Member; committees of the Senate or House of Representatives; the office of the Vice President (as president of the Senate); the office of the President pro tempore of the Senate; the offices of the majority and minority leaders of the Senate; the offices of the majority and minority whips of the Senate; the conferences of the majority and the minority of the Senate; the offices of the secretaries for the majority and minority of the Senate; the majority and minority policy committees of the Senate; and many of the offices under the secretary of the Senate, including the parliamentarian, clerks, printing services, and Senate chief counsel for employment.

[30] Telephone conversation between the author and Teresa James, director of dispute resolution, Office of Compliance, Feb. 8, 2008.

presumably be allowed to unionize pursuant to the Congressional Accountability Act unless they were made an exempt group as found in section 220(e)(2) of the act.

Currently, Senate restaurant workers are employees of the Architect of the Capitol. They are presumably authorized to unionize under the Congressional Accountability Act. They are not, however, currently represented by a union.[31] Were Senate restaurant employees to be transferred to the private sector, they presumably would have the right to unionize under the National Labor Relations Act.

[31] Telephone conversation between the author and Sean Bailey, congressional liaison, Architect of the Capitol, Feb. 8, 2008.