

115TH CONGRESS
1ST SESSION

S. 1305

To provide U.S. Customs and Border Protection with adequate flexibility
in its employment authorities.

IN THE SENATE OF THE UNITED STATES

JUNE 7, 2017

Mr. FLAKE (for himself and Ms. HEITKAMP) introduced the following bill;
which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To provide U.S. Customs and Border Protection with
adequate flexibility in its employment authorities.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “U.S. Customs and Bor-
5 der Protection Hiring and Retention Act of 2017” or the
6 “CBP HiRe Act”.

7 **SEC. 2. FLEXIBILITY IN EMPLOYMENT AUTHORITIES.**

8 (a) IN GENERAL.—Chapter 97 of title 5, United
9 States Code, is amended by adding at the end the fol-
10 lowing:

1 **“§ 9702. U.S. Customs and Border Protection employ-**
2 **ment authorities**

3 “(a) DEFINITIONS.—In this section—

4 “(1) the term ‘Commissioner’ means the Com-
5 missioner of U.S. Customs and Border Protection;

6 “(2) the term ‘covered CBP employee’ means—

7 “(A) a customs and border protection offi-
8 cer, as defined in section 8331(31); and

9 “(B) a border patrol agent, as defined in
10 section 5550(a);

11 “(3) the term ‘Director’ means the Director of
12 the Office of Personnel Management;

13 “(4) the term ‘local infrastructure’ means—

14 “(A) established communities;

15 “(B) suitable places of residence, including
16 sufficient affordable housing choices;

17 “(C) amenities and services, including
18 medical care, child care, and schools, that con-
19 tribute to quality of life;

20 “(D) consumer goods and services; or

21 “(E) other local infrastructure, as deter-
22 mined by the Commissioner; and

23 “(5) the term ‘rural or remote area’ means an
24 area within the United States—

25 “(A) in which a facility of U.S. Customs
26 and Border Protection is located;

“(B) that is so distant from the nearest local infrastructure as to require an appreciable degree of expense, hardship, and inconvenience, beyond that normally encountered in metropolitan life, on the part of an individual living or working in the area; and

“(C) that—

“(i) has not been defined and designated as an urbanized area by the Bureau of the Census during the most recently completed decennial census; or

“(ii) has been determined by the Commissioner to be a rural or remote area based on any other factors that the Commissioner considers relevant.

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

For purposes of subsections (c), (d), and (e), the Commissioner shall demonstrate a direct relationship between the rural or remote nature of a rural or remote area, and difficulty in the recruitment and retention of covered CBP employees in the area, by providing evidence—

“(1) that the Commissioner—

“(A) is unable to efficiently and effectively recruit individuals for positions as covered CBP

1 employees, which may be demonstrated with
2 various types of evidence, including—

3 “(i) evidence that multiple positions
4 have been continuously vacant for signifi-
5 cantly longer than the national average pe-
6 riod for which similar positions in U.S.
7 Customs and Border Protection are va-
8 cant; or

9 “(ii) recruitment studies that dem-
10 onstrate the inability of the Commissioner
11 to efficiently and effectively recruit covered
12 CBP employees for positions in the area;
13 or

14 “(B) experiences a consistent inability to
15 retain covered CBP employees that negatively
16 impacts agency operations at a local or regional
17 level; or

18 “(2) of any other inability, directly related to
19 recruitment or retention difficulties, that the Com-
20 missioner determines sufficient.

21 “(c) DIRECT HIRE AUTHORITY; RECRUITMENT AND
22 RELOCATION BONUSES; RETENTION BONUSES.—

23 “(1) DIRECT HIRE AUTHORITY.—

24 “(A) IN GENERAL.—In addition to the au-
25 thority under section 3304(a)(3)(B), the Com-

1 missioner may appoint, without regard to the
2 provision of sections 3309 through 3318, can-
3 didates to positions as covered CBP employees
4 if the Commissioner determines that there ex-
5 ists a severe shortage of highly qualified can-
6 didates because the positions are in a rural or
7 remote area.

8 “(B) PRIORITIZATION OF HIRING VET-
9 ERANS.—If the Commissioner uses the direct
10 hiring authority under subparagraph (A), the
11 Commissioner shall work to prioritize the hiring
12 of veterans by following the principles contained
13 in part 307 of title 5, Code of Federal Regula-
14 tions, or any successor regulation, regarding the
15 appointment of qualified veterans to the com-
16 petitive service.

17 “(2) RECRUITMENT AND RELOCATION BO-
18 NUSES.—The Commissioner may pay a bonus to an
19 individual if the Commissioner determines that—

20 “(A) the conditions under paragraphs (1)
21 and (2) of subsection (b) of section 5753 are
22 satisfied with respect to the individual (without
23 regard to any other provision of that section);
24 and

1 “(B) the position to which the individual is
 2 appointed or to which the individual moves or
 3 must relocate—

4 “(i) is a position as a covered CBP
 5 employee; and

6 “(ii) is in a rural or remote area.

7 “(3) RETENTION BONUSES.—The Commis-
 8 sioner may pay a retention bonus to a covered CBP
 9 employee if the Commissioner determines that—

10 “(A) the condition under subsection (b)(1)
 11 of section 5754 is satisfied (without regard to
 12 any other provision of that section);

13 “(B) the covered CBP employee is em-
 14 ployed in a rural or remote area; and

15 “(C) in the absence of a retention bonus,
 16 the covered CBP employee would be likely to
 17 leave—

18 “(i) the Federal service; or

19 “(ii) for a different position in the
 20 Federal service, including a position in an-
 21 other agency or component of the Depart-
 22 ment of Homeland Security.

23 “(4) OPM OVERSIGHT.—The Director—

24 “(A) may set aside a determination of the
 25 Commissioner under this subsection only if the

1 Director finds substantial evidence that the
2 Commissioner abused the discretion of the
3 Commissioner in making the determination; and

4 “(B) shall oversee the compliance of the
5 Commissioner with this subsection.

6 “(d) SPECIAL PAY AUTHORITY.—In addition to the
7 circumstances described in subsection (b) of section 5305,
8 the Director may establish special rates of pay in accord-
9 ance with that section if the Director finds that the re-
10 cruitment or retention efforts of the Commissioner with
11 respect to positions for covered CBP employees in one or
12 more areas or locations are, or are likely to become, sig-
13 nificantly handicapped because the positions are located
14 in a rural or remote area.

15 “(e) ALLOWANCE BASED ON DUTY AT REMOTE
16 WORKSITES.—

17 “(1) IN GENERAL.—Section 5942(a) shall be
18 applied, with respect to a covered CBP employee, as
19 if ‘of not to exceed \$10 a day’ and all that follows
20 were replaced with ‘for the cost of the commute at
21 a mileage reimbursement rate determined by the Di-
22 rector of the Office of Personnel Management’.

23 “(2) OPM DETERMINATION.—For purposes of
24 section 5942(a), as applied in accordance with para-
25 graph (1) of this subsection, the Director shall pub-

1 lish in the Federal Register a notice of a mileage re-
2 imbursement rate that is equivalent, to the max-
3 imum extent practicable, to the mileage reimburse-
4 ment rate for privately owned automobiles prescribed
5 by the Administrator of General Services under sec-
6 tion 5707(b)(2).

7 “(3) NON-COMMUTING FACTORS.—

8 “(A) IN GENERAL.—A covered CBP em-
9 ployee who is assigned to duty, except tem-
10 porary duty, at a location in a rural or remote
11 area is eligible for, in addition to pay otherwise
12 due the employee, an allowance in an amount
13 not to exceed the necessary amount per day, as
14 determined by the Commissioner in accordance
15 with subparagraph (C).

16 “(B) EXCEPTION.—The Commissioner
17 shall not be required to pay the allowance under
18 subparagraph (A) if the covered CBP employee
19 does not routinely operate the personal vehicle
20 of the employee for transportation between the
21 duty station and place of residence of the em-
22 ployee.

23 “(C) DETERMINATION OF NECESSARY
24 AMOUNT; OPM APPROVAL.—

1 “(i) DETERMINATION OF NECESSARY
2 AMOUNT.—In determining the necessary
3 amount of an allowance under subpara-
4 graph (A), the Commissioner shall consider
5 the factors considered by the Director
6 under regulations implementing section
7 5942.

8 “(ii) OPM APPROVAL.—The Commis-
9 sioner may not pay an allowance under
10 subparagraph (A) unless the Director ap-
11 proves the amount of the allowance.

12 “(f) IMPROVING CBP HIRING AND RETENTION.—

13 “(1) EDUCATION OF CBP HIRING OFFICIALS.—
14 Not later than 180 days after the date of enactment
15 of the U.S. Customs and Border Protection Hiring
16 and Retention Act of 2017, and in conjunction with
17 the Chief Human Capital Officer of the Department
18 of Homeland Security, the Commissioner shall de-
19 velop and implement a strategy to improve education
20 regarding hiring and human resources flexibilities
21 (including hiring and human resources flexibilities
22 for locations in rural or remote areas) for all em-
23 ployees, serving in agency headquarters or field of-
24 fices, who are involved in the recruitment, hiring, as-
25 sessment, or selection of candidates for locations in

1 a rural or remote area, as well as the retention of
2 current employees.

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

5 “(A) Developing or updating training and
6 educational materials on hiring and human re-
7 sources flexibilities for employees who are in-
8 volved in the recruitment, hiring, assessment, or
9 selection of candidates, as well as the retention
10 of current employees.

11 “(B) Regular training sessions for per-
12 sonnel who are critical to filling open positions
13 in rural or remote areas.

14 “(C) The development of pilot programs or
15 other programs, as appropriate, to address
16 identified hiring challenges in rural or remote
17 areas.

18 “(D) Developing and enhancing strategic
19 recruiting efforts through relationships with
20 local colleges and universities, veterans transi-
21 tion and employment centers, and job place-
22 ment program in regions that could assist in
23 filling positions in rural or remote areas.

24 “(E) Examination of existing agency pro-
25 grams on how to most effectively aid spouses

1 and families of individuals who are candidates
2 or new hires in a rural or remote area.

3 “(F) Feedback from individuals who are
4 candidates or new hires at locations in a rural
5 or remote area, including feedback on the qual-
6 ity of life in rural or remote areas for new hires
7 and their families.

8 “(G) Feedback from covered CBP employ-
9 ees, other than new hires, who are stationed at
10 locations in a rural or remote area, including
11 feedback on the quality of life in rural or re-
12 mote areas for those covered CBP employees
13 and their families.

14 “(H) Evaluation of Department of Home-
15 land Security internship programs and the use-
16 fulness of those programs in improving hiring
17 by the Commissioner in rural or remote areas.

18 “(3) EVALUATION.—

19 “(A) IN GENERAL.—Each year, the Com-
20 missioner shall—

21 “(i) evaluate, on an annual basis, the
22 extent to which the strategy developed and
23 implemented under paragraph (1) has im-
24 proved the hiring and retention ability of
25 the Commissioner; and

1 “(ii) make any appropriate updates to
2 the strategy under paragraph (1).

3 “(B) INFORMATION.—The evaluation con-
4 ducted under subparagraph (A) shall include—

5 “(i) any reduction in the time taken
6 by the Commissioner to fill mission-critical
7 positions in rural or remote areas;

8 “(ii) a general assessment of the im-
9 pact of the strategy implemented under
10 paragraph (1) on hiring challenges in rural
11 or remote areas; and

12 “(iii) other information the Commis-
13 sioner determines relevant.

14 “(g) LIMITATION ON USE OF POLYGRAPHS.—

15 “(1) IN GENERAL.—If an applicant for a posi-
16 tion in U.S. Customs and Border Protection does
17 not successfully complete a polygraph examination
18 required for appointment to that position, the Com-
19 missioner may not disclose the results of the poly-
20 graph examination to any other Federal agency or
21 non-Federal employer unless the applicant signs a
22 release granting the Commissioner permission to re-
23 lease all background investigation and adjudication
24 materials to another Federal agency or a non-Fed-
25 eral employer.

1 “(2) DISCLOSURES.—

2 “(A) IN GENERAL.—The Commissioner
3 shall provide each applicant for a position in
4 U.S. Customs and Border Protection who will
5 be required to successfully complete a polygraph
6 examination before appointment to the position
7 a list of actions or conduct of, or events relating
8 to, the applicant that could disqualify the appli-
9 cant from being appointed to the position,
10 which may include—

11 “(i) the criteria for making a suit-
12 ability determination under part 731 of
13 title 5, Code of Federal Regulations (or
14 any successor regulation); or

15 “(ii) the criteria for making an eligi-
16 bility determination under part 732 of title
17 5, Code of Federal Regulations (or any
18 successor regulation).

19 “(B) LIST REQUIREMENTS.—When pro-
20 viding the list required under subparagraph
21 (A), the Commissioner shall clearly inform all
22 applicants that the list may not constitute the
23 complete list of potential disqualifying actions,
24 conduct, or events.

1 “(3) USE OF POLYGRAPHS.—Paragraph (1)
2 shall not—

3 “(A) restrict the authority of the Commis-
4 sioner to report or refer an admission of crimi-
5 nal conduct or activity made by an applicant
6 during a polygraph examination to appropriate
7 law enforcement officials;

8 “(B) limit the authority of the Commis-
9 sioner to use the results of a polygraph exam-
10 ination administered as a requirement for ap-
11 pointment to a position in U.S. Customs and
12 Border Protection, in whole or in part, in deter-
13 mining whether to appoint the individual to the
14 position; or

15 “(C) limit the authority of another Federal
16 agency or another agency or component of the
17 Department of Homeland Security to use the
18 results of a polygraph examination administered
19 to an individual by a Federal agency other than
20 U.S. Customs and Border Protection, in whole
21 or in part, in determining whether to appoint
22 the individual to a position in the agency or
23 component.

24 “(h) RULE OF CONSTRUCTION.—Nothing in this sec-
25 tion shall be construed to exempt the Commissioner or the

1 Director from the applicability of the merit system prin-
2 ciples under section 2301.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—

4 The table of sections for chapter 97 of title 5, United
5 States Code, is amended by adding at the end the fol-
6 lowing:

“9702. U.S. Customs and Border Protection employment authorities.”.

