



Conversion from the National Security Personnel System to Other Pay Schedules: Issues for Congress

Wendy R. Ginsberg

Analyst in Government Organization and Management

July 15, 2010

Congressional Research Service

7-5700

www.crs.gov

R41321

Summary

Most federal employees (59.1%) are paid on the General Schedule (GS), a pay scale that consists of 15 pay grades in which an employee's pay increases are to be based on performance and length of service. Some Members of Congress, citizens, and public administration scholars have argued that federal employee pay advancement should be more closely linked to job performance than it currently is on the GS. With these concerns in mind and with explicit congressional authorization, the Department of Defense (DOD) began developing the National Security Personnel System (NSPS) in 2003 as a unique pay scale attempting to more closely link employee pay to job performance.

NSPS was beset by criticisms since it went into effect in 2006. The system faced legal and political challenges from unions and employees who claimed it was inconsistently applied and caused undeserved pay inequities, among other concerns. On October 7, 2009, House and Senate conferees reported a version of the National Defense Authorization Act for Fiscal Year 2010 that included language to terminate NSPS. On October 8, 2009, the House agreed to the conference report. The Senate agreed to the conference report on October 22, 2009. On October 28, 2009, the President signed the bill into law (P.L. 111-84). DOD must now return employees currently enrolled in NSPS to the GS or to the pay system that previously applied to them or their position. If the employee's position did not exist prior to NSPS or if the previous pay scale was abolished during NSPS's lifetime, DOD must determine an appropriate pay scale for the employee. The return to the GS or other pay system must be completed by January 1, 2012, pursuant to the law.

NSPS was initially intended to cover all DOD employees, but had a total final enrollment of roughly 227,000 DOD employees or 31.7% of the department's 717,000-person workforce. DOD has announced that it anticipates that approximately 75% of employees in NSPS will be placed in the GS by September 30, 2010. The remaining 25% of employees—most of whom would be placed in pay scales other than the GS—may take longer to transition out of NSPS.

P.L. 111-84 included language preventing any employee from suffering a loss or decrease in pay as a result of the elimination of NSPS. Pursuant to statute, some transitioning employees have been placed on "retained pay," which allows them to maintain their NSPS rate of pay instead of transitioning to the GS pay rate assigned to their job's grade. In such cases, the GS rate of pay assigned to the employee's position may not reach the pay level the employee achieved under NSPS. Retained pay, pursuant to statute, requires that an employee receive half of the annual pay adjustment given to employees who are at the maximum payable rate for their GS grade (step 10). Some NSPS employees may argue that the cap on their annual pay increase amounts to a loss in pay, and, therefore, violates P.L. 111-84.

This report focuses on the transition of employees from NSPS to non-NSPS pay systems. It does not address the operation of NSPS or other pay schedules. The report discusses how the transition is scheduled to occur and analyzes congressional options for oversight or legislative action.

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Introduction

Most federal employees (59.1%) are paid on the General Schedule (GS), a pay scale that consists of 15 pay grades in which an employee's pay increases are to be based on job performance and length of service.¹ Some Members of Congress, citizens, and public administration scholars have argued that federal employee pay advancement should be more closely linked to job performance. With explicit congressional authorization,² the Department of Defense (DOD) developed the National Security Personnel System (NSPS) as a unique personnel and pay system attempting to more closely link employee pay to job performance.

NSPS was beset by criticisms since it went into effect in 2006. The system faced legal and political challenges from unions and employees who claimed it was inconsistently applied and caused undeserved pay inequities, among other concerns.³ On October 7, 2009, House and Senate conferees reported a version of the National Defense Authorization Bill for Fiscal Year 2010 that included language to terminate NSPS. On October 8, 2009, the House agreed to the conference report. The Senate agreed to the conference report on October 22, 2009. On October 28, 2009, the President signed the bill into law (P.L. 111-84). DOD must now return employees currently enrolled in NSPS to the GS or to the pay system in which they were previously enrolled. The return to the GS or other pay system must be completed by January 1, 2012, pursuant to the law.

NSPS was initially intended to cover all DOD employees, but had a final total enrollment of roughly 227,000 DOD employees or 31.7% of the department's 717,000-person workforce. DOD anticipates that 75% of employees in NSPS will be placed in the GS by September 30, 2010.⁴ The remaining 25% of employees—most of whom would be placed in pay scales other than the GS—may take longer to transition out of NSPS. Every U.S. state has employees who were or are on NSPS. According to DOD, Virginia and California had the largest number of NSPS employees with 38,200 and 22,100, respectively.⁵ Vermont had the fewest employees with fewer than 20. **Figure A-1**, in the Appendix, includes a U.S. map with NSPS employee counts for each state.

¹ U.S. Office of Personnel Management, Central Personnel Data File, <http://www.fedscope.opm.gov/>. The employee count is from December 2009. The Central Personnel Data File does not include employee counts from several federal agencies, including the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the Postal Rate Commission, and the U.S. Postal Service. The employee count does not include Senior Executive Service employees, administrative judges, or other federal employees who are not paid on the General Schedule. Legislative branch coverage is limited to the Government Printing Office, U.S. Tax Court, and selected commissions. The judicial branch is entirely excluded.

² The legislation that created NSPS is P.L. 108-136, The National Defense Authorization Act for Fiscal Year 2004.

³ For more information on NSPS and its history and operation, see CRS Report RL34673, *Pay-for-Performance: Lessons from the National Security Personnel System*, by Wendy R. Ginsberg

⁴ Testimony of John H. James, Jr., U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *The National Security Personnel System and Performance Management in the Federal Government*, 111th Cong., 2nd sess., June 9, 2010, http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=92db1eca-3b5e-4774-b480-b2af3b83573f.

⁵ Information provided to the author electronically on March 23, 2010. The March 23, 2010, employee count marks peak NSPS enrollment, demonstrating the highest NSPS employee tallies in each state. CRS selected this employee count to ensure that the data provides the largest possible number of employees that will be affected by a transition out of NSPS.

P.L. 111-84 included language preventing any employee from suffering a loss or decrease in pay as a result of the elimination of NSPS. Pursuant to statute (5 U.S.C. § 5363), some transitioning employees have been placed on “retained pay,” which allows them to maintain their NSPS rate of pay, but requires that they receive half of the annual pay adjustment distributed to employees on the GS who are not receiving the retained rate.⁶ Some GS employees may argue that the NSPS employees who were in NSPS and who collect a retained pay rate receive a higher pay rate for similar work than does an employee who remained in the GS. Some NSPS employees, however, may argue that the cap on their annual pay increase amounts to a loss in pay.

This report focuses on the transition of employees from NSPS to non-NSPS pay scales. It does not address the operation of NSPS or other pay schedules. The report discusses how the transition is scheduled to occur and analyzes congressional options for oversight or legislative action.

Transition Timing

P.L. 111-84 required DOD to begin transitioning NSPS employees to non-NSPS pay scales six months after enactment of the law, which occurred on October 28, 2009. DOD was given until January 1, 2012, to convert all employees in NSPS to the pay system in which they were previously enrolled. If an employee was previously enrolled in a system that no longer exists, if his or her job and description did not exist prior to enrollment in NSPS, or if a new pay system is to be created for an employee to enter into, DOD is required by statute to determine the employee’s pay system and transition him or her into that pay system by the January 1, 2012, deadline.⁷ Employees not entering the GS are expected to be transitioned to their designated pay systems between spring 2011 and January 1, 2012.⁸

According to the DOD NSPS Transition Office, which is the office in charge of implementing the elimination of NSPS, approximately 75% of the employees in the NSPS system will either return to or enter the General Schedule. John H. James, Jr., director of the transition office, said, at a June 9, 2010, Senate hearing, that employees entering the GS would be transitioned by the end of September 2010.⁹ Another 21% of employees will be returned to or placed in other systems, including some pay systems that have not yet been created. In addition, 4% of employees will have their jobs eliminated as a result of closing military bases pursuant to the 2005 Defense Base Closure and Realignment Commission (BRAC) findings.

As noted above, some NSPS employees will be moved into personnel systems that have not yet been established. P.L. 111-84 §1105 authorized DOD to create demonstration pay systems at

⁶ Federal white-collar employees, including those paid under the General Schedule, usually receive an annual pay adjustment. Typically, this pay adjustment is given to employees in January. For more information on annual pay increases see CRS Report RL34463, *Federal White-Collar Pay: FY2009 and FY2010 Salary Adjustments*, by Barbara L. Schwemle.

⁷ Pursuant to P.L. 111-84, an employee not returning to the pay system that “last applied” to either the employee in question or to the position occupied by that employee, is to return to a pay system “that would have applied if the National Security Personnel System had never been established.” 123 Stat. 2498.

⁸ Testimony of John H. James, Jr., U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *The National Security Personnel System and Performance Management in the Federal Government*, 111th Cong., 2nd sess., June 9, 2010.

⁹ *Ibid.*

certain defense-related laboratories.¹⁰ Some of the federal employees at certain laboratories were in NSPS. By the end of April 2011, DOD must create new personnel systems at these laboratories and move eligible employees from NSPS into these personnel systems.

According to DOD, 60,930 employees have transitioned from NSPS to the GS as of June 17, 2010.¹¹

Linking NSPS and Different Pay Rates

Most positions in the NSPS system were formerly under GS position classification and grade and step parameters. An employee who occupies a position that previously had a GS grade and step assignment is to be moved to the GS and assume the grade and step that is closest to his or her current pay rate—ensuring that the employee’s level of pay increases to meet the GS scale. Pursuant to P.L. 111-84, an employee’s level of pay may not be reduced as a result of his or her transition from NSPS. For example, if the closest GS pay level is lower than the employee’s NSPS rate of pay, the employee would be assigned to the pay step above the lower amount.

In some cases, employees in NSPS who were or will be transitioned to the GS or a similar pay scale may have been collecting pay rates higher than the position’s GS grade classification permits. Pursuant to P.L. 111-84, an employee who meets this criteria will continue to receive his or her NSPS rate of pay under pay retention statutes once he or she converts to the GS system. The employee’s pay rate cannot be used as a factor in performance evaluation.

For example, if an employee’s position is evaluated and classified as a GS-13, the highest pay level (step 10) for such an employee in 2010 is \$93,175.¹² A supervisory employee in NSPS was not capped at this pay rate, and could have been collecting a salary of \$95,000 if he or she received positive performance evaluations. Pursuant to statute, this employee would continue to receive a salary of \$95,000 after transitioning from NSPS and being assigned to the GS.¹³ The employee’s manager would evaluate the employee’s job duties and responsibilities, however, based on the GS grade assigned to the position—without regard for the employee’s pay rate. The

¹⁰ Pursuant to P.L. 111-84, the laboratories included in this pay system demonstration project include the following: the Aviation and Missile Research Development and Engineering Center; the Army Research Laboratory; the Medical Research and Materiel Command; the Engineer Research and Development Command; the Communications-Electronics Command; the Soldier and Biological Chemical Command; the Naval Sea Systems Command Centers; the Naval Research Laboratory; the Office of Naval Research; the Air Force Research Laboratory; the Tank and Automotive Research Development and Engineering Center; the Armament Research Development and Engineering Center; the Naval Air Warfare Center, Weapons Division; the Naval Air Warfare Center, Aircraft Division; the Space and Naval Warfare Systems Center, Pacific; the Space and Naval Warfare Systems Center, Atlantic; and the laboratories within the Army Research Development and Engineering Command.

¹¹ U.S. Department of Defense, “NSPS Transition: NSPS to GS Transition Summary,” <http://www.cpms.osd.mil/nsps/docs/TransitionProgressStatus06172010.pdf>.

¹² The \$93,175 figure is based only on GS basic pay rate for a GS-13 in 2010 and does not include any supplemental pay, including locality pay, danger pay, or incentive awards.

¹³ An employee who transitions from NSPS will be able to keep his or her entire NSPS rate of pay, even if it exceeds 150% of the highest step of the grade to which his or her position is assigned, which would otherwise be prohibited pursuant to 5 CFR §§536.304(b)(3); 536.306. An employee is also permitted to maintain a pay rate that is above Executive Level IV pay, which would be prohibited in the GS, pursuant to 5 U.S.C. §5305(a) and 5 CFR §530.304(a). An employee’s NSPS pay rate, however, cannot be greater than 5% above Executive Level IV pay, the maximum under the NSPS pay banding system.

continued collection of the NSPS pay rate is defined in statute as “pay retention,” pursuant to 5 U.S.C. §5363. The statute requires agencies to provide employees on pay retention with half of the annual pay increase given to employees at the maximum payable rate for the GS grade (step 10).¹⁴

If Congress enacted legislation to increase federal employee annual pay rates in 2011 by 1.5%, an employee who receives a retained pay rate would collect a pay increase of 0.75%. A GS 13, step 10 employee without retained pay would receive a pay rate of \$94,573 (\$93,175 * 1.015) in 2011, and the employee with the retained rate of pay would receive \$95,713 (\$95,000 * 1.0075) in 2011. The retained rate of pay would continue until the employee’s GS rate of pay eclipsed his or her retained NSPS rate of pay.¹⁵ The length of time it may take for the GS rate to be greater than the NSPS rate would depend on a number of variables, including the level of pay increases enacted by Congress in future years as well as the employee’s grade and step.

Of the 60,930 former NSPS employees who have already been placed on the GS, approximately 72% (43,897) received a salary increase because of the transition.¹⁶ The average increase in salary was \$1,363 per year.¹⁷ Some 8% (4,940) of those who transitioned to the GS kept a salary identical to their NSPS pay rate, while 20% (12,093) of those who transitioned are receiving a retained pay rate.¹⁸

NSPS employees placed in a new pay system have opportunities to grieve certain aspects of their new assignments. A DOD employee may contact his or her human resources office to find out more information about filing an administrative grievance or to seek alternative dispute resolution.¹⁹ Additionally, more than 913 NSPS employees are in a bargaining unit and may contact their local union representatives if they wish to pursue a negotiated grievance procedure.²⁰

An employee may also appeal his or her case to the Merit Systems Protection Board (MSPB), which is an independent, quasi-judicial agency with jurisdiction over appeals claiming a reduction in pay, pursuant to 5 C.F.R. §§752 and 1201. An employee appealing to MSPB would have to establish that the transition from NSPS led to a reduction in pay.

An employee moving to the GS who disagrees with his or her position’s classification may challenge it pursuant to the process outlined in 5 C.F.R. §511.601-606.

¹⁴ 5 U.S.C. §5363(2)(B).

¹⁵ Pursuant to 5 U.S.C. §5363, retained pay rates do not expire (unlike a retained grade, pursuant to 5 U.S.C. §5362, which expire after two years). More information on grade retention, which applies to certain employees who are affected by a reduction in force (RIF) or grade reclassification, is available on OPM’s website, http://www.opm.gov/oca/pay/HTML/grade_retention.asp.

¹⁶ U.S. Department of Defense, “NSPS Transition: NSPS to GS Transition Summary,” <http://www.cpms.osd.mil/nsps/docs/TransitionProgressStatus06172010.pdf>.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Alternative dispute resolution is available pursuant to Department of Defense Directive 5145.5, April 22, 1996, <http://www.adr.af.mil/shared/media/document/AFD-070924-110.pdf>.

²⁰ No bargaining unit employees were placed in the NSPS system. During NSPS’s lifetime, however, some employees on the NSPS pay system formed bargaining units. Twenty-seven bargaining units were formed during NSPS’s lifetime, covering 913 NSPS employees. See Testimony of John H. James, Jr., U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *The National Security Personnel System and Performance Management in the Federal Government*, 111th Cong., 2nd sess., June 9, 2010, p. 12.

Policy Concerns

Employees who were covered by NSPS who are then placed on pay retention when moved to a different pay schedule may suggest that they are experiencing a loss in pay because they are not receiving the full annual pay increase that is provided to other federal employees. As explained earlier in this report, an employee who is moved to the GS but who receives a retained pay rate keeps his or her NSPS pay rate—if the NSPS pay rate is above the GS grade classification pay level. The employee, however, receives half of the annual pay increase given to GS employees until the pay rate he or she can receive in the GS eclipses his or her retained NSPS pay rate. The employees on a retained rate were likely high-performing employees, which allowed them to achieve higher pay rates in NSPS. Once removed from NSPS, these employees can no longer receive annual NSPS performance-based pay increases. A retained pay rate, however, allows the employee to collect a higher take-home pay (pay after taxes) than a similar employee in the GS system. The employee on retained pay also qualifies for larger pension benefits than could have been accrued in the GS.²¹

On the other hand, those who disagree with the employees on retained pay may suggest that these employees are receiving a higher rate of pay than would otherwise be permitted on the GS. The employees on retained pay, in fact, may receive pay rates much higher than employees who have the same GS classification and who perform at levels that are quite similar. An employee who remained on the GS, and who never entered the NSPS, did not have the opportunity to increase his or her pay based largely on performance and has no access to a retained pay rate.

Options for Congress

When Congress eliminated NSPS in the National Defense Authorization Act for 2010 (P.L. 111-84), it required DOD to return all employees to the pay system in which they were previously enrolled. Congress also required that no employee who was in NSPS experience a loss or reduction in pay as a result of being removed from NSPS and placed in a different pay scale.

Some employees in NSPS, however, occupy positions that did not exist prior to NSPS's creation, and they cannot, therefore, be returned to a pre-existing pay scale. Other employees performed their jobs at such high levels that they achieved pay rates that are not aligned with rates on their non-NSPS pay scale. Still other employees cannot be returned to a pre-existing pay scale because the pay scale was eliminated while NSPS was active. DOD has been examining ways to place employees who fit into these categories into appropriate pay schedules for their positions, including a solution that involves developing a new pay system. Congress has a variety of options to address these pay and personnel issues, including passing a law that would require all employees to receive the full annual pay increase, modifying the GS to better coincide with NSPS pay rates, or permitting DOD to determine the most effective course of action.

²¹ A federal employee's retirement pay is calculated by first determining the employee's "highest average annual pay produced by the employee's basic pay rates during any three consecutive years of service." For most federal employees, the most recent three years of service will produce his or her "high-3" average. Within-grade pay increases, quality-step increases, and locality pay are included when calculating an employee's "high-3." See CRS Report 98-972, *Federal Employees' Retirement System: Summary of Recent Trends*, by Patrick Purcell.

Congress required DOD to determine where to place NSPS employees who are or were to convert out of the NSPS. DOD must place employees in a variety of pay systems while adhering to all statutory requirements—both requirements in P.L. 111-84 and those that existed prior to the law's enactment. DOD has placed certain employees on retained pay. This policy has led to complaints from some employees who claim that retained pay, in effect, amounts to a loss in pay. Others, however, may claim that retained pay allows certain employees to maintain a higher rate of pay than an employee who is not eligible for retained pay, even though they perform the same work at similar performance levels. Congress may determine that DOD's policies follow the requirements of both P.L. 111-84 and Title 5 of the U.S. Code, which governs most of the civil service. Conversely, Congress may decide that allocating half of the annual pay increase to those on a retained pay rate violates the spirit of the language in P.L. 111-84, which states that employees removed from NSPS should not suffer a loss in pay as a result of the transition to a non-NSPS pay scale. If Congress determines that the reduced pay increase does violate the law, it could choose to enact legislation that ensures employees who convert to the GS or another pay system and who are on retained pay receive the full annual pay increase. Such legislation, however, would likely cause the retained pay rates to remain above GS pay rates in perpetuity. GS employees who performed similar work at similar performance levels may never receive the same pay as an employee who receives both the retained pay rate and a full annual pay increase.

A policy option that could offset concerns about loss of pay exists. Employees who are on retained pay could also receive a performance-based cash award to supplement their pay to account for any pay they will not receive as a result of the cap on their annual pay adjustment. Pursuant to 5 U.S.C. §4505a, a federal employee who receives a performance rating of fully successful or above may receive a one-time cash award in an amount deemed appropriate by the head of the agency. The cash award can be up to \$10,000 without OPM approval, or up to \$25,000 with OPM approval. DOD could use this authority to pay federal employees on retained pay the other half of the annual pay adjustment. For instance, in the example made earlier of the annual pay adjustment for GS employees in 2011 of 1.5%, where the retained pay employee would receive a 0.75% annual pay adjustment, DOD could use the authority in 5 U.S.C. §4505a. The award to retained-pay employees with fully successful performance ratings could be a one-time, lump sum bonus equal in value to the other half of the 1.5% pay increase given to GS employees: the additional 0.75% of the employee's basic pay rate. Pursuant to statute, the rating-based award could not be given to an employee with performance rating lower than fully successful. In addition, the award would not be considered part of an employee's basic pay and, therefore, would not count toward the employees annuity.

DOD could provide this cash award until the GS rate of basic pay for the employee's position eclipsed the retained NSPS pay rate. If DOD chose to use the performance-based cash award, the agency may need additional appropriation from Congress to fully fund it. Additionally, employees in the GS who perform similar work at similar performance levels will not receive the same pay for their work as the employee on the retained rate of pay.

Congress could also choose to modify the GS to better coincide with the pay rates on NSPS. Congress could enact legislation that adds grades or steps to the GS, allowing for NSPS pay rates to be incorporated in the personnel system and also for continued movement up the personnel system's pay scale for all GS employees. Such action, however, could complicate GS operations and policies by requiring job reclassifications and new regulations to govern the additional grades and steps.

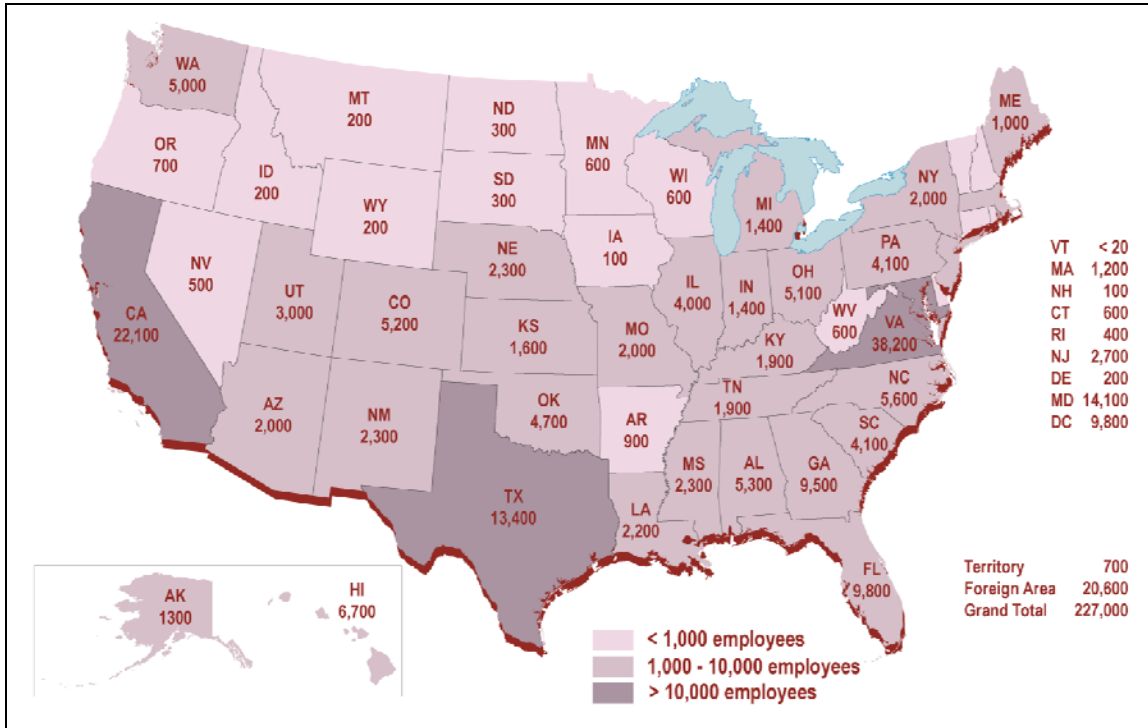
P.L. 111-84 also required DOD to create a new performance management system and hiring process.²² Congress may choose to use its oversight authority to ensure that all parties that may be affected by the establishment of such new system and process are afforded an opportunity to offer suggestions and present concerns prior to implementation.

²² P.L. 111-84 §113.

Appendix.

Figure A-I. The Number and Location of Employees in the National Security Personnel System

By State, Territory, and Foreign Area



Source: U.S. Department of Defense

Notes: Information provided electronically to the author on March 23, 2010. Employee counts are rounded to the nearest hundred except for Vermont, which employs fewer than 20 employees. The March 23, 2010, employee count marks peak NSPS enrollment, demonstrating the highest NSPS employee tallies in each state. CRS selected this employee count to account for the largest possible number of employees that will be affected by a transition out of NSPS.

Author Contact Information

Wendy R. Ginsberg
 Analyst in Government Organization and
 Management
 wginsberg@crs.loc.gov, 7-3933

Acknowledgments

Pat McClaughry, senior graphics specialist, created the report's graphic.