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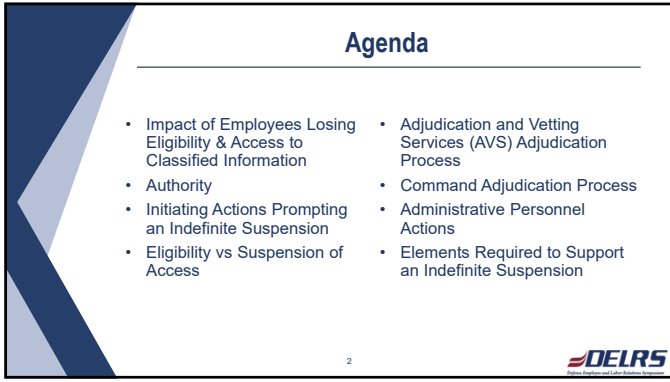
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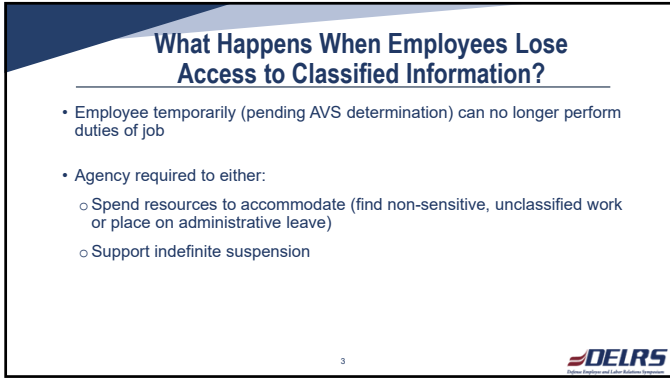
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### What Happens When Employees Lose Eligibility to Hold a Security Clearance?

- Employee can no longer perform duties of job
- Agency may either:
  - Spend resources to accommodate (find non-sensitive position to reassign)
  - Support removal based on failure to meet a condition of employment



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### Authority and Definition

- Regulations (authority) allow agency to take administrative action including indefinite suspension.
- Indefinite suspension means the placing of an employee in a temporary status without duties and pay pending:
  - Investigation,
  - Inquiry, or,
  - Further agency action.

5 CFR Part 752  
Adverse Actions  


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### Authority and Definition (continued)

- The indefinite suspension
  - Continues for an indeterminate period of time, and
  - Ends with the occurrence of the pending conditions set forth in the notice of action
    - which may include the completion of any subsequent administrative action.
  - DoD policy stipulates the security clearance adjudicative processes

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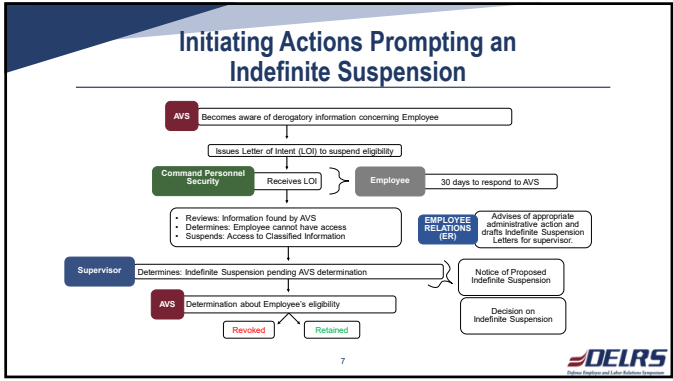
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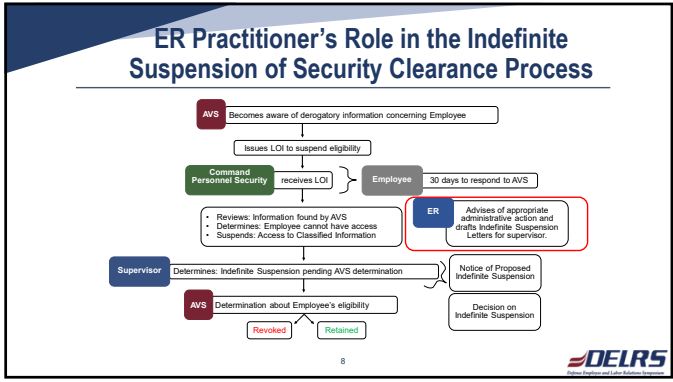
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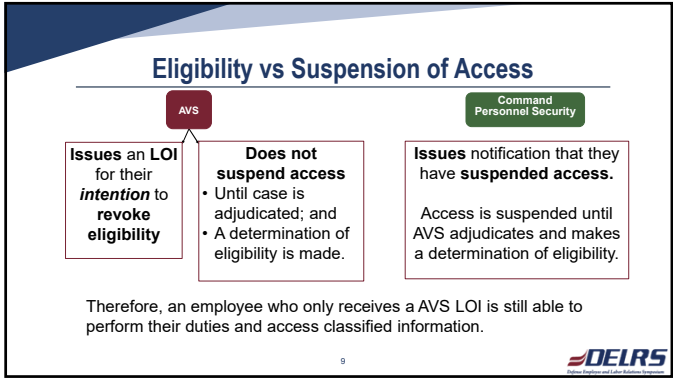
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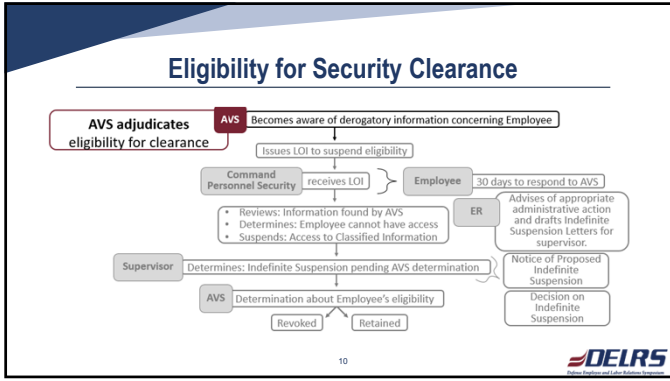
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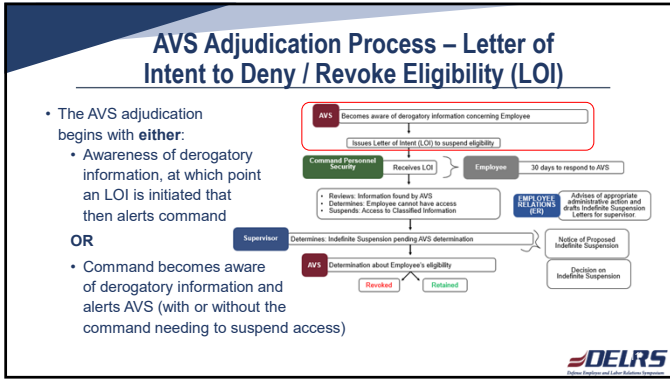
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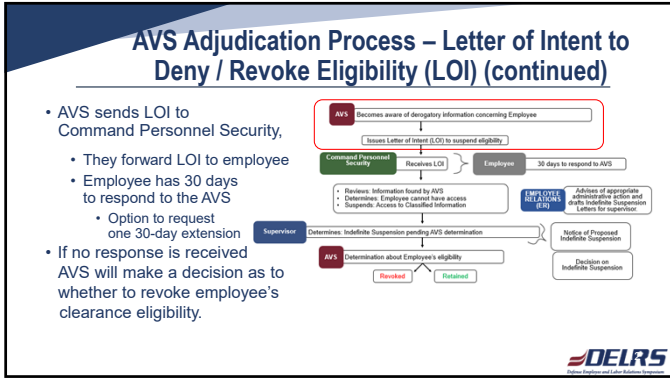
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### AVS Adjudication Process – Letter of Denial / Revocation of Eligibility (LOD/LOR)

- If AVS decision is unfavorable, AVS issues a LOD or LOR to Command Personnel Security
  - Forwards to employee
- If individual has not had access suspended by local command pending AVS adjudication, Command will ensure individual no longer occupies sensitive position; has no further access to classified information
- If employee responded to LOI, they will have opportunity to appeal

**DELRS**  
Defense Enterprise and Labor Relations System

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### AVS Adjudication Process – PSAB/DOHA Appeal

Appeal made to:

- Personnel Security Appeals Board (PSAB) or
- Defense Office of Hearings and Appeals (DOHA)

<p><b><u>In-person response: DOHA</u></b></p> <ul style="list-style-type: none"> <li>Handles appeal</li> <li>Provides recommendation to PSAB</li> </ul>	<p><b><u>Written response: PSAB</u></b></p> <ul style="list-style-type: none"> <li>Reviews</li> <li>Makes a determination</li> </ul>
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### AVS Adjudication Process – PSAB/DOHA Appeal (continued)

Employee will forfeit their right to appeal the AVS decision if:

- Employee chooses not to respond to the LOI, or
- Response is untimely without approved extension.

PSAB will make final determination regarding eligibility.  
This decision is final and may not be appealed.

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### AVS Adjudication Process – PSAB/DOHA Appeal (continued)

- A **favorable** decision is an event subsequent (trigger) in the indefinite suspension, so the employee's indefinite suspension ends and their access to classified information and assignment to sensitive duties is restored.



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### AVS Adjudication Process – PSAB/DOHA Appeal (continued)

- If unfavorable decision is made,
  - the eligibility is revoked
  - the command is notified.
- The employee is therefore unable to perform the duties of their job and,
- Removal action is taken to end the indefinite suspension.



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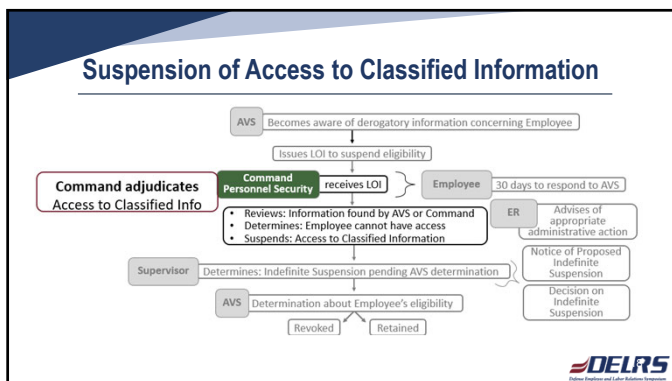
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### Command Adjudication Process – Letter of Intent to Suspend Access (LOI)

Command Adjudication begins with Personnel Security receiving either: AVS LOI or Derogatory Information

AVS LOI does not trigger loss of access; therefore, command must:

- Review AVS LOI
- Determine whether risks to national security warrant suspension of access to classified information and assignment to sensitive duties.

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### Command Adjudication Process – Letter of Intent to Suspend Access (LOI) (continued)

When there is no AVS LOI, command must:

- Review derogatory information received by its own means
- Determine whether risks to national security warrant suspension of access to classified information and assignment to sensitive duties.

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### Command Adjudication Process – Letter of Intent to Suspend Access (LOI) (continued)

If command determines a need to suspend access, they MUST follow their own personnel security program policies and processes.

- If command policy requires an LOI and reply period (not required by DoD), command
  - Must issue an LOI,
  - Allow the employee an opportunity to respond, and then
  - Render decision as to suspension of
    - Local access to classified information and assignment to sensitive duties.

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**Command Adjudication Process –  
Letter of Intent to Suspend Access (LOI) (continued)**

- If command policy does not require issuance of an LOI, command will provide employee with a written letter of notification advising of their decision to suspend access (LON).
- Process entails command security office using as basis for their own LOI/LON for suspension of access:
  - Statement of reasons from the AVS LOI
  - Any other information they have available as to the reasons for suspension



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**Command Adjudication Process –  
Letter of Notification (LON)**

**If Command determination is favorable (Retain Access)**

- If command does not determine AVS LOI/derogatory information warrants suspension of access, the employee will be notified and retain authorization to access classified information and assignment to sensitive duties.
- In such situations, supervisory official choices include:
  - Allow employee to continue to work as normal with access to classified information and assignment to sensitive duties. (Most exercised option.)
  - Temporarily reassign to non-sensitive position/duties pending outcome of the AVS adjudication of their eligibility.



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**Command Adjudication Process –  
Letter of Notification (LON) (continued)**

**If Command determination is unfavorable (Suspend Access)**

- Employee is issued a LON advising of determination to suspend access to classified information and assignment to sensitive duties
- Local access will be suspended in the personnel security system, triggering review of eligibility by AVS (if AVS LOI was issued, the review is already in progress)
  - Local access may not be restored until eligibility is adjudicated
  - AVS will be notified and begin their adjudication upon access being suspended
- Command will make determination whether or not to indefinitely suspend the individual pending adjudication, modify the duties, reassign, or place them on administrative leave.



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### Administrative Actions – Reassignment / Modification of Duties

- The command may choose to **temporarily reassign the individual or modify their duties** so that the loss of security access or the directive to have no access is upheld, while still allowing the employee to remain working.
  - Unless your command has a policy requiring these actions, there is no requirement for an employee who losses access to be afforded these opportunities. The choice is at management's discretion if not directed by policy.
  - If management decides to reassign or modify duties, an indefinite suspension is not appropriate.
  - A command's decision to reassign or modify duties for a period of time does not then preclude it from taking an indefinite suspension action.



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### Administrative Actions – Administrative Leave

Employee may only be placed on investigative/notice leave if command has:

<b>1. Determined that continued presence of employee in workplace may:</b> <ul style="list-style-type: none"> <li>• Pose threat to themselves or others</li> <li>• Result in destruction of evidence relevant to investigation;</li> <li>• Result in loss of or damage to government property;</li> <li>• Otherwise jeopardize legitimate government interests.</li> </ul>	<b>2. Considered:</b> <ul style="list-style-type: none"> <li>• Assigning employee to duties in which they no longer pose threat described above.</li> <li>• Allowing employee to take leave for which they are eligible</li> <li>• Carrying employee in absence without leave status if they are absent from duty without approved leave.</li> <li>• Curtailing notice period if there is reasonable cause to believe employee has committed crime for which sentence of imprisonment may be imposed.</li> </ul>	<b>3. And</b> determined that none of the above options is appropriate.
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### Administrative Actions – Removal

- When an employee loses their eligibility for a security clearance by way of a notification of revocation or denial of eligibility **AND they have exhausted their appeal rights** (either they appealed or the time period in which to have done so has expired), the command will move to propose removal based on the fact that the employee occupies a position that requires eligibility, and the employee is no longer eligible for a security clearance.
- When appropriate, an employee may be removed for the underlying merits of the derogatory information. It is not appropriate to use the security adjudication process to remove an individual if the underlying info supports a removal action.



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### Administrative Actions – Indefinite Suspension

- Management has the **discretion** to indefinitely suspend the employee for their inability to perform their job duties due to the suspension of access when:
  - An employee's access to classified information and assignment to sensitive duties **has been suspended**,
  - The employee's **position requires** access to classified information and assignment to sensitive duties, **AND**
  - The command **does not have a policy** requiring reassignment or modification of job duties.



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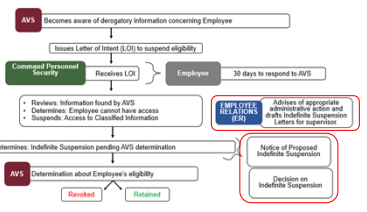
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### Indefinite Suspension Letters

Once Command Personnel Security has suspended access and the supervisor has decided to Indefinitely Suspend, ER provides assistance in drafting letters:

- Notice of Proposed Indefinite Suspension
- Decision on Indefinite Suspension



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### Required Elements

Proposed Indefinite Suspension letter must include the required elements; otherwise, action is not legally sufficient

#### Required Elements

1. Employee's position requires a security clearance/access
2. The employee's security clearance/access is suspended, revoked or denied



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**Required Elements (continued)**

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3. Action is in accordance with procedural protections of **5 USC 7513** and constitutional due process which are:

- a. Action is taken for such cause as to promote efficiency of the service;
- b. 30 day advance written notice with reasons for action
- c. Opportunity to reply
- d. Appeal rights to Merit Systems Protection Board (MSPB)
- e. Copies of materials relied upon
- f. Deciding official with authority to change the outcome of the adverse action.



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**Required Elements (continued)**

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4. Conditions Subsequent (what conditions lead to the end of the action)

5. Procedural protections of **5 USC 7701(c)2(A)**

- a. Board has authority to review the action to ensure the Agency follows its own policies and regulations.
  - i. Policy or lack thereof regarding reassignment
  - ii. Command Security Office actions align with policy requirements
  - iii. DCSAAVS actions align with policy requirements



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**1. Employee's Position Requires Security Clearance/Access**

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- Indefinite suspension will reference position description (PD) and sensitivity determination noted on the PD.
- If security clearance/access is required for position, it does not matter if individual handles classified information or does not:
  - Discretionary – in such cases command may be more likely to choose administrative action of modify or reassign
  - Position requires security clearance/access, and if access is suspended, it is appropriate to place employee on indefinite suspension regardless of whether they handle the information currently



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**2. Employee's security clearance/access is suspended, revoked or denied**

- Indefinite suspension will reference command LOI and/or LON regarding suspension of access to classified information and sensitive duties.
- Indefinite suspension will reference AVS LOI, if one was issued.



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**3. Action in Accordance with Procedural Protections of 5 USC 7513 & Due Process**

- 30 day advance written notice with reasons for action
- 5 USC 7513 requires agencies to give employee written notice stating specific reasons for suspension of security clearance when that is reason for suspending employee pending decision on security clearance.
- Notice must provide employee with adequate opportunity to make meaningful reply to Agency before being suspended.

**AVS issued LOI:** Statement of Reasons (SOR) provided to the employee may be used to satisfy this requirement; Ensure proof of the employee receiving the SOR.

**Command issued LOI or LON:** Ensure sufficient notice was provided of reasons for suspension of access; the decision was issued prior to proceeding with indefinite suspension action.



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**3. Action in Accordance with Procedural Protections of 5 USC 7513 & Due Process (continued)**

- Deciding official with authority to change the outcome of the adverse action
- The deciding official must possess the authority (but is not required) to either:
  - Reinstatement employee's access to classified information;
  - Reassign them to position not requiring access to classified information; or
  - Place individual on administrative leave.



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**3. Action in Accordance with Procedural Protections of 5 USC 7513 & Due Process (continued)**

- MSPB Appeal Rights
  - Employees must be afforded their notice of appeal rights
  - MSPB may not require a Douglas Factor Analysis for Indefinite Suspension Security Clearance cases (Ryan v. DHS, US Court of Appeals, Federal Circuit).
  - Uniformed Services Employment and Reemployment Rights Act (USERRA) does not authorize MSPB to review security clearance determinations



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**3. Action in Accordance with Procedural Protections of 5 USC 7513 & Due Process (continued)**

- MSPB Appeal Rights (continued)
  - Withholding of a clearance is not a personnel action and therefore the substance of an underlying decision is not reviewable by MSPB. (5 USC 2302(a)(2)(A)) and Dept of Navy v. Egan, 484 U.S. 518,520(1988))
  - Will not look at **Statement of Reasons** to determine whether it was appropriate or not to support loss of security clearance
  - Does not have jurisdiction to review mitigating factors related to the reasons for the loss of security access that employee may have provided in reply to LOI



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**4. Conditions Subsequent**

- Conditions Required to End the Suspension
  - 5 CFR 752.402 requires suspension notice provide pending conditions that must occur in order for indefinite suspension to end
    - Generally, conditions ending the suspension are: volunteer resignation, a favorable AVS determination of eligibility, administrative action resulting in removal.
    - Including language to allow for the continuation of the suspension through the effecting of any subsequent removal action, in the case of an unfavorable AVS determination, allows the command to avoid placing the individual on paid administrative leave during the required 30-day notice period of the removal.
    - The indefinite suspension does not end based on the resolution of the underlying reasons for the suspension of access because the action is based on the suspension of the security clearance not the underlying reasons. (Ryan v. DHS)



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**5. Procedural Protections of 5 USC 7701(c)2(A)**

- MSPB has authority to review the action to ensure the agency follows its own policies and regulations.
  - Address command's policy or lack thereof regarding reassignment/transfer
    - Absent agency policy or regulation requiring reassignment of employees who lose security clearances to other vacant positions, agency is under no obligation to do so
  - Address command's policy regarding personnel security programs such as the procedures for the suspension of access to classified information and sensitive duties.

Hesse v. Department of State, 99 FMSR 5273, 82 MSPR 489 (MSPB 1999), aff'd, 100 FMSR 7018, 217 F.3d 1372 (Fed. Cir. 2000)



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**Summary**

This lesson discussed:

- Impact of Employees Losing Eligibility & Access to Classified Information
- Authority
- Initiating Actions Prompting an Indefinite Suspension
- Eligibility vs Suspension of Access
- AVS Adjudication Process
- Command Adjudication Process
- Administrative Personnel Actions
- Elements Required to Support an Indefinite Suspension



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**ANY QUESTIONS**

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