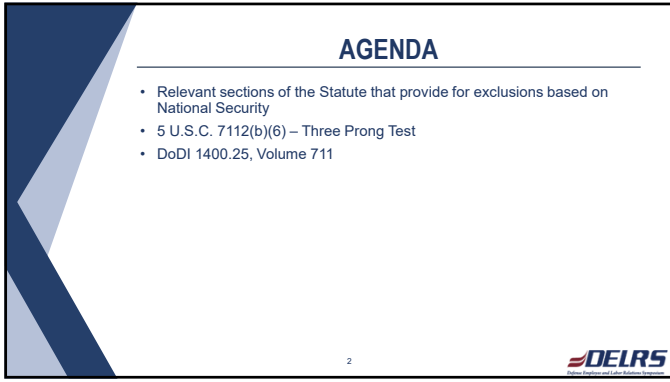
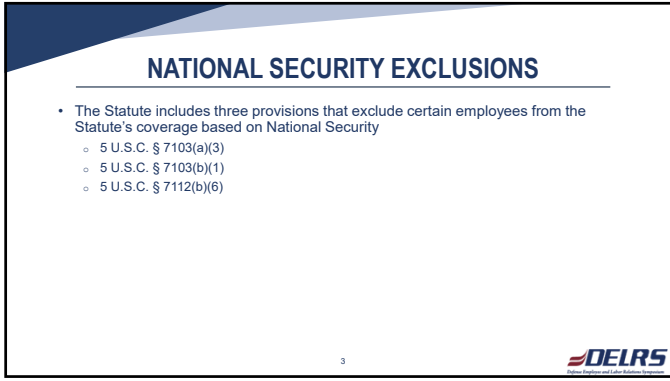




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3

5 U.S.C. § 7103(a)(3)

- Requires the mandatory exclusion of all employees employed by the following agencies: FBI, CIA, and NSA, and a few other non-security agencies






4

5 U.S.C. § 7103(b)(1)


- Section 7103(b)(1) provides for the discretionary exclusion of employees in any agency or subdivision thereof when the "President determines that:
 - (A) the agency or subdivision has a primary function of intelligence, counterintelligence, investigative, or national security work, AND
 - (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations



5

5 U.S.C. § 7103(b)(1)


- In accordance with this section, the following Executive Orders (EOs) were issued:
 - Executive Order 12171
 - Amended by EO 12338, 12632 and 13760
- EO 12171, as amended, identifies numerous Components/Commands that are engaged in national security work and are, therefore, excluded from coverage under Chapter 71 of Title 5 of the United States Code



6

5 U.S.C. § 7112(b)(6)


- 5 U.S.C. § 7112(b)(6) provides the third basis for excluding employees from coverage and allows for the statutory exclusion of individual employees from collective bargaining units in agencies or activities that are not excluded from coverage pursuant to §§ 7103(a)(3) or 7103(b)(1) if the employee is engaged in:
 - Intelligence
 - Counterintelligence
 - Investigative, or
 - Security Work



7

5 U.S.C. § 7112(b)(6)

- To be excluded under section 7112(b)(6), the employee must be:
 - engaged in intelligence, counterintelligence, investigative, or security work
 - directly affect national security
- See Oak Ridge and U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Arizona, 62 FLRA 332, 334 (2008)
- Note: The "directly affects" prong is often analyzed last and has been referred by the Authority as **the third prong**. The Authority appears first to determine whether the employee performs the requisite type of "work," then the Authority looks at whether the government activities performed meet the "national security" definition, and finally the Authority considers whether there is a "straight bearing or unbroken connection that produces a material influence or [alteration]" between the security work performed and national security




8

5 U.S.C. § 7112(b)(6)

A unit shall not be determined to be appropriate...if it includes "any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security."


- *Dep't of Energy Oak Ridge operations, Oak Ridge, Tenn. (OakRidge)*, 4 FLRA 644 (1980)
- *United States Dep't of the Treasury, IRS*, 62 FLRA 298 (2007)
- *United States, DOJ, Washington, D.C.*, 62 FLRA 286 (2007)
- *U.S. Dep't of the Air Force, Tyndall AFB, FL*, 65 FLRA 610 (2011)
- *U.S. Dep't of the Treasury, IRS*, 65 FLRA 687 (2011)
- *U.S. Nuclear Regulatory Commission (NRC)*, 66 FLRA 311, (2011)



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5 U.S.C. § 7112(b)(6)


- **MUST DIRECTLY AFFECT** national security
- The “**bad actor**” theory does not support a directly affects argument
- Such exclusions are based on the work of the individual, not the work of an agency or subdivision a whole



10

PRONG 1: INTELLIGENCE WORK


- **Intelligence Work**
 - The Statute does not define intelligence work
 - The Authority uses a definition from Webster’s 3d New Int’l Dictionary 1174 (2002)
- “**Intelligence**” means “evaluated information concerning an enemy or possible enemy or a possible theater of operations and the conclusion drawn therefrom”
- See NRC, 66 FLRA 311, 317-318 (2011)



11

PRONG 1: COUNTERINTELLIGENCE WORK


- **Counterintelligence Work**
 - The Statute does not define “counterintelligence” work
 - The Authority used a definition from Webster’s 3d New Int’l Dictionary 1174 (2002)
- “**Counterintelligence**” means “organized activity of an intelligence service designed to block an enemy’s sources of information by concealment, camouflage, censorship, and other measures, to deceive the enemy by ruses and misinformation, to prevent sabotage, and to gather political and military information”
- See NRC, 66 FLRA 311, 317-318 (2011)



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PRONG 1: INVESTIGATIVE WORK


- **Investigative Work**
 - The Statute does not define "investigative" work
 - The Authority has not issued a decision that defines "investigative" work
- Two decisions where the parties agreed the employees performed investigative work:
 - NRC, 66 FLRA 311, 315 (2011)
 - Parties did dispute that criminal investigators who investigate entities and individuals who allegedly violated laws, regulations, and/or licensed conditions issued by the Agency did investigative work
 - 4 of the 12 Criminal Investigators met the 3 prong test (access)
 - OPM, 5 FLRA 238, 247-248 (1981)
 - Parties did not dispute OPM investigators and "investigations technicians" who investigate applicants' suitability for employment did investigative work
 - Did not meet the 3 prong test



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PRONG 1: SECURITY WORK


- **Security Work**
 - An employee is engaged in security work if the required tasks, duties, functions, or activities of the employee's position is related to securing, guarding, shielding, protecting, or preserving something
 - See Oak Ridge and U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Arizona, 62 FLRA 332, 334 (2008)
- In United States Dep't of Justice, 52 FLRA 1093 (1997), the Authority modified this definition to include:
 - The designing, analyzing, or monitoring of security systems or procedures; or
 - The regular use of, or access, to classified information
- See SSA, Baltimore, MD, 60 FLRA572004; U.S. Dep't of the Army, Corps of Engineers, U.S. Army Engineer Research Dev. Ctr. , Vicksburg, MS, 57 FLRA 834 (2002)



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PRONG 1: SECURITY WORK (cont.)


- **Security Work**
 - Defined as work that involves regular use of, or access to certain non-classified information, i.e., "safeguards information" involving the security plans of nuclear facilities
- See, NRC, 66 FLRA 311 (2011)
- Whether an employee's use of, or access to, classified or safeguards information is "regular" has been discussed in several cases



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PRONG 1: SECURITY WORK (cont.)


- NRC provides some examples of what is and what is not, "regular" use or access of information
 - Employees cannot be excluded on the basis of "potential, future use of or access to safeguards and classified information"
 - Employees who had access to safeguards information on only one or two occasions, or "limited" access, did not have "regular" access
 - Employees who had access "several" times had "regular" access
 - That an employee was the "custodian of the safe in which safeguards information is kept" or "knew the combination of that safe", supported a conclusion that the employee had access on a "continuous, or regular basis"

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PRONG 2: NATIONAL SECURITY WORK


- "National security" includes "sensitive activities of the government that are directly related to the protection and preservation of the military, economic and productive strength of the Nation, including the security of the Government from sabotage, subversion, foreign aggression and any other illegal acts which adversely affect the national defense"
- Examples:
 - Oak Ridge; SSA, Baltimore, 59 FLRA 137 (2003) (the Authority reexamined the term "national security" as applied to security work related to the economic and productive strength of the United States)
 - Davis-Monthan, employees duties involved national security because they related to the protection and preservation of the nation's military strength. These employees regularly used and accessed classified information concerning, for example, troop movements and operational plans

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PRONG 3: DIRECTLY AFFECTS


- "Directly affects" is a "straight bearing or unbroken connection that produces a material influence on, or alteration to, national security"
- Where there are "no intervening steps between [the employees' duties and the potential effects on national security if the [employees] fail to perform their duties"
- The Authority has declined to find a direct effect where duties were "carried out in accordance with established procedures and provided little opportunity for making choices"
- See the following cases:
 - U.S. Dep't of the Treasury, IRS, 65 FLRA 867(2011)
 - U.S. Dep't of the Treasury, IRS, 62 FLRA 298 (2007)
 - U.S. DOJ, Washington, D.C., 62 FLRA 286 (2007)
 - U.S. Dep't of Agriculture, FSIS, 61 FLRA 397 (2005)
 - SSA, Baltimore, 59 FLRA 137 (2003)

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DIRECTLY AFFECTS AND CLASSIFIED INFORMATION


- In cases involving employees who regularly used or accessed classified information, the Authority has found a direct effect where, "given the nature of" the information at issue, it was "clear that there were no intervening steps between the employees' failure to prevent unauthorized disclosure " of the information and "the potential effect on national security should they fail to do so"
 - See Davis-Monthan, 62 FLRA 332, 335 (2008)
- The same standard applies to certain non-classified information as well
 - See NRC, 66 FLRA 311, 321 (2011)
 - Direct effect where employees' failure to prevent unauthorized disclosure of "safeguards" information involving the security plans of nuclear facilities could significantly adversely affect national security



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EXCLUSION CONSIDERATIONS


- Determinations of exclusions are based on the duties actually performed, NOT on the position description, grade, or title
- To be excluded, an employee doesn't need a security clearance or be in a position designated as sensitive. Having a security clearance is a significant factor in determining whether an employee performs security work; however, the focus is ALWAYS on the type of work being performed
 - See SSA, Baltimore, 59 FLRA 137 (2003).
- It is also not based on what the Agency thinks they might do in the future



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RAVEN ROCK EXAMPLE


- Underground nuclear bunker
- Emergency Operations Center
 - U.S. Army
 - U.S. Navy
 - U.S. Marine Corps
- Provides U.S. continuity of operations
- Security Guards and certain law enforcement officers were not excluded under (b)(6)



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NATIONAL SECURITY EXCLUSION QUESTIONS


- When a Component seeks an exclusion under 5 U.S.C. § 7116(b)(6), the Authority asks three questions, all of which must be answered affirmatively in order for the employee to be excluded:
 - Does the mission relate to the military, economic and productive strength of the United States (i.e., national security)?
 - Is the employee engaged in intelligence, counterintelligence, investigative, or security work?
 - Does the work that the employee performs directly affect national security?

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DoDI 1400, VOLUME 711


- 3.5(a)(4) requires components/LRO Agency heads **MUST** contact DCPAS for clearance **BEFORE** filing a petition that seeks to exclude employee(s) for national security reasons
- Components seeking this exclusion are required to work with DCPAS and are required to gather the appropriate documentation in order to show the exclusion is appropriate and in accordance with the Statute
- DoD Components will provide the following supporting documentation to DCPAS

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NATIONAL SECURITY EXCLUSION REQUEST


- Component Request:**
 - Request must be in writing and provide justification for request.
 - Request must be specific and address all employees sought for exclusion.
- DCPAS:**
 - Reviews request for adequacy
 - Contacts component/LRO for clarification, documentation, and additional supporting information
 - When requested to do so, assists the activity in preparing the justification by providing guidance and other technical assistance
 - If the Component's request is adequate and the file contains sufficient supporting documentation, LER drafts a recommendation for the Associate Director/Director for final determination

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NATIONAL SECURITY EXCLUSION QUESTIONS

- In making determinations under this exclusion remember the following:
 - Three prong test must be met
 - Focus on the nature and type of work performed by the employee
 - Remember security clearance and whether position is designated as sensitive is not dispositive; rather, they are significant factors to consider
 - Determinations are made on a case-by-case basis



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 **ANY QUESTIONS**



26

 **THANK YOU FOR ATTENDING**



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