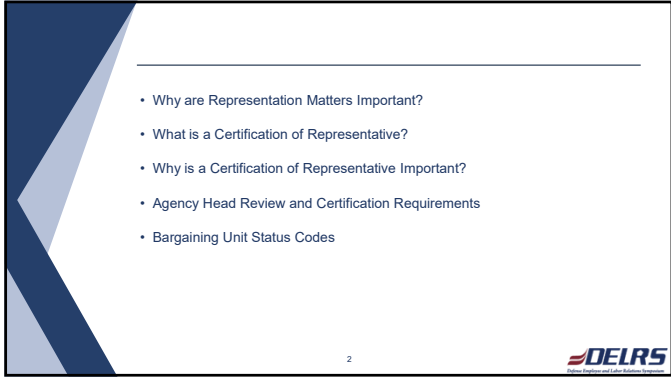
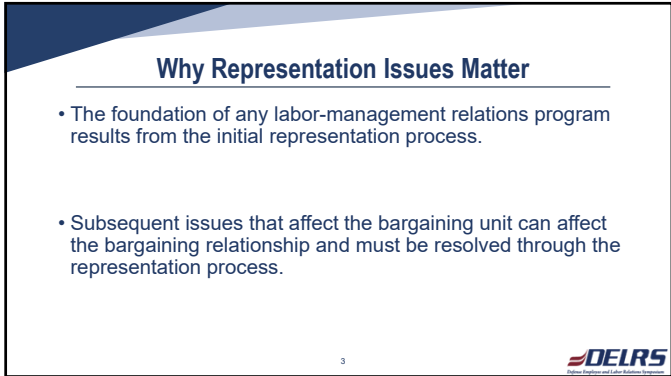




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FLRA's Sole and Exclusive Responsibility


- The FLRA has the sole authority to certify, clarify or amend a unit description under 5 U.S.C. §§ 7105(a) and 7112(a) of the Statute. *See Small Business Administration, 32 FLRA 847 (1988)*
- Practical application: if certifications are not maintained and updated by the agency if there is a change in the organization or by the exclusive representative if there is a change in affiliation, then the issue may result in a question of representation.
- **What is a Certification of Representative?**



4

Why is the Certification Important?


- Once a labor unit is certified, the agency is required to recognize the labor organization who holds the certification for purposes of collective bargaining about matters affecting the bargaining unit employees' conditions of employment.
- This sets the stage for the entire collective bargaining process.
- Keep your certifications update to be sure they accurately reflect the bargaining unit.
- Common situations where a Certification can be inaccurate:
 - Employees who were specifically identified in the unit are transferred out of the bargaining unit.
 - Employees are acquired by another agency.
 - The name of the employing agency changes.
 - Due to a reorganization, realignment or some other changes in the organization of the agency, there is a question to whether the existing units are appropriate under the Statute.



5

Why Should Management Care


- What happens when certifications are not maintained and updated?
 - Sample Certification of Representative Review
 - Impact on contract negotiations and AHR
- What is a delegation of authority and why is it important?



6

Bargaining Unit Status Codes


- What is a Bargaining Unit Status (BUS) Code?
- Positions Excluded from the Bargaining Unit
- Positions Included in the Bargaining Unit



7

What is a BUS Code?

- A four-digit number to identify employees bargaining unit status to determine:
 - Collective bargaining rights;
 - Entitlements to national consultation rights; and
 - Entitlements to official time for representation under federal law
- Used for reporting purposes
- BUS Code is based on the duties of the position
- Found on the SF-50 in block 37



8

BUS Codes

8888 - Employees Ineligible for Representation:

- Those "Excluded" IAW the statute at 5 USC 7102 or those agreed/decided and approved by FLRA to be "Excluded"

7777 - Eligible but not Represented:


- BUS code 7777 identifies that the employee holds a position eligible for representation, although no union currently represents the employee (could be a prof or non-prof position)

Additional BUS Codes

6666 - In transition because of a mass transfer:

- BUS code 6666 identifies that the employee has been certified to be represented and pending an assigned BUS Code from OPM

XXXX – Your Agency's BUS code(s) here




9

Statutory BU Positions and Exclusions

The determination of whether an employee is "in" the unit, is made by the duties of the position and how those duties are interpreted under the statute.

Statutory Exclusions 5 USC 7112(b):

- Supervisors
- Management Officials
- Confidential Employees (with access to labor relations materials)
- Personnel Work
- Employee engaged in administering the statute
- Employees engaged in national security
- Employees involved in internal audit functions (i.e. OIG), and
- Professional Employees (unless provided for in a Union Cert)




10

Supervisor Exclusion -5 U.S.C. 7103(a)(10)

Defined in 5 U.S.C. 7103(a)(10) as employees who have the authority to:

- hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline or remove employees
- adjust their grievances or effectively recommend such action
- requires the consistent exercise of independent judgment
- No requirement to perform all of these duties or supervise a certain number of employees
- Must consistently exercise independent judgment
- Supervision of only military members or inmates is not a supervisor within the meaning of the Statute
- Supervising for a portion of the year, or on a temporary basis = exclusion from the unit during the period they perform supervisory functions




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Team Leaders

Team Leaders are not Supervisors if:

- Primary duty is to give technical advice to others
- Responsibilities are routine in nature
- Does not consistently exercise independent judgment, but rather carries out the mission and work assignments designated by management, then the position is included in the bargaining unit. See National Mediation Board, 56 FLRA No. 1, (2000)




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Supervisor or Excluded Team Lead?

Some relevant Questions/Facts to determine if a position is a Supervisor or a statutorily excluded Team Lead:


- Identify names and positions held by subordinates;
- Description of the extent and nature of employee's involvement in the hiring process for employees that would fall under him/her;
- Description of the extent and nature of employee's involvement in the assignment of work;
- Does employee have the authority to detail, transfer or reassign employees;
- Does employee have the authority to suspend, discipline or remove employees; and
- Is the employee involved in the performance appraisal as a rater or in making recommendations on ratings, and/or grievance process as a deciding official?



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Management Official - 5 U.S.C.§7103(a)(11)


- FLRA has found that a management official creates, establishes, or prescribes general principles, plans or courses of action, decides upon plans or courses of action, and obtains a result by the adoption of plans or courses of action. See Navy, Automatic Data Processing Selection Office, 7 FLRA No. 24 (1981)
- Contrary to the statute governing private sector labor relations, an individual who "effectuates" policy is not a management official. The federal sector statute requires that an individual formulate, determine or influence policy. Executive Office of Immigration Review, 100 FLRR 1-1139 , 56 FLRA 616 (FLRA 2000)



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Management Officials-Excluded from Unit

- Although military personnel are not "employees" as defined in the statute, a civilian who develops policy applicable only to military personnel may be a management official. 35 FLRA 84, FLRA (1990)
- Specialists are management officials when they have certain decision-making authority, such as shutting down facilities and expending funds to resolve problems. 12 FLRA 358 (FLRA 1983)
- A GS-15 electronics engineer, serving as the technical director for the activity and a member of the activity "command group" responsible for the oversight of civilian personnel career planning. He influenced the policies of the activity. His role extended beyond that of an expert or professional rendering information or recommendations to the active participation in policy determination. He acted as a chief advisor on technical and civilian matters. Technical and Research Directors, citing Army Communications Systems Agency, Ft. Monmouth, N.J., 80 FLRR 1-1464 , 4 FLRA 627 (FLRA 1980)
- A GS-13 auditor was a manager. He was responsible for the internal and regulatory review of financial management, procurement, logistical, and other management responsibilities. He reviewed internal procedures, made recommendations for policy changes, and was responsible for IG audits and for determining the need for internal audits at the activity. Auditors, citing Army Communications Systems Agency, Ft. Monmouth, N.J., 80 FLRR 1-1464 , 4 FLRA 627 (FLRA 1980)




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Not a Management Official

Resource persons, or professionals who offer advice to decision-makers:

- Individuals whose advice was considered authoritative and whose recommendations were accepted, but who did not have the authority to commit the agency to a course of action or to authorize the expenditure of funds, were not management officials. Federal Crop Insurance Corporation, 46 FLRA 1457 (FLRA 1993)
- Attorneys who used their legal expertise in developing regulations and other documents were highly skilled professionals who did not have signatory authority and did not establish agency policy. Department of Energy, 91 FLRR 1-1195 , 40 FLRA 264 (FLRA 1991)
- A highly specialized individual who rendered advice to management that was usually accepted, was not a management official. The advice was subject to successive levels of review. Mine Safety and Health Administration, 90 FLRR 1-1538 , 37 FLRA 1151 (FLRA 1990)


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Not a Management Official

Those who implement, interpret or effectuate policies:

- The fact that employees interpret regulations and policies and have decision-making authority within that framework does not establish that they effectively make or shape policy. Department of Veterans Affairs, 105 LRP 12489 , 60 FLRA 749 (FLRA 2005)
- A GS-14 operations research analyst, the activity cost analysis expert, made recommendations based on expertise in cost analysis. He was an expert or professional rendering resource information or recommendations. Army Communications Systems Agency, Ft. Monmouth, N.J., 80 FLRR 1-1464 , 4 FLRA 627 (FLRA 1980)


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Questions to Consider – Management Official

Some relevant Questions/Facts to determine if a position is a Management Official:

- Scope of authority
- To what extent does the employee draft and implement rules, regulations, directives, binding decisions that interpret law
- What/who is the affected by the employee's decision
- Are decisions made pursuant to established policies/regulations (get copies)
- Do the employee's decisions require higher agency approval? How often are the decisions of the employee approved/disapproved
- Does the employee attend supervisory or managerial meetings (frequency, participation etc.); and
- What is the employee's responsibility concerning the Agency's operations or policies etc.


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Confidential Exclusion - 5 U.S.C. 7103 (a)(13)

- Assists and "acts in a confidential capacity to an official who formulates or effectuates management policies in the field of labor relations and who has regular access to confidential labor relations material"
 - There must be evidence of a confidential working relationship between an employee and the employee's supervisor; and
 - The supervisor is significantly involved in labor-management relations. See Department of Labor, 37 FLRA No. 112 (1990)

Employees who attend regular management meetings, where labor-management relations matters are discussed, are excluded from the bargaining unit because they meet this labor relations definition of confidential. National Aeronautics and Space Administration, 57 FLRA No. 103 (2001)




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Labor-Nexus Test: Other Official's Work

Do the official's responsibilities include:

- Developing negotiation strategies
- Developing bargaining proposals for management
- Deciding grievances
- Conducting negotiations
- Preparing arbitration cases for hearing
- Handling ULPs

Merely seeing or processing information of a personal nature (i.e. SSNs or EEO case documents) about other employees does not make employee a confidential




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Confidential Employee Exclusion

Employee must be acting in confidential capacity to official while official is engaged in labor-management relations

- Support staff that have access to grievances and grievance decisions before they are presented to the union are confidential employees. National Aeronautics and Space Administration, 57 FLRA No. 103 (2001)
- Other individuals (such as attorneys, paralegals, or specialists) who are privy to LR policies as they are developed, and whose inclusion in a BU would create a conflict of interest between the employee's work duties and unit membership, are excluded from the BU as confidential. The amount of time that an individual devotes to LR matters is not a controlling factor in determining confidential status. Department of Labor, 37 FLRA No. 112 (1990)




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Confidential Employee Questions to Consider

Some Relevant Questions/Facts to determine if the position is a Confidential Employee:


- Description of employee's daily routine;
- Description of the employee's participation and attendance at management meetings where discussions ensue concerning labor relations issues, contract negotiations strategies and proposals, and/or personnel policies (determine involvement, i.e., note taker, active participant, etc.)
- Description of the employee's participation in the preparation of management's responses for grievances, unfair labor practices, negotiation demands/proposals, proposed disciplinary actions, and other personnel actions that may result in the filing of a negotiated grievance
- If applicable, description of the nature and extent of the employee's access to confidential information concerning other employees and management labor relations policies/plans

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Confidential Questions to Consider

- Description of the type(s) of advice/assistance given to other employees or supervisors or managers in labor relations/personnel matters
- If applicable, description of responsibility for establishing, interpreting, and/or implementing personnel/labor relations policies
- If applicable, description of the employee's actual participation in contract negotiations, development of contract proposals, handling grievances/ arbitrations and disciplinary and adverse actions, etc.
- If applicable, description of participation in labor-union meetings Equal Employment Opportunity Complaints, Merit Systems Protection Board Proceedings, awards, and promotions; and
- If applicable, description of attendance and participation at Agency meetings at which sensitive labor relations matters are discussed and deliberated (i.e., to what extent does the person advise, develop, and/or implement negotiating positions or proposals)


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Personnel Work Exclusion – 5 U.S.C. 7112(b)(3)

- Employee's work must directly relate to personnel operations of the agency
- Work must be more than clerical in nature
- Employee must exercise independent judgment and discretion in personnel duties
 - In *Department of Veterans Affairs, Kansas City VA Medical Center, Kansas City, Mo.* and AFGE, 118 LRP 14970 (FLRA 04/13/18), the FLRA overturned its prior decisions holding that according to the statute's plain wording the employee must exclusively be focused on administrative tasks like filing and typing

Thus, personnel work involving evaluating, advising, recommending, and making assessments isn't purely clerical. Positions requiring staffing and recruitment, developing and posting vacancy announcements, qualifying applicants for employment, and onboarding new hires, can be argued to be excluded as the work isn't purely clerical.


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Personnel Work Questions to Consider

Relevant Questions/Facts to determine if an employee is engaged in personnel work:

- What are the employee's duties – if solely clerical in nature (i.e., typing, filing, etc.), then they should be in the bargaining unit
- Description of involvement in preparation and processing of personnel actions including hiring, adverse actions, promotions, pay increases, transfers, demotions, awards, performance appraisals, and training – if more than mere clerical tasks, they should be excluded from the bargaining unit
- Does employee counsel employees on personnel matters, such as retirement benefits, insurance benefits, etc. – if so, they should be excluded from the bargaining unit; and
- Is employee involved in the development or implementation of Equal Employment Opportunity programs – if so, they should be excluded from the bargaining unit.


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**Employees Engaged in Administering the Provisions of the Statute –
5 U.S.C. 7112(b)(4) & 5 U.S.C. § 7112(c)**

Any employee engaged in administering any provision of law relating to labor management relations may not be represented by a labor organization which represents other individuals to whom the Statute applies or by a labor organization which is affiliated directly or indirectly with an organization which represents other individuals to whom the Statute applies

- The Statute does not prohibit these employees from being represented by a union, they just cannot belong to the same unit, or be represented by the same union or union affiliate as other activity employees.
- Prevents the appearance of a conflict of interest between the labor law administration and its application to other employees in the same union


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**Employees Engaged in Administering the Provisions of the Statute –
5 U.S.C. 7112(b)(4) & 5 U.S.C. § 7112(c)**

Examples:

- Labor and employee relations specialists are excluded from the BU as administrators of the Statute (and in some cases personnelists)
- General attorneys that provide advice on negotiations, grievance handling, and contract interpretation are excluded from the BU as administrators of the Statute
- Secretaries in the LR office are not excluded from the BU as administrators of the Statute; however, they are excluded as confidential employees because the nature and duties of their position make them privy to confidential LR materials


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Questions to Consider-Administer Labor Relations Statute

Relevant Questions/Facts to determine if an employee administers a labor relations statute:


- Description of employee duties as they relate to the laws or regulations that allegedly involve the collective bargaining process; and
- Description of duties and responsibilities to determine whether and the extent to which the employees administer the law or regulation that allegedly involves the collective bargaining process

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National Security Exclusion - 5 U.S.C. § 7112(b)(6)


- An employee engaged in intelligence/counterintelligence/ national security work must be excluded
- Includes individuals involved in design/analysis/monitoring of security systems or classified information that directly affects national security (clearance is a factor, but not dispositive)
- The national security exclusion requires that the work be:
 - security work
 - that directly affects
 - national security
- For National security work, the material must directly affect national security, rather than simply include mere access to or use of sensitive information and material

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Investigators/Auditors- 5 U.S.C. 7112(b)(7)

- Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity
- An individual who audits agency programs or contracts that may uncover employees' failure to comply with programs is excluded. The investigators and/or auditors do not have to be directly investigating unit employees for the exclusion to apply. Whether or not the investigators/ auditors find violations of agency policies is not dispositive


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Investigators/Auditors- 5 U.S.C. 7112(b)(7)

Examples:


- Auditors and investigators in the Office of the Inspector General whose functions could uncover employee fraud, misuse of funds, or malfeasance are excluded from the BU because the work affects the internal security of the agency. See Small Business Administration, 34 FLRA No. 73 (1990)
- Any individual who audits and/or investigates particular types of employees to ensure that the employees are discharging their duties with honesty and integrity is excluded from the BU. See Small Business Administration, 34 FLRA No. 73 (1990)



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Questions to Consider


- Description of the employee's specific job functions/investigatory functions (if any)
- Type(s) of audit functions employee performs
- Identification of on whose behalf the agency investigations or audits are being performed
- Discussion of whether and how investigations or audits directly affect the internal security of the agency
- To what extent is the employee "primarily engaged" in investigation and audit functions (include percentage of time they spend on these investigations or audits; type of work performed - reviewing reports prepared by others versus actually conducting the investigation or audit);
- Discussion of whether and how the investigation functions they perform ensure an employee's duties are discharged with honesty and integrity



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Professional Employees – 5 USC 7103(a)(15)

- An Employee/Apprentice engaged in the performance of non-standardized work requiring knowledge or specialized intellectual instruction of an advance type in their field
 - requires the exercise of independent judgement or discretion
 - predominantly intellectual (not routine, manual, mechanical work)
 - does not always require a degree (i.e. board certification)
- If not "Included" in the BU they are not automatically "Excluded"
 - If petition is silent as to coverage of professionals, but they are not specifically "Excluded" – they are entitled to an independent election or may be listed as eligible/unrep (7777)



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