



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

January 26, 2023

Memorandum for Heads of Executive Departments and Agencies

From: Kiran A. Ahuja, Director

Subject: Guidance on Implementation of EO 14025: Addressing Whether Non-Bargaining Unit Positions are Correctly Excluded from Bargaining Unit Coverage

On April 26, 2021, President Biden issued [Executive Order \(EO\) 14025, Worker Organizing and Empowerment](#). On February 7, 2022, the White House Task Force on Worker Organizing and Empowerment (Task Force) publicly released its "[Report to the President](#)" outlining its list of recommended Executive actions that agencies can take to encourage worker organizing.

OPM is pleased to be leading the Biden-Harris Administration's efforts to promote worker empowerment within the federal workforce. As the nation's largest employer, the federal government can and should lead by example in encouraging worker organizing and collective bargaining. OPM has already taken actions to implement recommendations featured in the [Report to the President](#):

- On May 18, 2021, OPM issued "[Guidance on Labor-Management Relations in the Executive Branch](#)," which encourages agencies to establish labor-management forums and to engage in pre-decisional involvement (PDI) with labor unions on workplace matters¹;
- On October 20, 2021, OPM issued guidance on "[Highlighting Bargaining Unit Employee Rights in the Hiring and On-Boarding Process](#)," which encourages agencies to take certain actions in the hiring and on-boarding process that will assist job applicants and new employees to better understand their rights under the Federal Service Labor-Management Relations Statute;
- On October 20, 2021, OPM issued "[Guidance on Implementation of EO 14025: Highlighting Bargaining Unit Employee Rights to Join a Union and Other Rights](#)," which addresses actions agencies can take related to employee rights to join a union and ways to engage with their union;
- On April 12, 2022, OPM issued "[Guidance on Implementation of EO 14025: Highlighting Union Rights to Access and Communicate with Bargaining Unit Employees](#)," which addresses some actions agencies can take related to increasing union access and ability to communicate with bargaining unit employees;
- On April 12, 2022, OPM issued "[Guidance on Implementation of EO 14025: Highlighting Requirements During Union Organizing](#)," which provides guidance

¹ OPM is identifying additional actions to implement the recommendation on labor-management forums and PDI.

and training materials for agencies on statutory requirements regarding management actions during any union organizing; and

- On April 12, 2022, OPM issued “[Guidance on Implementation of EO 14025: Highlighting Requirements to Timely Process Requests for Payroll Deductions for Labor Organization Dues](#),” which provides guidance to agencies regarding the processing of bargaining unit employee requests related to payroll deductions for labor organization dues.

This memorandum addresses the Task Force recommendation to address whether federal sector bargaining unit employees who encumber positions are correctly excluded from bargaining unit coverage under the Federal Service Labor Management Relations Statute (Statute). To be consistent with the Task Force recommendations approved by the President, agencies would need to:

1. Review the bargaining unit status for non-bargaining unit employee who encumber positions to assess whether these employees are properly excluded from bargaining unit coverage under the Statute.
2. Involve agency labor relations staff and, if necessary, agency legal offices in the bargaining unit status review.
3. Work with any unions that represent other employees in the organization to correct, if necessary, the bargaining unit status of employees in federal sector positions which have been excluded from bargaining unit coverage.
4. Consider going to the Federal Labor Relations Authority jointly with the applicable union(s) to clarify bargaining unit coverage, particularly for bargaining unit employees who encumber positions transitioning to remote work. The plain wording of the unit description should not necessarily dictate the outcome for employees who encumber positions transitioning to remote work.
5. Inform employees of any changes to their bargaining unit status.

Additional Information

Agency headquarters-level human resources offices may contact OPM at awr@opm.gov with additional questions. Agency field offices should contact their appropriate headquarters-level agency human resources offices.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs and Human Resources Directors

Attachment: Fact Sheet – Reviewing Bargaining Unit Status under the FSLMRS

Reviewing Bargaining Unit Status under the Federal Service Labor-Management Relations Statute Fact Sheet

Background

On February 7, 2022, the White House Task Force on Worker Organizing and Empowerment released its [“Report to the President”](#), approved by President Biden, that promotes worker organizing and collective bargaining for public and private sector employees. OPM is leading recommendations for federal sector worker organizing and empowerment.

One federal sector recommendation is to address whether employees encumbering non-bargaining unit positions are correctly excluded from bargaining unit coverage. Specifically, the Task Force report notes that OPM should work with agencies and provide guidance to help them review and, if necessary, correct the bargaining unit status of federal sector employees encumbering such positions.¹

The purpose of this Fact Sheet is to assist agencies and unions in implementing the Task Force recommendation and to provide guidance regarding:

- bargaining unit status (BUS) codes;
- Federal Labor Management Information System;
- review and audit of a position’s BUS code status; and
- bargaining unit status for remote employees.

¹ The Department of Defense (DoD) and the Department of Health and Human Services (HHS) identified similar agency actions as OPM’s government-wide action on this matter. To the extent these agencies or others have already taken steps to implement their agency actions that are consistent with OPM’s guidance, agencies need not take these actions again. However, to the extent OPM’s guidance addresses matters not addressed by agencies’ earlier actions, agencies should evaluate what additional actions need to be taken. For example, if the issue of remote workers was not addressed, agencies should follow OPM’s guidance.

Bargaining Unit Status (BUS) Codes

A BUS code is a four-digit number used to identify whether an employee who encumbers a position is covered by a bargaining unit or not. If the employee is covered by a bargaining unit, each labor organization has a unique BUS code. Under the Federal Service Labor-Management Relations Statute (Statute) at [5 U.S.C. § 7103\(a\)\(4\)](#), a labor organization is defined as an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment. Employees can locate their BUS code in Block 37 of any Standard Form (SF)-50, Notification of Personnel Action in their personnel records.

There are three universal BUS codes:

- 6666 – Bargaining unit status of an employee(s) in this position(s) is in transition because of a mass transfer or the unit is newly established and OPM has not issued a code for the new unit. This code is meant only to be used temporarily.
- 7777 – The employee encumbering this position is eligible for representation, but not included in any bargaining unit.
- 8888 – The employee encumbering this position is ineligible for inclusion in a bargaining unit in accordance with the Statute.

Federal Labor Management Information System

Bargaining unit information can be found on the Office of Personnel Management's (OPM) [Federal Labor Management Information System \(FLIS\)](#) which serves as a public searchable database for bargaining unit information in the federal government.

After the Federal Labor Relations Authority (FLRA or Authority) has certified a bargaining unit, the bargaining unit is assigned a unique code by OPM using FLIS. This is a discreet four-digit code (e.g., "1234") preceded by a two-letter agency code and is assigned to the employee who encumbers a position included in an appropriate unit as determined by the FLRA and the BUS code is issued by OPM.

BUS codes assist in identifying particular bargaining units within agencies and their subcomponents. FLIS does not include information for non-appropriated fund (NAF) federal employees or U.S. Postal Service employees. NAF employment data is not reported to OPM by agencies with NAF bargaining unit employees and U.S. Postal Service employees are subject to the National Labor Relations Act, not the Statute. As a result, OPM does not assign BUS codes to NAF or U.S. Postal Service positions.

When a new bargaining unit is certified by the FLRA, the agency must request a new BUS code from OPM by submitting a completed [OPM913B](#) form, *Change Form – Recognitions and Agreements*.

Additionally, an [OPM-913B](#) form must be submitted when the following changes occur:

- Changes in name of an agency/activity or changes in the name of the certified representative.
- Decertification of the certified representative;
- Clarification of bargaining unit; or
- Successorship/accretion.

Reviewing/Auditing the Bargaining Unit Status

Agencies are responsible for properly assigning BUS codes to each employee who encumbers a position in the organization and documenting the employee's position data record to reflect the appropriate BUS code. OPM acknowledges that agencies have various procedures for determining and inputting BUS codes into a position data record. With this in mind, agencies are strongly encouraged to include the agency labor relations office in its procedures for determining the appropriate BUS codes to assist with accuracy and compliance with the Statute and the FLRA's bargaining unit certification, if applicable.

To be consistent with the Task Force recommendations approved by the President, agencies should review the bargaining unit status of employees in non-bargaining unit positions to assess whether these employees are correctly excluded from bargaining unit coverage under the Statute. Agencies should work with any unions that represent

other employees in the organization to correct, if necessary, the bargaining unit status of federal sector employees who encumber positions which have been excluded from bargaining unit coverage. OPM acknowledges agencies undertaking a comprehensive review of bargaining unit coverage may conclude existing bargaining unit employees who encumber positions should be excluded from bargaining unit coverage under the Statute. Such matters will be resolved by the FLRA.

If there are questions on the appropriate bargaining unit status, agencies and unions are strongly encouraged to jointly request assistance from the Authority. The Authority has the responsibility for making bargaining unit determinations.² [5 U.S.C. § 7112\(a\)](#) notes that “[t]he Authority shall determine the appropriateness of any unit.” It further notes that “[t]he Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate units should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.”

Reviewing/Auditing the Bargaining Unit Status - Bargaining Unit Exclusions

The Statute excludes certain types of positions from being included in a bargaining unit. [5 U.S.C. § 7112\(b\)](#) provides that “A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

1. except as provided under section [7135\(a\)\(2\)](#) of this title, any management official or supervisor;

² The Authority has set aside an arbitration award in which the arbitrator made a finding as to the bargaining unit status of the grievant’s position. The Authority held it had exclusive jurisdiction to make unit determinations and that arbitration was not a substitute. See *U.S. Dep’t of the Army, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172 (2017).

2. a confidential employee;
3. an employee engaged in personnel work in other than a purely clerical capacity;
4. an employee engaged in administering the provisions of this chapter;
5. both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
6. any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
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.”

The Authority, through its decisions interpreting [§ 7112\(b\)](#), has provided agencies and unions additional guidance on the types of positions excluded from bargaining unit coverage. Examples of relevant Authority decisions are provided below. These decisions do not represent all scenarios or the criteria upon which the FLRA bases its decisions. OPM strongly encourages agencies and unions to review these, other relevant decisions and FLRA Reference Guides discussed below and listed at the end of this Guidance when reviewing bargaining unit coverage. OPM also strongly urges agencies and unions to develop their own outlines of issues and factors from existing Authority case law to deal with each eligibility issue uniquely and separately.

Additional information on the Authority’s decisions on bargaining unit coverage is found in the Authority’s [Representation Case Law Outline](#). The information provided by the Authority is comprehensive and quite useful and should be reviewed by the parties before starting a BUS code review. It provides multiple examples for each category of exclusions. It is written in an easy-to-understand format explaining how and when certain types of positions are excluded or are not excluded from bargaining unit coverage. It is important that agencies and unions read the text from an entire case before relying on a case to make a decision or before citing it in any legal filing.

- a. [5 U.S.C. § 7112\(b\)\(1\)](#) – Management Officials and Supervisors.

- 1) Supervisor: In *Social Security Administration and American Federation of Government Employees*, [60 FLRA 590 \(2005\)](#), the Authority reaffirmed that an employee is statutorily excluded if the employee “consistently exercises independent judgment with regard to any one of the supervisory indicia set forth in 5 U.S.C. § 7103(a)(10)”. Furthermore, the joint performance of a supervisory function such as the joint recommendation to hire an employee which stems from the exercise of independent judgment by two individuals may justify statutory exclusion from a bargaining unit (BU) based on supervisory status. The Authority noted that “The Statute does not state that a decision requiring the exercise of independent judgment must only be made by one individual”. See *Department of Veterans Affairs and AFGE Local 933*, [35 FLRA 1206 \(1990\)](#).

Indicia of supervisory status under [5 U.S.C. 7103\(a\)\(10\)](#) include the authority to hire; direct; assign; promote; reward; transfer, furlough, layoff, or recall; suspend, discipline, or remove; adjust their grievances; or effectively recommend above actions, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority.

- 2) Supervisor: In *Department of the Interior, Bureau of Indian Affairs Navajo Area Office. Gallup, N.M. and American Federation of Teachers National Council of Bureau of Indian Affairs Educators*, [45 FLRA 646 \(1992\)](#), the Authority established that evaluating employee performance is indicative of supervisory status, despite the fact that it’s not explicitly listed in [5 U.S.C. § 7103\(a\)\(10\)](#), since “performance evaluations form the basis for decision to reward, promote, reassign, retain, and discipline employees”. More specifically, this decision explained that an employee’s performance evaluation determinations constituted “the effective recommendation of retention” of employees. Therefore, the employee who conducted the performance evaluations was statutorily excluded from the bargaining unit due to supervisory status.

- 3) Supervisor - Subordinate employees: In *the Adjutant General, State of Georgia Department of Defense, Military Division, Atlanta, Georgia and Georgia Association of Civilian Technicians*, [14 FLRA 187 \(1984\)](#) the Authority established that a person must supervise an employee(s) of an Executive agency as defined by 5 U.S.C. § 7103(a)(2) in order to be statutorily excluded from the bargaining unit due to supervisory status under 5 U.S.C. § 7112(b)(1)³.
- 4) Supervisor - Team Leaders: In *Department of Army, Aviation Systems Command and Army Troop Support Command and National Federation of Federal Employees Local 405*, [36 FLRA 587 \(1990\)](#) the Authority established that team leaders who consistently exercise independent judgment i.e. assessment of the technical nature of work accompanied by assignment and review of workload (including assessment of the need to reassign work) and/or the effective recommendation of awards are statutorily excluded from bargaining units due to supervisory status. However, senior employees who simply review team members' work products from a technical standpoint without exercising independent judgment as to the direction or review of work have not been found to be supervisors under the Statute.
- 5) Supervisor – Nurses and Firefighters: There is particular statutory criteria for assessing the supervisory status of firefighters⁴ and nurses⁵ who must “devote a preponderance of their employment time to exercising such authority” in order to meet this definition. See [5 U.S.C. § 7103\(a\)\(10\)](#).

³ The Authority has treated temporary employees as regular employees for the purpose of assessing supervisory status. See *DOI, Fish & Wildlife Serv. Paxtuxent Wildlife Rsch. Cntr., and AFGE AFL-CIO*, [7 FLRA 643 \(1982\)](#). However, supervision of contractors cannot be used for the purpose of assessing supervisory status. See generally *Fort Knox Dependent Schools and Fort Knox Teachers Ass'n*, [5 FLRA 33 \(1981\)](#).

⁴ The term “firefighter” may encompass other positions titles, such as Park Rangers, who perform firefighter duties on a seasonal basis. See *National Park Service, Santa Monica Mountains and Laborers' International Union of North America*, [50 FLRA 164 \(1995\)](#).

⁵ The Authority has treated “direct” and “hands on” patient care performed by head nurses to evaluate subordinates in assessing supervisory status. See *Veterans Administration Medical Center, Fayetteville, N.C., and AFGE AFL-CIO*, [8 FLRA 651 \(1982\)](#).

6) Management official: In *Department of Navy, Automatic Data Processing Selection Office and American Federation of Government Employees, Local 1*, [7 FLRA 172 \(1981\)](#), the Authority interpreted the definition of “management official” in 5 U.S.C. § 7103(a)(11) finding that “a general Congressional intent that a management official is an individual who is identified with management and who, by virtue of his or her stature and level of responsibility within the agency, must have the interests of agency management as his or her primary concern in the context of a collective bargaining relationship”. It further found that management participation in a labor organization would constitute a conflict of interest. This decision also clarified that, pursuant to the language in [5 U.S.C. § 7103\(a\)\(11\)](#), –

- Formulate means “to create, to establish or to prescribe”;
- Determine means “to decide upon or settle upon”;
- Influence means “to bring about or to obtain as a result”; and
- Policies “are general principles, plans or courses of action”⁶.

Lastly the Authority explained that “valuable experts or professionals whose actions assist in implementing as opposed to shaping” policies “do not function in the interest of management in a way which is at odds with their being represented by an exclusive bargaining representative” and therefore, these positions are not statutorily excluded from bargaining units due to ‘management official’ status.

b. [5 U.S.C. § 7112\(b\)\(2\)](#) – Confidential employees.

1) The statutory definition of confidential employee in [5 U.S.C. § 7103\(a\)\(13\)](#) is the foundation of the Authority’s two-prong “labor-nexus” test⁷ used to

⁶ *934th Tactical Airlift Group (AFRES) and Local 1997, AFGE*, [13 FLRA 549](#) (1993) highlights that performance of actions such as formulating local policies and procedures that necessarily deviate from command policies because of the unique nature of the unit, which then influence or result in general agency policy, establish status as a “management official.”

⁷ (1) There is evidence of a confidential working relationship between an employee and the employee’s supervisor, and (2) the supervisor is significantly involved in labor-management relations. See *U.S. Army Plant Representative Office and AFGE Local 3973*, [35 FLRA 181](#) (1990).

determine the extent of an employee's confidential working relationship. More specifically, evidence of an employee's confidential working relationship with a supervisor who is significantly involved in labor relations establishes a need to exclude the employee from bargaining units in accordance with [5 U.S.C. § 7112\(b\)\(2\)](#). In *Department of Labor, Office of the Solicitor, Arlington Field Office and American Federation of Government Employees Local 12*, [37 FLRA 1371 \(1990\)](#) the Authority expanded application of the "labor-nexus" test beyond employees assisting their supervisors in the exercise of managerial labor relations functions. The Authority determined that the statutory definition of confidential employee encompasses other employees who have advance access to management's positions, internal policy documents, or guidance for supervisors and managers concerning contract negotiations, the disposition of grievances, and other labor relations matters. The Authority explained that inclusion of said employees in a bargaining unit would present a conflict of interest and emphasized that "management should not be faced with having bargaining unit members in positions where they could divulge information that they obtained as part of their confidential internal labor relations duties."

- 2) In *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association*, [71 FLRA 28 \(2019\)](#), the Authority clarified existing Authority precedent and explained that future duties may be considered in determining whether or not an employee should be statutorily excluded from a bargaining unit under [5 U.S.C. § 7112\(b\)\(2\)](#). The Authority stated, "to the extent that our precedent has implied that only those duties which have actually been performed will support an exclusion under [§7103\(a\)\(13\)](#), we take this opportunity to clarify that it is necessary to consider those duties which an employee would be called upon to perform when a grievance or complaint is filed or negotiations with the Union occur. Specifically, we will consider the manner in which a supervisor defines the duties of a confidential employee as well as those duties which are set forth in a position description."
- c. [5 U.S.C. § 7112\(b\)\(3\)](#) – Employees engaged in personnel work in other than a purely clerical capacity.

- 1) Personnelist: In *Department of Veterans Affairs Kansas City VA Medical Center, Kansas City, Mo., and American Federation of Government Employees*, [70 FLRA 465 \(2018\)](#), the Authority reversed prior Authority decisions saying these decisions “overly relied on analyzing whether duties were performed in a routine manner or whether employees exercised independent judgment and discretion.” This decision established that “any analysis of the [§7112\(b\)\(3\)](#) exclusion must comport with the Statute’s plain language”; “personnel work that involves evaluating, advising, recommending, and making assessments is not purely clerical”; and “‘purely clerical’ would mean that the employee was exclusively focused on administrative tasks like filing and typing”.
 - 2) Personnelist – non-bargaining unit employees (BUEs): In *934th Tactical Airlift Group (AFRES) and Local 1997 American Federation of Government Employees*, [13 FLRA 549 \(1993\)](#), the Authority explained that employees engaged in personnel work involving individuals, such as military personnel, who do not meet the definition of “employee” in [5 U.S.C. § 7103\(a\)\(2\)](#) cannot be statutorily excluded from bargaining units under [5 U.S.C. § 7112\(b\)\(3\)](#).
- d. [5 U.S.C. § 7112\(b\)\(4\)](#) – Employees engaged in administering provisions of chapter 71.
- 1) In *Federal Mediation and Conciliation Service (FMCS) and FMCS Association of Federal Mediators*, [52 FLRA 1509 \(1997\)](#), the Authority determined that mediators employed by FMCS may not constitute an appropriate unit since they “‘implement and carry out section [7119\(a\)](#) of the Statute by providing mediation and conciliation and technical services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses.’ The Authority further concluded that by providing such services, FMCS mediators are engaged in ‘administering’ the provisions of the Statute within the meaning of section [7112\(b\)\(4\)](#).”⁸

⁸ The Authority has noted that FMCS mediators’ involvement in matters unrelated to negotiations, such as grievance mediation; settlement recommendations; and technical assistance, also justifies statutory exclusion from units. See *FMCS Region 7 and Council of Federal Mediators Region 7*, [3 FLRA 138 \(1980\)](#).

- 2) Enforcement: In *Department of Labor, Office of the Solicitor, Region III, and National Council of Field Labor Locals*, [8 FLRA 286 \(1982\)](#) the Authority held that employees, such as attorneys, who enforce sections of the Statute, including [§§ 7120\(a\)-\(e\)](#) which address standards of conduct for labor organizations, are engaged in administering the Statute pursuant to [§ 7112\(b\)\(4\)](#). In this decision, while noting there was no evidence in the record demonstrating that affected attorneys actually participated in “providing legal advice and assistance with regard to enforcement” of the Statute, the Authority determined that the attorneys were precluded from inclusion in a BU pursuant to [§ 7112\(b\)\(4\)](#) since the positions, which were designated as generalist attorneys, were responsible for performing such duties when called upon to do so.
- 3) Interpretation of “Administer” in [§ 7112\(b\)\(4\)](#) vs. [§ 7112\(c\)](#): In *National Mediation Board and American Federation of Government Employees*, [56 FLRA 1 \(2000\)](#), the Authority explained that “the very existence of section [7112\(c\)](#) implies that *some* unit can exist even at those agencies that administer a labor-management relations statute. [...] This language does not, by its terms, provide for a blanket or *per se* exclusion of every individual employed by an agency that administers a statute relating to labor-management relations. Rather the language prohibits union representation only if the employee is engaged in administering a law relating to labor-management relations.”

In this decision, the Authority provided a more comprehensive definition of “administer” for adoption and application of all future cases as related to [§§ 7112\(b\)\(4\)](#) and [7112\(c\)](#) which “would be construed as permitting employees who are not responsible for managing, implementing, carrying-out, or otherwise executing a provision of law relating to labor-management relations to be included in an appropriate unit.”

- e. [5 U.S.C. § 7112\(b\)\(5\)](#) – Professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit.

Agencies and unions should start with the statutory definition of “professional” employee at [5 U.S.C. § 7103\(a\)\(15\)](#) and then consider relevant Authority decisions:

- 1) “[D]eterminations that require judgment and extensive educational background [are] the hallmark of professional employees.” *Department of Homeland Security, Bureau of Customs and Border Protection*, [61 FLRA 485](#) (2006).
 - A college degree is not necessarily required for an employee to be considered a professional.
 - Those whose work involves routine mental, manual, mechanical, or physical work are not considered professionals.
 - Other agencies may use the term “professional,” but this doesn’t mean they are using the Statutory definition.
 - Only the FLRA can determine someone is a professional under section 7103(a)(15).
 - 2) The Authority has also considered the extent to which performance of the job involves the exercise of discretion and judgment, as well as whether the nature of the work is intellectual and varied, as opposed to routine mental, manual, or physical work. *934th Tactical Airlift Group (AFRES), and Local 1997, American Federation of Government Employees*, [13 FLRA 549](#) (1983).
- f. [5 U.S.C. § 7112\(b\)\(6\)](#) – Employees engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.⁹

⁹ In some instances, the Authority has relied, in part, on OPM regulations in making determinations on whether a “national security” position is excluded from bargaining units. On June 5, 2015, OPM and the Office of the Director of National Intelligence (ODNI) published a Federal Register notice for [5 CFR 732](#) (now part 1400) and noted that “it is not the intention of this regulation to impact how the Federal Labor Relations Authority (FLRA) makes unit determinations based on national security under 5 U.S.C. § 7112(b)(6), but to clarify when designating national security positions as required under E.O. 10450. This regulation is not intended to, nor could it alter, statutory authorities vested in the FLRA.” See [80 FR 32244-01](#). Despite this statement, OPM recognizes that, under 5 U.S.C. § 7105(a)(2)(A), Congress delegated to the FLRA the exclusive jurisdiction to determine the appropriateness of bargaining units for labor union representation under 5 U.S.C. § 7112, and that the FLRA may in fact rely on information about how agencies’ positions have been designated under OPM’s and ODNI’s joint regulation in determining whether the position falls within the national security exclusion.

- 1) In *Department of Energy, Oak Ridge Operations, and National Association of Government Employees Local R5-181 (Oak Ridge)*, [4 FLRA 644 \(1980\)](#), the Authority defined "national security" as "those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense."
- 2) In *Nuclear Regulatory Commission and National Treasury Employees Union (NRC)*, [66 FLRA 311 \(2011\)](#), the Authority has held that "directly affects" means "a straight bearing or unbroken connection that produces a material influence or alteration" on national security. The Authority has further held that the "plain terms of this definition - - - that any bearing on national security must be straight, any connection must be unbroken, and any influence or alteration must be material." In other words, the Authority has noted that this makes "it clear that § 7112(b)(6) does not permit the exclusion of positions *merely* because they have some connection to national security - - - even important national [security] interests."
 - Where the Statute does not define a pertinent term, the Authority has found it appropriate to consider dictionary definitions of the term:
 - "Intelligence" means "evaluated information concerning an enemy or a possible theater of operations and the conclusions drawn therefrom."
 - "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."
 - In applying § 7112(b)(6) since [Oak Ridge](#), the Authority "has found that positions directly affect national security only in limited circumstances. For example, there are no intervening steps between

the employees' failure to satisfactorily perform their duties and the potential effect [of that failure] on national security, the Authority has found the requisite connection." By contrast, "where an employee's role in protecting national security is limited, the Authority has not found the requisite direct connection."¹⁰

- 3) The Statute and the Authority have not defined "investigative" work but agencies and unions have agreed that employees performed investigative work on a few occasions.
 - In *NRC*, [66 FLRA 311 \(2011\)](#), the parties did not dispute whether criminal investigators for the NRC did investigative work.
 - In *Office of Personnel Management and AFGE*, [5 FLRA 238 \(1981\)](#), OPM investigators and investigations technicians who investigate applicants' qualifications and suitability for employment did investigative work.
- 4) In *NRC*, [66 FLRA 311 \(2011\)](#), the Authority noted that "an employee will be found to be engaged in 'security work' within the meaning of § 7112(b)(6) if the employee's duties include 'the regular use of, or access to, classified information.' In assessing bargaining unit status, with certain exceptions not relevant here, the Authority focuses on the duties actually performed by the employee at the time of the hearing, rather than potential future duties."
- g. [5 U.S.C. § 7112\(b\)\(7\)](#) – Employees 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.
 - 1) This statutory exclusion encompasses work involving the audit or investigation of internal programs, activities, systems, and functions of an agency to ensure duties are performed with honesty and integrity, including efforts to determine the extent of employees' compliance with

¹⁰ *Department of the Treasury, Internal Revenue Service and National Treasury Employees Union*, [65 FLRA 687 \(2011\)](#).

policies, procedures, laws, and regulations; the safeguarding of agency assets; and the adequacy of internal controls, such as the detection of possible fraud, waste, and abuse in the performance of work by employee's whose duties directly affect the agency's internal security.¹¹

- 2) However, the mere performance of procedural quality control checks to ensure employee compliance with generally accepted Federal standards does not justify reliance on this statutory exclusion.¹²

h. [5 U.S.C. 7103\(b\)\(1\)](#) provides that "The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that - - -

- 1) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
- 2) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations."

- Over the years, various Presidents have issued Executive Orders to exclude an agency or subdivision of an agency from coverage under the Statute. *See American Federation of Government Employees, Local 1592 v. Federal Labor Relations Authority*, 836 F.3d 1291 (10th Cir 2016) (Executive Order 12171).
- As each agency reviews positions which are excluded from bargaining unit coverage due to an Executive Order exclusion, the agency should consider whether circumstances have changed for these organizations which may raise questions of whether the previous exclusions continue to be appropriate.
- For example, organizations may have reorganized resulting in changes to the primary functions of the agency or subdivision. Such

¹¹ *Department of Navy, Naval Audit Service Southeast Region and National Federation of Federal Employees*, [46 FLRA 512 \(1992\)](#)

¹² *Department of State, Bureau of Consular Affairs, Passport Services and National Federation of Federal Employees Local 1998*, [68 FLRA 657 \(2015\)](#)

matters are not for review by the Authority. OPM is available to consult with agencies on any questions related to Executive Order exclusions.

Reviewing/Auditing the Bargaining Unit Status – Next Steps

As previously noted, the White House Task Force on Worker Organizing and Empowerment "[Report to the President](#)" notes that OPM should work with agencies and provide guidance to help them review and, if necessary, correct the bargaining unit status of federal sector positions

Therefore, to be consistent with the Task Force recommendations approved by the President, agencies should review the bargaining unit status of non-bargaining unit positions to assess whether these positions are correctly excluded from bargaining unit coverage under the Statute and, if appropriate, pursue corrective action in accordance with the Statute and FLRA procedures at [5 CFR Part 2422](#). Agencies should work with any unions that represent other employees in the organization to correct, if necessary, the bargaining unit status of federal sector positions which have been excluded from bargaining unit coverage.

More specifically, agencies and unions may file petitions requesting clarification of existing bargaining units in their efforts to address inclusion and exclusion of positions. Such petitions should be filed with the appropriate [FLRA Regional Director](#) (RD) in accordance with the requirements specified in [5 CFR 2422.3 – 2422.5](#). Agencies and unions are strongly encouraged to work together on identifying which positions should be included or excluded from bargaining units and consider filing a joint petition to the FLRA.

In addition to the Authority's [Representation Case Law Outline](#) previously mentioned, the Authority has other resources to help guide agencies and unions on representation issues:

- [Representation Case Handling Manual](#) – detailed information about the FLRA's procedures for processing representation petitions;

- [Hearing Officers Guide](#) – a guide to the FLRA’s representation procedures;
- [Representation Frequently Asked Questions](#);
- Training slides - [Bargaining Unit Determinations: Appropriate Units and Exclusions](#);
and
- Training slides - [Reorganizations: Impact on Bargaining Units and Impact on Bargaining Obligations](#)

Bargaining Unit Status Review of Remote Employees

Bargaining unit certifications often describe bargaining units in terms of organization and geography. Over the last several years, more and more employees are becoming remote workers raising questions of continued bargaining unit coverage once an employee moves to a different geographic area while remaining in the same organization.

Once the decision is made that an employee occupying a bargaining unit position qualifies as a remote worker, the next step is for the agency and union to review the existing Unit Certification. Consultation with Agency labor relations and general counsel offices is strongly encouraged.

