

Increased Management Rights [28]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

- Collective bargaining process is time-limited and DHS is able to enact changes if the parties have not completed negotiations within the mandatory time limits. Post implementation bargaining is permitted.
- DHS-wide regulations and government-wide regulations are not negotiable. They cannot be challenged on the basis of their “compelling need” under § 7117.
- Secretary, DHS has the unreviewable authority to suspend and/or disapprove negotiated contract provisions when necessary for national security reasons, or to prevent significant impairment to the DHS mission.
- Management rights in current 5 USC Chapter 71 are retained and those in § 7106(b)(1) are made mandatory rights under § 7106(a)(2).
- Bargaining is required only when the DHS establishes new or revises existing personnel policies, practices or matters affecting working conditions that have a significant impact upon a substantial portion of the bargaining unit as a whole. “Significant” and “substantial” are terms that will be clarified through LRA/LRA Panel decisions.
- Requirement under 5 USC Chapter 71 to notify the union before meeting with bargaining unit employees is eliminated.
- Labor relations disputes are adjudicated internally by a single entity. Time frames are short and decisions can be set aside by the Secretary, DHS if necessary for national security reasons, or to prevent significant impairment to the DHS mission.

Internal Administration of LR Program:

- The FLRA and the FSIP are replaced by an internal DHS-appointed Labor Relations Administrator (LRA) or Labor Relations Panel operating under the general direction of a Chief LRA. The LRA/LRA Panel hears and decides on negotiability disputes, impasses, unfair labor practice charges, appeals of certain grievance decisions, and unit determinations.
- Secretary may halt any labor relations process, e.g., processing of a grievance, disclosure of agency information, etc., when necessary for national security reasons, or to prevent significant impairment to the DHS mission.

Narrower definition for Bargaining Units:

- “Most appropriate unit” definition is adopted. Bargaining unit certification requires a majority of the unit vote.
- Exemptions from coverage in a bargaining unit will be made by agency regulation.

Limitation on Official Time and Secure Funding Structure for Unions:

- Dues payment structure aligned to limitations on official time entitlements.
- Unions may require payment by non-dues paying members of mandatory representation fees on an incident basis or impose mandatory dues deduction if at least 60% of employees in unit agree (a vote will occur every 2 years.) In either case, official time will be limited to preparation and representation for negotiated grievances, disputes before the LRA/LRA Panel, and negotiations.

Note: Whenever "Secretary" is used throughout this Option, it should be understood to include "or designee(s)."

Key Features:

Negotiations and Consultation:

- The scope of negotiations is limited.
- Bargaining is required only when the DHS establishes new or revises existing personnel policies, practices or matters affecting working conditions that have a significant impact upon a substantial portion of the bargaining unit as a whole. "Significant" and "substantial" are terms that will be clarified through LRA/LRA Panel decisions.
- Management-initiated changes during the life of a contract (or in the absence of a contract) are subject to negotiations as specified above. Otherwise, advance notice and a consultation opportunity are provided to unions. Post-implementation bargaining is permitted when necessary to meet operational needs.
- The parties will make every reasonable effort to resolve issues collaboratively at all levels of the DHS.
- Contract negotiations are limited to 60 calendar days. Standard ground rules will be developed. Issues still outstanding at the end of the 60-day period automatically go to the LRA/LRA Panel for an expedited decision.
- The Secretary, DHS can unilaterally suspend any provision of the contract when necessary for national security reasons, or to prevent significant impairment to the mission of DHS. When suspension is necessary to meet operational or other needs, the Secretary, DHS provides advance notice to the National Presidents of DHS unions and meets with them, if practicable.
- The Secretary, DHS has expanded "agency head" authority to remand/reject any contract provision that is inconsistent with law, DHS regulation/policy and/or where necessary for national security reasons, or to prevent significant impairment to the mission of DHS.
- DHS Labor Council (comprised of DHS unions) meets periodically with the Secretary, DHS to discuss broad agency labor relations issues and concerns.

Internal Administration of LR Program:

- The FLRA and the FSIP are replaced by an internal DHS appointed Labor Relations Administrator (LRA) or Labor Relations Panel operating under the general direction of a Chief LRA. The LRA/LRA Panel hears and decides on negotiability disputes, impasses, unfair labor practice charges, appeals of certain grievance decisions, and unit determinations. Representation elections will still be handled by the FLRA.
- LRA/LRA Panel adjudication time frames are very short (30 – 45 days). An even more expedited process is used to resolve union information requests and post-implementation bargaining disputes.
- LRA/LRA Panel decisions can be set aside by the Secretary, DHS if necessary for national security reasons, or to prevent a significant impairment to the mission of DHS. No further review of LRA/LRA Panel decisions (other than by the Secretary, DHS) is available.
- Secretary, DHS may halt any labor relations process, e.g., processing of a grievance, disclosure of agency information, etc., when necessary for national security reasons, or to prevent significant impairment to the DHS mission.

Bargaining Units and Union Rights:

- Unit certification occurs based upon a majority of employees in the unit voting for representation. Permit automatic intervention of incumbent union.
- Unions may require payment by non-dues paying members of mandatory representation fees on an incident basis or impose mandatory dues deduction if at least 60% of employees in unit agree (a vote will occur every 2 years.) In either case, official time will be limited to preparation and representation for negotiated grievances, disputes before the LRA/LRA Panel, and negotiations.
- The requirement to notify the union in advance of a formal discussion with employees is eliminated.

Sub-Options:

- A single LRA or LRA Panel could serve as reviewer and adjudicator of labor disputes. A regional or organizational structure could be used.
- LRAs are appointed by the Secretary, DHS or are appointed by the Secretary, DHS after consultation with unions.
- The FLRA or the LRA/LRA Panel could conduct elections.
- Timeframe for hearing and adjudicating disputes could be 30 or 45 days (or some other longer period.)
- Level of recognition no lower than the Bureau level or status quo or permit variation among DHS organizational elements.
- Redefine [negotiated] "grievance" to, "any complaint for which another avenue of redress is not available, is in the control of DHS management, and involves the violation, misinterpretation or misapplication of any law, rule, regulation, or contract" or permit the parties to negotiate a definition in the contract.
- Retain limitation on filing either NGP or ULP (§ 7116(d)) but note that time frame for filing ULP is significantly shortened or require parties to use the ULP process only.
- Status quo (§ 7114), except –
 - replace last sentence in (a)(1) with provision for payment by non-dues paying members of

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- mandatory representation fees on an incident basis or
- impose mandatory dues deduction if at least 60% of employees in the unit agree. A vote will occur every 1 or 2 or 3 or 5 years.
- in either case, official time will be limited to preparation and representation for negotiated grievances, disputes before the LRA/Panel, and negotiations or eliminate official time.

Relation to Other Options:

- Other system options that are regulated DHS-wide will provide fewer opportunities for bargaining.
- "Strict liability violations" reference found in System Element 8 comports with Adverse Action/Appeals Option, titled, "Streamlined Process with Strict Liability Violations."

Implications (This section contains "possible advantages/benefits" and "possible problems/ challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Should enable managers to make workplace changes expeditiously. Limiting bargaining to those changes that have a significant impact on a substantial portion of the bargaining unit as a whole might be especially important in an organization that is likely to undergo frequent change in the next few years.
- Establishing a standard of "most appropriate unit" should enable the Department to organize effective labor relations through a sensible bargaining unit structure.
- Provides for a simple and expeditious process to resolve labor disputes.
- DHS mission accomplishment is given the highest priority. The Secretary should have the ability to balance the rights of employees to engage in collective bargaining with the need to accomplish the agency mission. His/her exercise of this authority is not unfettered since Congress provides oversight of the Department's programs and the Secretary's actions.
- Pre-decisional consultation with DHS unions on a range of matters should meet the Secretary's goal of a cooperative and inclusive labor relations environment and address any concerns employees might have regarding the need to implement changes in a prompt and timely manner
- Requires national-level Labor Council which should lead to improved communication and cooperation among management and unions.
- Controls litigation and official time costs.

Possible Problems/Challenges

- Represents major overhaul to current labor program; could result in significant internal workplace disruption.
- Limitation on mid-term bargaining might result in more complicated term bargaining or might eliminate bargaining over important changes having an impact on many employees.
- Non-precedential LRA/LRA Panel decisions could lead to unpredictability.
- Raising level of recognition to Bureau-level or higher might significantly hinder union ability to organize.
- Eliminating the requirement for pre-implementation bargaining might lead to frustration and discontent among employees who feel they have no voice in workplace changes; might be contrary to Secretary's goal of a cooperative, give and take environment.

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- Unions will resist limits on current scope and duty to bargain, management-appointed panels, bargaining unit coverage through agency regulation, and any system that makes DHS regulations nonnegotiable and give the Secretary discretion to waive bargaining obligations and contracts; unions will maintain that such systems lack credibility, independence and objectivity.
- "Most appropriate unit" standard has no precedence in law; concerns were also raised about its impact on employee self-determination.
- Reduces the scope of management's discretion to bargain.

Other Implications

- Establishing recognition at the Bureau level may have a disruptive impact on some organizational elements such as the U.S. Coast Guard which has multiple, geographically dispersed units; currently stable labor management relationships may suffer.
- Eliminating judicial review of LRA/LRA Panel decisions could make DHS subject to *Bivens* actions (allowing remedies for constitutional violations by Federal employees)
- Eliminating right to file either a negotiated grievance or a ULP will result in a simpler system but will diminish flexibility for both parties.
- There may be legal and regulatory hurdles to establishing a mandatory representation fee for non dues-paying employees.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- Staffing requirements for LRA/LRA Panel structure.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Extremely mission centered in that the scope of negotiations is markedly limited and the standard for adjudicating disputes is operationally focused. In addition, LRA/LRA Panel structure establishes an internal decision-making body that is solely dedicated to DHS issues.

Performance Focused

- Standard for adjudicating disputes is operationally focused. Expedited processing for resolving disputes permits greater workforce focus on mission accomplishment.

Contemporary and Excellent

- Enhanced management flexibility will enhance DHS ability to respond to changing mission and operational requirements.
- Establishment of Labor Council will promote collaboration and exchange of ideas for innovation.

Generate Trust and Respect

- Dispute resolution processes are simple and transparent. However, greater unilateral management authority may diminish system credibility.

Based on Merit System Principles and Fairness

- Preserves interests of both parties - involves employees through their union representatives in pre-decisional discussions, allows them an opportunity to bargain collectively with management over changes, but allows management to enact changes required by mission.
- Provides for the efficient and expeditious resolution of appeals.

**Detailed Description
By System Component and System Element**

L		Labor Relations System
System elements:		Summary description:
1	<p>General provisions</p> <p>Administration</p>	<p>Revise last sentence of (b), "...in a manner consistent with the requirement of an effective, efficient, cost-conscious, mission-oriented Department of Homeland Security."</p> <p><u>Jurisdiction and composition:</u></p> <ul style="list-style-type: none"> • Labor Relations Administrator (LRA)/Labor Relations Administrator Panel administers the DHS labor relations program, develops implementing regulations, and hears and adjudicates labor disputes. • LRAs are appointed by the Secretary <u>or</u> are appointed after consultation with unions. LRA/LRA Panel members are paid by DHS on a full-time salaried basis and retain small support staffs. • Use either a single LRA <u>or</u> a LRA Panel structure. A regional <u>or</u> organizational structure could be used. • If a single LRA structure is used a cadre of LRAs would be appointed all of whom would report to a Chief LRA. The Chief LRA would be responsible for ensuring consistency and soundness of LRA decisions. If a LRA Panel structure is used, multiple panels would be established all of whose members would also report to a Chief LRA. • LRA/LRA Panel members review and adjudicate unfair labor practice charges, appeals of certain negotiated grievance decisions (see System Element 8), impasses, and negotiability disputes; and determine most appropriate unit. The FLRA <u>or</u> the LRA/LRA Panel could elections. • LRA/LRA Panel decisions would not be reviewable by an external body. However, if they must be, the standard for review should include consideration of employee benefit but be primarily based on avoiding adverse impact on the DHS mission. <p><u>LRA/LRA Panel procedures:</u></p> <ul style="list-style-type: none"> • Applies single set of short (30 <u>or</u> 45 calendar days <u>or</u> some longer period) strict adjudication time frames. • Reviews and adjudicates union information requests and post-implementation bargaining disputes using an expedited process. • May conduct hearing or render decision on the record. • May attempt mediation with the parties using the FMCS or another mediation service. • Render non-precedential decisions. • Secretary, DHS may set aside LRA/LRA Panel decisions if necessary for national security reasons, or to prevent a significant impairment to the mission of DHS.

L		Labor Relations System
System elements:	Summary description:	
		<p>There is no review of the Secretary's determination.</p> <ul style="list-style-type: none"> • Secretary, DHS may halt any labor relations process, e.g., processing of a grievance, disclosure of agency information, etc., when necessary for national security reasons, or to prevent significant impairment to the DHS mission. • DHS Labor Council (comprised of DHS unions) meets periodically with Secretary, DHS to discuss broad agency labor relations issues and concerns.
2	Employee rights	<ul style="list-style-type: none"> • Status quo - <ul style="list-style-type: none"> ➤ Right to form, join, or assist any labor organization or to refrain from such activity. (Except that fees may be required under the alternate suboption for mandatory dues deduction. See 2nd arrow under 3rd bullet of System Element 9, Dues Allotments.) ➤ To act for a labor organization as a representative including engaging in collective bargaining and presenting views of the labor organization to appropriate authorities. ➤ Add bar on activities when necessary for national security reasons, or to prevent a significant impairment to the mission of DHS.
3	Union rights & obligations	<ul style="list-style-type: none"> • Status quo (§ 7120), Standards of Conduct for Labor Organizations, except that the LRA/LRA Panel will have the authority to determine and enforce (f) – revoke exclusive recognition status of a labor organization or take other appropriate disciplinary action if that labor organization has participated in a strike, work stoppage, or slowdown. • Status quo (§ 7114), except – <ul style="list-style-type: none"> ➤ replace last sentence in (a) (1) with provision for payment by non-dues paying members of mandatory representation fees on an incident basis <u>or</u> impose mandatory dues deduction if at least 60% of employees in the unit agree. Vote will occur every 1 <u>or</u> 2 <u>or</u> 3 <u>or</u> 5 years. ➤ delete formal discussion provision. ➤ modify information request provision with obligation to provide information necessary for collective bargaining and processing of established ULP or NGP; that is relevant, necessary and available in an existing format; and whose collection is not unduly burdensome for DHS. Further, DHS may require pre or post payment by the union of fees equivalent to the cost of collecting and providing the required information. Finally, disagreements would flow to an expedited LRA/LRA Panel process for resolution.
4	Management rights	<ul style="list-style-type: none"> • Status quo (§ 7106) except – <ul style="list-style-type: none"> ➤ clarify language, e.g., delete (a)(2)(C)(i) and (ii), distinguish between “assign” and “assign work”, etc. ➤ at (a)(2)(D), replace with, “ to take whatever actions may be necessary for national security reasons or to prevent significant impairment to the mission

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L		Labor Relations System
System elements:	Summary description:	
		<p>of DHS.”</p> <ul style="list-style-type: none"> ➤ permissive subjects in § 7106(b)(1) are made management rights under § 7106(a)(2.) ➤ I & I bargaining is eliminated unless the exercise of a management change would have a significant impact upon a substantial portion of the bargaining unit as a whole.
5	Bargaining unit	<ul style="list-style-type: none"> • Appropriate unit definition (§ 7112) should be replaced with “most appropriate unit” definition to be assessed against same criteria (clear and identifiable community of interest; effective dealings with DHS; and efficient dealings with DHS). • LRA/LRA Panel will review and adjudicate “most appropriate unit” determinations. • Level of recognition no lower than the Bureau level <u>or</u> status quo <u>or</u> permit variation among DHS organizational elements. • Eliminate differential treatment afforded “professional” employees. • FLRA <u>or</u> LRA/LRA Panel will oversee elections. • Unit certification will occur based upon a majority of employees in the unit voting for representation. Permit automatic intervention of incumbent union. • Revise definition of [negotiated] grievance, to “any complaint for which another avenue of redress is not available, is in the control of DHS management, and involves the violation, misinterpretation or misapplication of any law, rule, regulation, or contract” <u>or</u> permit the parties to negotiate a definition in the contract. • Revise definition of “confidential employee” by deleting the words, “in the field of labor relations.”
6	Negotiations	<ul style="list-style-type: none"> • Retain good faith bargaining standard (§ 7114.) • Delete national consultation rights (§ 7113.) <p><u>Duty to bargain:</u></p> <ul style="list-style-type: none"> • Require substance bargaining over working conditions that are clearly separable and distinct from management rights, law, government-wide regulation, and DHS-wide rules and policy. However, bargaining is required only when the DHS establishes new or revised existing personnel policies, practices or matters affecting working conditions that have a significant impact upon a substantial portion of the bargaining unit as a whole. “Significant” and “substantial” are terms that will be clarified through LRA/LRA Panel decisions. • DHS-wide rules and regulations are non-negotiable. They cannot be challenged on the basis of their “compelling need.” • Require I & I bargaining when the exercise of a management right would have a significant impact upon a substantial portion of the bargaining unit as a whole. • Management-initiated changes during the life of a contract (or in the absence of a contract) are subject to negotiations as specified above. Otherwise, advance

L Labor Relations System	
System elements:	Summary description:
	<p>notice and a consultation opportunity are provided to unions. Post-implementation bargaining is permitted when necessary to meet operational needs.</p> <p><u>Contract negotiations:</u></p> <ul style="list-style-type: none"> • Contract negotiations would be limited to 60 calendar days. Standard ground rules would apply. FMCS or other mediation services could be used by the parties. Issues still outstanding at the end of the 60-day period automatically go to the LRA/LRA Panel for an expedited decision (15 calendar days to issue decision). • Expand DHS agency head review to include remand/rejection based on inconsistency with law, DHS regulation/policy and/or where necessary for national security reasons, or to prevent significant impairment to the mission of DHS. • DHS Secretary has the unreviewable authority to suspend negotiated contract provisions when necessary for national security reasons, or to prevent significant impairment to the DHS mission. • When suspension of a negotiated contract provision is necessary to meet operational or other needs, the Secretary, DHS provides advance notice to the National Presidents of the DHS unions and meets with them, if practicable. <p><u>LRA/LRA Panel process and standards:</u></p> <ul style="list-style-type: none"> • Standard for adjudicating impasses - "enhance accomplishment of DHS mission" and "effective and efficient use of government resources." • LRA/LRA Panel would enforce expeditious timeframes – <ul style="list-style-type: none"> ➤ parties have 7 <u>or</u> 15 calendar days to file complaint. Parties must provide clear and complete description of their positions. ➤ LRA/LRA Panel could conduct hearing or review the record but must render a decision within 23 <u>or</u> 30 calendar days of receipt of required documents. If the parties agree to FMCS mediation, the time frame would be expanded by a maximum of 7 calendar days. • LRA/LRA Panel would employ expedited adjudication procedures for information requests and post-bargaining issues. • LRA/LRA Panel will find union proposals non-negotiable if they – <ul style="list-style-type: none"> ➤ significantly or substantively interfere with a management right or DHS operations; ➤ are contrary to law, government-wide regulation, or DHS-wide rules and policy; or ➤ do not address conditions of employment of bargaining unit members. • Secretary, DHS may set aside LRA/LRA Panel decisions if necessary for national security reasons, or to prevent a significant impairment to the mission of DHS. There is no review of the Secretary's determination.

L		Labor Relations System
System elements:	Summary description:	
7	Unfair labor practices	<ul style="list-style-type: none"> • The basis for ULP filing will be limited to the following – <ul style="list-style-type: none"> ➤ interfere with employee rights under the DHS labor relations regulations (M, U, I) ➤ interfere with union rights under the DHS labor relations regulations (U, I) ➤ failure to act in good faith (M, U, I) ➤ condone work stoppage or other job action (M, I) • LRA/LRA Panel would enforce expeditious timeframes – <ul style="list-style-type: none"> ➤ parties (including employees) have 7 <u>or</u> 15 calendar days to file complaint. Parties must provide clear and complete description of their positions. ➤ LRA/LRA Panel could conduct hearing or review the record but must render a decision within 23 <u>or</u> 30 calendar days of receipt of required documents. If the parties agree to FMCS mediation, the time frame would be expanded by a maximum of 7 calendar days. • Secretary, DHS may set aside LRA/LRA Panel decisions if necessary for national security reasons, or to prevent a significant impairment to the mission of DHS. There is no review of the Secretary’s determination. • Retain union right to deny membership in certain situations (§ 7116 (c)) • Retain limitation on filing either NGP or ULP (§ 7116(d)) but note that time frame for filing ULP is significantly shortened <u>or</u> require parties to use the ULP process only. • Retain right to express certain statements (§ 7116 ((e)))
8	Grievance/ arbitration	<ul style="list-style-type: none"> • Redefine [negotiated] “grievance” to, “any complaint for which another avenue of redress is not available, is in the control of DHS management, and involves the violation, misinterpretation or misapplication of any law, rule, regulation, or contract” <u>or</u> permit the parties to negotiate a definition in the contract. • Whether to include a NGP and/or arbitration contractual provision will be left to the discretion of the parties. • If an NGP is negotiated without an arbitration provision, appeals of final grievance decisions will be accepted by the LRA/LRA Panel only if the complaint alleges a substantial violation, misinterpretation or misapplication of the DHS labor relations regulations. If an arbitration provision is negotiated, the Secretary, DHS can set aside arbitrator decisions if necessary for national security reasons, or to prevent significant impairment to the mission of DHS. The Secretary, DHS can also set aside decisions for traditional reasons such as, on the basis of violation of law, reliance on a non-fact, failure to draw its essence from the contract, no fair hearing, arbitrator bias or misconduct, arbitrator authority exceeded, etc. • Retain required characteristics, references to 2302 and conceptual references to 4303 and 7512 actions (§ 7121.) • Add DHS “Strict Liability Violations” offenses to list of exclusions (see Relation to Other Options section).
9	Dues	<ul style="list-style-type: none"> • DHS role is solely limited to ministerial payroll processing of dues deduction

L		Labor Relations System
System elements:		Summary description:
	allotments	<p>requests.</p> <ul style="list-style-type: none"> • Delete provision regarding duty to negotiate over the deduction of dues contingent upon a showing of 10% unit membership (§ 7115(c)) • Status quo (§ 7114), except – <ul style="list-style-type: none"> ➤ replace last sentence in (a)(1) with provision for payment by non-dues paying members of mandatory representation fees on an incident basis <u>or</u> ➤ impose mandatory dues deduction if at least 60% of employees in the unit agree. Vote will occur every 1 <u>or</u> 2 <u>or</u> 3 <u>or</u> 5 years. Employees have the right to object to dues deductions and pay only an amount (a pro rata amount) attributable to costs of negotiations, contract administration, and grievance handling. ➤ in either case, official time will be limited to preparation and representation for negotiated grievances, disputes before the LRA/LRA Panel, and negotiations <u>or</u> eliminate official time.
10	Official time	<ul style="list-style-type: none"> • Official time will be limited to preparation and representation for negotiated grievances, disputes before the LRA/LRA Panel, and negotiations <u>or</u> eliminate official time. • Procedures for handling travel and per diem for employees performing union representation functions will be established by DHS regulation.
11	Evaluation	<ul style="list-style-type: none"> • Has the LR program impeded DHS operational requirements or mission accomplishment? • Has the LR program allowed management and employees, through their representatives, to express and resolve concerns? • How much time has it taken to resolve the various disputes?