

Wisconsin Human Resources Handbook

Chapter 324

Confidential, Management or Supervisor Exclusions For Positions in the Classified Service

Sec. 324.010	Introduction	Attachment #1	Confidential
Sec. 324.020	Statutory and Rule Authority		Exclusion Analysis
Sec. 324.030	Purpose of Exclusions	Attachment #2	Management
Sec. 324.040	Definitions		Exclusion Analysis
Sec. 324.050	Use of Exclusion Analysis Forms	Attachment #3	Supervisor Exclusion
Sec. 324.060	Procedures for Requesting an Exclusion		Analysis
Sec. 324.070	Administrative Information		

Sec. 324.010 Introduction

The primary purpose of this chapter is to provide agencies and human resource offices with guidelines for assessing if an employee occupying a position in the classified service is appropriately excluded from representation by a collective bargaining unit. The provisions of this chapter apply to positions in the classified service.

Sec. 324.020 Statutory Authority

1. The majority of State employees have the right to bargain collectively through representatives of their own choosing. See ss. 111.82 and 111.825, Wis. Stats.
2. Certain types of employees are specifically excluded from this right to bargain collectively. See s. 111.81 (7), (13), and (19), Wis. Stats.

Sec. 324.030 Purpose of Exclusions

A classification decision made under the authority granted to the Director of the Office of State Employment Relations (OSER) pursuant to s. 230.09, Wis. Stats., also involves a decision as to whether the position is appropriately included in a collective bargaining unit. The final authority for determining whether an employee is appropriately excluded from bargaining unit representation rests with the Wisconsin Employment Relations Commission (WERC).

Pursuant to s. 111.825(3), Wis. Stats., the WERC assigns eligible employees to the appropriate bargaining units defined by s. 111.825(1) and (2), Wis. Stats. The appropriate designation of positions as represented or nonrepresented is a critical component of the personnel management system within the Wisconsin classified service.

In some cases, the work assigned to all positions within a particular classification or classification series has been determined to be excluded from representation (e.g., Human Resources Specialist). In other cases, the work performed may have similarities to work performed by represented positions, but differs enough to warrant exclusion on the basis of “confidential,” “management,” or “supervisor” (e.g., State Patrol Trooper and State Patrol Trooper - Confidential). Therefore, it may be necessary to perform a detailed analysis of a position’s duties in order to determine whether a position meets the statutory definitions which allow for exclusion from representation by a bargaining unit.

Sec. 324.040 Definitions

Section 111.82, Wis. Stats., provides that state employees have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in lawful, concerted activities for the purpose of collective bargaining. To be excluded from the definition of employee found in s. 111.81(7), Wis. Stats., at least one of the following definitions must be met:

1. **Confidential**, as defined by s. 111.81 (7)(a), Wis. Stats., describes a classified employee who is privy to confidential matters affecting the employer-employee relationship. (Additional detail is provided on Attachment #1, OSER-DCLR-86.)

Confidential employees have access to, knowledge of, or participate in confidential matters relating to labor relations.

When applying this definition, the WERC has held that “confidential matters relating to labor relations”

- a. must deal with the employer’s strategy or position in collective bargaining, contract (labor agreement) administration, litigation, or similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; **and**
- b. must not be information which is available to the employees’ bargaining representative or its agents (i.e., a position must be privy to management strategy information regarding employment relations).

NOTE: The WERC has determined that the following activities **do not** qualify a position for confidential status:

1. Access to payroll and personnel records.
2. De minimis amounts of time spent on confidential matters.
3. Physical proximity to a confidential employee.
4. Typing grievance replies or performance ratings.

NOTE: *De minimis* is a Latin expression meaning *about minimal things*, normally in the locutions *de minimis no curat* (“the praetor (government official) does not concern himself with trifles” or *de minimis no curat lex* (“the law does not concern itself with trifles”).

Generally, OSER looks at anything less than 5 percent as de minimis.

NOTE: Clarification regarding the definition of “confidential” after the enactment of 2011 Wisconsin Act 10 and Act 32. The State of Wisconsin as an employer continues to bargain with certified unions for base wage increases only and the State continues to issue discipline. The need for a confidential exclusion continues to exist. However, certified unions do not have bargaining representatives as it relates to representing an employee at a grievance hearing because the certified unions no longer have contractual grievance language. Almost any state employee can potentially function as the representative of another state employee in the grievance process. OSER recognizes that there are activities relating to the investigatory process for possible employee misconduct, the discipline process, and the grievance process where the State as an employer would need to have a confidential employee conduct or participate in such activities as the employer’s representative.

Examples of duties performed by a confidential employee include:

1. Represents the employer in conducting investigations of employees.
2. Represents the employer in discussions regarding whether discipline of an employee would be appropriate and what level of discipline would be appropriate.
3. Represents the employer in conducting grievance hearings and answering grievances.
4. Represents the employer in discussions regarding grievance settlements.
5. Assists OSER Labor Relations staff in preparing for and participates as a management representative in the hearing process before the Wisconsin Employment Relations Commission for employees' appeals of grievances.
6. Has access to, knowledge of, or participates in confidential matters relating to the above employment relations activities in accordance with the conditions identified in sec. 324.040 1(a) and (b) of this handbook chapter.

2. **Management**, as defined by s. 111.81 (13), Wis. Stats., includes those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads, and employees exercising similar functions and responsibilities as determined by the WERC.

The following criteria are considered when determining if employees meet the definition of management. (Additional detail is provided on Attachment # 2, OSER-DCLR-85.)

- a. If the employee is a division administrator, bureau director, or institution head, the employee is management.
- b. The employee may be management if:
 - 1) the employee is engaged predominately in executive and managerial functions similar to those engaged in by division administrators, bureau directors, or institution heads; **or**
 - 2) the employee participates in a significant manner in the formulation, determination **and** implementation of management policy; **or**
 - 3) the employee exercises effective authority to commit the employer's resources.
3. **Supervisor**, as defined by s. 111.81 (19), Wis. Stats., means any individual whose principal work is different from that of the individual subordinates and who has authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if the individual's exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Additional detail is provided in Attachment # 3, OSER-DCLR-84.)

Principal work, for the purposes of this handbook chapter, can be quantitative (i.e., time spent performing supervisory activities) or qualitative (i.e., whether the factors considered by the WERC are present in sufficient combination and degree to warrant finding the position supervisory.) The qualitative analysis will reveal the most important function of the position under review is different from the work of the subordinates and is essential or important to the fulfillment of the State's or the work group's mission.

Criteria used to apply the statutory definition include:

- a. the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
- b. the authority to direct and assign the workforce.

- c. the number of permanent employees supervised.

Note: Typically a position must supervise a minimum of at least three full-time permanent employees in order to meet the supervisory exemption.

- d. the amount of time spent supervising.

Note: Typically a position which spends less than 20 percent of its time on supervisory activities would not meet the supervisory exemption, and positions which perform work of the same type as that performed by the employees supervised has only a remote possibility of being a supervisor.

- e. the number of other persons exercising greater, similar, or lesser degrees of authority over the same employees.

Note: Only one position can be credited with supervision of an individual employee.

- f. the level of pay, including an evaluation of whether the supervisor is paid primarily for technical professional skill or supervision of employees.
- g. whether the supervisor is primarily supervising an activity (which may not require a supervisory position) or is primarily supervising employees performing the activity.
- h. whether the supervisor is a working supervisor (which may be more indicative of a lead worker) or whether the employee spends a substantial majority of the time supervising employees.
- i. the amount of independent judgment and discretion exercised in the supervision of employees.

Sec. 324.050 Use of Exclusion Analysis Forms

The guidelines and forms to be used when making “confidential,” “management,” or “supervisor” exclusion recommendations are included at the end of this chapter as Attachments 1, 2, and 3, respectively. These sample “Exclusion Analysis Forms” (EAFs) are provided to assist agencies in making the proper recommendation regarding the classification of individual positions and the status of the employee(s) occupying the position. The forms themselves are located on our website at: <http://oser.state.wi.us/docview.asp?docid=1126> (Confidential); <http://oser.state.wi.us/docview.asp?docid=1209> (Management); and <http://oser.state.wi.us/docview.asp?docid=1237> (Supervisory).

1. The appropriate completed EAF must accompany all initial requests for an exclusion of a position from bargaining unit representation and must be included as part of the supporting justification accompanying any subsequent classification transactions (excluding “replace, same duties” certification transactions unless the EAF is specifically requested by a DMRS consultant). The supervisory EAF is a *required* part of the position description for any supervisory position. The management EAF is a *required* part of the position description for any career executive position or other position that must meet the definition of management.
2. The EAF is used to identify the need for and recommend the exclusion of positions in:
 - a. classification transactions (i.e., certification requests, reallocation requests, reclassification requests).
 - b. personnel management survey implementation.
 - c. bargaining unit recommendation/determination purposes.

3. The completed EAF serves as formal documentation that is often used as the employer's exhibit when the status of a position's exclusion from a bargaining unit is being reviewed by the WERC in bargaining unit clarification proceedings.

Sec. 324.060 Procedures for Requesting an Exclusion

1. General

- a. The appropriate EAF should be completed by the position's first-line supervisor whenever possible. If this is not possible, any supervisor in the chain of command who has knowledge of the position may complete the form(s).
- b. The central human resources office of the employing agency must review the position's duties to determine if the recommendation for the exclusion meets the intent of the statutory definition prior to submitting the recommendation to the OSER for consideration.
- c. The OSER will review the materials, make a determination based on the information provided by the agency and notify the employing agency of the results of the review.

Note: Individuals performing the review of a position for the possibility of a "management" or "supervisor" exclusion are reminded that the initial assignment or complete removal of lead work, supervisory or managerial duties or responsibilities are not logical changes, therefore, competition may be required.

2. Role of the Supervisor

- a. The supervisor completing the EAF should review the definitions of confidential, management, and/or supervisor to ensure that the intent of the requested exclusion is understood. If the supervisor does not understand the implications of exclusion or the intent of the definitions, the supervisor should consult with the agency central human resources office. The supervisor should then complete the appropriate EAF and process accordingly.

1) The **Confidential** EAF (Attachment # 1, OSER-DCLR-86):

- a) Complete Position Identification Data items 1 through 6.
- b) Respond to questions 7 through 9. List the specific task statement(s) (i.e., A2, B7, C3) from the position description which indicate the specific work functions which support a "yes" response.
- c) Sign and date the form.
- d) Submit the completed Confidential EAF, along with the official position description and organizational chart, to the agency central human resources office.

2) The **Management** EAF (Attachment # 2, OSER-DCLR-85):

- a) Complete Position Identification Data items 1 through 6.
- b) Read the criteria used by the WERC in items 7 and 8 of the form and provide detailed rationale for the recommendation where indicated.
- c) Respond to Questions 8 and 9.
- d) Sign and date the form.

- e) Submit the completed Management EAF, along with the official position description and organizational chart, to the agency central human resources office.
- 3) The **Supervisory** EAF (Attachment # 3, OSER-DCLR-84):
- a) Complete Position Identification Data items 1 through 6.
 - b) Respond to questions 7 through 9.
 - c) Sign and date the form.
 - d) Submit the completed Supervisory EAF, along with the official position description and organization chart, to the agency central human resources office.
3. Role of the Agency Central Human Resources Office
- a. The agency central human resources office must analyze each exclusion request to ensure that it meets the intent and definition of the recommended exclusion.
 - b. The agency central human resources representative must sign and date the EAF where noted if approval of the request is recommended.
 - c. The agency central human resources office must forward the completed EAF, along with the appropriate classification transaction form (certification, reallocation, or reclassification request), the official position description, organizational chart and justification, to the classification analyst in OSER's Division of Compensation and Labor Relations (DCLR) for further review and analysis.
4. Role of the DCLR Classification Analyst and Bureau of Labor Relations (BLR) Reviewer
- a. The DCLR classification analyst must analyze each exclusion request to ensure it meets the intent and statutory definition of the requested exclusion as well as to ensure the position is appropriately classified.
 - b. The DCLR classification analyst will forward the package of material to the BLR reviewer, along with an internal recommendation.
 - c. The BLR will review the recommendation and accompanying documentation and ultimately either approves or denies the recommendation of the classification analyst. Upon approval or denial of the recommendation, the BLR representative will return the materials to the DCLR classification analyst who will notify the requesting agency of the approval or denial of the requested exclusion.

Questions regarding the information contained in this chapter should be referred to the DCLR classification analyst.

Sec. 324.070 Administrative Information

This chapter was originally issued by the Division of Compensation and Labor Relations in March 1998. In March 2002, the Bureau of Classification moved from that Division to the Division of Merit Recruitment and Selection. In May 2003, minor formatting changes were made to the chapter, and links and an administrative information section were added. In August 2010 the chapter was revised to acknowledge the return of Classification to DCLR, change the title of the forms from DCC to DCLR, add the definition and correct the spelling of "de minimis" and to identify that all Career Executive positions and positions that must meet the definition of management are required to have the Management EAF attached to the PD. In February 2013, the chapter was revised to clarify the definition of the term "confidential" after the implementation of Wisconsin Act 10 and Act 32.

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Confidential Exclusion Analysis (Non-Supervisory Positions)

This analysis should be completed by the position's supervisor and reviewed by the agency human resources representative prior to classifying a position as "confidential." The information will be used to assist in determining if the position is performing confidential duties which support inclusion of the position in a confidential classification, resulting in exclusion of the position from bargaining unit representation.

Wisconsin Statute s. 111.81(7) excludes from the definition of employee for collective bargaining purposes "individuals who are privy to confidential matters affecting the employer-employee relationship . . ." Under s. 111.825(3), Wis. Stats., the Wisconsin Employment Relations Commission (WERC) assigns eligible employees to the appropriate statutory bargaining unit and ultimately determines appropriateness of confidential exclusions. Through case decisions, the WERC has developed the following criteria to determine if an individual should be excluded on the basis of being confidential. The criteria should be used to determine if a position may appropriately be classified as confidential.

Position Identification Data

1. Name of Employee (if filled): _____
 2. Civil Service Classification: _____
 3. Department and Division: _____
 4. Bureau, Section, and Unit (or comparable): _____
 5. Name and Classification of Supervisor: _____
 6. Name and Complete Civil Service Title of Former Incumbent (if any): _____
-

7. Does the position have access to, knowledge of, or participate in matters which deal with: [If the answer is Yes, please list the corresponding position description (PD) task statement(s) next to the response below.]

PD Task #s

- | | |
|--|----------------------|
| a. the employer's strategy or position in collective bargaining? | Yes ___ No ___ _____ |
| b. contract (labor agreement) administration, which may include grievance settlements or interpretation of contractual language? | Yes ___ No ___ _____ |
| c. information being gathered in preparation for litigation of labor relations issues? | Yes ___ No ___ _____ |
| d. other similar matters pertaining to labor relations and grievance handling between the bargaining unit representative and the employer? | Yes ___ No ___ _____ |
| 8. Is the information the position has access to available to the bargaining representative or its agents? | Yes ___ No ___ _____ |
| 9. Are there other confidential employees available to perform the confidential tasks? | Yes ___ No ___ _____ |

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Division of Compensation and Labor Relations

Confidential Exclusion Analysis

For a position to be confidential, a “yes” answer is required in at least one of the questions listed under number seven (7a through 7d), and a “no” answer is required in both questions eight and nine. If the answer to question number nine is “yes,” then the possibility of consolidating confidential tasks should be discussed with the agency’s management.

A signature below means the position has been reviewed and you have concluded it should be confidential as defined by s. 111.81(7)(a), Wis. Stats.

Supervisor _____ Date _____

Human Resources Representative _____ Date _____

State of Wisconsin
Office of State Employment Relations
Division of Compensation and Labor Relations

Management Exclusion Analysis

This analysis should be completed by the position's supervisor and reviewed by the agency human resources representative prior to classifying a position as "management." The information will be used to assist in determining if the position is performing duties which support inclusion of the position in a career executive or other management classification, resulting in exclusion of the position from bargaining unit representation.

Wisconsin Statute s. 111.81(13), excludes management personnel from the definition of employee for collective bargaining purposes. Section 111.81(13) defines "management" to include "those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institution heads, and employees exercising similar functions and responsibilities as determined by the [Wisconsin Employment Relations] Commission."

The Commission referenced above is the Wisconsin Employment Relations Commission (WERC) which, under s. 111.825(3), assigns eligible employees to the appropriate bargaining units and ultimately determines the appropriateness of management exclusions.

Position Identification Data

1. Name of Employee (if filled): _____
 2. Civil Service Classification: _____
 3. Department and Division: _____
 4. Bureau, Section, and Unit (or comparable): _____
 5. Name and Classification of Supervisor: _____
 6. Name and Complete Civil Service Title of Former Incumbent (if any): _____
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In Case 33, No. 16403, SE-65, Decision No. 11640-C, the WERC used the following criteria in determining if employees were management. (Some of the statements are interpretations of statements made by the WERC rather than statements actually made in the decision.)

7. If the employee is a division administrator, bureau director, or institution head, the employee is, per se, management.
8. If the employee is not a division administrator, bureau director, or institution head, and if the employee is engaged predominately in executive and managerial functions similar to those engaged in by division administrators, bureau directors, or institution heads, the employee is management.

"Predominate function" is defined as the primary duties performed by the employee. If the primary duty is to provide legal services or supervise and review the work of others for compliance with established policy, the employee is not engaged predominately in executive and management functions, even though some of the time is spent in formulation, determination, and implementation of management policy. Predominate functions may be based on importance or percent of time spent. Generally, percent of time spent will be the determining factor.

Supervisor Exclusion Analysis

This information is to be provided by the position's supervisor and reviewed by the agency central office human resources representative for both filled and vacant positions and must be submitted as part of any position description (PD) for a position performing supervisory responsibilities (i.e., if # 13 of the PD is checked YES). This information will be used to determine (1) if the position is performing supervisory functions and thus should be allocated to a supervisory classification and (2) what supervisory classification is appropriate based on the total duties of the position.

According to s. 111.81(19), Wis. Stats., a supervisor is any individual “who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or to adjust their grievances, or to authoritatively recommend such actions” and “whose principal work is different from that of the subordinates.” The criteria used by the Wisconsin Employment Relations Commission (WERC) to apply this definition include: the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; the authority to direct and assign the workforce; the number of employees supervised (typically a minimum of 3 FTE permanent employees); the amount of time spent supervising; the number of other persons exercising greater, similar or lesser degrees of authority over the same employees; the level of pay, including an evaluation of whether the supervisor is paid for skill or supervision of employees; whether the supervisor is primarily supervising an activity or is primarily supervising employees performing the activity; whether the supervisor is a working supervisor or whether he/she spends a substantial majority of his/her time supervising employees; and the amount of independent judgment and discretion exercised in the supervision of employees. The WERC ultimately determines the appropriateness of supervisory exclusions.

Position Identification Data

1. Name of Employee (if filled): _____
2. Civil Service Classification: _____
3. Department and Division: _____
4. Bureau, Section and Unit (or comparable): _____
5. Name and Classification of Supervisor: _____
6. Name and Complete Civil Service Title of Former Incumbent (if any): _____

7. Supervisory Responsibilities

- a. In view of the definition statement and criteria listed in the second paragraph of this form, does the incumbent of this position:

- (1) have the responsibility for directly supervising the activities of other classified employees? YES ___ NO ___
- (2) have the responsibility for supervising the activities of lower level supervisors? YES ___ NO ___
- (3) meet the definition statement and criteria? YES ___ NO ___

- b. List the official classification titles and number of permanent classified employees (full or part-time) directly supervised by the incumbent. If this position supervises lower level supervisors, indicate the number of employees supervised by the lower level position(s) in parentheses after the classification title of the position. (NOTE: LTE, student, patient/inmate, volunteer, and unclassified employees should be specifically identified since the direction of these individuals is not considered to warrant supervisory status.)

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Division of Compensation and Labor Relations

Supervisor Exclusion Analysis

- c. What percentage of this position's total time is allocated to each of the following?
 - 1) Supervisory functions (i.e. hiring, dismissing, disciplining employees, evaluating performance, settling grievances)? _____
 - 2) Activities relating to supervisory responsibilities (i.e., establishing operating procedures, reviewing work of subordinates, counseling subordinates on performance, training and orienting new employees, performing related administrative functions, etc.)? _____
 - 3) Performance of other work activities similar to those of the employees supervised? _____
 - 4) Performance of other non-supervisory work activities different from those of the employees supervised (including program administration)? _____

*NOTE: The totals of c.1), 2), 3), and 4) must equal 100%. _____
*100%

8. Organizational Relationships

List (in order of descending authority) the names and classification titles of all other positions in the employing unit in the chain of command over the employees listed in 7.b.

A copy of the organizational chart must be attached for the immediate work unit (i.e., the organizational unit which includes the employees supervised), including the names and classifications of all employees.

9. Supervisory Activities

Is this position identified as a formal step in the employee grievance procedure? YES ____ NO ____
(If no, list below the name and classification of the first formal step in the grievance procedures for the employees listed in 7.b.)

A signature below means the position has been reviewed and you have concluded it meets the definition of supervisor found in s. 111.81 (19), Wis. Stats.

Supervisor _____ Date _____

Human Resources Representative _____ Date _____

To be completed by Incumbent (for filled positions):

- I agree with the preceding statements.
- I do not feel that the preceding statements are accurate for the reasons indicated below.
- No Comment _____

Employee Signature _____ Date _____