

**Before the
Office of Personnel Management
Washington, D.C. 20415**

In the Matter of
Confidential Government Information
Nondisclosure Agreement

Docket ID: OPM-2026-0100

**COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN
CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA**

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I. INTRODUCTION

The American Civil Liberties Union is one of the nation's preeminent defenders of the First Amendment and the value of free speech. The American Civil Liberties Union of the District of Columbia is the ACLU's Washington, D.C. affiliate. We write in response to the Office of Personnel Management (OPM)'s request for comments on a proposed nondisclosure agreement (NDA) for use by Federal agencies. Requiring government employees to sign the proposed NDA as a condition of employment would violate the First Amendment because the proposed NDA is a prior restraint on speech, sweeps too broadly, and is vague. It would cut off a critical source of information to the public about core matters of public concern. Indeed, that appears to be the goal of the proposal. We urge OPM to abandon this effort.

II. GOVERNMENT EMPLOYEES HAVE FIRST AMENDMENT RIGHTS

The First Amendment limits the government's power to determine what individuals can and cannot say. Regulations that impact the ability to disclose "truthful information of public concern" "implicate[] the core purposes of the First Amendment."¹ This is especially true when there is a threat of criminal sanction – because that threat "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."² And the First Amendment's protections are particularly strong when it comes to debate on public issues, which occupy "the highest rung of the hierarchy of First Amendment values."³

Although the government has more latitude to regulate the speech of its employees than the speech of the general public, government employees do not give up their First Amendment rights

¹ *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

² *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997).

³ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

when they accept a job offer.⁴ In fact, “speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”⁵ The Supreme Court has held that the government cannot discipline employees for exercising their right to speak as citizens on matters of public concern – so long as their speech does not unduly interfere with the operation of the workplace.⁶ The government’s ability to silence employees before they speak is even more limited, as a prior restraint “gives rise to far more serious concerns than could any single supervisory decision.”⁷

III. REQUIRING GOVERNMENT EMPLOYEES TO SIGN THE PROPOSED NDA AS A CONDITION OF THEIR EMPLOYMENT WOULD VIOLATE THE FIRST AMENDMENT

The proposed NDA is an unconstitutional prior restraint on public employees, sweeps far too broadly, and is vague. OPM’s proposed NDA would bar current and future employees from sharing “all non-public, confidential, or proprietary information,” to “include, *but not be limited to*, information relating to internal agency operations, personnel matters, procurement processes, or any sensitive, pre-decisional or deliberative material” “without prior authorization or through unauthorized channels.”⁸ Depending on each agency’s discretion, employees of all ranks and roles could be forced to sign the NDA, and the prohibitions would apply both during and after

⁴ Even though respondents work for the Government, they have not relinquished “the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.” *Pickering v. Bd. of Educ.*, 391 U. S. 563, 568 (1968).

⁵ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 150–52 (1983).

⁷ *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468 (1995) (“*NTEU*”).

⁸ *Id.*

employment.⁹ Violation of the NDA could carry severe sanctions, including termination and criminal penalties.¹⁰

A. The Proposed NDA Would Be an Unconstitutional Prior Restraint

The proposed NDA would constitute a quintessential prior restraint: it would “empower [the government] to determine whether [a speaker] should be granted permission” to speak before they say anything, based on the government’s “review of the content of the proposed [speech].”¹¹ Prior restraints are particularly suspect because they stop speech before it happens. Moreover, government policies like this one “constitute... a wholesale deterrent to a broad category of expression by a massive number of potential speakers,” and implicate the First Amendment rights of both the restricted employees and all of their potential audiences.¹²

The Supreme Court has recognized that “the freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”¹³ To that end, restrictions on when government employees can share information must take into account the right of the public to “read and hear what Government employees would otherwise have written and said.”¹⁴

By the government’s own admission, it created the proposed NDA to hide information from the public. The government says it was motivated to create the NDA, in part, because some government employees leaked non-finalized policies to the press. But, the government failed to

⁹ Confidential Government Information Nondisclosure Agreement, 91 Fed. Reg. 31478 (May 27, 2026) (notice with request for comment).

¹⁰ OFF. OF PERS. MGMT., NON-DISCLOSURE AGREEMENT (2026), <https://www.regulations.gov/document/OPM-2026-0100-0003>.

¹¹ *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975).

¹² *NTEU*, 513 U.S. 454, 468–73 (1995).

¹³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹⁴ *NTEU*, 513 U.S. 454, 455 (1995).

take into account the potential value of those disclosures in maintaining government alignment with the public. By intentionally preventing the public from accessing information about non-finalized government policies, the government is attempting to ensure that there can be no public outcry in time to prevent the implementation of proposed policies, no matter how objectionable, fraudulent, or harmful its policies may be. Moreover, as discussed in the next section, the proposed NDA is in no way limited to the disclosure of non-finalized policies. It would gag employees and limit the public's access to information about the government much more broadly.

B. The Proposed NDA Sweeps Too Broadly

The proposed NDA reaches a wide universe of speech that federal employees—and former employees who will continue to be governed by the NDA after they leave government employment—have every right to utter, from the trivial details people frequently share about work to information that is of critical importance to the public. A policy is unconstitutionally overbroad and unenforceable when it punishes “a substantial amount of protected free speech, judged in relation to the [policy’s] plainly legitimate sweep.”¹⁵ The Court has recognized that when people abstain from protected speech it doesn’t just harm the speaker – it harms “society as a whole, which is deprived of an uninhibited marketplace of ideas.”¹⁶

1. The Proposed NDA Would Prevent Government Employees from Sharing Information about Issues of Critical Public Importance

The proposed NDA would prevent the public from learning about many issues of critical public importance, and it would deprive the public conversation of the insights of those who

¹⁵ *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (citation modified).

¹⁶ *Id* at 119 (2003).

have experience with the government's inner workings (i.e. government employees).

Government employees are critical in sharing information that is necessary for the public to understand the operation of government, stop fraud, and hold the government accountable. If government employees could not reveal information such as that described below, then changes would not have been implemented. The disclosures that would be prohibited by the proposed NDA would be numerous and cover far reaching topics. Previous disclosures have revealed times when the government withheld information from or lied to its constituents,¹⁷ made decisions that risked public health,¹⁸ or simply revealed working conditions that impacted the employees' own wellbeing.¹⁹

¹⁷ Alec Schemmel, *Biden Admin Suppressed Intel Officials' Views that Supported COVID-19 Lab Leak Theory: Report*, Fox News (Dec. 30, 2024 at 15:14 EST), <https://www.foxnews.com/politics/biden-admin-suppressed-intel-officials-views-supported-covid-lab-leak-theory-report> (FBI employees allege that the Biden administration prevented them from sharing their opinions and research that COVID originated at a lab in China); Aria Bendix, *Acting CDC Director Delayed Release of Study Showing Benefit of Covid Vaccines*, NBC News (Apr. 10, 2026 at 16:38 EDT), <https://www.nbcnews.com/health/health-news/acting-cdc-director-delayed-release-study-showing-benefit-covid-vaccin-rcna273724> (Center for Disease Control officials say the Trump-administration pulled an article on the efficacy of COVID vaccines); *CBS News Interview with ICE Whistleblower Interrupted by Surprise Visit from Government Agents*, CBS News (June 28, 2018 at 10:56 EDT), <https://www.cbsnews.com/news/former-ice-spokesman-james-schwab-opens-up-about-resignation-trump-administration/> (former ICE spokesman recounts the administration told him to perpetuate a lie); Maxine Joselow & David A. Fahrenthold, *Trump Blames Vandals for Reflecting Pool Problems. Internal Records Tell Another Story.*, N.Y. Times (June 23, 2026), https://www.nytimes.com/2026/06/23/us/trump-reflecting-pool-green-peeling.html?emc=edit_ufn_20260624&nl=from-the-times&segment_id=222041 (showing that government documents contradict Trump's claims that both the reflecting pool is pristine, and it was marred by vandals).

¹⁸ Jake Spring, *Internal Memo Orders Staff Not to Reveal Deaths in National Parks*, Wash. Post (June 24, 2026), <https://www.washingtonpost.com/climate-environment/2026/06/24/internal-memo-tells-staff-stay-mum-deaths-national-parks/> (National Park Service staff are told not to share information about people dying in National Parks. Previous disclosures of deaths in national parks helped visitors understand and avoid certain risks); Joe Hernandez & Joel Rose, *Air Traffic Controllers Say a Push to Modernize Equipment Won't Fix Deeper Problems*, NPR (July 17, 2025, at 00:01 ET), <https://www.npr.org/2025/07/17/nx-s1-5453878/air-traffic-controllers-sean-duffy-faa> (air traffic controls reveal that outdated equipment and employee burnout remain major problems); Fatma Tanis, *In His Book, Self-Described USAID 'Whistleblower' Talks About the Agency and Ebola*, NPR (June 8, 2026, at 07:22 ET), <https://www.npr.org/2026/06/08/g-s1-125269/ebola-usaid-outbreak-trump-musk-woodchipper-nicholas-enrich> (a former USAID official says that political appointees wouldn't allow screening for Ebola at airports because Ebola is "a scam.").

¹⁹ Jory Heckman, *Mold, Pests and Broken Elevators: Federal Employees Wary of Return-to-Office Conditions*, Fed. News Network (Sep. 9, 2025, at 18:11 ET), <https://federalnewsnetwork.com/federal-report/2025/09/mold-pests-and-broken-elevators-federal-employees-wary-of-return-to-office-conditions/> (federal employees share concerns about mold, rodents, and accessing safe drinking water in their offices); Chiara Eisner, *Yosemite Employees Worked for Weeks with No Pay before the Government Hired Them*, NPR (Aug. 4, 2025, at 03:00 PDT), <https://www.kpbs.org/news/2025/08/04/yosemite-employees-worked-for-weeks-with-no-pay-before-the->

In some cases, government employee disclosures have saved lives. For example, in 2014, an employee with the Department of Veterans Affairs (VA) revealed tactics that some VA medical centers used to keep their waiting lists artificially short so that doctors and executives could earn bonuses.²⁰ This information is of clear importance not just to the veterans who rely upon VA care, but also to individuals considering entering military service and anyone who is concerned with healthcare availability or fraud. Revealing this information led to improvements. After the media revealed this fraud, the Pentagon announced a review of the entire military health system, and the conversation amongst policymakers shifted to how best to provide our nation's veterans with care.²¹ If the proposed NDA had been in effect, it would have been a violation for the employee to disclose this important information.

Likewise, the proposed NDA would have prohibited a United States Public Health Service employee from revealing information that caused the government to end a deadly public experiment. In 1966 Peter Buxtun revealed to the Associated Press that the government was studying the effects of syphilis using African American men who didn't know they had the disease. Although the government knew their diagnosis, it didn't tell them. Instead, the government simply told the men they had "bad blood," and refused treatment to many -- ultimately allowing these individuals to not only infect their partners and children, but also to

government-hired-them? (seasonal employees at Yosemite National Park worked for weeks without pay because hiring paperwork was delayed. They were never paid for the work they did as volunteers while they waited to be put on the federal payroll.).

²⁰ Wyatt Andrews, *VA Bonuses Were Incentive to Hide Wait Times, Whistleblowers Say*, CBS News (May 13, 2014, at 19:43 EDT), <https://www.cbsnews.com/news/va-bonuses-tied-to-secret-waiting-lists-whistleblower-says/>.

²¹ The Ariz. Republic, *Timeline: The Story Behind the VA Scandal*, USA TODAY (May 21, 2014, at 08:57 ET), <https://www.usatoday.com/story/news/politics/2014/05/21/veterans-healthcare-scandal-shinseki-timeline/9373227/>.

die.²² After the nature of the program was revealed, the program was shut down and Congress rewrote the rules of human participation in medical experiments.

In these examples, government employees were the keys to revealing information that the public had a clear right and desire to know. And, more importantly, they often led to rule changes which prevented these issues from happening again. By preventing government employees from revealing information of public importance, the proposed NDA creates numerous risks for our nation's safety and financial security.

2. The Proposed NDA could chill protected Whistleblowing

Although the proposed NDA purports not to prohibit protected whistleblowing, it is likely to have a chilling effect on potential whistleblowers. The proposed NDA is so broad, and the exemption for whistleblowing so lacking in detail, that potential whistleblowers engaging in legally protected behavior may legitimately fear that the government will retaliate against them for violating the NDA. After all, history shows us that government employees who engaged in protected whistleblowing still faced retaliation and extended legal battles. For example, in 1968 Ernie Fitzgerald revealed to Congress that the Lockheed C-5 aircraft program had a \$2.3 billion dollar cost overrun. His whistleblowing led Congress to amend the False Claims Act. Nevertheless, Fitzgerald was fired for his whistleblowing and spent years defending his actions in court (he was ultimately vindicated).²³ Thus, many government employees – even those who are compliant with the law – will choose to stay silent because the price is too steep.

²² Trip Gabriel, *Peter Buxton, Who Exposed Tuskegee Syphilis Study, Dies at 86*, N.Y. Times (July 18, 2024), <https://www.nytimes.com/2024/07/18/us/peter-buxtun-dead.html>.

²³ Mark Thompson, *A Tribute to Pentagon Whistleblower Ernie Fitzgerald*, Feb. 5, 2019, <https://www.pogo.org/analyses/remembering-ernie-fitzgerald> <https://www.pogo.org/analyses/remembering-ernie-fitzgerald>.

C. The Proposed NDA is Vague

The Constitution mandates that laws provide clarity—to both speakers and government actors—about what is prohibited. Individuals require fair notice about what they can and cannot say, so that they can act accordingly. Additionally, a lack of clarity allows the government to “discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.”²⁴ The proposed NDA does not meet this standard, and instead forces government employees to guess, at their own peril, what information they can or cannot share. The proposed NDA would also enable the government to change what information it decides an employee must not disclose based upon its daily whims.

Under the proposed NDA, the government could find that almost anything gleaned during work hours is non-public information. Government employees who sign the proposed NDA could think that they are prohibited from sharing even the most mundane facets of their day with their friends and family. For example, the proposed NDA could plausibly prohibit government employees from disclosing that they met a new hire, complain about broken air-conditioning in the building, share funny stories from the workday, or even tell their spouse that they might be home late because they have a meeting with their supervisor. The disclosure of this type of innocuous information poses no risk to the government. However, silencing it would pose a significant risk to government employees’ ability to speak freely. Employees would be second-guessing every statement about anything remotely work-related, which, especially for committed public servants, is a significant amount of their speech. Employees’ personal lives would also

²⁴ *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988).

suffer, as it is difficult, if not impossible, to maintain relationships when you cannot share even the most basic information about your life.

Ultimately, the proposed NDA gives government employees who don't want to be subject to enforcement just one choice: do not disclose anything you learn at work to anyone outside of work except as specifically authorized.

IV. THE PROPOSED NDA IS UN-DEMOCRATIC

A key characteristic of authoritarian states is that they only allow the press to report on approved information and punish those who share messages that the government doesn't approve of. But our nation is a proud democracy, where the government's duty is to serve the public. If the government breaches this duty, our democracy is designed to allow the public to hold it accountable and push for change. But the public cannot do this without knowing what the government is up to. As the Supreme Court has recognized, information about the government "serve[s] as a powerful antidote to any abuses of power by governmental officials."²⁵ Moreover, the free flow of information and ideas are necessary to "brin[g] about ... political and social changes desired by the people."²⁶

To be sure, the government can limit public employees from sharing certain information. But existing laws and regulations already restrict such disclosures. And though the proposed NDA claims to only reflect existing legal obligations, it would go far beyond them by prohibiting the disclosure of information that would merely expose the government to criticism or embarrassment. That is not a legitimate government interest.²⁷ Quite simply, our democracy

²⁵ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

²⁶ *Roth v. United States*, 354 U.S. 476, 484 (1957).

²⁷ *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)

depends upon the free and open exchange of ideas, which would be significantly hobbled if government employees were required to sign the proposed NDA.

V. THE PROPOSED NDA WOULD MAKE IT MORE DIFFICULT FOR THE GOVERNMENT TO HIRE AND RETAIN TALENT

It's not only government employees and the public who would be at risk if the government were to implement the proposed NDA. The government itself would also suffer, because the proposed NDA would make it much harder for the government to hire and retain qualified employees. This is particularly problematic now, as multiple agencies have been unable to achieve their goals in the midst of a staffing crisis.²⁸

Many, if not most, government employees don't choose to be public servants for the money, but rather out of a sense of duty and a desire to help their country. But even the most loyal government servants will have their limits. If prospective federal employees know that casually sharing even the smallest tidbit of information about their work life could cost them their jobs or result in criminal prosecution, they may choose not to become federal employees to begin with. Similarly, if enough current employees decide that the risk is too great, the government could lose many more essential employees, further exacerbating the existing staffing crisis. The federal government should not jeopardize its ability to hire qualified employees and maintain its workforce by implementing the proposed NDA.

VI. CONCLUSION

("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.").

²⁸ Eric Tucker & Alanna D. Richer, *FBI and Justice Department Try to Rebuild After Wave of Resignations and Firings*, PBS News (Apr. 19, 2026, at 10:22 EDT), <https://www.pbs.org/newshour/nation/fbi-and-justice-department-try-to-rebuild-after-wave-of-resignations-and-firings>.

In conclusion, the proposed NDA is unconstitutional and undemocratic. Implementing it would hurt government employees, the public, and even the government itself. For these reasons, the government should abandon this proposed rule.