



Attorneys: Proposed NDA lacks detailed definition of confidential information

By Alison Bennett, **cyberFEDS®** Editor Washington Bureau

IN FOCUS: Federal workers could be discouraged from whistleblowing under a new [proposed nondisclosure agreement](#), which will likely be challenged in court if finalized in its current form, attorneys told **cyberFEDS®**.

The Office of Personnel Management said the **proposed NDA** could be used by federal agencies for both new and existing employees. It's intended to document employees' acknowledgment of, and agreement to comply with, "current legal obligations to safeguard non-public, confidential, or proprietary information, created or obtained through their official duties, while expressly preserving the right to make disclosures authorized by law," OPM said in issuing the draft NDA.

While OPM says the document doesn't impact existing employee rights, attorneys interviewed by **cyberFEDS®** said the requirement could have a chilling effect on whistleblowing and other protected disclosures and is likely to be challenged on First Amendment and other grounds.

"This is really a power grab from OPM to try and muzzle federal employees from engaging in otherwise protected First Amendment or whistleblower activity," Kevin Owen, a partner at Gilbert Employment Law, P.C said in an exclusive interview with **cyberFEDS®**.

Confidential information unclear

James Eisenmann, a partner at Alden Law Group PLLC, said the **proposed NDA** contains few specifics as to what would be considered confidential information.

"One of the biggest, biggest concerns that I have is how broad it is, or overbroad," Eisenmann told **cyberFEDS®** in an exclusive interview.

"The definition of confidential information is not very clear, and [it's] so open," he said. "I think, because of that, it will make federal employees think twice before saying anything, disclosing anything, revealing any information to anyone, even if people think they want to be a whistleblower."

For the purposes of the NDA, OPM is defining "Confidential Government Information" as "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 that is not currently publicly available and should not be disclosed under applicable law."

Eisenmann criticized the OPM's assertion that it is simply putting all the restrictions on disclosing information that exist in law already in one place, because the definition is so broad.

Instead, he said, the NDA is "making things more confusing" and warning employees that they "could get fired [or] could be subject to criminal charges. So, it's really over the top and heavy-handed."

Suitability standards connection

Owen noted that OPM is also trying to tie the NDA to additional suitability standards for employees [proposed](#) last June.

In that proposal, OPM talked about "strengthening suitability and giving OPM a greater independent role in firing or finding federal employees unsuitable and then removing them because of the set of suitability determinations," Owen said.

Tying the NDA to suitability standards could increase employees' fear of losing their jobs if they disclose information, he told [cyberFEDS®](#).

Joe Spielberger, senior policy counsel with the Project On Government Oversight, noted that OPM's suitability proposals would apply to current employees based on their on-the-job activity, not just applicants, based on information that's in their backgrounds.

OPM has also filed a separate proposed rule to transfer [suitability](#) appeals from the Merit Systems Protection Board to OPM.

"You know this will make it easier to fire civil servants, and with the confusion around what it means to adhere to this [draft] NDA, we can fairly anticipate situations where someone lawfully blows the whistle and OPM determines that they're out of compliance with nondisclosure restrictions and fires them almost immediately because of that reason," Spielberger said in an exclusive interview with [cyberFEDS®](#).

First Amendment concerns

In addition, several attorneys interviewed said the [≤ proposed NDA](#) raises First Amendment concerns for federal employees.

"I think putting some sort of nondisclosure prohibition on employees being able to discuss issues potentially infringes on their First Amendment rights," said Michael Fallings, managing partner at Tulley Rinckey PLLC.

That could especially be the case for those who are starting their careers, Fallings said in an exclusive interview with **cyberFEDS®**.

"I think it's been concerning for federal workers to potentially have to sign an NDA when onboarding, because it gives the impression that you're really limited in what you could talk about."

Other avenues

Owen said the NDA also doesn't offer federal workers any assurances that certain lawful avenues for disclosure will still be available to them.

"What's missing here is other appropriate and lawful routes for disclosure -- and we're not talking about disclosures that would be in violation of the Privacy Act or other laws -- because this is very broad in the way that they describe things," Owen said.

He noted, for example, that the NDA doesn't include a carveout for federal employees to communicate with their own counsel.

"If I have a client who's being brought in for some sort of management inquiry, and they have a legal right to have the ability to consult with counsel, this would prohibit them from disclosing it to me," Owen said.

Court challenges

Fallings said that if the NDA is finalized in its current form, he believes there will be court challenges asserting that OPM is "unlawfully restricting First Amendment rights for employees, and then there may be potential prohibited personnel practices violations to the extent that this agreement isn't more restricted as far as how employees can file whistleblower claims."

Owen also said OPM could be opening itself up to litigation in the suitability arena if the final OPM suitability regulations go into place and OPM adjudicates suitability appeals and not the MSPB.

If that happens, "there's going to be multiple avenues of litigation on the suitability front, challenging OPM's power grab on suitability determinations, as well as due process issues, so there's going to be cascading litigation," Owen said.

John Mahoney, founding and managing partner at the Law Firm of John P. Mahoney, Esq., said in his view, the picture for court challenges is less certain.

"They have the requisite waiver with regard to disclosing information in the course of whistleblowing activity, so I think that's fine," he said in an exclusive interview with **cyberFEDS®**. "It's just kind of a restatement of the law with regard to using non-public, confidential proprietary information outside the scope of their employment, so I think that's going to be upheld as lawful."

However, legal questions could arise based on the way the NDA is implemented and enforced, Mahoney said. It could be challenged if it's used to "impede lawful whistleblowing activity. So we'll have to wait and see."

June 22, 2026

Copyright 2026© LRP Publications