CIVIL SERVICE STRONG POWERED BY DEMOCRACY FORWARD

January 29, 2026

Submitted via Federal eRulemaking Portal: https://www.regulations.gov

Scott Kupor, Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Subject: Proposed Rule: Streamlining Probationary and Trial Period Appeals, 90 Fed. Reg. 61,070 (Dec. 30, 2025) – RIN 3206–AO96; Docket ID: OPM–2025–0013

Dear Director Kupor,

Civil Service Strong ("CSS"), a project of Democracy Forward Foundation, is a national coalition of individuals, organizations, and communities committed to defending and strengthening a nonpartisan, professional civil service. CSS brings together labor organizations, civil society groups, former public servants, and good-government advocates who share the common goal of ensuring that the federal workforce is governed by merit, not politics. CSS urges the Office of Personnel Management ("OPM") to withdraw its proposed rule, Streamlining Probationary and Trial Period Appeals, 90 Fed. Reg. 61,070 (Dec. 30, 2025).

For decades, limited probationary appeals alleging partisan political discrimination or marital-status discrimination have served as a critical anti-spoils safeguard for newly hired federal employees. Because partisan politics and marital status discrimination have no place in the merit system principles codified by Congress, these narrow appeals have been available even during probation, to ensure that unlawful motive does not infect federal hiring and retention.

The Proposed Rule effectively abandons that safeguard. It removes these appeals from the Merit Systems Protection Board ("MSPB") and replaces an established, independent adjudicatory process with an internal OPM process designed to proceed "based on the written record," "without the need of extensive discovery," and without a right to a hearing unless OPM deems one "necessary." The proposal would also foreclose judicial review. The predictable result is systematic under-enforcement of core merit system protections at the moment when new employees are vulnerable to unlawful termination.

This proposal does not arise in a vacuum. Since the Inauguration, the Trump-Vance Administration, through executive action and OPM policy, has abandoned long-standing merit system principles in multiple respects. The Proposed Rule represents the latest departure. By consolidating workforce policy, enforcement, and adjudication of these appeals within OPM itself, the Proposed Rule undermines the institutional safeguards Congress deliberately built into the Civil Service Reform Act of 1978 ("CSRA").Probationary appeals alleging partisan political

or marital-status discrimination have been preserved for decades because they protect the merit system from unlawful firings at a point of great vulnerability. Eliminating MSPB adjudication for these claims is a direct retreat from longstanding merit system principles and is especially troubling given this Administration's and OPM's penchant for over-stepping its authority, including by directing agencies to fire probationary employees en masse.

OPM should withdraw the Proposed Rule for, among other reasons, the following:

First, Congress deliberately separated workforce policy from workforce adjudication in the CSRA, dividing the former Civil Service Commission into distinct entities so that OPM would manage personnel policy while MSPB would independently adjudicate employee rights. The Proposed Rule violates that separation for a category of claims where independence matters.

Second, discrimination claims are inherently fact-intensive and cannot be adjudicated fairly without discovery and testimony. By stripping discovery and hearings from these appeals, the Proposed Rule replaces meaningful adjudication with paper-only proceedings incapable of uncovering unlawful motive.

Third, the OPM component designated to adjudicate these appeals, Merit System Accountability and Compliance ("MSAC"), is not equipped, legally or institutionally, to perform this function. MSAC's existing adjudications are narrow, technical, and grounded in specific statutory grants that do not extend to prohibited-motive termination claims.

Fourth, the Proposed Rule compounds its structural and procedural defects by eliminating all external review, including judicial review.

Fifth, weakening independent review at the probationary stage will harm recruitment and retention. It signals to current and prospective employees that federal employment is unstable and politicized, directly undermining OPM's stated goal of building and retaining a strong, professional workforce.

I. The Proposed Rule Must Be Evaluated in the Context of Executive-Directed Rollbacks and Mass Probationary Terminations

The context of this Proposed Rule is important. OPM presents the Proposed Rule as a neutral procedural "streamlining." But the proposal is the latest step in a coordinated regulatory and operational shift that dismantled the regulatory regime for probationary employees and accelerated mass probationary terminations across the government, actions that have already generated adverse Office of Special Counsel findings, federal litigation, and judicial rulings finding key OPM termination directives to be unlawful. This context matters because the Proposed Rule would move adjudication of probationary appeals alleging partisan political discrimination and marital-status discrimination into OPM itself, at the same time OPM has directed termination initiatives.

A. <u>What the Proposed Rule Changes</u>

The Proposed Rule would fundamentally restructure the limited set of probationary and trial-period appeals that, for decades, were adjudicated by the MSPB:

- **Transfers adjudication from MSPB to OPM** – Probationary employees generally cannot appeal terminations to MSPB but longstanding regulations permitted MSPB appeals when the termination was alleged to be based on partisan political reasons or marital status, or was based on certain pre-appointment reasons.[1] The Proposed Rule would remove MSPB as the adjudicative forum and require these appeals to be filed with and decided by OPM.[2]
- **Replaces MSPB litigation tools with a paper-first internal process** – OPM proposes adjudication "based on the written record," "without the need of extensive discovery," and without any right to a hearing unless OPM deems one "necessary."[3] This is a significant departure from the MSPB's established adjudicatory model, where discovery and evidentiary hearings are routine tools for developing a factual record in contested cases.
- **Channels review internally and purports to foreclose judicial review** – The Proposed Rule provides for reconsideration, but the process remains within OPM.[4] The proposal also states that a party "cannot obtain judicial review" of decisions under the new scheme.[5]

These changes convert a narrow but important safeguard (the independent adjudication of prohibited-motive probationary terminations), into a discretionary, record-based process housed inside the workforce-policy agency itself.

The Proposed Rule is the third step in a sequenced rollback that harms probationary employees.

On April 24, 2025, the President issued Executive Order 14284, "Strengthening Probationary Periods in the Federal Service." It directed a new "Civil Service Rule XI" that would "supersede subpart H" of 5 C.F.R. part 315, which were OPM's regulations related to probationary employees and included the longtime appeal rights for probationary employees at issue in the Proposed Rule.[6] It also directed the OPM Director to prescribe circumstances under, and procedures by, which employees terminated from a probationary or trial period may appeal such termination.

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[1] *See* former 5 C.F.R. pt. 315, subpart H (revoked) (probationary appeals for partisan political reasons, marital status, and certain pre-appointment bases); *see also* 90 Fed. Reg. at 61,070–71 (describing prior MSPB role and categories of appeals).
[2] 90 Fed. Reg. at 61,070–72.
[3] *Id.* at 61,071.
[4] *Id.* at 61,071–72.
[5] *Id*. at 61,082 (proposed 5 C.F.R. § 751.101(e) stating a party "cannot obtain judicial review").
[6] Exec. Order No. 14284, Strengthening Probationary Periods in the Federal Service (Apr. 24, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/strengthening-probationary-periods-in-the-federal-service/.

OPM then issued a rulemaking implementing this directive. OPM's June 24, 2025, final rule removed subpart H from the CFR as "inoperable," explaining that Executive Order 14284 "supersede[d]" subpart H and "rendered [it] inoperative and without effect."[7]

Which brings us to the December 30, 2025, Proposed Rule that proposes to complete the restructuring by creating a new adjudicatory framework by moving covered probationary appeals away from MSPB and into OPM.

So the proper frame is not "streamlining," but replacement – the Executive Order displaced OPM's regulations governing probationary employees, which included the limited probationary appeal right to the MSPB. The Proposed Rule now installs an OPM-run substitute.

B. Merit-System Reform Has Always Been About Eliminating Patronage in Hiring and Firing

For more than 140 years, meritocratic principles have been essential to the efficient and continuous operation of the career civil service. Before that, a "spoils system" reigned and each successive president simply filled federal jobs with political allies. Under this patronage system, positions were not filled based on qualifications or merit, and when presidential administrations changed, employees were regularly dismissed from government regardless of how well they had performed their duties.[8]

The Pendleton Act of 1883 ended the spoils system and laid the foundation for the modern civil service, wherein employees were hired on the basis of their knowledge and expertise, not political ideology. Subsequent congressional and executive actions have consistently moved the federal civil service in one direction: toward greater protections and political insulation for members of the career civil service, and toward a greater proportion of the federal workforce being covered by these protections. This progress has been charted to improve the efficiency and effectiveness of the federal government as it works for the American people.

Whereas the Pendleton Act eliminated the spoils system and introduced a merit-based civil service as a key pillar of our democratic system, the CSRA of 1978,[9] was the signature, bipartisan reform that has most shaped the system we have today. It created a "new framework" of the modern civil service, provided clear protections for career federal employees against undue partisan political influence, and extended adverse action rights by statute to a larger cohort of employees, so that the business of government can be carried out efficiently and effectively, in compliance with the law, and in a manner that encourages individuals to apply to participate in the civil service. *See Lindahl* v. *OPM,* 470 U.S. 768, 773 (1985) (explaining that the CSRA "overhauled the civil service system"); *see also United States* v. *Fausto,* 484 U.S. 439, 443 (1988).

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[7] Strengthening Probationary Periods in the Federal Service, 90 Fed. Reg. (June 24, 2025), https://www.federalregister.gov/documents/2025/06/24/2025-11576/strengthening-probationary-periods-in-the-federal-service.

[8] Jay M. Shafritz et al., Personnel Management in Government: Politics and Process, (5th ed. 2001).

[9] Pub. L. No. 95-454.

A central goal of the CSRA was to ensure that "[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion."[10] It was designed to ensure that federal employment decisions are based on merit, not political loyalty, patronage, or personal favoritism.[11]

Congress codified a set of merit system principles, at 5 U.S.C. § 2301, that form the foundation of a professional, nonpartisan federal workforce. These principles require, among other things, that recruitment and advancement be based on ability and qualifications, that employees receive fair and equitable treatment without regard to political affiliation or other non-merit factors, and that protection be provided against arbitrary action, personal favoritism, and coercion for partisan political purposes.

C. Probationary Employees Have Long Had Narrow—but Essential—Appeals to Protect from Partisan Political Discrimination

The CSRA governs probationary employment. Since 1978 the relevant law has been codified at 5 U.S.C. § 3321(a), and implementing regulations for probationary appeals were found at 5 C.F.R. §§ 315.800-.806 (Subpart H). These regulations make clear that a probationary period is the first year of an employee's career appointment to the competitive service or the first two years of an employee's career employment in the excepted service (typically called a "trial period"). The probationary period is understood as a structured evaluation period designed to assess an employee's fitness for the job, not as a license for political or pretextual removal.[12]

Although probationary employees historically lacked full civil service protections and MSPB appeal rights, they have long had the right through regulations to appeal terminations to the MSPB where the termination was alleged to have been for (1) discrimination based on partisan political reasons or marital status, or (2) based on pre-appointment reason.[13]

These probationary appeal rights, though narrow, have been instrumental to the civil service since the early 1960s. In 1957, the Civil Service Commission initiated an expansion of appeal rights to probationary employees.[14] In 1962, the CSC thoroughly revised these probationary rights.[15] In 1963, the CSC issued the new version of the regulations at 5 C.F.R. §§ 315.800-.806 with the appeal rights at Subpart H at issue in the Proposed Rule.[16] These appeal rights for probationary employees have remained unchanged for more than six decades, until now.

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[10] S. Rep. No. 95-969, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2741.
[11] CSRA, October 13, 1978, Pub. L. No. 95-454, 92; *see also* Fong, Bruce D., Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980's, 40 Am. U.L. Rev. 1015, 1017-18 (1991). Stat. 1111-1116.
[12] OPM, Practical Tips for Supervisors of Probationers, https://www.opm.gov/policy-data-oversight/hiring-information/practical-tips-for-supervisors-of-probationers/.
[13] *See* 5 C.F.R. part 315, subpart H (revoked).
[14] *See* 22 Fed. Reg. 10025, at 10029 (December 14, 1957); *see also* U.S. Civ. Serv. Comm'n, 75th Annual Report 4 (1958); 5 C.F.R. § 9.103 (1960).14.
[15] *See* Civil Service Regulations, 27 Fed. Reg. 4755, at 4759 (May 19, 1962).
[16] Civil Service Regulations, 28 Fed. Reg. 9973, at 10052 (Sept. 14, 1963).

D. This Administration and OPM Have Sought to Dismantle and Reshape the Career Civil Service Along Ideological Lines, Including by Targeting Probationary Employees

Since returning to power, the Trump Administration has made clear its intent to (1) dismantle and reshape the career civil service along partisan lines because it views career federal employees not as nonpartisan professionals fulfilling their duties, but as obstacles to the Administration's policy objectives; (2) systematically undermine the very institutions, most notably OSC and the MSPB, that Congress created to enforce civil service protections and uphold the rule of law, and (3) fill the federal workforce ranks with loyalists.

President Trump has publicly disparaged career civil servants as "crooked," "dishonest" and "corrupt."[17] On the first day of his second term, he declared that "most" federal employees "are being fired" and added that "it should be all of them."[18] Vice President JD Vance echoed this hostility, stating that President Trump should, "fire every single mid-level bureaucrat, every civil servant in the administrative state. Replace them with our people."[19]

The Administration has also sought to weaken the independence of the MSPB, the agency responsible for adjudicating appeals of adverse personnel actions and, until recently, the probationary appeals at issue here.[20]

The Trump Administration's assault on the civil service has also extended to probationary employees, virtually all of whom had been hired or promoted by the previous administration. Shortly after the Inauguration, OPM issued guidance on probationary periods, advising agencies that probationary periods are "an essential tool for agencies to assess employee performance and manage staffing levels," and directing agencies to provide OPM with a list of all probationary employees, and instructing agencies to "promptly determine" whether probationary employees should be retained.[21] On February 11, 2025, the President issued an Executive Order directing agency heads to "promptly undertake preparations to initiate large-scale reductions in force…" and to develop "[r]eorganization [p]lans."[22]

OPM directed agencies across the federal government to terminate their probationary employees en masse, apart from the highest performers in 'mission critical' roles and those within the scope

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[17] Erich Wagner, Trump's second-term agenda: Breaking the bureaucracy, GOV'T EXEC. (Sep. 16, 2024), https://tinyurl.com/msauddjt; Erich Wagner, Trump calls federal workforce 'crooked,' vows to hold them 'accountable', DEFENSE ONE (Aug. 28, 2024), https://tinyurl.com/456twry5.

[18] Erich Wagner, Trump: Agencies should fire 'all' bureaucrats, GOV'T EXEC. (Jan. 20, 2025), https://tinyurl.com/283h58cx.

[19] Joe Davidson, Trump's second-term agenda plans a purge of the federal workforce, WASH. POST (July 26, 2024), https://tinyurl.com/5crb87a2.

[20] Nick Bednar, The Merit Systems Protection Board's Independence is Dead, Lawfare (Jan. 20, 2026), https://www.lawfaremedia.org/article/the-merit-systems-protection-board-s-independence-is-dead.

[21] *See* Exec. Order 14,158, Establishing and Implementing the President's "Department of Government Efficiency, 90 Fed. Reg. 8441 (Jan. 20, 2025); Off. of Pers. Mgmt., Guidance on Probationary Periods, Administrative Leave and Details (Jan. 20, 2025).

[22] Exec. Order 14,210, Implementing The President's "Department of Government Efficiency" Workforce Optimization Initiative, 90 Fed. Reg. 9669 (Feb. 11, 2025); *see* White House, Fact Sheet: President Donald J. Trump Works to Remake America's Federal Workforce (Feb. 11, 2025) (explaining that DOGE will assist with "shrink[ing] the size of the federal workforce," "large-scale reductions in force," "reducing the size and scope of the federal government," and "shrink[ing] the administrative state.").

of an OPM-approved exception.[23] Between February 12 and 14, 2025, the Trump Administration initiated a sweeping government-wide effort to terminate thousands of probationary federal employees.[24] The culling took place across the federal government. At the time of the firings, there were approximately 200,000 probationary employees in the federal workforce.[25] These terminations were reportedly executed without any individualized assessment of performance, conduct, or fitness for continued employment and many of the termination notices were riddled with errors.

In subsequent litigation, a federal court held that the government's mass probationary terminations violated federal law because OPM exceeded its authority by instructing agencies to fire employees.[26]

In short, at the moment the Administration is seeking to dismantle and reshape the career civil service along partisan lines and OPM is directing the termination of scores of probationary employees, OPM now proposes to adjudicate probationary appeals that involve partisan political discrimination, among other bases.

II. Congress Deliberately Separated Personnel Management from Independent Adjudication to Ensure the Integrity of the Adjudicatory Process

A core judgment of the CSRA was that the same agency should not both manage the federal workforce and adjudicate claims that workforce decisions were unlawful. Congress therefore replaced the Civil Service Commission ("CSC"), which had combined those functions, with an architecture that separates personnel policy and management from independent, quasi-judicial adjudication.

The CSRA's "integrated system" depends on neutral adjudication outside the personnel-management agency. The Supreme Court has emphasized that the CSRA replaced "haphazard arrangements" for review of federal personnel actions with an "integrated system" of administrative and judicial review.[27] Congress built that system around institutional role separation: OPM would lead personnel management and policy as part of the Executive's management structure, while adjudication of employee-rights claims would be housed in an entity designed to be independent and impartial, the MSPB.[28]

Reorganization Plan No. 2 of 1978, transmitted alongside the CSRA, explained that the CSC had been asked both "to help manage the Federal Government" and "to protect the rights of Federal

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[23] *AFGE v. OPM*, 799 F. Supp. 3d 967 (N.D. Cal. 2025), appeal docketed No. 25-5875 (9th Cir. Sept. 18, 2025).
[24] Michael Embrich, Trump and Musk's Valentine's Day Massacre of Military Veterans, Rolling Stone (Feb. 14, 2025), https://www.rollingstone.com/politics/political-commentary/trump-musk-lay-off-veterans-affaris-staffers-1235268532/.
[25] Tami Luhby et al., Thousands of probationary employees fired as Trump administration directs agencies to carry out widespread layoffs, CNN (Feb. 14, 2025), https://www.cnn.com/2025/02/14/politics/probationary-federal-employees-agencies-firings-doge.
[26] *See* AFGE, Judge Rules Mass Termination of Probationary Federal Workers Illegal, (Sept. 15, 2025), at https://www.afge.org/publication/judge-rules-mass-termination-of-probationary-federal-workers-illegal/.
[27] *United States v. Fausto*, 484 U.S. 439, 444 (1988) (CSRA replaced "haphazard arrangements" with an "integrated system" of review).
[28] CRS, Merit Systems Protection Board (MSPB): A Legal Overview, (describing post-1978 allocation of OPM management and MSPB adjudication functions), https://www.congress.gov/crs-product/R45630.

employees," but "ha[d] done neither job well."[29] The Plan's solution was explicit: separate the two functions.[30]

Contemporaneous oversight reflected the same concern. The Government Accountability Office described the CSC as both a "protector of employee rights" and a "promoter of efficient personnel management policy," and explained that meaningful reform required dividing those responsibilities among separate institutions.[31] It was Congress's considered judgment that those who manage the workforce must not control adjudication of claims that management actions were unlawful.

Consistent with the CSRA's structure, MSPB was created to serve as the system's neutral adjudicator and "guardian of Federal merit systems." MSPB describes itself as an "independent, quasi-judicial agency" established by Reorganization Plan No. 2 of 1978 and codified by the CSRA.[32]

That independence is especially important for claims involving political discrimination or pretext, where credibility, informal communications, and comparative treatment are often determinative and where management's institutional interests are most likely to diverge from neutral rights-enforcement. The Proposed Rule collapses Congress's separation for precisely the claims where neutrality is critical.

That defect is intensified here where OPM is directing probationary terminations in ways courts have found to be unlawful, as detailed above. Placing adjudication of probationary appeals alleging partisan political motives inside OPM creates an inherent conflict of interest. OPM would effectively adjudicate challenges to a termination environment it has materially shaped. That is precisely the scenario Congress sought to prevent by separating personnel management from independent adjudication in the CSRA's post-CSC design.

III. Eliminating Discovery in Probationary Appeals Makes Those Claims Functionally Unprovable

The Proposed Rule's decision to adjudicate probationary termination appeals "based on the written record" and "without the need of extensive discovery"[33] undercuts the enforceability of the rights the rule purports to preserve. Claims alleging termination based on partisan political reasons or marital status, like other intentional discrimination claims, are rarely provable without discovery because evidence of unlawful motive is almost never contained in the employer's stated rationale for the adverse action.

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[29] President Jimmy Carter, Federal Civil Service Reorganization Message to the Congress Transmitting Reorganization Plan (May 23, 1978) (describing CSC's dual responsibilities and shortcomings), https://www.presidency.ucsb.edu/documents/federal-civil-service-reorganization-message-the-congress-transmitting-reorganization-plan.

[30] *Id.* (stating purpose is to "separate the two functions").

[31] U.S. Gov't Accountability Off., A Review of the Reorganization Plan No. 2 of 1978 (discussing CSC's "conflicting roles" as "policymaker, prosecutor, judge, and employee protector" and the rationale for division), https://www.gao.gov/assets/fpcd-80-38.pdf.

[32] MSPB, About MSPB, https://www.mspb.gov/about/about.htm.

[33] 90 Fed. Reg. at 61,071.

The Supreme Court has repeatedly acknowledged that intentional discrimination is frequently proven by circumstantial evidence.[34] Employers seldom leave a paper trail admitting unlawful motive, and there will "seldom be 'eyewitness' testimony as to the employer's mental processes."[35] As a result, plaintiffs must prove intent indirectly, through comparative evidence, patterns of conduct, internal communications, shifting explanations, and departures from ordinary procedures.[36]

Academic research also shows that discovery is "arguably even more" significant "in employment discrimination litigation" than in most civil litigation because plaintiffs must reconstruct intent from facts largely controlled by the employer.[37] This necessarily requires broad workforce-wide and temporal discovery, including evidence about similarly situated employees, decision-makers' past actions, and patterns over time.[38] Without such discovery, plaintiffs are deprived of the tools necessary to meet their burden of proof.

The Proposed Rule nonetheless contemplates resolving probationary termination appeals on a written record, without guaranteed discovery and without a hearing unless OPM deems one "necessary."[39] That is fundamentally incompatible with the nature of discrimination claims. By eliminating meaningful discovery and treating hearings as optional rather than integral, the Proposed Rule makes these claims functionally unenforceable in practice.

IV. MSAC Is Not Equipped to Replace MSPB and Federal Circuit as the Adjudicative Forum for Probationary Appeals

OPM proposes to route the probationary and trial-period termination appeals at issue to its Merit System Accountability and Compliance ("MSAC") office. OPM's own description of MSAC's role shows why this proposal is inadequate. MSAC's adjudications are narrow, technical, and exist only where Congress has expressly assigned adjudicatory authority. There is no comparable statute authorizing OPM or MSAC to serve as a substitute quasi-judicial tribunal for probationary appeals.

OPM explains that MSAC generally adjudicates four categories of matters: classification appeals, Fair Labor Standards Act ("FLSA") claims, compensation and leave claims, and declination-of-reasonable-offer appeals.[40].

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[34] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("We have often acknowledged the utility of circumstantial evidence in discrimination cases.").
[35] *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)
[36] *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 147-48 (2000) (discussing circumstantial proof and inference of discrimination).
[37] *See* Susan K. Grebeldinger, How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery, 74 Denv. U. L. Rev. 159, 160–62 (1996), https://digitalcommons.du.edu/dlr/vol74/iss1/6/.
[38] *Id*. at 175–86 ("The courts routinely state that discovery in employment discrimination litigation is special. An individual plaintiff suing 'a huge industrial employer' creates a 'modem day David and Goliath confrontation….' She needs ample discovery, because 'the nature of the proofs required to demonstrate unlawful discrimination may often be indirect or circumstantial.'").
[39] 90 Fed. Reg. at 61,071.
[40] OPM, Adjudications, https://www.opm.gov/compliance/adjudications/. Classification appeals are authorized by 5 U.S.C. chapter 51 and implemented through 5 C.F.R. part 511. FLSA claims arise from Congress's extension of the FLSA to federal employees and are governed by 29 U.S.C. § 204 and 5 C.F.R. part 551, with de novo judicial review preserved by statute. Compensation and leave claims are governed by 31 U.S.C. § 3702 and 5 C.F.R. part

These are not general employment-termination appeals. They are discrete, congressionally authorized claim-resolution programs, largely technical in nature and frequently accompanied by external judicial review.

The Proposed Rule would require MSAC to adjudicate termination appeals alleging claims that turn on intent, credibility, informal communications, and comparator evidence. That function bears no resemblance to classification, pay, or leave adjudications.

OPM identifies no statute authorizing OPM or MSAC to replace MSPB as the adjudicator of probationary termination appeals alleging partisan political or marital-status discrimination, much less to do so while eliminating MSPB review and foreclosing judicial review.

V. Lack of Judicial Review Compounds the Proposed Rule's Structural and Procedural Defect.

In addition to transferring probationary appeals from MSPB to OPM, the Proposed Rule eliminates judicial review entirely.[41] By contrast, Congress, in 5 U.S.C. § 7703, allows judicial review for MSPB decisions at the Federal Circuit. Under the proposal, MSAC decision are subject at most to reconsideration by the OPM Director, with no access to Article III courts. The OPM Director is not independent, is not insulated from political pressure, does not apply judicial standards of review, and does not issue precedential decisions subject to appellate correction.

This is far worse than replacing one adjudicative form with another. Judicial review is the final safeguard that ensures rights are meaningfully enforceable, that agencies apply follow the law, and that violations can be identified and corrected. By foreclosing judicial review, the Proposed Rule would insulate prohibited-motive terminations from any external check and convert potentially unlawful action into discretionary, non-reviewable agency determinations.

VI. The Proposal Will Undermine Federal Recruitment and Retention by Signaling Instability and Politicization at the Earliest Stage of Federal Service

Beyond its legal and structural defects, the Proposed Rule will materially harm the federal government's ability to recruit and retain talented employees. By stripping probationary employees of meaningful, independent review of terminations alleging partisan political or marital-status discrimination, the proposal signals to prospective and newly hired civil servants that federal employment is unstable, politicized, and offers little protection against unlawful treatment, precisely the opposite message OPM has repeatedly emphasized is necessary to sustain a strong federal workforce

As recently as April 2024, OPM expressly acknowledged that civil service protections play a critical role in recruitment and retention. In its final rule, Upholding Civil Service Protections and Merit System Principles, OPM explained that "[i]nstability and politicization makes public service less attractive, leading to higher turnover of experienced civil servants and giving public officials less reason to develop expertise."[42] OPM further emphasized that preserving merit-

178. And declination-of-reasonable-offer appeals are expressly created by the CSRA itself, 5 U.S.C. § 5366, and implemented through 5 C.F.R. part 536.

[41] 90 Fed. Reg. at 61,071–72, 61,082.

[42] 89 Fed. Reg. 24,982, 25,044 (Apr. 9, 2024) (explaining that instability and politicization make public service less attractive and reduce incentives to develop expertise).

system protections "protect[s] agencies' abilities to meet mission requirements by mitigating disruptions caused by upheavals within an agency's workforce."[43]

OPM grounded these conclusions in both empirical data and human capital research. It cited its Fiscal Year 2019 Human Capital Reviews, which identified recruitment and retention, particularly for scientific, technical, IT, and cyber positions, as among agencies' most significant and persistent challenges.[44] OPM also recognized that competition with the private sector, coupled with perceptions of instability, exacerbates agencies' difficulty attracting and retaining skilled employees.[45]

Probationary employees occupy a vulnerable position in the federal workforce in terms of civil service protections. They may also still be assessing whether federal service offers a viable long-term career. For this group, the availability of independent review of unlawful terminations, even in narrow categories such as partisan political discrimination, plays an outsized signaling role. The predictable effect of the Proposed Rule is to convey that newly hired employees can be terminated for unlawful reasons with little realistic chance of redress. That message will discourage qualified candidates from entering federal service and will accelerate attrition among those who do.

OPM has recognized that "public service motivation" is a central driver of federal employment and that civil servants "invest effort and develop expertise precisely because a stable public job provides an environment where they can pursue their motivation to make a difference."[46] As OPM explained, a "vast body of research" demonstrates that when public employment becomes politicized or unstable, employees have "less reason to develop expertise," and agencies suffer a corresponding loss of institutional knowledge.

The Proposed Rule cuts directly against these findings. By weakening protections for new hires and eliminating independent review at the probationary stage, it reduces the perceived stability of federal employment precisely when employees are deciding whether to commit their careers to public service.

Conclusion and Recommendations

For all these reasons, OPM should withdraw the Proposed Rule in its current form.

At a minimum, OPM should:

- Retain MSPB jurisdiction over prohibited-motive probationary termination appeals.
- Preserve meaningful discovery and hearing rights for these claims.
- Refrain from foreclosing judicial review.
- Avoid weakening protections for new hires, which will harm recruitment, retention, and public confidence in the merit system.

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[43] *Id.* at 25,043–25,044.
[44] *Id* at 25,043 (citing U.S. Off. of Pers. Mgmt., Fiscal Year 2019 Human Capital Reviews Summary Report 1–2 (Mar. 2020) (identifying recruitment and retention as top agency challenges).
[45] *Id.*
[46] *Id.* at 25,044.

Respectfully submitted,

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