Public Employees for Environmental Responsibility Comments on Administrative Leave for Workplace Realignment and Other Purposes, OPM Proposed Rule, OPM-2026-0397

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VIA FEDERAL eRULEMAKING PORTAL

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Office of Personnel Management
1900 E Street, NW Washington, DC 20415

Dear Mr. Barker:

PEER submits these comments in opposition to OPM Proposed Rule, OPM-2026-0397. The proposed rule contravenes the plain language of the Administrative Leave Act (ALA). Specifically, the Proposed Rule would allow agencies to place employees who have been identified as candidates for a Reduction in Force (RIF) into indefinite nonduty status — expressly as a way to avoid the "burdensome" procedural requirements of the RIF statute and regulations

For nearly ten years, Public Employees for Environmental Responsibility (PEER) has strenuously advocated for the implementation of the ALA) consistent with the letter of the law and the intent of Congress. This involvement has included commenting on OPM's 2017 Proposed Rule governing administrative and investigative leave, suing OPM in Federal District Court in 2024 over its failure to finalize a Proposed Rule, and continuing advocacy to OPM regarding its ongoing incorrect implementation of the ALA's requirements. We also have represented numerous clients before the Office of Special Counsel (OSC), the Merit System Protection Board (MSPB), and in other contexts regarding incorrect use of administrative and investigative leave by agencies, which in some cases caused severe detriment to our clients.

I. Overview

The statute. Congress passed the ALA in 2016 to stop agencies from exiling employees from their jobs by placing them on paid leave with essentially no guardrails, sometimes for months or years at a time, with no way back to work and no way to contest it. The ALA, 5 U.S.C. § 6329a, is clear: agencies may not place an employee on involuntary administrative leave for more than 10 workdays in a calendar year. Congress adopted that cap specifically to end the practice of parking employees on leave for long periods of time — a practice Congress found left employees "without any available recourse to (A) return to duty status; or (B) challenge the decision of the agency." Pub. L. 114–328, § 1138(b), 130 Stat. 2000 (Dec. 23, 2016).

OPM's 2024 Final Rule was OPM's first regulation that attempted to put Congress's anti-limbo law into practice, although it created a loophole not established in that law. This loophole allowed agencies to get around the 10-day administrative leave cap. This regulation was only issued after PEER petitioned and then sued OPM to compel it to issue the rule.

What the Proposed Rule does. the Proposed Rule would make it easier for agencies to place employees who have been identified as candidates for a Reduction in Force (RIF) into long-term nonduty status — expressly as a way to avoid the "burdensome" procedural requirements of the RIF statute and regulations (91 Fed. Reg. at 39034). It does so by replacing the existing, narrow "emergency" standard in 5 C.F.R. § 351.806 with a vague "government's best interest" standard in proposed § 630.1403(c)(9) (91 Fed. Reg. at 39037). In practice, this would put employees facing a RIF right back into the same limbo the ALA was written to end: pulled from their jobs, unable to work, and with no meaningful way to challenge that determination before they are ultimately separated.

Why this is unlawful. The Proposed Rule is contrary to law on at least three independent grounds:

1. It conflicts with the plain 10-work-day limit Congress enacted in 5 U.S.C. § 6329a(b)(1), by re-authorizing exactly the indefinite, uncontestable leave status Congress acted to eliminate.
2. It conflicts with the RIF statute and OPM's own RIF regulation, 5 C.F.R. § 351.806, which requires agencies to keep a RIF candidate in active duty status absent a genuine emergency — a requirement OPM cannot override through a leave regulation, since an agency may not use one rule to nullify the procedural protections Congress required in another.
3. It builds on, and extends, a separate defect already present in OPM's regulatory scheme: OPM's own guidance describes § 6329a as "the exclusive administrative leave authority" for covered employees, yet OPM's regulations and guidance simultaneously let agencies achieve the identical practical result — paid, no-work leave lasting months — by relabeling it as leave granted under general management authority rather than as "administrative leave" under § 6329a. If a statutory cap can be avoided simply by changing the label applied to functionally identical leave, the cap becomes optional in practice.

This is not a merely technical defect. Employees placed on this kind of open-ended leave are, in effect, exiled from the workplace they have devoted their careers to, with no path back and no forum in which to contest the agency's decision until it is far too late. Congress understood in 2016 that this indefinite limbo is itself a form of harm to employees, independent of whatever comes after it — and it legislated the 10-day cap precisely to prevent agencies from imposing that harm without recourse. A rule that reopens the door to months-long, effectively unchallengeable leave for employees facing a RIF reproduces the same harm Congress diagnosed and acted to end.

One provision of the Proposed Rule is lawful and should be retained: the clarification, at proposed § 630.1403(b)(3), that the 10-work-day limit applies whenever leave is being used in connection with an investigation. The body of this letter addresses each of these points in turn, along with the factual record supporting them.

II. Additional Background: OPM's 2024 Final Rule Also Departed from the ALA

While OPM's 2017 Proposed Rule was consistent with the ALA, OPM's Final Rule in 2024 dramatically deviated from Congress's intent by creating a loophole under which agencies could purport to use administrative leave beyond the unambiguous 10-day limit in 5 U.S.C. § 6329a:

(b) Administrative Leave.— (1) In general.— During any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days.

The ALA made clear that Congress meant to restrict agencies' past practice of unlimited administrative leave:

(5) data show that there are too many examples of employees placed in administrative leave for 6 months or longer, leaving the employees without any available recourse to— (A) return to duty status; or (B) challenge the decision of the agency;

Section 1138(b), National Defense Authorization Act for FY 2017 (Pub. L. 114–328, 130 Stat. 2000, Dec. 23, 2016).

Put simply, the ALA is an anti-limbo law. Before it, agencies could — and did — send employees home on paid leave with almost no limits, sometimes for years, without any process for the employee to get back to work or to challenge what was happening to them. Congress's 2016 findings, quoted above, were a direct response to that practice. When OPM finally issued its 2024 Final Rule — only after PEER's petition and lawsuit forced the agency's hand, more than seven years after Congress's statutory deadline — it attempted to put Congress's intent into a workable structure. However, the 2024 Rule created a loophole to the statute described below.

OPM's 2024 Final Rule correctly described Congress's intent and then proceeded to contravene it through the agency's reinterpretation:

In the sense of Congress provisions in section 11388(b) of the Administrative Leave Act, Congress expressed the need for legislation to address concerns that usage of administrative leave had sometimes exceeded reasonable amounts and resulted in significant costs to the Government. Congress wanted agencies to (1) use administrative leave sparingly and reasonably….

89 Fed. Reg. 102,257 (Dec. 17, 2024) (emphasis added). And OPM stated in its own Final Rule (emphasis added):

§ 630.1403 Principles and prohibitions. (a) General principles. In granting administrative leave, an agency must adhere to the following general principles: … (3) Administrative leave is appropriately used for brief or short periods of time—usually for not more than 1 workday.

89 Fed. Reg. at 102,290.

PEER has made these defects known to OPM and OSC in past correspondence. *See* Letter to OPM Acting Director Charles Ezell Regarding Federal Civil Service Employees Placed on Administrative Leave (Feb. 4, 2025), https://peer.org/letter-to-opm-acting-director-charles-ezell-federal-employee-administrative-leave/; Letter to OSC (June 9, 2025), https://peer.org/wp-content/uploads/2025/06/6_9_25-OSC-supp-cover-letter.pdf. This includes PEER's detailed Legal Memorandum on ALA abuses, https://peer.org/wp-content/uploads/2025/06/6_9_25_OSC-Supplemental-Legal-Memorandum-ALA.pdf, attached hereto in full. OPM's maladministration of administrative leave has also been documented in scholarly analyses. *See* Materna, M., *Permissibility of Agencies' Use of Paid Administrative Leave*, Reform for Results (May 30, 2025), https://reformforresults.org; Bednar, N., *The Use and Abuse of Administrative Leave*, Lawfare (Feb. 13, 2025), https://www.lawfaremedia.org/article/the-use-and-abuse-of-administrative-leave.

Despite these critiques, OPM and the agencies have allowed the rampant and uncontrolled use of administrative leave to sideline many thousands of federal employees as part of agency reorganizations, in preparation for removal of probationary employees, and in preparation for RIFs. PEER has clients who were "in limbo" on administrative leave for 13 months or longer during 2025–26 with no opportunity to challenge it. This widespread, unlimited use of paid administrative leave cost taxpayers billions of dollars in salaries paid to more than 100,000 civil servants to not work. *See* PEER Press Release, *At Least $10 Billion Was Spent on Paying Federal Staff to Do Nothing in 2025*, https://peer.org/at-least-10-billion-spent-paying-federal-staff-to-do-nothing-2025/. This waste of taxpayer funds directly contradicted Congress's intent in enacting the ALA.

II. The 2024 Loophole Itself Is Not Grounded in the Statute and Is Independently Unlawful

The Proposed Rule does nothing to close a separate defect that already runs through OPM's regulatory scheme, and which the RIF-related provisions discussed below would compound rather than correct. OPM's own materials describe 5 U.S.C. § 6329a as the exclusive administrative leave authority for covered employees. Yet OPM's regulations and subsequent guidance let agencies avoid the 10-work-day cap entirely for leave that is functionally indistinguishable from administrative leave, simply by characterizing it as something else — leave granted under agencies' general authority to manage their own workforces, rather than as "administrative leave" governed by § 6329a. OPM's own guidance, for example, has authorized up to 12 weeks of paid, no-work leave for employees affected by workforce realignments — a figure with no relationship to the statutory 10-day limit, and one that is reachable only because the leave is not counted as "administrative leave" under § 6329a in the first place.

Nothing in the text of § 6329a creates this carve-out. The statute caps placement of an employee "in administrative leave" without qualification; it does not exempt leave that an agency chooses to authorize under a different label, or leave that is "officially sponsored or sanctioned" for a management purpose rather than tied to a specific investigation. The exemption exists only in OPM's own regulatory definitions and guidance, layered on top of the statute after the fact — not in anything Congress wrote into the ALA itself.

That layering is itself legally vulnerable. If OPM's own position is that § 6329a is the exclusive authority for administrative leave, then allowing agencies to achieve the identical practical result — months of paid, no-work leave — by relabeling that leave as arising under general management authority instead of § 6329a renders the statutory cap optional in practice rather than mandatory as Congress wrote it. This defect independently undermines the legality of OPM's administrative leave framework, and it is compounded by the Proposed Rule's further loosening of the standard governing leave imposed on RIF candidates, discussed next.

III. The Proposed Rule's RIF-Related Provisions Are Unlawful

The Proposed Rule now proposes to continue allowing administrative leave to be used in connection with agency reorganizations and other sweeping purposes as a substitute for complying with the statutory and regulatory requirements governing RIFs. The Proposed Rule, at 91 Fed. Reg. 39034, states plainly that the rule is intended as a way around the "burdensome" RIF requirements. But those requirements were set by Congress in the RIF statute and cannot be negated by an OPM regulation.

The human cost of this approach is severe, and it is precisely the cost Congress legislated in 2016 to prevent. An employee notified that they are a RIF candidate and then immediately placed on indefinite leave under proposed § 630.1403(c)(9) has, in practical effect, no way to challenge that determination before their career is upended: they cannot point to a hearing, an appeal, or any other meaningful process that would let them contest the leave decision itself while it is happening. They simply wait — often for months — cut off from the work they have devoted their careers to, with the RIF process unfolding around them and no forum in which to be heard. That experience is traumatic for the employees who live through it, and it is exactly the kind of unreviewable limbo Congress found intolerable when it enacted the ALA's 10-day cap.

The damage compounds from there. Employees placed on unending administrative leave see their ongoing work abruptly halted. Several PEER clients — and many others — have effectively been "blacklisted": because they lost access to their government email and internal hiring systems while on extended leave, they were unable to apply for other positions within their agencies for which they were qualified. This outcome directly contradicts Congress's design for RIFs, under which affected employees are meant to have ample opportunity to apply for other open positions.

The existing RIF regulation, 5 C.F.R. § 351.806, makes clear that once an employee is identified as a RIF candidate, that employee should ordinarily remain in active duty status — not be barred from the workplace or placed in nonduty status — until the date of actual removal, unless "emergency" circumstances apply:

§ 351.806 Status during notice period. When possible, the agency shall retain the employee on active duty status during the notice period. When in an emergency the agency lacks work or funds for all or part of the notice period, it may place the employee on annual leave with or without his or her consent, or leave without pay with his or her consent, or in a nonpay status without his or her consent.

By contrast, proposed § 630.1403(c)(9) (91 Fed. Reg. at 39037) would authorize the same outcome under a far less rigid standard — whenever "the agency determines it is in the government's best interest." That standard is irreconcilable with the existing RIF regulation and with Congress's design that merely proposing an employee for a RIF should not effectively remove that employee immediately. As proposed, this provision would render the RIF process largely redundant.

Consistent with this, OPM also proposes to revise 5 C.F.R. § 351.806 itself, to make it easier to apply involuntary administrative leave to employees who have been proposed for RIF. Other than serving OPM's own interest in avoiding Congress's RIF scheme, this revision serves no identifiable public interest, and it is contrary to Congress's intent that administrative leave not be used to facilitate wasteful payments to employees who are not working. As noted above, billions of dollars have already been spent paying employees on administrative leave for months at a time in advance of a RIF. OPM's Proposed Rule offers no justification for placing civil servants into that status. This revision appears designed to retroactively legitimize administrative leave practices that were themselves unlawful; extensive litigation has already established that much of OPM's 2025 RIF implementation was independently unlawful, but that history does not justify weakening the RIF regulations further.

IV. OPM's Regulatory Impact Analysis Is Inadequate

The Proposed Rule's Regulatory Impact Analysis does not address the RIF-related change discussed in Part III at all. That omission is itself unlawful. As detailed above, the real-world impacts of authorizing unlimited leave for employees facing a RIF include not only billions of dollars in direct financial losses but also serious constraints on agencies' ability to carry out their statutory missions when large portions of their workforce are in involuntary nonworking status. Under Executive Orders 12866 and 13563 on regulatory review, OPM was required to prepare a regulatory impact analysis given that this proposal is likely to have an effect on the economy exceeding $100 million annually, and it has failed to do so.

V. The Investigative-Leave Clarification Should Be Retained

One provision of the Proposed Rule is beneficial and should be retained. Highlighted at 91 Fed. Reg. 39033 and set out in the proposed text at 91 Fed. Reg. 39036–37, proposed § 630.1403(b)(3) clarifies that administrative leave may not be used in an investigative context beyond the 10-work-day limit in 5 U.S.C. § 6329a — that is, once an investigation is underway, the stricter provisions governing investigative leave must be followed. PEER has represented several clients for whom this limit was not honored even though they were under agency investigation. These clients were instead left on vague, unlimited administrative leave, often for many months — a practice that was unlawful and that prejudiced their ability to challenge their status under the ALA's investigative-leave time limits.

Conclusion

OPM should revise the Proposed Rule to ensure strict adherence to the 10-work-day limit on involuntary administrative leave that Congress enacted in the ALA. OPM should also close the separate loophole, described in Part II above, that allows agencies to place employees on months-long paid leave by characterizing it as arising under general management authority rather than as "administrative leave" subject to § 6329a's cap. OPM should withdraw its proposed changes that would ease the imposition of administrative leave on civil servants who have been proposed for RIF or other involuntary separation. OPM should, however, retain the provision in proposed § 630.1403(b)(3) clarifying that the 10-work-day limit in 5 U.S.C. § 6329a applies whenever employees are under investigation.