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FIREFIGHTER FREE SPEECH

What Fire Departments Can And Can't Do To Restrict Free Speech

Free speech is a fundamental right for all U.S. citizens. But while the right to free speech sounds simple, it is far from it. The issue becomes much more complex when the government (city/county/state) is also an employer—as is the case in most fire departments.

Understanding some foundational concepts behind free speech and public employees can help firefighters avoid saying or writing something that could get them into trouble. These concepts also form the foundation for legally defensible department policy.

WHAT CONSTITUTES "SPEECH"?

Social media tends to dominate headlines about firefighter free speech issues. In fact, however, "speech" is a broad term that applies to many forms of expression, including:

- Talking to the media
- Posting to a website
- "Liking" or sharing content
- Making a commercial or a video
- Campaigning for an elected official
- Endorsing a product

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WHEN DOES THE FIRST AMENDMENT PROTECT FIREFIGHTER SPEECH?

For most of us, the idea that our speech can be lawfully restricted feels wrong—after all, doesn't the First Amendment protect speech? The answer lies in the dichotomy of the government as a *sovereign* versus the government as an *employer*.

The sovereign's ability to regulate content is subject to the highest level of judicial scrutiny, requiring a compelling government interest to regulate the speech (which is rarely found). The government as employer, however, may regulate the time, place and manner of speech, and thus be subject to a lower level of judicial scrutiny. Also, First Amendment protection only applies if you're speaking as private citizen.

Put simply: You cannot be jailed in the U.S. for complaining about your department's overtime policy. But if you're viewed as a department spokesperson, your department may be able to legally fire you. The "free" in "free speech" means free from government interference—not free from consequences.

SO IF I'M SPEAKING AS A PRIVATE CITIZEN, I'M FREE TO SAY WHATEVER I WANT?

Not exactly. In *Pickering v. Board of Education*, the U.S. Supreme Court recognized that public-sector employees have First Amendment rights. But it did not rule that such rights are absolute. Rather, it adopted the rather nebulous "Pickering Balance Test." The test has two parts:

1. Is the firefighter speaking as a private citizen on a matter of public concern?
2. Does the firefighter's interest in "commenting upon matters of public concern" outweigh the "interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"?

The first part of *Pickering* is not that hard. Determining what constitutes "a matter of public concern" is not always obvious, but in general this has proven to be a low bar to meet. Whether an employee is speaking as a private citizen is a bit more complicated, but still is a straightforward analysis looking at all the factors surrounding how the statement was made.

The second part of the *Pickering* test is more complex, and therefore it's much more difficult to predict the outcome. How do we balance employer interests against employee interests? The "interests of the employer" can refer to internal interests—such as the detrimental impact on working relationships or on an employee's ability to perform his/her job—or external interests, such as the disruptive consequences of intense media coverage or the impact on department recruitment effects.

Courts have held that when employee speech causes *actual harm or disruption to the mission and functions of a public employer*, the employee can lose First Amendment protections, even if speaking on a matter of public concern as a private citizen. What types of speech qualify? One example is polarizing speech indicating a public employee harbors great animosity or hatred toward certain people or groups. When the speech is so hostile the public may question whether the employee is capable of delivering a service to all members of the community, the stage is set for an "actual harm or disruption" finding.

Speech that threatens violence, encourages others to commit violence, threatens to withhold services or encourages others to withhold services from members of the public also sets the stage for a finding of "actual harm or disruption."

DOES BEING ON- OR OFF-DUTY MAKE A DIFFERENCE?

It can! The seminal case here is from 2006, *Garcetti v. Ceballos*, in which the court found the *Pickering* test was inapplicable to speech made in one's capacity as a public employee. It ruled: "When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Courts have since struggled with this onerous decision and a few cases have begun to whittle away at the ruling, focusing less on whether the speech was made on- or off-duty and more on the *Pickering* test. Bottom line: Whether the speech was made on- or off-duty is less important than whether it can be shown to cause actual harm or disruption.

Note: Whistleblower statutes may provide some additional protection, but they vary widely across the country.

THE TAKEAWAYS

The country is littered with ex-public-sector employees who thought they could post whatever content they wanted on the internet without ramification, only to find out their employer did not feel the same way. These employees then run the First Amendment protection up the flagpole, only to find it is not there to protect them—*because the government's interest (as an employer) in regulating their speech outweighed their interest in that free speech*.

So remember:

- Speech can take many forms.
- Departments can restrict what firefighters can say when the firefighter is not speaking as a private citizen.
- When you're on-duty, chances are no First Amendment protection will apply to what you say.
- Whether on- or off-duty, when you speak in such a way that you are viewed as being a spokesperson for the department, you will have no First Amendment protection.
- When you speak as a private citizen on a matter of public concern AND your interest in speaking outweighs the interests of department in regulating your speech, you will have First Amendment protection.

In all fire department free speech cases, very little is black and white. Sound department policies are a must—as is the exercise of common sense and individual discipline. Even law professors who study First Amendment issues for a living cannot agree beforehand how a certain case will be decided. So, the best advice is to play it safe!

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ABOUT THE AUTHORS

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