1. How does the First Amendment protect public employees?

The First Amendment to the U.S. Constitution says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The first thing to know about the First Amendment is that it is a limit only on government. It prohibits the federal government from making laws that infringe on the rights of religion, speech, press, assembly and petition. Through the Fourteenth Amendment, state and local governments are also prohibited from infringing on these rights. Yet, one of the most powerful restraints on individual freedom is the power of employers to discharge workers. If your employer is a private entity, the First Amendment offers you no protection from being fired on account of what you say. (You may still have protection from other sources described below, or in the one state that abolished employment-at-will, Montana).

Public employees, on the other hand, work for the government. So, public employees do have protection from retaliation for exercising certain First Amendment rights. Courts have been cautious in this area, limiting the protection to speech that is on matters of "public concern." The Supreme Court is not yet ready to say that public employees are protected from retaliation for any First Amendment activity. Thus, while the government could not put someone in jail for complaining about a meager raise, the government might still be able to fire a public employee for this reason, unless the complaint was a matter of "public concern."

2. Do I have any other protections against being discharged as a public employee?

Many, but not all, public employees have other protections. If you belong to a union, you are likely to be protected from any discharge that is without "just cause." This right is protected by binding arbitration. Similarly, many state and local governments have civil service laws that promise continued employment during good behavior. The civil service laws typically create a government agency to conduct hearings on whether there is sufficient evidence to justify a discharge or long suspension. Public employees with these rights will want to carefully consider whether to pursue these protections with an administrative agency, or alternatively a First Amendment case in court. You (and your attorney) will need to consider the merits of your claims, as well as the reputation of the arbitrators, civil service agency, and the courts in your area. You may also consider pursuing both options, accepting the risk that a decision in one case may possibly control the outcome of the other.

There are also protections for those whistleblowers who report government illegality, waste, and corruption, whose reports are likely to make the perpetrators mad. By protecting the rights of whistleblowers, we can discourage not only the retaliation, but also the corruption itself. See our site's section on whistleblowing for more information.

3. What has the U.S. Supreme Court said about the First Amendment rights of public employees?

The Supreme Court has ruled that public employee speech involving matters of public concern constitutes protected speech under the First Amendment.

The U.S. Supreme Court first recognized that public employees could sue for retaliation in 1968. In the case *Pickering v. Board of Education*, the Court set out the balancing test that remains controlling law today:

"the interests of the [employee] as a citizen, in commenting on matters of public concern" must be balanced against "the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees."

In other words, if you bring a claim against your employer under the First Amendment, you must convince the court that your interest in speaking openly on a matter of public concern outweighs the government's interest in having an efficient workplace.

This is an important right, because, as the Supreme Court has conceded, government employees are often in the best position to learn the deficiencies in the government agencies for which they work. It is important to allow government employees to make these deficiencies open to the community, so the public can debate how to improve them.

4. What must I prove to win a First Amendment retaliation case?

To win a retaliation case under the First Amendment, a court must find that:

a) the plaintiff was engaged in a constitutionally protected activity;
b) the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and
c) the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

For a public employee claiming retaliation by the employer, the court must also find that:

d) the employee's speech was a matter of 'public concern'; and
e) the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs through its employees.

5. What are matters of "public concern"?

Since the First Amendment is a constitutional principle, the doctrines that interpret it come from a series of court cases, rather than laws that have been passed. The courts add to the list of what subjects are of "public concern" only when a particular case requires them to decide on a new issue. We can look to some of those cases to discern what is, and is not, of "public concern."

The Supreme Court has found the following speech to be of public concern:

a) the allocation of school funds, and the administration's methods of informing, or not informing, the taxpayers of the real reasons why additional tax revenues were being sought for schools,
b) testifying before a state legislature,
c) a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers at a public school,
d) statements concerning a School District's allegedly racially discriminatory policies,
e) where speech criticizes government inefficiency and waste, not as an aggrieved employee, but as a concerned citizen,
f) staff psychologist criticizing a hospital for unnecessary psychotropic drugs, failing to provide safe working conditions, and inadequately supervising a penal code patient,
g) the manner in which police and fire fighters performed upon a particular occasion,
h) adequacy of funding for emergency services, environmental violations at wastewater treatment plant,
i) an elementary school teacher who claimed she was fired for inviting actor Woody Harrelson to come speak to her class about the environmental benefits of hemp.

6. What are not generally considered matters of "public concern?"

The Supreme Court has ruled that when employee expression cannot be fairly considered as relating to any matter of **political, social, or other concern to the community**, government officials should not have to suffer too much interference with managing their offices.

Your employer may dismiss you for speech that is not considered of public concern, such as employee grievances concerning internal office policy, such as a petition circulated by an Assistant District Attorney to other Assistant District Attorneys about the office's transfer policy, office morale, and whether a grievance committee was needed. However, a person dismissed for such activity would have the same First Amendment protections a non-employee would have in a libel or other case.