



FREE SPEECH

For School Employees



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Introduction

Many Americans take for granted their right to speak freely on controversial issues. However, every right has limits, and not all speech is protected by law.

This booklet summarizes legal protections for speech by and about public school employees. Unfortunately, recent court decisions have limited the protection provided for public employee speech by the First Amendment of the United States Constitution. Public employees should remember that constitutional protections for free speech are the minimum protections required by law. Employers can provide additional protections.

You and your local association can work together to promote policies that encourage employees to speak freely. For example, many school districts have adopted policies that prohibit reprisals for filing grievances and provide some academic freedom for teachers.

If you need additional information about free speech protections in your district, consult district policies, employee handbooks, and the agreement between your district and local association. For further assistance, contact your local association representative or your AEA Organizational Consultant, or arizonaaea.org/helpdesk.

For over 100 years, AEA and its members have worked to improve the learning and working conditions at Arizona schools. AEA is proud of that long tradition. This booklet is part of AEA's continuing effort to inform school employees of their rights and to encourage them to work together to improve their schools.

Free Speech Guaranteed by the First Amendment

The First Amendment of the United States Constitution provides:

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 Amendment also applies to states and other governmental bodies such as school districts through the Fourteenth Amendment. Private businesses and individuals are not bound by the First Amendment to protect free speech.

Similar, but not identical, free speech protection is provided by Article 2 of the Arizona Constitution, as follows:

Section 5. The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged.

Section 6. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.



General Restrictions on Everyone’s Right to Free Speech

The right to free speech is not absolute

The right to speak freely about matters of public concern is a fundamental liberty in our nation. Popular opinions are protected. Unconventional and foolish statements also are protected.

However, individuals do not have an absolute right to speak on any topic at any time and at any place. No individual has the right to endanger others, whether the endangerment occurs due to speech or conduct. Similarly, the Constitution does not protect fraudulent, threatening, obscene, or defamatory speech.

Few limits permitted on content of speech

Courts carefully scrutinize government laws and regulations that restrict the content of speech. Most content-based speech restrictions are not constitutional. Content-based restrictions on speech generally are permitted only when they are supported by a compelling governmental interest. For example, the government has a strong interest in protecting children from certain sexually explicit materials and may restrict such materials to adults.

Time, place, and manner restrictions

Most reasonable time, place, and manner restrictions on speech are constitutional. These types of restrictions must be content-neutral and further a significant interest of the government. For example, a school district governing board may permit the public to speak at its meetings, but limit each speaker to three minutes at the end of the meeting. This rule does not affect the content of the speech but restricts the time and manner of speech to further the board’s interest in preventing one person from disrupting or delaying the meeting. Please note that nothing in the First Amendment requires public comment at every meeting or at every location.

Public forums where speech must be permitted

Public speech must be permitted at “traditional public forums,” such as parks and streets, due to the long tradition of permitting public speech at those locations. The government may designate other areas as “nonpublic forums” and not permit any speech by the general public. For example, the federal government often prohibits the general public from speaking in courthouses or military bases, although the public may picket or speak outside those sites.

Once the government permits some communication by the general public, it has designated that location as a “limited public forum” where most speech is protected. As discussed above, the government can impose reasonable time, place, and manner restrictions on public speech in a limited public forum, but must be careful to avoid most content-based restrictions on speech.



Speech that presents a “clear and present danger”

Individuals do not have the right to speech that presents a “clear and present danger” to others. The classic example is that the First Amendment does not protect someone who falsely yells “fire” in a crowded theater because patrons may panic and hurt themselves as they flee the nonexistent fire. Similarly, governments can prohibit bomb threats or speech that incites others to riot or to engage in other imminent unlawful conduct.

“Fighting Words”

The government may prohibit the use of “fighting words,” usually under a statute making it illegal to disturb the peace. Fighting words are words which by their very nature are a direct personal insult and invite or tend to provoke a fight or immediate breach of the peace.

Obscenity

The government can ban the distribution of “obscene” materials. Obscenity is difficult to define, but generally includes certain hard core pornography that violates contemporary community standards and has no redeeming social value. Some sexually explicit materials are pornographic but not obscene. This non-obscene “soft” pornography is protected by the First Amendment, although a government can enact laws to shield children from it.

Picketing restrictions

Arizona law prohibits a labor organization (like AEA) from engaging in a “secondary boycott.” Unions and labor organizations can peacefully picket an employer with whom they have a dispute regarding wages or working conditions. They cannot picket businesses not directly involved in the dispute. See A.R.S. §§ 23-1321 through -1324.

Arizona law also limits assembly and picketing places of employment. See A.R.S. §§ 23-1326 through -1329. Please consult an attorney for the application of these statutes.

Protection for Public Employee Speech on Matters of Public Concern

Many school districts require employees to first communicate with the administration on school- or employment-related matters, before communicating with the school district governing board. Some school districts have adopted policies that prohibit employees from speaking or writing directly to the governing board. Those district policies may go too far. Although a district can require employees to take everyday grievances and work problems to the appropriate person in the “chain of command,” it cannot prohibit all speech to the board by employees.



A public employee does not give up the right to comment on matters of public interest when he or she chooses to work for a government. However, the First Amendment does not protect all speech by public employees. The United States Supreme Court has limited the constitutional protection given to public employee speech, in part because it has determined that a government's interest in regulating the speech of its employees differs significantly from its interest in regulating the speech of ordinary citizens.

In order to prove a violation of a public employee's constitutional right to free speech, a public employee must prove the following:

1. The public employee's speech is made as a private citizen, not when performing job duties.

The First Amendment does not protect a public employee's speech when the employee is speaking as a part of his or her official duties or in the course of official business. For example, a special education aide who complains directly to the governing board about a violation of special education laws is speaking as part of her job duties. She may not be able to challenge a reprimand for failing to follow the chain of command by claiming a violation of free speech rights. She may have protection under other laws and policies, such as Arizona's whistleblower laws.

2. The public employee's speech (either oral or written) involves a matter of "public concern."

The First Amendment only protects public employee speech when the employee speaks as a citizen on matters of public concern. The First Amendment does not protect public employee speech when an employee speaks about matters that are not a public concern, such as private personnel issues.

Speech involves a matter of public concern if it involves a political, social, or other concern of the community. For example, the community has political and social concerns about elections, controversial topics such as abortion and the death penalty, the safety of school children, misuse of government funds, and violations of law.

Whether an employee's speech addresses a matter of public concern is determined by the content, form, and context of the statement. Ordinary staff "gripes" about a rude or inept supervisor generally are not a matter of public concern and have no constitutional protection. In contrast, an employee complaint that a supervisor stole public funds, endangered students, or engaged in repeated civil rights violations probably addresses a matter of public concern to the community. These serious public issues are of vital interest to citizens in evaluating the performance of their government and relate to broad, systemic problems.

Often it is difficult to determine whether an issue is a matter of public concern. When one teacher complains to a principal about the high number



of students in his class, his comments probably are a private personnel issue and not a matter of public concern. However, the same teacher's comments about the importance of small class size may be protected free speech if he speaks to a public group in favor of legislation to limit class size. His speech also may be protected if he speaks to the school board on behalf of the local education association and explains the association's position that smaller classes are needed to improve the general working conditions and effectiveness of all teachers.

3. The public employee's interest, as a citizen, in commenting on a matter of public concern must outweigh the interest of the government employer in promoting the efficiency of the public services it performs.

A court considers many factors when balancing an employee's interest in free speech against the employer's interest in running an efficient operation. Generally, a court looks to see if the employee's speech: 1) impairs discipline or control by superiors; 2) disrupts coworker relations; 3) erodes a close working relationship premised on personal loyalty and confidentiality; 4) interferes with the employee's performance of his or her duties; or 5) obstructs the routine operation of the office or agency. The disruption of the workplace must be actual, not imagined. However, courts give great deference to an employer's judgment that close working relationships are essential to fulfilling public responsibilities.

4. The constitutionally protected speech must have been "a motivating factor" in the government's decision to dismiss, discipline, or take other action against a public employee.

Even if the employee can prove that constitutionally protected speech was a motivating factor, the employee will not succeed in a free speech claim if the governmental employer proves that it would have taken the same employment action for other legitimate reasons.

Defamation

The First Amendment does not protect defamatory statements. Defamation is a legal claim that seeks compensation for damage to reputation due to the publication of false information. The legal requirements for defamation cases are similar whether the false statements are written (libel) or oral (slander).

To be defamatory, a publication or statement must meet the following requirements:

1. The statement must be provably false.

The plaintiff in a defamation lawsuit must prove that the statement is false. Truth is an absolute defense to defamation.

Some statements are difficult to prove false. Statements that someone is "rude" or "not a team player" are difficult to prove false because these statements involve subjective perceptions.



Other statements are difficult to prove false because witnesses provide contradictory testimony. For example, assume that Ms. Smith tells others that Mr. Jones hit her. Mr. Jones denies hitting her, and there are no other witnesses and no evidence of a fight or injury. Ms. Smith cannot prove that her allegation is true, but Mr. Jones also cannot prove that the allegation is false.

2. The statement must relate to a person’s reputation or character.

The false statement must bring the defamed person into disrepute, contempt, or ridicule or must impeach the person’s honesty or integrity, virtue, or reputation. In order to damage a person’s reputation, the false statement must be made to someone other than the defamed person.

3. If the false statement concerns a “public figure,” then the statement must be made with “actual malice.”

Our country and Constitution value an ordinary citizen’s right to criticize government officials and others who place themselves in public view. In legal terms, individuals have a “conditional privilege” to comment about the public conduct, fitness, or role of public figures, so long as they do not abuse that privilege. Teachers are considered public figures for the purposes of defamation law. Therefore, parents and others have a “conditional privilege” to criticize them.

In defamation lawsuits, teachers and other public figures must prove that a false statement about their conduct, fitness, or role was made with “actual malice,” that is with actual knowledge that the statement was false or with reckless disregard for truth or falsity. It is not enough to prove that the statement was false and damaging; the teacher also must prove that the person making the statement knew that the statement was false or essentially did not care.

Other types of complaints and criticisms also are subject to a “conditional privilege.” For example, our government encourages people to report complaints to the proper authorities for investigation and resolution, rather than to take the law into their own hands. These types of complaints are subject to a conditional privilege and are not defamatory unless made with 1) “actual malice,” as defined above, or 2) “excessive publication.” “Excessive publication” means that the false statement was made to individuals not necessary to protect the reason for the privilege — individuals who could not help investigate or solve the problem.

For example, a student may lie to a parent about a teacher’s conduct. The parent may believe the lie and report it to the proper authorities, such as the principal or the police. The parent’s false statement is protected by a conditional privilege and is not defamatory. However, the false statement might not be protected if the parent distributed fliers all over town that publicized the false information about the teacher; this might be “excessive publication.”



Another common example concerns statements by supervisors within the course of their employment duties, such as evaluations and memos. These supervisory comments are protected by a conditional privilege and are not defamatory unless made with “actual malice.”

4. As in most lawsuits, the plaintiff usually must prove “damages,” or some monetary loss.

A court cannot return a person’s good name and reputation. However, a court can order payment for lost wages, medical expenses, and other monetary losses. A court also can order compensation for some non-monetary losses, such as extreme emotional distress.

A few types of statements are defamatory per se and do not require proof of monetary loss. For example, a false statement that accuses another of a crime or of incompetence at work is defamatory per se and does not require proof of monetary loss. As a practical matter, this may not make any difference because attorneys are reluctant to take cases unless there is a substantial monetary loss.

5. Parents may express opinions, but may not defame a school employee.

Parents, guardians, and other members of a school community may express their opinions about a school employee’s job performance and their student’s progress. They may not defame a school employee by telling, with actual malice or reckless disregard for truth or falsity, provably false information to a third person that harms the employee’s reputation or integrity.

If a parent makes a provably false statement about you, write a letter pointing out that the statement is false and defamatory. Request that the parent stop making the statement. Here’s a sample letter:

<p>I understand that you are making false statements about me that are damaging to my reputation. These false statements include the following:</p> <ol style="list-style-type: none"> 1. _____ 2. _____ 3. _____ <p>This letter is to notify you that those statements are false and defamatory. If you do not stop communicating false statements about me, I will consider pursuing all legal alternatives.</p>

Keep a copy for your records. Other helpful suggestions for dealing with parents who may be annoying, hostile, or demanding are in the booklet “Helping School Employees with Parent Relationships,” which is available from AEA staff.

Please note that AEA does not fund attorney representation or consultation in defamation cases.

Protection for Speech by a Former Employer

A former employer who gives information about a person's education, training, experience, qualifications or job performance to a prospective employer has additional protection against lawsuits. A former employer is liable only if 1) the information about the person is false and defamatory and 2) the employer intends to mislead, knows that the information is false, or acts with reckless disregard of the information's truth or falsity. See A.R.S. § 23-1361(D). A copy of any written communication regarding employment must be sent to the former employee's last known address. See A.R.S. § 23-1361(B). Also, while a teacher's performance evaluation is confidential, it can be released to a prospective employer. See A.R.S. § 15-537(J).

Prospective employers seldom are willing to share the information they receive from former employers. If you suspect that a former employer is giving you a bad reference or disclosing false and defamatory information, you can obtain a reference check. Check online for services that will check job references and document what former employers say.

Tips for Whistleblowers

Public employees sometimes fear reprisal for disclosing negative information about their employer or supervisor. Arizona law protects some whistleblowers from reprisal, especially if they follow the procedures outlined in A.R.S. §§ 38-531 through -534. In order to obtain protection from reprisal under that law, whistleblowers should disclose information in the following manner.

1. The disclosure of information must be in writing.

The disclosure can be a brief letter, with or without attached documents as evidence. Ask your AEA Organizational Consultant or your local association through arizonaaea.org/helpdesk to review the disclosure before submitting it. The letter should be factual. Avoid emotional statements, exaggerations, and mere rumors. Request an investigation into the alleged misconduct. Request protection from reprisal under Arizona whistleblower laws. Avoid disclosing student names and records. If necessary, refer to students by a fictional name, such as Student A or Student B. Keep a copy of the letter for your records.

2. The letter should state that the employee reasonably believes that the disclosed information is evidence of one or more of the following: 1) a violation of law; 2) mismanagement; 3) a gross waste of monies; or 4) an abuse of authority.

A whistleblower is not expected to have absolute proof of wrongdoing — just some evidence that causes him or her to “reasonably believe” the allegations. The purpose of whistleblowing is to bring serious problems to the attention of government officials so that the problems can be investigated and resolved. Use grievance or staff complaint procedures for ordinary workplace problems.



3. **The letter must be dated.**
4. **The letter must include the name of the employee making the disclosure.**
5. **The letter must briefly describe the nature of the alleged violation of law, mismanagement, gross waste of monies or abuse of authority.**
6. **If possible, the letter should provide a date or range of dates when the problems occurred.**
7. **The letter must be sent or delivered to a “public body,” such as a school district governing board, law enforcement agency, attorney general, county attorney, legislature, governor, or government agency.**

Whistleblower protection is most certain if the letter is sent directly to the school district governing board. Arizona law prohibits reprisal against an employee for this type of written disclosure. A reprisal is a negative employment action, such as a demotion, reprimand, dismissal, poor evaluation, or transfer.

8. **If an employee experiences a reprisal due to the written disclosure, the employee must make a complaint to the school district governing board WITHIN 10 DAYS of the effective date of the reprisal.**

The complaint can be a simple letter stating that the employee would like a hearing to protest an adverse employment action believed to be a reprisal for a whistleblowing disclosure. If an AEA member faces reprisal due to a written whistleblowing disclosure, the member should contact his or her AEA Organizational Consultant or arizonaaea.org/helpdesk immediately and request a referral for legal assistance. Usually the school district governing board holds a hearing to determine whether the employment action was a reprisal for a protected whistleblowing disclosure. In some circumstances, the state personnel board or a hearing officer will hold the hearing.

Some legal protection is available for whistleblowers who fail to follow the requirements of the Arizona whistleblower statutes, but this protection is less certain and more difficult to enforce. More information and sample letters are available in the booklet “Reporting Serious Misconduct,” which is available from AEA staff.

Also, be careful when making allegations. A.R.S. §38-532(M) states:

An employee who knowingly makes a false accusation that a public officer or employee who has control over personnel actions has engaged in a violation of any law, mismanagement, a gross waste of monies or an abuse of authority is personally subject to a civil penalty of up to twenty-five thousand dollars and dismissal from employment by the employer.

Academic Freedom

Many teachers cherish the ideal of academic freedom, the right to choose a controversial teaching method or subject matter. However, most recent court decisions state that the U.S. Constitution does not protect academic freedom for K-12 teachers.

Recent court cases have acknowledged the rights of school districts to make reasonable curriculum decisions. For example, some school districts have adopted a detailed sex education curriculum, an approved book list for certain classes, or procedures for approving controversial movies or plays. When a school district has adopted these types of detailed curriculums and policies, most courts have held that K-12 teachers do not have a First Amendment right or academic freedom to ignore the district's directives. In the absence of a specific policy, curriculum, or other directive, some courts have held that teachers may select their own methods and materials based upon sound instructional principles. However, even in those instances, the courts have not ruled uniformly in favor of teachers.

Common Sense Suggestions to Protect Your Free Speech Rights

- **Take the high road.** Be professional and respectful in all communications and complaints. Choose your words carefully. Avoid confrontational language, exaggerations, and overly emotional statements.
- **Check your facts before making serious allegations.** An employee who knowingly makes false accusations could be subject to severe consequences. Seek written materials and witnesses to support your statements. Keep records of your efforts and copies of all documents, notes, and letters.
- **Report only the information that you know firsthand.** Do not jump to conclusions or spread unsubstantiated rumors. State the facts you know in an honest, brief, and professional manner. Request an investigation to confirm or deny your suspicions.
- **Do not disclose confidential information protected by law, such as student names and records.** You may disclose student information to that student's parent or guardian and to other school employees who need the information for a legitimate educational purpose. Do not discuss a student's conduct, grades, or background with other students or their parents.
- **Establish boundaries for your discussions with students.** For example, do not involve students in discussions about your workplace disputes or intimate details of your personal life.



- **Utilize the procedures and forums established by your employer to solve workplace problems.** For example, use your district's complaint and grievance procedures. Participate honestly and respectfully at meetings designed to solicit employee comments. In most instances, you should try to resolve problems within the district at the lowest level possible.
- **Look at the big picture.** Your private workplace concerns may not be protected speech. Your personal concerns may be part of a broad, systemic problem within your school district. Work with your local association to identify and describe such problems as general, public concerns about working conditions. Official association statements about working conditions or other broad issues of public concern are more likely to be protected speech than one person's statements about individual work problems.

Assistance from AEA

Most assistance to AEA members is provided by local leaders and AEA Organizational Consultants. AEA Organizational Consultants are paid professional staff who provide training in association activities, consult on local association issues, assist members in trouble, and work with locals at the bargaining table. The AEA also provides a wide variety of seminars, workshops, and training materials to assist members and local associations with educational employment concerns. This booklet is part of AEA's commitment to helping members learn more about their rights and responsibilities. Your local association representative or Organizational Consultant can assist you in resolving workplace disputes through a grievance, disciplinary appeal, or informal meeting. Members can also contact arizonaaea.org/helpdesk.

The AEA Defense Fund primarily funds legal representation to defend members in adverse job actions initiated by their employers, such as dismissal hearings and certificate revocation proceedings. The AEA Defense Fund also funds representation for members at whistleblowing hearings before a school district governing board or other administrative body. For other employment-related legal problems, AEA Organizational Consultants can refer members to the AEA General Counsel for a brief initial consultation to help explain legal rights and options.

Due to limited resources, the AEA Defense Fund funds very few court cases. Funding for court cases is based on many factors, including: 1) whether the member has exhausted all other possible remedies; 2) whether there is a strong likelihood of success; and 3) whether resolution of the legal issues in the case will benefit members throughout the state. Funding of court cases must be recommended by the AEA General Counsel and approved by the AEA Board of Directors. If you would like further information about the AEA Defense Fund, ask arizonaaea.org/helpdesk for a copy of the Defense Fund Guidelines.

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A Final Note

For more information and assistance, contact your local association, arizonaaea.org/helpdesk, or your AEA Organizational Consultant.

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This booklet is a general guide for AEA members and is not intended to provide complete information or legal advice on specific problems. Changes in laws and cases may modify the information provided. To find Arizona statutes on the Internet, go to www.azleg.gov.



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