

A More Perfect Workplace: A Plain-English Guide to Constitutional Law for Municipal HR

Adapted from a presentation by Brent L. Hinders, J.D., MPA, Hinders Law.

If you do HR for a city, county, or school district, you're playing a different game than the HR manager at the factory across town.

When a private company fires someone over a Facebook post, the Constitution never comes up. When your municipality does it, the Constitution is the whole conversation, which, if handled incorrectly, can result in the employee suing you directly for violating it.

That's the core difference: **you are the government**. The Bill of Rights follows you into every investigation, every accommodation request, every desk search, and every termination meeting.

Here are the five areas where public employers get into the most trouble, and what to do about each one.

1. Employee Speech

An employee posts something that makes your phone ring. Your first instinct is to ask, "Was that appropriate?"

That's the wrong question. Courts ask three different ones, in this order.

Question 1: Was the employee just doing their job?

If someone said or wrote something *as part of the work they're paid to do*, they generally have no free-speech protection. A report you assigned, an email they sent to the department, a statement made in their official role are all subject to discipline. This is where most employee speech cases end.

But be careful not to stretch this too far. If an employee testifies in court about something they learned at work, that's usually protected because testifying isn't part of their job. Also, Courts have warned employers not to treat *everything* an employee says on the clock as government-controlled speech.

Question 2: Was it about something the public cares about, or just a personal gripe?

Speech about politics, community issues, or how the public's money is spent is protected. Complaints about *their own* schedule, *their own* reassignment, or *their own* performance review usually aren't.

The classic case: a teacher wrote a letter to the newspaper criticizing how her district spent money. She never mentioned her job title. She was fired, and the Supreme Court sided with her.

Question 3: Did it actually disrupt your operation?

If the answer to Questions 1 and 2 favors the employee, courts weigh their right to speak against your need to run a functioning workplace. They look at things like:

- Did it damage working relationships people need to do the job?
- Did it hurt the employee's own ability to do their work?
- When, where, and how did they say it?
- How much does the public genuinely care about the topic?

One thing HR managers often miss: rank matters. Someone in a policy, confidential, or public-facing role is held to a higher standard than a rank-and-file employee. Your public information officer and your street crew are not in the same position.

What to do: Before disciplining over speech, write down (a) whether it was part of their job, (b) whether it was a public issue or a personal complaint, and (c) what specific, concrete disruption it caused. If you can't fill in that third blank with facts about the disruption and how it affected the workplace, not just "people were upset", stop.

2. Political Activity, Unions, and Religion

Groups and affiliations

Employees can belong to a political party, a union, or an advocacy group, and you can't punish them for it. But belonging to a group doesn't make anyone untouchable.

The line is simple:

You're on solid ground when you act because of...

Actual workplace disruption

A policy they broke

Real operational needs

You're at risk when it looks like you acted because of...

Who they associate with

Their political views

Their union involvement

The union organizer who also falsifies timesheets can absolutely be disciplined — for the timesheets. Your file must make clear that's what happened.

Religious accommodation — not as easy as you think anymore.

The old rule let employers deny a religious accommodation if it caused more than a trivial cost. **That rule is gone.**

Since a Supreme Court ruling in 2023 that has changed. Now you have to show the accommodation would cause a **substantial** increase in costs to how your organization actually operates. "It would be inconvenient" and "other people would have to adjust their schedules" are no longer good enough.

What hasn't changed:

- **You don't have to give them the accommodation they asked for** — just a reasonable one.
- **You don't have to remove essential parts of the job**, or move someone into a role they can't fully perform.
- **The employee has to do their part**: show a sincere religious belief, show it genuinely conflicts with a work requirement, and tell you about it. Courts do look closely at whether the belief is sincere and whether anything bad actually happened to them.
- **Neutral rules that apply to everyone are still fine**, even if they happen to burden someone's practice.

What to do: Have a real back-and-forth conversation about options, and document it. If you deny a request, your written justification needs actual numbers, i.e. overtime cost, coverage gaps, safety problems, not adjectives.

3. Searches, Monitoring, and Drug Testing

Private employers can search a desk on a hunch. You can't. The Fourth Amendment applies to you and not to them.

The good news: **you don't need a warrant**. You need to be *reasonable*, which means two things:

1. **Good reason to start**. Either you have real grounds to suspect work-related misconduct, or it's a routine, non-investigative procedure you do anyway.
2. **Don't go further than you need to**. The search has to fit the problem. Don't turn a missing-petty-cash question into a full audit of someone's life.

Where employees usually keep their privacy

- Purses, bags, briefcases, and personal phones
- A locked drawer nobody else uses
- Personal email on a work device — *unless you clearly warned them*
- Sealed personal mail addressed to them
- Their house, when working remotely

Where privacy is usually reduced

- City-owned devices and networks, **if you have a signed acceptable use policy**
- Safety-sensitive jobs
- Shared or open workspaces
- Positions requiring a security clearance
- Anywhere the employee signed a monitoring consent

That acceptable use policy is doing enormous work. Courts have upheld searches of work-device messages specifically because the employer had a clear, signed policy saying government systems are monitored. Without it, you're guessing.

Drug testing

- **Safety-sensitive roles** (police, drivers, heavy equipment): random testing is generally fine.
- **Everyone else:** testing has to be based on specific facts you can point to, not a hunch. Blanket testing of office staff is likely illegal.

Monitoring

Legitimate reasons: network security, productivity, investigating misconduct.

Almost certainly illegal: cameras in restrooms or changing areas, hidden keystroke loggers with no notice, and reading personal communications.

Three special situations

- **Police officers** have less privacy at work. Internal affairs investigations, use-of-force reviews, and equipment inspections are generally fine under an established policy.

- **School staff** can have workspaces and school computers searched when there's reasonable suspicion of something affecting students. Personal belongings still get more protection.
- **Remote workers** keep strong privacy at home. Don't touch home networks or personal devices without clear permission, and write your BYOD policy to limit you to work data only.

Your checklist:

1. Keep signed acceptable use and monitoring policies. Refresh them at least every two years.
2. Train supervisors on what they can and can't search.
3. Write down *why* you searched, **at the time you searched**.
4. Keep it narrow. Don't use one investigation as an excuse to go looking for other things.
5. Limit drug testing to safety-sensitive roles.
6. Run any new monitoring program, BYOD policy, or surveillance tool past your attorney first.

And: an employee who pushes back on a search in good faith can't be retaliated against for it.

4. Investigations That Could Turn Criminal (Garrity)

This is where good HR managers do the most accidental damage, usually in the first ten minutes of an interview.

The rule: **if you tell an employee "answer me or you're fired," their answer can't be used against them in a criminal case.** You forced it out of them, so prosecutors can't use it.

Here's the part people get backwards. That statement is off-limits for *criminal prosecution*. It is **not** off-limits for *employment decisions*.

You can still:

- Order an employee to answer questions about their job
- Discipline them for refusing, if you warn them properly first
- Use what they tell you to decide on discipline or termination

What you **cannot** do is make them sign away their protection from prosecution as a condition of keeping their job. Firing someone for refusing to sign that kind of waiver is unconstitutional.

What to do: The moment you think conduct might also be a crime, stop and call your attorney and your prosecutor *before* the interview. Use a proper written advisement. An off-the-cuff ultimatum in a conference room is exactly what a defense attorney needs to get the criminal case thrown out and a potential lawsuit for the violation.

5. Treating People Differently

The Fourteenth Amendment says the government can't deny anyone equal protection of the law. For you, that means discrimination claims can come at you *two* ways: through the usual employment discrimination laws, and directly through the Constitution, which means different damages and different people named as defendants.

Two things to know:

Numbers alone aren't enough. If your hiring statistics look bad but there's no evidence anyone intended to discriminate, a constitutional claim generally fails. Intent is required. (Note that regular employment discrimination law is different and more forgiving to employees on this point. So, don't take comfort in it being broadly applied.)

"You singled me out" claims mostly don't work against public employers. In theory, one person can sue for being treated differently than everyone else for no rational reason. But the Supreme Court has said these claims generally aren't available in public employment, because employment decisions are inherently individual and judgment-based. So, as long as your decisions are not made for illegal reasons (protected class or protected conduct retaliation) you are free to make individualized determinations on how you treat your employees.

Courts throw out these claims when there's no comparable coworker who was treated better, no evidence of intent, or a legitimate reason on file.

What to do: Your defense gets built long before anyone sues. Treat similar situations similarly, and write down your legitimate reason *when you make the decision*.

The Three Habits That Cover Most of This

Across all five areas, the same handful of practices do most of the protecting:

1. Write down your reason when you decide, not when you're asked to defend it. A note in the file dated the day it happened beats a beautifully written explanation produced eighteen months later. Every single doctrine above rewards this.

2. Keep your policies current and signed. Your acceptable use policy and your investigation advisement form aren't paperwork — they're the legal foundation for things you'll need to do later.

3. Train your supervisors. The violation almost never happens in the HR office. It happens when a shift supervisor pops a locker open or says "answer me or you're done."

Being a public employer means working under rules your private-sector peers never think about. Handled well, that's not a burden. It produces cleaner decisions, better records, and a workplace that holds up when someone looks closely.

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