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What Every Municipal Attorney Should Know About the First Amendment

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What Every Municipal Attorney Should Know About the First Amendment

Local governments must honor the rights granted to all persons by the First Amendment of the US Constitution. The text of the First Amendment says:

> *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 (U.S. Const. amend. I).*

While the text refers only to the US Congress, First Amendment rights are enforceable against state and local governments under the Fourteenth Amendment. Engaging with citizens, enforcing government regulations, and managing government workplaces requires balancing First Amendment rights with the need to operate the government efficiently. Local government attorneys must draft and apply regulations, policies, and procedures that withstand constitutional challenges. Applying constitutional law to real world situations can involve complex analysis, and the law continuously evolves through court decisions.

This paper provides an overview of First Amendment issues local governments face. It discusses the rights guaranteed by the First Amendment, and how they intersect with local government operations. It offers basic guidance on applying the First Amendment in public meetings, government regulations, and employment matters.

Local government attorneys should also be familiar with rights granted under state constitutions that complement or add to the rights granted by the First Amendment.

THE RIGHTS GUARANTEED BY THE FIRST AMENDMENT

The First Amendment guarantees certain fundamental rights to all persons, including:

- **Freedom of speech and freedom of the press**, protecting:
  - the right to express individual opinions and beliefs, even if they are offensive to others; and
  - the right of the press to publish without government censorship.
- **Freedom of religion**, under:
  - the **Establishment Clause**, which prohibits the government from establishing a national religion or favoring one religion over another; and

    - the **Free Exercise Clause**, which protects the rights of individuals to practice their religion freely or to refrain from practicing any religion.
- **Freedom of assembly**, protecting individual rights to gather peacefully with others.
- **The right to petition the government**, protecting individual rights to interact with the government to express concerns and seek amends for grievances.

Additionally, the US Supreme Court has recognized an implicit guarantee of **freedom of association** for the purpose of engaging in the activities the First Amendment explicitly protects (*Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). This freedom includes the right to associate with or refrain from associating with specific groups or belief systems.

FUNDAMENTALS OF FREE SPEECH LIMITATIONS

Each of the First Amendment's clauses has implications for local government, but the Free Speech Clause may have the greatest impact on how local governments operate. The Free Speech Clause protects:

- All speech except for a few narrow categories.
- Not only verbal speech, but also printed words and expressive conduct.
- The speech of:
    - individuals, regardless of citizenship; and
    - corporations and other organizations.

The Importance of Content Neutrality

In a legal challenge to government regulations that affect speech, the outcome often depends on whether the regulations are content based or content neutral.

Content-Based Regulations

A regulation is content based if it either:

- Indicates disagreement with a viewpoint (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
- Applies to an entire topic of speech, regardless of the speaker's viewpoint. For example, a sign code provision that singles out specific subject matter for differential treatment is a content-based speech regulation (*Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); see Sign Regulations, below).

It is typically difficult to defend content-based regulations because courts generally analyze them under a strict scrutiny standard. Under this standard, speech regulations must be:

- Based on a compelling governmental interest.
- Narrowly tailored to serve that interest.
- The least restrictive means to accomplish the government's objective.

Content-Neutral Regulations

A speech regulation is content neutral if it focuses only on the speaker's manner or method, rather than the message or viewpoint. Content-neutral regulations are easier to defend because courts use intermediate scrutiny to review them. Under this standard, speech regulations must:

- Be based on a significant governmental interest, which is easier to show than a compelling governmental interest.
- Be narrowly tailored to serve that interest.
- Leave open ample alternatives for communication.

Public Forum Categories

Courts recognize four types of public forums for determining how much protection speech and expression on public property should receive. When a speaker uses local government property to express an idea or opinion, the government entity should understand whether the location is:

- A **traditional public forum**, such as a street, sidewalk, park, or public square. Regulations affecting speech in these places should be content-neutral time, place, and manner restrictions.
- A **designated public forum** at a location not normally open for First Amendment activities but at which the government has chosen to allow them. Speech limitations in a designated public forum are treated the same as those in traditional public forums.
- A **limited public forum**, only open for use by certain groups or dedicated solely to the discussion of certain subjects. In these forums, a government entity may limit speech to only certain subjects and impose blanket restrictions on others. Although limitations do not have to be content neutral, they must still be viewpoint neutral and reasonable.
- A **non-public forum**, not traditionally used or designated for expressive activity.

THE FIRST AMENDMENT IN GOVERNMENT MEETINGS AND EVENTS

Public Participation in Meetings

Local government legislative bodies, boards, and committees must observe First Amendment rights in the way they conduct their meetings. The First Amendment does not guarantee members of the public the right to speak at a meeting of a local governing body or advisory board. However, many local government meetings include public comment periods, either because of state law requirements or in observance of local policy or tradition.

When the public is allowed to speak, counsel should understand the type of forum the government has created and the corresponding limitations on speech regulations. Depending on the way comment periods are conducted, courts generally view them as either a designated public forum or a limited public forum. If a comment period is a limited public forum, the government has more leeway to limit comment periods to the discussion of certain subjects. However, the limits must be viewpoint neutral. If the government has created a designated public forum, it should avoid both content-based and viewpoint-based restrictions on citizen comments.

Public Prayer

Legislative Prayer

Local government bodies that begin their public meetings with a prayer should have measures in place to ensure that the prayer meets constitutional standards. Under the Establishment Clause, legislative prayer is government speech rather than individual speech. Courts determine the constitutionality of ceremonial prayer at government events under two tests:

- A **historical test** that analyzes whether the practice is consistent with long-standing tradition. The Supreme Court has recognized that the opening of legislative sessions with prayer is deeply embedded in US history and tradition (*Marsh v. Chambers*, 463 U.S. 783, 786 (1983)). Legislative prayers need not be nonsectarian and may reflect the prayer-giver's religious beliefs or tradition (*Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014)).
- A **coercion test** that investigates whether the government is coercing anyone to support or participate in religion or its exercise (*Lee v. Weisman*, 505 U.S. 577, 587 (1992)). This inquiry is fact-sensitive and considers both the setting in which the prayer is given and its audience (*Town of Greece*, 572 U.S. at 587).

Boards can mitigate concerns about public meeting prayers if they have policies and procedures that:

- Forbid discrimination on the basis of religion.
- Create an organized procedure for choosing prayer-givers.

Courts may find prayers less acceptable at school board meetings where children may be audience members and active participants (*Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018)).

Prayer and Religious Exercise at Other Public Events

The constitutionality of prayer at public events other than board or committee meetings may depend on whether the prayer is government or private speech, as determined by:

- The central purpose of the program in which the speech occurs.
- The degree of editorial control exercised by the government or private entities over the speech's content.
- The identity of the speaker.
- Whether ultimate responsibility for the speech's content falls on the government or a private entity.

(*Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008.)) A government employee's prayer in view of the public at a public event is not necessarily government speech (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529 (2022)).

If a prayer is given at a government-sponsored event:

- The prayer must meet the requirements of the Establishment Clause if it is government speech.
- The government must honor the rights of the prayer-giver under the Free Exercise and Free Speech Clauses if the prayer is private speech (*Kennedy*, 597 U.S. at 532-33).

The same analysis applies to other forms of religious expression, such as readings or proselytizing.

THE FIRST AMENDMENT IN REGULATIONS AND POLICIES

Sign Regulations

Local government lawyers should be able to determine whether local sign regulations are content neutral. Sign restrictions that make distinctions based on a sign's message are content based, even if the intent is innocuous. A sign regulation is content based if it includes restrictions aimed at either certain viewpoints or an entire topic of speech. As a result, imposing different size, location, and durational requirements by topic categories, such as directional, political, or ideological signs, impermissibly regulates the signs' content. (*Reed*, 576 U.S. at 164.)

To prevent constitutional challenges, sign regulations should:

- Avoid prohibiting, allowing, or making exceptions for signs based on their message.
- Focus on the physical characteristics, location, and number of signs.

In 2022, the Supreme Court clarified its decision in *Reed* by holding that sign regulations may distinguish between on-premises and off-premises signs without triggering strict scrutiny (*City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022)). Courts have also generally given local governments latitude to distinguish between commercial and noncommercial signs. Although *City of Austin* does not directly involve commercial speech regulation, it references the Court's previous decisions allowing commercial speech distinctions and implicitly leaves them intact (*City of Austin*, 596 U.S. at 73).

Panhandling and Soliciting

Panhandling and soliciting involve speech protected by the First Amendment. Courts have invalidated many panhandling and solicitation restrictions as content based because they targeted specific subject matter. It did not matter that the regulations were not an attempt to squelch certain ideas or viewpoints. (For example, see *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).)

However, in *City of Austin*, the Supreme Court discusses its decisions involving solicitation regulations and observes that:

- The First Amendment allows the government to regulate the time, place, and manner of solicitation.
- Restrictions on solicitation are not content based if they do not discriminate based on topic, subject matter, or viewpoint.

(*City of Austin*, 596 U.S. at 72-73.)

Panhandling restrictions are more likely to survive a challenge if they focus on conduct that threatens public safety as opposed to the content of a panhandler's speech. Cities have been less successful prohibiting panhandling from persons waiting in line or within a designated buffer zone surrounding a bank, ATM, or outdoor dining area. Courts generally find provisions like these are not narrowly tailored to the government's interests.

Street Solicitation

Solicitation ordinances sometimes specifically target interactions between solicitors and persons in vehicles on public streets. Some cities have been successful in defending against challenges to regulations emphasizing vehicular and pedestrian safety. However, courts have found that other cities' street solicitation regulations were content neutral but were not narrowly tailored to

serve the government's safety interests (for example, see *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015), invalidating regulations that prohibited pedestrians from occupying any median strip except while crossing the street).

Door-to-Door Solicitation

Local governments often find it difficult to regulate door-to-door solicitors in a way that both satisfies property owners and protects free speech rights. Government regulators should treat door-to-door solicitation as a form of expression that warrants the same constitutional protections as other types of speech. After *Reed*, some courts struck down ordinances that more heavily regulated commercial solicitation. However, the Supreme Court's *City of Austin* decision indicates that distinguishing between commercial and noncommercial may still be permissible (*City of Austin*, 596 U.S. 61at 73). Counsel drafting or reviewing door-to-door solicitation regulations should keep in mind that:

- Regulations must still be narrowly tailored to serve a substantial government interest even if they:
  - are content neutral; or
  - affect only commercial speech and are held to a lower level of scrutiny.
- Regulating the conduct of solicitors rather than the content of their speech is generally easier to justify.

Holiday Displays on Public Property

Holiday displays on public property can generate difficult questions involving both the Free Speech and the Establishment Clauses. Local governments often use public property for their own displays celebrating various holidays and sometimes allow private parties to have displays on government property. In advising local governments about holiday displays, counsel should keep in mind that:

- The government's own holiday displays on public property are government speech and the Establishment Clause applies in evaluating their constitutionality. Even a private party's display may be government speech if the government:
  - selects the components to be included;
  - maintains final authority over every aspect of the approval process; or
  - gives the display preferential access to property that is not available to all on equal terms.

  (*Pleasant Grove City v. Summum*, 555 U.S. 460, 470-71 (2009).)

- Although a symbol may come from religious holiday traditions, courts may still treat it as secular in nature. For example, a Christmas tree on

public property does not typically raise Establishment Clause concerns. Additionally, including both religious and secular symbols can provide context and acknowledge the religious aspects of a holiday without violating the Establishment Clause.

- Displays of standalone religious symbols may be more problematic. In a legal challenge, courts are likely to look at:
  - the context of the display, its historical significance, and the extent to which it has become part of the community's identity; and
  - how the display fits in with a tradition of similar displays in other parts of the country.

(*Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2082-85 (2019).)

- Establishment Clause jurisprudence is in flux. The Supreme Court holds that the Establishment Clause must be interpreted by reference to historical practices and understandings (*Kennedy*, 597 U.S. at 535-36). However, the Court has not yet provided definitive guidance on how its history and tradition framework applies to religious displays on public property. Counsel should continue to monitor case law developments in this area.
- The Free Speech Clause applies when:
  - a private holiday display on public property is not government speech; or
  - the government denies a request to locate a private display on public property.
- Regulations governing private holiday displays must be viewpoint neutral.
- The line between the government's own displays and the creation of a public forum for private displays is not always clear. In attempting to comply with the Establishment Clause, the government may end up violating a private party's free speech or free exercise rights. (*Shurtleff v. City of Boston*, 596 U.S. 243, 247-48 (2022).)

A well-drafted written policy can be helpful in avoiding challenges involving either the government's own displays or private displays on public property.

Protests, Demonstrations, and Parades

The First Amendment supports participation in protests, demonstrations, rallies, parades, and similar events in many public places. To prepare for these events, government entities should:

- Be aware of the places that may be the site of First Amendment events.
- Have clear policies for handling the events.

- Adopt procedures for issuing permits in advance for events exceeding a designated size or in specified locations. Permitting procedures should allow for timely decisions and should accommodate spontaneous demonstrations that occur in response to recent occurrences.
- Promote an understanding of the government's obligations and its policies within the organization and in the community.

Government officials must accept that traditional public forums are open for free speech activities. However, governments can address health, safety, and welfare concerns. Some locations that fall within the definition of traditional public forum work better for protests and demonstrations than others. It may be necessary to reroute or relocate a proposed event from one traditional public forum to another for safety reasons.

Policies and practices can impose reasonable controls over the use of public property, preserve public safety, and prevent First Amendment violations by:

- Avoiding unconstitutional prior restraints.
- Limiting restrictions to reasonable, content-neutral time, place, and manner regulations. For example, regulations for these events sometimes set restrictions on the time of day when they may occur or limit sound amplification to a reasonable level.
- Ensuring that provisions for separating protesters from counter-protesters and others are no more burdensome than necessary (see Buffer Zones, below).
- Distinguishing between speech that is not protected, such as fighting words, from speech that is merely offensive to many (see *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015)).
- Avoiding the heckler's veto, which results in silencing the speech of one party out of fear of a hostile reaction from others (see *Bible Believers*, 805 F.3d at 252).
- Preparing law enforcement officers to handle interactions with participants.

Buffer Zones

Regulations sometimes establish buffer zones limiting activities that normally get First Amendment protection, such as protesting or leafletting. In some cases, government entities have successfully used legislation or policies to create buffer zones that:

- Require pro-life advocates to keep their distance from clinics that provide abortions or from persons entering the clinics.

- Separate protesters and counter-protesters at rallies and demonstrations.

Counsel assisting in drafting regulations implementing buffer zones should feel comfortable the regulations are content neutral and can survive intermediate scrutiny. A buffer zone that is too big or overly intrusive improperly diminishes the communication potential of those required to stay outside the zone (see *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400 (6th Cir. 2022)).

Sexually Oriented Businesses

Many of the activities that take place in establishments known as adult businesses or sexually oriented businesses fall under the First Amendment's free speech protections. However, many local government leaders and citizens believe these businesses are detrimental and pose risks to their communities.

Local governments must clearly define what sexually oriented businesses are before they attempt to regulate them. Without a precise definition:

- Code enforcers may struggle to determine whether a business is a sexually oriented business.
- Some officials may push for an overly wide view and attempt to regulate businesses that do not justify regulation as a sexually oriented business.

Some US Supreme Court cases have allowed local governments to target sexually oriented businesses for differential treatment. The Court has:

- Recognized that adult business regulations have an impact on the content of speech. However, society's interest in protecting sexually explicit expression is "of a wholly different, and lesser, magnitude" than other protected classes of speech (*Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)). Even though adult business regulations single out a specific type of expression, courts often treat the regulations as they treat content-neutral regulations.
- Applied a lower level of scrutiny to the regulations when their intent is to address the businesses' secondary effects, such as crime and effects on property values. If the primary purpose is to address secondary effects associated with sexually oriented businesses, courts apply intermediate scrutiny review. The Supreme Court views ordinances that focus on the secondary effects of adult businesses and that do not completely ban the businesses as content-neutral time, place, and manner regulations. (*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).) However, the emphasis on secondary effects should not rely on merely speculative findings, but on evidence that fairly

supports the government's rationale (*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)).

Local governments typically regulate adult businesses through a combination of approaches, which can include:

- Limiting the potential locations for sexually oriented businesses through zoning.
- Requiring sexually oriented businesses to apply for and maintain special licenses.
- Setting standards to regulate structural and operational aspects of the businesses.

Even if a local government justifies regulating adult businesses, its regulations must not be unconstitutionally overbroad or vague.

The Supreme Court has not addressed the impact of *Reed* on adult business regulations, but the US Courts of Appeals have had divergent views on its impact. The secondary effects doctrine still applies unless the Supreme Court or a court with jurisdiction over the local government entity determine otherwise. Local government counsel should continue to monitor case law developments for trends in the way courts treat the use of secondary effects to justify regulations.

Other Regulations and Policies Implicating the First Amendment

Regulations Targeting Religion or Religious Practices

Local governments should avoid adopting or enforcing regulations that control or prohibit religious conduct or conduct motivated by sincere religious belief (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). For example, courts have ruled against government entities that:

- Suppressed a religious exercise by prohibiting the ritual slaughter of animals (*Church of the Lukumi*, 508 U.S. at 539-40).
- Discriminated against a religious group by prosecuting a Jehovah's Witnesses minister for violating an ordinance prohibiting persons from addressing religious gatherings when other groups were allowed to hold church services (*Fowler v. State of R.I.*, 345 U.S. 67 (1953)).
- Allowed secular groups to use school property for meetings after the school day but prohibited religious uses (*Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

To satisfy the Free Exercise Clause, a regulation must be neutral and generally applicable. If the law is neutral and generally applicable, the government must provide a rational basis for the law. If the law is not neutral nor generally applicable, the government must survive a strict scrutiny analysis. Even if a law appears neutral on its face, it is not neutral if its effect is to discriminate

against religiously motivated conduct. (*Church of the Lukumi*, 508 U.S. at 531.) Additionally, governmental bodies themselves must be neutral decisionmakers and give full and fair consideration to religious objections (*Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638-39 (2018)).

In addition to the Free Exercise Clause, federal law creates other causes of action for persons whose religious rights have been violated. The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits local governments from implementing zoning and other land use regulations that infringe on religious exercise. Local government counsel should also be aware of state religious freedom laws imposing additional limitations on governmental actions that burden the exercise of religion.

Noise Regulations

Laws that restrict loud or disruptive noises are content neutral if they make no reference to the communicative content of speech. Even when noise is expressive conduct, a noise restriction can be content neutral:

- If it targets the effects of the noise itself with no reference to content (*Ward*, 491 U.S. at 791-92; see also Porter *v. Martinez*, 68 F.4th 429, 441-42 (9th Cir. 2023), *cert. denied*, 2024 WL 759806 (Feb. 26, 2024) (upholding a prohibition on horn honking as applied to a motorist at a protest rally)).
- Even if it focuses on the noisemaker's function or purpose, such as interfering with the delivery of health services (see *March v. Mills*, 867 F.3d 46 (1st Cir. 2017)).

Flags

Regulating the types of flags an individual or private entity can display may invite a First Amendment challenge. Cities should use caution in attempting to distinguish between the types of flags that parties may display when:

- Sign ordinances or other regulations set standards for flags on private property. A regulation is content based if it exempts governmental flags from regulation while restricting flags with other messages.
- Private groups are allowed to display flags on public property. For example, the Supreme Court found that Boston exercised impermissible viewpoint discrimination when it refused to allow a Christian flag in a public plaza where it allowed other private flags (*Shurtleff*, 596 U.S. at 258).

Book Banning

Some local governments may ask for their counsel's legal advice when concerned citizens or board members want to either:

- Remove specific books from school libraries or public libraries.

- Establish a process for persons to submit complaints about library books and petition for their removal.

A 1982 Supreme Court opinion involving the removal of nine books from a school library by the local school board holds that:

- First Amendment rights are available to students, but there are limitations to those rights in public schools.
- The right to receive information and ideas is inherent to free speech rights.
- School boards have discretion to decide on school library contents, but:
  - the exercise of that discretion may not be narrowly partisan or political;
  - the removal of a book violates the Constitution if it is due to disagreement with ideas in the book; and
  - boards must not prescribe political or religious orthodoxy in determining whether to remove a book.

(*Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26. v. Pico*, 457 U.S. 853 (1982).) However, only three of the justices signed on to the portion of the opinion with these holdings, while two other justices concurred in the judgment.

A 2009 decision from the Eleventh Circuit holds that:

- The Supreme Court's plurality opinion in *Pico* has no precedential value for applying the First Amendment.
- School boards may remove books that contain factual inaccuracies and students have no First Amendment rights to have those books in the school library.

(*ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009.) More recent pushes to ban library books deemed harmful to minors may result in new case law and further guidance on applying the First Amendment.

THE FIRST AMENDMENT IN THE GOVERNMENT WORKPLACE

The First Amendment affects not only the way local governments interact with citizens, but also how they handle internal matters. Local government attorneys should understand the protections the First Amendment provides to government employees and applicants for employment.

Employee Protected Speech

The First Amendment protects a government employee's right to speak as a citizen on matters of public concern. When a government employer restricts

employee speech, the restrictions must fall within constitutional limits. The outcome of a free speech challenge by a government employee generally depends on whether:

- The employee was speaking as a citizen rather than as an employee. An employee's speech made as part of official job duties is speech made as an employee and not as a citizen.
- The employee's speech was about a matter of public concern. Courts examine the context, form, and content of speech to determine whether it is a matter of public concern. Workplace concerns, such as duty assignments and office morale, are matters of personal interest that are not protected by the First Amendment.
- The employer has an adequate justification for regulating the employee's speech that outweighs the employee's interest in speaking on a matter of public concern. Courts balance the employee's interest with the government employer's legitimate interests in effectively performing its mission. The government may only restrict employee speech to the extent that the speech harms government operational interests, such as by interfering with proper discipline.

(*Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Connick v. Meyers*, 461 U.S. 138, 148-49 (1983).)

Freedom of Association in the Workplace

In public sector employment, freedom of association:

- Protects employees' rights to join a union or association and advocate for its interests (*Smith v. Ark. State Highway Emps. Loc. 1315*, 441 U.S. 463, 464-65 (1976)).
- Prevents public sector employers from allowing employee unions to require non-union members to pay dues or fees (*Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)).
- Protects employees' rights to independent political affiliation and belief. Political patronage requirements satisfy First Amendment concerns only in limited situations, usually in positions involving policymaking or confidential relationships with a superior (see *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004)).

Freedom of Religion in the Workplace

To accommodate the exercise of religion, government employers:

- May not discriminate against employees or applicants on the basis of religion.

- Must reasonably accommodate their employees' religious practices unless an accommodation would create an undue hardship for the government. Examples of reasonable accommodations can include measures such as:
  - modifying schedules to permit employees to engage in or observe religious practices;
  - permitting religious expression in the workplace, such as allowing employees to display religious symbols at their workstations or proselytize, unless it is harassing to other employees; and
  - making exceptions to a dress code policy to permit employees to wear religious attire or symbols.

Employment claims involving the Free Exercise Clause typically also allege violations of Title VII of the Civil Rights Act of 1964. Title VII applies to most public and private employers with 15 or more employees. Individuals may enforce their rights under Title VII by filing a claim with the Equal Employment Opportunity Commission (EEOC). The EEOC may also file a lawsuit to enforce Title VII on behalf of an individual or individuals.

THE FIRST AMENDMENT AND SOCIAL MEDIA IN LOCAL GOVERNMENT

If a government official's social media posts are attributable to the government, the First Amendment prohibits deleting unwelcome comments or blocking those who make them. However, officials are free to delete comments or block commenters altogether when they post only as a private citizen. A 2024 Supreme Court case provides new guidance for determining whether an official's social media posts are attributable to the government. In *Lindke v. Freed*, the Court's unanimous opinion holds that a public official's social media activity constitutes government action only if the official both:

- Possesses actual authority to speak on the government's behalf.
- Purports to exercise that authority when the official speaks on social media.

(2024 WL 1120880 (March 15, 2024).)

Private actions are not attributable to the government, no matter how official they may look. A plaintiff who alleges violations of First Amendment rights must show that the official's actions were rooted in actual authority to speak for the government. Even when officials have that authority, their social media posts are not the government's speech unless the posts are in furtherance of the official's duties. Categorizing posts as personal or official requires a fact-specific inquiry, with their content and function as the most important considerations. However, the Court stresses that public officials expose themselves to greater

liability when they fail to keep personal social media posts in clearly designated personal accounts. (*Lindke*, 2024 WL 1120880, at *9-10.)

CONSEQUENCES OF VIOLATING THE FIRST AMENDMENT

Under 42 U.S.C. Section 1983, local governments and their officials and employees are subject to civil liability if they deprive individuals of their constitutional rights. A successful plaintiff in a Section 1983 action may obtain one or more of the following:

- Prospective relief (typically, an injunction or declaratory judgment).
- Compensatory judgment.
- Punitive damages.
- Attorneys' fees.
- Costs.

This paper is adapted from a Practice Note published by Practical Law, titled First Amendment Issues for Local Government: Overview. The following additional related resources are available on Practical Law:

- First Amendment Compliance for Government Attorneys Toolkit
- Practice Note, Free Speech Limitations on Government Regulation: Overview
- Practice Note, Content Neutrality in Government Regulations
- First Amendment Public Forum Analysis Checklist
- Practice Note, Regulating Speech and Conduct in a Local Public Meeting
- Standard Document, Citizen Comment Policy for Local Government Board Meetings
- Practice Note, Legislative Prayer During Local Government Meetings
- Practice Notes, Content Neutrality in Sign Regulations
- Practice Note, Holiday Displays on Public Property
- Public Protest and Demonstration Response and Regulation Toolkit
- Practice Note, Sexually Oriented Business Regulation by Local Governments
- Practice Note, Free Exercise Clause and Religious Freedom Limitations on Government Regulation
- Practice Note, Local Government Regulation of Religious Land Uses Under RLUIPA
- Practice Note, Avoiding and Defending Against RLUIPA Claims
- Practice Note, Constitutional Protections in Local Government Employment: Overview
- Legal Update, The Supreme Court Rules Against Public Unions Collecting Fees from Non-Union Members
- Practice Note, Religious Discrimination and Accommodation Under Title VII
- Legal Update, US Supreme Court Sets Test for Determining When Government Officials Can Silence Critics on Social Media
- Practice Note, Section 1983: Overview
- Section 1983 Toolkit