

# 2022 Update – Public Employee Issues

Presenters:

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## State Employees: Broader In Some Respects More Restrictive In Others

- **11<sup>th</sup> Amendment Immunity** for States
- Congress' 14<sup>th</sup> Amendment authority: must be “congruence and proportionality between injury to be prevented or remedied and means adopted to that end.”
- ~~Age Discrimination In Employment Act~~
- ~~Americans With Disabilities Act~~
- ~~Family and Medical Leave Act (self care)~~
- Immunity for State Employers & Arms Of State, Not Local or County Employers

STATE ENTITY IMMUNITY FROM SUITS BY STATE EMPLOYEES				
Law	Is There State Entity Liability?	Can State Employee File Against State Entity In Federal Court?	Can State Employee File Against State Entity In State Court?	Can State Employee File Against Agency Head in Their Official Capacity for Prospective Injunctive Relief, Attorneys Fees and Costs in Federal Court?
ADA	NO	NO	NO	YES
§ 504 Rehabilitation Act	YES - IF... the agency is a "recipient" of "federal financial assistance."	YES – IF... the agency is a "recipient" of "federal financial assistance."	UNSETTLED*	Unnecessary in Federal Court Because Agency Can Be Named Directly.  May Be Required By Conservative Practice If Filing in State Court*
FMLA (Employee Self-Care)	NO	NO	NO	YES - Plaintiff May Also Have Individual-Capacity Claim Against Bad Actor
ADEA	NO	NO	NO	YES
TCHRA	YES	NO	YES	NO (N/A)

## I. FREE SPEECH IN THE WORKPLACE

- Long established – public employees do not wholly relinquish First Amendment rights by accepting public employment
- But their rights can be limited more than those of the public generally
- Courts engage in *Pickering* balancing test, where employee rights are measured against governmental employer's needs
- *Pickering v. Bd. of Educ.* (Sup Ct – 1968)

# Elements – public employee Free Speech Claims

- Test for public employee free speech claims:
  1. Did employee suffer **adverse employment action**?
  2. Did employee speak on **matter of public concern**?
  3. Did employee **interest in speech outweigh employer's interest in governmental efficiency**?
  4. Was employee's speech **"substantial or motivating factor"** for the adverse action?

## **Added Element** – did employee speak pursuant to official job duties?

- Seminal case – *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
- Clarification – *Lane v. Franks*, 573 U.S. 13 (2014)
- Critical distinction – speech connected to job can still be protected if it is not speech required by job (but courts blur this line *often* – especially in cases involving whistleblowers reporting internally)

Also available as part of the eCourse

[Employment Law Public Sector Update 2022](#)

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