

Risk Control Best Practices: First Amendment Auditors

Don't become click bait.

The First Amendment to the United States Constitution provides 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.

Over the years, what is considered “speech” has expanded to include recording public officials and employees in public spaces. (See, for example, *Fields v. City of Philadelphia*, 862 F.3d 353, 354 (3rd Cir. 2017))

This has led to the rise of what are known as First Amendment Auditors. These “auditors,” armed with a cell phone or other recording device, enter public buildings and record employees doing their jobs. Often, they will ask questions and go places designed to annoy, with the goal of having the employee become confrontational so they can post the video on social media. The more outraged the act, the more viewers, which allows the auditor to monetize their site.

As the ultimate goal is to get clicks on social media and/or have their First Amendment rights violated so they can file suit, these Auditors may push the envelope of allowable behavior. They may ask questions and comment on the work being done ostensibly to let the public know how public employees are doing their jobs - all the while maintaining a calm tone while hoping the subject matter will provoke an irritated response from the public employee.



While the First Amendment is generally interpreted broadly, it does not protect all speech all the time. As a public entities have the power to regulate how its public meetings are run and when someone can speak during these meetings, they also have the power to regulate how the workplace is run. Also the First Amendment does not protect speech that is considered disorderly conduct, harassment, stalking and/or disruptive of a public proceeding. As what constitutes this type of behavior varies from jurisdiction to jurisdiction and does have constitutional limits, it is important to familiarize yourself with these proscriptions.

REMEMBER THAT THE AUDITOR'S GOAL IS TO PUSH YOU INTO A CONFRONTATION!



Here are a few ways to deal with the situation:

1. Be polite. Answer questions politely and calmly. Do not overreact.
2. Please don't try to take the recording device or stop the auditor from recording. As the auditor has the First Amendment right to record, this may be a violation and the grounds for a lawsuit – precisely what the person is looking for.
3. Let others in the office, especially your supervisor, know what is going on. This will prevent others in the office from saying or doing something they shouldn't on camera.
4. If the person tries to access a part of the building that is not open, calmly ask them to stop.
5. Contact law enforcement if the auditor becomes threatening, abusive or disrupts operations. Remember, the mere act of recording is not considered threatening or disruptive.
6. Know your local law on what constitutes stalking, harassment, intimidation, disrupting a public proceeding, etc. The auditor will probably be aware of these and know where the limits are and go right up to the line.
7. Create a policy detailing the actions that should be taken in the event you find yourself under these circumstances. When to contract the police, management and any public information officer should be included. Also included should be what is considered private work spaces and make sure that these are clearly delineated and identified by signs or otherwise to the public.

Calmly going about your business is the best defense against finding yourself on the wrong end of a YouTube video. Once the auditor determines that they are unlikely to get a viral moment where they are, they will probably move on down the road.

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