

## Free Speech on Campus: Frequently Asked Questions

Freedom of speech is central to our democracy, which is why the federal and state constitutions protect our rights to express our views, including viewpoints with which other people may disagree, free from most government intrusion.

On college and university campuses, the ability of students and faculty to engage in open discourse and peaceful protest enables students to hone critical thinking skills, while creating space for new ideas to emerge for debate and consideration.

Freedom of speech is essential when ideas and values clash because the alternatives – repression or violence – are unacceptable in our democracy.

This FAQ is intended primarily to address situations in which private parties engage in competing speech or expressive conduct that may make the opposing party feel vulnerable or chilled from speaking.

### **1. Can I bring a First Amendment claim against a private person or entity if they publicize my name, political views, or views of groups to which I belong, or otherwise attempt to “chill” my speech?**

- The First Amendment of the U.S. Constitution protects you only from *government* actions that attempt to silence speech—in other words, only where there is “state action.” This means that you cannot bring a First Amendment claim against private individuals or entity on the basis that they are attempting to suppress your speech or retaliate against you for your speech.

### **2. Can I seek relief under other laws?**

- Depending on the facts of your circumstances, you may be able to seek relief under state defamation law, harassment law, the Massachusetts Civil Rights Act, or privacy law. These laws, however, generally cannot be used to punish constitutionally protected speech.
- Private speech and expressive conduct in opposition to someone else’s speech is constitutionally protected against government infringement (including court orders).

- Protected speech may include sharing publicly available information with others, even in ways that are uncomfortable, offensive, or deeply upsetting. Your name, your membership in student groups, actions or statements made by that group, and photographs that are available on the Internet would generally fall within this category of publicly available information.
- Speech that contains true threats, incites violence, defames someone, or is integral to a course of illegal conduct may – depending on the facts – constitutionally be the subject of legal action.

### 3. What are the scope and limits of some potential Massachusetts state law claims?

→**Defamation**: If a person or organization attributes to you facts that are provably false, you may have a claim for defamation. Assertions of *opinion* are very often not actionable under defamation law.

→**“Doxing”**: Massachusetts does not currently have an anti-doxing law.

→**Harassment**: If a person engaged in unlawful harassment, this can lead to criminal charges or a civil restraining order. A harassment charge or claim based on speech alone can only prevail if the speech is constitutionally unprotected (for example, true threats, “fighting words,” and speech integral to criminal conduct).

- In order to violate state criminal harassment law, [Mass. Gen. Laws ch. 265, § 43A](#), there must be 3 or more incidents of harassment, targeted at a specific person, that are intended to and do reasonably cause extreme emotional distress and serious alarm.
- A person can obtain a civil harassment protective order under [Mass. Gen. Laws ch. 258E, § 1](#) if the conduct at issue meets the requirements for criminal harassment provided above, *or* there are 3 or more acts of willful and malicious conduct; aimed at a specific person; committed with the intent to cause fear, intimidation, abuse or damage to property; and that does in fact cause fear, intimidation, abuse or damage to property.<sup>1</sup>

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<sup>1</sup> “Abuse” means “attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm.” Mass. Gen. Laws ch. 258E, § 1. “Fear” means fear of physical harm or property damage. *Van Liew v. Stansfield*, 474 Mass. 31, 37-38 (2016) (quoting *O’Brien v. Borowski*, 461 Mass. 415, 427 (2012)). “Intimidation” is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *O’Brien*, 461 Mass. at 435.

- As a matter of both constitutional law and statutory interpretation, the civil and criminal harassment provisions are focused on behavior that threatens or puts someone in fear of physical harm to a person or property.

→**Massachusetts Civil Rights Act (“MCRA”)**: Private parties can potentially violate the MCRA, [Mass. Gen. Laws ch. 12, § 11H](#), if they engage in “threats, intimidation or coercion” to interfere or attempt to interfere with someone else’s rights, including speech rights.

- The MCRA, however, also protects the constitutional free speech rights of counter-protesters: vigorously opposing someone else’s speech or conduct is permitted under the law, so long as the counter-protesters express themselves in lawful ways, even if those ways are very offensive or upsetting.
- Only narrow categories of speech are unprotected by the state and federal constitutions and therefore potentially subject to MCRA claims. Those include:
  - true threats,
  - incitement to imminent violence,
  - face-to-face fighting words, and
  - speech related to criminal conduct.

→**Privacy law**: If a person or organization obtained your personal information or image by unlawful means, you may have legal recourse under state privacy laws, including [Mass. Gen. Laws ch. 214, § 1B](#) and related common laws. In Massachusetts, there is also a right to likeness law [Mass. Gen. Laws ch. 214, § 3A](#), which applies only to use of images for a commercial purpose. All of these laws must be applied consistently with free expression rights, which means they generally could not be used to restrict constitutionally protected speech.

#### **4. Is it illegal for employers to refuse to hire someone (or withdraw a job offer) based on what the prospective employee had said about a political matter or conflict?**

- The free speech and association provisions of the state and federal constitutions do not prohibit private employers from taking adverse action based on the speech of prospective employees.
- Employers who engage in this conduct may violate existing contract obligations or create a disparate impact based on race, national origin, or religion that could violate federal or state employment discrimination laws.

- Anti-discrimination laws in some states (not Massachusetts) make it illegal to discriminate based on an employee's or prospective employee's speech or political activities.<sup>2</sup>
- *Government* employers who take adverse actions against prospective or existing employees based on an employee's speech or association may violate the Constitution, but the analysis depends on the role of the speech or association in the hiring decision or, as to existing employees, whether the speech interferes with an ability to perform the job.
- Those who face adverse employment actions as a result of speech or association should seek experienced employment counsel.

## 5. Can a college or university take adverse action against a student based on the student's speech on a matter of public concern?

- *Public* colleges and universities are subject to the First Amendment and Article 16 of the Massachusetts Declaration of Rights, so adverse action based on protected student speech on a matter of public concern may raise serious issues.
  - Note that these institutions may impose some content- and viewpoint-neutral restrictions on student speech reasonably regulating the time, place, and manner in which demonstrations can take place. For instance, they might adopt a rule that demonstrations can only take place outdoors and between the hours of 8am and 10pm. Demonstrators must also obey generally applicable laws. For example, if students stage a protest in an unauthorized area, such as the inside of a building, they may be charged with trespass.
- *Private* colleges and universities are not subject to the First Amendment,<sup>3</sup> but most have policies that guarantee some level of free speech. These policies can sometimes be enforced as a contract with students, depending on the specific facts and policies at each school. Students should check their school's specific policies about discipline and speech-related topics.

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<sup>2</sup> In Massachusetts, employers may not take employment-related actions to influence an employee's voting activity or political contributions. See [Mass. Gen. Laws ch. 56, § 33](#).

<sup>3</sup> The Massachusetts Supreme Judicial Court has not yet decided whether private colleges and universities are covered by Article 16 of the Massachusetts Declaration of Rights, explicitly describing that as an open question. *Roman v. Trustees of Tufts College*, 461 Mass. 707, 712-13 (2012).

- Students who wish to stage demonstrations on college or university property should check school policies for applicable rules to avoid inadvertently violating them.
- The public has a right to demonstrate on public streets, sidewalks, and parks, subject to reasonable time, place, and manner restrictions. Students who wish to engage in demonstrations or marches on *public* property that is not overseen by their schools, like public parks or streets, should check the ordinances applicable to the specific city or town, including those about requesting permits in order to block streets or sidewalks.<sup>4</sup>

## 6. What steps can I take to protect my online privacy?

- There are ways to protect your privacy. One option to protect your privacy is to hire a private service to “scrub” your personally identifiable information (PII) from the Internet. [DeleteMe](#) is one such service.
- Strong online [privacy practices](#) may also help to protect your PII.

**To find this and other general Know Your Rights materials, including those about responding to interview requests from law enforcement or immigration officials, go to <https://www.aclum.org/en/know-your-rights>**

**To seek additional Legal Resources from ACLU of Massachusetts, see information available at <https://www.aclum.org/en/seeking-legal-help-aclu>**

Note that we may not be able to provide direct assistance. To seek advice from private counsel, you may contact the Massachusetts Bar Lawyer Referral Service by phone Monday-Friday 10am to 3pm at 617-654-0400 or 866-627-7577, by email [LRS@massbar.org](mailto:LRS@massbar.org), or through their website: <https://www.masslawhelp.com/lrs-find-lawyer-intellinx.html>.

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<sup>4</sup> For some information about rules in Cambridge, Massachusetts, see the public demonstration policy developed as a result of litigation filed by ACLUM on behalf of Mass. Peace Action in 2018: <https://www.aclum.org/en/cases/massachusetts-peace-action-v-city-cambridge>.