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Advantage Member Exclusive

Will Our Church Get Sued for Reopening?

How church leaders should weigh the potential legal liabilities associated with public gatherings during the pandemic.



Matthew Branaugh, JD, Editor, Content and Business Development  [Bio](#)

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Should churches reopen?

It is *the* question weighing on the minds of church leaders nationwide. The evolving storyline of the COVID-19 (coronavirus) pandemic, coupled with varying local and state government directives issued to try and slow the virus's spread, have left many congregations feeling uncertain and frustrated.

In several states, directives have limited public gatherings to small groups of people—oftentimes 10 or fewer—and forced “nonessential” businesses and organizations, including churches, to remain shuttered. Orders also have included “shelter-in-place” restrictions requiring people to remain in their residences unless tending to an essential need, such as a trip for groceries or to see a physician. Some states issued [religious exemptions](#) as part of their directives, but many did not.

Cases and deaths attributed to COVID-19 continue to climb, but as the economic tolls of these measures also mount, so too have pressures to begin reopening the country. Numerous political protests in Michigan, Colorado, and elsewhere have emerged. A number of [religious liberty lawsuits](#) have been filed by houses of worship, with [results thus far mixed](#).

States are responding to the virus and the public pressures in different ways. Most state already are opting to follow “phased” reopening plans, while a handful are moving slower.

Against this confusing and ever-changing backdrop, church leaders must answer numerous questions as they wrestle with what they should do. Questions undoubtedly range from congregational demographics to building logistics to staff and volunteer readiness, among others. A recent [Washington Post article](#) detailed the tensions many congregations in Maryland and Virginia feel as those respective states begin phased reopening efforts (with the former including houses of worship in its phased reopening plans).

Before addressing these questions pertaining to reopening, though, church leaders must first make one crucial assessment: what legal liabilities their church faces if it reopens.

Create an information baseline

While a decision to reopen a church's doors shouldn't be based solely on the likelihood of a future lawsuit, the existence of such a possibility looms large. Leaders must seriously weigh the prospects of potential litigation, and other possible regulatory or criminal

penalties, and determine how much legal risk they are willing to tolerate. Otherwise, they may unintentionally make their church vulnerable to an adverse court decision or a costly sanction down the road.

Several types of legal matters could arise for churches, ranging from a civil lawsuit alleging the church's decision to reopen caused an attendee's or volunteer's injury or death, to an employment-related claim brought by an employee who becomes ill after returning to the office, to fines administered by local law enforcement.

Before sorting out these various possibilities, leaders must first establish a baseline of information about how government and medical officials are handling the public health risks for their area.

Finding and prioritizing the information

Preferably daily, but at least every few days, leaders must verify the recommendations, guidelines, and—most importantly—mandates issued by local, state, and federal authorities, attorney and senior editor Richard R. Hammar told Church Law & Tax.

Local information usually can be found on the town, city, or county's website, or those of the local public health authority. Likewise for information issued by the state. (Relatedly, this [free article](#) from *The Wall Street Journal* includes an excellent map that tracks state reopening plans and offers regularly updated summaries covering how each state is proceeding.)

In terms of federal guidance, presidential executive orders related to the pandemic are logged by the [Federal Register](#), while the US Centers for Disease Control and Prevention (CDC) on May 14, 2020, released reopening guidelines for both [workplaces](#) and [faith-based organizations](#). Although the CDC's materials are not binding, they nevertheless establish publicly available standards of care that churches should take into account.

The information-gathering process can be challenging when optional guidance—but not mandates—exists. It can be especially challenging when government sources conflict with one another. In general, church leaders should identify the materials most clearly labeled as mandates, orders, or bans and prioritize those first, followed by guidelines or recommendations. If contradictions arise between information sources, particularly with respect to what is or is not legally mandated, church leaders should carefully document the materials they find, consult with qualified local legal counsel and their church's insurer, and then decide how to proceed.

A church that desires to fully minimize its legal liabilities will want to follow the strictest directives applicable to it, whether at the local, state, or federal level, Hammar said. Beyond directives, the church will want to abide by the most rigorous of any optional guidelines or recommendations applicable to it, which will help demonstrate the church strove to follow the most cautious approaches publicly available.

Not all churches will choose to follow the most conservative path, under a belief that they can tolerate a higher risk for potential legal issues. Or, in some instances, governmental authorities will give optional recommendations, but few, if any, mandates, leaving the decision to reopen—and the ways of doing so—in the church's hands. For churches finding themselves in either position, they will want to consider these additional points before making a final call:

- **Denominational guidance.** Churches affiliated with a denomination will want to reference any guidance or mandates established by regional or national denominational offices and make certain their decision is appropriately aligned.
- **Insurance.** Church leaders should consult with their insurer regarding their policy (or policies) to determine what is—and is not—covered in terms of opting to reopen and risking an outbreak in their congregation. Leaders should verify whether any employment-related coverage will apply in the event an employee becomes ill. Lastly, the church should determine with the insurer whether coverages will include the provision of legal representation in the event any type of claim tied to COVID-19 is brought against the church.

- **Workplace practices.** Churches that reopen their offices and require pastors and staff members to lead services will have to meet regulatory requirements designed to ensure safe workplaces. Churches [must legally comply](#) with the Occupational Safety and Health Act of 1970 (OSHA). OSHA [requires employers](#) to provide “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm,” including COVID-19. OSHA also deems COVID-19 to be a required reporting event if an employee becomes ill on the job.

Additionally, [state labor safety laws](#) must be accounted for.

Tip. Learn more about OSHA- and CDC-related guidance for COVID-19 in workplaces, as well as other employment law considerations, in this [Advantage Member article](#).

- **Criminal penalties.** Violations of government orders or bans can result in numerous penalties that church leaders will want to weigh carefully. As attorneys Theresa Sidebotham and Nicole Hunt [noted in March](#), consequences can include “financial penalties, forced closure, stripping state benefits from the organization, or even jail time for church leaders.”

Could we get sued?

Lastly, leaders must weigh the likelihood of facing a lawsuit should they reopen.

In places where local or state directives currently prohibit public gatherings, a church that still decides to open is likely in the most vulnerable position with respect to a future lawsuit, Hammar noted. The likelihood of such a lawsuit prevailing is not clear, since a plaintiff will have the burden of proving the church’s gathering directly caused the plaintiff to contract COVID-19. If only one or two people became ill after the church met, then it will be harder to convince a jury. Conversely, if dozens of churchgoers become ill, then the odds improve of convincing a jury.

Hammar also said it’s important to note that attorneys who represent plaintiffs likely will pursue a certain type of legal claim known as “negligence per se” in situations involving businesses or churches that choose to reopen even though local or state mandates prohibited them from doing so. Under a “negligence per se” claim, a defendant’s causation of a plaintiff’s injury is automatically assumed if the defendant violated a local, state, or federal mandate in place at the time the injury occurred. If a church decides to meet in person for services and activities, despite directives mandating otherwise, then causation may automatically be assumed for a plaintiff who brings a lawsuit against the church, Hammar said. The ability for the plaintiff to prevail then becomes much easier.

Relatedly, members of Congress are debating the creation of an [immunity provision](#) that would shield businesses and other entities from civil litigation if they comply with applicable local, state, and federal mandates while reopening during the pandemic. While no such provision has been adopted yet, church leaders should monitor such a development. But even if an immunity law emerges, church leaders still must recognize the vital importance of “complying with applicable mandates” in order to attain any benefits provided by such a shield, Hammar said.

Matthew Branaugh is editor of content and business development for Church Law & Tax at Christianity Today. He earned his juris doctor (JD) with honors from the University of Denver Sturm College of Law.

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