



LEGAL MEMORANDUM

FROM: Pacific Justice Institute

TO: Pastors and Church Leaders

DATE: March 24, 2020

RE: Updated Guidance on Church Responses to COVID-19 Restrictions in Colorado

INTRODUCTION

The unprecedented crisis and response to COVID-19 is prompting near-daily changes in the legal landscape and new parameters within which churches must operate. These unprecedented restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. PJI has been advising many church leaders navigating this crisis. In order to be as precise as possible under the circumstances, this resource will focus primarily on Colorado law. PJI will be preparing similar resources for other states in the days ahead.

LEGAL DISCUSSION

Although President Trump has issued Executive Orders in coordination with the Centers for Disease Control, these have so far been a less direct factor in the bans of mass gatherings than have state and local orders.¹ As a practical matter, the bans affecting churches are most likely to be enforced locally, pursuant to state law. This memo turns to specific laws and orders that impact clergy, ministries, religious assemblies, and the free exercise of religion.

The Governor of Colorado has authority to declare a state of emergency under the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* Governor Jared Polis did so by Executive Order D 2020 003 on March 22, 2020, due to the reach of COVID-19 into Colorado. On March 22, 2020, Governor Polis ordered the Executive Director of the Colorado Department of Public Health to issue an order to reduce the in-person workforce by half. As a result, on that same day Public Health Order 20-24 was issued by the Colorado Department of Public Health which implements a 50% reduction in nonessential business in-person work. The order provides for certain exemptions for critical services. One of these is “in-person pastoral services for individuals who are in crisis or are in need of end of life services [and] social distancing is observed to the greatest extent possible.” One other exemption that would be applicable to some ministries is for “providers of basic necessities to economically disadvantaged populations” including “homeless shelters and congregant care facilities.”

In addition, Public Health Order 20-24 requires “social distancing” by maintaining a “six-foot distance from other individuals” and not shaking hands. This rule would impact religious assemblies. This order is not mere guidance, but mandatory. Penalties for violating Public Health

¹ On a federal level, emergency declarations are governed by the Stafford Act, 42 U.S.C. § 5121 *et seq.* There appear to be no cases involving the Stafford Act and the First Amendment.

Order 20-24 is a fine of up to \$1,000 and up to one year in county jail. Colo. Rev. Stat. § 25-1-114. The Order is of limited duration, lasting until 11:59 p.m. of April 10.

The Colorado Department of Public Health, Jill Hunsaker Ryan, issued Public Health Order 20-23 which limits all mass gatherings to no more than 10 people. This includes “faith-based events.” This was done pursuant to her authority under Colo. Rev. Stat. § 25-1.5-101(1)(a) to “close theaters, schools, and other public places, and to forbid gatherings of people when necessary to protect the public health.” This Order remains in effect for 30 days.

In addition to the Governor and Executive Director of the Colorado Department of Public Health, counties are required to establish and maintain a public health agency or participate in a district public health agency. Colo. Rev. Stat. § 25-1-506(1). Among the many duties that a public health agency must undertake, there are specific responsibilities related to epidemics as follows:

(V) To investigate and control the causes of epidemic or communicable diseases and conditions affecting public health;

(VI) To establish, maintain, and enforce isolation and quarantine, and in pursuance thereof, and for this purpose only, to exercise physical control over property and over the persons of the people within the jurisdiction of the agency as the agency may find necessary for the protection of the public health;

(VII) To close schools and public places and to prohibit gatherings of people when necessary to protect public health;

(VIII) To investigate and abate nuisances when necessary in order to eliminate sources of epidemic or communicable diseases and conditions affecting public health. Colo. Rev. Stat. § 25-1-506(3)(b)(V)-(VII).

Colorado lawmakers have placed some restrictions on this authority in light of the right to the free exercise of religion. In sum, health agencies cannot “impose on any person any mode of treatment inconsistent with the creed or tenets of any religious denomination of which he or she is an adherent if the person complies with sanitary and quarantine laws and rules.” Colo. Rev. Stat. § 25-1-506.

Churches will have a variety of responses to such restrictions. Beyond the legal issues presented, the directives and overarching health crisis are spiritual challenges to be wrestled with by pastors and, where applicable, the eldership or other ecclesiastical authority of a church.

Many churches will comply. In many ways, churches today are better positioned than many other entities to deal with this crisis. Most churches now have online giving options and broadcast their sermons and/or services online.

This crisis could also present tremendous service opportunities such as delivering groceries to the elderly, becoming better acquainted with neighbors and their needs, sharing resources, and offering prayer for the sick and those in our immediate surroundings.

Some church leaders may feel they cannot in good conscience cancel a worship service, or exclude people from a small group gathering in order to achieve prescribed numeric limitations. They may believe that the admonition not to forsake the assembling of ourselves together, laying hands on the sick, and similar commands, do not yield to bans on mass gatherings or health crises.

Throughout history, the church has met secretly and when necessary illegally, from the catacombs of Rome to the barns of Puritan England and Chinese house churches today. These are sobering decisions that church leaders should not undertake lightly. If a church is hierarchical or has a local body of elders, the decision should be made in consultation with those authorities and not by the pastor alone. If so, such churches should be aware that failure to comply is a criminal offense. Colo. Rev. Stat. § 25-1-114.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. The legal outcome of such a prosecution would be highly uncertain, and it must not be assumed that the First Amendment would provide a complete defense to such prosecutions. Moreover, like all cases involving criminal or civil defense, the actions of the ministry may not necessarily reflect the views the Pacific Justice Institute.

Civil liability for meeting in defiance of a ban on mass gathering should also be taken into account. A church in the Sacramento area is now under scrutiny for having several of its attendees afflicted with coronavirus. Two members have died. (It is unclear at this point whether the church had any fault or could have prevented this with reasonable precautions.) It is far from clear what kind of liability a church might have if it met in violation of the law and members subsequently became sick. It is therefore strongly recommended that churches consult their liability insurance carrier to ascertain the scope and limits of their coverage prior to taking such actions. Insurance policies may have conditions excluding coverage for willful criminal acts.

CONCLUSION

There is reason to be concerned about governmental overreach during a state of emergency. As noted above, statute and precedent provide a basis for raising First Amendment arguments during this crisis. At the same time, it seems most likely that a court would uphold almost any shutdown order by the Governor during the present crisis as it relates to churches, at least in the short term. PJI staff are taking appropriate precautions, but we are not giving in to fear. We remain here to serve the Body of Christ through every crisis. Due to all of the disruptions this crisis is creating in many different areas of our lives, our response times may be somewhat delayed as we prioritize the most urgent needs of churches, ministries, and clients.

In order to help empower churches, PJI will soon make videos available on our website, www.PJI.org, that will (1) train churches how to have church services via Facebook, and (2) show how churches may take advantage of the opportunity to initiate Church Homeschool Co-ops in their churches.

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