



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders
DT: April 3, 2020
RE: Guidance on Church Responses to COVID-19 Restrictions in Ohio

INTRODUCTION

The unprecedented crisis and response to COVID-19 (novel coronavirus) is prompting near-daily changes in the legal landscape and new parameters within which churches must operate. These restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. Pacific Justice Institute has advised hundreds of church leaders across the nation as they navigate this crisis. In order to be as precise as possible under the circumstances, this resource will focus primarily on Ohio law. PJI has released separate memos for dozens of other states now under varying levels of restrictions. Check in regularly with us at www.PJI.org to access all of our resources on this and many other topics.

BACKGROUND

On the federal level, President Trump has issued a number of Executive Orders and guidance in coordination with the Centers for Disease Control (CDC). Among the more notable aspects of this guidance are social distancing measures that have come into common usage, and a baseline list of sectors deemed “essential” for purposes of continuing operation during the pandemic. Many Americans undoubtedly wonder how it was determined that some industries and sectors of the economy are deemed more “essential” than others. This list was originally developed after 9/11 to protect critical infrastructure and industries from terrorist attacks. Since counterterrorism involves different considerations than combating an epidemic, the list has been expanded upon by many jurisdictions, including Ohio.

One of the leading federal lists, originally developed as a counterterrorism measure by the Cybersecurity and Infrastructure Security Agency (CISA), includes no mention of religious entities or services.

Ohio has adopted but significantly expanded on the CISA list of essential businesses. On March 9, 2020, Ohio Gov. Mike DeWine issued Executive Order 2020-01D and declared a state of emergency due to COVID-19. As of this writing, the leading stay-at-home order was issued by

Dr. Amy Acton, Director of the Ohio Department of Health, under the authority of the Governor. This directive went into effect on March 23 and will be in effect until April 6 unless extended.

Like many of its counterparts, this stay-at-home order generally directs all state residents to remain at home except for “essential” business, work, and travel. In regards to churches, the order contains significant exceptions for church services and related activities. At Section 12(e), the order includes religious entities and facilities, as well as those gathering for religious events such as weddings and funerals, to be essential. In Section 12(g), it further deemed “First Amendment protected speech” to be essential. The order separately deems essential the provision of social services such as food and shelter outreaches to the needy, whether carried out by religious, non-profit, or governmental entities.

The designation of religious facilities as essential does not mean churches are free to hold services in exactly the same way they normally would. Even for essential operations, the order further requires social distancing such as 6-foot separation, hand washing or use of hand sanitizer as often as possible, and extra cleaning.

The order further provides that it is intended to supersede prior state or local orders, to the extent they are in conflict.

LEGAL DISCUSSION

Where does the Ohio Director of Health derive the authority to take such drastic action as prohibiting all work, business, and travel that she deems non-essential, and placing social distancing limits even on church services and activities that are deemed essential? The order cites Ohio Revised Code Section 3701.13, which states in relevant part:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established. . . .

The department may make special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as are best controlled by a general rule.

The Director’s authority is derivative of the Governor’s authority. In Ohio, this authority is extremely broad in cases of emergency. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St. 2d 127 (Ohio 1973).

At the same time, the Ohio Supreme Court has interpreted Article I, Section 7 of the Ohio Constitution to be broader and more protective than the First Amendment. *Humphrey v. Lane*, 89 Ohio St. 3d 62 (Ohio 2000). Nevertheless, the question under the state constitutional provision would still come down to whether the government could demonstrate a compelling interest advanced through the least restrictive means. This could be a closer question in Ohio, particularly in less-affected, rural parts of the State, than it might be for a court in California or New York. But in the short term, it seems most likely that a court would still defer to the government. When the threat from COVID-19 diminishes, the balance will shift and may well make the continuation of church closures unconstitutional.

Churches will have a variety of responses to these limitations. Many churches have moved to an almost exclusively online presence in the short-term. 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 via social media or other online platforms. 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. Many churches are doing all of this and more. Some are finding that the viewership of online sermons actually exceeds their usual attendance on a Sunday morning.

Some church leaders believe they cannot in good conscience cancel a worship service, or exclude or separate people in order to achieve social distancing. They may believe that the admonitions not to forsake the assembling of ourselves together, laying hands on the sick, or distribution of sacraments do not yield to health crises. 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. Churches should be aware that failure to comply with a public health directive may be enforced by law and treated as a criminal violation. On the last Sunday in March, a pastor in the Tampa, Florida, area was criminally charged for violating mass gatherings orders. Pastors in Louisiana and elsewhere have had similar clashes with authorities.

PJI may be willing to defend church leaders under certain circumstances who are fined and jailed for following their consciences. This would be a very fact-specific determination, taking into account the relative precautions or recklessness of the particular church. As one example, a church gathering of 15 people observing social distancing would be much more defensible than would a gathering of 500. The legal outcome of any prosecution would be highly uncertain. While PJI has had significant success defending evangelists against criminal charges, it must not be assumed that the First Amendment would provide an effective defense to an intentional violation in light of the current crisis. As with all cases, PJI's defense does not necessarily constitute philosophical, theological, or public policy agreement with a defendant's position.

Potential tort liability for meeting during the pandemic must also be taken into account. A church in the Sacramento area is now under scrutiny for having several of its attendees afflicted with coronavirus. (It is unclear at this point whether the church had any fault or could have prevented this with reasonable precautions.) Another church in the same area now reportedly has dozens of members who are afflicted with the virus. Tragically, a community chorus in Skagit County, Washington, has now had 45 of its members fall ill from the virus, and at least a couple have died, after practice was held at a local church. At the time, no one attending the practice showed any symptoms and there had been no reported cases in the county. Similar tragic stories are emerging from churches in Illinois and Arkansas. It is far from clear what level of liability a church might have if it met while services were still permitted but strongly discouraged by health officials, and attendees subsequently became sick or died. 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.

In addition to the required social distancing standards discussed earlier, church leaders do have the authority to take steps such as directing elderly or high-risk congregants to avoid church gatherings. Churches may also wish to require masking or make masks available. Lastly, churches not yet subject to outright bans on meetings would still be well-served to begin shifting toward home-based fellowships and gatherings in very small groups. In many ways, this would be a return to the church's New Testament roots.

CONCLUSION

While there is good reason to be concerned about governmental overreach during a state of emergency, churches in Ohio remain more free than their fellow congregations in many other states, particularly on the West Coast and Northeast. For the time being, Ohio seeks to balance religious freedom and public health by deeming religious facilities and gatherings essential and permitted, while requiring social distancing precautions. PJI will closely monitor this situation since the law has been in a state of flux. Throughout this crisis, our attorneys and staff will continue to serve the Body of Christ.

This general information does not constitute legal advice; instead, all information, content, and materials available in this resource are offered for general informational purposes only. The content may not constitute the most up-to-date legal or other information. Readers of this resource should contact PJI to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information herein without first seeking legal advice from counsel in the relevant jurisdiction. Only an attorney can provide assurances that the information contained herein—and your interpretation of it—is applicable or appropriate to your particular situation. Use of, and access to, this resource does not create an attorney-client relationship between the reader and authors. The views expressed through this resource are those of Pacific Justice Institute as a whole. All liability with respect to actions taken or not taken based on the contents of this educational resource are hereby expressly disclaimed. The content in this resource is provided "as is"; no representations are made that the content is error-free. Contact Pacific Justice Institute via our website, www.PJI.org, if you believe your rights have been violated and you need representation.