

Risk Assessment for Churches

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As the State of North Carolina loosens restrictions imposed on the public related to the COVID-19 pandemic, the churches in The Western North Carolina of The United Methodist Church face a variety of the same questions and issues faced by the business community as they look toward opening their doors again.

There are two main “buckets” of questions and issues:

- Employer/Employee
- Church/Public

These buckets are both separate and interrelated. This means that what you do or do not do in one bucket has implications in another bucket. More on that later. First, let’s address some threshold issues related to the state emergency order themselves and our local churches.

Compliance with State and Local Orders

The United States Supreme Court has long held that the federal government and states can pass legislation and issue orders that restrict core constitutional rights, like freedom of exercise of religion or free association, where the law or order is necessary to achieve a compelling governmental interest and is narrowly tailored. In the case of religious practice, an order cannot single out religious practice or institutions for disparate treatment.

What this means is that states are well within the bounds of the U.S. Constitution and state laws in issuing temporary, emergency “stay at home” orders that only allow commerce deemed essential to operate and which prevent certain types of assembly. They are also permitted to charge violators criminally. This is well and long settled law despite what some political pundits on the radio and internet might say.

Also notable, states can require that employers screen their employees for public health issues before allowing them into the workplace.

North Carolina has seen both a statewide order (from the governor) and local orders from counties and cities. Where one geographic area is covered by two or more orders, the most restrictive order controls. For example, while the Mecklenburg County order was in place, it governed “shelter in place” and “essential services” rules for the county even though a more permissive state order was in place at the time.

The North Carolina order also requires that all retail employers screen workers for symptoms of COVID-19 *before* the worker comes into the workplace. These screenings must include a written questionnaire addressing whether or not the worker has symptoms of COVID-19.

Violating local and state orders not only exposes violators to criminal penalties, the behavior can have serious and unintended legal consequences relating to employees and third parties (i.e., parishioners and volunteers).

For example, North Carolina law is well settled that where an employer instructs an employee to violate safety laws and the employee is injured as a result, the employee may directly sue the employer. Why is that a big deal? In North Carolina, generally, the sole remedy for an employee injured at work is to file a workers compensation claim. But, where the employer has willfully or recklessly violated state safety laws, the employee may actually file a lawsuit and sue the employer for much more than they would have otherwise been entitled to under a workers compensation claim. Workers compensation insurance will not cover these sorts of claims. In other words, the employer is completely on the hook, not the insurance company.

Similarly, intentionally violating a state or local public health order would negate insurance coverage for any claims parishioners might bring against a church if the parishioner claims they contracted COVID-19 at the church. The carrier would deny coverage in that situation.

Also, evidence of violating a state or local order would be admissible as evidence in court in a premises liability suit in the context of punitive damage claims. For example, if a church violated CDC guidance that a state order recommended or mandated and a governmental agency cited them for the violation, that violation would be valid evidence of gross negligence or willful and reckless conduct.

Many churches don't understand their own property casualty insurance. If your property casualty policy has a "virus exclusion," it will not pay for sanitizing your church property if it is contaminated by COVID-19. Something to always understand and keep in mind.

So, do not let well-meaning belief or opinion (political or religious) make a bad situation much, much worse. Church officers have a fiduciary to act in the best interest of the church, not their own self-interest. That means putting aside polarized opinions and objectively assessing risk to employees, parishioners and the institution.

In fact, the *Book of Discipline* requires churches to abide by state and local laws in matters governing corporate operation and real property matters. Abiding by the state and local orders are not just a matter of risk reduction or citizenship, observing the orders are also part of the connectional commitment each local church has made to The United Methodist Church and its own annual conference.

Clergy intentionally violating state or local orders should think very carefully about their own exposure as that conduct may also violate the *Book of Discipline*.

Finally, recent legislation in North Carolina does provide limited civil immunity to businesses and non-profits designated as "essential services" in the state emergency orders. Religious organizations were deemed essential for the purposes of allowing employees to come to work. While this limited immunity shields essential services providers from third party civil lawsuits for negligence (i.e., claims that a customer contracted COVID-19 while on the premises), it does

not shield the entity from claims related to intentional, willful or reckless conduct. Nor does it shield an employer from any liability claims from an employee. The limited immunity seemingly lasts only while the state emergency orders are in place (the legislature will have to clarify this later). So, the essential services limited immunity law does not protect a church where the church intentionally ignores state law or behave recklessly.

Bottom line: Take the time to understand your state and local orders and observe them the best you can, including related federal guidance.

I. Employer/Employee

Employers have certain legal responsibilities to both their employees and to various state and local regulating agencies. Dealing with COVID-19 as an employer is no simple task. How do you handle an employee you think might be sick? Does the employee have to tell you they have COVID-19? Can you make taking employee temperature mandatory?

At a minimum, Employers need to:

- Comply with state and local orders regarding COVID-19;
- Understand their worker's compensation insurance coverage;
- Have adequate procedures under the American's With Disabilities Act ("ADA") to deal with COVID-19 and their employees; and,
- Comply with the rules and regulations of the Occupational Safety and Health Administration ("OSHA") pertaining to COVID-19.

Non-compliance in one bullet point subject can have dramatic, unintended consequences in other areas.

Worker's Compensation

North Carolina state law requires that employers with three (3) or more employees carry worker's compensation insurance. For the purposes of the worker's compensation statute, this includes part time employees and independent contractors where the contractor has little to no discretion in how or when to do the particular job (i.e., the contractor observes the employers policies and may be directly supervised by the employer).

If an employer does not have worker's compensation insurance, they are individually liable for workplace injuries to employees. Generally, the principals of an unincorporated entity are personally liable (meaning if your church is not incorporated and you there is no workers compensation insurance, church trustees and other officers could be personally liable for employee injuries).

The greatest benefit to employers for the workers compensation system is that it is typically the sole remedy an injured employee has if they are injured at work. So, if an employer has

insurance and has complied with state laws and has otherwise not behaved recklessly or intentionally to harm the employee, the employee's sole remedy is file a claim with the workers compensation carrier and the ultimately the North Carolina Industrial Commission (if the claim is not fully resolved with the carrier).

However, as discussed above, North Carolina law does allow employees to pursue employers in court for actual damages and punitive damages where the employer violates laws or behaves recklessly and the employee is injured. Workers compensation coverage typically does not cover these types of claims.

Right now, across North Carolina, workers compensation claims are being filed with carriers by employees who claim they have contracted COVID-19 at work. How carriers treat these claims is a subject of intense interest in the legal community. Showing a causal link between the employee and the virus at work may be difficult in some cases absent a workplace outbreak (think meat processing plants, cruise lines, or distribution centers).

However, the North Carolina workers compensation statute has a broad, catch all provision regarding "occupational diseases" which allows employees workers compensation coverage where an employee is exposed to a greater degree of risk to an undefined illness due to their job or work environment. This is the textbook COVID-19 situation where an employer has ignored state orders, CDC or OSHA guidance, and/or turned a manageable situation into a mess. Plenty of other viral and bacterial infections have fallen into the part of the statute, so there is no reason to think that COVID-19 would not.

So the broad takeaway here is to make sure you have workers compensation coverage, abide by governmental orders and guidance, and take appropriate steps to make the workplace as safe for employees as reasonably possible. So long as you do that, employee claims that they contracted COVID-19 at work will not subject your church to any liability past that covered by your workers compensation insurance policy.

Conversely, employees need to be aware that the trend among workers compensation insurance carriers has been to deny employee's COVID-19 claims where there is no clear evidence of causation. Employees can have a bit of a fight on their hands and may have to file contested claims with the North Carolina Industrial Commission. Again, the best way to avoid this is to for the workplace to be as safe as reasonably possible and prevent worker infections.

The ADA

The Equal Opportunity Employment Commission ("EEOC"), the federal agency charged with enforcing the ADA, has issued guidance for employers in regards to COVID-19 and employment related matters. While COVID-19 in and of itself is not a disability, certain ADA issues come into play in regards to screening employees, excluding sick employees from work, recordkeeping, and protecting the workplace. Typically, the ADA requires that certain employee health conditions be accommodated if reasonably possible. COVID-19 is an exception.

Common ADA related questions and issues:

- Should employers screen employees for COVID-19? **Yes.**
 - Governor Cooper’s Phase 1 order of May 5, 2020 **requires** all retail employers to screen employees for symptoms on a daily basis using a written questionnaire prior to the employee entering the workplace (note Phase 1 only applied to opening a wider array of retail). Questionnaires are common among most employers right now. It is reasonable to expect that questionnaires will be required or suggested for non-profits and other employers when Phase 2 begins. While questionnaires will not capture asymptomatic carriers, they should identify the symptomatic carriers and those at higher risk.
 - Under the ADA, what you can ask is limited and how you ask it is important. For example, your questionnaire cannot illicit information on specific health conditions the employee might have (i.e., you could not ask them if they have cancer or a high blood pressure or heart problems). But you can ask if the employee thinks they are at higher risk for complications if they contract COVID-19.
 - You can inquire as to common symptoms of COVID-19, whether they have been exposed to anyone with COVID or the symptoms, recent travel, etc. **We have included a sample questionnaire in the attachments.**
 - Screening is a reasonable step to take in making your property safe, and property owners have a duty to invitees to make reasonable efforts to prevent injury and warn against dangers. Screening employees and preventing contamination of the church facility helps fulfill that obligation and reduces the likelihood of parishioners or others entering the building getting sick when you can reopen.
- What do we do with the questionnaires? The questionnaires and the information on them should be treated as confidential health information. The documents should not be kept in the employee’s personnel file. Rather, you should create secure files for each employee and keep the questionnaires there.
- Can you prohibit an employee with COVID-19 or symptoms from coming to work? Yes. The EEOC has instituted its own pandemic related emergency regulations (which give employers greatly enhanced leeway in dealing with employee health conditions) and has issued guidance deeming COVID-19 a “direct threat” to the workplace as is anyone who has it. This means you can make infected employees stay home.
- Can you take employees’ temperatures? Yes. Unless you operate a skilled care facility in NC, you don’t have to take temperatures under NC orders or federal guidance. It is otherwise optional. The EEOC has issued guidance allowing this in the context of COVID-19. Considerations for taking temperatures:

- The results are private health information under the ADA and should be recorded and kept in the employee's private file along with their daily screening questionnaire.
 - Are you taking all employees temperatures or just "critical employees"? The best practice is take everyone's instead of just some.
 - Privacy. It should be done in a private setting that maintains social distancing requirements.
 - Maintain social distancing of 6 feet. This means using a no-touch thermometer.
 - PPE (masks, eye protection, gloves) should be worn by the person taking the temperature
 - Thought needs to be given to whom on staff will be taking temperatures. They are at a higher risk of infection so their own health considerations should be taken into account.
- Can you send an employee home if they refuse to have their temperature taken? Yes. In the context of COVID-19, this is fine. Disciplinary action could also be in order.
 - You need to define "fever." The CDC says 100.4° F is a fever for the purposes of COVID-19. Delaware defines fever at 99.4. Disney defines it as 99.7. North Carolina does not currently define it. The trend is towards using a lower number as risk reduction and capturing "low grade" fevers often found on the front end of COVID-19 symptoms.
 - Can you require temperature taking of parishioners and volunteers before they enter the building? Yes, you could. It may not be practical.
 - Can you make an employee who exhibits COVID-19 symptoms leave the church? Yes. You should counsel them to contact their doctor and to seek a test for the virus. You can also isolate them while on the property (although it should be subject to social distancing and the people dealing with the employee should use PPE if at all possible). Their workspace and areas they have been in should be sanitized.
 - Can you tell other employees that an employee has tested positive or is showing symptoms or has been sent home? Yes, but with limits. You cannot personally identify the employee. It might be completely obvious, but you should not identify them. You should, however, ask the employee for a list of all people they have come into contact with related to the church over the last week or so for the purposes of aiding contact tracing.
 - Can you report the name of an employee with COVID-19 or suspected symptoms to public health agencies? If there is a confirmed test result, yes. Otherwise, no.

Until the state releases its planned requirements for churches, we will not know for certain what requirements church employers will face, but the above offer some insight and guidance.

For the time being, the same processes and procedures should be used for volunteers.

OSHA and NC Guidance

The regulations of the Occupational Health and Safety Administration (“OSHA”), an agency of the United States Department of Labor, generally apply to all employers and require an employer to provide a worker **"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."** In North Carolina, employers need to think about both OSHA and the North Carolina Department of Labor, who has adopted OSHA’s regulations as its own regulations.

OSHA cannot create or enforce rules regulating safety as to employees engaged in actual religious practices. For example, they can’t dictate the distance a pulpit can be from the edge of stairs or how a preacher handles communion. However, regulations that apply to general employee conditions are fully enforceable. And, this is directly applicable to the COVID-19 pandemic.

OSHA has issued guidance to employers in a general sense and in an industry specific manner. The impact on churches may largely depend on what you have going on in your building. OSHA has not issued guidance specific to churches or houses of worship regarding COVID-19. But much of the guidance issued can and should be implemented by churches in their facilities.

First, not implementing OSHA guidance can lead to valid complaints being filed with OSHA by employees. OSHA may initiate investigations and fine employers until compliance is achieved. Evidence of non-compliance may be used in employee or third party lawsuits as evidence of negligence or reckless conduct. Second, many of the regulations are common sense and designed to help keep employees from getting sick and your property contaminated.

OSHA identifies COVID-19 risks to workers based on both the particular industry the employer is in and based upon the function of the worker. The healthcare industry is a high risk industry, and their workers are generally at a high or very risk of infection.

Churches are probably closest in classification to retail stores. Most retail workers are in the medium risk or lower risk categories. However, this can change depending on child care options, meal service, etc.

Basic OSHA procedures require of all employees to include policies that educate employees to:

- Frequently wash your hands with soap and water for at least 20 seconds. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol. Always wash hands that are visibly soiled.
- Avoid touching your eyes, nose, or mouth with unwashed hands.

- Practice good respiratory etiquette, including covering coughs and sneezes.
- Avoid close contact with people who are sick.
- Stay home if sick.
- Recognizing personal risk factors. Certain people, including older adults and those with underlying conditions such as heart or lung disease or diabetes, are at higher risk for developing more serious complications from COVID-19.

More general OSHA guidance for retail employees, employers should:

- Practice sensible social distancing, maintaining six feet between co-workers and customers, where possible. For example, some worksites have already begun to demarcate six-foot distances with floor tape in checkout lines. Workplaces where social distancing is a challenge should consider innovative approaches, such as opening only every other cash register, temporarily moving workstations to create more distance, and installing plexiglass partitions.
- Provide workers and customers with tissues and trash receptacles.
- Train workers in proper hygiene practices and the use of workplace controls.
- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus.
- Encourage workers to report any safety and health concerns.

OSHA requires retail employers to have procedures and protocols in place for cleaning and disinfecting workspaces, public areas and high touch point surfaces. They refer to the CDC guidance on COVID-19 disinfecting. <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>

North Carolina's own orders have similar cleaning and disinfecting requirements.

More specifically, OSHA reminds employers to observe its blood borne pathogens regulations when cleaning a suspected or known contaminated area of a facility. Many churches have no experience with this particular regulation (unless they have had the training in connection with food service or medical clinics). These regulations mandate certain types of personal protective equipment and disposal of wastes.

The OSHA guidance also encourages employers to eliminate and monitor bottlenecks or choke points of public traffic within their facilities.

Currently, North Carolina highly recommends social distancing among retail employees and plexiglass shields for employees at high traffic choke points or points of sale. North Carolina requires floor tape for the public in retail space designed to keep the public 6 feet apart.

OSHA has received tens of thousands of employee complaints in the last several months. To date, their enforcement stance has been to investigate high risk employers (like medical and meat processing). Otherwise, OSHA says that good faith attempts at compliance with regulations and

guidance will suffice for now. They are apparently working on more specific, long term regulations for most of American commerce, including non-profits.

For now, churches should do the best they can. Remember, right now in North Carolina, worship cannot occur in the church building, only outside if possible. Most child care is shut down. Your staff can come to work but that's it for the most part. Plan now. Know what North Carolina is requiring of retail and non-profits. Know what OSHA is requiring of retail.

Have plans in place to identify problems, decontaminate property, and protect your workers and volunteers.

FFCA

The new Families First Coronavirus Act ("FFCA") requires employers to provide up to 80 hours of paid sick leave to full time employees who contract the virus (whether or not it was contracted on at work). Part time employees get payments equal to the average of two weeks of work. There are some technical rules surrounding calculations. Be aware that this is in addition to enhanced Family Medical Leave Act benefits that may be available. More good reasons to make your workplaces as safe as you can.

II. The Public

In North Carolina, a property owner has to exercise reasonable care to make their property safe to invitees from known or hidden dangers. If you don't do that, and someone gets hurt or sick as a result, you can be liable. The common cause of action is negligence. But in cases of intentional or reckless conduct, it can be much worse.

Conversely, North Carolina observes the contributory negligence doctrine. This means if someone is hurt on your property, if they are at fault in any way, no matter how small, they cannot recover anything. Some exceptions, children are generally not capable of negligence and teens may not be depending on their age, so safe the bet they can't be contributorily negligent. Arguably, an adult could know so much about the virus and/or do something to be contributorily negligent, so putting them on notice of potential hazards becomes key.

In the context of COVID-19, what should property owners, like churches do before they open?

- Understand your insurance policies. Review your general liability policy and your commercial property casualty policy. If you have virus exclusions or communicable disease exclusions in them, you should be much more concerned about opening to your congregation. This is a crucial in assessing your risk tolerance in whether or not to open the doors and how to do it. If you have no insurance coverage, your risk tolerance is

much lower (and very unfair to parishioners who may get sick). If you have coverage, that does not mean you do whatever you want and ignore state and federal guidance.

- Recent legislation does make essential services organizations (like churches) immune from COVID-19 related lawsuits while the Governor's emergency order is in effect. But understand, this is a limited immunity that only covers negligence actions. It does not cover claims by employees or claims based on intentional or reckless conduct. It is also not clear if the immunity is for claims that accrued during the emergency order or only includes claims brought during the emergency order period. It also does not limit criminal liability for violating state orders.
- Know the occupancy limits for your facilities. This includes fire occupancy and square footage per room (think about not only the sanctuary, but classrooms, chapels, family life centers). Retail openings have been limited to a percentage of permitted occupancy. Plan on somewhere between 25% to 50% of a room's maximum capacity. Be prepared to have trained counters at entrances. If the state doesn't mandate capacity restrictions, institute your own. OSHA and CDC both advise that.
- Review and comply to the best of your ability the CDC and OSHA guidance on retail operations, symptom screening and cleaning.
- Look at what people will touch in your sanctuary. There is the obvious like door handles, pew rails, but not the not so obvious like hymnals, offering envelopes, pens, and Bibles. Should you temporarily remove some of these items that are too numerous or too fibrous to sanitize? What about microphones, musical instruments, sound equipment?
- Be prepared to tape floors to mark directional traffic (one way aisles), spacing of 6 feet apart for waiting at entrances, exits, aisles, etc.
- Be prepared to institute social distance spacing in pews.
- Clearly communicate your procedures and plans via social media and other mediums in advance.
- If you run weekly community meals, have a homeless ministry, or are operating emergency childcare, make sure you are complying with the current state orders and federal guidance.
- All guidance currently emphasizes the importance of hand sanitizers and providing that openly and freely to the public. If you have no supply of sanitizer, you have no business opening.
- Be prepared to resolve conflicts. You will have members who don't want to comply with rules. You will have people who complain about others not complying with rules, whether justified or not. You will have staff stuck in the middle. Have clear processes

for reporting concerns and a team with the authority and knowledge prepared to swiftly resolve them.

- Don't be afraid to refuse to let someone enter the building or to make them leave. If someone has recently traveled to a "hot spot" and not quarantined, or if someone is exhibiting symptoms of COVID-19 or they are known to be sick with the virus, you can refuse to let them enter and you can make them leave. The same applies to those who will not follow your procedures.
- Have procedures in place to isolate members or volunteers who are exhibiting symptoms. And, have think through what you will do if someone is coughing or sneezing. Be prepared to immediately isolate and sanitize areas affected and prevent others from coming into those areas.
- Masks. Know the rules for your locality and the state. Currently, the state advises wearing masks but does not mandate it. Some cities may start requiring it where they can. Can you make your own rule to require them? Yes. You set the conditions for entry onto your property.
- Signage. Put up signs warning of COVID symptoms and advocating proper sanitary practices and social distancing. This is simple and this can be a key tool in putting people on notice of potential hazards.

Why is this stuff important? You don't want people to get sick, you don't want to have to pay tens of thousands of dollars to have specialized cleaning and sanitizing of your building, and you don't want to get sued. The vast majority of the foregoing is exercising reasonable care. It is making sure you are not negligent.

Right now across the country, there are thousands of lawsuits being filed by people against cruise lines, retailers, hospitals, and other businesses who claim they got sick in these establishments. It is only a matter of time before churches are sued.

More ominously, insurance companies are now beginning to deny claims and coverage under general liability insurance policies (even where there are no virus exclusions). In some cases, they are claiming pollution exclusions prevent coverage (a well litigated and debunked notion in other contexts), and in other cases, they are claiming that virus exclusions in separate policies somehow also apply to general liability policies. So even if you think you have coverage, you might have to fight the carrier in court to get coverage. About the only certain thing about the COVID-19 pandemic is that nothing is going to be easy.

A couple final words of advice. If you have largely moved to online giving, make sure you are PCI compliant. Payment Card Industry standards ("PCI") are a set of security standards the credit card industry has implemented and inserted into your processing agreements with credit card processors. If you have a data breach of any sort, typically, you are liable for the breach. You may also be under certain consumer reporting obligations if personally identifiable information is lost. If you are PCI compliant and have been certified with the latest security

certificates, good chance you won't be financially responsible to the card processors for losses and penalties. Otherwise, you are on the hook all the way around.

If you are using platforms like Zoom or Microsoft Team for meetings, counseling, pastoral calls, etc., make very sure you are using the proper security protocols built into the software to preserve confidentiality and privacy.

The foregoing is by no means exhaustive. We have tried to deal with some of the most common issues that are cropping up. Probably the bottom line is to be very thoughtful and conservative in your approach to opening. First and fast is not always best in these situations. It can often be the path to nothing but problems.