



COVID-19 LEGAL TOOL KIT*

The Episcopal Diocese
of East Tennessee

COVID-19 Task Force

** All information provided is valid as of May 20, 2020.
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BASIC CHURCH PREMISES
LIABILITY IN COVID-19
TIMES: A PRIMER



Basic Church Premises Liability in COVID-19 Times: A Legal Primer

When someone is injured or becomes ill on someone else's property because of a hazardous condition or negligence, that person may have a case of premises liability. In Tennessee, the person, agency, or entity that owns or maintains property may be held responsible for injuries or illness suffered on the premises.

For example, a restaurant patron may slip and fall on a spilled beverage that had not been cleaned or trip and fall on a broken step that has not been fixed or tripping over a broken sidewalk. Because each of these conditions are dangerous and should have been taken care of by the individual or business that owns and/or maintains the premises, they can open the business (or church) up to liability. Failure to maintain your property and/or to take steps to remove dangerous conditions can lead to significant injuries for an unsuspecting visitor. Common premises liability injuries include head injuries, broken bones, severe burns, electric shocks, and even illnesses derived from toxic exposure or, as in the subject of this article, exposure to the novel COVID-19 virus that results in illness or injury.

A Property Owner's Duty of Care

In Tennessee, property owners owe different duties of care to different groups—invitees, social visitors, and trespassers.

- An invitee is a person who comes to a property for business or a purpose that is mutually beneficial to both parties. This includes going to a store, restaurant, and to work. Invitees are entitled to the highest level of care. Property owners must make regular inspections for hazardous conditions too.
- Social visitors or licensees are people who are welcome on someone's property but don't necessarily have to be invited. This could be a friend or family member.
- A trespasser is a visitor who is not welcome on a property owner's premises. The property owner is obliged not to intentionally injure the trespasser. If a person is trespassing and injured, the property owner is not liable.

Unless that person is a child. If there is a dangerous condition on your property and it attracts a child or children on to the premises, the property owner can be held liable for any injuries that occur under the doctrine of "attractive nuisance." If the condition is known by the property owner, it is the property owner's duty to remove it from the premises to avoid fault. The "attractive nuisance" doctrine only applies to man-made dangerous conditions, however, and not to those that naturally occur.

A premises liability Plaintiff must have evidence to show that the defendant had actual or constructive notice of the dangerous condition. Without such evidence, a premises liability action will most likely fail. It would be hard to prove that the church, or any landlord, had no knowledge of COVID-19.



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COVID-19 Specific information:

Businesses of every nature—including churches, grocery stores, banks, daycares, gyms and restaurants—may face increasing liability claims from customers and third parties claiming to have been exposed to the novel coronavirus, or COVID-19, while at their location. The novel virus raises questions as to whether businesses and churches have a heightened duty of care to their customers, and what type of exposure churches and businesses face if an attendee/parishioner/customer claims to have been exposed to COVID-19 while on the premises.

For example, a lawsuit was recently filed against Princess Cruise Lines for gross negligence. This means that the plaintiffs allege that the cruise line did not take the necessary steps it should have to prevent passengers from being to be exposed to COVID-19 on a cruise ship. More specifically, plaintiffs allege that Princess Cruise Lines allowed their cruise ship to go out to sea *knowing* that two passengers from a previous cruise on the same ship had symptoms of COVID-19 while aboard. It further claims that the cruise passengers were not warned of the potential exposure to COVID-19 either before or after they boarded the ship. The outcome of this case is still pending.

In other news reports around the country, business owners have reported taking extraordinary precautions to prevent customers' risk of contracting COVID-19. For example, one grocery store recently reported that it discarded \$35,000 worth of food after a customer coughed on fresh produce. With the rapidly evolving public health crisis surrounding COVID-19, and new cases being reported daily, we can expect that more and more lawsuits will be commenced against businesses, and possibly even churches, for an alleged failure to safeguard attendees/parishioners/customers from contracting the virus.



Basic Church Premises Liability in COVID-19 Times: A Legal Primer

LIABILITY FAQs:

How Does COVID-19 Affect Our Liability to Parishioners, Service Attendees, and Those Who Use Our Church Building(s) and Facilities?

In Tennessee, business owners and landlords (such as churches) have a duty to take reasonable measures to limit parishioners'/attendees' exposure to dangerous conditions. A church must take reasonable or due care to provide a safe environment to those who use their facilities and buildings. This duty of care generally requires a church to discover and eliminate dangerous conditions, to maintain the premises in a safe condition, and to avoid creating the conditions that would render the premises unsafe.

Note that legal arguments for liability could stem from an alleged failure to follow best practices in the use, distribution, cleaning, or disposal of material in the Eucharist. Similarly, arguments imposing liability could flow from a failure to use due care when cleaning the church and items frequently touched or used by multiple persons, including garments such as albs, surplices and choir robes.

What About Charitable Immunity? Is the Church Immune from Suits Like This?

Unfortunately, no. In Tennessee, the only protection that a charitable organization, such as a church, has against a tort lawsuit (such as premises liability) pertains to what assets of the charity/church might be used to pay for any damages. In other words, the church still owes a duty to those who use its facility and attend its services and can be sued for any alleged violation(s) of that duty. The protection only extends to any properties and/or funds held in trust for the charity/church. Assets in trust cannot necessarily be seized to satisfy any judgment against the church, nor appropriated to satisfy any tort liability. More information on this issue, along with a detailed analysis of the law behind this principle can be found in the Tennessee Supreme Court case *Anderson v. Armstrong*, 171 S.W.2d 401 (Tenn. 1943).

Does a Church or a Business Have an Enhanced Duty to Follow CDC Guidelines?

Anyone who owns property in Tennessee is responsible for making sure the property is safe for visitors. To achieve that, property owners are required to do everything in their power to remove or repair any potential dangers before visitors encounter them.



Basic Church Premises Liability in COVID-19 Times: A Legal Primer

Premises liability extends to all property owners in the state, including homeowners, landowners, churches, and business owners. However, the levels of responsibility they must uphold to keep guests and visitors safe vary depending on who is on their properties. A reminder, the three classifications of people who enter properties and the levels of responsibility property owners owe them include:

- **Invitees** - These visitors are owed the highest duty of care and include people who visit properties for business purposes, including customers in stores or restaurants and church attendees.
- **Licensees** - These visitors are owed the second-highest duty of care and include social guests at both businesses and private residences.
- **Trespassers** - Although they're uninvited and may be entering a property illegally, property owners still must attend to situations or conditions that could potentially harm trespassers.

In Tennessee, a parishioner, service attendee, or others who use our facilities with permission are most likely considered invitees. Best practice, therefore, is to assume that a heightened duty of care exists for any churchgoer to make reasonable inspections to discover defective conditions. Restatement (Second) of Torts § 343 (1965).

However, while there is currently no specific heightened or enhanced duty for a church or business to follow the Centers for Disease Control and Prevention's (CDC) guidelines, it is almost certainly best practice for the church to follow CDC guidelines to avoid potential third-party liability claims given the abundance of information and guidance available to the public regarding social distancing and other preventative measures. The CDC, as well as the Tennessee Department of Health, have offered guidance and resources to help prevent workplace exposure to COVID-19 and guidance on reopening safely. This information can be found on their websites:

- <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- <https://www.tn.gov/governor/covid-19.html>

Churches should exercise reasonable diligence to understand the risks of failing to take reasonable precautionary measures. Failure to do so may increase exposure to health inspections and lawsuits from third parties. Finally, make sure to follow the guidance of and consult with the Diocese and the office of the Bishop for timing on reopening that's right for you and your parish, and reach out if you have additional questions and concerns.



Basic Church Premises Liability in COVID-19 Times: A Legal Primer

What Are the Reasonable expectations of a Churchgoer During the COVID-19 Crisis?

In Tennessee, for all cases tried or re-tried after 1992, the courts apply a modified comparative fault system. This means that, if a plaintiff is in some way negligent, he or she may recover for his/her injury or illness only if a plaintiff's negligence is less than the defendant's. In such a case, plaintiff's damages are reduced in proportion to the total negligence attributed to the plaintiff. Given the extensive media coverage on the virus, recommendations to the public to stay indoors, and tips to stay at least six feet away from one another if one must go outside, there will be at least some degree of culpability/negligence if an individual claims to have contracted COVID-19 while at a church's premises. This is particularly true if the individual fails to adhere to the CDC's recommended distancing guidelines and/or the church's requirements.

For example, if a churchgoing invitee comes to church and refuses to wear a mask and wash his or her hands, or sits too close to others not in his/her family group, the churchgoer will be at least partially at fault if s/he contracts COVID-19 while at church. A court will then consider the level of the defendant church's duty to the churchgoer, whether the church was negligent in that duty, and to what extent the churchgoer was also negligent. If the churchgoer is found to be equally as or more negligent than the church, then the churchgoer will not be compensated for his/her injury or illness. More information on this can be found in the Tennessee Supreme Court case *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

However, it is different for minors. Tennessee uses the Rule of Seven when determining how responsible a child (under age 18) plaintiff is for his or her own negligence. Under the Rule of Seven, a child under the age of seven is held to have no capacity for negligence. Children between seven and thirteen years old have a rebuttable presumption that there is no capacity for negligence. Children between 14 and 18 have a rebuttable presumption that they do have capacity to be responsible for their own negligence. For a more detailed explanation of the Rule of Seven, see Tennessee Court of Appeals case *Crockett et al. v. Sumner County Board of Education, et al.* No. M2015-02227-COA-R3-CV (Tenn. Ct. App. Nov. 30, 2016).



Basic Church Premises Liability in COVID-19 Times: A Legal Primer

How Can Businesses and Churches Protect Themselves from COVID-19 Liability Claims?

Businesses and churches should take reasonable precautions to limit their customers' exposure to COVID-19 while at their premises. Businesses can follow the CDC guidelines by using reasonable mitigation strategies which include, but are not limited to:

- separating sick employees and asking anyone who displays symptoms to remain home;
- educating employees and parishioners about how they can reduce the spread;
- using proper building ventilation, filtration and humidity control;
- practicing proper hand hygiene (e., providing sufficient hand sanitizer and soap);
- practicing proper respiratory hygiene (e., providing tissues and places to properly dispose of tissues) and encouraging or requiring the use of masks;
- encouraging employees, customers/parishioners to stay at least six feet apart while at the company's premises;
- discouraging handshaking; and
- routine cleaning and disinfection (e., high contact surfaces, dust, removing trash, cleaning restrooms).

The good news is, as a practical matter, it will be difficult for a parishioner/ church attendee to prove causation given the nature of the virus and the ongoing inability to pinpoint where and when people have contracted the virus.

What is the Statute of Limitations on a Lawsuit for COVID-19 or Other Injury or Illness?

The statute of limitations for a premises liability incident in Tennessee is one year from the date of the incident, meaning, in most cases, one year from the date the injury or illness occurred. If a claim is filed after the allotted time, the legal action is barred.

WORKPLACE LEGAL ASPECTS OF THE PANDEMIC

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Workplace Legal Aspects of the Pandemic

Federal & State Standards, Rules & Regulations

Responsibility:

Parishes have responsibilities for maintaining safe workplaces for employees, including ensuring their workplace operates within applicable legal and CDC guidelines related to employee health and safety concerns. COVID-19 is a respiratory illness that spreads from one sick person to another (i.e. through exposure) and employers are expected to take reasonable steps to help prevent workplace exposures to infection. The federal OSHA and Tennessee Occupational Safety and Health Administration guidelines and regulations establish the ways in which these duties can be appropriately managed. In the case of COVID-19, the OSHA guidelines are not yet mandatory, but this could change quickly. Generally, the requirement is that employers must provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

Coverage:

The OSHA/TOSHA laws apply to any employer with one or more employees. TCA §50-3-103 (8) There are some exclusions, but not for church operations. Employees and employers are required to comply with the applicable rules, regulations and standards. There are various potential civil and criminal remedies in the event of violations of varying types.

Resources:

The Tennessee Department of Labor & Workforce Development has the following COVID-19 related info at <https://www.tn.gov/workforce/employees/covid-19.html>:

<https://www.osha.gov/Publications/OSHA3990.pdf>

<https://www.osha.gov/SLTC/covid-19/standards.html>

<https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>



Workplace Legal Aspects of the Pandemic

Tennessee Workers' Compensation Laws

Employees of parishes have rights under the Tennessee Workers' Compensation Law. This set of laws was adopted by the Tennessee Legislature in 2013 and replaced the former workers' compensation laws for our state. The definition of employee is accompanied by various qualifications as to scope of work, control, etc., and would be examined in any particular case. Employments of fewer than 5 employees are not bound by the provisions of the workers' compensation statutes, unless the employer chooses to opt in by buying a workers' compensation insurance policy. See TCA §50-6-106 (5). The right to compensation under the workers' compensation laws is exclusive. See TCA §50-6-108. There are various injuries that are not covered. See TCA §50-6-110. Occupational diseases are carefully defined and must be fairly traced to the employment as a proximate cause. They must not have originated from a hazard to which workers would have been equally exposed to outside of employment. See TCA §50-6-301. Claims must be properly noticed to the employer and timely brought. In instances of occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable for the occupational disease, without contribution from any prior employer or insurance carrier. See TCA §50-6-304.

Insurance & Risk Management

The Episcopal Church Manual of Business Methods in Church Affairs includes a chapter on Risk Management & Insurance. It is an excellent discussion of how a parish can address its various risks and consider obtaining insurance to protect for various forms of legal liability. Financial risks may be avoided, reduced or transferred with appropriate insurance coverage. See (beginning at page VII-1): https://episcopalchurch.org/files/full_manual_updated_012815_0_0.pdf

In addition to coverages for workplace injury—workers' compensation, property loss, worker's operating Church vehicles—non-owned auto, excess limits—umbrella, management liability (D&O), (employee theft) defalcation and general liability, parishes may want to investigate coverages such as pastoral professional liability and employer practices liability (particularly for those qualifying parishes that are not required to or have not elected to purchase workers' compensation policies.)

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GOING BACK TO WORK:
LEGAL AND LIABILITY
TIPS FOR CHURCH
EMPLOYERS



Going Back to Work: Legal and Liability Tips for Church Employers

Workplace Safety is the employer's legal responsibility. Providing safe workplaces are the employer's obligation, even in a pandemic.

- Best practices include following CDC Disease Control and Prevention Guidelines for Workplaces; For coronavirus, safe workplaces include following social distancing, wearing masks and PPE, hand washing, limiting crowding, and sanitizing work surfaces
- CDC guidance is recommended, not mandatory

Dealing with healthy employees who don't feel safe and prefer working from home longer—an interactive process

Fear is not a legal reason for refusing to work, in the absence of severe anxiety, panic disorder or other disabilities

Dealing with **"vulnerable employees"** under CDC and White House guidelines; vulnerable employees are the last to return to work under governmental best practices; vulnerable employees are generally those with serious underlying health conditions, and "the elderly" employees (without providing guidance here)

Serious health conditions include blood pressure, diabetes, obesity, asthma, other lung diseases (not pregnancy)

Your vulnerable employees may desire to be the first, rather than the last, to return to work.

If "vulnerable" employees volunteer, employers should not force them to wait or decide the risks for them; avoid intense questioning about health/medical conditions; avoid making rehire and return to work decisions based on the employer's perceptions of employees' risks

Managing Other Workplace Concerns:

- Potential exposure from visitors and vendors to workplace
- Implementing workplace health screenings and health questionnaires
- Dealing with requests for continuing to telework
- Dealing with employees who don't feel safe returning – if no telework available, consider unpaid leave
- Dealing with employees' refusal to wear PPE; relying on employees to supply their own PPE; PPE and job-specific requirements
- Minimizing non-essential job-related travel
- Minimizing in-person meetings and use conference calls and videoconferencing



Going Back to Work: Legal and Liability Tips for Church Employers

Some returning employees will complain, question, or express criticisms of your plans


- Employers should view the return to work protocols and plans as an interactive process with their employees—address concerns and review procedures critically; avoid retaliation against employees viewed as complaining
- Employees have a legal right to question and voice concerns about workplace exposure and unsafe working conditions to you and to TOSHA—avoid confrontational discussions with employees voicing concerns, while being firm in the decision we are following Best Practices and CDC Guidelines

Privacy Concerns and Health Related Inquiries

Employers' reasonable return to work protocols include questioning employees regularly about their health and conducting temperature screenings. These do not violate employees' recognized privacy concerns in the workplace, in the context of a pandemic

- A simple daily health questionnaire is recommended for all employees
- Encourage workers to proactively report symptoms and stay home if feeling ill
- Employee medical information collected should be treated as confidential and private, with secure record keeping
- Send symptomatic employees home
- Will COVID-19 vaccines ultimately be required of all employees?

CHURCH EMPLOYERS
MANAGING THE
REOPENING PROCESS
AMIDST THE
COVID-19 PANDEMIC

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Church Employers Managing the Reopening Process Amidst the COVID-19 Pandemic

Church employers facing the reopening process for parish offices and day schools should develop a set of “Return to Work” protocols that include:

- When and how employees will return-phased return to work considerations, including staggered shifts; What work needs to be done and who can do it?
- Which employees will be asked to return to work, when and why now?
- Social distancing measures—plans for implementation
- Personal guidelines for social distancing
- Physical changes to work spaces and common areas
- Common areas-limits on use; limit sharing of equipment and work areas
- Increase Ventilation and high efficiency air filtering in work areas

Personal Protective Equipment (PPE—gloves and masks) - refer and implement CDC Best Practices

- Sanitation issues; source cleaning supplies and implement cleaning procedures for common areas and heavily trafficked areas
- Thermometers for temperature checking
- Basic training on masking

Visitor and vendor restrictions in workplace: Are limitations and rules desirable?

- Curbside pick up and delivery notices posted

Initial Communications Plan for employees returning to work

- Preparation and implementation of new policies and procedures;
- Consider need for training employees;
- Communications are necessary to satisfy the expectations of employees for information; Communicating expectations and plans with employees is an ongoing responsibility

Contingency Plans—Create and Review

- Plan for recurring government Shelter in Place and Stay at Home Orders
- Anticipate such Orders may be reinstated depending on local health conditions and virus circumstances
- Evaluate the successes of how your recent closure was implemented, as well as failures, based on original Orders
- Evaluate efficacy of working from home; improve execution of plans for recurring Shelter in Place Orders