

## Richard Hammar Webinar

### Legal Risks: Recommendations vs. Mandates?

- Legal risk is same for recommendation as mandate in a civil suit

### First Amendment?

- We comply with legal requirements all the time (e.g. building permits, food safety, etc.)
- You CANNOT ignore mandates

### Business Interruption Insurance?

- Does not apply to Covid-19; only earthquakes, etc.

### Meetings?

- Roberts Rules does not address “postponement” of meetings
- Needs to be addressed in by-laws: vest the board with emergency authority, with “emergency” needing to be defined.
- Significant difficulties: determining a quorum, how to tabulate voting, how to request to speak, how to ensure persons are members. When next possible, amend your by-laws.

### Laid Off Employees?

As Church Law & Tax senior editor [Richard Hammar](#), an attorney and CPA, explains in chapter 12 of his annual *Church & Clergy Tax Guide*:

The following activities ordinarily are exempt from state unemployment taxes: [S]ervice performed in the employ of a church, a convention or association of churches, or an organization that is operated primarily for religious purposes and that is operated, supervised controlled or principally supported by a church or convention or association of churches [and] service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

As Hammar also notes, “[t]he exemption is not limited to employees performing strictly religious duties,” and generally includes employees of church-controlled elementary or secondary schools. Churches theoretically can pay state unemployment taxes voluntarily, which would then make their ex-employees eligible. But such situations are rare, notes [Robert Brockman Jr.](#), a California-based attorney who represents numerous churches. “They are the minority,” he adds. “The vast majority of them do not participate.” Adds [Lisa Runquist](#), a California-based attorney and senior editorial advisor for Church Law & Tax: “I know of no church that voluntarily does it.”

**How can churches still help?** Brockman, Runquist, and others shared these insights:

- Note the responsibilities your church now faces with respect to paid leave and sick leave after the [recently adopted federal law](#) affecting the Family and Medical Leave Act. Also note that the [Labor Department says](#) any “individual receiving paid sick leave or paid family leave is still receiving pay” and thus is *not* considered unemployed.
- Consider going above and beyond what’s legally required with a layoff to compensate the person losing their job, says Donn Meindertma, an attorney and partner with Washington, D.C.-based Conner & Winters. But he cautions churches to tread carefully, since any such steps taken will trigger taxable income and may be shaped—or even limited—by federal and state laws.
- Encourage former employees to seek assistance through the church’s existing [benevolence program](#). (Also note that any benevolence provided to a current employee, especially in response to any type of compensation reduction, still results in [taxable income](#).)
- Contact your state to determine if it has applied yet for a portion of the \$100 million in [Dislocated Worker Grants](#) recently made available by the US Department of Labor in response to coronavirus. The grants “will provide eligible participants with both disaster-relief employment and employment and training activities,” the department said. “These participants can include dislocated workers, workers who were laid-off as a result of the disaster, self-employed individuals who are unemployed or underemployed as a result of the disaster, and long-term unemployed individuals.”
- Contact your state to determine if funds for [Disaster Unemployment Assistance](#) from the Federal Emergency Management Agency (FEMA) become available, Brockman says. In general, FEMA says individuals who become unemployed due to a major disaster, and otherwise couldn’t qualify for state unemployment insurance, may be able to do so, he notes. But [FEMA says](#) the program depends upon whether the president declares a disaster.
- Note that this is a point in time to reevaluate your church’s decision not to pay into unemployment (if it currently does not), Batson suggests. Though the law exempts churches, there still may be theological reasons to participate. “Is there a Christian witness issue here in the midst of this?” he says. While there may be good reasons for churches to decide not to pay into unemployment, Batson says that “this situation highlights practical considerations that may or may not impact how a church evaluates this decision in the future.”

## **Emergency Family and Medical Leave Expansion Act**

### **Does the Act apply to nonprofits and religious organizations?**

The FMLA generally applies to all employers that meet the coverage tests, whether commercial, for profit, nonprofit, or charitable. The Act does not alter that scope. However, employees of religious

organizations who are “ministers” may be exempt under the so-called [ministerial exception](#) to employment laws.

**When is paid leave required?**

The Act amends the FMLA by adding a new Section 110, which adds “public emergency health leave” (PEH) to the types of FMLA-leave qualifying employees may take. The Act does not require *existing* types of FMLA leave to be paid leave.

**Does the Act change which *employers* are covered by the FMLA?**

Yes, but only for PEH leave. The FMLA normally applies to employers with 50 or more workers. The PEH leave provisions apply to employers with *fewer than* 500 employees. That *includes* employers with fewer than 50 workers.

**Does the Act change which *employees* the FMLA covers?**

Again, yes, but only for PEH leave. Employees are eligible (assuming their employer is covered) if they have worked for their employer for at least 30 calendar days. This includes part-time workers.

**What is PEH leave?**

PEH leave is leave taken because of a “qualifying need related to a public health emergency,” which means that an employee is unable to work (or telework) due to a need for leave to care for his or her son or daughter (under 18 years old) if the child's school or place of care has been closed, or the child's care provider is unavailable, due to a public health emergency. Unlike the more expansive initial House bill described in our prior Alert, the new law *does not* provide PEH leave for other circumstances, such as for self-quarantining.

**What is considered a “public health emergency?”**

The term “public health emergency” means an emergency with respect to COVID-19 declared by a federal, state, or local authority. President Trump [declared a national emergency](#) on March 13.

**When would PEH leave need to be paid leave?**

An employee’s first 10 days of qualifying leave may be unpaid. During that period, an employee can choose to substitute any available employer-provided accrued paid leave, but the employer may not require the employee to use accrued paid leave. Additional qualifying leave after 10 days would have to be paid at a rate of at least two-thirds of the employee’s normal wage and on the assumption that the employee is working a normal schedule. Up to twelve weeks of PEH leave is available.

**Are there any limits on the amount of paid PEH leave?**

Yes. The maximum per employee is \$200 per day and \$10,000 in total.