

Tax and Legal Guide for Elders: *Business Law for Church Leaders*

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IV. Legal issues

A. *Financing church construction*: Financing opportunities that most churches miss out on—

1. *Do not* issue “church bonds” as they raise securities problems and often reduce giving.
 - a) Elders can be personally liable for bonds even though they don’t guarantee them.
 - b) Church bonds result in high issuance costs and unnecessary underwriter fees.
 - c) Church bonds allow members to invest at a profit instead of making donations.
 - d) Don’t ever issue church bonds.
2. *Do not* borrow long-term at prime.
3. VRDN (variable rate demand note) financing is often 1.5% *below* prime. Requires use of bond counsel.
4. Tax-exempt bonds can be even lower. Also requires use of bond counsel.
5. Swaps and caps can reduce risk on floating rate loans.

B. *Insurance*

1. Be sure your church has—
 - a) *Directors and officers liability (D&O) coverage.*

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(1) This is what protects the elders from personal liability on covered claims.

b) *Employment practices liability insurance (EPLI) coverage.*

(1) This is now inexpensive and *essential* in an age of sexual harassment and abuse.

(2) It's awful enough when a preacher is guilty of adultery. It's even worse when the sin is followed by a sexual harassment suit.

c) *Fidelity bonds.*

(1) Be sure you have one for *whoever* handles the cash.

(2) The employer is *always* dumbfounded that this honest, dependable, beloved servant of God stole money.

(3) Unreliable people aren't put in positions where they can steal.

(4) Therefore, *all* embezzlers are trusted.

d) *Workers compensation.*

(1) Most states do not exempt churches, but many exempt employers that have only a few employees (for example, less than 5 in Alabama).

(2) But a disability claim or death claim could cripple a self-insured church.

C. *Embezzlement*

1. Let your CPA members help you establish "internal controls" to protect you from theft.

2. Don't let the person who handles donations write the receipts.

a) The best way to catch a thief is for the members to notice that they aren't getting receipts for donations made.

b) It's easy for the person making the deposits to issue a false receipt and thereby go years without getting caught.

3. Always issue receipts. The tax laws require it, and it greatly reduces the risk of embezzlement.

D. *Employee references*: It's wrong to lie—and it's dangerous to tell the truth.

1. *Lying* is the choice taken by many elders and preachers who fear—
 - (1) saying something bad about a brother, or
 - (2) liability for slander, or
 - (3) feeling responsible for a former employee being unable to get work.
 - b) PLEASE don't lie.
 - (1) It's sin and it hurts the churches in countless ways.
 - (2) Adopt a written policy that only certain persons may provide references and train them on how to do it right.
 - (3) *Strictly* prohibit all others from giving a reference.
 - c) You can be sued for fraud for lying to help a friend get a job.
 - d) If you lie, consider yourself to have personally guaranteed his job performance backed by your house and savings.
2. Telling the truth—
 - a) It's safe if the former employee performed well, but—
 - b) You could be sued for slander or invasion of privacy if you *truthfully* speak ill of a former employee.
 - c) Even if you spoke the truth, litigation is a legitimate fear.
 - d) And most recommendations are verbal and so may be reportedly inaccurately.
3. But if you say nothing—
 - a) Many lawyers recommend that you say nothing about a former employee—good or bad—other than to confirm dates of employment, to avoid risk of suit for slander.
 - b) But saying nothing is hardly fair to your brothers and sisters in the other congregation.
 - c) Saying nothing may deeply offend an excellent former employee.

d) In fact, many employers only refuse a reference for a bad employee, so that saying nothing may be taken as a negative recommendation of someone who deserves much better treatment.

e) Saying nothing is nearly impossible for some people.

4. Solutions—

a) Get a written release from the former employee as a condition to giving a reference.

b) Provide employees with written performance reviews, allow them to have a copy that they may share with a future employer.

c) Be willing to confirm that a report was correct *as of its date*.

E. *Checking references.*

1. *Always* check references—and also call people who worked with the employee who weren't on the reference list.

2. We've been listed as references by former employees we fired and would never recommend, and they have been *hired* by churches that never bothered to call.

F. *Employee handbooks*

1. These are *absolutely* essential. You must have one and should have it reviewed professionally at least every five years.

2. These are not for amateurs. Courts will likely hold you to your written promises.

3. Benefits—

a) A written sexual harassment policy can be a complete defense to a sexual harassment suit, even if your preacher is guilty.

b) A good written policy protects you from discrimination claims arising from inconsistent policy application.

c) A good written policy avoids hard feelings when the preacher's expectations differ from the leadership's.

(1) What do you say when the preacher says he didn't know he could only take two weeks of vacation?

(2) Or didn't know that the church wouldn't pay for his wife's travel to a seminar?

(3) Or couldn't use the credit card for private expense even if he really meant to repay the church—one day?

d) Employees are happier when they know what they can and cannot do.

e) A written privacy policy can allow you to view employee computer records, phone records, and such without fear of an invasion of privacy suit.

(1) This may give you the evidence you need to fire an adulterer or thief.

(2) In churches, it's hard to fire a beloved staff member based on mere suspicion of wrongdoing.

f) A written policy can protect you from severe civil and criminal liability from copyright violations, such as from a youth minister making illegal CD's for his teens or downloading songs without a license.

g) A written policy can protect you from penalties under the Fair Labor Standards Act for unpaid overtime or making unauthorized deductions from an exempt employee's salary.

G. *Sexual accountability.*

1. Nowadays, ministers should be subject to a *written sexual accountability policy*—to avoid even the appearance of impropriety, to avoid temptation, to prevent opportunity.

2. As these become more common, the practice tends to establish a legal standard.

3. Many, many of our preachers have destroyed their careers and hurt their churches by sexual impropriety.

4. Preachers should meet regularly with an accountability group.

5. Preachers should be required to share his room with a traveler of the same sex when traveling with members of the opposite sex. He should never be the only male in the traveling party.

6. Preachers should not be allowed to ride in a car with a member of the opposite sex or to meet with a member of opposite sex in a closed office (without a window) or at a private location, especially at night.

7. It's the elders' job to insist on these things.

H. *Child protection*

1. Churches have serious liability risk for failing to prevent abuse in children's and youth programs.

2. Many practices are becoming standard and are expected by insurers, parents—and juries.

3. Insurers are requiring written abuse prevention policies.

4. But failure to follow your own policy may destroy insurance coverage and nearly guarantee liability.

5. State laws impose mandatory abuse reporting and failure to report can lead to criminal and civil liability.

6. Policy should include at least—

a) Background checks for employees and volunteers for overnight activities.

b) Requirement that volunteers in children's or teen ministry be attending for six months—to prevent a pedophile from joining church just to gain access to children.

c) Training on recognizing and reporting abuse.

d) Restrictions on sleeping arrangement and chaperones for overnight trips

7. These are really hard to design and to put into effect. Allow six months or more lead time.

8. Insurers often have model policies. These can usually be varied.

9. Get a lawyer to help.

10. Take the time to do it right.

I. *Prevent kidnapping.*

1. In a preschool or day care program (including Sunday morning classes for children), churches must take precautions against delivering a small child to a non-custodial parent or other kidnapper.
2. Especially a problem in larger churches.
3. Use a beeper as a “receipt.”
4. In a preschool, require the custodial parent to list adults and teens who may pick up the child—in writing.
5. When in doubt, call the custodial parent.
6. Be careful!

J. *Incorporating your church.* All churches that own land or have employees should be incorporated.

1. Incorporation reduces (but doesn’t eliminate) personal liability of elders.
2. Many state laws require appointment of trustees.
 - a) These should be “the elders as from time to time in office; or in the absence of elders, the deacons as from time to time in office” or the like.
 - b) Many churches fail to provide for succession of trustees and create severe legal problems.
3. Incorporation is often essential to convey or mortgage real estate.
4. It is often better to use an incorporation statute designed for a church rather than the general nonprofit corporation act.
5. Separately incorporate all high-liability church programs.
 - a) Preschools and daycares should always be separately incorporated.
 - (1) Liability for child care.
 - (2) Need for separate employee practices or fringes from church office staff.

(3) Likely should be overseen by a board rather than the elders.

b) Housing

(1) The Fair Housing Act imposes severe liability for housing practices.

(2) Again, separate management is likely wise.

6. Piercing the “corporate veil”

a) Separate incorporation is no guarantee of a liability shield.

b) It is essential to keep separate books, bank accounts, and minutes.

c) Different corporations should have different boards.

d) Dealings should be at arm’s length.

K. The *conflict between privacy rights and church discipline*.

1. Courts will normally not interfere with *internal* church affairs unless the law clearly requires them to do so.

2. Laws that are targeted at churches apply to churches so long as the laws don’t discriminate against churches.

3. (Yes, these principles are just a bit inconsistent.)

4. Generally, a church is immune from suit for acting consistently with its established doctrines as to internal matters.

5. Members have impliedly consented to being treated consistently with church doctrine.

6. *Guinn v. Church of Christ of Collinsville* (Supreme Court of Oklahoma 1989), holds that if a former member is disciplined by the former church, the church is not shielded from ordinary liability for slander and invasion of privacy.

7. The church had to pay \$400,000 in damages! (Don’t forget to check your coverage!)

8. Therefore —

- a) It's important that members know about church policies on discipline.
- b) Adequacy and fairness of warning is important.
- c) Churches that discipline members who've withdrawn from the church are at risk of liability (but how can you disfellowship someone who is not in fellowship?)

9. This is problematic for "community churches" that have no history of doctrinal practice.

10. Some apparently internal matters may be governed by state law, especially when statutes have been enacted for the public's protection.

a) Privacy/confidentiality matters may be governed by professional standards for certified counselors.

(1) A licensed counselor must comply with state law governing counselors even though working as a church counselor.

(2) Only way to avoid this is to obtain written consent from the member being counseled in advance of counseling.

b) Reporting suspected child abuse, sexual or physical, likely applies to church regardless of doctrine.

L. *Overtime and minimum wage*

1. Many churches routinely violate the Fair Labor Standards Act.

2. Are churches subject to FLSA?

a) Yes, if they engage in interstate commerce.

b) It is not safe to assume the church is exempt as "interstate commerce" has been interpreted very broadly.

3. Who is an exempt employee?

a) Clergy,

b) Professionals,

c) Administrative personnel, and

- d) Supervisors of two or more full-time employees (if they are paid enough – presently \$455 each week in salary).
- 4. Interns studying for the ministry may be exempt if job description is correctly written
- 5. Babysitters are not exempt.
- 6. When is a volunteer not a volunteer?
 - a) Many employees volunteer to work extra hours for free. This is prohibited unless in a different job category.
- 7. Penalty for breach is two-times the wages that are underpaid.

M. *Do the anti-discrimination laws apply?*

- 1. Title VII of the Civil Rights Act of 1964
 - a) Prohibits race, color, religion, sex, and national origin discrimination.
 - b) Title VII applies to employers with 15 or more employees.
- 2. Age Discrimination in Employment Act of 1967 (ADEA)
 - a) Prohibits age discrimination against individuals who are 40 years of age or older.
 - b) The ADEA applies to employers with 20 or more employees
- 3. The Americans with Disabilities Act of 1990 (ADA)
 - a) Prohibits employment discrimination against qualified individuals with disabilities.
 - b) Applies to employers with 15 or more employees
- 4. Equal Pay Act of 1963 (EPA)
 - a) Prohibits wage discrimination between men and women in substantially equal jobs within the same establishment.
 - b) The EPA applies to most employers with *one* or more employees
- 5. In counting employees, closely affiliated organizations, such as a commonly managed preschool, are usually included in the count.

6. Temporary and part-time employees count. This is *not* based on full-time equivalents (FTEs).
7. Of course, many types of discrimination are prohibited by *scripture*.
8. State laws may also apply and may have lower thresholds.

N. *Civil Rights Act/EEOC*

1. Churches are not exempt, except for—
 - a) discrimination in hiring ministers: that is, an employee whose primary duties consist of teaching, spreading the faith, church governance, or participation in religious ritual;
 - b) religious discrimination generally.
2. It is therefore important that job descriptions define positions in these terms.
3. Nowadays, employees who are fired routinely file an EEOC claim.
4. To protect yourself from an EEOC claim, you should—
 - a) Have written policies prohibiting discrimination.
 - b) Have written policies advising employees of how to internally complain about perceived discrimination.
 - c) Post the legally required notices prohibiting discrimination.
 - d) When advertising a job opening (other than for a minister), state that you are an “equal opportunity employer.”
 - e) Have clear job descriptions, so you can prove employee failings were material performance issues.
 - f) To be able to fire an employee for becoming pregnant out of wedlock or other immoral conduct, you should have a written job description warning employees of this possibility.
5. Progressive discipline is expected.
 - a) Absent a severe failure (theft, sexual harassment), EEOC and courts expect the employee to be warned—in writing—and given a chance to correct the failing.
6. Written sexual harassment policy is essential to a defense.

- a) Employees must have someone to complain to who is not a supervisor, such as an elder. It is best to have at least one female to whom complaints may be directed.
 - b) Eliminate all sexist and racist language from the workplace, including emails. This may mean periodically monitoring employee use of the Church's electronic communications resources.
7. Retaining an employee who has been guilty of sexual harassment creates a high risk of liability if it happens again, depending on how severe and intentional the conduct is.
8. If you are charged with discrimination, you should—
- a) Hire a real labor lawyer, not a general practitioner who knows a little labor law.
 - b) Conduct a thorough investigation of the claim. Don't wait for the government to come do it for you.
 - c) Take appropriate disciplinary action, in consultation with your labor lawyer. Again, don't wait for the government to make you clean up your own mess.
 - d) Strictly follow your own procedures.
 - e) Do *not* retaliate against the person making the claim. You can be liable for retaliating even if you were innocent of the original charge. There is a very low threshold for actionable retaliation.
9. Don't forget to buy EPLI coverage! It's too late once the claim is filed.

O. *COBRA continuation health insurance coverage*

- 1. Churches are exempt, even if you don't want to be.
- 2. Can you provide continuation coverage anyway? Generally, no.
- 3. But some state laws may provide continuation coverage even though federal law doesn't.

P. *Family and Medical Leave Act*

- 1. Applies if you have 50 or more employees.
- 2. Allows eligible employees up to 12 weeks of unpaid leave each year for childbirth or serious health conditions.

3. If covered, you must provide appropriate procedures and notices in your employee handbook.

Q. *Americans with Disabilities Act*

1. Job descriptions should specify essential duties, such as the need to pick up and carry babies in a preschool, because you can only refuse to hire someone due to disability if the disability prevents performance of essential duties.
2. Doesn't apply to construction of the church building, but local building codes now usually apply the same standards.

R. *Copyright issues*

1. Songs and other copied material are protected intellectual property.
2. Copying CDs, sheet music, and books without authority is a criminal offense. Civil penalties and fines can be very large.
3. There are fair use exceptions.
4. You should not print copies of a hymn or project copies on a screen without a license.
5. Bulk licensing of hymns is available through publishers. See Music Publishers Association. <http://www.mpa.org/copyright/church.html#9>
6. Singing a song from memory is fair use and not a problem, unless you charge for the performance, in which case royalties are still owed.
7. If ministers download music without a license, they may be subject to criminal prosecution—and scores of people have been prosecuted.
8. If ministers make copies and distribute them to students, they may owe \$10,000 per song per copy in civil fines, unless they have a license.
9. *iTunes*, *RealPlayer*, and similar music services license the right to download and burn CDs for fair charges.
10. You should have a written policy prohibiting illegal downloading or copying of music or videos so the church doesn't become liable for the misdeeds of youth ministers.

S. *Christian mediation and arbitration*: Resolving disputes without going to court against a brother

1. 1 Corinthians 6 prohibits going to court before a non-Christian but permits resolution of legal disputes within the church.
2. Federal Arbitration Act often makes agreements to arbitrate enforceable, but only if involving interstate commerce.
3. Most states enforce arbitration agreements entered into after dispute arises.
4. Avoid agreements calling for resolution based on “Christian principles,” as this concept is undefined and may lead to surprising results based on an arbitrator’s peculiar views.
5. Several groups offer Christian arbitration and mediation services. Christian Conciliation. See <http://www.hispeace.org/>.
6. Elders may be authorized to mediate. If so, a formal mediation agreement should be entered into. Most lawyers know how to do this.
7. Likely unwise for elders to arbitrate a dispute within their own church. The elders should encourage disputing members to retain as arbitrator a Christian lawyer from another congregation or a Christian arbitration service.