



CHRISTIAN  
LEGAL SOCIETY

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Church Guidance  
for Same-Sex Issues

*Frequently Asked Questions*

# *Introduction*

The following information provides answers to frequently asked questions raised in connection with Christian Legal Society’s July 8, 2015 Church Guidance webinar on same-sex issues and related nondiscrimination laws. This supplemental material follows in the wake of the U.S. Supreme Court’s *Obergefell* decision, ruling that same-sex couples have a “fundamental right” to marry. CLS’s Church Guidance audio webinar, accompanying power-point materials, and supplemental white paper are available at [www.religiouslibertyguidance.org](http://www.religiouslibertyguidance.org) and CLS’s home website at [www.christianlawyer.org](http://www.christianlawyer.org). The white paper includes sample doctrinal language and policy language. CLS’s additional forthcoming guidance will be specifically focused on Christian schools and other faith-based organizations.

**These answers are not intended to substitute for legal counsel specific to a church’s own circumstances and geographic location, particularly since applicable federal, state, and local laws vary widely. Consequently, it is highly recommended that knowledgeable nonprofit legal counsel be sought for such specific questions and particular issues. CLS can provide referrals at [www.christianlawyer.org](http://www.christianlawyer.org).**

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# *Corporate Documentation*

## ***1. What same-sex related documentation belongs in our articles of incorporation? In our constitution and/or bylaws?***

A church's articles of incorporation should contain its corporate purpose statement, which should be wholly religious in nature (e.g., "to promote the gospel of Jesus Christ through evangelism and discipleship"). Articles of incorporation typically do not contain detailed statements of faith or extensive information about a church's governance or operations. Rather, the constitution and/or bylaws (depending on the denomination and faith tradition), are the key locations for a doctrinal statement of faith, which includes a sexuality statement about Biblical marriage and sexual conduct, as well as other core theological foundations for churches. Note that some denominations will not permit changes to a nationally adopted statement of faith, so the Biblical marriage and sexual conduct statement should be located elsewhere. The church's religious purpose statement and doctrinal statements should be woven throughout its board-approved policies, including policies that address facility usage, wedding services, employment policies for paid staff and volunteers (including faith requirements and Christian codes of conduct), and housing.

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## ***2. If our denomination has a strong faith statement regarding Biblical marriage and sexuality, does our local church have to restate such information?***

A denominational statement is helpful, but the local church should affirm its beliefs as well through its own bylaws by restatement and specific reference to the denominational statement. Related policy documents for the local church likewise should refer explicitly to the same statements and affirm the same Biblical marriage and sexuality standards.

## ***3. Should our church craft a statement only against homosexuality, same sex marriages, and its sinful sexual conduct to clearly state where we stand from a biblical and religious nature on the subjects?***

Distinguishing types of sin that suggests one sin is worse than another is not good theology but presents an even worse legal and public relations scenario. A church should clearly state its positive stance on Biblical marriage as between one man and one woman for a lifetime and that all sex outside of Biblical marriage is a sin and if not repented could be a

bar to membership, leadership, employment etc. But focusing only on homosexuality or just same sex marriage could be problematic in many ways.

## ***Facility Usage, Including Weddings***

***4. If our church allows its pastors to marry nonbelievers or Christians who may disagree with our doctrinal position on marriage, will such practices open the door for same-sex couples to argue that they should likewise be allowed to be married in our facility, regardless of their disagreement with our beliefs?***

**At present, no minister can legally be forced to officiate a same-sex marriage.** However, any dilution of a church's compliance with its own doctrinal position and/or wedding policy could in the future jeopardize its legal right to exclude same-sex couples from getting married in the church. One key element for religious liberty protection is that the church consistently adheres to its sincerely held religious beliefs. Failure to do so may in the future expose the church to arguments that its doctrine and policies do not actually matter, so anyone should be allowed to marry in the church. On the other hand, if a church believes that its ministry should include marrying couples even if they do not share its religious beliefs, the church's policy should include an explanation of its religious beliefs for marrying non-church couples, and why those religious beliefs allow heterosexual couples to marry but not homosexual couples.

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***5. May a church restrict rental and/or use of its facility?***

The answer to this question is closely related to the above answer. To date, no U.S. church property per se has been deemed a public accommodation. Rather, church facilities are uniformly **private property**, access to which may be restricted. But test cases are surely on the way.<sup>1</sup> But to the extent a church allows facility usage without regard to its religious doctrine or policies, it raises the risk that someone may assert it is a "public accommodation" and therefore should be accessible to same-sex couples without restriction. Charging rental fees may further increase this risk, since rental fees are typically viewed as commercial in nature.

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<sup>1</sup> Notably, some state same-sex marriage laws may expressly provide religious exemptions for church facilities (e.g., Illinois, Vermont, Hawaii, Washington, New York, Connecticut, District of Columbia, Minnesota, New Hampshire, Rhode Island, Maryland and Utah which all had LGBT laws pre-*Obergefell*). The constitutionality of such laws may be challenged post-*Obergefell*, however, with a potential clash between LGBT nondiscrimination laws and First Amendment religious liberty rights.

Churches should be careful about renting their facilities, since such practices may also jeopardize their qualification for property tax exemption. In addition, facility rental raises important questions of wise stewardship and effective outreach. Overall, churches are wise to consider how best they can and should share their facilities with others, with due regard for potential same-sex access inquiries, appropriate ministry correlation, and other significant considerations, such as insurance, cost-sharing if appropriate, and the need for written agreements.

***6. Should a church turn away community groups like the Boy Scouts, Alcoholics Anonymous (AA) and Red Cross?***

Whether such shared facility usage will jeopardize a church's position that its facility is not a "public accommodation" is hard to predict at this point. Churches have long played vital roles in providing community meeting space, through which they can operate evangelistically and otherwise beneficially. Accordingly, a church should carefully consider the extent to which such access promotes its religious missions. The church's written facility use policy and its written use agreements should explicitly identify the religious purpose that each facility use serves. Limiting church facilities to "just Christians" should not be the result, since such practices are clearly against God's call to share Christ with others. On the other hand, opening the church doors indiscriminately may invite trouble. Careful discernment and wisdom are therefore critical. Bottom line: If a church's doors are open to others, then it needs to tie its written facility use policy and written use agreements closely to its sincerely held religious purposes.

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***Officiating Weddings***

***7. Should marriage as an institution be separated into "religious" and "government" versions, particularly to avoid any potential legal compulsion to perform same-sex marriage?***

Keep in mind that as a primary matter ministers are **ecclesiastical officials**. Notably, marriage is a sacrament in the Catholic Church, and the Hebrew word for Jewish marriage includes the concept of sacredness. Ministers are thus quite able to both approve and reject prospective wedding couples based on their own subjective discernment, such as the couple's readiness for the commitment of marriage, areas of unrepentant sin like unfaithfulness or addiction, and whether the couple is otherwise violating the church's religious tenets. As religious

officials, they therefore cannot be legally compelled to perform same-sex marriages.<sup>2</sup>

The government has long recognized ministers as having such authority within their theological/religious tradition to marry people. The government further recognizes the civil law status of marriage, based on churches' representations and otherwise applicable legal requirements (e.g., age, time limits for getting a license, whether a previously married person is divorced). In other words, a wedding is a **religious ceremony** with legal implications, but it is not itself a legal procedure.

Consequently, ministers should **not** be viewed as “state officials” simply by virtue of their religious function that carries such legal implications. Of course, their own views are to be respected, and indeed some divergence has developed among religious leaders and legal scholars regarding the mixed religious and legal aspects of weddings. While it may be too early to take the bifurcated approach in light of lack of case precedent, it certainly is less risky to employ the religious and secular approach to marriage licenses. Under that approach, one option is for clergy members to perform the religious ceremony and a civil officer to sign the government-issued marriage license, as done in some other countries.

## ***Continued Protection of Tax-Exempt Status***

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### **8. Are churches at risk of losing their Section 501(c)(3) tax-exempt status, as a result of Obergefell?**

This possibility was raised during oral argument in *Obergefell* when the government's lawyer responded that it could be an issue in the future. However, the IRS Commissioner verbally committed to not adopting such a regulation in the next few years, during a July 2015 U.S. Senate oversight hearing.

Such concerns harken back to the development of a “public policy” doctrine concerning Section 501(c)(3) tax-exempt status, which in turn is grounded in common law charitable trust principles.<sup>3</sup> In 1983, in

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<sup>2</sup> Such protection is expressly recognized in certain states' same-sex marriage laws that were enacted pre-*Obergefell*: Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maryland Minnesota, New Hampshire, New York, Rhode Island, Utah, Vermont, and Washington.

<sup>3</sup> See IRS Rev. Rul. 75-384 (trust law concepts apply to Section 501(c)(3) “charitable” qualification, and no trust may be created for illegal purposes or “if the accomplishment of the purpose is otherwise against public policy.”).

*United States v. Bob Jones University*, the Supreme Court allowed the IRS to remove a religious university's tax-exempt status because its student conduct policy prohibited interracial marriage and dating. The college claimed its policy was based on its religious beliefs. The Court agreed with the IRS that the college should lose its tax-exempt status because its policy was against "public policy."

So far the IRS has not applied this doctrine beyond racial discrimination in educational institutions and other very limited areas, such as illegal activity. Some legal commentators have argued that tax-exempt status should be removed from religious nonprofits that keep policies prohibiting same-sex conduct or marriage, as also against "public policy" after the Supreme Court's ruling in favor of same-sex marriage. But to date, the IRS has officially treated churches with "benevolent neutrality" per the Supreme Court's *Walz* 1970 decision.<sup>4</sup>

Federal legislation that would prohibit the IRS from changing its public policy standards has now been introduced.<sup>5</sup> Given the continuing rancor accompanying same-sex marriage and SOGI anti-discrimination issues, churches should thus watch for further developments concerning legislative or judicial attempts to remove tax-exempt status. In particular, there may be efforts on state and local levels to modify tax exemption privileges.

## ***Employment/Volunteer Worker Practices***

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### ***9. Should our members, staff, and/or volunteers acknowledge their agreement with our church's corporate religious tax-exempt purpose statement, doctrinal statement of faith, and related policies?***

Yes! All committed participants in a church should be required to sign a written statement acknowledging their agreement with the church's key doctrinal positions and their commitment to live in according to the church's standards of conduct. Such express acknowledgement reflects the church's consistent adherence to its sincerely held religious beliefs, including Biblical standards for sexuality. The statement should also

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<sup>4</sup> *But see* IRS Private Letter Ruling 2013-25-015 (March 28, 2013) (rejecting 501(c)(3) tax-exempt status for religious society that affirms polygamy, as criminally illegal and contrary to public policy as per *Bob Jones* and charitable trust law).

<sup>5</sup> *See, e.g.,* "How to Protect Endangered Religious Groups You Admire," *Christianity Today*, <http://www.christianitytoday.com/ct/2015/august-web-only/how-to-protect-endangered-religious-groups-you-admire.html> (commenting on the First Amendment Defense Act that, if enacted, would prevent federal officials from eliminating tax-exempt status for religious organizations and provide other religious liberty protections).

require agreement with the church’s commitment to Biblical dispute resolution. To the extent that a worker later is found to be in violation of such standards, the church should have ample grounds for discipline including termination. However, given our generally litigious society and the continuing evolution in related legal areas, such action would likely warrant careful investigation, due deliberation, and consequent steps taken with assistance of qualified legal counsel.

***10. To what extent should we identify church personnel as “ministers”?***

This designation may be extremely helpful, if legally appropriate, because it provides a church with complete legal protection against anti-discrimination laws, such as sex, age, and disability discrimination. Identifying a staff member as a “minister” should include a good faith determination that such designation is appropriate, use of a job title that includes the word “minister,” and development of a written job description showing how such position is properly “ministerial.” (E.g., minister of music – responsible for selecting music through which attendees can worship the Lord; youth or children’s minister – responsible for discipling the youth and children of the Church, through sharing Christ and teaching the Bible.)

***11. To what extent may a Biblical Code of Conduct apply to volunteers and/or employees who make supportive comments about same-sex marriage on social media?***

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A ministry worker who vocally supports abortion could well be subject to church discipline, including employment termination, to the extent that (a) the church adheres to Biblical standards regarding the sanctity of life and (b) he or she is expected to agree with such standards as a condition of employment. The same considerations hold true for same-sex marriage and other sexual conduct outside of Biblical marriage. Therefore, the standards of conduct that employees are required to sign on an annual basis should include clear written statements that an employee’s ministry work carries responsibilities outside his or her official work hours and outside the church building..

This issue demonstrates the importance and benefits of using worker Biblical codes of conduct for paid employees and volunteers alike. For improved legal protection as well as clarity in expectations, among, it is imperative that a church have a written code of conduct and provide that to employees and volunteers, with a sufficient explanation so that they understand what is expected and prohibited, as well as the Biblical verses supporting the standards of conduct. The code of conduct needs to be applied consistently. If an employee or volunteer later publicly



expresses views contrary to the church's Biblical code of conduct, the appropriate church authority should conduct any investigation and conversations with sensitivity, applying the steps found in Matthew 18.

***12. Could a church be liable to its applicants and employees for sexual orientation/gender identity (SOGI) discrimination?***

As explained above, a church may enjoy complete legal protection as to those employees who qualify for the ministerial exception. For other employees, a church should adopt a Biblical Code of Conduct and include it in all its employment materials, including job descriptions, contracts, employee handbook, and annual reviews. These Biblical sexuality standards should be clear about sexual behavior that is unacceptable for church employment. In addition, a Biblical dispute resolution clause that is agreed to in writing by both applicants and employees is important for keeping a church out of court, and it otherwise reflects a church's Biblically consistent values.

SOGI anti-discrimination legal protections have been steadily growing. Great care and caution is thus highly warranted in these sensitive areas, and knowledgeable legal counsel must be utilized at all stages of worker-related considerations

***13. What if a church uses a "Preferred Employer Organization" (PEO) arrangement, through which the church's workers are technically employees of the PEO?***

Such arrangement could be problematic, since legally the workers are employees of the PEO. Some special protections may exist under applicable state laws providing for PEO arrangements, but it is doubtful that the developing legal pressure will provide religious protection under such arrangements against SOGI and same-sex marriage attacks. Further legal evaluation is thus important, to ensure that the church can avail itself of otherwise applicable legal protections for religious "employers."

***Legal Protection for Separately Incorporated Ministries***

***14. In light of same-sex legal developments, should our church reconsider using separately incorporated nonprofits for its related ministries and/or keep its outreach ministries in-house?***

Many churches operate ministry programs internally as well as through separately incorporated nonprofits, such as afterschool programs,

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counseling centers, and homeless shelters. The prime benefits of keeping such activities legally separate from the parent church are (a) for risk management purposes – i.e., separating major assets from major liabilities to “silo” potential liabilities, particularly from personal injuries involving participants; (b) to develop broader circles of support beyond the church itself; and (c) to protect churches from audit and other reporting requirements imposed on ministries funded through government agencies or corporate foundation grants. These legal and practical benefits may be extremely important.

Keep in mind, however, that some laws may provide religious exemptions only for churches. In addition, some parachurch types of organizations may seek to be more inclusive regarding their participants and therefore give rise to “public accommodation” issues as addressed above. On the other hand, the more closely aligned a separate ministry is to its church partner, as well as the more it demonstrates a strong religious identity, the more likely such ministry will be to fall within available religious liberty legal protections. These considerations can quickly get complex and therefore should be evaluated carefully with the assistance of experienced legal counsel.<sup>6</sup>

**15. *If our church itself is not presently incorporated, would incorporating it help better protect our religious liberty rights against same-sex issues and attacks?***

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Generally yes, since unincorporated churches are not legal entities able to hold property and have independent legal rights. Technically, all leaders and other members of an unincorporated church would be jointly and severally liable for all acts of the church deemed to be wrongful, which is quite undesirable for both general liability and potential religious liberty issues. Church incorporation has many other benefits, including the following: (1) a church can more easily buy, sell, and encumber real estate and engage in other business transactions; (2) legal trustee and court approvals for purchase, sale and encumbrance of church corporation property are no longer necessary; (3) incorporation protects the corporate name in the state and eases trademark-related considerations; (4) incorporation promotes long-term stability more so than an unincorporated association; (5) incorporation makes it easier to obtain state sales tax exemptions, special nonprofit mailing rates, and other benefits; and (6) banks and lending institutions generally prefer to deal with an incorporated entity, to assure its governance, purpose and legal status.

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<sup>6</sup> For example, religious liberty protection should be available to churches’ closely related “integrated auxiliaries” and “disregarded” single-member nonprofit LLCs, particularly since both organizations derive their tax-exempt status from their parent church.

## ***Special Anti-Discrimination Considerations***

### ***16. May our church's housing ministry exclude residents based on same-sex considerations?***

Possibly, depending on applicable state and local laws. Generally speaking, the more that a church-operated housing facility gears its services to Christians and to specifically Christian outreach, the more likely it will be that a religious exemption applies. Such exemption should allow the church to develop its own admission standards free from government interference. Unfortunately, statutory exemptions tend to be narrower than what many religious organizations need, in order to live out their sincerely held religious beliefs.

### ***17. To what extent could a church be limited in its ability to obtain financing from private lenders, based on its doctrinal position about same-sex issues?***

No adverse consequences should result at present. Lenders in some jurisdictions may be subject to sexual orientation/gender identity laws that require equal opportunity loan services. Such laws, however, do not yet impose any similar requirements on the loan applicants.

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### ***18. Does a church need to be concerned about anti-discrimination laws with respect to distribution of benevolence funds to those in need?***

Not if the funds to be distributed are private funds and do not include government funding.<sup>7</sup> Benevolence funds should be distributed according to a good faith determination of legitimate needs and appropriate recipients. Charitable distributions need to be made in accordance with applicable IRS guidelines, including a well-written policy providing for independent decision-making, a team/committee to identify and determine appropriate recipients, and consistent follow-through.

## ***Other Religious Liberty Considerations***

### ***19. Will Biblical teaching about homosexuality possibly lead to a discrimination challenge?***

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<sup>7</sup> For this reason, it may be preferable to separately incorporate government-funded ministries that involve benevolence dimensions, particularly so that accompanying government audit and other reporting obligations are limited to such separately formed entity. See Q&A No. 14 above.

Preaching the Scriptures on any Biblical topic should never lead to any legally valid civil rights challenge, as a matter of each pastor's First Amendment freedom of speech rights.

## ***20. How can Religious Freedom Restoration Act (RFRA) laws help churches and their members?***

The federal RFRA, which was passed with near-unanimous political support in 1994, and its state counterparts provide a significant opportunity for religious liberty protection against governmental burdens. Contrary to recent media brouhaha against state religious liberty laws, RFRA laws do *not* give anyone a license to discriminate against anyone. Accordingly, we should promote them as much as possible.

To assert a RFRA claim, a person or organization must show two elements: (a) a sincerely held religious belief; (b) that has been substantially burdened by a government action. Upon such showing, the burden shifts to the government to demonstrate the existence of (a) a compelling government interest that (b) is unachievable by a less restrictive alternative. RFRA laws thus establish a balancing test that seeks to both honor religious liberty and government interests, without any predetermined outcomes.

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## ***Concluding Remarks***

On behalf of Christian Legal Society, the authors pray that each church recipient of this guidance will be encouraged, strengthened, and better equipped to effectively carry out their ministry. May we remain vigilant and winsome for Christ, always seeking to carry out the Great Commission for God's glory, to bring His message of salvation for the lost, and for His rich blessings throughout our ministry work.

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