

AN EDUCATIONAL UPDATE FROM  
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** Interested Persons  
**Date:** January 2021  
**From:** A. Eric Johnston  
**Re:** Update on Religious Freedom and Other Rights Related to Covid

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Next month we will have been dealing with the world wide Coronavirus pandemic for one year. The end may be in sight, but it will, at least, be months away. Three efforts by government dominate how to respond to the pandemic: (1) Lockdown of various degrees; (2) Vaccination against the disease; (3) Wearing masks, social distancing, and other preventative measures.

The most contentious and debated efforts thus far have been lockdown in various forms, *viz.*, classifying essential and non-essential activities, total and partial restrictions, and time periods of mandates. Activities included are churches, businesses, schools and social gatherings.

SCOTUS addressed religious freedom in a New York case which dealt with a Jewish synagogue and a Catholic diocese. Governor Andrew Cuomo unfairly held religious meetings to a stricter standard than other essential services and businesses. The court made it clear those religious activities could not be shut down or unfairly limited saying: “[T]he restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty.”

Lower courts have addressed variations of religious issues, *i.e.*, prohibiting or limiting attendance at church services, religious gatherings, including funerals and other events that bring people together. Religious freedom is our first freedom. It must be given a high priority of protection.

Initially, Governor Kay Ivey did not hold religious activities as essential. SLI responded with a letter, undoubtedly like others, that resulted in the Governor and the Alabama Department of Health recognizing religious activities as essential. The Governor immediately corrected and Alabama has not seen recurring problems.

Most churches have seen it as their duty to cooperate with the government in reasonable solutions and protections. See our April 2020 Educational Update. Still, some churches have chaffed at any regulation and at least one lawsuit was filed in Alabama.

The ability of the government to regulate activities, require vaccinations, face masks and other restrictions is uncertain. States generally are accorded under the 10<sup>th</sup> Amendment “police powers” to regulate the public health. That is not without limits. Many state advocates rely on *Jacobson v. Massachusetts (1805)* that held the state had the right to require smallpox vaccinations. However, smallpox was more serious, particularly at a time when there was minimal healthcare options, unlike today. Does that Massachusetts authority extend to require mass vaccinations today? Justice Alito said in his recent address to the Federalist Society that the case’s “... primary holding rejected a substantive due process challenge to a local measure that targeted a problem of limited scope. It did not involve sweeping restrictions imposed across country for an extended period. And it does not mean that whenever there is an emergency, executive officials have unlimited unreviewable discretion.” There are cogent and valid arguments on both sides of this issue. It is not the purpose of this article to address that issue in detail. That time may come.

Initially, we do not expect mandated vaccinations. Present thought is that enough will be vaccinated to create the “herd immunity” necessary to quell the virus. The question of herd immunity is also debated, but the goal is that enough people will be resistant to the disease that its effects will be minimized.

Private employers will be faced with whether to require vaccinations. That may depend on the nature of the job. Those employers who come under the federal law, most notably the Civil Rights Act of 1964, will have employees who will refuse to be vaccinated on religious grounds. There is likely to be court action. Covered employers are those that have 15 or more employees for 20 or more weeks during the year. For them the law requires accommodation of religious belief. Religious objections to vaccination is the most common reason. There may be other reasons, such as a medical condition, but reasons for mere personal preferences may not sustain the right to object. Small employers, that is those with less than 15 or more employees, will have much more authority to require vaccinations. In Alabama, there is no state law that would sustain an objection to an employer requiring vaccinations.

Social distancing, avoiding crowded places, unventilated rooms, *et cetera*, appear to be well founded medically and, at least, common sense would dictate avoiding conditions where the Coronavirus, like the common cold, can be transmitted between or among people. However, masking has been debated by healthcare professionals throughout the entire pandemic. It appears unlikely most government authorities will mandate masking. Such a law would have weaker grounds than those for vaccination, and those who would oppose it would also have a weaker position. Development of this legal issue will be interesting.

The purpose of this Educational Update is not to address all of these issues in detail. Specific issues will arise and as the law develops, we will report. Please contact us if you have questions or concerns.