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Managing the Risks & Benefits of an On-Site Automatic Defibrillator Program

By Carrie Masters Starts and Nathan Lennon




Sudden cardiac arrest (“SCA”) is the largest cause of natural death in the United States and is responsible for approximately half of all heart disease deaths. SCA, however,

is not a “heart attack” (i.e. an artery blockage) but instead pertains to the electrical system to the heart. One of the main methods of emergency treatment involves the use of an Automated External Defibrillator (“AED”). Thus, to protect employees, patrons and customers, business owners need to consider the use, care and maintenance of this equipment.

Background

In recent years, it has been estimated that between 250,000 – 400,000 Americans have died annually from an SCA. During the SCA, an individual’s heart loses the ability to pump blood effectively and the victim collapses and stops breathing, which can quickly lead to death, particularly where medical treatment is not immediately available. Although the occurrence rate



of SCAs is more common as individuals age, many victims of SCA actually have no known risk factors prior to the onset of symptoms, and individuals across the age and health spectrum are at risk.

According to public health authorities, such as the American Heart Association, one of the keys to surviving an SCA is the timely institution of a “chain of survival” treatment protocol, beginning at the time of the onset of arrest. Important elements to the “chain of survival” protocol can include: (1) beginning cardiopulmonary resuscitation (“CPR”); and (2) applying defibrillation. Many people do not realize, however, that CPR on its own is often not effective in cases of SCA without the additional use of defibrillation. This is because CPR helps to “buy time” in a cardiac arrest by continuing the flow of blood through the body, ensuring that life-sustaining oxygen continues to make its way to the individual’s vital organs, including the brain. However, SCA is essentially a problem with the heart’s electrical impulses, and without restoring a healthy electrical signal to the heart, victims often will never be able to recover a heart rhythm through the use of CPR alone.

Defibrillation addresses the underlying electrical issues with the heart that make SCA so deadly. In essence, defibrillation shocks the heart with a measured dose of electricity, in order to restore a healthy heart rhythm, which in turn enables the SCA victim to begin breathing on his or her own again. Defibrillation is critical in the chain of survival protocol because defibrillation increases the survival rate of a victim of cardiac arrest by approximately 60 percent. For every minute that goes by without CPR or defibrillation, government authorities have observed that the chance of survival decreases by about 10 percent.

Historically, defibrillation has been limited to hospital use due to the size and complexity of the equipment involved. Over the last twenty years, however, technological advances have made possible the miniaturization and portability of defibrillators, resulting in the “automated external defibrillator” (“AED”). An AED is a smaller version of the defibrillator that

would be used in a hospital, and has the key innovation of being an autonomous device. The AED device gives instructions to the user through sound or visual commands, and determines through a computer program whether and when to apply electric defibrillation to shock the victim’s heart during an SCA. Because the AED itself determines when defibrillation is applied, a layperson can use this device in an emergency to render aid to SCA victims until EMS can arrive.

Regulatory & Legal Issues Related to AEDS

In the Midwest, broad support has been found for the use of AEDs as a matter of public policy through the introduction of legislation. As recently as 2004, Ohio enacted HB 434, which appropriated \$2.5 million to purchase AEDs for use in public schools. Ohio, as with many states, has also enacted “good Samaritan” legislation, which confers qualified immunity upon a rescuer who employs the use of an AED during a medical emergency. However, along with protections also come responsibilities. Ohio requires that entities offering AEDs on-site follow a manufacturer’s recommendations regarding care and maintenance of AEDs. Moreover, consultation with a physician is required when implementing AEDs for on-site use in Ohio.

Similar to Ohio, Kentucky also requires physician oversight of AEDs for on-site use, and also requires that “expected users” of AEDs receive training in CPR and the use of AEDs. Kentucky further requires entities to follow the AED manufacturer’s recommendations regarding care and maintenance of AEDs. Finally, Kentucky also has a “good Samaritan” law, which extended qualified immunity for the good faith use or implementation of an AED. Kentucky’s law also specifically extends qualified immunity to the premises owner as well as the AED user.

In Indiana, AEDs are actually required equipment in a number of different premises, including: health spas and studios, sports centers, weight control studios, and school gymnasiums. Indiana law requires that the AED be easily accessible and that the facility employ staff who have

completed training in both CPR and AED use. Like both Ohio and Kentucky, Indiana provides qualified immunity to individuals who use AEDs in good faith.

Practical Considerations When Implementing an AED Program

There are currently millions of AEDs in use around the country. When considering implementation of an AED program, the first concern that arises relates to the lifespan of these devices. Typically, an AED would be expected to last 5-10 years in service. Because very few of these machines are ever used, problems arise from years of non-use, and can include:

- Software problems, including the failure to update software;
- Obsolete or malfunctioning electrical components, including electrodes, resistors, batteries, and circuit boards;
- Tampering/vandalism; and
- Adverse climatic conditions (such as chronic humidity).

In addition to the hardware challenges related to the AED itself, as noted above, various state regulatory systems impose specialized requirements for implementing these programs. Thus, it is advisable for any facility considering an AED program to consider the following steps:

- Getting physician input/oversight, in compliance with state and federal regulations;
- Coordinating AED placement with local emergency medical services;
- Implementing a training program in both CPR and the AED for “expected users”; and
- Implementing an annual care and maintenance program for the AED, in consultation with a physician.

Conclusion

As can be seen from this brief overview, states are continuing to encourage (and in some cases, to require) private and public entities to provide AEDs for on-site use. While these devices have undeniable benefits, careful implementation of an AED program to ensure compliance and effectiveness is key to success.

EAP – What Is It & Why Do You Need One?

By Gregory Guice and Katie Lynn Zorc



If you work in a large building on one of the higher floors, you will remember the last fire drill where you walked umpteen flights of stairs following your co-worker with the orange hat. Once you reached the bottom and walked out into the street, you might have asked yourself why such things are necessary. It is

because the Occupational Safety and Health Administration (OSHA) requires employers to have an Emergency Action Plan (“EAP”) to ensure your safety from fire and other emergencies.

But what triggers the need for an EAP? 29 CFR 1910.38(c) tells us that “[A]n employer must have an emergency action plan whenever an OSHA standard in this part requires one.” What does that mean? In this context, there are several portions of 29 CFR 1910 et seq. that require an employee action plan. The most prevalent situation requiring an EAP is the presence of fire extinguishers as referenced in 29 CFR 1910.157. This section directly references 1910.38 and calls for an EAP. Since most workplaces have a fire extinguisher, this section is likely the driving force behind your trek down the stairs.

So what is an EAP? At a minimum an EAP has the following elements, codified in 29 CFR 1910.38(c) and 29 CFR 1910.39(c):

Reporting

An EAP must identify a way employees may report fires and other emergencies. This may include dialing 911, pulling a fire alarm, or activating any other emergency warning systems.

Evacuation Procedures

An EAP must identify evacuation procedures and emergency escape route assignments for employees. This may include publishing a list of authorized orders of evacuation, or posting evacuation routes and locations in a spot visible to all employees.

Critical Operations

An EAP should include procedures for employees who must remain to perform critical operations before they evacuate. This may include designating employees who operate fire extinguishers, or shut down gas or electrical systems or equipment that may create additional dangers to personnel or emergency responders.

Accounting for Employees

An EAP needs to include a means of accounting for all employees after the evacuation is complete. Some employers even designate “evacuation wardens” in their plans to verify that all employees have evacuated and conduct roll calls.

Rescue/Medical

An EAP should include the names of any employees designated to perform rescue or medical duties. Many employers rely on public resources for this task, such as the local fire department or hospital; however, the unique characteristics of each employment facility may require employee designations for these tasks.

Identifications of Employees

An EAP should identify the names and job titles of all persons to be contacted in an emergency. OSHA recommends that EAPs include diverse representatives, consisting of both management and base-level employees, to assure universal understanding and application of the EAP.

As an employer, your EAP must be broad. It should cover everything from fires, toxic chemical releases, inclement weather, to active shooter response and procedures for handling irate workers who are served with legal process. The employer should also brainstorm any unique risks their facility faces and create plans to deal with worst-case-scenarios.

The EAP must be available to all employees. The best way to ensure this is to provide new employees with copies of the plan, and make sure a copy is posted in a well-traveled location. The plan should be explained to each new employee, and explained again if any material changes are incorporated. Effective plans also require annual drills in which the employees practice their respective task and evacuation routes, hence your traipsing down to street level once a year. While in most cases, the EAP must be written, if your business has less than 10 employees, the plan may be communicated orally.

While you cannot accurately predict who and what may present a workplace safety risk, you can ensure that your employees are trained on the best response. Creating an EAP that adheres to the requirements above is a great start to achieving that goal.

Don't have an EAP and/or do you believe your EAP needs to be updated? Check with OSHA's resources, or contact us if you need assistance with the development of an OSHA-compliant plan.

OSHA EAP Information

<https://www.osha.gov/SLTC/etools/evacuation/eap.html>

Practical Considerations for Restroom Accommodations in the Retail & Hospitality Industry

By Holly Marie Wilson and Christina Essex



The increased focus on LGBT issues and rights has spawned a number of public debates in the United States. Indeed, in recent months, lawmakers, educators, activists and business owners have entered into a heated public debate focusing on bathroom accommodations for transgender individuals. The discussion was crystalized in some respects when North Carolina's House Bill 2, also known as the "bathroom bill," was signed by North Carolina governor Pat McCrory on March 23, 2016. (H.B. 2, 3d Leg., 2d Spec. Sess. (2016)). House Bill 2 mandates that individuals use the bathroom that corresponds to the gender listed on their birth certificate – not the gender with which they identify.

The U.S. Department of Justice weighed in on the issue by concluding that the law was a direct violation of Title VII of the Civil Rights Act of 1964. Specifically, they found that it discriminated against transgender employees by limiting their use of restroom facilities. (See Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, U.S. Dept. of Justice, Civil Rights Division, to Governor Pat McCrory, State of North Carolina (May 4, 2016)). Days later, on May 13th, the Education Department's Office for Civil Rights and the Justice Department's Civil Rights Division announced to educators that transgender students must be allowed to use rest rooms that are "consistent with their gender identity" or face losing federal funding. (See Joint Guidance announcement from May 13 2016; <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>)

The response from the private sector (national retail and hospitality providers) has been mixed. Perhaps most vocal in the debate, Target took a clear stance by issuing a public statement outlining their bathroom policy on April 19, 2016. (See *Continuing to Stand for Inclusivity*, (April 19, 2016) <https://corporate.target.com/article/2016/04/target-stands-inclusivity>.) The policy explicitly provides that Target "welcome[s] transgender team members and guests to use the restroom or fitting room facility that corresponds with their gender identity." *Id.* In addition, Starbucks, Hudson's Bay Co., and Barnes & Noble have followed Target's lead by stating that their policies allow customers and employees to use the bathroom of the gender that they identify with, as jurisdictional limits permit. Hadley Malcom, *How Other Stores are Handling Transgender Bathroom Policies*, USA TODAY, (April 27, 2016, 9:35 PM) <http://www.usatoday.com/story/money/2016/04/27/retailers-transgender-bathroom-policy-lgbt/83560714/>.

Other retailers, while expressing support for customer rights in general, and in some cases gender identity rights, have taken a more reserved approach to the issue. For example, Sears Holdings, did not comment on their bathroom policy but has opined that they "have strict policies against discrimination or harassment of any kind" and "are fortunate to serve a diverse customer base across the United States." Malcom, *Id.* Similarly, Walmart, who includes gender identity in its non-discrimination policies, has declined to publically comment on the issue. *Id.* And, Whole Foods, Macy's and Simon Property Group have also declined to comment. *Id.*

Hospitality industry giants have also entered the debate. For instance, Arne Sorenson, CEO of Marriott International, recently appeared in person on CNBC and stated, "At Marriott, we are dedicated to ensuring every guest and all of our associates are valued, welcomed and

protected from discrimination whenever they enter our doors." Arne Sorenson, CEO of Marriott International, CNBC (April 4, 2016) <http://www.cnbc.com/2016/04/04/anti-lgbt-laws-are-not-ok-marriott-ceocommentary.html>.

As is too often the case, retail and hospitality providers are left with the challenge of how best to accommodate their customers' diverse needs while staying in compliance with unsettled laws. Because this area is still developing, the answer is not clear. However, it is of the utmost importance to understand the law in your jurisdiction. Title VII of the Civil Rights Act of 1964 mandates that the retail and hotel industries accommodate bathroom preferences of transgender employees, but it does not require that these industries honor the same for the general public. Currently, no federal law exists that prohibits discrimination based on sex, gender identity or sexual orientation in public accommodations.

State and or local laws, however, may impose an obligation on an organization to accommodate all guests by explicitly prohibiting gender identity discrimination in public places. Indeed, as of 2014, 17 states and more than 200 cities have enacted laws addressing gender identity discrimination within their jurisdictions. See *Transgender People and Access to Public Accommodations*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Sept. 2014) http://www.transequality.org/sites/default/files/docs/kyr/PublicAccommodations_September2014.pdf.

By way of example, the cities of Philadelphia, Seattle, Washington, D.C., West Hollywood and Austin have passed measures requiring all single-occupancy bathrooms to be relabeled as gender-neutral and that all new buildings constructed in the city have a gender-neutral bathroom on each floor. (Jan. 11, 2016, <http://time.com/4175774/san>

[francisco-gender-neutral-bathrooms/](#)).

Therefore, while federal and state law may not explicitly require an organization to allow a customer or guest to use a restroom that corresponds with their gender identity, a local law may mandate

or prohibit such an accommodation. As such, businesses must ensure that their restroom policies do not violate any law on the federal, state, or local level. Further, it is critical to stay current on the development of these laws, as any change may create a risk of liability for the organization.

The overriding principle in this arena is that despite the ever-changing legal landscape, best practice requires the implementation of a bathroom policy that treats all people with dignity and respect while remaining in compliance with the law in your jurisdiction.

So You Think You Have Insurance?

By Michelle Sheehan and Taylor Knight



In this day and age of an insurance-driven society, it behooves parties to a contract to be clear and upfront about who will bear the cost of insurance. In that regard, most business contracts require the contractee to add the contractor as an additional insured on the contractee's commercial

general liability policy. For example, retail businesses frequently require suppliers to add the retail business as an additional insured in case the retail business is sued because of the supplier's product. Astute businesses require proof that they are an additional insured and will often accept a certificate of insurance ("COI") from the supplier as confirmation that the business is an additional insured. Beware: most COI are non-binding and do not necessarily mean the business is an additional insured on the insurance policy.

Most COI statements specifically provide that they are for informational purposes only. The COI does NOT confer any rights upon the certificate holder. In fact, most COI statements provide:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURERS, AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

Insureds often confuse a COI with the insurance policy itself. After all, most COI contain detailed information about the insurance policy such as the policy number, effective dates, types of coverage and are even endorsed by an authorized representative of the insurance company. However, insurance policies are contracts with specific terms and conditions agreed upon by the insurer and insured. An insured cannot unilaterally change the terms and conditions of the insurance policy by requesting a COI that identifies additional insureds – especially when the COI expressly provides that the COI is for "informational purposes only" and "confers no rights upon the certificate holder." Simply stated, a COI

cannot change an insurance policy to create coverage where none would otherwise exist. *See e.g., Andelmo v. Spock*, Cuyahoga C.P. No: 14-829044 (April 2, 2016)(certificate of insurance does not create coverage; Reminger defended insurer); *Carolina Cas. Ins. Co. v. Ortiz*, 2010 WL 55880, *12 (E.D. Cal. Jan 4, 2010), *aff'd*, 433 F. App'x 608 (9th Cir. 2011) (certificate cannot be read as evidence of coverage); *Pardee Construction Co. v. Insurance Co. of the West*, 77 Cal. App.4th 1340, 1347 (2000) (same); *Wendy's of Bowling Green, Inc. v. Marsh USA, Inc.*, 2011 WL 1399772, *2 (M.D. Tenn. Apr. 13, 2011) (certificate of insurance could not create insured status).

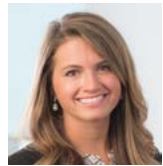
So how do you make sure your business is an additional insured on a supplier's or contractee's insurance policy? Require an endorsement to the policy that changes the terms of the policy and certifies that your business is an additional insured. While it will require an extra step in the process, it could potentially save thousands, or tens of thousands of dollars in defense and indemnity costs in the long run. When in doubt, do not rely solely on a COI. Instead, talk to your insurance agent or counsel and make sure that your business interests are protected by changing the policy itself.

The Rise of Spoliation Claims In Premises Liability Cases

By D. Patrick Kasson and Jackie Jewell



“Spoliation” generally includes the destruction of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. See *Owner-Operator Indep. Drivers Ass’n v. Comerica Bank*, No. 2:05-cv-56, 2012 U.S. Dist. LEXIS 37143, 2012 WL



936208, at *16 (S.D. Ohio Mar. 20, 2012). As premises liability claims have become more difficult to prove, plaintiffs have sought to distract courts from their inability to make the prima facie elements of a negligence claim and instead would have the court focus on whether or not the business took steps to preserve any possible evidence (or in some cases whether the business owner actively destroyed evidence) that the plaintiff believes would have supported their claim. Increasingly, spoliation torts are becoming the centerpiece of premises liability lawsuits and the actual premises liability claim is becoming an afterthought. It is important that retailers take active steps to preserve evidence and are able to show that these steps were taken.

Potential Effects of Spoliation

Adverse Inference: Traditionally, if a party lost or destroyed evidence, a jury is instructed that they may draw an adverse inference about the missing evidence. That is, the jury would be instructed that the evidence—which was destroyed—would have been favorable to the plaintiff. To justify an adverse inference instruction based on the spoliation of evidence, Plaintiff, as the moving party, must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the [evidence was] destroyed with culpable state of mind; and (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Id.* (quoting *Beaven v. U.S. Dept. of Justice* 622

F.3d 540, 553 (6th Cir. 2010). This test is conjunctive, so a party seeking an adverse inference must satisfy all three prongs. *Id.*

Sanctions: Moving beyond a mere adverse inference, many state and federal courts have issued actual sanctions for spoliation of evidence. As part of a court’s “inherent powers,” it has the broad discretion to craft proper sanctions for spoliation, “including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence.” *Adkins v. Wolever*, 554 F.3d 650, 653 (6th Cir. 2009). Regardless of the underlying state court law, federal law governs spoliation issues in federal court. *Id.* Spoliation sanctions are wholly discretionary: courts can order dismissal, an adverse inference, or attorneys’ fees after evaluating a party’s conduct on a “continuum of fault,” ranging “from innocence through the degrees of negligence to intentionality.” *Id.* at 652–53. A court should use the least severe sanction that removes the prejudice caused by the spoliation. *Strong v. U-Haul Co.*, No. 1:03-cv-00383, 2006 U.S. Dist. LEXIS 97158, *14 (S.D. Ohio 2006). “Absent exceptional circumstances,” Courts generally **require bad faith** before dismissal or default judgment. *In re Nat’l Century Fin. Enters.*, No. 2:03-md-1565, 2009 U.S. Dist. LEXIS 68379, *16 (S.D. Ohio 2009).

Spoliation Torts: Ohio has created an actual cause of action for spoliation if:

- Litigation involving the parties is existing or probable;
- Knowledge that litigation exists or is probable;
- Willful destruction of evidence designed to disrupt plaintiff’s case;
- Disruption of plaintiff’s case; and
- Damages proximately caused by the Defendant’s acts.

Id.

A plaintiff who prevails on a spoliation claim can collect “damages proximately caused by the defendant’s acts.” *Smith v. Howard*

Johnson Co., Inc., 1993-Ohio-229, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037, 1038 (1993). The Ohio Supreme Court has confirmed that, in addition to compensatory damages, an intentional alteration, falsification, or destruction of evidence to avoid liability can give rise to a punitive damages award upon a showing of actual malice. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.2d 331, ¶ 1 syllabus (1994); see also 1-CV 437 OJI CV 437.01, Comment 3 (“The Ohio Supreme Court has also held that interference with evidence may be used as grounds for a claim for punitive damages where the underlying cause of action was not interference with or destruction of evidence.”).

Addressing & Preventing Spoliation Issues

As more and more plaintiff-oriented counsel are seeking to use spoliation claims to account for their lack of evidence, a business owner’s road to pre-empting these claims starts before the accident or incident ever occurs. The first step is to create policies and procedures aimed at preserving the potentially relevant evidence. The policies and procedures should be clear and precise, as well as easy to follow. For example, if the business has video cameras, there should be policies about preserving potentially relevant footage. This may include the method of preservation (e.g. making a hard copy or maintaining an electronic version), the amount of footage (e.g. 30 minutes before the accident and 30 minutes after), and the length of time the evidence should be retained. Similarly, another policy might involve precise instructions on how to respond if an employee encounters a spilled liquid or an overturned display, and what actions should be taken to both preserve the evidence and guard against a subsequent accident.

The next step is to ensure that the policies are being followed. Knowledge of the policies and procedures and compliance with those mandates is crucial. It should be part of an employee’s evaluation. In this manner, even non-management employees will have

the necessary knowledge so that they can actively participate in preserving evidence. Far too often, such issues are solely in the hands of management employees, who usually not the first employee on the scene. For example, a policy on responding to an accident involving a spilled liquid may require the first employee on the scene to cordon off the area around the spill. This allows the evidence to be preserved and should prevent further accidents involving other patrons and the spill. But, if the non-management employee does not have knowledge of the policies and procedures, the spill may be cleaned up before it is examined and the evidence may be lost.

Another issue faced by business owners is the problem transmitting the investigative

materials from the store to risk management and/or counsel. Retailers should not allow the only copy of the investigative materials to be maintained at the store. Rather, multiple copies should be maintained. Policies should be clear and have checklists for employees on the steps needed to preserve the evidence.

Yet an additional overlooked issue with regard to spoliation is proving that evidence preservation actions took place. With turnover in retail establishments, it is difficult to prove that there was an attempt to preserve evidence, absent documentation to this effect. In order to overcome this problem, retailers should have policies which designate a central

person to investigate, a checklist for the investigations which is signed by that person and this information should be preserved, along with the actual evidence.

Finally, once suit is filed, defense counsel should lead the effort to preserve evidence. Defense counsel should obtain not only the evidence, but also policies, procedures and checklists related to the preservation of the evidence. Thus, if there is actually a spoliation issue, defense counsel can be in a position to evaluate the issue and its potential effect on the litigation. In some cases, this can even lead defense counsel to recommend settlement of the underlying case before the potential spoliation issue comes into play.

Retail & Hospitality Liability

We vigorously defend against all types of claims including the traditional adulterated food, 'slip/trip and fall,' and 'falling object' cases, as well as the high exposure false arrest, pharmaceutical negligence, negligent security, and dram shop liability matters. In addition, we counsel these same clients about risk management, safety concerns and post-accident investigation.

Our attorneys work with self-insured retailers, general liability insurance carriers, and units of liability insurance carriers dedicated to specific insureds. We, at no charge, participate in safety and risk control seminars for the clients, and are available, again without charge, for periodic 'I have a question' calls from clients. Our goal is not just to be the premier defense counsel on these types of claims, but also to work with clients to minimize these claims.

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