

## AED Risk Factors & Ownership Requirements

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## Sudden Cardiac Arrest and AED Overview

### Sudden Cardiac Arrest (SCA) Facts

#### Heart Attack vs. SCA

- Not the Same Thing
- Plumbing problem vs. Electrical Problem

#### Causes of SCA:

- Pre-existing condition
- Lightning/electrical shock
- Drowning
- Trauma

#### Number one killer in the United States

- 350,000 annually
- Every 2-minutes

National Survival Rate: 5-7%

### Automated External Defibrillators (AEDs)

AED use within 3 minutes: 75% survival rate

#### How AEDs work:

- Electrical Shock delivered to the heart
- Stops the heart and allows it to "re-start"
- Computer lock-up example

#### Top reasons AED programs are implemented:

- They work and save lives, SCD is preventable
- Mandates
- Human Resources: Employee benefit
- Risk Management: Standard of Care, Ownership Requirements

## Legal and Risk Management Issues

### "Duty" to have AED Programs

#### Mandates:

*Arizona Revised Statutes § 34-401 A. Any state building that is constructed or any state building that undergoes a major renovation at a cost of at least two hundred fifty thousand dollars after the effective date of this section must be equipped with automated external defibrillators.*

*Arkansas Code § 20-13-1306 (b)(1) Each health spa shall have at least one (1) automated external defibrillator on the premises.*

*California Health & Safety Code § 104113 (a)(1) Commencing July 1, 2007, every health studio, as defined in subdivision (g) shall acquire an automatic external defibrillator.*

*Connecticut General Statutes § 19a-197c Each public golf course, as defined in section 30-33, shall provide and maintain in a central location on the premises of the public golf course, at least one automatic external defibrillator, as defined in section 19a-175. (Effective October 1, 2006)*

*Florida Statutes § 258.0165 (1) Each state park is encouraged to have on the premises at all times a functioning automated external defibrillator.*

*Florida Statutes § 1013.502 (1) Each public school that is a member of the Florida High School Athletic Association must have an operational automated external defibrillator on the school grounds.*

*210 Illinois Compiled Statutes § 74/15 (a) By the dates specified in Section 50, every physical fitness facility must have at least one AED on the facility premises.*

*Indiana Code § 24-4-15 Chapter 15. Automated External Defibrillators in Health Clubs*

*Sec. 5. An owner or operator of a health club shall do the following: (1) Ensure that a defibrillator is: (A) located on the health club premises and easily accessible to the health club staff, members, and guests;*

*Iowa Code § 147A.15 Automated external defibrillator equipment--penalty. Any person who damages, wrongfully takes or withholds, or removes any component of automated external defibrillator equipment located in a public or privately owned location, including batteries installed to operate the equipment, is guilty of a serious misdemeanor.*

*Louisiana Revised Statutes § 40:1236.13 D. (1) The owner of or the entity responsible for a physical fitness facility shall keep an AED on its premises.*

*Code of Maryland § 7-425 (A) (1) Each county board shall develop and implement an automated external defibrillator program that meets the requirements of § 13-517 of this article for each high school in the county.*

*Massachusetts General Laws 93 § 78A A health club shall have on the premises at least 1 AED.*

*Michigan Compiled Laws § 333.26312 Beginning 1 year after the effective date of this act, [FNI] the owner or operator of a health club shall do all of the following: (b) Have available on the premises of the health club an AED deployed in a manner that provides obvious and ready accessibility to staff, members, and guests.*

*Code of Mississippi Rules § 50 012 002(K)(3); (K)(4) Section 3. Automatic External Defibrillators (a) All licensed gaming establishments shall be equipped with AED units for use*

*on the gaming premises, and shall comply with all reporting requirements of Miss. Code Ann. §41-60-33 (Supp.1999).*

*Missouri Statutes § 191.938 2. The committee shall advise the department of health and senior services, the office of administration and the general assembly on the advisability of placing automated external defibrillators in public buildings, especially in public buildings owned by the state of Missouri or housing employees of the state of Missouri, with special consideration to state office buildings accessible to the public.*

*Nevada Revised Statutes § 450B.600 1. Not later than July 1, 2004, and thereafter: (a) The board of trustees of a school district in a county whose population is 100,000 or more shall ensure that at least one automated external defibrillator is placed in a central location at each high school within the district. (b) The Airport Authority of Washoe County shall ensure that at least three automated external defibrillators are placed in central locations at the largest airport within the county. (c) The board of county commissioners of each county whose population is 400,000 or more shall ensure that at least seven automated external defibrillators are placed in central locations at the largest airport within the county. (d) The Board of Regents of the University of Nevada shall ensure that at least two automated external defibrillators are placed in central locations at each of: (1) The largest indoor sporting arena or events center controlled by the University in a county whose population is 100,000 or more but less than 400,000; and (2) The largest indoor sporting arena or events center controlled by the University in a county whose population is 400,000 or more. (2) Ensure that at least one automated external defibrillator is placed in a central location at each county building or office identified pursuant to subparagraph (1).*

*New Hampshire Revised Statutes Chapter 195-I:1 Declaration of Purpose. It is the intent of the state of New Hampshire to encourage all schools to obtain and maintain automated external defibrillators at appropriate school locations for the safety and protection of students and others participating in or attending school athletic and related activities.*

*New Jersey Statutes § 2A:62A-31 No later than one year after the effective date of this act (enacted August 6, 2007): a. The owner or operator of a health club registered with the Director of the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to P.L.1987, c.238 (C.56:8-39 et seq.) shall: (1) acquire at least one automated external defibrillator as defined in section 2 of P.L.1999, c.34 (C.2A:62A-24),*

*New York Education Law § 917 1. School districts, boards of cooperative educational services, county vocational education and extension boards and charter schools shall provide and maintain on-site in each instructional school facility automated external defibrillator (AED) equipment,*

*New York General Business Law § 627-a 1. Every health club as defined under paragraph b of subdivision one of section three thousand-d of the public health law whose membership is five hundred persons or more shall have on the premises at least one automated external defibrillator*

*Ohio Revised Code § 3313.717 (B) The board of education of each school district and the administrative authority of each chartered nonpublic school may require the placement of an automated external defibrillator in each school under the control of the board or authority.*

*Oregon Revised Statutes § 431.680 (1) As used in this section, “health club” means an indoor facility: (a) With the primary purpose of offering exercise or athletic activities that patrons or members may participate in for a fee; and (2) The owner of a health club shall have on the premises at all times at least one automated external defibrillator.*

*Oregon Administrative Rule 333-030-0105 Camp Safety (8) AUTOMATIC EXTERNAL DEFIBRILLATOR (AED). By June 1, 2009, all residential camps with 100 or more campers and staff on-site at any one time must have at least one AED with pediatric capability, located at the camp.*

*Oregon Administrative Rule 333-060-0210 Pool Safety (g) Automatic External Defibrillators (AED). All general-use pools, and pools at health clubs serving 100 patrons or more a day, must provide an AED on-site and accessible for use.*

*24 Pennsylvania Statutes § 14-1423 (a) For the fiscal year 2001-2002, the department shall establish a one-time automatic external defibrillator program to assist school entities in acquiring automatic external defibrillators.*

*General Laws of Rhode Island § 5-50-12 (a) Every health club registered with the department of attorney general pursuant to this chapter shall have at least one automated external defibrillator (AED) on the premises.*

*General Laws of Rhode Island § 23-6.2-2 On or after September 30, 1998, the Rhode Island municipal police academy, after consultation with the coalition for public safety defibrillators, shall provide two (2) defibrillators for distribution to each and every city or town in the state, one defibrillator to the State House, one defibrillator to each campus of the University of Rhode Island, one defibrillator to Rhode Island College, and one defibrillator to each campus of the Community College of Rhode Island. On or after July 1, 1999, thirty-five (35) defibrillators shall be provided to the Rhode Island state police; two (2) defibrillators to the Licht Judicial Complex, two (2) defibrillators to the Garrahy Judicial Complex, two (2) defibrillators to the Kent County Leighton Judicial Complex, one defibrillator to the Washington County McGrath Judicial Complex, one defibrillator to the Newport County Murray Judicial Complex, and fifty (50) automated external defibrillators to cities or towns within the state based upon current deployment levels of automated external defibrillators, population, and geographic need.*

*Texas Education Code § 38.017 (a) Each school district shall make available at each campus in the district at least one automated external defibrillator, as defined by Section 779.001, Health and Safety Code.*

*18 Virginia Administrative Code § 60-20-110 D. Emergency equipment and techniques. A dentist who administers deep sedation/general anesthesia shall be proficient in handling emergencies and complications related to pain control procedures, including the maintenance of respiration and circulation, immediate establishment of an airway and cardiopulmonary resuscitation, and shall maintain the following emergency equipment in the dental facility: 11. External defibrillator (manual or automatic);*

*Revised Code of Washington § 246.817.722 Defibrillator. Every dental office in the state of Washington that administers anesthetic must have an automatic external defibrillator (AED) or defibrillator.*

As of February 16, 2010, there are 226 new AED Bills in front of various state legislatures. Ref: <http://statescape.com/>

## Legal and Risk Management Issues (Continued)

### "Duty" to have AED Programs (Continued)

#### Standard of Care:

*"AEDs are becoming an unofficial standard of care, the debate isn't about what happens if you have an AED and use it improperly, but what happens if you don't have an AED at all." Sandy Lovett, Senior AED associate with the American Red Cross. - 2005*

*24 Hour Fitness: Attorney Mike Danko, a partner with O'Reilly, Danko & Yamane, who recently brought a lawsuit on behalf of a family whose son died of sudden cardiac arrest at a 24 Hour Fitness Inc. club that didn't have an AED. "It's evidence of negligence if you're not meeting the standard your competition has set."*

*Bally Total Fitness: Any health club that does not have an AED, even in states in which doing so is not a statutory obligation, runs the risk of being seen as acting with indifference to the welfare and safety of its patrons and either negligent or grossly negligent for any deaths that may result from a cardiac event. That was the message handed down earlier this year by the Cook County Circuit Court in *Fowler v. Bally Total Fitness* [Case No. 07 L 12258], a case that suggests a change in the way courts are viewing such incidents. The court ruled that Bally's refusal to maintain an AED at its Gaithersburg facility demonstrated intentional indifference to the welfare of its patrons and rose to the level of gross negligence.*

*Chai v. Sports Fitness Clubs of America: Jury found for defense, but case settled for \$2.25M.*

*Somes v. United Airlines, Inc.: Settled before trial on undisclosed terms.*

*Malhorta v. Northwest Airlines: Settled out of court*

*Ferguson v. Trans World Airlines: Result unknown*

*Stone v. Frontier Airlines, Inc.: A widow brought a wrongful death suit against an airline claiming the lack of an AED and other medical equipment caused her 28 year old husband's death. The court held that a jury should decide whether the airline had a duty to carry AEDs. Importantly, the court considered the widow's contention that the airline was on notice as to the wide use and effectiveness of AEDs for in-flight cardiac arrests and therefore had a duty to carry AEDs. Case settled out of court.*

#### FAA has mandated AEDs be carried on all commercial aircraft

*Busch Entertainment Group: Wrongful death suit against Busch Gardens (Tampa, Florida) by mother of a 13 year old girl who died after a roller coaster ride. The suit claimed that the death resulted from the park's failure to have an AED and to provide proper emergency medical care. A jury returned a verdict of \$500,000 (reduced to \$350,000 based on a finding the mother was partially at fault).*

## Legal and Risk Management Issues (Continued)

"Duty" to properly maintain an AED and have an effective AED Management Program

### Ownership Risks:

*"The reality, however, is that there are few cases of either users or their employers being sued for using an AED or for administering an AED safety program improperly, says Lisa Berns, an attorney with the law firm Tueth, Keeney, Cooper Mohan & Jackstadt in St. Louis". – 2005*

*Richard Lazar, Esq. believes this second wave of litigation has only just begun. "More than **90 percent of AED deployments are probably flawed**. Comprehensive AED programs - not just AEDs - are required to reduce liability risks and improve the chances of saving lives".*

Richard Lazar, Esq. is the founder and CEO of AED Risk Insights, a Portland, Ore., company which provides risk management and legal information services related to AEDs. He also serves on the SCA Foundation Board of Directors.

*Philadelphia International Airport: A passenger died of a heart attack at the after two AEDs failed because the batteries were dead. - Lawsuit pending*

*Saint Louis International Airport: A SCA victim was less than 20 yards away from an AED when he collapsed from a sudden cardiac arrest on May 27, 2005. He was found by a maintenance worker, an employee of the city, who notified Southwest Airlines employees to call 911. The employees failed to use any of the AEDs in the terminal to treat the victim. - Attorney Matthew Casey, of Casey & Devoti said. "Essentially, if a business or a city undertakes a gratuitous activity, they have a duty to do it right. The city may not have a duty to get AEDs, but once they did, they had a duty to tell employees, train them and put proper signage up.*

*Madison v Ernest N. Morial Convention Center: A family brought a wrongful death suit against a convention center claiming an SCA victim's death was caused by the convention center's nurse failing to bring or timely call for an available AED. A jury found for the plaintiff and awarded \$800,000 in damages.*

*Rhode Island High School: A 14-year-old student at a Rhode Island high school died of sudden cardiac arrest during baseball practice because the only AED in the building was locked in the school nurse's office - 1/5 of a mile from the baseball field. This case caused schools across the state to begin buying defibrillators.*

*Cherry Creek Shopping Center: A Denver man is suing the Cherry Creek shopping center, alleging his daughter died because the mall's automatic defibrillators were not used to revive her after she collapsed while working at the American Eagle Outfitters store. Memorie Purser, 18, a model and a dancer, collapsed while working as a clerk. Purser had a heart condition - long Q-T syndrome - and had a pacemaker. She went into cardiac arrest at 4:44 p.m. and went into seizures. Following protocol, co-workers called the security office for help, as only the security guards had access to the five defibrillators that the mall had on the premises. "These are not open to the public, there are no signs," said Rollins. "They are hidden behind doors. The guards are the only ones who have keys to them."*

*A college basketball player died after suffering a cardiac arrest on the court. Emergency personnel who responded performed CPR but were unable to resuscitate him. A photograph that subsequently appeared in Sports Illustrated showed a team physician carrying an AED that was never used. The player's family filed suit against the college for failing to use the AED; the case was quickly settled for almost \$2.5 million.*

*Community School of Naples: A Collier Circuit judge ruled The Community School of Naples can't be held liable under the Good Samaritan law because access wasn't required to a defibrillator the nurse locked in her office on April 12, 2007, when 13-year-old George tried to save his father, Tony Hiller, 38. He died of a heart attack while playing basketball with a staff member at the North Naples school's field house. Hayes wasn't willing to set a legal precedent that would prompt fears of liability involving AEDs, which often can jump-start a heart if used within minutes after cardiac arrest. "We want businesses and public places to use AEDs," Hayes said, before dismissing Hiller's second lawsuit. "I think it's a dimension I don't want to go into."*

## Legal and Risk Management Issues (Continued)

### Colorado Statutes

#### Colorado Revised Statute § 13-21-108

*(1) Any person licensed as a physician and surgeon under the laws of the state of Colorado, or any other person, who in good faith renders emergency care or emergency assistance to a person not presently his patient without compensation at the place of an emergency or accident, including a health care institution as defined in section 13-64-202(3), shall not be liable for any civil damages for acts or omissions made in good faith as a result of the rendering of such emergency care or emergency assistance during the emergency, unless the acts or omissions were grossly negligent or willful and wanton. This section shall not apply to any person who renders such emergency care or emergency assistance to a patient he is otherwise obligated to cover.*

#### Colorado Revised Statute § 13-21-108.1, SB 09-010

*(1) The general assembly hereby declares that it is the intent of the general assembly to encourage the use of automated external defibrillators for the purpose of saving the lives of people in cardiac arrest.*

*(2) As used in this section, unless the context otherwise requires:*

*(a) "AED" or "defibrillator" means an automated external defibrillator that:*

*(I) Has received approval of its premarket notification filed pursuant to 21 U.S.C. § 360(k), from the federal food and drug administration;*

*(II) Is capable of recognizing the presence or absence of ventricular fibrillation or rapid ventricular tachycardia, and is capable of determining, without intervention by an operator, whether defibrillation should be performed; and*

*(III) Upon determining that defibrillation should be performed, automatically charges and requests delivery of an electrical impulse to an individual's heart.*

*(b) "Licensed physician" means a physician licensed to practice medicine in this state.*

*(3)(a) In order to ensure public health and safety, a person or entity who acquires an AED shall ensure that:*

*(I) Expected AED users receive training in cardiopulmonary resuscitation (CPR) and AED use through a course approved by the department of public health and environment;*

*(II) The defibrillator is maintained and tested according to the manufacturer's operational guidelines and that written records are maintained of this maintenance and testing;*

*(III) Written plans are in place concerning the placement of AED's, training of personnel, pre-planned coordination with the emergency medical services system, medical oversight, AED maintenance, identification of personnel authorized to use AED's, and reporting of AED utilization, which written plans have been reviewed and approved by a licensed physician; and*

*(IV) Any person who renders emergency care or treatment to a person in cardiac arrest by using an AED activates the emergency medical services system as soon as possible.*

*(b) Any person or entity that acquires an AED shall notify an agent of the applicable emergency communications or vehicle dispatch center of the existence, location, and type of AED.*

*(4)(a) Any person or entity whose primary duties do not include the provision of health care and who, in good faith and without compensation, renders emergency care or treatment by the use of an AED shall not be liable for any civil damages for acts or omissions made in good faith as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment, unless the acts or omissions were grossly negligent or willful and wanton.*

*(b) The limited immunity provided in paragraph (a) of this subsection (4) extends to*

## Colorado Statutes (Continued)

- (I) the licensed physician who reviewed and approved the written plans described in subparagraph (IV) of paragraph (a) of subsection (3) of this section;*
- (II) the person or entity who provides the CPR and AED site placement;*
- (III) Any person or entity that provides teaching or training programs for CPR to the site at which the AED is placed, which programs include training in the use of an AED; and*
- (IV) the person or entity responsible for the site where the AED is located.*
- (c) The limited immunity provided in this subsection (4) applies regardless of whether the requirements of subsection (3) of this section are met; except that the person or entity responsible for the site where the AED is located shall receive the limited immunity only if the requirements of subparagraph (II) of paragraph (a) of subsection (3) of this section are met.*
- (5) The requirements of subsection (3) of this section shall not apply to any individual using an AED during a medical emergency if that individual is acting as a good Samaritan under section 13-21-108.*

### Colorado Revised Statute § 22-1-125 “David’s Law”

- (1) The general assembly hereby declares that it is the intent of the general assembly to encourage school districts to acquire and maintain automated external defibrillators on public school grounds. The general assembly finds that it is in the best interest of students, staff, and visitors to a public school to ensure that automated external defibrillators are available in public schools for use in emergency situations.*
- (2) As used in this section, unless the context otherwise requires, "automated external defibrillator" shall have the same definition as provided in section 13-21-108.1 (2) (a), C.R.S.*
- (3) (a) Each school district is encouraged to acquire an automated external defibrillator for placement in each public school of the school district and in each athletic facility maintained by the school district at a location separate from a public school.*
  - (b) A school district shall accept a donation of an automated external defibrillator that meets standards established by the federal food and drug administration and is in compliance with the manufacturer's maintenance schedule. A school district shall also accept gifts, grants, and donations, including in-kind donations, designated for obtaining an automated external defibrillator, and for inspection, maintenance, and training in the use of an automated external defibrillator as required in subsection (5) of this section.*
  - (c) Any automated external defibrillator acquired by a school district shall be appropriate for use on children and adults.*
- (4) Use of an automated external defibrillator donated to or purchased by a school district is limited to school property and school events.*
- (5) To ensure public health and safety, a school district that acquires an automated external defibrillator shall meet the requirements set forth in section 13-21-108.1 (3), C.R.S., and shall reference the requirements of that section in the school district's crisis management policy pursuant to section 22-32-109.1 (4).*
- (6) Pursuant to section 13-21-108.1 (4), C.R.S., a person or entity whose primary duties do not include the provision of health care and who, in good faith and without compensation, renders emergency care or treatment by the use of an automated external defibrillator shall not be liable for any civil damages for acts or omissions made in good faith as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment, unless the acts or omissions are grossly negligent or willful and wanton.*
- (7) The requirements of subsection (5) of this section shall not apply to an individual using an automated external defibrillator during a medical emergency if that individual is acting as a good Samaritan under section 13-21-108, C.R.S.*

## AED Program Risk Factors:

### Risk Factor #1: General Maintenance of the AEDs

- Expired electrodes (2-5 years past expiration date)
- Dead batteries
- AED contained electrodes from another brand (Local FD)
- 3rd party electrodes (Local FD), not covered by manufacturer's indemnification or warranty.
- Pediatric electrodes outfitted with Non-pediatric compatible AED (Manufacturer's Service Agreement)

### Risk Factor #2: Records of Maintenance

- Rarely checked once a month as required by most manufacturer's guidelines
- Records are usually non-existent

### Risk Factor #3: CPR/AED certified personnel:

- AHA general rule of thumb is 5 **certified** personnel per AED.
- Aquatic , Fitness Centers & School RNs have this covered.
- City Hall, Event Centers, Golf Courses, Utilities, etc. rarely have **certified** personnel.
- CPR/AED Certification, much different than explaining to employees how the AED works.
- There are 4 nationally recognized programs: AHA, ARC, ASHI, NSC. They will always be approved by the Colorado Department of Health.

### Risk Factor #4: Placement of AEDs:

- Publically accessible Alarmed Cabinets vs. behind front desk
- Let the employees/public KNOW they are available.
- Locked Doors (reference RI school case)

### Risk Factor #5: Policies & Procedures:

- Rarely in place
- Can't find, not on file
- Not specific to AEDs

### Risk Factor #6: Dispatch Notification:

- Rarely done – usually the FD/EMS know, not the point of the statute

## **AED Program Implementation**

Risk management/Legal should get always get involved and educate the AED program manager, Safety, Security, and Purchasing.

Internal Programs: City/County EMS or FD (pitfalls), Aquatics Directors (Limited Authority & Oversight), etc...

3rd Party programs: AED programs are often delegated to Safety and/or Security. They then go to Purchasing (BIDS). If it does go to purchasing and out for bid, be sure the specifications are in line with Colorado Statutes and your requirements. (Example: "Medical Oversight")

## **Status of the AED Manufacturers**

### **SAVES**

- KHOW Radio's Dan Caplis (2009) Thanksgiving. Caplis representing client in Montana AED lawsuit, reason for owning AED.
- South Suburban Goodson Recreation Center (Jul-2009) 19 year old swimmer
- Boulder Bolder (May-2009) 2 runners revived with AEDs
- Wheat Ridge Community Center (Dec-2008) 16 year old WRHS Student
- City of Aurora - Springhill Golf Course (Jun-2008) 1 week after AED placed
- Stanley Lake High School (2008) 16 year old student
- Aurora Reservoir (2005) Park Rangers save fisherman
- Colorado State University (4 in past 5 years)
- Many, many others (SCHHI - 4 in 4 months)

## Richard Lazar, Esq.

*"Strategies available to manage AED program negligence liability risk depend on whether or not an organization chooses to deploy AEDs.*

*For organizations electing not to deploy AEDs, risk management relies on the expectation that a court will find an absence of legal duty. Given the growing awareness of AEDs and their benefits, and AED deployment trends in venues such as health clubs, office buildings, hotels, schools and the like, it is quite likely more courts will find that a legal duty does indeed exist in these venues and will impose liability on organizations that fail to deploy AEDs. Ultimately, this risk management strategy relies exclusively on factors outside the control of the organization. In contrast, a variety of risk management strategies are available to organizations that elect to implement AED programs. These strategies are controlled by the organization and include:*

**Program design:** *The best way to manage liability risk is to carefully design, implement, and operate the AED program in a "reasonable" manner.*

**Program certification:** *Becoming "certified" by a trusted third party can help minimize and share liability risk.*

**Manufacturers' indemnification:** *Some AED manufacturers offer liability indemnification to purchasers of their products. The types and scope of coverage vary – so read the fine print carefully.*

**Good Samaritan immunity:** *Good Samaritan immunity laws offer various levels of liability protection if they apply and if **all** conditions associated with the immunity are precisely followed.*

**Liability insurance:** *Liability insurance offers a contractual way to share liability risk with an insurance company. Be sure to carefully understand the scope of coverage, any conditions that apply, and the dollar limits of coverage.*

*Quantifying the precise liability risk associated with AED programs is not possible. However, legal trends – in terms of court cases, legislative activity and other safety related categories – strongly suggest that organizations that carefully design and implement AED programs lower their liability risks in comparison to similar organizations that choose not to do so."*