READINESS™
SYSTEMS

White Paper

CURRENT STATE OF U.S. AED LAWS

INCLUDING THE AED LAW REPORT CARD

2016 UPDATE

By: Richard A. Lazar

March 2016

Published by:
Readiness Systems, LLC
www.readisys.com

READINESS™
SYSTEMS

The Current State of U.S. AED Laws:
Risk and Uncertainty for Public Access Defibrillation Programs
2016 Update

The information contained in this white paper is not intended to be, does not constitute, and should not be relied upon as legal advice or services. Readiness Systems does not provide legal advice or legal services.

For more information about this white paper, please contact:

Readiness Systems, LLC
info@readisys.com

About Readiness Systems

Readiness Systems helps organizations properly set up and operate AED programs that are compliant and designed to save lives. The firm translates the complexities of AED program operations, standards of care and regulatory compliance requirements into understandable and actionable knowledge, tools, and policies that support life-saving efforts and reduce the risks of non-compliance. Readiness Systems can strengthen your AED program whether self-managed or co-managed with a third-party services company.

For more information about Readiness Systems, please visit www.readisys.com.

INTRODUCTION

Starting in the mid-1990s, legislatures throughout the U.S. began enacting AED-related laws, including Good Samaritan immunity laws, presumably with the intent that these laws would reduce liability risks and encourage more organizations and individuals to buy, place, and use AEDs in public settings. AED laws now exist in every state and vary widely in structure, content, complexity, and scope of coverage. The level of legislative activity in this area remains robust with continuous efforts to modify existing laws or add new ones. (AED Law Center™ subscribers receive regular updates when state AED laws change.)

The unfortunate reality is that many existing AED laws actually increase rather than decrease liability risks facing AED owners and users and act as a barrier to those organizations considering the purchase of AEDs. Further, these laws are misunderstood even by those in the AED industry. Indeed, persistent myths and misinformation about the true scope and presumed benefits of these laws can be found on many websites.

The goal of this white paper is to dispel many of the currently circulating AED law myths (e.g., statements suggesting that AED laws provide broad coverage for all AED program constituents for all activities) by providing a snapshot of the true current state of AED laws in the U.S. More importantly, this white paper represents a call to action for everyone involved in the public access defibrillation movement that improvements are needed if the goal of reduced sudden cardiac death rates is to be achieved. For a suggested path to a modern AED Good Samaritan immunity approach, see our companion white paper *Legislative Strategies for Modernizing U.S. AED Laws*.

MYTHS SURROUNDING AED LAW COVERAGE

Public policy goals associated with existing AED laws are not well-articulated in the statutes themselves or in the current literature surrounding AED public policy. Ostensibly, these laws were originally intended to reduce legal liability risks facing organizations deploying, and bystanders using, AEDs in non-medical settings. It is also widely perceived, and often stated in published materials, that the existing universe of AED laws offers broad liability protection to all AED program participants for all AED program activities.

In stark contrast to these widespread perceptions, most current AED laws **do not** protect all of the people and AED program activities that should be protected. The current structure of AED laws helps explain why.

AED laws address one or more of the following three subject areas. Not all states address all subject areas.

- **Administrative and Operational Requirements:** AED laws may impose various administrative and/or operational requirements on AED owners, users, and sometimes others. These requirements may include maintenance, training, medical direction, administrative reporting, and others. Not all states impose administrative and/or operational requirements and the scope of requirements varies widely in states that do. The consequences of non-compliance may include the loss of Good Samaritan immunity protection or, in very limited circumstances, the imposition of administrative sanctions by a state agency. Plaintiffs lawyers may also try to use evidence of non-compliance as proof of negligence in AED-related lawsuits.

- **Good Samaritan Immunity:** AED laws may describe Good Samaritan immunity protections potentially available in the event of AED-related litigation. The scope of immunity differs in each state in terms of who may be covered, the types of activities and conduct that may be protected, and whether immunity is conditioned upon compliance with specified administrative and/or operational requirements.

  Keep in mind that Good Samaritan immunity laws don't prevent lawsuits, but can make them easier to defend by protecting certain people for certain activities and certain levels of misconduct like negligence. Because many of these laws are poorly drafted, parties in AED lawsuits often fight about whether and how a particular Good Samaritan law may apply to a specific case. Contrary to common perceptions, the scope of AED-related Good Samaritan immunity protection potentially available is quite limited in most states.

- **AED Placement Mandates:** AED laws may mandate that certain types of locations have AEDs (e.g., health clubs, schools, etc.). There are a relatively small number of AED placement mandates in the U.S. As a result, most organizations voluntarily implement AED programs.

It is also important to keep in mind that AED laws are not the primary source of information about how an AED program should be properly set up and run (the so-called "standard of care"). Many factors determine what the standard of care is for a particular organization, few of which are included in AED laws. AED laws may influence how an AED program should be operated but mere compliance with AED laws does not ensure compliance with the standard of care. (*National AED Program Design Guidelines* that describe reasonable design and performance objectives for all AED program components are available from Readiness Systems.)

COMPREHENSIVE REVIEW OF STATE AED LAWS

Readiness Systems conducted an updated, comprehensive review of state AED laws as a follow-up to the 2013 survey. An overview of our findings is provided below. First, we present selected aggregate highlights of the current state of AED laws in the United States. Second, we present an updated and expanded AED Law Report Card™ assessing the quality of AED laws for each state and the District of Columbia. Full-text AED laws and state-specific AED Law Profiles™ can be found in the AED Law Center available from Readiness Systems.

Overall, AED laws were evaluated in relation to important public health and public policy considerations. Readiness Systems believes the primary objective of AED laws is to promote the public health goal of widespread public access AED placement and use. Doing so requires offering meaningful Good Samaritan immunity protection for all AED program participants and activities in a manner that omits inclusion of operational burdens.

While the public access defibrillation model emerged over 15 years ago, many organizations today remain reluctant to deploy AEDs because of legal liability risks and concerns. We therefore evaluated AED laws based on whether or not, in our judgment, they are structured to help mitigate liability risks in ways designed to encourage more organizations to implement AED programs.

Structurally, AED laws generally fall on a continuum between the following two diverse approaches:

- Highly controlling medical model: Laws favoring this approach generally contain burdensome operational requirements that are often difficult to understand, difficult to comply with, and typically not well-suited to public access AED response systems; and
- Open access "any-willing-rescuer" model: Laws favoring this approach generally contain few if any operational conditions, are easier to understand, and are easier to comply with.

In their current form, most AED laws incorporate AED program administrative and operational requirements, sometimes as conditions of immunity. This occurs despite the fact that no uniform standards exist defining a "reasonable" AED program. This is an issue currently left for courts to consider on a case-by-case basis. Yet, requirements embedded within AED laws impose mandatory "standards" and operational burdens on every AED program site regardless of size, scope, or unique characteristics. This unusual mix of often-conflicting legislation, and the unrealistic one-size-fits-all approach creates significant risk that AED law requirements will be viewed as establishing a "standard of care."

The inherent and growing risk of the current approach is that immunity protection will be lost because an organization is unable to understand what constitutes compliance, and thus fails to fully act in accordance with an AED law's terms. We believe the better approach is to simplify AED Good Samaritan laws by removing operational requirements and to address AED program issues through external guidelines not embedded within AED laws themselves.

It is clear from our review that efforts to use AED laws as a tool to design AED programs has led to significantly increased confusion and legal liability risk. Current laws vary in all 50 states, meaning in effect that program design and operating standards vary in all 50 states. Adding further to this confusion is the growing number of local laws that potentially conflict with state requirements. This AED law quagmire often makes it difficult for organizations potentially interested in deploying AEDs to implement AED programs since the implementation process frequently leads to increased confusion, burdens, and risk. The current state of U.S. AED laws also creates a situation in which it is nearly impossible

for AED owners and willing bystanders to know whether they have Good Samaritan immunity protection, and thus they might not buy AEDs, or retrieve and use publicly placed AEDs when called upon to do so.

Structure and clarity of AED laws are key evaluation factors in our assessment and grading process. Because we believe AED laws favoring a highly controlling medical model act as a deterrent to AED deployment, and actually increase rather than decrease liability risks facing AED programs, we grade these types of laws lower than those favoring an open access model. In our view, the best approach is to simplify AED laws to offer broad protection to all AED program constituents for all AED program activities.

SELECTED U.S. AED LAW HIGHLIGHTS AS OF MARCH 2016

Our research reveals a continuing worrisome state of existing U.S. AED laws. To understand the true nature of the problem, consider the following:

- **3 states (6%) do not appear to protect AED owners or those responsible for AED program sites, 16 states (31%) do not appear to offer immunity protection to AED program medical directors and 12 states (24%) do not appear to protect AED trainers:** All states appear to offer immunity protection to AED users, though 2 states appear to cover only trained AED users (assuming other requirements of the laws are met).
- **34 states (67%) appear to limit immunity protection only to AED use-related activities – other AED program design and operational activities are not protected:** Strikingly, 34 states appear to protect only AED use-related activities (the statutes in 8 other states are unclear on this issue). This means only the actions of AED responders occurring at the time of a sudden cardiac arrest event get immunity protection and only if they actually use an AED (and by extension, this limitation applies to site owners and managers). AED program decisions and actions taken in advance of an event are not protected. For example, decisions and actions regarding how many AEDs to buy, where to place them, who can use them, who is told about them, how people are trained, and others, are not protected. Only 9 states (18%) appear to clearly protect a broad range of AED program activities.

- **The laws in 12 states (24%) are unclear about what types of conduct may qualify for immunity protection – meaning no immunity protection is or may be available at all (plus 1 state that clearly offers no protection):** The AED law language in 12 states is so unclear that it will likely require court intervention to know whether at least ordinary negligence is protected – an essential baseline requirement for strong laws. Thirty-eight states (75%) do protect at least ordinary negligence for some AED program participants.
- **19 states (37%) appear to offer immunity protection only if statutory operational requirements contained in AED laws are met**, regardless of whether meeting or not meeting these requirements has any impact on a sudden cardiac arrest response or outcome.
- **When considering all AED law attributes, only 5 states (10%) offer meaningful Good Samaritan immunity protection because they:**
    - Cover all AED program constituents;
    - Cover a broad scope of operational activities;
    - Provide protection for at least ordinary negligence; and
    - Do not condition immunity protection upon compliance with any statutory operational conditions.

  [Data as of March 2016]

While well intentioned, current AED laws are not well crafted. As a result, significant gaps now exist in the scope of AED Good Samaritan immunity coverage.

GET YOUR STATE'S AED LAWS AND AED LAW PROFILE
Click Here to Subscribe to the AED Law Center

AED LAW REPORT CARD GRADING CRITERIA

The 2016 AED Law Report Card is offered to help organizations better understand the relative quality of applicable AED laws of the states in which they do business, and to help them balance compliance requirements with reasonable AED program design and operational considerations. AED Law Report Card grades for each state are based on assessments of the following four key AED law attributes.

People Who May Qualify for Immunity Protection

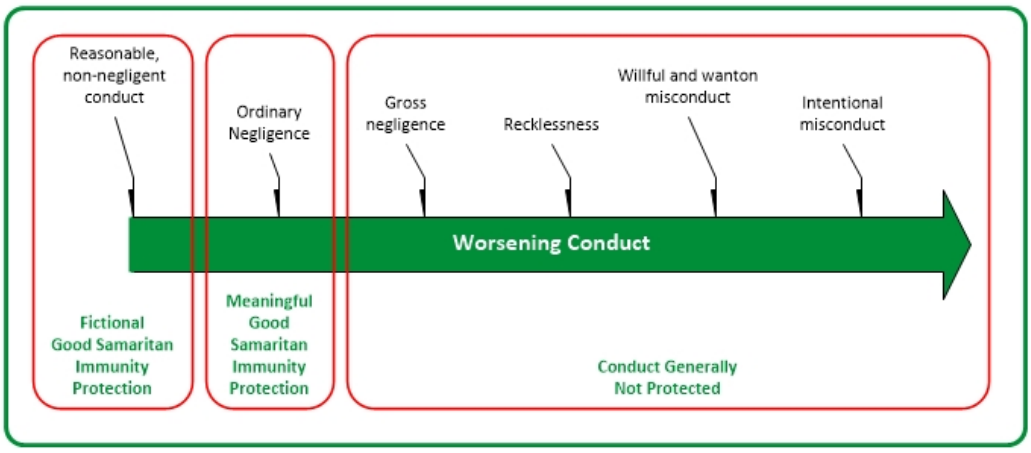
AED program constituents who may be covered by an AED law include (various laws sometimes use differing words to describe these constituents):

- People who own AEDs or are responsible for AED program sites
- AED users, which may include trained and/or untrained users
- AED trainers
- AED program medical directors

Not every law covers every constituent. States that cover all constituents are graded higher than those that do not.

Degree of Misconduct That May Qualify for Immunity Protection

The degree of misconduct found in the world of negligence law can be characterized along a continuum ranging from non-negligent conduct to intentional misconduct. This continuum is shown in the following chart (different states sometimes use different words but the concept is the same):



By definition, Good Samaritan laws make it more difficult to sue those involved with AED programs by protecting certain levels of misconduct from liability. The level of protection

varies from state to state. Meaningful immunity laws typically protect misconduct rising at least to the level of ordinary negligence. For example, a law may protect all but "acts of gross negligence or willful or wanton misconduct." Laws that protect negligent misconduct (or worse) offer a layer of risk management protection if all other attributes of the law are met.

> An example of ordinary negligence might be a bystander's failure to use an AED because a sudden cardiac arrest victim is wrongly perceived to have a pulse. An example of gross negligence might be the removal of an AED battery because a person nearby is bothered by the device's audible alerts signaling the battery is in need of replacement.

In contrast, some states may offer only "fictional" immunity that applies only to those who act "as an ordinary, reasonably prudent person would have acted under the same or similar circumstances." Thus, only reasonable – or non-negligent – conduct is protected in these states. Levels of misconduct, including ordinary negligence and beyond, are not protected at all. These types of laws create the perception that immunity protection is available, though in reality it is not.

The statutory language in a number of states is unclear creating uncertainty about the degree of misconduct that may qualify for immunity protection. In these states, it will take lawyers, juries, and judges to decide the scope of immunity coverage only after a lawsuit is filed.

States that clearly protect at least ordinary negligence are graded higher than those that offer only "fictional" immunity or are unclear.

AED Program Activities That May Qualify for Immunity Protection

Many activities take place within an AED program long before an AED is ever retrieved for use in an actual emergency. Examples include deciding how many AEDs to buy, putting AEDs in various placement locations, maintaining equipment, training, developing policies, and many more. Some of these activities will influence or impact how an organization responds during emergency events. Yet, most state AED laws appear to cover only actions associated with the use of an AED. Other preparatory or response activities do not appear

to be covered. This limitation currently creates the most significant legal liability risk for AED programs.

AED laws that cover a broad range of activities are graded higher than those that limit coverage only to the use of an AED or are unclear.

Operational Requirements Specified in AED Laws

Most state AED laws impose operational requirements on AED programs and their constituents. Types of requirements may include:

- Maintenance
- Agency notification
- Training
- Medical direction

Some states require compliance with these operational requirements as a condition of immunity and some do not.

Those states that do not include operational requirements are graded higher than those that do. And those laws that require operational compliance as a condition of immunity are graded lowest.

AED LAW REPORT CARD – 2016

READINESS SYSTEMS AED LAW REPORT CARD™ As of March 2016	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	District of Columbia	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas
SCOPE OF OPERATIONAL BURDENS None - Light - Moderate - Extensive	L	N	M	M	M	M	N	M	E	L	M	N	L	M	L	L	L
ELEMENTS OF GOOD SAMARITAN IMMUNITY PROTECTION Yes - No - Uncertain																	
All four AED program participant categories are included	Y	N	Y	Y	Y	Y	N	N	Y	N	Y	Y	N	Y	Y	N	Y
All AED program activities are protected	N	N	Y	N	N	N	Y	U	N	N	N	N	N	N	U	U	N
Conduct of at least ordinary negligence is protected	U	Y	Y	U	Y	Y	Y	U	U	Y	Y	Y	U	Y	Y	N	U
Immunity is conditioned on compliance with one or more operational requirements	N	N	N	N	Y	Y	N	N	N	Y	N	N	N	Y	Y	Y	Y
2016 OVERALL GRADE ASSESSMENT	D	C	B	D	D	C	B	D	F	D	C	C	D	D	D	F	F

READINESS SYSTEMS AED LAW REPORT CARD™ As of March 2016	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina
SCOPE OF OPERATIONAL BURDENS None - Light - Moderate - Extensive	M	M	N	E	M	N	L	M	M	E	L	L	L	M	E	E	N
ELEMENTS OF GOOD SAMARITAN IMMUNITY PROTECTION Yes - No - Uncertain																	
All four AED program participant categories are included	Y	Y	Y	N	N	Y	N	Y	Y	Y	N	N	N	Y	N	N	Y
All AED program activities are protected	N	U	Y	N	U	N	N	N	N	U	N	N	U	N	N	N	N
Conduct of at least ordinary negligence is protected	U	Y	Y	U	Y	Y	Y	U	Y	Y	Y	Y	Y	Y	Y	U	Y
Immunity is conditioned on compliance with one or more operational requirements	N	N	N	Y	N	N	N	Y	N	Y	N	Y	N	Y	Y	N	N
OVERALL GRADE ASSESSMENT (2016)	F	C	A	F	C	B	F	F	C	F	F	D	C	C	F	F	B

READINESS SYSTEMS AED LAW REPORT CARD™ As of March 2016	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
SCOPE OF OPERATIONAL BURDENS None - Light - Moderate - Extensive	M	L	L	N	L	N	M	N	E	M	L	L	N	M	E	L	M
ELEMENTS OF GOOD SAMARITAN IMMUNITY PROTECTION Yes - No - Uncertain																	
All four AED program participant categories are included	Y	Y	Y	Y	N	Y	Y	N	N	Y	Y	N	Y	Y	Y	N	Y
All AED program activities are protected	N	Y	N	Y	U	N	N	N	Y	Y	Y	Y	N	N	N	N	N
Conduct of at least ordinary negligence is protected	U	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	U	Y	Y	Y	Y
Immunity is conditioned on compliance with one or more operational requirements	N	N	N	N	Y	N	Y	N	Y	Y	N	N	N	N	Y	Y	N
OVERALL GRADE ASSESSMENT (2016)	D	A	B	A	D	F	C	F	F	B	A	B	C	C	D	C	C

NEXT STEPS FOR PROGRESS IN 2016 AND BEYOND

In contrast to their perceived purpose, most existing U.S. AED laws actually create confusion and liability risk rather than establishing meaningful protection. AED legislation can and should be used as a tool to promote widespread AED deployment and use. This objective can only be achieved, however, if the current approach to AED public policy is radically altered. Creating AED laws that serve as a true safety net, permit and empower large-scale AED deployment, and encourage all willing persons to act as citizen AED responders will go a long way toward increasing the chances of survival for sudden cardiac arrest victims.

Broad changes in legislative philosophy and approach are needed if Good Samaritan immunity is truly to be used as a tool to promote the public health goal of widespread public access AED deployment. Specifically, we believe the following objectives must be achieved before AED public policy can truly drive and support public access defibrillation public health goals:

- Simplify state AED laws by clearly covering all AED program participants and activities, and removing operational burdens imposed on AED programs, especially those requirements that must be met as conditions of immunity.
- Enable state laws, to the extent they continue to serve as the primary source of AED Good Samaritan immunity, to preempt local laws in order to eliminate legislative conflicts and fragmentation that are now emerging.
- Pursue a federal AED Good Samaritan law that preempts state laws in order to create uniformity and consistency throughout the United States.
- Address AED program design, administration, and operational components through external guidelines rather than embedding these types of requirements in AED laws themselves.

We hope this information will provide policymakers and thought leaders with the data necessary to better structure AED laws in ways that meaningfully protect all AED program participants and truly promote widespread AED deployment. This, in turn, will ultimately lead to increased sudden cardiac arrest survival rates.

IT'S NOT ABOUT THE LAWS

AED laws and their perceived meaning and impact are much written and talked about in and around the public access defibrillation community. It is true that the current generation of AED laws are complicated and confusing. But, to put this issue in perspective, AED laws are often overemphasized in importance and have little to do with how an organization responds to a sudden cardiac arrest emergency and whether victims are given a meaningful chance at survival. Rather, the people and organizations who buy AEDs, place them in non-medical settings, operate AED programs on a day-to-day basis, and do their best to help save the lives of sudden cardiac arrest victims are the things that matter. Organizations are typically better off focusing their energies on designing AED programs that fit their needs and striving for AED program operational excellence rather than worrying about the laws and the lawyers. In a nutshell, it's about the AED program, not the laws.

ABOUT THE AUTHOR

Richard A. Lazar is the founder and President of Readiness Systems. Richard has been at the forefront of AED program operations, risk management, legal, and public policy issues for the past 25+ years. He has served as a public speaker, AED program operations and risk management consultant, and expert witness to a variety of clients nationwide. Richard is often quoted as an expert on operational, risk management and legal matters surrounding AEDs and has authored numerous articles appearing in a variety of publications. Richard's deep understanding of AED program operations and risk management has led him to testify before the U.S. Congress (Sudden Cardiac Arrest Survival Act), FDA (AED over the counter and classification issues), and state legislatures (AED public policy issues and immunity laws).

Richard has a law degree from Lewis & Clark School of Law (Cornelius Honor Society) and a Bachelor of Science degree in Public Affairs from the University of Oregon.

