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First-Aid Training?

Won't That Increase My Organization's Legal Liability Risk?

By Alexander "Sandie" Pendleton of KMK

A reader of this website recently raised the following question:

Suppose a recreational business is trying to decide whether it should institute a new policy, requiring its employees to receive first-aid training. The worry or concern the business has, however, is that if it arranges for such training, and one of its employees then provides first aid unsuccessfully or inadequately, is that going to result in the business getting sued, alleging that it's liable because its employee messed up? If it institutes the new policy, won't that increase its legal liability risk?

As with many before-the-fact legal questions, the answer unfortunately is "it depends." While we cannot give a full answer to this question without knowing additional information about the specific business and its operations, here are some suggestions about how it might want to go about making its decision.

For purposes of our discussion, let's consider a hypothetical situation where a Wisconsin business organizes guided mountain bike trips in remote areas, and **does not require** its guides to have any first-aid training. Let's assume, too, that a cyclist is injured on a trip, and because of inadequate first aid provided by a tour guide, the cyclist later has to have his leg amputated. The cyclist sues the business, claiming that the business and the guide are liable to him, due to the negligence of the business and its guide. The laws of the different states vary, but because our hypothetical accident occurs in Wisconsin, we'll assume for purposes of our discussion that Wisconsin law applies.

One would need first to consider the common law of negligence. In Wisconsin, a person is negligent when he or she fails to exercise "ordinary care," which is defined as "the care which a reasonable person would use in similar circumstances." So, for instance, in our hypothetical situation, to attempt to establish that the business was negligent, the injured cyclist's counsel might retain an expert in the bike tour industry, who opines that industry trade associations recommend that bike tour guides have first-aid training, and/or that most businesses in the industry require their guides to have first-aid training, and that because of

this, it was negligent on the part of the Wisconsin business not to require its guides to have first-aid training.

Let's next give consideration to the opposite scenario (one in which a business requires all of its guides to have first-aid training). In that setting, one would need to give consideration to the doctrine of *respondeat superior* (the doctrine relating to the circumstances in which an employer or other principal will be held liable for the careless or wrongful actions of its employees or agents). Under this doctrine, even if the business in the above "bike tour" scenario required all of its guides to have first-aid training, if one of the business' guides negligently provides first aid, and that negligence was a cause of the person's injuries (or made them worse), the business could be held responsible for that guide's negligence.

Many businesses view this as "damned if you do, damned if you don't," and find that aspect of the law frustrating. Such is one reason why it is prudent for businesses, no matter how well run, to have a well-thought-out insurance program.

Further, after considering whether a business can be considered negligent and therefore potentially liable (either for its own acts, or the acts of its employees), one would next need to consider the key statutory exemptions to common law negligence in Wisconsin. The main immunity statute in Wisconsin when it comes to emergency aid is the "Good Samaritan Law" (Wis. Stat. § 895.48(1)). Generally, under that law, a lay person who in good faith provides emergency care at the scene of an emergency or accident is immune from civil liability for the care provided. Currently, all states have some form of Good Samaritan Law, but the terms and protections of such statutes vary. One would also want to consider key decisions under the Wisconsin Good Samaritan Law, in particular cases like *Mueller v. McMillian Warner Insurance Company*, a 2006 Wisconsin Supreme Court case involving the scope of the protection provided by that law, in a situation where allegedly inadequate emergency first aid was provided to an injured ATV passenger.¹

Bottom line, a recreational business that is considering whether it should or should not require its employees to be trained in first aid, should at a minimum consider these three questions:

1. Is there a statute that requires the business to have employees who have first-aid training?² (If yes, the business should ensure employees have the training.)

¹ In Wisconsin, there are also "specialized" immunity laws (similar to Good Samaritan Laws) that provide protections to persons who use an Automated External Defibrillator ("AED"), and to members of the National Ski Patrol (currently, that law does not provide protection to members of comparable outdoor aid organizations such as the National Mountain Bike Patrol). Depending on the circumstances involved in a business' operations in Wisconsin, a business would also want to give consideration to the Wisconsin Recreational Use Statute ("RUS"), another potentially powerful specialized immunity statute for many recreational businesses. A full discussion of the RUS, its application in emergency medical situations, and using the RUS to plan operations so as to reduce a business' legal liability risk, is beyond the scope of this article. Many other states have their own versions of such specialized immunity laws.

² Recreational businesses covered by OSHA regulations, which businesses operate in rural or wilderness areas, should give attention to 29 CFR 1910.151, an OSHA regulation requiring trained first-aid providers at all workplaces of any size if there is "no infirmary, clinic or hospital in near proximity to the workplace."

2. What are other businesses in the industry doing – is it a standard or a recommended practice in the relevant industry for businesses to require their employees to have first-aid training? (If yes, the business should probably do likewise.)
3. Does common sense suggest that it would be prudent for the business to have employees who have first-aid training? (If yes, the business should ensure that relevant employees have training.)

It can be difficult for a lawyer to predict before an accident occurs whether a potential course of action will or will not increase a particular business' risk of liability. Even when an accident occurs, a business' liability or potential liability can only be assessed after all relevant facts have been collected, and the relevant laws, regulations and case law reviewed. Even then—because conflicting testimony often exists, or because different jurors may view the same testimony or evidence differently, and because gray areas exist in the law—what a jury will conclude in a particular case can be difficult to predict. If we at KMK can be of assistance to your organization regarding the above or other legal issues, contact us.

(The information and views discussed in this article are for general information purposes only, and should not be attributed to any client of KMK. An organization that has specific questions as to the effect the above referenced laws or cases should discuss such with its attorney, or with an attorney who is familiar with this area of the law and the organization's specific operations or concerns. All businesses and organizations involved in recreational activities in Wisconsin should consult with an attorney to determine whether their operations or ownership structure should be modified, so as to increase the chances that they are protected by the Wisconsin Recreational Use Statute.)

About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Kohner, Mann & Kailas, S.C., and is the leader of the firm's Sports, Fitness and Recreational (S/F/R) Team. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues. To learn more about Sandie and the KMK S/F/R Team, visit www.releaselaw.com.

About Kohner, Mann & Kailas, S.C.: At Kohner, Mann & Kailas, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. If you would like to explore whether we can help your organization achieve its mission, contact us. Founded in 1937, KMK provides legal expertise across the numerous areas of law encountered by businesses in the normal course of their day-to-day operations and growth. In addition to our S/F/R services, our services range from high-profile appellate representation and international business issues, to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and effectively.

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