

Feature Article

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The Danger of Security Manuals: How to Prevent Liability Instead of Create It

One weekend three people are shot in a restaurant parking lot. One person is dead and the others are severely injured. Within days, a lawsuit is filed and the restaurant is made a respondent in discovery. The first thing that the plaintiffs want is the security manual. Will the manual prevent liability or create it?

A written policy or procedure may be open to broad interpretation during civil litigation. A security manual, however, can be risky because opposing counsel will try to use it to create a duty of care against a company defendant. The plaintiff's attorney will argue that if every word of the security manual is not followed, the defendant's employees breached a duty. In other words, a poorly drafted manual may create a duty of care on a company that did not previously exist. Even when a court refuses

manuals can be used against a company rather than as a tool to keep the company safe. It also provides practical tips for drafting security manuals that will provide optimal protection for employees, customers, and the company. Finally, the article discusses how security manuals can be used in civil litigation.

Liability Created by Security Manuals

The two scenarios below explain some ways that a security manual can be used against a company.

Scenario #1

A drugstore chain develops a "crisis handbook" and gives one to each store for use in emergencies like fire, rob-

bery, or power outages, among others. Company policy requires that every manager be trained on the procedures in the handbook and know how and when to use them. Company policy also directs that these trained employees sign a form

showing that they received training. The form is kept in each employee's personnel file. A few years after the handbook goes into effect, a gang shooting takes place in one of the store's parking lot. The store manager never refers to the crisis handbook because there was no emergency inside the store. By the time the store employees learn of the shooting, the incident is over. Just minutes before the shooting, however, the victim and the shooter were store customers.

A few months later, the victim sues the store alleging that its security was insufficient and that the criminal attack was reasonably foreseeable based on previous crime in the area. During discovery, the plaintiff requests all of the store's security manuals.

Once the handbook is produced, the plaintiff's attorney studies every word of it. Not only does the handbook address what to do in case of certain emergencies, it also includes sections about looking for signs of potential violence. It also lists preventive measures the store should take when there are signs of gang activity. These sections require that the store managers be aware of loitering and other activity in the area and to notify

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to allow such manuals to create a duty of care, compliance with such manuals and policies may be admissible to assist the trier of fact in determining *whether* a legal duty has been breached.

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the corporate security department if any signs of gangs or violence are noticed in or near the store.

During his deposition, the store manager testifies that he was aware of the handbook, but, that he had no knowledge of the sections that addressed preventive measures and potential signs of gangs or violence. He also testifies that he was not trained on the specifics of the handbook. He thought the handbook was only meant for emergency situations and would never look at it unless there was an emergency in progress. The company cannot produce the form proving that the manager was properly trained, when he was trained, and by whom. In this scenario, the store's handbook created its own crisis. The plaintiff argues that the preventive measures in the handbook could have prevented the incident but those measures were not instituted by the store and the store manager was not aware the recommendations existed in the handbook. Such testimony supports the plaintiff's negligent undertaking of security claim.

Scenario #2

A corporation with hundreds of franchised gas station locations around the country has a corporate security department and manual aimed at protecting employees. The manual establishes mandatory security procedures. The corporation's security department monitors and enforces compliance with the security procedures by performing inspections at each location several times a year. Warnings and fines are imposed on the franchised locations when they do not comply with the procedures.

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pliance program are implemented, an employee arrives to work late one night and is robbed and killed before he can get inside. The employee's estate sues the franchisor corporation, alleging negligence. The corporation argues that it did not own, operate, or control the gas station. It also argues that it did not hire, fire, or train the employees.

The plaintiff's attorney obtains a copy of the security manual and procedures during discovery and learns about the franchisor corporation's involvement in security at the gas station. The plaintiff contends that a corporate representative visits the gas station several times a year and speaks with management about the manual and safety compliance. Therefore, counsel argues that the franchisor corporation voluntarily assumes a duty of protection over the employees as a result of the security department and the manual.

The court agrees with the plaintiff's position and determines that because the franchisor corporation provides such detailed and thorough security procedures for the employees, the duty is assumed by the corporation. The court also determines that the corporation had the duty to ensure that the manual was followed and complied with by the employees. As such, the franchisor corporation could be held liable for the employees' failure to comply with the strict security policies in the manual.

In this scenario, the franchisor corporation set out to protect its franchisees and their employees, but because of the way the policies were drafted and the amount of control retained by the corporation, it failed to protect itself from liability.

Legal Implications: Security Manuals as Evidence

If the plaintiff's attorney believes that a security manual can be used against the defendant at trial, the plaintiff's counsel will go to great lengths to put it in front of a jury. The most powerful argument is that the manual created a duty of care, an employee did not comply with the manual, and therefore, the defendant breached its duty and was negligent. This argument is the primary reason that companies must ensure that their manuals are properly written.

For decades, Illinois courts have rejected the plaintiffs' attempts to create legal duties from the defendants' internal policies or guidelines by holding that such policies do not have the force of law. *Fichtel v. Bd. of Directors of the River Shore of Naperville Condo. Assoc.*, 389 Ill. App. 3d 951, 959-960 (2nd Dist. 2009); *Shank v. Fields*, 373 Ill. App. 3d 290, 296 (4th Dist. 2007); *Bulger v. Chicago Transit Auth.*, 345 Ill. App. 3d 103, 119-120 (1st Dist. 2003); *Rhodes v. Illinois Central*

Gulf R.R., 172 Ill. 2d 213, 238-39 (1996); *Blankenship v. Peoria Park Dist.*, 269 Ill. App. 3d 416, 422 (3rd Dist. 1994); *Fillpot v. Midway Airlines, Inc.*, 261 Ill. App. 3d 237, 244 (4th Dist. 1994)).

In *Rhodes*, the decedent was found asleep and intoxicated in the warming house of a commuter train system by train employees but did not receive assistance for several hours and later died. *Rhodes*, 172 Ill. 2d 213. The plaintiff argued that the railroad's internal policy to provide immediate assistance to anyone found injured in a warming house created a legal duty of care. *Id.* at 238. The Illinois Supreme Court rejected this argument holding that "whether a legal duty exists is a question of law and is determined by reference to whether the parties stood in such a relationship to each other that the law imposes an obligation on one to act for the protection of the other." *Id.* at 237-238. The court went on to note that "where the law does not impose a duty, one will not generally be created by a defendant's

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rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required." *Id.*

In *Fillpot*, a passenger sued for injuries suffered after slipping and falling on ice and snow while exiting a plane and walking on the tarmac to the terminal. *Fillpot*, 261 Ill. App. 3d at 237.

The airline's policy manual indicated that salt should be kept near the gate to keep walkways clear. *Id.* at 244. The plaintiff alleged that the manual created a legal duty to have salt at the gate. The court refused to impose such a duty and noted that the plaintiff had no knowledge of the manual before her accident and did not rely on its contents. *Id.* at 244.

Despite these rulings there is no guarantee that an internal manual will be barred completely. In *Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487 (1st Dist. 1991), an employee's representative sued the franchisor after the employee was killed at work. The primary evidence used against the defendant to determine the existence of a duty of care was the company security manual. In *Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill. App. 3d 533 (1st Dist. 2000), a wrongful death action was brought against a medical clinic. The court held that "when considering the standard of care to which a clinic should be held, the clinic's internal policies and procedures are an appropriate source of evidence, and the failure of a clinic to follow its policies can be evidence of a breach of the clinic's duty to a patient." *Adams*, 315 Ill. App. 3d at 548.

Even when the plaintiff is barred from using a manual against the defendant to prove negligence directly, the plaintiff's attorneys will look for another avenue to introduce the manual to the jury. Unfortunately for the defense, this is often allowed. Judges often allow experts and witnesses to discuss manuals and specific policies. The judge generally will not allow the specific claims related to the manual to be placed in the jury instructions. From the defense perspective, this distinction is irrelevant.

As many defense attorneys know, some manuals are so detrimental to the defense that the jury's mere viewing of the manual causes great concern, and may result in a quick settlement. Even if the jury is instructed that a manual does not have the force of law, the jury viewing that manual and determining that an employee did not comply with it, can harm a defense.

Practical Tips for Security Manual Content

These examples demonstrate how security manuals can create problems and liability. It is up to retailers, restaurants, hotels, and businesses open to the public, and their attorneys, to ensure this does not happen and that their security manual is not used against them. There are a number of practical tips that can help ensure that a security manual does not become a liability.

First, before writing or revising a manual, a business should determine the manual's intent and purpose. Keep the focus narrow and only include information that is directly related to the manual's specific intent and purpose. As in Scenario #1, if the intent is to have a crisis handbook, keep the focus on proper responses when faced with a crisis. Do not include information about how to prevent the crisis because that alters the handbook's intent.

Second, keep it simple. If there are too many procedures, too many requirements, or too many details, it is less likely that employees will follow the policies. This increases the chances of a manual becoming a liability.

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Third, pay attention to who contributes to drafting the security manual. Several people from all departments within the organization should be involved in the drafting. This includes people in the corporate office who decide policy, managers who will train others on the manual, and those working on site and in the field who must follow the policy requirements. People from all of these departments within a company can provide invaluable information to make a manual more useful and user friendly.

Finally, it is crucial to involve both in-house counsel and outside defense litigation counsel in the preparation of a manual. Not only is it important to ensure that the wording is correct, but also that the procedures are not stricter than what is required by law. Frequently, authors get carried away with guidelines in an attempt to create a safer environment. If a manual requires more than what the law requires and the manual is shown to a jury, the jury may hold that business to the heightened standard that the manual created and not the *legal* standard. This may be disastrous to the defense.

In addition, a security manual should not be finalized until defense litigation counsel has reviewed it. Defense litigation counsel must defend the manual in times of trouble and is often best at identifying problematic sections. It is always better to have those conversations before a manual is

finalized than later, when the company faces a lawsuit.

Once the manual is drafted, the final step is training. Not only must training be completed, but it must be documented. As with the proverbial falling tree in the forest, if you cannot prove that the training happened, did it really happen? On the flip side, if no one is properly trained on a new manual, what is the point in drafting it?

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he or she claims never to have heard of or seen the manual, a document with his or her signature, a date, the type of training received, and the name of the trainer is crucial.

Once the employees are trained and the manual is released, the process is not over. As a manual is used, it is important that training continue for all future hires

and promotions. As long as a manual is in existence, there will always be new employees; so training must be ongoing. Whenever possible, defense litigation counsel should be involved in the training process as well, even if only to help develop the training protocol. This will ensure that the proper information is given and can minimize the chance that training materials can be used against the company in court.

Conclusion

Security is an important issue that every retailer, restaurant, hotel, and business open to the public must address. For most companies, having a manual that solely addresses security issues is a must. As such, every company needs to ensure that its manual is an asset and not a liability. Defense litigation counsel plays a major part in that analysis and must help their clients create manuals

that do not cause more harm than good. Security manuals should be well written and well executed. Indeed, the ability to defend one wrongful death lawsuit with a well-written and well-executed security manual makes the hard work that goes into drafting the manual and training the employees worth the time and the expense.