



A White Paper

Assessing E911 Liability Risk



Executive Summary

Many states throughout the U.S. have passed Enhanced 911 (E911) legislation to better protect American workers in emergency situations. As a result, enterprises are now being tasked with implementing a reliable solution that complies with the legislation. Failure to provide E911 protection to employees could result in regulatory fines, and more significantly, expose the enterprise to large damages from civil and criminal litigation. The purpose of this white paper is to provide a comprehensive overview of the legal liability that enterprises may face and provide a baseline understanding of E911 as a technology. The authors of this white paper would like to thank Seyfarth Shaw At Work for its suggestions, direction, encouragement and editing assistance. Seyfarth Shaw At Work is a training subsidiary of Seyfarth Shaw, LLP. Headquartered in Chicago, Illinois Seyfarth Shaw is one of the nation's leading law firms, specializing in workplace safety compliance. Also headquartered in Chicago, RedSky Technologies is the leader in automated E911 solutions for the enterprise with more than 200 Fortune 1000 and public sector clients.

Background on E911

Enhanced 911 or E911 enables the 911 dispatcher to automatically pinpoint the exact location of a caller in a building, even without the caller speaking. In emergency situations, like a fire or heart attack, improving emergency response time can be the difference between life and death.

E911 legislation was first passed in Illinois in 1997 in direct response to a high-rise fire that took the life of Ms. Nancy Clay, a marketing director for a Chicago company. Ms. Clay was working late in her office at One Illinois Center in downtown Chicago when a fire broke out on her floor. Although she dialed 911 multiple times from various phones on the floor, in attempts to avoid the fire and smoke, emergency dispatchers were not able to locate the correct building or floor. It took emergency responders 90 minutes to locate her within the high-rise facility and by that time, it was too late. Ms. Clay ultimately perished in the fire.

Situations like this are common in high-rise buildings, campus environments or sprawling corporate facilities. Most employees assume that if they dial 911, the emergency dispatcher knows their location, just like dialing 911 from their home telephone. Unfortunately, this is a false assumption.

When 911 is dialed from a residence, the telephone number is matched with the street address or billing address so the 911 dispatcher knows the exact location. If 911 is dialed from a multi-line telephone system, typically used by businesses, and E911 is not enabled, the 911 dispatcher will see only the corporate billing address, which may not be the building location of the emergency. Without E911, dispatchers do not have details like the floor and room to assist them in locating the caller. The burden is placed on the employee or visitor to communicate their exact building, floor and room location from where they're calling, which could be difficult if the caller is disoriented or unfamiliar with their surroundings. This situation leaves open many questions regarding responsibility, liability and risk as it relates to workplace safety.



It is estimated that over 50 million Americans go to work each day in high rises and office complexes and are not protected with Enhanced 911 calling capabilities⁵. E911 software solutions are now readily available for multi-line telephone systems and these solutions maintain detailed location records for every phone in every building. Prudent planning requires that corporations assess their current risk profile regarding E911.

E911 State Legislation Overview

As of November 2005, 13 states have E911 statutes⁶. The statutes vary from loosely defined to those that are very definitive in the size and scope of their requirements. In their proposed model legislation to the FCC, the National Emergency Number Association requires that an enterprise facility larger than 7,000 square feet implement E911. Some states, like Minnesota have incorporated the 7,000 square foot requirement into their law. Many other state laws also require enterprises that occupy multiple floors of a building to identify each of those floors as separate locations regardless of the square footage. Most state laws specifically address shared living facilities and nursing homes as requiring E911, as well as those environments in which a building owner or landlord provide telecommunications services to multiple tenants in a building. The most recent laws that were passed require location identification down to the desktop for all new phone systems installed after a certain date regardless of facility size.

The state of Minnesota, one of the more recent states to adopt legislation, requires all new phone systems to have E911 for facilities larger than 7,000 square feet. The statute also requires owners/operators of shared residential facilities including nursing homes to incorporate E911 into their existing phone systems. In addition to the technical requirement for E911, all businesses in Minnesota must educate phone users exactly how to dial 911 from their phone. According to the Association of Public Safety Communications Officials, "the (education) provision will begin to assure that every Minnesotan who goes to work or school will receive the information that they need to know how to dial 911 from their location."⁷

Other states like Florida and Louisiana that have recently adopted E911 laws require the phone system to be capable of identifying a caller down to the station level. The FCC is currently reviewing comments and proposed legislation from the National Emergency Number Association and other 911 industry leaders in regard to implementing a national requirement for E911 on multi-line telephone systems. See Appendix A for a summary of state E911 legislation.

State By State Compliance

Many corporate legal counsels and risk managers are contemplating what level of compliance is required for their corporation to meet existing regulations and to mitigate any liability risk. Some are also contemplating liability risk for insufficient 911 calling capabilities regardless of legislation mandating E911 compliance.

⁵ Estimated from U.S. Department of Labor statistics.

⁶ States with E911 legislation include AK, CO, CT, FL, IL, KY, LA, ME, MN, MS, TX, VT & WA

⁷ Visit www.apointnl.org for more information or for local contacts.



Enterprises must interpret the legislation in each state where they have facilities and institute a policy on whether or not the enterprise should comply with the existing law. Enterprises that have locations spanning multiple states with and without E911 legislation have other considerations when deciding on E911 including:

- Should I implement E911 for my entire company or only in states with legislation?
- If I choose to implement E911 in only those states with legislation, what is the legal risk of not treating all employees equally?
- Should I standardize my level of compliance across my facilities even though the state requirements may be different?
- Should I implement a strict level of compliance in anticipation of a federal mandate?

Our research has indicated that a jury could investigate what a reasonable person would do when faced with the question of what a reasonable person should've done under certain circumstances to protect workers or building occupants, given the cost effective solutions available today. If an organization doesn't take reasonable actions to ensure effective 911 calling capabilities, then it could be potentially liable for negligence regardless of whether an E911 law is in place⁸.

The remainder of this white paper addresses a series of compliance, liability and risk issues, and discusses each individually.

Scoping the Risks

- Workplace Safety
- Regulatory Penalties
- Liability Considerations
- Workers Compensation Exceptions
 - Negligence
 - Personal Animus
 - Alternative Work Arrangements

Workplace Safety Considerations

Telecommunications service, specifically 911 calling, is expected for every employee, and all employees should be treated equally when it comes to this "corporate service." It could be argued that undue delay in emergency response due to lack of appropriate 911 calling and emergency response capabilities does not arise out of a person's employment, but from overall workplace safety governed by the corporation.

According to the National Institute for Occupational Safety and Health, in 2001, 677 workplace homicides (not counting 9/11) occurred, and about 1 million more workers became victims of non-fatal workplace violence. An employer certainly does not want a circumstance to arise where a person loses his/her life due to the delay of emergency response. Aside from workplace violence, there are countless situations where emergency response time becomes critical to the survival of a person when injured

⁸ Gross negligence or intentionally engaging in conduct that puts employees at risk have been vehicles utilized by the employee or their family as a means to recover exemplary damages and launch civil action against the employer.



accidentally or when afflicted with a sudden severe illness or attack. The American Heart Association estimates a victim's chance of survival after cardiac arrest is reduced by 7 to 10 percent with every minute that passes without treatment. Few resuscitation attempts succeed after 10 minutes have elapsed⁹.

Clearly, when combining the numbers of victims of workplace violence with the thousands of workers who suffer accidents or become gravely ill at work, one realizes that effective emergency response must be a high priority in the workplace.

Regulatory Penalties and Liability Considerations

Non-compliance to a statutory requirement could be construed as a violation of the Occupational Safety and Health Act.

Regulatory Penalties:

Of the 13 states that have E911 statutes, two have monetary fines for non-compliance. Enforcement varies from state to state, with minimal enforcement the present rule. Some statutes skirt the issue and leave it up to individual businesses to determine their level of liability if they don't comply.

There is a possibility that OSHA may penalize an employer for failing to implement E911. Although it hasn't been addressed as of yet, OSHA may find an employer violates Section 5(a)(1) of the Occupational Safety and Health Act, also known as the General Duty Clause, which requires employers to furnish a workplace which is free from recognized hazards which may cause or are likely to cause death or serious physical harm. OSHA may also reject an employer's emergency action plan if E911 is not included. Penalties for violating OSHA can run from \$7,000 to \$70,000 per day per employee.

Many states may impose penalties on employers for failure to comply with statutory safety regulations. For example, in Connecticut a worker shall be compensated at the rate of 75% when his injury or illness is caused by the employer's violation of a safety regulation after such violation has been cited and not abated in the time fixed by the citation. Minnesota state law requires its worker safety agency to impose a \$25,000 non-negotiable fine on employers when a serious safety violation results in a worker's death. If willful in nature the penalty increases to \$50,000. Penalties are also given for serious and willful misconduct of the employer or supervisory personnel.

E911 would be considered a safety regulation in such cases. Cases have shown that violation of a safety regulation is one of the more reliable foundations for a charge of serious and willful misconduct.

Liability Considerations:

Regardless of the type and amount of regulatory penalties for inaction on E911, the larger question is to what extent an employer can be liable through common law action for failure to implement E911.

Intentional disregard of statutory requirements could lead to regulatory fines as discussed above. However, a company could find itself faced with serious common-law liability in the event of a workplace injury or death. Consider how a plaintiff's attorney would react to a situation where an employee's injury was exacerbated by a delay in emergency

⁹For more information see the American Heart Association www.americanheart.org



response because of a failure to implement a mandated and reasonable workplace safety measure like E911.

Generally, an employer is shielded against common law negligence actions and exorbitant damages when an injury to an employee occurs at work. Workers compensation provides the exclusive remedy. Corporations may assume that a failure to implement E911, and resulting injuries based on an employer's failure, would not pose much of a monetary risk due to workers compensation insurance. That is not necessarily the case. There are many exceptions to workers compensation exclusivity, including personal animus, gross negligence or intentional injuries, and alternative work arrangements that a plaintiff can pursue.

Workers' Compensation Exceptions

Nearly 10% of all workers are not covered by workers' compensation.

Workers compensation protection only applies when an injury arises out of and in the course of employment. Generally, courts have interpreted "arising out of and in the course of employment" to cover most injuries that occur at the work place. However, there are significant exceptions to the exclusivity of workers compensation.

It is a common occurrence in large enterprises for emergency responders to arrive in the lobby of a building in response to a 911 call. Many times the security or lobby staff is unaware that a 911 call was made and therefore are unable to provide the location of the caller. These occurrences are well known by the telecommunications and security staff, and the corporation's conscious choice not to fix a potentially harmful situation exposes it to legal action outside of workers compensation.

Courts, depending on how unfortunate the facts, have relied on the following exceptions to permit cases to proceed in common law.

Gross Negligence or Intentional Injuries Exceptions:

If a court finds the employer intentionally exposes its employees to known risks or dangers without informing them of the risks, an employee may sue his employer outside of the workers compensation system. The use of intentional in this case can mean substantially certain to cause injury or death. It can also apply if the employer has been specifically warned of a dangerous situation prior to the event that caused the injury and failed to take corrective action. Such misconduct is tantamount to an intentional tort.

A Texas statute provides that workers compensation immunity does not prohibit the recovery of exemplary damages from an employer when an employee's death is "occasioned by homicide" from the willful act, omission or gross negligence of any person, firm or corporation. Plaintiff attorneys have successfully claimed that failure by an employer to take safety precautions was grossly negligent, leading to an exacerbated injury.

Another possible way around an employer's workers compensation protection is the use of 3rd party lawsuits. A savvy plaintiff's attorney could sue the building owner at common law and the owner could then seek indemnification from the employer.



Personal Animus Exception:

While risks distinctly associated with employment are typically compensable by workers compensation, risks personal to the claimant are universally non-compensable. This exception is referred to as the personal animus exception.

Injuries arising out of risks or conditions personal to the claimant do not arise out of employment unless the employment contributes to the risk or aggravates the injury. Thus, injuries or illnesses resulting from idiopathic conditions may not be covered by workers comp, like a heart attack or seizure. Injuries resulting from violent acts are potentially not covered. For example, workers can bring common-law causes of action against their employers when victimized by a fellow worker if the reason for the attack is motivated by personal animosity versus the injured employee's job or position in the company.

Courts often consider injuries caused by acts of God as not arising out of employment. Thus, employees incurring injuries through natural disasters may find remedies available through common law actions. While an employee would likely find it difficult to establish that the employer somehow had a duty to protect against natural disasters, it would not be difficult to find an employer negligent if a delay due to inadequate 911 calling capabilities exacerbated the injury.

Would an employer be responsible for providing effective emergency response during a fire? One would think so. An even more important question to ask is, "Would injuries resulting from the response measures be scrutinized by employees and their families?" Without question.¹⁰

Risks of Alternate Work Arrangements: Contractors, vendors, visitors

What should be even more frightening for employers is that workers compensation law provides absolutely no protection from claims made by clients, customers, third parties or other non-employees who are injured. The possibility of a vendor or visitor not being able to quickly identify his or her location in an emergency is much greater than it is for an employee who is familiar with the surroundings. This in turn, increases the risk to the enterprise or public entity.

In February 2001, there were 8.6 million independent contractors, making up 6.4% of the workforce, 2.1 million on-call workers (1.6% of total employment), 1.2 million temporary help agency workers (1% of total employment). Thus, nearly 10% of workers are not covered by workers compensation law. Factoring in customers and clients, employers must realize that its workplace is teeming with people to whom a duty of care is owed and potentially litigated when something goes wrong.

¹⁰ A downtown Chicago high-rise fire at the Brunswick building in late 2003 demonstrates just one example of the massive public scrutiny and outcry over improper response procedures that can erupt.



Conclusion

The liabilities exposed by E911 are multi-faceted. Each enterprise must evaluate its footprint in states with legislation and assess its tolerance for risk related to liability. Additionally, the momentum for E911 legislation continues to build with two to three additional states per year passing E911 statutes. Enterprises need to comply with E911 in a growing number of states not only to meet statutory requirements but because non-compliance in these states could provide proof of negligence (negligence per se). Even in those states without such statutes, failure to implement E911 technology may be hard to justify with the technology so readily available and widely implemented.

As the exceptions to workers compensation exclusivity illustrate, an enterprise cannot be complacent when considering its potential liabilities for employee injuries occurring at work. Further, it is imprudent to rely solely on workers compensation protection when there is great potential of injuries occurring to non-employees at the workplace.

At present, case law does not afford much legal guidance. However, it is likely that if an employee or visitor is killed because of an employer's failure to utilize readily available E911 technology, the court will face a tremendous pressure to find a way to right a wrong. And even if no exception to workers compensation seems applicable, an employer must be prepared for the legal maxim that bad facts make bad law.

Although this document addresses a number of legal ramifications for failing to implement workplace safety equipment and processes, it doesn't fully address perhaps the greatest potential cost to employers. Explaining to the workforce, the public or stakeholders why E911 has not been implemented after a catastrophic event could cause irreparable damage to workplace morale, productivity and public goodwill.

About RedSky Technologies – RedSky Technologies, Inc. helps large organizations of all types capture, manage and deliver the detailed location information necessary to provide effective 911 emergency response. Over 200 customers, including 50 Fortune 500® companies, use RedSky's E911 Manager to automate their E911 processes. Headquartered in Chicago, Illinois, RedSky has partnerships with other leaders in the telecommunications and 911 industries to help shape 911 policy, leverage emerging technology, and comply with evolving regulatory requirements. For additional information on RedSky, visit www.redskyE911.com.

About Avaya – Avaya is a global leader and innovator, serving customers who require superior enterprise communications to power their business. Over 95% of the FORTUNE 500® as well as government organizations rely on Avaya for secure network infrastructures and reliable voice and data applications. For more information on Avaya visit the web site at: www.avaya.com.



Appendix A – Summary of State E911 Legislation

Authority	Implementation	Description *
Arkansas	Broad Interpretation	Any exchange telephone service provider is required to send telephone number and street address to the PSAP, rules apply to broad base of entities.
Colorado	MLTS Operators	MLTS operators that do not give the ANI, ALI or both shall disclose this in writing to their end-users and instruct them to provide their phone number and exact location when calling 911.
Connecticut	Business	Companies cannot prevent a 911 call from being made. But, all can be directed to on-site security answering points proven to be the same or better than PSAP.
Florida	Business	Any PBX installed after 1/1/2004 must be capable of providing ALI, automatic location identification, to the station level.
Illinois	Private Residential and Business Switch Service	Requirements vary based on residential vs. business and square footage. Generally, a distinct location needs to be provided per 40,000 ft ² or each entity sharing a building.
Kentucky	Residential MLTS Only	MLTS operator must provide updated number and location identification for each phone dialing 911.
Louisiana	Business	Any PBX installed after 1/1/2005 must be capable of providing ALI, automatic location identification, to the station level.
Maine	Business and Residential MLTS	Effective for businesses – MLTS installed or upgraded after 7/27/05 require a minimum of one ANI/ALI per floor, per 40,000 ft ² . Effective for residences – Minimum of one ANI/ALI per living unit.
Minnesota	Business and Residential MLTS	Any owner/operator of a MLTS installed after 1/1/2005 must provide a call back number and emergency response location.
Mississippi	Service Suppliers and Shared Tenant Services	Service supplier must provide access to PSAP. Where technically available, service supplier must provide location and telephone number for each extension.
Texas	Tarrant County – Business, Multi-tenant services	Businesses utilizing a private or public phone switch to consolidate telephone service must provide a phone number and an accurate physical address of the caller. State of TX requires E911 for residential MLTS.
Vermont	All Businesses	Businesses that own private telephone systems must provide ANI signaling, station identification and updates to the 911 database.
Washington	Business and Residential MLTS	Businesses occupying over 25,000 ft ² , more than one floor or multiple buildings need to provide automatic location identification in a format compatible with local 911 systems.
Michigan Ohio Pennsylvania	PENDING	Details not yet available.

*These descriptions are very general, please see the legislation on our website for your own interpretation.