

Issues and Trends in Health Care Security Litigation

by Tina Kristof



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Karim H. Vellani, CPP, CSC
Committee Chair
IAHSS Foundation

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KARIM H. VELLANI, CPP, CSC
Threat Analysis Group, LLC

THOMAS TAGGART
Paladin Security

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Boston Medical Center

STEPHEN A. TARANTO, Jr., J.D.
Boston University Medical Center

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Healthcare

KEN WHEATLEY, MA, CPP
Royal Security Group, LLC

BRYAN WARREN, MBA, CHPA, CPO-I
Atrium Health

INTRODUCTION

- A lawsuit resulted in a million-dollar jury verdict against a hospital and one of its security guards. The plaintiff, a hospital visitor, sued the hospital and the security guard for assault and battery, false imprisonment, and malicious prosecution.
- Two federal lawsuits were filed in connection with an incident involving a jail inmate who took two nurses hostage, and raped, tortured and beat one of them, before being killed by a SWAT team.
- Recently, a lawsuit was filed seeking \$20 million in damages after a special needs teenager was beaten by hospital security officers.

Cases like these highlight the types of lawsuits against healthcare facilities (HCFs) that fall into the category of “negligent security.” People who are on a HCF’s property, such as patients, visitors and employees, expect to be reasonably safe. When a HCF’s security fails, and someone suffers an attack, the HCF might be held liable and have to compensate the injured person. Negligent security lawsuits can result in significant time and money expenditures for HCFs. Settlements and jury verdicts resulting from these cases can involve hundreds of thousands or even millions of dollars. The costs of defending against such a lawsuit can also be very significant, even if the HCF eventually wins in court.

PREMISES LIABILITY AND NEGLIGENT SECURITY

Premises liability law refers to the legal principles that hold landowners and/or occupiers responsible when someone enters onto their property and gets hurt due to a dangerous condition. In general, common law for premises liability requires an owner or occupier of a premises to correct or warn of a dangerous or defective condition on the premises that the owner/occupier knew, or reasonably should have known the existence of. Premises liability claims are usually based on negligence, although state statutes, municipal ordinances, and local building codes may also be relevant and set standards that an owner or occupier must follow.

Negligent security, also known as inadequate security, is a specific type of premises liability claim. A negligent security case arises when an individual was harmed as a result of a criminal or violent act on the property of a business, and the individual sues the business arguing that lack of security was a factor in the occurrence of the crime. A classic example of negligent security arises when someone is robbed in a hospital parking lot. Plaintiffs in negligent security cases often have incurred significant injuries, given that they involve criminal or violent acts such as assault and battery, rape, sexual assault, wrongful death, robbery, and false imprisonment.

Defendants in Negligent Security Lawsuits

Negligent security lawsuits are brought against the property owner or business, rather than the person who committed the crime or violent act. It is generally much easier to locate an owner or business than a stranger who perpetrated a crime. Damages are also more likely to be recovered from a property owner or business, which typically carries insurance against which a judgment can be enforced. In addition to the negligent security case, criminal and civil penalties can also be separately pursued against the criminal perpetrator.

Negligent security cases are often very complex and can involve several different defendants depending on the type of case and the location of the criminal act. If the incident involved security officers, the security company hired by a HCF may be a defendant. If the crime occurred in a parking lot, the HCF or manager of the parking lot may be at risk. Other parties such as the property management company or landscaping company may also be brought in as defendants.

Employers might also be at risk for negligent hiring claims, if they hired individuals who are not qualified for the job or failed to adequately train their employees. In such a case, a HCF's security and HR directors may be required to testify regarding their selection, screening, training, and supervision of the individual whose actions led to the lawsuit.

Elements of a Negligent Security Claim

The legal standard for negligent security claims is based on the tort of negligence. Negligence occurs when an individual or entity breaches a duty of care that the law requires for the protection of other individuals and their interests. In negligent security cases, property owners have breached their duty of care when they fail to adequately secure their premises in areas where they should have been able to reasonably foresee the potential for criminal activity. In court, the plaintiff bears the burden of proof and must show: (1) the existence of a legal duty owed by the business, (2) a breach of that duty, (3) the breach was the actual and proximate cause of the resulting injury, and (4) damages to the plaintiff's person or property.

1. Duty

A defendant's legal duty is measured according to an ordinary, prudent, reasonable person. The assumption is that an ordinary, prudent person will take precautions against creating unreasonable risks of injury to others. People who enter a property in connection with the business of an owner or occupier are considered "business invitees." For HCFs, this includes patients, visitors, store customers, employees, persons making deliveries such as drug wholesalers, as well as members of the community at large who are invited to eat at the cafeteria.

Owners and occupiers generally owe invitees a legal duty to use reasonable and ordinary care to keep the property reasonably safe for the benefit of invitees. This includes a duty to make reasonable inspections to discover dangerous conditions and make them safe. The requirement to make dangerous conditions safe can be satisfied if a reasonable warning is given. When a HCF has knowledge of prior criminal activity, it can educate patients, visitors, and staff on the risk of criminal attacks and allow them to take proper safety precautions to avoid possible confrontations.

While most industries have no written standard of care for their security programs, HCFs have several sources of written security standards they may need to comply with as part of their accreditation process, including those established by the Centers for Medicare and Medicaid (CMS), The Joint Commission (TJC), and Del Norske Veritas (DNV).

Foreseeability

A key issue in determining whether a legal duty existed in regard to a criminal attack is whether that type of criminal activity was “reasonably foreseeable.” The plaintiff must show that the criminal act was reasonably foreseeable, given the risk of that crime occurring on that property at that specific time. If the criminal attack was not reasonably foreseeable, then the business had no legal duty to provide any security to reduce, minimize, or eliminate the unforeseeable criminal event.¹

The foreseeability of a crime is determined by the court, the jury, and/or the laws of that state. Foreseeability is established on a case-by-case basis, and courts and juries often rely on the testimony of security experts to clarify what was foreseeable based on the specific facts of the case. Courts generally use one of three different tests to determine whether a particular crime is a foreseeable event: (1) specific harm, (2) prior similar incidents, and (3) totality of the circumstances.

Specific Harm Test: The specific harm test is applied in limited circumstances where the business is aware of the probability of specific harm to an individual. For example, where the HCF is aware of a threat made by a specific assailant, a plaintiff might argue that the specific crime by that assailant was foreseeable.

Prior Similar Incidents Test: The prior similar incidents test is a conservative test that requires there to be evidence of prior crimes at the business that are similar to the one complained of in the plaintiff’s case. Under this test, if a plaintiff was robbed in a hospital parking lot, there must be evidence of prior similar crimes. State courts apply the prior similar incidents test on a case-by-case basis, and have varied in their interpretations of the following key issues:

- How similar the prior incidents are to the subject crime
- How large the geographic area is in which prior incidents occurred

¹ Norman D. Bates. (2006). “Premises Security Liability,” in Karim H. Vellani's [Strategic Security Management: A Risk Assessment Guide for Decision Makers](#). Woburn: Butterworth-Heinemann.

- The frequency and proximity in time of prior incidents
- The publicity or notice surrounding the prior crimes

Totality of the Circumstances Test: The totality of the circumstances test expands the definition of foreseeability of a criminal incident. Courts that apply this test look beyond prior similar criminal incidents and may also consider evidence related to:

- Prior dissimilar crimes
- Level of crime in the neighborhood
- Criminal activity at other business locations
- Location and visibility of the business on the property
- Existence of security personnel and surveillance cameras
- Adequacy of lighting surrounding the business
- Maintenance of the property and physical barriers like fences, and landscaping
- Crimes at other facilities within the same industry

Determining Foreseeable Threats at HCFs

The International Association of Professional Security Consultants (IAPSC) has developed Forensic Methodology Best Practices for security experts in connection with third party premises security litigation. The IAPSC's Best Practices establishes the framework for performing threat assessments which includes an evaluation of all actual and inherent threats.² Actual threats are the crimes that have happened historically at the property based on crime data for the property, as well as relevant crimes in the immediate vicinity of the property. Examples of actual threats at HCFs include Workplace Violence Type II incidents (patient-on-staff assaults), theft of medical equipment, and other crimes of opportunity. Inherent threats are the potential crime risks at the property based on its status as an HCF. Examples of these include infant/child abductions and pharmacy robberies.

2. Breach of Duty

Once it is established that the crime was foreseeable and therefore a duty exists, the injured party must then prove that there was a breach of the duty of care owed to them. Businesses have a duty to act reasonably and responsibly in connection with providing a safe and secure environment for its customers. A business breaches this duty if it: (1) fails to provide adequate security against foreseeable crimes, (2) fails to provide adequate inspections to guard against dangerous conditions, or (3) fails to warn or conceals a known criminal safety hazard. When a victim is harmed by someone who took advantage of that breach in security, the victim can pursue damages against the business.

² International Association of Professional Security Consultants, *Best Practices: Forensic Methodology*, 2018. https://iapsc.org/wp-content/uploads/2018/01/BestPractices_Forensic_Jan2018.pdf

Adequate Security Measures

Negligent security cases assume that a crime could have been prevented or at least made less likely by using adequate security measures. Adequate security measures for a particular property will vary from case to case. There are no comprehensive laws or standards that regulate the types of security measures that a private business must have. As with the question of foreseeability, courts and juries frequently rely on security expert testimony to determine what measures were adequate given the specific facts of the case. Jurors will consider a variety of factors, including:

- Nature of business conducted at the property
- Whether a business has complied with statutory requirements
- Industry standards for that type of business
- For crimes occurring at night, was the location and level of lighting adequate
- Location of the crime on the property
- Physical layout and visibility of the business
- Maintenance and location of landscaping
- Business routines
- Blind spots in walls, at entrances, or walkways
- Other deterrence measures
- Prior crimes on the property, whether the incidents were similar, and what actions were taken to prevent additional incidences
- Neighborhood crime rate, and types of crimes that have occurred in the area
- Condition of security devices
- Business staffing levels

3. Causation – Actual and Proximate Cause

Once duty and negligence have been established, the plaintiff must prove that the defendant's breach of duty was the actual and proximate cause of the harm or damage the plaintiff suffered. Specifically, the plaintiff must demonstrate that the defendant's breach of duty was a "substantial factor" in causing the harm to the plaintiff. This means that without the defendant's actual, specific breach of a duty, the plaintiff would not have suffered the injury or damage. For example, if a plaintiff asserts that a property owner acted negligently by failing to remove a pile of debris from their walkway, then the plaintiff must prove that their slip and fall accident would not have occurred but for that failure.

In negligent security cases, the question is whether the injury could have been avoided had the property security measures been taken. In civil court, a plaintiff need not prove that correcting a deficiency would have absolutely prevented the crime, only that the

deficiencies more likely than not contributed to the crime.³ If it is unclear that additional security measures would have deterred the attack, the property owner may not be liable. In addition, there must be no legal rule or defense excusing the defendant's conduct or relieving the defendant of liability for the breach of the relevant duty.

4. Damages

In tort law, damages are an award, typically a sum of money, given as compensation for loss or injury to an individual's person or property. Compensatory damages generally include economic losses such as loss of earnings, property damage and medical expenses, as well as noneconomic damages such as pain and suffering and emotional distress. Punitive damages may be recovered under certain circumstances if there was evidence of "gross negligence" on the part of the defendant. To qualify as gross negligence, there must be a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons or property.⁴

It should be noted that most negligent security lawsuits against HCFs are unlikely to go to trial. Nationally, it is estimated that around 97% of all civil cases are settled or dismissed without a trial.⁵ Given that the terms of settlement agreements and other key information for civil cases resolved before trial may not be reported to the court or may not be publicly available, there is little data available regarding the dollar amounts involved in most cases.

Common Claims in Negligent Security Cases

There are a number of common deficiencies in HCF security programs that could be used as the basis for a negligent security lawsuit. While any of these deficiencies alone may not constitute negligence on the part of the organization, they should be seen as red flags that merit further attention. Some of the most common deficiencies in HCF security programs include:

- Inadequate lighting of hallways, stairwells, elevators, entrances, parking garages/lots
- Poor parking lot surveillance

³ Norman D. Bates. (2006). "Premises Security Liability," in Karim H. Vellani's *Strategic Security Management: A Risk Assessment Guide for Decision Makers*. Woburn: Butterworth-Heinemann.

⁴ Wex Legal Dictionary, Cornell Law School, <https://www.law.cornell.edu/wex>

⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Civil Bench and Jury Trials in State Courts*, 2005, revised 4/9/09, Washington, DC. <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>

- Poor security design (e.g. lack of compliance with Crime Prevention Through Environmental Design guidelines⁶)
- Poorly maintained facilities (broken doors and locks, overgrown landscaping, etc.)
- Inadequate or poorly maintained security systems (gates, cameras, alarms, etc.)
- Inattentive or poorly-trained security officers
- Improper surveillance
- Failure to change security codes on keypads
- Failure to deactivate lost or stolen access cards
- Inadequate number of security staff
- Restriction of key duplication
- Inadequate or outdated security plans and procedures
- Failing to comply with security plans or procedures
- Excessive use of force
- Negligent hiring, retention, training, supervision of employees and security staff
- Failure to conduct security background checks on employees and contractors.

RECENT NEGLIGENT SECURITY CASES INVOLVING HCFS

A review of recent cases highlights the types of deficiencies in HCF security programs that have been used as the basis for a negligent security lawsuit. By learning about these common deficiencies in advance, HCFs can better develop security programs to avoid the mistakes made by others.

Excessive Use of Force

A lawsuit resulted in a million-dollar jury verdict against an Alabama hospital and one of its security guards in 2013. The plaintiff, a hospital visitor, sued the hospital and one of its security guards for assault and battery, false imprisonment, and malicious prosecution. In that case, an altercation between visitor and a security guard was caught on hospital security video. In the video, the visitor and her husband approached a security desk manned by the defendant security officer, and after a verbal confrontation, the visitor is

⁶ C. Ray Jeffrey, *Crime Prevention Through Environmental Design* (Beverly Hills: SAGE Publications, Inc., 1977).

led away in handcuffs. While there was no audio, the visitor appeared to remain calm while the security officer showed agitation.⁷

Conscious Disregard for Safety

In 2013, a wrongful death lawsuit was filed against the security provider of a hospital in North Carolina, alleging conscious disregard for safety. The complaint was filed by the family of a patient who died while being transported from the hospital to his home. According to the lawsuit, the patient suffered from non-Hodgkin lymphoma and was being treated at the hospital for recurrent pneumonia. After a week, the hospital staff considered the patient stable enough for discharge despite his protests that he didn't want to go home. A nurse called security after the patient became "uncooperative." Despite his condition, the security employees strapped the patient in the van, and he subsequently died in the van on the way home. The family claimed that the security workers should have known that the patient, described as "unresponsive" and "slumped in his wheelchair" was in no condition to be discharged from the hospital, and in fact needed medical care.⁸

Inadequate Security Procedures

A 2017 lawsuit was filed against an Atlanta area psychiatric hospital, claiming the hospital failed to provide adequate security and supervision after a teenage girl was raped in the bathroom by another patient. The complaint alleged that the hospital had a history of failing to have adequate staff and had been cited by the federal government for violations. The lawsuit sought damages including lost wages and medical care.

Also, in 2017, lawsuits were filed by four nurses harmed after a jail inmate who was a patient at an Illinois hospital took a gun away from a correctional officer who was guarding him and took two nurses hostage. The lawsuits named the sheriff's office, the correctional officer, and the hospital's security company as defendants. A second lawsuit making similar claims was filed by a patient of the hospital who was in a room down the hall from the inmate during the hostage incident.⁹

The inmate was a known career felon on suicide watch with a history of combative and deceptive behavior, who had tried to harm himself twice to get out of jail. The complaint

⁷ Specker, Lawrence, "Alabama Supreme Court upholds million-dollar verdict against Mobile Infirmary," *Alabama Media Group*, May 23, 2017, https://www.al.com/news/mobile/index.ssf/2017/05/alabama_supreme_court_upholds.html

⁸ DeVane, Steve, "Hospital Security Firm Named in Wrongful Death Suit," *The Fayetteville Observer*, December 18, 2013, <http://www.fayobserver.com/article/20131218/News/312189652>

⁹ Leone, Hannah, "Lawsuit: Hostage Situation at Delnor Hospital gave Patient PTSD," *Aurora Beacon-News*, August 24, 2017, <http://www.chicagotribune.com/suburbs/aurora-beacon-news/news/ct-abn-patient-sues-delnor-kane-county-st-0824-20170824-story.html>

alleged a pattern of unshackling the inmate to use the restroom, and guards distracted by cellphones and TV. During the incident, a county correctional officer had again unshackled the inmate to use the bathroom, then failed to place him back in restraints. After the inmate obtained the officer's 9mm handgun, the officer ran down the hall and hid in another hospital room. One of the nurses was beaten, tortured and raped by the inmate during the 3-hour ordeal. The inmate was ultimately shot dead by a SWAT team.¹⁰

The complaints alleged that the defendants failed in their duty to protect the hospital employees from a dangerous jail inmate. The plaintiffs claimed that the corrections officer had violated his employer's policy by failing to notify or protect others inside the hospital. The suit also claimed that the hospital and the security company violated their duties by failing to ensure proper procedures were followed and a security plan was in place for the inmate, and for not properly warning patients that an inmate had escaped and was armed.¹¹

False Imprisonment

In 2018, a lawsuit seeking \$20 million in damages was filed alleging that a special needs teen being held at the hospital for psychiatric evaluation was beaten by security guards when he wanted to leave the facility after three days of confinement. The lawsuit cites eight causes of action, including false imprisonment and malicious detainment beyond the legal 72 hours, battery, and causing serious and permanent injuries. The lawsuit was filed against the hospital, the security company, unnamed security guards, the hospital's medical-dental staff, the treating physician, and the hospital's foundation.¹²

LIABILITY MITIGATION MEASURES FOR HCFS

Negligent security claims can be very costly to HCFs in time, money, and negative publicity. Settlements can reach into the hundreds of thousands or even millions of dollars. Litigation costs of defending against such a lawsuit, which often include costs for experts in security, lighting, and other specialized areas, can be equally significant, even if the HCF eventually wins. While it may not be possible to completely prevent a negligent security lawsuit from being filed, HCFs can be proactive in protecting themselves from liability.

¹⁰ Esposito, Stefano, "Nurse Raped During Hostage Ordeal at Geneva Hospital, Lawsuit Says" *Chicago Sun Times*, May 25, 2017, <https://chicago.suntimes.com/news/nurse-raped-tortured-during-inmate-hostage-ordeal-at-geneva-hospital/>

¹¹ Esposito, Stefano, "Nurse Raped During Hostage Ordeal at Geneva Hospital, Lawsuit Says" *Chicago Sun Times*, May 25, 2017.

¹² Lieberman, Steve, "Special needs teenager beaten by Nyack Hospital security officers: lawsuit," January 12, 2018. *Lohud.com, USA Today*, <https://www.lohud.com/story/news/local/rockland/2018/01/12/special-needs-teenager-beaten-nyack-hospital-security-officers-lawsuit/1028079001/>

Having a well thought out security program in place can help to reduce the risk of claims and increase a HCF's chances of successfully defending itself against a lawsuit. There are several actions that HCFs can take, among others, to improve the effectiveness of their security program and thus reduce the risk of crimes against patients, visitors and staff, depending on the circumstances. These include:

- a. **Involve All Employees.** One of the most effective ways to secure a workplace is to integrate all employees into the security program. All staff should be educated on the HCF's security program and how the various elements work together to create a safe environment. Staff should also be trained to identify suspicious people and circumstances and how to respond appropriately to them, such as by calling emergency personnel or asking a suspicious person to leave the facility.
- b. **Comply with all Legal Requirements.** HCFs should regularly review and comply with all legal requirements. When necessary, organizations should seek the aid of a lawyer to see what security measures they are lawfully required to take.
- c. **Comply with Regulatory Requirements and Industry Standards.** Security standards established by CMS, TJC, and DNV must be complied with in order to receive accreditation from these organizations. Healthcare security directors can enlist the help of their Environment of Care personnel to identify shortcomings in the security program that may fall short of CMS, TJC, or DNV requirements.
- d. **Physical Security Measures.** HCFs should implement appropriate security measures. Examples of such measures include:
 - Warning signs
 - Safety lighting, including floodlights
 - Motion sensor-controlled lights or alarms
 - Security guards
 - Alarms
 - Locks
 - Fencing
 - Screening of those who enter the property
 - Security cameras or surveillance
- e. **Budget Appropriately for the Security Program.** An HCF increases its risk of liability when budget cuts result in reductions in the level of security provided at the facility without a corresponding reduction in the level of security risk. HCFs should identify and correct inconsistencies in security staffing or security systems that are not supported by risk assessment data. Examples of such inconsistencies include having security officers on duty at certain times but not others solely to reduce costs or having cameras in one area of the facility but not another for budgetary reasons.
- f. **Be Aware of Local Crime.** HCFs must be aware of current crime conditions at the property and in the surrounding community. HCFs risk liability if there have been

previous attacks at the property, or if the HCF had reason to know that an attack might occur and did nothing to prevent it. If levels of crime in the surrounding neighborhood increase, there should be corresponding improvements in the facility's security program. HCFs should be aware of, and provide, a level of security that is equal to or greater than that provided in similar neighboring facilities. It should be noted that criminology studies and related research have generally found that crime in the area may or may not be relevant to the subject property.¹³

- g. Pay Attention to All Incidents and Complaints.** Security directors need to be tracking all incidents to ensure that security threats are not underreported. HCFs should be tracking and following up on all complaints about crime or security received from staff, patients, or visitors. HCFs may be well served by providing employees with a confidential reporting line or access to an electronic risk management portal to report security and safety issues. Workplace violence threats need to be taken seriously and steps taken to mitigate the risk. For example, if a nurse reports a threat of harm by an estranged husband, an HCF can take steps to prevent a confrontation by alerting security officers, changing the nurse's shift, or relocating the nurse to another wing or neighboring facility.
- h. Provide Adequate Warnings.** As discussed earlier, an HCF may be able to satisfy its legal obligation to make a known dangerous condition safe by giving a reasonable warning. If an HCF has knowledge of prior criminal activity, it can provide appropriate warnings for people to take proper safety precautions to avoid possible confrontations. In addition, HCFs should avoid representing or overselling the level of security they provide, for example by making statements such as "completely safe" or "crime-free," or by stating that areas are under "24 Hour Surveillance" when in fact they are not.
- i. Hire a Security Consultant.** HCFs can employ a certified healthcare security consultant who will prepare a comprehensive security analysis. Security consultant reports may be discoverable in a lawsuit, so HCFs may want to consider such a comprehensive study only if they intend to follow the recommendations. If, for example, an HCF decides not to follow a consultant's recommendations for 24-hour security in a particular area, this may end up attached as an exhibit in a lawsuit.
- j. Security Officer Documentation and Training.** HCFs should not shy away from accountability measures that not only make their own security departments more efficient but can also serve to mitigate specific claims. These measures include:

 - 1. Recording radio transmissions
 - 2. Recording phone calls to the Security Operations Center
 - 3. Use of Computer Aided Dispatch (CAD) systems
 - 4. GPS patrol vehicle tracking

¹³ IAPSC, *Best Practices: Forensic Methodology*, 2018.

5. Foot patrol audit systems (e.g. Guard Tour Systems)
6. Detailed daily Activity Reports
7. Detailed Incident Reports
8. Post Orders. Post orders are essential documents that provide guidance on expectations and instructions on performing security duties for each shift and each post. Post Orders may include some or all of the following:
 - Reporting on and off duty
 - Patrol frequency and locations
 - Conducting escorts (if applicable)
 - System monitoring (if applicable)
 - Visitor management (if applicable)
 - Perimeter and sensitive area inspections
 - Documentation (Daily Activity Reports and Incident Reports)
 - Rotating with other posts (if applicable)
9. Security Officer Training. Security officer training is an integral part of the healthcare facility's security program. The International Association of Healthcare Security and Safety (IAHSS) has published healthcare security best practices. IAHSS also offers a certification program for HCF security personnel.¹⁴

CONCLUSION

For many HCFs, it is becoming more challenging to maintain security in their facilities. HCFs face increasing security threats, often related to behavioral issues and opioid addictions, which may increase their risk of facing a negligent security lawsuit. Having a comprehensive, continuously evolving security program in place can play a significant role in preventing security threats and increasing a HCF's ability to protect itself from liability.

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¹⁴ International Association for Healthcare Security and Safety, Training and Certifications, <https://www.iahss.org/page/certifications>

Author

Tina Kristof is a healthcare attorney working out of Houston, Texas. She earned her J.D. with a Health Law Specialization from Boston University School of Law, and her B.A. from the University of California at Los Angeles. Ms. Kristof is admitted to practice law in Texas, California and Massachusetts. Previously, she served as Assistant General Counsel for Walmart Stores, Inc., Staff Attorney at Donoghue, Barrett & Singal, and Health Policy Manager at Wellpoint Health Networks. Ms. Kristof may be reached at tinaskristof@gmail.com or (281) 725-0444.