



CCI 261.01
EFFECTIVE DATE: 18 May 2022

By Order of the Assistant Secretary for Health:

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SUBJECT: Defense Liability

1. PURPOSE: This Instruction provides general policy to officers of the U.S. Public Health Service (USPHS) Commissioned Corps regarding protection provided by the Government for lawsuits filed against officers or employees for damages resulting from the performance of their official duty activities or acting within the scope of their employment.
2. APPLICABILITY: This Instruction applies to all members of the Regular Corps and the Ready Reserve Corps.
3. AUTHORITY:
 - 3-1. [10 U.S.C. § 2733](#), "Property loss; personal injury or death: incident to noncombatant activities of Department of Army, Navy, or Air Force"
 - 3-2. [28 U.S.C. § 1346\(b\)](#), "United States as Defendant"
 - 3-3. [28 U.S.C. § 1402\(b\)](#), "United States as Defendant"
 - 3-4. [28 U.S.C. § 2401\(b\)](#), "Time for Commencing Action against the United States"
 - 3-5. [28 U.S.C. §§ 2671-2680](#), "Tort Claims Procedure"
 - 3-6. [42 U.S.C. § 215\(a\)](#), "Detail of Service Personnel"
 - 3-7. [42 U.S.C. § 233](#), "Civil Actions or Proceedings against Commissioned Officers or Employees"
4. PROPONENT: The proponent of this Instruction is the Assistant Secretary for Health (ASH). The Surgeon General (SG) is responsible for providing supervision of activities relating to the day-to-day operations of the USPHS Commissioned Corps. The Director, Commissioned Corps Headquarters (CCHQ), provides overall management of USPHS Commissioned Corps personnel operations and processes.
5. SUMMARY OF REVISIONS AND UPDATES: This is the first issuance of this Instruction within the electronic Commissioned Corps Issuance System (eCCIS) and replaces Commissioned Corps Personnel Manual (CCPM) CC29.9.6, "Defense of Suits Involving Charges of (1) Medical

Professional Liability or Negligence, or (2) Liability or Negligence Incident to Operation of a Motor Vehicle," dated 1 March 1976.

- 5-1. Sections 1. and 6-1. eliminates references to suits against the United States under the Federal Tort Claims Act (FTCA) "resulting from the operation by the officer or employee of the Government of any motor vehicle while acting within the scope of his/her office or employment" to reflect changes in [28 U.S.C. § 2679\(b\)](#).
- 5-2. Section 6-1. recognizes the requirement for a determination that the act or activity in question was within the scope of the officer's office or employment and Section 7-5. states that the Attorney General or his/her designee will make that decision.
- 5-3. Section 6-1. specifies that Government liability is determined by the law of the state where an act or omission occurred.
- 5-4. Section 6-2. clarifies when the FTCA applies and when an officer has personal liability.
- 5-5. Section 6-3. defines official duty activities and explains how PHS officers engaged in these activities are protected under the FTCA.
- 5-6. Section 6-3. specifies non-official duty activities and explains how these lack FTCA protection.
- 5-7. Section 6-4. specifies that PHS officers assigned or detailed to the Department of Defense (DoD) are subject to the laws for the government of the service to which they are assigned or detailed, including the Military Claims Act.
- 5-8. Section 7-4. lists the roles of supervisors/managers of PHS officers to avoid liability issues.
- 5-9. Section 8-1. states what an officer should do if a liability lawsuit is brought against him/her.
- 5-10. Appendix A contains a glossary.

6. POLICY:

- 6-1. Federal Tort Claims Act (FTCA). Generally, the FTCA shields federal employees from being held personally liable for civil claims for injury or loss of property, or personal injury or death caused by their negligent (see Appendix A) or wrongful acts or omissions while acting within the scope of their employment (see [28 U.S.C. § 2679](#) and Appendix A). The FTCA acts as a limited waiver of sovereign immunity by allowing such claims against the United States when the United States, if a private person, would be held liable (see [28 U.S.C. § 1346\(b\)](#) and [28 U.S.C. §§ 2671-2680](#)).
- a. The FTCA remedy is the exclusive remedy for most claims arising from the negligent or wrongful acts of Federal employees committed within the scope of their employment. Before a PHS officer may invoke protection under this statute, the Government must determine that the act or activity in question was within the scope of the officer's office or employment.
 - b. The head of each Federal agency or his/her designee, in accordance with regulations prescribed by the Attorney General, may consider, adjust, and settle any claim for monetary damages against the U.S. Government for injury or personal injury caused by negligence or omission of any federal employee acting within the scope of his/her official duty activities.
 - c. Government liability (see Appendix A) is determined by the tort law of the state where the act or omission occurred (see [28 U.S.C. § 1346\(b\)](#)).
 - d. In general, only claims of negligence, as opposed to intentional misconduct, are allowed.
 - e. A claimant who accepts a settlement releases any claim against the U.S. Government and against the officer or employee (see [28 U.S.C. § 2672](#)).
 - f. A tort claim against the U.S. Government shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing of notice of final denial of the claim by the agency to which it was presented (see [28 U.S.C. § 2401\(b\)](#)).
- 6-2. Personal Liability of PHS Officers. [42 U.S.C. § 233\(a\)](#) makes the FTCA remedy against the United States exclusive of any other civil action or proceeding by reason of the same subject-matter against an officer or employee whose act or omission gave rise to the claim for any damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by PHS officers or employees acting within the scope of their employment. In effect, § 233(a) provides PHS officers and employees absolute immunity from any claims for injury arising out of performance of medical or related functions within the scope of their employment.
- a. To protect federal employees from civil lawsuits, the FTCA requires claimants to sue the U.S. Government, not the employee, for actions of the employee performed as part of his/her official duties (see [28 U.S.C. §§ 2671-2680](#)).
 - b. [42 U.S.C. § 233](#) provides FTCA coverage to commissioned officers and employees of the Public Health Service when performing medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, while acting within the scope of their office or employment.

- (1) A PHS officer will not be covered by the FTCA when the officer's actions were not authorized by his/her agency or employer, were not a part of or an extension of his/her official duties, or did not further an agency or employer's mission but instead furthered the officer's interests or were outside the scope of his/her employment.
 - (2) Agencies and supervisors will refrain from authorizing officers to engage in activities beyond the agency's statutory authority.
 - (3) Officers who regularly engage in practice hours (see Appendix A) with non-federal agencies, should ensure these activities are covered by malpractice insurance or maintain their own malpractice liability insurance.
 - (4) The FTCA applies to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions (see [42 U.S.C. § 233\(e\)](#)).
- c. FTCA matters may become the subject of litigation, so the Department of Justice (DOJ) and the federal courts may assume primary roles in certifying whether a given activity falls within the scope of an officer's official duties.
- d. Recognizing that personal liability tort claims against PHS officers affect the interest of the United States, the government authorizes their defense by attorneys in the DOJ. Representation of an officer by a DOJ attorney is not mandatory; an officer may retain counsel at his/her own expense.
- 6-3. Officers Performing Official or Non-Official Activities. FTCA coverage does not extend to non-official duty activities (see Appendix A). If an officer receives compensation directly from an outside organization for performing activities with that organization, those activities cannot be official duty activities; therefore, the officers is not entitled to FTCA coverage.
- a. Official Duty Activities. Activities performed by an officer as part of or as an extension of his/her regular official duties as defined in his/her position/billet description are deemed to be official duty activities (see Appendix A).
- (1) Officers, as assigned, can engage in official duty activities within their scope of federal employment at a non-federal facility or outside organization if the primary purpose of the activity is to achieve an agency or USPHS Commissioned Corps mission (e.g., the USPHS Commissioned Corps' readiness mission). In such cases, the officer is covered by the FTCA.
- b. Non-official Duty Activities. Activities that are outside of, or not related to, an officer's current regular official duties, performed outside of an officer's agency work area, using the officer's own or an outside entity's resources (rather than government resources) are non-official duty activities (see Appendix A). A non-official duty activity remains non-official even when the USPHS Commissioned Corps has approved it as an outside activity. An activity is generally not within the scope of an officer's federal employment when:
- (1) The officer performs the activity for his/her own benefit, and not for an approved agency or USPHS Commissioned Corps purpose.
 - (2) The sole purpose of the activity is to enable the officer to qualify for

special pay requirements.

- (3) The officer is required to have an approved Form [HHS-520](#), "REQUEST FOR APPROVAL OF OUTSIDE ACTIVITY," to engage in the non-official duty activity, instead of Form [PHS-7047](#) or Form [PHS-7085](#) for an official duty activity.
- 6-4. Officers Assigned or Detailed to the Department of Defense (DoD). Officers assigned or detailed to the U.S. Armed Forces are subject to the laws for the governance of the service to which they are assigned or detailed (see [42 U.S.C § 215\(a\)](#)), including the Military Claims Act (MCA) (see [10 U.S.C. § 2733](#)) for damages caused while acting within the scope of their employment (see Appendix A) or non-combatant activities. In contrast to the FTCA, the MCA:
 - a. Covers claims for damages not covered by the FTCA;
 - b. Pays for damages that occur worldwide, unlike the FTCA; and
 - c. Only pays damages in circumstances that are specifically outlined in a military department's regulations, unlike the FTCA.
7. RESPONSIBILITIES:
 - 7-1. The Assistant Secretary of Health (ASH) is responsible for developing Instructions involving Government protections in defense against suits for damages resulting in death or injury from performance of job-related duties including medical, surgical, dental, or related functions.
 - 7-2. The Surgeon General (SG) is responsible for providing supervision of activities relating to the day-to-day operations of the USPHS Commissioned Corps.
 - 7-3. The Director, Commissioned Corps Headquarters (CCHQ), provides overall management of USPHS Commissioned Corps personnel operations and processes for the daily operations of the USPHS Commissioned Corps and making recommendations to the SG.
 - 7-4. Supervisors and managers of officers are responsible for:
 - a. Assigning tasks to PHS officers that do not go beyond or outside their respective agency's and/or the USPHS Commissioned Corps' mission;
 - b. Retaining any documents that allow officers to practice outside the normal scope of their federal employment or at a non-federal facility or other outside organization. Documentation can include: position/billet addenda, Memoranda of Understanding (MOU), Memoranda of Agreement (MOA), copies of orders, etc. ; and
 - c. Reporting any lawsuits filed against PHS officers to the Director, CCHQ, and to the relevant Agency/OPDIV/STAFFDIV Human Resources Official.
 - 7-5. The Attorney General, or his/her designee, is responsible for determining whether or not the officer was acting within the scope of his/her employment during the incident that caused the lawsuit. If the Attorney General determines that the officer was acting within his/her scope as a federal employee, the Attorney General will file a certification to that effect, and the officer will be dismissed from the action and replaced by the United States as defendant (see [28 U.S.C. § 2679](#)).

- 7-6. All PHS officers must adhere to the guidelines and procedures listed in this Instruction, as well as any additional guidance provided by the SG or Director, CCHQ.
8. PROCEDURES:
- 8-1. When a PHS officer receives notice that a lawsuit has been or will be brought against him/her for damages resulting from performance of their official duties, the officer must deliver all proceedings and pleadings served upon him/her, or an attested true copy, to his/her immediate supervisor. The officer should collect:
- a. A written determination by a supervisor with the authority to make such a determination, in consultation with the Department of Health and Human Services, Office of the General Counsel (OGC) attorney assigned to advise CCHQ, that the officer was conducting an activity in support of his/her agency and that this was an authorized activity not otherwise prohibited by law or agency policy.
 - b. Any written agreement (e.g., MOU/MOA) between the agency/organization and the USPHS Commissioned Corps defining the officer's role, official duty activities, or employment.
 - c. Personnel orders, position/billet descriptions and/or addenda, and any other written documents that define the understandings of the agency, the officer, or any outside agency or organization.
 - d. Any other document that supports or demonstrates whether an activity occurred within the scope of an officer's official duty activities or employment.
- 8-2. The officer's supervisor will immediately notify the Director, CCHQ, or his/her designee, Agency/OPDIV/STAFFDIV Human Resource Official and the General Law Division of OGC. The supervisor will forward all documents and pertinent information concerning whether or not the officer was acting within the scope of his/her official duties.
- 8-3. Under [28 U.S.C. § 2679](#), the Attorney General will decide whether or not to certify that the officer was acting within the scope of his/her employment.
- a. If the Attorney General refuses to certify that the officer was acting within the scope of his/her employment, under [28 U.S.C. § 2679\(d\)\(3\)](#) the officer may at any time before the trial ask the court to certify that he/she was acting within the scope of his/her employment.
 - b. Upon such certification, the DOJ will request that the court dismiss the case against the officer and replace it with a case against the United States.
9. HISTORICAL NOTES: This is the first issuance of this Instruction within the eCCIS. It replaces CCPM CC29.9.6 "Defense of Suits Involving Charges of (1) Medical Professional Liability or Negligence, or (2) Liability or Negligence Incident to Operations of a Motor Vehicle" dated 01 March 1976, and creates a stand-alone Instruction within eCCIS.

Appendix A

Glossary

1. **Clinical Practice Hours:** Hours spent providing clinical care in accordance with Personnel Operations Memorandum (POM) [821.77](#), "Certification of Practice Hours".
2. **Federal Tort Claims Act (FTCA):** A limited waiver of sovereign immunity of the U.S. government that grants certain plaintiffs permission to sue the federal government for monetary damages for injury, loss of property, personal injury, or death caused by negligence, a wrongful act, or a wrongful omission by employees while acting within the scope of their federal employment.
3. **Liability:** Under the FTCA, the basis for settlement is liability, which requires a finding of negligence. The federal government will pay damages if the court finds a negligent or wrongful act or omission by an employee while acting in the scope of his/her employment.
4. **Memorandum of Agreement (MOA) and Memorandum of Understanding (MOU):** Agreements that can facilitate an officer's performance, such as the performance of practice hours at a non-HHS agency.
5. **Negligence:** Negligence or fault generally is the performance of an act, which a reasonably prudent person would not do under the same or similar circumstances, or failing to perform an act which such a person would do; the FTCA deals basically with negligence or fault. The specific definition of negligence in any particular circumstance will be defined by the law of the state where the act or omission occurred.
6. **Non-Official Duty Activities:** Activities that are outside of, or not related to, an officer's current regular official duties, performed outside of an officer's agency work area, using the officer's own or an outside entity's resources, and not government resources. This definition applies whether or not the officer is compensated by an outside entity. Officers may not represent themselves by wearing their uniform while engaged in outside activities.
7. **Official Duty Activities:** Activities performed by an officer as part of, or as an extension of, his/her regular official duties as defined in his/her position//billet description.
8. **Outside Organization:** For purposes of this Instruction, outside organizations are those that are not federal agencies. Outside organizations may include state, local, tribal, academic, for-profit or not-for-profit, or non-governmental hospital, clinic, skilled nursing facility, or a rehabilitation facility.
9. **Position/Billet Addendum:** A form that extends an officer's current position/billet to expand his/her official duties to include an additional activity to achieve an agency or Corps mission. This activity can occur at a federal or a non-federal site.
10. **Scope of Employment:** An officer's assigned duties which he/she is authorized to perform.
11. **Tort Claims:** Claims for damages to or loss of property, personal injury, or death that must be presented to a federal agency for investigation and a final determination (e.g., settlement, denial, or failure to respond within six months) before a civil action can be filed against the United States in federal district court.