

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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Making Private Entities and Individuals Immune from Tort Liability by Declaring them Federal Employees

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Abstract. The Federal Tort Claims Act (FTCA), 28 USC 1346 (b), 2671-2680, makes the United States liable for some of the torts of its employees committed within the scope of their employment. Sometimes, Congress wishes to immunize a private organization, or its employees or volunteers, from tort liability. One way it may do so is to enact a statute declaring that the organization or its employees or volunteers shall be deemed federal employees for purposes of the FTCA. This report discusses the pros and cons of this type of statute, and then lists examples of more than 50 such statutes.

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CRS Report for Congress

Making Private Entities and Individuals Immune from Tort Liability by Declaring Them Federal Employees

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Summary

The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671-2680, makes the United States liable, in accordance with the law of the state where a tort occurs, for some of the torts of its employees committed within the scope of their employment. It also makes federal employees immune from all lawsuits arising under state law for torts committed within the scope of their employment. (The FTCA does not prevent a federal employee from being sued for violating the Constitution or a federal statute that authorizes suit against an individual.) Sometimes, Congress wishes to immunize a private organization, or its employees or volunteers, from tort liability. One way it may do so is to enact a statute declaring that the organization or its employees or volunteers shall be deemed federal employees for purposes of the FTCA. This report discusses the pros and cons of this type of statute, and then provides examples of more than 50 such statutes.

Pros and Cons

The reason that Congress has sometimes declared private organizations or individuals federal employees for FTCA purposes is generally that it has concluded that potential liability, or the high cost of liability insurance, could discourage an organization, or its employees or volunteers, from doing the work it does. Thus, the basic argument in favor of these statutes is that, by immunizing potential defendants from tort liability, they encourage work that Congress deems to be in the public interest. In addition, because the United States has “deep pockets,” these statutes can also benefit some plaintiffs. An injured party who prevails in an action against the United States is more likely to be compensated fully than one who prevails against a private party.

In general, however, these statutes probably leave injured parties worse off. First, they arguably remove an incentive for individuals protected by them to exercise due care in the performance of their duties. Second, they leave some injured parties with no

remedy, because the FTCA makes the United States liable for only some of the torts of its employees. In general, the FTCA makes the United States liable for the torts of its employees to the extent that a private employer would be liable for the torts of *its* employees, under the law of the state where the tort occurred. However, the FTCA has exceptions under which the United States may not be held liable even though a private employer could be held liable under state law. These exceptions include suits by military personnel for injuries sustained incident to service, suits based on the performance of a discretionary function, intentional torts, claims arising out of combatant activities, claims arising in a foreign country, and others. In addition, the FTCA does not permit awards of punitive damages, and does not allow jury trials (and plaintiffs in tort cases tend to prefer jury trials).

The Supreme Court has held that the FTCA makes federal employees immune from suit under state law for torts committed within the scope of employment even when an FTCA exception precludes recovery against the United States. *United States v. Smith*, 499 U.S. 160 (1991). The same apparently would be the case with respect to organizations or individuals who are not federal employees but who are declared federal employees for FTCA purposes. Consequently, in considering whether to make a private organization or individual a federal employee for FTCA purposes, Congress may wish to balance the benefits of immunizing the organization or individual from liability against the likelihood of leaving potential plaintiffs without a remedy.

A way that Congress might protect both plaintiffs and defendants would be to allow the defendants to be sued but provide for the United States to take over the defense of the suit and to pay any damages for which the defendants are held liable. This way, plaintiffs would not be precluded by the exceptions in the FTCA from recovering against the United States. A partial precedent for this approach was the National Swine Flu Immunization Program, P.L. 94-380 (1976), which made an action against the United States under the FTCA the exclusive remedy for persons having claims in connection with the swine flu immunization program of the 1970s against vaccine manufacturers, but it removed or relaxed several of the FTCA exceptions that might have precluded recovery in some cases.

A statute may declare the employees of a private entity to be federal employees for purposes of the FTCA, but not declare the entity itself to be a federal employee for purposes of the FTCA. It may instead declare the entity to be a federal agency for purposes of the FTCA, or it may remain silent as to the status of the entity. If it declares the entity to be a federal agency for purposes of the FTCA, then the entity would be immune from tort liability, because, under the FTCA, only the United States may be sued. If it remains silent as to the status of the entity, then the entity presumably could be sued in addition to the United States (and would not have the benefit of the exceptions, such as the discretionary function exception, that protect the United States from liability). Perhaps, however, the entity could argue that, since its employee is a federal employee for purposes of the FTCA, its employee should not be deemed its employee for purposes of state tort law. If an entity's employees are not deemed its employees for purposes of state tort law, then the entity would not be responsible for its employees' torts. In deciding this question, a court would of course consider the language and legislative history of the particular statute involved.

List of Statutes

The following are examples of statutes that make private organizations or individuals federal employees for FTCA purposes, and thus immune from liability under state tort law:

(1) “[T]he Administrative Assistant, with the approval of the Chief Justice, may accept voluntary personal services to assist with public and visitor programs.... No person volunteering personal services under this subsection shall be considered an employee of the United States for any purpose other than for purposes of [the FTCA].” 28 U.S.C. § 677(c).

(2) The Commission on the Advancement of Women and Minorities in Science, Engineering, and Technology Development Act, 42 U.S.C. § 1885a note, § 5(i), provides: “Members of the Commission shall not be deemed to be employees of the Federal Government by reason of their work on the Commission except for purposes of — (1) the tort claims provisions of chapter 171 of title 28, United States Code.”

(3) The Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5055(f)(3), provides, with respect to volunteers in the ACTION Agency (including the Volunteers in Service to America (VISTA) program and the Older American Volunteer Programs): “Upon certification by the Attorney General that the defendant was acting in the scope of such person’s volunteer assignment at the time of the incident out of which the suit arose, any such civil action or proceeding shall be ... deemed a tort action brought against the United States under the provisions of title 28....”

(4) The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(f), provides: “Volunteers shall not be deemed employees of the United States except for purposes of — (1) the tort claims provisions of title 28....”

(5) The Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. § 233(g), provides that such centers, and their officers, employees, and contractors, shall be deemed employees of the Public Health Service, and the FTCA shall be the exclusive remedy with respect to any medical malpractice they may commit.

(6) The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 233(o), extended the same protection as the Federally Supported Health Centers Assistance Act of 1992 to a “free clinic health professional” providing a “qualifying health service,” which means an unpaid volunteer providing “any medical assistance required or authorized to be provided in the program under title XIX of the Social Security Act,” commonly called “Medicaid.”¹

(7) The Fish and Wildlife Act of 1956, 16 U.S.C. § 742f(c)(4), provides that volunteers for, or in aid of programs conducted by the Secretary of the Interior through the Fish and Wildlife Service or the Secretary of Commerce through the National Oceanic

¹ For additional information on this provision and the preceding one, see CRS Report RS20984, *Public Health Service Act Provisions Providing Immunity from Medical Malpractice Liability*, by Henry Cohen.

and Atmospheric Administration shall be considered a federal employee “[f]or the purpose of the tort claim provisions of title 28.”

(8) The Glass Ceiling Act of 1991, 42 U.S.C. § 2000e note, § 203(h)(3). This statute, which was enacted by the Civil Rights Act of 1991, provides: “A member of the [Glass Ceiling] Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for purposes of — (A) the tort claims provisions of chapter 171 of title 28, United States Code.”

(9) The Indian Health Care Improvement Act, 25 U.S.C. § 1680c(d), provides that non-Indian Health Service health care practitioners who provide services to individuals eligible for health services under the act may be regarded as employees of the Federal Government for purposes of the FTCA.

(10) The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(d), provides that

[A]n Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under this section or section 450h of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28 [the FTCA] are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement....

(11) The National Gambling Impact Study Commission Act, 18 U.S.C. § 1955 note, § 6(e), provides that, for purposes of the FTCA “the Commission is a ‘Federal agency’ and each of the members and personnel of the Commission is an ‘employee of the Government.’”

(12) The National Guard Challenge Program of opportunities for civilian youth, 32 U.S.C. § 509(i)(1)(B), provides that a person receiving training under the National Guard Challenge Program shall be considered an employee of the United States for purposes of the FTCA.

(13) The National Guard Technicians Act of 1968, 32 U.S.C. § 709(d), provides that a technician employed under the act is “an employee of the United States.” The act does not mention the FTCA, but apparently does make these individuals federal employees for FTCA purposes. See, *Proprietors Insurance Co. v. United States*, 688 F.2d 687 (9th Cir. 1982).

(14) The National Service Trust Act, 42 U.S.C. § 12651b(f), provides: “For purposes of the tort claims provisions of chapter 171 of title 28, United States Code, a member of the Board [of Directors of the Corporation for National and Community Service] shall be considered to be a Federal employee.” It also provides that Corporation volunteers “shall not be subject to the provisions of law relating to Federal employment ... except that — (i) for the purposes of the tort claims provisions of chapter 171 of Title 28, a volunteer under this division shall be considered to be a Federal employee.” 42 U.S.C. § 12651g(a)(B).

(15) The Peace Corps Act, 22 U.S.C. § 2504(h), provides: “Volunteers shall be deemed employees of the United States Government for the purposes of the Federal Tort Claims Act and any other Federal tort liability statute....”

(16) The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, 16 U.S.C. § 670c(d), provides:

In connection with the facilities and programs for public outdoor recreation at military installations ..., the Secretary of Defense may accept — (1) the voluntary services of individuals and organizations.... A volunteer ... shall not be considered to be a Federal employee ... except that — (1) for the purposes of the tort claims provisions of chapter 171 of title 28, United States Code, the volunteer shall be considered to be a Federal employee.

(17) The Support for East European Democracy (SEED) Act of 1989, 22 U.S.C. § 5422(c)(2), provides that a volunteer providing technical assistance to Poland or Hungary through the Department of Labor shall be deemed an employee of the United States for purposes of “the tort claims provisions of Title 28....”

(18) The Take Pride in America Act, 16 U.S.C. § 4604(c)(2), provides that, for purposes of the FTCA, “a volunteer under this subsection shall be considered an employee of the government....”

(19) “[T]he United States Geological Survey may hereinafter contract directly with individuals or indirectly with institutions or nonprofit organizations ... for the temporary or intermittent services of science students or recent graduates, who shall be considered employees for purposes of [the FTCA].” 43 U.S.C. § 50d.

(20) The Volunteers in the National Forests Act of 1972, 16 U.S.C. § 558c(b), provides: “For the purpose of the tort claim provisions of Title 28, a volunteer under sections 558a to 558d of this title shall be considered a Federal employee.”

(21) The Volunteers in the Parks Act of 1969, 16 U.S.C. § 18i(b), provides: “For the purpose of the tort claim provisions of title 28 of the United States Code, a volunteer under this Act shall be considered a Federal employee.”

Additional Statutes

The following 32 additional statutory provisions listed in this paragraph also cause non-federal employees or entities to be treated as federal employees for purposes of liability: 5 U.S.C. § 3161(i)(4) (temporary organizations), 7 U.S.C. § 2279c(b)(8) (Department of Agriculture), 10 U.S.C. § 1588(d) (Armed Forces), 10 U.S.C. § 2113(j)(4) (Uniformed Services University of the Health Sciences), 10 U.S.C. § 2360(b) (Secretary of Defense), 10 U.S.C. § 2904(c) (Strategic Environmental Research and Development Program Scientific Advisory Board), 14 U.S.C. § 93(t)(2) (Coast Guard), 15 U.S.C. §§ 4102(d), 4105(5) (Arctic Research Commission), 16 U.S.C. § 450ss-3(b)(5) (Oklahoma City National Memorial Trust), 16 U.S.C. § 565a-2 (Forest Service), 16 U.S.C. § 932(a)(3) (Great Lakes Fishery Commission), 16 U.S.C. § 952 (International Commission for the Scientific Investigation of Tuna, and Inter-American Tropical Tuna Commission), 16 U.S.C. § 971a(1) (International Commission for the Conservation of

Atlantic Tunas), 16 U.S.C. § 1421e (Secretary of Commerce),² 16 U.S.C. § 1703(a)(3) (Youth Conservation Corps), 16 U.S.C. § 3602(c) (North Atlantic Salmon Conservation Organization), 16 U.S.C. § 5608(c) (Northwest Atlantic Fisheries Organization), 20 U.S.C. § 761(e)(2) (Trustees for the John F. Kennedy Center for the Performing Arts), 20 U.S.C. § 4420(b) (Institute of American Indian and Alaska Native Culture and Arts Development), 22 U.S.C. § 2124c(i)(3) (Rural Tourism Development Foundation), 22 U.S.C. § 3508(d) (Institute for Scientific and Technological Cooperation), 24 U.S.C. § 421(b) (Armed Forces Retirement Board), 24 U.S.C. § 422(d) (Retirement Home Board), 33 U.S.C. § 569c (Army Corps of Engineers), 36 U.S.C. § 2113(f)(2) (American Battle Monuments Commission), 42 U.S.C. § 233(p) (persons who manufacture, distribute, or administer smallpox countermeasures, or who transmit vaccinia after receiving a smallpox countermeasure),³ 42 U.S.C. § 7142(b) (National Atomic Museum), 42 U.S.C. § 7142c(b)(2) (American Museum of Science and Energy), 42 U.S.C. § 12620(c) (Civilian Community Corps), 42 U.S.C. § 12655n(b)(3) (American Conservation and Youth Service Corps), 49 U.S.C. § 106(l)(5)(C) (Federal Aviation Administration), 49 U.S.C. § 20107(b) (Secretary of Transportation).

The most recent statute that provides that non-federal employees shall be deemed federal employees under the FTCA is the Project BioShield Act of 2004, P.L. 108-276, which enacted § 319F-1 of the Public Service Health Act. Section 319F-1(d)(2) (42 U.S.C. § 247d-6a(d)(2)) provides that a person carrying out a personal service contract under the statute, “and an officer, employee, or governing board member of such person shall, subject to a determination by the Secretary, be deemed to be an employee of the Department of Health and Human Services for purposes of [the FTCA].” Section 319F-1(d)(2), however, contains exceptions to the immunity from liability that the FTCA otherwise grants to federal employees:

Should payment be made by the United States to any claimant ..., the United States shall have ... the right to recover against [the person deemed a federal employee] for that portion of the damages so awarded or paid, as well as interest and any costs of litigation, resulting from the failure ... to carry out any obligation or responsibility ... under a contract with the United States or from any grossly negligent or reckless conduct or intentional or willful misconduct....

² This provision protects persons who, pursuant to the Marine Mammal Protection Act, “respond to a stranding,” but they are not immune from liability for actions “that are grossly negligent or that constitute willful misconduct.”

³ The immunity for persons who manufacture, distribute, or administer smallpox countermeasures was provided by section 304 of P.L. 107-296 (2002); the immunity for persons who transmit vaccinia was provided by section 3 of P.L. 108-20 (2003).