



Federal Employee Liability –The Counter Point

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Just last week, you may have read an article posted here about perceived and actual risk to federal officials, managers, supervisors and employees if sued –and whether it makes sense to purchase professional liability insurance to cover that risk. We read the article, and saw too many information gaps and erroneous assumptions about the laws governing federal employee liabilities to let last week’s article go without a response. So, here are our counter points.

Introduction and Disclosure

First a few disclosures. We are attorneys. For over 25 years, our law firm has specialized in the representation of federal employees, managers, supervisors, and law enforcement officers in all legal aspects of federal employment, including disciplinary and performance based actions, administrative investigations, retirement claims, bringing and defending against EEO complaints, and security clearance proceedings. We should also state that for almost 15 years, a part of our practice has included cases assigned to us by various insurance providers to defend Feds covered by various insurance policies. In the last several years, our law firm has also been retained by the U.S. Department of Justice to act as counsel in the defense of individual federal officials who were sued, but for which DOJ declined to provide a direct defense. With this background, we have much to say about the myriad of laws surrounding federal employee liability.

But back to last week’s article. Let’s simplify and say that the author’s analysis just touched the tip of the liability iceberg –without recognizing the iceberg sitting below the surface. And we all know what happened to the Titanic when it failed to steer clear of the unseen mass of ice. So without informing you on the mass of legal concepts governing the rules of federal employee liability, you simply cannot make an informed decision about whether to buy the professional liability insurance offered to Feds, and may therefore make a decision that has a financially catastrophic consequence to you.

Yes, we agree that insurance is all about a person’s perceived risk. That’s a valid assumption we agree with. So let’s talk about your risk.

Common Law Tort Lawsuits and Westfall Act Immunity procedures

The author of last week’s article focused mostly on one single category of risk, i.e., suits against a Fed for a *common law tort*. The author correctly pointed to the Westfall Act, which applies to lawsuits for *common law torts*, and noted that the Act states if the Attorney General (AG) certifies you were acting within the scope of your employment from which the claim or civil action arose, then the U.S. is substituted into the suit as the correct defendant and you are substituted out of the lawsuit, putting an end to your risk of liability. Magic. But let’s face it, nothing in our American legal system could consistently be that easy, especially when it involves the Government.

Last week's article then deftly notes that the insurance coverage against lawsuits offered to Feds is for actions that were committed in the "course and scope of your employment." So the author ponders, if the insurance coverage is tied to an AG's decision about whether the acts complained of in the lawsuit were within the "scope of employment," then the insurance is only covering you for something the law already grants you protection. Oh, if it were that simple!

Finally, the author ponders if the AG rejects certifying you as within the scope of your employment, then the author says "you must have acted *outside* 'the course and scope of your employment.'" Now that is some leap of faith in the AG.

In sum, the author wonders: "I'm just wondering if it's a misleading business if it only covers you when you don't need coverage."

We'll put aside how the insurance providers advertise or explain the need for insurance coverage, and stick to legal concepts.

The Westfall Act is all about a congressionally created means of giving Feds full immunity from lawsuits for a *common law tort*. Yes, if the AG certifies that the acts complained of against you in the suit arose within the scope of your employment (and the Federal Judge doesn't disagree with the AG), then the law gives you full immunity. But how exactly is that defense of "scope of employment" made for the Fed in order to achieve full immunity from the suit? Last week's article missed an entire concept. You'll need an attorney to present your "scope of employment" defense in court, in a series of pleadings, that set out why the acts complained of are within "scope."

Let's be clear, for the vast majority of Feds, DOJ will provide you with the attorney (usually through your local U.S. Attorneys Office) who will prepare the legal pleadings setting out why you were within "scope," so as to obtain for you full immunity from the suit. And, the DOJ attorney will also defend you against any challenge made by the plaintiff to the AG's certification that you were within "scope." That's right, the plaintiff can contest you were within scope, but we'll get to that later.

But first, back to the need for an attorney. Yes, the vast majority, but not everyone gets a DOJ attorney. Here's how that works. Under DOJ regulations at 28 C.F.R. § 50.15, DOJ in its sole discretion decides whether you will be assigned a DOJ attorney to defend you. Even if it's clear that you were acting within the scope of your employment, DOJ must also determine that it is in the "interest of the United States" to provide you with DOJ defense counsel. Hmm, "interest of the United States." What's that mean? Whatever DOJ decides it means. Although it remains undefined in DOJ regulations, at a minimum it means that if you did something well within your job duties, but you did it in a way that DOJ finds was offensive or hostile or unprofessional, then count on DOJ thinking it won't assign you a DOJ attorney --not in the interest of the U.S. That doesn't mean you can't make the defense in court that you should not be sued because you were acting within the "scope of your employment," it just means that DOJ will not provide you a DOJ attorney to do it. While DOJ has the authority under its regulations at 28 C.F.R. §

50.16 to hire a private attorney for you at DOJ expense, such is the rarity you should not count on.

So that's our first example of where even with a determination by DOJ that you were within the scope of your employment, you're left fending for yourself. The insurance protection in such an instance provides defense counsel, and you'll need it. Putting on a "scope of employment" defense can cost \$30,000 (or more) of attorney effort. First, you'll need to extract from DOJ a certification of scope of employment which can be had in most cases, sometimes with more or less legal effort. Then, you should know that more and more plaintiffs are challenging even the DOJ certification. What last week's article failed to point out is that the AG's certification is not game over. Turns out the federal judge, and then federal appeals court, have the final say on whether you were acting within "scope," based on a review of all available facts (think evidentiary court hearings) and the body of "scope of employment" case law. These legal fees are simply cost prohibitive to most Feds.

DOJ does not take pleasure in denying a Fed DOJ counsel, but it happens. We know. We've had our fair share of Westfall suits defending federal employees whose fees were paid for either by private insurance or by the federal employee himself. Some (not all) private insurers will even pay for private defense counsel to "appeal" a DOJ denial of "scope of employment" or "interest of the U.S." determination in order to get DOJ to reconsider its denial of "scope" determination or assignment of DOJ counsel. The reason being that some insurers see it in their interest to obtain as much DOJ backing in a lawsuit early on as possible.

Back now to the author's leap of faith in the significance of the AG's refusal to certify you within the scope of your employment. For sure, in that scenario DOJ will not be defending you—even without making an "interest of the United States" determination. But the AG's determination on "scope" is not definitive. The final scope of employment determination is made by a federal court, and there are cases of the courts overruling DOJ.

Final point on Westfall Act (common law tort) lawsuits. Not every Fed needs to worry about these types of suits. Thus, not every Fed needs to consider buying the insurance to fill the small gap where DOJ may not provide an attorney. If you have no contact with the public, are not in a law enforcement position, do not make decisions that affect private property stakeholders, and do not engage in a line of work that could cause potential physical harm to another (for example, medical malpractice claims against federal physicians and lawsuits against postal carriers who get into car accidents), then you probably do not need to worry about being sued for a common law tort.

Certainly you don't need to worry about being sued by your own subordinates. The law makes that virtually improbable and impossible, unless you hit, touch, grab, or otherwise assault someone at work. As an aside, federal employee associations do not recommend the purchase of insurance to protect against suits from subordinates, but rather for

administrative type claims, covered by a different provision in the insurance policy (see below).

Bivens Type lawsuits

But there's more to lawsuits against Feds not mentioned in last week's article, and it would be irresponsible if we didn't mention it here. That's the world of *Bivens* type suits. For those of you who've never heard of a *Bivens* suit, consider yourself lucky. But if you work in the arena of Federal law enforcement or national security, you've heard of a *Bivens* suit and likely purchased the insurance at some point in your career or have been meaning to do so. Why is it that these employees are apt to buy the insurance? Well, unlike in *common law tort* suits where a Fed enjoys full immunity from suit if acting within the scope of employment, immunity from suit in a *Bivens* case is not full but instead "qualified." That means simply being within the scope of employment (the determination necessary for full immunity in a *common law tort* case) is not enough to avoid potential liability in a *Bivens* case. It takes a lot more than that.

Here's a very, very abbreviated legal lesson. *Bivens* suits are premised on a claim by a plaintiff that the federal official violated his or her constitutional right. Thus, *Bivens* claims are known as *constitutional tort* suits. Whereas common law tort suits (regular negligence claims) are governed by the Westfall Act process described above, not so with *Bivens*. Rather, to obtain immunity in a *Bivens* suit (and therefore avoid legal and financial liability to the plaintiff) you must prove that: you did not violate a clearly established constitutional right of which a reasonable government official would have known. No "scope of employment" analysis here. No AG certification, etc. Rather, the factually and legally intense analysis of whether there was a federal right at stake, whether that right was clearly established under the law, whether your conduct was objectively reasonable under the circumstances (meaning reasonable mistakes in judging the legality of your behavior will still get you immunity). Sounds complicated? It is.

Some examples of *Bivens* claims are claims as follows. Federal agents (FBI, DEA, ICE, etc.) execute a search warrant and the home or property owner asserts some claim that his or her Fourth Amendment right was violated in the course of the warrant being served and executed. Federal prison officials are regularly sued by federal inmates claiming a violation of their Fifth or Eight Amendment rights for harsh treatment or the conditions of their confinement. Federal prosecutors are also frequently the target of these suits for claims of false prosecutions or constitutional deprivation of freedom. Post 9-11, the number of *Bivens* lawsuits are up drastically.

Now to why these Feds buy insurance. Just like in common law tort cases where DOJ's decision whether to assign you a DOJ attorney to defend you is based on whether it is in the "interest of the United States" to provide you with a DOJ counsel, the same test is true in a *Bivens* suit. So the same small risk exists that DOJ will not make a favorable decision to assign DOJ counsel.

Moreover, and more importantly, Feds are entitled to immunity if they did not violate a clearly established constitutional right of which a reasonable government official would

have known. And proof of that can be incredibly fact specific. Indeed there are enough cases where a federal court did not find for the Fed and did not grant immunity that it gave rise to the impetus for the insurance policy more than 20 years ago. What happens when a court finds against a grant of immunity in a *Bivens* suit? Well, there's usually a monetary judgment entered in favor of the plaintiff and against the Fed. There simply is not enough room to explain the indemnification process here. Suffice it to say that getting the employing agency to indemnify the Fed on the judgment is not a slam dunk. It's another process governed by each agency and also by DOJ. All of this makes up the minority of cases, but nonetheless a minority exists.

It is for these reasons that many Feds in law enforcement, many DOJ prosecutors, and many in national security field, buy insurance. For a rather nominal premium, they think they are covering that million dollar risk against a judgment.

What's left to cover? A whole lot.

Let's now go to the areas of coverage that interest most white collar managers and supervisors (those not in a law enforcement function) and federal manager associations. Yes, these insurance policies provide you with defense counsel if you are alleged to have engaged in some professional act of wrongdoing (off duty misconduct and on duty poor performance charges are not covered) and are placed under investigation or disciplinary charges are brought against you. Simply being able to take an attorney into your investigative interview is absolutely the wrong way to think about whether you need an attorney. The need for counsel goes well beyond the actual interview.

What about having an attorney to advise you of your legal rights and your obligations in the investigative process, the powers of the investigator, whether the investigation could result in criminal charges, and the parameters of the law under which you've been accused? We cannot count how many managers and supervisors we have defended in disciplinary actions who were dead certain they'd done nothing wrong, went to the interview without first obtaining legal advice, and turns out unknowingly admitted to violating some civil service or other law, rule or regulation. Welcome to the proposed disciplinary action or prosecution!

There is so much more an attorney can do to just prepare you for your investigative interview. The art of answering tough questions . . . that takes work. Although there are some internal investigative offices in the law enforcement agencies of DOJ and DHS that do not allow you to bring an attorney into the interview, you should know that in our 25 years or more in business, we have never known an OIG to deny any employee from having an attorney present in his or her IG interview. Never.

In today's world of complex, over-reaching, and never-ending government investigations, attorneys in D.C. now say that the well-informed innocent persons are usually the first to lawyer-up. Yes, the innocent. So many innocent people get caught up in the complexities of the federal legal investigative process, and even though innocent, are simply unable to maneuver the process successfully without counsel. That may be a sad commentary on what's become of our system, but you ignore it at your own risk.

Conclusion

Thank you for the opportunity to share our thoughts and experiences representing and defending Feds. It is a complex set of laws and legal concepts governing the areas of federal employee liabilities. When deciding whether to buy insurance, get informed! Visit the websites of federal employee associations and of the different insurance providers. Call and speak with representatives of these associations and insurance providers and ask questions. If need be, talk with experienced counsel. Just be informed and then decide.

*Shaw, Bransford, & Roth, P.C. (SBR) is a law firm in Washington, D.C. SBR is frequently assigned as defense counsel to represent federal employees through their professional liability insurance benefits offered by Federal Employee Defense Services (FEDS). As such, SBR earns fees from FEDS to represent federal employees on covered claims. In explaining how federal employee professional liability protection works, SBR is not making a legal recommendation whether any particular federal employee should purchase a professional liability protection benefits package, or whether the employee should purchase from FEDS. That recommendation and decision depends on the particular circumstance of the federal employee who is contemplating making the purchase. You may want to consult with your own attorney about whether to purchase a professional liability protection benefits package. You may also want to review the different protection packages available from providers before making any purchase decision.