

**Subpart M—Federal Tort Claims Act
Coverage General Provisions**

§ 900.180 What does this subpart cover?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

(a) Coverage of claims arising out of the performance of medical-related functions under self-determination contracts;

(b) Coverage of claims arising out of the performance of non-medical-related functions under self-determination contracts; and

(c) Procedures for filing claims under FTCA.

§ 900.181 What definitions apply to this subpart?

Indian contractor means:

(1) In California, subcontractors of the California Rural Indian Health Board, Inc. or, subject to approval of the IHS Director after consultation with the DHHS Office of General Counsel, subcontractors of an Indian tribe or tribal organization which are:

(i) Governed by Indians eligible to receive services from the Indian Health Service;

(ii) Which carry out comprehensive IHS service programs within

geographically defined service areas; and

(iii) Which are selected and identified through tribal resolution as the local provider of Indian health care services.

(2) Subject to the approval of the IHS Director after consultation with the DHHS Office of General Counsel, Indian tribes and tribal organizations which meet in all respects the requirements of the Indian Self-Determination Act to contract directly with the Federal Government but which choose through tribal resolution to subcontract to carry out IHS service programs within geographically defined service areas with another Indian tribe or tribal organization which contracts directly with IHS.

(3) Any other contractor that qualifies as an "Indian contractor" under the Indian Self-Determination Act.

§ 900.182 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671-2680) and related Department of Justice regulations in 28 CFR part 14.

§ 900.183 Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?

Yes. There are claims against self-determination contractors which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. General guidance is provided below as to these matters but is not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) *What claims are expressly barred by FTCA and therefore may not be made against the United States, an Indian tribe or tribal organization?* Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) *What claims may not be pursued under FTCA?*

(1) Except as provided in § 900.181(a)(1) and § 900.189, claims against subcontractors arising out of the performance of subcontracts with a self-determination contractor;

(2) claims for on-the-job injuries which are covered by workmen's compensation;

(3) claims for breach of contract rather than tort claims; or

(4) claims resulting from activities performed by an employee which are outside the scope of employment.

(c) *What remedies are expressly excluded by FTCA and therefore are barred?*

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and

(2) other remedies not permitted under applicable state law.

§ 900.184 Is there a deadline for filing FTCA claims?

Yes. Claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 900.185 How long does the Federal government have to process an FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

Six months.

§ 900.186 Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?

No, it is optional. At the request of Indian tribes and tribal organizations, self-determination contracts shall include the following clauses to clarify the scope of FTCA coverage:

(a) The following clause may be used for all contracts:

For purposes of Federal Tort Claims Act coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to provide health care services) are deemed to be employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

(b) The following clause is for IHS contracts only:

Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purposes is not affected.

§ 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?

Yes.

§ 900.188 To what extent shall the contractor cooperate with the Federal government in connection with tort claims arising out of the contractor's performance?

(a) The contractor shall designate an individual to serve as tort claims liaison with the Federal government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the contractor shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the contractor or any of its employees that relates to performance of a self-determination contract or subcontract.

(c) The contractor, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

(1) The date, time and exact place of the accident or incident;

(2) A concise and complete statement of the circumstances of the accident or incident;

(3) The names and addresses of tribal and/or Federal employees involved as participants or witnesses;

(4) The names and addresses of all other eyewitnesses;

(5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;

(6) A statement as to whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;

(7) The contractor's determination as to whether any of its employees (including Federal employees assigned to the contractor) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The contractor shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the contractor shall make an assignment and subrogation of all the contractor's rights and claims (except those against

the Federal government) arising out of a tort claim against the contractor.

(f) If requested by the Secretary, the contractor shall authorize representatives of the Secretary to settle or defend any claim and to represent the contractor in or take charge of any action. If the Federal government undertakes the settlement or defense of any claim or action the contractor shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 900.189 Does this coverage extend to subcontractors of self-determination contracts?

No. Subcontractors or subgrantees providing services to a Public Law 93-638 contractor or grantee are generally not covered. The only exceptions are Indian contractors such as those under subcontract with the California Rural Indian Health Board to carry out IHS programs in geographically defined service areas in California and personal services contracts under § 900.193 (for § 900.183(b)(1)) or § 900.183(b) (for § 900.190).

Medical-Related Claims

§ 900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?

Yes, except as explained in § 900.183(b). No claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the Act. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

§ 900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?

Yes. For the purpose of Federal Tort Claims Act coverage, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are deemed a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract.

§ 900.192 What employees are covered by FTCA for medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor); and

(e) Federal employees assigned to the contract.

§ 900.193 Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?

Yes. The coverage extends to individual personal services contractors providing health services in such a facility, including a facility owned by an Indian tribe or tribal organization but operated under a self-determination contract with IHS.

§ 900.194 Does FTCA coverage extend to services provided under a staff privileges agreement with a non-IHS facility where the agreement requires a health care practitioner to provide reciprocal services to the general population?

Yes. Those services are covered, as long as the contractor's health care practitioners do not receive additional compensation from a third party for the performance of these services and they are acting within the scope of their employment under a self-determination contract. Reciprocal services include:

- (a) Cross-covering other medical personnel who temporarily cannot attend their patients;
- (b) Assisting other personnel with surgeries or other medical procedures;
- (c) Assisting with unstable patients or at deliveries; or
- (d) Assisting in any patient care situation where additional assistance by health care personnel is needed.

§ 900.195 Does FTCA coverage extend to the contractor's health care practitioners providing services to private patients on a fee-for-services basis when such personnel (not the self-determination contractor) receive the fee?

No.

§ 900.196 Do covered services include the conduct of clinical studies and investigations and the provision of emergency services, including the operation of emergency motor vehicles?

Yes, if the services are provided in carrying out a self-determination contract. (An emergency motor vehicle is a vehicle, whether government, contractor, or employee-owned, used to transport passengers for medical services.)

§ 900.197 Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?

Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

§ 900.198 Are Federal employees assigned to a self-determination contractor under the Intergovernmental Personnel Act or detailed under section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?

Yes.

§ 900.199 Does FTCA coverage extend to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?

Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries. Such personnel are not covered when providing services to non-IHS beneficiaries.

§ 900.200 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes. Non-Indian individuals served under the contract whether or not on a fee-for-service basis, may assert claims under this Subpart.

Procedure for Filing Medical-Related Claims

§ 900.201 How should claims arising out of the performance of medical-related functions be filed?

Claims should be filed on Standard Form 95 (Claim for Damage, Injury or Death) or by submitting comparable written information (including a definite amount of monetary damage claimed) with the Chief, PHS Claims Branch, Room 18-20, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, or at such other address as shall have been provided to the contractor in writing.

§ 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?

They should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.

§ 900.203 If the contractor or contractor's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the contractor do?

As part of the notification required by 28 U.S.C. 2679(c), the contractor should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Room 5362, Washington, DC 20201, and the contractor's tort claims liaison, and forward the following materials:

- (a) Four copies of the claimant's medical records of treatment, inpatient and outpatient, and any related correspondence, as well as reports of consultants;
- (b) A narrative summary of the care and treatment involved;
- (c) The names and addresses of all personnel who were involved in the care and treatment of the claimant;
- (d) Any comments or opinions that the employees who treated the claimant believe to be pertinent to the allegations contained in the claim; and
- (e) Other materials identified in § 900.188(c).

Non-Medical Related Claims

§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?

Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical-related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

§ 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?

It applies to:

- (a) All tort claims arising from the performance of self-determination contracts under the authority of the Act on or after October 1, 1989; and
- (b) Any tort claims first filed on or after October 24, 1989, regardless of when the incident which is the basis of the claim occurred.

§ 900.206 What employees are covered by FTCA for non-medical-related claims?

- (a) Permanent employees;
- (b) Temporary employees;
- (c) Persons providing services without compensation in carrying out a contract;
- (d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are

provided in facilities not owned by the contractor); and

- (e) Federal employees assigned to the contract.

§ 900.207 How are non-medical related tort claims and lawsuits filed for IHS?

Non-medical-related tort claims and lawsuits arising out of the performance of self-determination contracts with the Indian Health Service should be filed in the manner described in § 900.201 (for both § 900.207 and § 900.208).

§ 900.208 How are non-medical related tort claims and lawsuits filed for DOI?

Non-medical-related claims arising out of the performance of self-determination contracts with the Secretary of the Interior should be filed in the manner described in § 900.201 with the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

§ 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?

- (a) If the contract is with DHHS, they should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.
- (b) If the contract is with DOI, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240.

§ 900.210 If the contractor or contractor's employee receives a summons and/or complaint alleging a non-medical related tort covered by FTCA, what should an Indian tribe or tribal organization do?

- (a) If the contract is with the DHHS, they should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue S.W., Room 5362, Washington, DC 20201 and the contractor's tort claims liaison.
- (b) If the contract is with the Department of the Interior, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240, and the contractor's tort claims liaison.