

Claims Report
U.S. Army Claims Service

Tort Claims Note

New National Guard Missions and the Federal Tort Claims Act

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Since 2001, the Army National Guard has performed an increasing number of non-traditional missions.⁶⁸ This has led to confusion as to their coverage under the Federal Tort Claims Act (FTCA)⁶⁹ for torts conducted while performing these missions. In the past, it was relatively simple to determine their coverage: National Guard Soldiers performing federal missions were covered by the FTCA, while missions performed in state Active Duty status led to state responsibility for claims.⁷⁰ Because the National Guard has recently undertaken a number of non-traditional federal missions that previously would have been performed in State Active Duty status, Army claims offices are seeing an increasing number of claims for activities that may not appear to be federal in nature, but are covered by the FTCA. This note will describe National Guard missions, to include new non-traditional duties, and provide practitioners guidance in handling claims arising from the performance of these missions.

National Guard members performing duties in a Title 32 status⁷¹ are considered federal employees for FTCA purposes even though they are under the control of the State.⁷² The following six paragraphs list some typical Title 32 duties performed by the National Guard and describe the documentation needed to establish coverage by Title 32 and the FTCA.

Monthly drills, officially termed “Unit Training Assemblies (UTA),”⁷³ are scheduled pursuant to the unit training calendars and conducted to meet federal training requirements. Individual orders are not issued for UTA.

National Guard members are in a Title 32 status when performing a UTA and are, therefore, covered by the FTCA.⁷⁴ Proof of Title 32 status can be derived from a copy of the unit training calendar for the time period in question, a certification by the member’s commander that they were present for duty during the UTA or a copy of the pay documents, if available, showing the member was paid for the drill.

Annual training is federally mandated training for National Guard members and usually lasts for two weeks. This training is conducted in a Title 32 status⁷⁵ and is, therefore, covered by the FTCA. Individual orders are generally issued for each member performing Annual Training, and serve as the most appropriate proof of a National Guard member’s Title 32 status.

Active Guard and Reserve (AGR) duties are performed by full-time National Guard personnel to organize, administer, recruit, instruct, and train the Guard.⁷⁶ Many National Guard recruiters fall into this category. Title 32 Active Guard and Reserves are covered by the FTCA. Individual orders issued by the State Adjutant General⁷⁷ are needed to prove Title 32 status.

National Guard technicians are full-time employees of the Guard and are considered federal employees for FTCA purposes.⁷⁸ They serve as federal civilian employees during the work week even though they wear military uniforms and are required to be members of the military as a condition of their federal employment.⁷⁹ Orders are the most appropriate proof of Title 32 status for technicians.

National Guard personnel performing counter-drug missions pursuant to Title 32 are performing full-time National Guard duty.⁸⁰ These personnel are covered by the FTCA, as long as the mission is covered by the Drug

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⁶⁸ See U.S. Army Claims Serv., *Claims Arising from the Performance of Duties by Members of the National Guard*, ARMY LAW., Aug. 2001, at 24; Major Christopher R. Brown, *Been There, Doing That in a Title 32 Status—The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in a Title 32 Status*, ARMY LAW., May 2008, at 23.

⁶⁹ 28 U.S.C. §§ 2671–2680 (2006).

⁷⁰ U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS paras. 2-2b(3), 2-15(e)(2)(a) (8 Feb. 2008) [hereinafter AR 27-20].

⁷¹ 32 U.S.C. §§ 115, 316, 502, 503, 504 or 505 (2006).

⁷² 28 U.S.C. § 2671 (2006). This section defines federal employees to include “members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32 . . .” *Id.* See also AR 27-20, *supra* note 3, para. 6-2.

⁷³ 32 U.S.C. § 502(a)(1).

⁷⁴ 28 U.S.C. § 2671.

⁷⁵ 32 U.S.C. § 502(a)(2).

⁷⁶ *Id.* § 502(f).

⁷⁷ 28 U.S.C. § 2671.

⁷⁸ 32 U.S.C. § 709(e).

⁷⁹ *Id.*

⁸⁰ *Id.* § 112(b).

Enforcement Agency (DEA). These claims should be referred to the DEA for appropriate action.⁸¹

Beginning in 2001, the Army National Guard was authorized by the President or the Secretary of Defense to perform missions in Title 32 status that in the past would have been performed in State Active Duty status. Examples of non-traditional National Guard missions accomplished while on Title 32 status include the airport security mission in the aftermath of the 11 September 2001, natural and manmade disasters (such as Hurricane Katrina), Operation Jump Start on the Southwest Border, and National Special Security Events (such as the 2008 Democratic and Republican National Conventions and the 2009 Presidential Inauguration).⁸² The FTCA applies to National Guard members performing these missions when conducted under Title 32.⁸³ When these operations are a response to a natural disaster or national emergency, National Guard members may have tort immunity under State emergency operations statutes. The unit orders for these missions provide proof of Title 32 status.

Active duty claims offices should accept all claims arising from National Guard activities that purport to file a FTCA claim.⁸⁴ Once the claim is accepted, claims personnel should determine if the National Guard Soldier allegedly responsible for the claim was in Title 32 status and, therefore, covered by the FTCA.⁸⁵ As described above, orders, training calendars or similar documentation will be necessary to establish this. National Guard judge advocates can assist in providing this documentation. Active duty claims offices should not reject claims solely because Title 32 status or the tortfeasor has not been established without first coordinating with the U.S. Army Claims Service (USARCS) at Fort Meade, Maryland.⁸⁶

Claims personnel must also determine if the National Guard Soldier was acting within the scope of Title 32 employment.⁸⁷ Although National Guard Soldiers may have

Title 32 orders, if they were actually conducting state duties inconsistent with their Title 32 status, they may not be covered by the FTCA because they have become a “borrowed servant” of the state.⁸⁸

National Guard claims must be coordinated with the full-time National Guard Judge Advocate for the state involved. Normally, this will be the State Claims Officer under National Guard Regulation 27-20.⁸⁹ Such claims should also be coordinated with the appropriate Area Action Officer at USARCS.⁹⁰

Once an active duty claims office has confirmed that the alleged tortfeasor was acting in Title 32 status, the claim should be processed and investigated. If the alleged tortfeasor was not acting in a Title 32 status, the FTCA claim may be denied⁹¹ and the claimant may be referred to the appropriate state agency for resolution of the claim. If a National Guard Soldier’s Title 32 status cannot be determined, claimants and their counsel should be advised to take appropriate action to protect potential claims against the state or tortfeasor.

Claims offices should contact the USARCS before denying any National Guard claim based upon a determination that the tortfeasor was not acting in Title 32 status and, therefore, not covered by the FTCA. Claims offices that encounter difficulty obtaining needed documentation from the National Guard can obtain assistance from the appropriate National Guard State Claims Officer or Area Action Officer at the USARCS. The USARCS is currently partnering with the National Guard Bureau to ensure expeditious processing of all National Guard claims.

⁸¹ *Id.*

⁸² *Id.* § 502(f).

⁸³ 28 U.S.C. § 2671.

⁸⁴ AR 27-20, *supra* note 3, para. 2-9.

⁸⁵ *Id.* para. 2-24d.

⁸⁶ The U.S. Army Claims Service may be contacted at (301) 677-7009. Additional information may be obtained at their Internet site at <https://www.jagcnet.army.mil/8525752700444FBA>.

⁸⁷ AR 27-20, *supra* note 3, para. 2-24f.

⁸⁸ See *Himel v. Alaska*, 36 P.3d 35 (Alaska 2001). An example of this would be a National Guard Soldier on a proper title 32 mission, such as assisting with a national political convention, who is borrowed by her state to conduct duties that solely benefit the state, such as providing transportation for the state Governor.

⁸⁹ U.S. DEP’T OF THE ARMY AND AIR FORCE, NAT’L GUARD, REG. 27-20, CLAIMS AGAINST OR IN FAVOR OF THE UNITED STATES ARISING FROM NATIONAL GUARD ACTIVITIES ch. 2 (10 July 1989), available at http://www.ngbpcd.ngb.army.mil/pubs/27/ngr27_20.pdf.

⁹⁰ AR 27-20, *supra* note 3, para. 2-15e(2).

⁹¹ *Id.* para. 2-31.