**(700)-80 Government Representation**

80.1 Overview.

There may be instances in which a Treasury Inspector General for Tax Administration (TIGTA) employee is sued or subpoenaed in his/her individual capacity as a result of actions the employee has taken within the scope of his or her TIGTA employment. It is important to distinguish between official and individual capacity lawsuits. When a government employee is sued in an official capacity, the actual defendant is the United States; any adverse judgment would be directed to the actions or the resources of the United States. Government representation of employees sued in their official capacity is virtually automatic and no formal request for representation is necessary.

When employees are sued in their individual capacities, they are the targets of the lawsuit; the plaintiff is seeking to recover from the employee's personal assets and not from the United States. Under certain circumstances, the Government will provide personal representation to current or former employees. The following section provides guidance and establishes the procedures to be followed to obtain government representation when an employee is sued individually or receives a subpoena to provide testimony in his/her official capacity.

Two criteria must be met for government representation to be authorized:

1. The employee's actions giving rise to the lawsuit must reasonably appear to have been performed within the scope of his/her employment; and,
2. It is in the interest of the United States to provide the requested representation.

28 C.F.R. § 50.15(a). With input from TIGTA's Office of Chief Counsel, the Department of Justice decides whether the above-listed elements have been met, and therefore, whether government representation will be provided to the employee. The Department of Justice's representation determination is not subject to review by the judicial system.

Employees are under no obligation to request or utilize government representation; the employee may obtain representation from a private attorney at his/her own expense. In addition, at any time after obtaining government representation, the employee may elect to withdraw his/her request and discontinue government representation. Further, an employee may seek advice and/or assistance of private counsel even while receiving government representation; however, the Government is solely responsible for filing pleadings and will not enter into "co-counsel" arrangements.

Government representation is generally not available in a federal criminal proceeding or investigation unless the Government determines that it would be in the interests of the United States. In making this determination, the Government will consider "the relevance of any non-prosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities." 28 C.F.R. § 50.15(a)(4).

Government representation is not available to an employee involved in an agency disciplinary proceeding. In addition, it is generally not available in civil cases if the employee is the subject of a federal criminal investigation for the same acts; however, the Department of Justice has the discretion to provide a private attorney to the employee at federal expense.

Government representation may be available for TIGTA employees involved in state criminal proceedings. For example, a TIGTA employee who is investigated by a state law enforcement agency for actions taken within the TIGTA employee’s official capacity, e.g., firing a weapon or other use of force, may seek government representation. TIGTA employees performing federal functions may be immune from state prosecution for the performance of their official duties if they can show that their actions were “necessary and proper” to carry out their federal responsibilities. To show that conduct is necessary and proper, an employee must satisfy two criteria: 1) that the employee reasonably believed that the conduct was authorized by his or her federal supervisors, and 2) that the conduct was reasonably calculated to further some legitimate federal function.

80.2 Named Employees.

Upon receiving a complaint in which a TIGTA employee has been named as a defendant in his/her individual capacity or upon becoming the subject of a state criminal matter, the employee should forward the complaint and/or relevant information to TIGTA's Office of Chief Counsel as quickly as possible. Generally, there is only a short period in which the employee and his/her counsel must respond to the complaint; therefore, it is important to begin the process to obtain government representation as quickly as possible.

If applicable, the Office of Chief Counsel will advise the employee in writing that he or she may be eligible to be individually represented by government counsel and that such representation is subject to the scope and interest limitations set forth above. In addition, the employee will be provided with the Department of Justice's Acknowledgment of Conditions of Department Representation.

The Acknowledgment of Conditions of Department Representation contains the following information that the employee should consider when seeking government representation:

* Attorney-Client Communication Privilege - All written or oral communications between the employee and his/her assigned Justice Department lawyer will be protected by the attorney-client privilege.
* Claims Against the United States - The Justice Department attorney will not assert any claim on the employee’s behalf against the United States; nor will he or she assert any claim the employee might have against other federal employees.
* Counterclaims - As a general policy, the Department of Justice attorney may only undertake to defend the employee. He or she will not assert an affirmative claim on the employee's behalf against the plaintiff or anyone else. If the employee strongly believes that such a claim should be asserted, the employee's normal recourse would be to hire a private attorney at his/her personal expense to press that claim. In the rare instance when an affirmative claim would further not only the employee's defense, but also the interests of the United States, the Department will consider pursuing the claim.
* Conflicts With the United States - If there is a legal argument which could be made in the employee's defense, but which conflicts with a legal position taken by the Untied States, or any of its agencies, the Department of Justice attorney will not make the argument. The employee will be advised of this fact so that he or she may assess available options. Correspondingly, should the employee ever have questions in this regard, he or she should take the opportunity to discuss them with the Justice Department attorney.
* Conflicts With Co-Defendants - If there is a material conflict of interest between the employee and one of the employee's individually-sued co-defendants, whether factual or legal in nature, the Department of Justice attorney will advise the employee of this fact so that he or she may assess available options. Correspondingly, should the employee ever become aware of such conflicts, the employee should immediately notify the Justice Department attorney. Normally, in such cases, it will not be possible for the lawyer to continue representing the employee and other co-defendants having mutually conflicting interests.
* Defending Co-Defendants - If the Justice Department attorney is representing other defendants in addition to the employee, including the United States or an agency, the Department attorney may elect to press available defenses that could result in the dismissal of a co-defendant before the employee.
* Appeals - If the judgment of the court is in the employee's favor and the losing plaintiff appeals, government representation will continue throughout the appellate stage of this case. In the event of an adverse judgment against the employee, the Solicitor General of the United States will determine whether an appeal by the Justice Department attorney would be in the interest of the United States. If not, the employee will be promptly advised in order to discuss available options.
* Retention of Private Counsel - In certain limited circumstances where a Department of Justice attorney can no longer represent the employee, the Department may elect in its discretion to provide the employee with a private attorney at Government expense. The employee will be so advised if such circumstances arise.

If the employee is interested in obtaining government representation, he/she will be asked to sign both the letter from TIGTA Counsel as well as the Department of Justice's Acknowledgment of Conditions of Department Representation. As indicated previously, representation will be denied if the Department of Justice determines that the employee did not act within the performance of his/her official duties.

After receiving the employee's signed request for government representation, the Office of Chief Counsel will forward this form to the Department of Justice as well as factual information and TIGTA's recommendation as to whether employee representation should be provided. As indicated previously, the Department of Justice will authorize government representation if it determines that the employee's actions were taken in the performance of his or her official capacity and it is in the Government's interest to provide individual representation. TIGTA Counsel’s Office will notify the employee of the recommendation and whether or not the Department of Justice has authorized government representation.

An attorney-client relationship between the employee and the government attorneys commences with the request for representation and applies to all communications made for purposes of obtaining government representation. While privileged information may be used in determining whether government representation is to be authorized or continued, it ordinarily cannot be used against the TIGTA employee in agency disciplinary actions. The statute governing Department of Justice representation provides, in part:

Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued.

28 C.F.R. § 50.15(a)(3).

80.3 Witnesses.

TIGTA employees who are called to provide testimony in their official capacities may seek government representation. Ordinarily, however, individual government representation of employee-witnesses is not necessary. In cases where the employee is called to testify, the government attorney assigned to the matter will represent the employee in his/her official capacity as a designated representative of the United States. If the employee is testifying as a fact witness, the government attorney represents the United States and is responsible for assisting the employee who is an employee of the United States.

There may be instances where a TIGTA employee, called to testify in his or her official capacity, may be entitled to government representation, for example, in litigation in which the government is not a party to the lawsuit. If an employee believes that individual representation is necessary, the same procedures to obtain government representation as set forth in section 80.1 need to be followed. The employee must sign a request for representation to be submitted to the Department of Justice for consideration along with the Office of Chief Counsel's recommendation as to whether the employee's actions reasonably appear to have been performed within the scope of his/her employment and whether providing representation will be in the interest of the United States. The Office of Chief Counsel will notify the TIGTA employee in writing of the Department of Justice's representation determination.