

INFORMATION PAPER

PERSONAL LIABILITY RELATED TO Y2K

1. Introduction:

As part of AMC efforts to address issues related to the Year 2000 (Y2K) problem, this paper addresses the potential liability of AMC officials for claims filed by those individuals or entities harmed by AMC computer systems that are not Y2K compliant.

2. General Legal Position:

a. Federal government managers, supervisors, and employees enjoy a broad grant of immunity for actions they take as government employees. The key is whether the action taken (or the omission) falls "within the outer perimeter of the employee's scope of duties".

b. In reaction to a 1988 Supreme Court decision that seemed to narrow the granting of immunity, the Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4563. This legislation set forth a broad grant of immunity for executive branch employees, stating that for actions taken within the scope of duties, the United States, and not an individual employee, is the proper defendant.

c. There are three exceptions:

o Constitutional violations--you are not immune from personal liability if you violate the constitutional rights of another.

o Criminal activity--you are not immune from personal liability if you commit a crime.

o For statutes that specifically permit suits against the individual--you are not immune from personnel liability if a law states that those who violate the statute are personally liable (for example, pursuant to specific provisions of the Privacy Act, those who violate that law are subject to personal liability).

d. The reason for this broad grant of immunity is: To protect Federal employees from being "harassed" through threats of lawsuits, and to encourage employees to make decisions without the fear that they are personally liable for their decisions.

3. Immunity and Liability Related to Y2K:

a. The general rule described above applies to Y2K. That is, Federal officials enjoy immunity for actions they take as part of their official duties related to Y2K matters, such as certifying that a system is Y2K compliant.

b. Y2K Compliance Certifications:

The Army legal position is that certifications made in good faith as part of an official's job duty would not subject the official to personal liability. The law provides immunity from personal liability for those actions of federal officials acting within their "scope of duties". The Army Y2K Program requires certification whenever an entry is made in the database that a specific computer is Y2K compliant. Thus, certification is part of the official duties of AMC personnel who perform that act. We should ensure that responsible officials are free to declare their doubts as to compliance, and that no action is taken to require certification in circumstances of doubt. As we get closer to the critical date we must still make good faith judgments as to compliance. In other words, you must act with "due diligence", in executing these responsibilities.

c. You may be subject to personal liability if you have certified a computer system as Y2K compliant when you knew it was not in compliance.

4. DOD As A Defendant In Y2K Claims: DOD *Not* Individual Employees:

a. Claims against the government can arise out of virtually any aspect of Federal operations. The following list of possible claims is not intended to be all-inclusive.

b. Certification of Information Technology Products as Year 2000 Compliant. If DOD incorrectly certifies vendor equipment as Year 2000 compliant, it might be liable for the improper certification under the tort theory of misrepresentation. Although there is an exemption from liability in the Federal Tort Claims Act (FTCA) for misrepresentations, the facts of the particular situation must be reviewed to determine whether the exemption will apply. 28 U.S.C. § 2680(h). Certifying officials should act with "due diligence" in executing Y2K responsibilities. Never make official certifications or any other assertions that you know are not true. Similarly, your decision making process should be consistent with the information you had available. It is a good idea to keep a proper paper "trail" and records of the information used in making decisions.

c. Providing Items That Are Not Year 2000 Compliant As Government Furnished Property (GFP). If the government provides a contractor defective GFP, the contractor may be entitled to compensation and schedule adjustments. *Celesco Industries*, ASBCA 21928, 81-2 BCA ¶ 15,260 (1981). Similarly, if a vendor receives GFP that is not Year 2000 compliant and modifies it for another government customer, the vendor might be relieved from liability for its failure to provide a Year 2000 compliant product. Additionally, the “wronged” government customer could not generally assert a damage claim against the originating government activity. 65 Comp. Gen. 464 (1986).

d. Electronic Funds Transfer. If DOD fails to make a deposit, the government must pay the intended recipient what was actually owed, but is not normally liable for any overdraft or other charges that the recipient may incur. 31 C.F.R. § 210.10(a). However, there is a significant exception to this normal rule that DOD is not liable. Both military and Federal civilian employees enrolled in the direct deposit program are entitled to be reimbursed for any charges imposed by the financial institution where government error caused the pay to be deposited late or in an incorrect amount. 10 U.S.C. §§ 1053, 1594.

e. Prompt Payment Act, 31 U.S.C. §§ 3901 - 3907. If DOD fails to make timely payment for goods or services acquired from a business concern under a contract, the government is liable for interest on the payment.

f. Federal Tort Claims Act. Claims for personal injury or loss of property may be payable when the injury or damage is caused by negligent or wrongful acts of DOD personnel acting within the scope of their employment. There are innumerable types of such claims, including improper patient care, air traffic control failures, and motor vehicle accidents. These types of claims might result in liability for DOD, and the possible consequences from failures of embedded systems are difficult to predict.

5. What To Do If You Are Sued:

a. If you are ever sued because of actions you take as a Federal employee the first step you should take is to seek advice from your legal office.

b. A preliminary determination will be made as to whether the actions that caused the lawsuit were those "within the scope of your employment."

c. Most often, your legal office will work with you to complete a document signed by your Commander stating that you were acting as a Federal official.

d. This document is staffed through DA and DOD with the Department of Justice. If DOJ rules that you were indeed operating within the scope of your duties, then they will take actions to represent you and to have the United States named the

defendant, dropping you from the lawsuit.

6. Contact Your Legal Office:

For further information on the issues of personal liability and immunity from suit contact your local legal office