

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:CT:NO:140199-04
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date: October 8, 2004

to: CHIEF, CRIMINAL INVESTIGATION
Attn: Deputy Director, Strategy CI:S

from: EDWARD F. CRONIN
Division Counsel/Associate Chief Counsel (Criminal Tax)

subject: Effect of the Law Enforcement Officer Safety Act of 2004

REQUEST

Attached is General Legal Services' response to your request for a legal opinion on the impact the recently enacted legislation, the Law Enforcement Officer Safety Act of 2004, Public Law 108-277, which allows active and retired law enforcement officers to carry concealed weapons, will have on your policies and guidelines.

RESPONSE

As more fully detailed in their memorandum, General Legal Services opines Criminal Investigation (CI) may permissibly have identifications developed and printed for retired CI agents using appropriate funds. Further, they opine the IRS would not likely be exposed to any significant risk of liability by issuing the identifications and certifications.¹

If we can be of any assistance to you regarding this matter, please feel free to contact me directly at (202) 622-4460 or Marta Yanes of the Criminal Tax Division at (202) 622-4470.

¹ The certification provides proof the retired special agent received firearms standards certification in the last twelve months along with their photographic identification

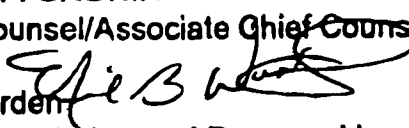
Office of Chief Counsel
Internal Revenue Service

memorandum

CC:GLS:CLP:PGray
GLS-144417-04

date: OCT - 1 2004

to: EDWARD F. CRONIN
Division Counsel/Associate Chief Counsel (Criminal Tax)

from: Neil B. Worden 
Chief, Claims, Labor and Personnel Law Branch (GLS)

subject: **LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004**

This responds to your request for advice concerning what type of photographic identification (ID) must be provided to Special Agents upon their retirement from the Service and potential government liability arising out of issuing such identification and qualifying retiring agents in weapons use. We address both of these questions in turn.

Under the Law Enforcement Officers Safety Act of 2004 (the Act), retired law enforcement personnel may carry concealed weapons provided they are qualified and possess the requisite photographic identification issued by the agency from which they retired. Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108-277, 118 Stat. 865 (July 22, 2004). As discussed below, the Director of Real Estate and Facilities Management (REFM) oversees the execution of the ID program, including the printing of ID media for the Service. Therefore, if Criminal Investigation (CI) obtains the necessary approval from the Office of Communications and Liaison to incorporate the agency seal, we are of the opinion that the Director of REFM may be asked to develop and print IDs for retired CI agents, and this would be a permissible use of appropriated funds.

The IRM contains directives detailing the information and symbols that IRS ID cards must contain. IRM 1.16.5.4. Specifically, the IRM provides that the data area on the face of the IRS employee ID card will have a large IRS seal with the words INTERNAL REVENUE SERVICE around the outside of the seal. IRM 1.16.5.4.4. The Commissioner, through the Office of Communications and Liaison, has the authority to authorize the use of the IRS logo or other official Service seal based upon Counsel's advice. See Treas. Reg. 301.7514-1; T.D. 73-04 ¶ 4(d).¹ The Chief of AWSS

¹ There have been no specific delegations from the Commissioner with regard to the authority to determine when the use of the Service's seal and other insignia may be appropriate. However, this authority falls within the functional responsibilities of the Communications Division, Office of Communications and Liaison.

maintains the authority to prescribe identification badges for use by the agency. IRM 1.16.4.3:1; see also Delegation Order 164 set forth at IRM 1.2.2.1.34. In this regard, the Director of REFM is responsible for planning, developing, and implementing the Service-wide Identification Media program. IRM 1.16.4.3:2. Requests to print any type of IRS ID must be submitted in writing to the Director of REFM. IRM 1.16.4.4:2. Based upon these directives, it appears that CI may wish to seek approval from the Communications Division to use the IRS seal, then consult with the Acting Chief of AWSS, James P. Falcone, and the Director of REFM, Norris L. Walker to develop and print an official ID for the retired Special Agents who qualify to carry a firearm.

The legislative history for the Act reveals that the rationale for permitting retired officers to carry their weapons is that these officers need to be able to protect themselves and their families, and they are just as trustworthy as they were when they were employed full time. H.R. Conf. Rep. No. 560, 108th Cong., 2d Session. (June 22, 2004). The amendment that was added to the bill before it passed to the Senate included a requirement that retired officers must carry proof that they have received firearms standards certification in the last twelve months along with their photographic identification. *Id.* While not explicitly stated in the text, in order to fulfill the purposes of the Act it appears that Congress intended for the agencies to issue the ID cards. While the basic rule of appropriations law is that an agency may only use its appropriations for authorized purposes, an agency may incur expenses not provided for if they are reasonably necessary to carry out an authorized function and not otherwise prohibited by law. 31 U.S.C. § 1301(a); see 71 Comp. Gen. 469, 471 (1992); see also 66 Comp. Gen. 356, 359 (1987). Since the Act indicates that each Federal agency will provide its retired law enforcement officers with valid identification in order for them to carry concealed firearms, the provision of IDs to retired Special Agents is an authorized function, and the expenditure of funds to issue ID cards is a permissible use of appropriated monies. See *supra* Pub. L. No. 108-277, 118 Stat. 865 (July 22, 2004).

With respect to your question regarding the government's potential liability for issuing identification and certifying the weapons qualifications of retiring law enforcement agents, we do not think the government will be exposed to any significant risk of liability by issuing the identification and certifications for the following reasons.

The United States has waived its immunity for common law torts under the Federal Tort Claims Act, 28 USC §§ 1346(b), 2671-2680 (FTCA), which constitutes the exclusive remedy for such actions. Liability must be based on the negligent or wrongful act or omission of an employee of the United States acting within the scope of his or her employment. 28 U.S.C. §§ 2671, 2672. Because retired employees are not employees for FTCA purposes, the United States cannot be held vicariously liable for their actions.

The potential for claims based on the negligence of the federal employees who issue the identification or certify the weapons qualifications of former agents also exists. However, in addition to the FTCA requirement that liability be based on the act or omission of an employee acting within the scope of his or her employment, damages can be awarded only where the employee committed a negligent or wrongful act or

omission. Negligence or wrongfulness are determined under state law, and may be differently defined from state to state, but there are generally four elements to establish fault: (1) the actor must owe a duty to the person complaining of the harm; (2) there must be a breach of that duty; (3) the breach must be the cause of the harm; and (4) damages must result. Prosser and Keeton on Torts § 31(5th ed. 1984). We do not believe that there would be a sufficient causal connection between the issuance of identification and certification that the former employee is qualified to use a weapon, and any personal injury or property damage caused by the former officer's carrying and/or using the concealed weapon. See, e.g., *Ciatto v. Lieberman*, 769 N.Y.S.2d 48, 51 (N.Y. App. Div. 2003) (negligently permitting use of dealer license plates, thus allowing an unregistered vehicle to be on the road, was not the proximate cause of an accident involving that vehicle). In the absence of causation, a claimant would be unable to establish negligence, and there would be no basis for government liability.

If you have any questions regarding the issuance of identification, please contact Melinda De Atley at (202) 283-7900. For questions regarding liability, please contact Patti Gray at (202) 283-7917.