

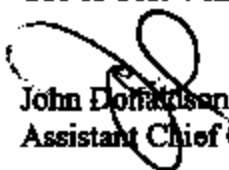


U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

Memorandum

Subject: Use of Test Vehicle by NHTSA Staff

Date: MAR 30 2004

From:  John Donatelli
Assistant Chief Counsel for Legislation and General Law

Reply to
Attn. of:

To: Kathleen C. DeMeter
Director, Office of Defects Investigation

Michael Monk
Director, Vehicle Research and Test Center

You have requested advice on the whether NHTSA employees may be authorized to drive Vehicle Research and Test Center (VRTC) test vehicles for personal business outside of normal working hours in order to evaluate the performance of a component on a vehicle that is the subject of a defects investigation. We find no prohibitions against the use of VRTC test vehicles in this manner if the appropriate Office of Defects Investigation and VRTC personnel authorize such use and restrictions and limitations are imposed on the NHTSA employees before they are allowed to drive vehicles for evaluation purposes.

In this particular case, VRTC plans to acquire two or three test vehicles for the purpose of evaluating the performance of the anti-lock brake system (ABS) for model years 2002-2003 Subaru Impreza WRX vehicles. You have indicated that your offices wish to allow employees a certain amount of flexibility in using these vehicles. Before this use is allowed, however, you want to ensure that protections available to employees under Federal laws, such as the Federal Tort Claims Act (FTCA), extend to this situation.

As a general matter, the FTCA waives the sovereign immunity of the Federal government and allows it to be sued in tort for the negligent acts of its employees. As long as employees are found to have acted within the scope of their employment, the Federal government must defend employees against negligence-based lawsuits. Questions concerning an employee's "scope of employment" generally proceed from the standpoint of whether a particular act furthers the purpose of the employer.

The vehicle use being proposed by your office in this situation presents a dual-purpose scenario. NHTSA employees would use the vehicles for personal business outside of normal working hours, but with the understanding that they would also use the time to observe and report on the vehicles' performance on various road surfaces similar to those



identified by consumers in Vehicle Owner Questionnaires. The proposed use would serve the agency by allowing employees to evaluate the performance of the ABS and identify parameters of road conditions and vehicle operation characteristics to develop the appropriate test procedures to test the Subaru Impreza WRX's ABS system.

In analyzing this situation, we find determinative that the purpose of the use is to evaluate vehicle safety performance, that the agency expressly permits and desires this use, and that a test procedure may be developed through the observations made during this use. I understand further that the vehicles will be leased or purchased by the agency. Noting that these vehicles will be obtained by VRTC to evaluate ABS performance, and that the proposed use will allow the desired observation of the ABS in normal, everyday traffic situations, we are satisfied that the protections of the FTCA would extend to agency employees in this situation. In addition, we are satisfied that the above-listed facts would serve to extend coverage of the Federal Employees Compensation Act (FECA) to agency employees should they be injured while using the vehicles.

Certain steps should be taken to limit the agency's potential liability. As a starting point, employees should receive express permission from an appropriate person in your offices before beginning any use. In conjunction with this permission, we recommend that your office set appropriate use limitations. We suggest that only VRTC employees be allowed to drive the vehicles and that the vehicles not be taken to places where alcohol is served. Also, VRTC employees who use the vehicles should not drive passengers who are not VRTC employees. Employees taking medications that prohibit driving also should not use the vehicles. In addition, the vehicles should be limited to a prescribed radius of travel.

The restrictions listed above, in addition to any that you find necessary, should be conveyed to employees prior to the start of any vehicle use. We note that the government is under no obligation to defend employees who commit torts while under the influence of alcohol or drugs. Reckless or criminal behavior or other behavior clearly beyond the scope of an individual's employment would also not be protected under the FTCA.

Please note that this advice applies to the specific facts described herein, and should not be assumed to apply to future proposed uses of vehicles.

If you have any questions or concerns regarding this matter, please feel free to contact me (x61834).

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