

March 10, 2010

John Duncan
Director
California Department of Industrial Relations
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102 -7004

Dear Director Duncan:

On behalf of Public Employees for Environmental Responsibility (PEER), I am writing to protest an overly broad and illegal inquiry that you have ordered into the private activities of Cal-OSHA employees. PEER requests that you end this investigation immediately, retract directives issued concerning it and that the materials submitted by employees be destroyed.

At your personal directive, according to March 1, 2010 memo from your "Senior Special Investigator" Frank Dickey, all workers inside the California Division of Occupational Safety and Health are under orders to report any outside "teaching, training and presentation activities" performed while working for DOSH even if they were not compensated. This extraordinarily intrusive "internal investigation" also requires Cal-OSHA employees to surrender all related materials including those stored on "home computers or other personal electronic devices."

By March 15, 2010, all employees must file an audit questionnaire "under penalty of perjury" detailing every non-work presentation regardless of whether it had anything to do with Cal-OSHA. Employees are being advised that they must detail activities such as serving as a volunteer Sunday school teacher, Little League coach or CPR instructor. It even includes activities by employees while serving as military reservists.

Lest there be any doubt about the limitless scope of this exercise, Mr. Dickey tells employees to "be overly inclusive; do not make any assumptions about the scope of the information we require."

As you may know, Article 1, Section 1 of the California Constitution declares:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Amended Nov. 7, 1972, to add the word "privacy.")

As an inalienable right granted to all people (state employees included) under the California Constitution, state actions which threaten or hamper one's right to privacy are judged under the standard of "strict scrutiny." By this standard, your decision to require DOSH employees to disclose non-work related activities, including protected religious, political and union organizing activities cannot stand.

Strict scrutiny also requires that your agency employ the most limited intrusion necessary to accomplish a legitimate public purpose. First, the breadth of your investigation is the antithesis of limited. Second, there is no legitimate purpose that can be identified for any inquiry of this length and depth.

Agency employees already must file conflict of interest forms disclosing any source of income related to official duties. Moreover, DIR may not take disciplinary action against employees for events which occurred more than three years ago. Yet, the DIR "audit" goes back to the start of employment, a period of decades for senior workers.

Moreover, the stated basis for this probe is a state audit which found a former Cal-OSHA employee who "taught and delivered presentations concerning occupational safety and health for pay and other compensation while working for the Division as a full-time employee," per a February 24, 2010 memo to DOSH staff. In this case, that employee had been caught and resigned. It is not clear what, if anything, this heavy-handed probe adds to the current protections.

Besides being constitutionally suspect, this inquiry conflicts with the policies contained within key sections of the California labor Code – a body of laws that your department is supposed to be enforcing.

- **Labor Code § 1101** prohibits an employer (including a state agency) from making, adopting, or enforcing any rule or policy forbidding or preventing employees from participating in politics. In addition, an employer cannot control or direct the political activities or affiliations of its employees.
- **Labor Code § 1102** prohibits an employer from coercing or influencing the political activities of employees.

By requiring DOSH employees to disclose any political presentations they have made, together with an order to provide "any documents or other information kept in any form concerning these activities," this inquiry is chilling political speech in violation of the underlying policy expressed in the Labor Code.

In addition, this sweeping inquiry includes activities undertaken in union organizing and representation. In essence, you, as agency management, are requiring union officials within DOSH to detail all "presentations" they have made about union business and supply DIR management with all associated union materials. If this is your intent, you can expect to generate unfair labor practice complaints to the state Public Employment Relations Board.

PEER has been receiving complaints back here in Washington, DC, from our members within DOSH. I can only imagine the effect this is having on employee morale. It adds insult to injury for DIR employees to be subject on the one hand to involuntary unpaid furloughs and on the other hand to be under investigation for what they said and did during those furloughed hours.

Finally, this inquiry raises disturbing questions about the priorities within DIR. The use of state funds for what can only be called a wild goose chase during this time of continuing fiscal distress suggests that the values of public service within your department should be reexamined.

Sincerely,

Jeff Ruch
Executive Director

Cc. Len Welsh, DOSH
Vanessa Holton, Chief Counsel