

Is Cal-OSHA Violating Employees' Constitutional Rights?

Mar 10, 2010 4:20 PM, By Sandy Smith and Laura Walter

All professional staff inside the California Division of Occupational Safety and Health have been directed by Len Welsh, chief of the Division of Occupational Safety and Health of the state's Department of Industrial Relations (DIR), to report any outside "teaching, presentations and training" performed while working for Cal-OSHA.

If these activities, which include uncompensated volunteer work, are not disclosed, the employee faces disciplinary action. In a March 1 memo, Frank Dickey, senior special investigator for the legal unit of the office DIR Director John Duncan, warned employees to be "overly inclusive" with what they provide to investigators, adding "do not make any assumptions about the scope of the information we require."

According to Public Employees for Environmental Responsibility (PEER), employees are being explicitly advised that the inquiry covers religious, political or union organizing activities and even military reserve training. Employees are expected to complete a **questionnaire** (http://peer.org/docs/ca/3_10_10_DOSH_Audit.pdf) about their off-site activities – even ones that have nothing to do with Cal-OSHA – and provide Dickey with "any and all documents as well as electronic information related to your teaching, training or presentation activities. You are directed to preserve and not to destroy or alter any documents or other information kept in any form concerning these activities."

According to Dickey, this electronic information includes "emails, voicemail messages, cell phone and PDA chips, portable electronic storage devices and all types of information that is commonly created, stored and transferred by computer or electronically." This includes, he added, "any electronic information you may have created on home computers and other personal electronic devices."

PEER contends that the inquiry violates workers' constitutionally guaranteed right to privacy. In addition, the California Labor Code, which DIR is supposed to enforce, provides that all workers, including state employees, shall not be intimidated or held to answer for political affiliations or activities. Similarly, union activities also would be included in what workers now must report in detail, together with all relevant documents, to DIR management.

"In California, all workers enjoy a constitutional right to privacy which means that a government agency has no business probing your personal life," said PEER Executive Director Jeff Ruch. "This thoroughly wrongheaded and illegal probe should end immediately and the minds behind it should have their heads examined."

A **Feb. 24 all-staff memo** (http://peer.org/docs/ca/3_10_10_DOSH_Memo.pdf) claims the investigation was prompted by a state audit that 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."

Although that employee resigned after he was caught, DIR Director Duncan decided to "broaden" the inquiry.

"California is supposed to be broke but this department somehow has the money and time for this nonsense," said Ruch, who sent Duncan a protest letter. "Heaven help us if this exemplifies the philosophy the Department of Industrial Relations brings to workplaces in the Golden State."

PEER argues that this overly broad inquiry serves no useful purpose, as 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 that occurred more than 3 years ago. The DIR audit goes back to the start of employment, a period as long as decades ago for senior workers.

When asked to comment, a DIR public relations officer told *EHS Today*, "We have an internal audit ongoing. We're not able to discuss this."

A call to federal OSHA for comment was not returned.

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Thursday, March 11, 2010

FLASH REPORT!

Controversy over "Double Dipping" Investigation

Cal/OSHA inspectors are loudly protesting a Department of Industrial Relations (DIR) probe into their outside activities that they say is unnecessarily intrusive and violates their privacy.

Unions representing Division of Occupational Safety and Health personnel have demanded that DIR scale back the audit, which was triggered after an inspector was alleged to have improperly participated in safety instruction for compensation. The inspector has since resigned. California's Bureau of State Audits (BSA) investigated the incident and is expected to release a report on the issue of "double dipping" in April.

DIR initiated its investigation at the direction of BSA and says the scope of the audit is at the bureau's behest. Inspectors are being required to disclose teaching, training or presentation activities for their entire tenure at DOSH. One DOSH official is reported to have told employees that they should disclose such activities as teaching a CPR course or coaching a children's soccer team. They also have been instructed to preserve written and electronic documents, including those on home computers, prompting one inspector to raise the specter of employees' homes being searched. "Be overly inclusive," DIR directed DOSH employees.

Union officials worry that the probe could include labor organizing activities.

The March 12 edition of *Cal-OSHA Reporter* has complete coverage of this important story.

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The Pump Handle

A water cooler for the public health crowd

A Bureaucratic Assault on CalOSHA Staff

March 11, 2010 in Uncategorized | by The Pump Handle

By Jack Oudiz

Pump Handle readers may recall the “Exit Interview” I posted here in June 2009 upon my retirement from Cal/OSHA after nearly 25 years of service. In that letter, I testified about the many ways that Cal/OSHA was failing to carry out its mandated mission, in part as a result of abysmal leadership, poorly trained and inspired staff, employer-oriented policies and woefully inadequate staffing resources. In the nine months since my departure, things have only become worse. Much worse. To the point that a local news station in Los Angeles was motivated to devote an entire 30 minute program on the many failings of the agency in protecting California’s workers. Now comes the latest instance of bureaucratic assault on Cal/OSHA staff, one so blatantly idiotic and outrageous that it has provoked the kind of bad press that will undoubtedly lead the initiative to blow up in the agency’s face. In the meantime, Cal/OSHA staff morale continues to plummet to unprecedented lows.

On February 24, Cal/OSHA Chief Len Welsh issued a memo to all Cal/OSHA staff directing them to comply fully with an investigation being conducted by the Department of Industrial Relations (DIR) (Cal/OSHA’s parent agency). The details of this investigation were subsequently spelled out in a memo issued by DIR’s legal staff on March 1. In essence, all Cal/OSHA staff are required, under threat of disciplinary action, to complete a questionnaire listing every outside, “teaching, presentations and training” performed while working for Cal-OSHA during their entire agency employment lifetime (which for some staff can be 20 years or more), whether compensated or not, whether related to occupational safety and health or not. Employees are being explicitly advised that the inquiry covers religious, political or union organizing activities and even military reserve training. One Cal/OSHA Regional Manager advised her staff that given the language of DIR’s memo, it would be prudent to even include coaching a child’s soccer team as an activity!

Furthermore, as part of this disclosure, staff is required to submit “any and all documents as well as electronic information related to your teaching, training or presentation activities... [and] are directed to preserve and not to destroy or alter any documents or other information kept in any form concerning these activities.” This electronic information includes “emails, voicemail messages, cell phone and PDA chips, portable electronic storage devices and all types of information that is commonly created, stored and transferred by computer or electronically” and includes “any electronic information you may have created on home computers and other personal electronic devices.”

This witch hunt was apparently instigated after the discovery that a former Cal/OSHA employee had conducted compensated offsite training while a full-time employee – a practice that has frequently occurred during my tenure, was well known by and even explicitly condoned by management in many cases. But even if truly violative behavior can be proven, the Department of Industrial Relations, the state’s ultimate arbiter of worker rights and labor relations, by this action, is sending a broader message that it condones employers carrying out this kind of giant fishing expedition and invasion of privacy

under the threat of disciplinary action. It is particularly troubling to think that a government agency can demand this information with impunity. As Jeff Ruch, Executive Director of Public Employees for Environmental Responsibility (PEER), put it in a letter of protest to the DIR Director, "In California, all workers enjoy a constitutional right to privacy which means that a government agency has no business probing your personal life, this thoroughly wrong-headed and illegal probe should end immediately and the minds behind it should have their heads examined."

To date, Professional Engineers in California Government (PECG), the union that represents most Cal/OSHA field staff, has reacted swiftly and strongly to protest this open ended and overly broad investigation in letters to both Cal/OSHA and DIR.

For those of you who have ever engaged in volunteer or other activities outside of work, consider the time it would take you to comply with this questionnaire over a working lifetime of 10 years or more. How long would it take you to retrace dates, locations, organizations, content, materials, etc. and to gather up all the physical evidence. Now, put yourself in a Cal/OSHA inspector's steel-toed shoes for a minute and realize that that is exactly how much time is not available to you to conduct the workplace inspections and accident investigations which are piled ever deeper on your desk. And how does it feel to receive this accusatory and threatening directive? How is your morale and attitude toward the agency that you have committed your career to holding up? How strong is your sense of support and recognition from management for the incredibly challenging job you are asked to perform every day? How is your motivation to carry out the agency's mission, to the best of your ability, doing? Given that this is one of the very few direct communications that you have received from the Agency's Chief in the past 5 years, how inspired do you feel?

As I mentioned in my earlier post, what has not been successfully undermined through legislative attempts, has been achieved through the every day sabotage of an agency's ability to carry out its mission. Low Cal/OSHA staff morale, worker furloughs, intimidation and lack of leadership, resource starvation and time consuming witch hunts, these all benefit employers to the detriment of the protection of worker rights.

For more, see this [EHS Today](#) article and letters from [PEER](#), [PECG](#), and the [ACLU](#).

Jack Oudiz retired in 2009 from his position as a senior safety engineer with Cal/OSHA. His Cal/OSHA service included district manager of the Modesto office, regional senior IH, designer and manager of the agency's Professional Development and Training Unit. He led a contingent of Cal/OSHA staff-volunteers to assist at the World Trade Center disaster recovery site in October 2001. Following that, he successfully (but not without a struggle) integrated Cal/OSHA into California's Emergency Response system, leading to the agency's full integration into the local and State Incident Command System.

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Uproar Over "Double Dipping" Audit

Alleged "double dipping" by a former Division of Occupational Safety and Health (DOSH) employee has led to a far-ranging – and some say unconstitutional – audit of all DOSH staff and their outside activities.

The audit, conducted by the Department of Industrial Relations Legal Unit, is prompting howls of protest from inspectors, with at least one bargaining unit firing off a letter to DIR calling it a violation of employees' privacy.

DIR wants to know whether inspectors, during their entire tenure with DOSH, have conducted teaching, training or presentations in any form, compensated or not. DIR has directed employees to list the date, time and location of each activity, for whom it was performed, the subject matter, whether DOSH approved the activity and from whom, whether the employee represented himself or herself as a DOSH employee in any way and whether state resources were used.

"This seems like a 'sledgehammer to swat a fly' approach, a DOSH field inspector told *Cal-OSHA Reporter* on condition of anonymity. No matter what unethical behavior an ex-employee did, "it does not justify the open-ended invasion of privacy. Nothing in all my years in DOSH has been so damaging to morale as this incident. Everyone I have spoken with comes away with a bad taste in their mouth about the leadership of DIR and DOSH."

"Nothing in all my years at DOSH has been so damaging to morale as this incident."

—DOSH Inspector

The uproar began after a whistleblower complaint about a DOSH employee's outside activities prompted an investigation by California's Bureau of State Audits (BSA). The bureau recently issued a draft report on the episode, in which the employee allegedly gave presentations on occupational safety and health and was compensated, while working full-time for the Division. BSA is expected to release its final report in April.

In the wake of the draft report, DIR Director John Duncan ordered an internal investigation into other potentially inappropriate activities. The probe is being conducted by DIR Chief Counsel Vanessa Holton and Senior Special Investigator Frank Dickey.

DOSH Chief Len Welsh says the BSA audit doesn't necessarily indicate that there are widespread problems in the agency

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Cal/OSHA Investigations

Cal/OSHA Cites UCLA Lab Again

Just over a year after a chemical fire took the life of a University of California, Los Angeles, research assistant and subsequent citations were issued by the Division of Occupational Safety and Health (DOSH), the Division again has cited the school for alleged laboratory violations, this time including a repeat allegation.

Cal/OSHA says UCLA's Department of Chemistry and Biochemistry continually failed to train laboratory employees on the hazards of working with "particularly hazardous substances" and the required protections they must take, even after the department submitted proof of abatement of the a violation cited in May 2009.

The citations are the latest development following the December 2008 death of 23-year-old UCLA research associate Sheharbano Sangji, who suffered serious and ultimately fatal burns over at least 40% of her body after she splashed tertiary butyl lithium on her clothing while transferring it from a container to a syringe. The pyrophoric compound ignites on contact with oxygen. Sangji was wearing protective gloves but not a lab coat or apron.

DOSH cited UCLA because Sangji was not wearing protective clothing, and because it did not implement procedures for safely handling the chemical and did not train employees on procedures for using hazardous substances.

It was the latter citation that led to the latest alleged violation. "As of the Division's inspection on August 25, 2009, the employer had not provided training to laboratory employees regarding the hazards and required additional protection when working with particularly hazardous substances, including select carcinogens, reproductive toxins, and chemicals with a high degree of acute toxicity, including, but not limited to, methyl chloride, benzene, formaldehyde, ethidium bromide and osmium tetroxide," DOSH says.

In November 2009, three workers at the Department of Chemistry and Biochemistry appeared before the Cal/OSHA Advisory Committee to say that while the lab has undergone major

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"Double Dipping" Audit

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regarding outside activities, "but we have to be aggressive." Welsh added that he is subject to the audit, as well.

The department also wants employees to disclose their understanding of DOSH policy on teaching, training and presentation activities, if they disclosed such activities on the state Form 700 Statement of Economic Interests and whether they have ever submitted to their superiors a DIR Incompatible Activities Request for Determination.

DOSH workers are being required to complete the questionnaire under penalty of perjury, by March 15.

Furthermore, DIR is requiring employees to provide all documents related to these activities, as well as emails, voice messages, cell phone and PDA chips and portable electronic storage devices, including any information created on home computers or other personal electronic devices. Employees have been instructed to be "overly inclusive" when answering questions or preserving documents or information.

Matt Austin, labor relations consultant for Professional Engineers in California Government (PECG), which represents a number of Cal/OSHA inspectors, says the DIR audit has "generated a firestorm of calls to this office." He tells *Cal-OSHA Reporter*, "The employees went a little nuts."

In an email to DIR, Austin notes that one regional manager has suggested that inspectors report such activities as "teaching a CPR course, or a children's soccer team." Calling such a request "nonsense," Austin added that DIR has no legitimate interest in obtaining such information "and asking for it violates the state constitution's guarantees of privacy."

He also noted that DIR cannot take disciplinary action against employees for events more than three years old. PECG has demanded that DIR clarify the limits of the audit and extend the deadline for completing the questionnaire.

In his email, Austin also told DIR that many DOSH staffers pursue their professional interests in the community "and do so in ways that not only enhance their reputations and those of the agency, but do so with little or no support from agency management" and mostly gratis. If a DOSH inspector is engaged in activities with a conflict of interest, that person is wrong, Austin added, but the vast majority of such activities are legal "and unreportable to management, and need to be recognized as such. It is improper to attempt to 'chill' employee rights to engage in legal, proper activities," he said.

In a March 8 letter to Holton, PECG counsel Gerald James acknowledged that DIR has the right to ask employees about teaching, training or presentations related to occupational safety and health. But, he added, the audit questions "seek information beyond what the scope of a reasonable investigation should entail."

Specifically, PECG says the audit's main question is too broad and covers too much time. James says DIR should have phrased the question as follows:

"During the past three years with the Division of Occupational Safety and Health have you conducted teaching, training

Fair Inquiry or Big Brother?

Here are the questions on outside activities DIR is requiring DOSH personnel to answer, under penalty of perjury:

1. During your tenure with DOSH, have you conducted teaching, training or presentations in any form? This includes those for which you were compensated in any form or not and performed during work hours or not.

If your answer to this question is yes, please list each teaching, presentation or training ("activity"), and for each:

(a) The date, time and location of the activity

(b) For whom the activity was performed

(c) The subject matter of the activity

(d) Whether you were compensated, including the form and amount of any compensation

(e) Whether you received approval to perform the activities or their content and if so, from whom, when and in what form

(f) Whether you represented yourself in any way as a DOSH employee

(g) Whether you used state resources in connection with the activity and if so, describe

2. What is your understanding of DOSH's current or past policy or practice regarding DOSH employee teaching, training or presentation activities?

3. If required, did you disclose Form 700 Statement of Economic Interests income from your activities? If so, for which years?

4. Have you ever submitted to any DOSH supervisor or manager a DIR Incompatible Activities Request for Determination or otherwise requested approval to engage in teaching, training and presentation activities? If yes, when and what was the result of your request? If not, why not?

or presentations concerning occupational safety and health in any form?"

He also said the question about an inspector's understanding of DOSH policy on teaching and similar outside activities is "not a useful exercise" because the policy has changed over the years. Regarding Form 700, he noted that DOSH should already have such forms in its possession. And on incompatible activities determination requests, PECG believes the question should be limited to occupational safety and health teaching, training or presentations.

Austin tells *COR* that he has been told DIR believes it "has" to ask for information on employees' private activities because BSA has requested it do so. "I am not persuaded that BSA can order them to inquire into whether or not an employee teaches Sunday school, and then insist that employees disclose it," he says.

The Public Employees for Environmental Responsibility (PEER), based in Washington, D.C., also has weighed in on the issue, requesting that DIR end the investigation immediately, retract its directives and destroy materials already submitted by DOSH employees.

Executive Director Jeff Ruch said that under the California Constitution, state actions that threaten or hamper one's right to privacy are judged under the standard of "strict scrutiny," meaning that an agency must use the most limited intrusion necessary to accomplish a legitimate public purpose.

Ruch also said the inquiry conflicts with California Labor Code §§ 1101 and 1102, which prohibits employers from preventing employees from participating in politics or control the political activities of workers. He also suggested that the inquiry could include union activities.

"California is supposed to be broke but this department somehow has the money and time for this nonsense," Ruch commented.

The San Francisco office of the American Civil Liberties Union is expected to send a protest letter to DIR, as well.

One inspector who contacted PECG reported having taught classes "for years" and wondered if that would be viewed as improper, even though the employee had been told in mandatory ethics classes that teaching was acceptable. Another inspector has been teaching classes at a university extension since the early part of the decade and was worried about supplying incorrect information on classes for which there no longer were records.

Yet another inspector says the directive includes the "implicit threat of searches of DOSH employees' homes to verify their complete list of all off-duty activities. Isn't there real work to be done protecting California workers on the job, rather than all this?"

Dean Fryer, DIR deputy director for communications, says the department does not "comment on ongoing audits."

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Cal-OSHA Narrows Scope of Internal Employee Investigation

Mar 18, 2010 9:38 AM, By Laura Walter

The California Department of Industrial Relations (DIR) issued a clarification to Cal-OSHA employees regarding the controversial questionnaire sent out as part of an internal investigation, stating that the audit was not designed to obtain personal information about employees.

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As part of its investigation into employees' outside training and presentation activities, DIR instructed Cal-OSHA employees to be "overly inclusive" in the information they provided about any and all of their training, teaching or presentation activities, which could cover personal, religious, political or union organizing activities. Groups such as American Civil Liberties Union (ACLU) of Northern California and Public Employees for Environmental Responsibility (PEER) expressed concerns that this audit violated employees' privacy and constitutional rights.

In a March 15 memo obtained by *EHS Today*, DIR Chief Deputy Director David Rowan offered clarification and defined a narrower scope for the audit.

"First of all, I wish to make it absolutely clear that the intent of this inquiry is not to seek information on your purely personal activities," Rowan wrote. "The sole purpose is to determine whether state resources have been or are being misused."

Rowan also stressed that answering "yes" to any of the questions does not automatically mean the employee is in violation of DIR policy.

The memo offered the following clarifications regarding the employee questionnaire:

- Employees may limit their responses to activity that has taken place in the past 3 years rather than throughout their entire tenure;
- Employees no longer must sign under penalty of perjury and may cross out those words before signing;
- Employees who answer "no" to the first question concerning whether they conducted

- teaching, training or presentations need not answer the additional questions; and
- Employees who answer ☐yes☐ to the first question only must continue on to the next questions if they used state resources in the course of preparing for or conducting the activities.

Rowan clarified ☐state resources☐ to mean ☐property that belongs to the State, State paid work time, funds, equipment, supplies, phones, computers, vehicles, or compensation for travel. We do not mean publicly available material free of charge such as free pamphlets or information that might be obtained from a State website or other similar materials.☐

The deadline for submitting the questionnaire also was extended from March 15 to March 31.

DIR launched its internal investigation after learning that a former Cal-OSHA employee received compensation for presentations concerning occupational safety and healthy while still working for the department.

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Is Cal-OSHA Violating Employees ☐ Constitutional Rights?

All professional staff inside the California Division of Occupational Safety and Health have been directed by Len Welsh, chief of the Division of Occupational Safety and Health of the state's Department of Industrial Relations (DIR), to report any outside ☐teaching, presentations and training☐ performed while working for Cal-OSHA...

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