

MEMORANDUM OF LAW

DATE: March 13, 1990

TO: D. Cruz Gonzalez, Risk Management Director

FROM: City Attorney

SUBJECT: Legal Requirements for Firefighters
Surveillance Program Protocols

Recently you asked for a legal opinion regarding the mandated medical examinations for firefighters and hazardous material team members (HAZMAT). The request was prompted by a letter from Dr. Kim Fuller, the medical director of Occupational Health Services at Sharp Rees-Stealy Medical Group. Dr. Fuller, in his role as the City's industrial doctor, has recommended the addition of a chemistry panel, urinalysis and audiogram, as well as a treadmill test based on risk factor, to the annual physical examination of firefighters. The proposed additional tests would eliminate the discrepancy in the level of physical examinations given HAZMAT team members and firefighters. Dr. Fuller indicated that the regulations governing medical examinations for employees who wear respirators are found in the California Administrative Code, Title 8, section 3401 and 29 C.F.R. section 1910.120. You have asked what the regulations mandate for firefighter physicals.

Both the California and the Federal Occupational Safety and Health Acts (OSHA) mandate medical examinations for workers who wear respirators during the course of their employment. The regulations Dr. Fuller cites clarify the details of the statutory scheme. In determining which guidelines the City must follow, it is necessary to determine whether the Federal statute pre-empts the field in the area of hazardous material protection. The Federal OSHA, 29 U.S.C. section 651 et seq., provides that it will preempt state statutes unless a state has adopted a federally approved plan. 29 U.S.C. section 667(a) and (b) provides:

Section 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards. Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6 29 USCS section 655.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards. Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 629 USCS section 655 shall submit a State plan for the development of such standards and their enforcement.

Additionally, 29 U.S.C. section 667(c) mandates that state plans must meet or exceed Federal standards if the plan is to be approved.

California has adopted a federally approved statutory plan. The plan is embodied in the California Labor Code section 6300 et seq., and California Code of Regulations Title 8, Chapter 3.2. California submitted its plan in 1972. The plan was found to meet the necessary criteria and was approved on April 24, 1973. See 38 Fed. Reg. 10717 (1973). The court, in the case of *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.*, explained the scope of the California statutory scheme by stating:

Under the section 667 scheme, California is preempted from regulating matters covered by Fed/OSHA standards unless the state has adopted a federally approved plan. The section does not, however, confer federal power on a state - like California - that has adopted such a plan; it merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health. There is no indication in the language of the act that a state with an approved plan may not establish more stringent

standards than those developed by Fed/OSHA (citations omitted).

United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd., 32 Cal. 3d 762, 772 (1982).

Both the California OSHA and the Federal OSHA have regulations which address industrial safety in the use of and/or exposure to, hazardous materials. Therefore, under the provisions of 29 U.S.C. section 667 the California regulations prevail. Although the regulations touch on the issue of physical

examinations for employees who wear respirators, neither set of regulations promulgates guidelines which specify the exact nature of the medical examinations that must be performed.

California Administrative Code Title 8, section 5144(h) provides only the most general guidelines, stating simply:

(h) Medical Limitations. Persons should not be assigned to tasks requiring use of respirators unless it has been determined that they are physically able to perform the work while using the required respiratory equipment. A licensed physician shall determine what health and physical conditions are pertinent. The medical status of persons assigned use of respiratory equipment should be reviewed at least annually. Wearing of contact lenses shall not be permitted in an atmosphere where a respirator is required (emphasis added).

The general nature of the regulation indicates that the legislature intended to leave the determination of the extent of the examinations necessary up to the industrial physician. In other areas the legislature has adopted strict guidelines for medical examinations required by other employees exposed to hazardous materials. For example, employees who work with vinyl chloride and polyvinyl chloride or cotton dust have detailed requirements concerning the medical examinations employers must provide. By separate correspondence, a copy of the regulations for these two industries, as well as a copy of the American National Standard guidelines for physical qualification for respirator use provided by the regional California OSHA office, will be forwarded to you for comparison.

In the absence of defined requirements such as those found in other regulations, the determination of what type of testing is

necessary must be based on a balancing of the industrial doctor's recommendation and the City's needs. The decision to bring firefighter physical examinations up to the level of HAZMAT team members appears to be based on the perception that the two classes are exposed to the same hazards. If the levels of exposure are comparable for HAZMAT members and firefighters, there would seem to be no reason for different physicals. The interests of all concerned, including the public, are best served by ensuring that firefighters are able to safely and adequately perform their duties.

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By

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