

# U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210



March 3, 2008

Mr. David F. Perez  
Control Center Operator  
Tampa Electric Company  
32576 Greenwood Loop  
Zephyrhills, FL 33544

Dear Mr. Perez:

Thank you for your October 28, 2007 letter to the Occupational Safety and Health Administration (OSHA). Your letter was forwarded to OSHA's Directorate of Enforcement Programs (DEP) for response. Your letter requested clarification of whether an employee can opt out of medical surveillance examinations under the Hazardous Waste Operations and Emergency Response (HAZWOPER) standard, 29 CFR 1910.120. This letter constitutes OSHA's interpretation only of the requirements discussed and may not be applicable to any question not detailed in your original correspondence. Your questions and our responses are below.

**Question 1:** Does OSHA mandate that all volunteer members of a HAZMAT team be required to participate in medical surveillance, or may an employee opt out of medical surveillance?

**Response 1:** As you are aware, medical surveillance requirements for personnel involved in emergency response to the release of hazardous substances, i.e., HAZMAT team members, are set forth in 1910.120(q)(9). Paragraph 1910.120(q)(9)(i) provides: "Members of an organized and designated HAZMAT team and hazardous materials specialists **shall receive** a baseline physical examination and be provided with medical surveillance as required in paragraph 1910.120(f) of this section." [Emphasis added.]

Therefore, HAZMAT team members involved in emergency response operations covered by 1910.120(q)(9)(i) must receive a baseline physical exam. Any employee subject to 1910.120(q)(9) who elects not to have a baseline examination may not perform emergency response duties as part of a HAZMAT team or as a hazardous materials specialist.

An employee who is a "volunteer" member of a HAZMAT team or hazardous materials specialist must still receive the baseline examination under paragraph 1910.120(q)(9)(i). That paragraph applies to **all** members of any organized and designated HAZMAT team. Any employee who is expected to respond to hazardous substance releases as a HAZMAT team member with the knowledge of the employer is covered under the requirements.

The purpose of a baseline medical examination is to take a detailed medical history and develop a health baseline prior to any exposures so as to be able to evaluate changes which may result due to future exposures to hazardous substances. In addition, the initial examination permits evaluation of whether the employee can appropriately wear a respirator and whether the employee has any pre-existing conditions which put him or her at increased risk when engaging in emergency responses to releases of hazardous substances.



While OSHA recommends that employees who have had an initial or baseline exam under paragraph 1910.120(q)(9)(i) continue to participate in medical surveillance, HAZMAT team members and hazardous materials specialists may decline additional participation in the employer's medical surveillance program. In those cases where an employee chooses not to participate in further exams per the worksite's medical surveillance program, OSHA recommends that the employer note the refusal in the employee's work file.

**Question 2:** If an employee is forced (does not volunteer) by the company to be a member of a HAZMAT team, is the employee mandated by OSHA to participate in medical surveillance, or may the employee opt out?

**Response 2:** As explained in the prior response, the employee must receive a baseline examination under paragraph 1910.120(q)(9)(i), but may opt out of additional examinations. Please note that OSHA's regulations are intended only as minimum standards, however. Employers can adopt more stringent requirements and may enforce a rule requiring mandatory participation in medical surveillance programs as appropriate under applicable laws and/or labor-management contracts. The Occupational Safety and Health Act prohibits retaliation against employees for engaging in certain occupational safety and health activities (such as complaining about occupational hazards or refusing to work in the face of imminent, serious dangers). Employers are permitted to promote safer work conditions than those required under the OSH Act. Thus, if the employer makes an employee's participation in its medical surveillance program a condition of employment, an employee's refusal is not protected activity under Section 11(c) of the OSH Act, and disciplinary measures taken in response to an employee's refusal to comply with the employer's health and safety rules are not regarded as violations of Section 11(c).

**Question 3:** If OSHA does mandate participation in medical surveillance for HAZMAT team members, why are other forms of medical testing optional to an employee, as described in many OSHA interpretations, but not be optional for a HAZMAT team member?

**Response 3:** As previously stated, only the baseline examination is required for HAZMAT team members. OSHA has taken the position that when a standard (e.g. lead, benzene) requires the employer to "provide" medical surveillance examinations or to make such exams "available," employees can opt out of the program. Paragraph 1910.120(q)(9)(i) specifically states, however, that HAZMAT team members and hazardous materials specialists must "receive" a baseline exam. Therefore participation in the baseline exam is a mandatory condition to serving on a HAZMAT team.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you may consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please feel free to contact the OSHA Office of Health Enforcement at (202) 693-2190.

Sincerely,

Richard E. Fairfax, Director  
Directorate of Enforcement Programs