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United States Department of State

Washington, D.C. 20520

10.E.4.C.

September 11, 1990

Mr.
Director of Personnel
The Embassy

Washington, DC 20001

Dear _:

This letter responds to yours of May 23, 1990, in which you advised me of intent to withdraw from participation in the Workers' Compensation Plan of the State of California and requested the Department's comments on this proposed course of action.

Your letter gave two reasons for decision to withdraw from the California Plan. First, own Workers' Compensation Plan, which would apply to all employees of consulates in California after the planned withdrawal, is "more comprehensive and indeed more generous" than the plans that apply in many U.S. states. Second, finds it both an administrative burden and an inequity to its U.S. employees to have different benefit levels apply to its several consulates. From this explanation I infer that does not now participate in any U.S. state compensation plan except California's, and that at the time your letter was written you were not certain whether the Plan is in fact more comprehensive and more generous than the California Plan.

Based on the description of the provisions of the Plan that was attached to your letter, it appears that the coverage thereunder is extensive, though I am not in a position to compare it with the California Plan. Even if the Plan would in fact be more beneficial to U.S. employees, however, I suggest that your government consider carefully two issues before terminating its participation in the California Plan: (1) the legal obligations of diplomatic and consular missions as employers in the United States, and (2) potential liability to the State of California or to its employees following termination.

1. Foreign Missions as Employers

Under international law, a sovereign state is not immune in the courts of another state from lawsuits arising out of its commercial acts. The Foreign Sovereign Immunities Act of 1976,

28 U.S.C. §§ 1330, 1602 et seq., expressly incorporates this principle into U.S. law. See 28 U.S.C. § 1605(a)(2). In any lawsuit involving a claim to which it is not immune, a foreign state, including its political subdivisions, agencies and instrumentalities, is liable to the same extent as a private individual under like circumstances. Id. § 1606.

The courts of many countries have concluded that the employing of local residents is a commercial activity and that foreign sovereigns are therefore not immune to lawsuits arising out of these employment relationships. Moreover, under both the Vienna Convention on Diplomatic Relations (article 41) and the Vienna Convention on Consular Relations (article 55), the personnel of foreign missions are obliged to respect host state laws and regulations. Taken together, these provisions mean that, as employers in the United States, missions are subject to relevant federal and state employment laws and regulations unless they are exempted from these rules by U.S. or international law.

Certain U.S. statutes contain express exemptions for foreign governments as employers. See 26 U.S.C. § 3401(a)(5) (foreign governments need not withhold income tax from the salaries of their foreign national employees); 26 U.S.C. § 3121(b)(11) (foreign missions exempt from withholding Social Security taxes from their employees' salaries); and 26 U.S.C. § 3306(a) and (c)(11) (foreign missions exempt from paying federal unemployment tax on the salaries of their employees). As you are already aware, at least one state has interpreted its laws as exempting foreign consulates from participating in a mandatory state-administered unemployment compensation scheme. [See Opinion of Georgia Administrative Law Judge Harold Irvin, Jan. 3, 1990, Claim Number 255-80-9357.] In addition, it is the U.S. position that international law precludes a host state from requiring a diplomatic or consular mission to employ any particular person. Thus, we regard foreign missions as exempt from any requirement to reinstate a former employee found to have a right under local law to reemployment -- as, for example, following a successful action for wrongful discharge.

I am aware of no U.S. law, treaty provision, or rule of customary international law, however, that exempts a sending state from participating in a workers' compensation plan if local law so requires. Because I do not know whether California law imposes such a requirement, my first recommendation is that determine, through private counsel or consultation with the State of California as

appropriate, (1) whether a foreign government is required to participate in such a plan, and, if so, (2) what action by the State would be required to exempt from this requirement.

2. Potential Liability of

Failure to participate in the California Plan could open the Government of to liability on two fronts: benefit or tort suits by employees, and suits by the State of California. Because I am not an expert in these areas, I strongly recommend that consult with someone who is before making a final decision about withdrawal.

A. Liability to Employees

Even if the benefits offered under the Plan are more generous than those under the California plan, an employee might assert rights under California law to the benefits of the local plan. As you are aware from your experience in the *Georgia workers' compensation case, it is not unforeseeable* that some workers may try to "double dip" by collecting benefits under both and local plans. It is possible that California law would require the Government of to compensate an employee as provided under the local plan regardless of benefits previously provided.

Perhaps more problematic for it is also possible that an employee covered by the Plan could sue in tort on a cause of action that would have been precluded if were participating in the California Plan. Both the cost of litigating or settling such a suit, and the potential costs of jury verdicts favorable to plaintiffs, should be considered in determining whether it makes sense for your government to withdraw from the California Plan. In my view it is essential that obtain expert counsel in evaluating these issues.

B. Liability to the State of California

Unless is legally exempt from participating in the California Plan, the State of California might take legal action to collect mandated employer payments. Such action could come either immediately after announces its withdrawal or at a later date, possibly after California pays state-mandated workers' compensation to an employee who has attempted to "double dip," as described above. If is not exempt from participating in the plan, liability to the State could become large as years pass. Thus, it is important to clarify liability and to ensure that withdrawal is consistent with California law.

From our discussion of this issue I am confident that has every intention of both doing what is best for its U.S. employees and complying with U.S. laws and regulations. I hope my comments will prove helpful toward these goals, and would be pleased to offer further assistance if required.

Sincerely,

David A. Jones, Jr.
Attorney-Adviser
Division of Diplomatic Law
and Litigation