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March 4, 2008

Robert Roginson, Chief Counsel
Division of Labor Standards Enforcement
Department of Industrial Relations
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Re: Whether Time Spent to Obtain a Mandatory Transportation Worker Identification Credential ("TWIC") Card is Compensable

Dear Mr. Roginson:

We seek an Opinion Letter on whether employees required to apply for a Transportation Worker Identification Credential ("TWIC") Card are entitled to be compensated for their time spent on the application process[1] during which they are under the control of the employer performing mandated activities related to their productive work. We have actively researched this subject matter on the DLSE website, including the DLSE Enforcement Policies and Interpretations Manual and there is no California decision or prior DLSE opinion on point. Furthermore, this opinion is not sought in connection with anticipated or pending private litigation concerning the issue addressed in the request nor is the opinion sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement

What Is the TWIC Card?

Oil refinery workers in the Bay Area, covered by Industrial Welfare Commission Order 1-2001, Regulating Wage, Hours, And Working Conditions In The Manufacturing Industry" ("Wage Order 1") are being required by employers to obtain a TWIC card as a condition of employment. This security measure stems from the Maritime Transportation Security Act (MTSA"), and is overseen by the Department of Homeland Security ("DHS") and Transportation Security Administration ("TSA"). Although the TSA has not yet set firm deadlines for employers' compliance, nor has it expanded the requirement to include all refinery employees, the

[1] At present, the employer reimburses employees for mileage expense, and the application fee (approximately $140.00), but does not compensate for the time spent completing the application process. For estimates of the time spent getting a TWIC card, refer to *"How Does One Obtain a TWIC Card"* in this letter, and the http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm "TWIC FAQ" website; *see also* "Paperwork Reduction Act Statement" section of "Transportation Worker Identification Credential (TWIC) Disclosure Form and Certifications, TSA Form 2212, October 2007.

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employers anticipate that compliance will be phased in, and are thus requiring all-bargaining-unit employees to obtain a TWIC card.

How Does One Obtain A TWIC Card?

The enrollment process is described on the TSA's website:

> Applicants may pre-enroll online to enter all of the biographic information required for the threat assessment and make an appointment at the enrollment center to complete the process (although appointments are not required). Then applicants must visit the enrollment center where they will pay the enrollment fee, complete a TWIC Application Disclosure Form, provide biographic information and a complete set of fingerprints, and sit for a digital photograph. The applicant must bring identity verification documents to enrollment and in the case of aliens, immigration documents that verify their immigration status, so that the documents can be scanned into the electronic enrollment record.

"TWIC FAQ" website (emphasis added).

By the TSA's own estimate, ninety minutes are required for completion of the TWIC Application Disclosure Form ("Disclosure Form"), and fifteen minutes for the initial visit to the enrollment center – a minimum of nearly two hours[2].

The core of the TWIC process is the "security threat assessment." *See* TWIC Application Disclosure Form, available at http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#enrollment. The information gathered is sent to the Federal Bureau of Investigation ("FBI"), and DHS "so that appropriate terrorist threat, criminal history, and immigration checks can be performed." *See* Disclosure Form. If the application is approved, then the employee must make a second trip to the Application Center to obtain the TWIC. *See* "TWIC FAQ" website.

California Law Requires Employers to Compensate Employees For All Time Spent Obtaining the TWIC Card

Wage Order 1 defines "Hours Worked" as "...the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do." Cal. Code Regs., tit. 8 § 11140, subd. 2(G). The California Supreme Court found that the DLSE's interpretation that it is only necessary that the worker be subject to the "control" of the employer in order to be entitled to compensation Morillion v. Royal Packing Co., 22 Cal.4th 575, 587 (Cal. 2000). *See also* 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised), Division of Labor Standards Enforcement ("DLSE Manual"), § 46.1.

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[2] The TSA has provided time estimates for some, but not all of the steps listed above. *See* "TWIC FAQ" website; *see also* "Paperwork Reduction Act Statement" section of "Transportation Worker Identification Credential (TWIC) Disclosure Form and Certifications, TSA Form 2212, October 2007.

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It is proper and consistent with past practice for the DLSE to look to federal precedent in circumstances such as this where closely-related matters have been considered under federal law and found compensable. Furthermore, federal law "is designed as a floor, not a ceiling." *See* DLSE Manual § 43.5 so the DLSE may expand compensability beyond that which has been determined under federal law. However, no such expansion is necessary as will be explained in the analysis of the two Opinion Letters issued by the Department of Labor ("DOL").

Under the Fair Labor Standards Act ("FLSA"), the inquiry is whether the time spent by the employee obtaining the TWIC is time when the employee is "suffered or permitted" to work. The DOL has issued two Opinion Letters finding that time spent on mandatory physical examinations and drug testing must be compensated – situations most analogous to that at hand.

> Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical examinations and drug testing. . . .

DOL Opinion Letters, 09/15/97 and 01/26/98.

The TWIC requirement is precisely such a "special requirement or condition[]" for continued employment. Like a drug test or a physical examination, the essence of the TWIC process is akin to a test: a "threat assessment" examination. Biometric and criminal background information is sent to the FBI and TSA "so that appropriate terrorist threat, criminal history, and immigration checks can be performed." *See* Disclosure Form. Surely, the time spent to complete the application, travel to and from the application site, at least twice, and provide the documents and biometric information to obtain the TWIC is "indispensable to the performance of the principal activity the employee is hired to perform." Id.

The TWIC program is being implemented in phases. *See* TWIC FAQ website. An entire workforce with TWIC clearance would be highly beneficial to businesses such as the oil refinery employers in this situation. It is likely that the employer will advertise this attribute of its work force in seeking business opportunities and that at some point in the near future this will be a basic requirement for refineries to operate their businesses. In any event the employers are requiring that employees submit to the TWIC clearance. In a nearly identical circumstance, the DOL found compensability for time spent by employees submitting to mandatory physical testing and drug tests. The Opinion Letters state, in relevant part:

> Where the Federal government requires employees to submit to physical examination and drug testing as a condition of the employer's license to operate its business, both the drug tests and physical examinations are for the benefit of the employer.
>
> Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control.

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DOL Opinion Letters, 09/15/97 and 01/26/98 (emphasis added):

An employee completing the TWIC application and waiting for it to be processed at an application center has his or her freedom of movement restricted, and does so for the purpose of obtaining the TWIC, i.e. to fulfill a requirement of his or her employment. Such waiting time is compensable, as such time spent waiting has been consistently regarded as "hours worked" where the employee is subject to the employer's control. Armour & Co. v. Wantock (1944) 323 U.S. 126; Skidmore v. Swift (1944) 323 U.S. 134. *See* DLSE Manual § 46.6.3.

Thank you for your time and attention to assuring that California employees are properly compensated for all time spent under the control of the employer performing mandated activities related to their productive work. We hope you will find this analysis compelling and will issue a letter providing guidance on this issue to employers and employees in the California refinery industry.

Sincerely,

W. Daniel Boone /PMG/

W. Daniel Boone

Patricia M. Gates

Patricia M. Gates

PMG/jys

Enclosures: DOL Opinion letters

cc: Jim Payne
Janna Kamimura

118217/485858

2008.11.25

Mandatory Drug Testing/Hours Worked

[September 15, 1997]

This is in response to your letter on behalf of several clients in the trucking industry who are subject to the Department of Transportation's mandatory random and post-accident drug testing regulations. You inquire whether time spent in drug testing and in physical examinations required by the Department of Transportation for commercial licensing purposes may be considered compensable hours of work under the Fair Labor Standards Act (FLSA).

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $5.15 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

We agree with the comment in your letter that the regulation at 29 C.F.R. 785.43, pertaining to the receipt of medical attention, is inapplicable to this case. However, attendance by an employee at a meeting during or outside of working hours for the purpose of submitting to a mandatory drug test imposed by the employer would constitute hours worked for FLSA purposes, as would attendance at a licensing physical examination during or outside of normal working hours.

Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical examinations and drug testing. Where the Federal government requires employees to submit to physical examinations and drug testing as a condition of the employer's license to operate its business, both the drug tests and

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ISSN 1048-6682

[*September 15, 1997—Contd.*]

physical examinations are for the benefit of the employer.

Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination and drug testing is during the employee's normal working hours or during nonworking hours.

The physical examination and the drug testing are essential requirements of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

[Opinion signed by Office of Enforcement Policy, Fair Labor Standards Team member Daniel F. Sweeney, September 15, 1997]

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Drug Testing/Hours Worked

January 26, 1998

This is in response to your letter on behalf of _____. You inquire whether time spent in drug and alcohol testing required of the employer by the Department of Transportation may be considered compensable hours of work under the Fair Labor Standards Act (FLSA).

You ask, specifically, whether testing in the following situations would be considered compensable:

(1) Pre-employment
(2) Post-accident
(3) Random
(4) Reasonable suspicion testing
(5) Return-to-duty
(6) Follow-up testing

Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical exams and drug and alcohol testing. When the Federal government requires employees to submit to drug and alcohol as a condition of the employer's license to operate its business, the drug and alcohol tests are for the benefit of the employer.

However, if the drug and alcohol testing is conducted prior to an employment relationship between the employer and the potential employee, then the employer may not have to include the time spent in such testing as hours worked.

Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing such testing is during the employee's normal working hours or during nonworking hours. The testing and the time spent undergoing it are essential requirements of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this has been responsive to your request.

[Opinion signed by Office of Enforcement Policy, Fair Labor Standards Team member Daniel F. Sweeney, January 26, 1998]

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May 23, 2008

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Dear Mr. Roginson:

Thank you for the opportunity to provide your office with the position of Shell Oil Products US ("Shell") regarding whether time spent by employees in obtaining a Transportation Worker Identification Credential ("TWIC") is compensable under the California Labor Code, the applicable Industrial Wage Order, or under any other California obligation.

As will be described below in more detail, there is no obligation in any of these sources for employers to compensate employees for the time needed to obtain a TWIC.

Background

As you are aware, the federal Maritime Transportation Security Act ("MTSA") requires that all workers who work within a secure zone connected with a harbor must obtain a TWIC. To obtain a TWIC, workers must show clear proof of identity, pass a security screen regarding their background, and have their fingerprint taken and put on record. Estimates of the length of time required for this process (some of which can be done via the internet and some of which must be done in person at a federal facility) range from 30 minutes to 2 hours.

Shell operates a refinery connected to the Port of Martinez in the northern San Francisco Bay Area. This facility includes a dock where ocean-going vessels unload and load crude oil and petroleum-related products. The dock facilities are immediately adjacent to, and directly connected with, Shell's substantial refinery operations in

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Martinez. Shell has submitted a security plan to the United States Coast Guard (the agency which has the task of overseeing security operations for the Port of Martinez), and the Coast Guard has approved that plan. Under the terms of that security plan, all employees associated with Shell's Martinez refinery have regular access to secure areas, and as a result, must obtain a TWIC.[1]

The TWIC is personal to each worker, is valid for five years, and is entirely portable by that worker. That is, once a worker has obtained a TWIC, that TWIC may be accepted by any future employer of that worker. In this regard, the TWIC is analogous to driver's licenses or social security cards typically required of employees. For example, during a standard hiring process, new employees are required to provide documents that demonstrate proof of identity and proof of ability to work lawfully in the United States (the "I-9" process). If they are unable to provide these documents, the employee must obtain them. The TWIC adds one more similar element to this process for workers who have access to harbor facilities, such as the employees at Shell's refinery in Martinez.

California Law Does Not Require Employers to Compensate Employees for Time Spent Obtaining the TWIC

The TWIC is analogous to a license required by the state or federal government which is "portable" in that once obtained it can be used by an employee generally for employment with other employers in the industry.

In California, the general rule is that when a license is required by the state or locality as a result of public policy, it is the employee who must be licensed, and unless there is a specific statute that requires the employer to assume the cost, the cost of licensing and any associated training must be borne by the employee.[2] For example, where an employee needed to obtain a license to sell life insurance in order to remain employed in her position, the employer was not required to pay for the cost of the license or the associated training. DLSE Opinion Letter, November 17, 1994. In reaching its conclusion that it was the *employee* who was responsible for the cost of licensing, the DLSE stated:

[1] At some refineries near a harbor, some parts of the refinery facilities are physically separated from the dock area, and may be five to ten miles (or more) distant from the dock. Under those circumstances, the employer may be able to limit the number of employees who can access secure areas, and hence limit the number of employees who need a TWIC. At Shell's Martinez refinery, however, the refinery and dock facilities share a common area, operations are intertwined, and there is no practical method of preventing any refinery employee from having access to secure areas. Under these circumstances, all employees at the Martinez refinery will be required to obtain a TWIC. Further, technically, the owner of the Martinez refinery facility and the employer of the employees at the facility is Equilon Enterprises LLC dba Shell Oil Products US.

[2] The same logic would apply to a license required by the federal government.

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> There is generally no requirement that an employer pay for training leading to licensure or the cost of licensure for an employee. While the license may be a requirement of the employment, it is not the type of cost encompassed by Labor Code § 2802. The most important aspect of licensure is that it is required by the state or locality as a result of public policy. It is the employee who must be licensed and unless there is a specific statute that requires the employer to assume part of the cost, the cost of licensing must be borne by the employee.

The DLSE opinion does not specifically discuss compensation for time spent on the application process but it is clear that if there is no obligation on the employer to compensate the employee for the cost of a real estate license or the training involved in obtaining the license there is no corresponding obligation to pay for the time involved in obtaining the license. Similarly, there is no obligation for an employer to compensate an employee for the time spent in obtaining a TWIC even if the employer voluntarily elects to reimburse the employee for the application fee cost or other mileage expenses.[3] The TWIC is required by the federal government as a result of public policy and there is no statutory requirement that the employer assume part or all of the cost.[4] In addition, compensation for time spent obtaining a TWIC is not encompassed by Labor Code § 2802.

The only California statute requiring an employer to assume the cost of a license is Labor Code § 231, which requires an employer to pay the cost of any physical examination required for a driver's license when such license is a condition of employment; notably, Labor Code § 231 does not require the employer to compensate the employee for the time spent in obtaining the driver's license.

The enactment of Labor Code § 231 is significant with regard to the issue of whether an employee must be compensated for the time spent to obtain a TWIC because it shows that in California the Legislature must act affirmatively to impose an obligation on an employer to reimburse an employee for costs incurred by the employee to obtain a license or other certification. Without a specific statute imposing such a reimbursement obligation on the employer, it is the employee who must bear the cost of obtaining the license. Likewise, absent a statutory mandate, an employer is not required to reimburse an employee for the time he or she spends to obtain the license. Through its enactment of Labor Code § 231, the California Legislature has demonstrated the ability to act in a specific area by requiring an employer to pay the cost of any physical

[3] Even though not obligated to do so, Shell has chosen to reimburse employees' application fees and some mileage expenses (under some circumstances).

[4] The MTSA does not require employers to reimburse employees for the time spent in obtaining the TWIC.

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examination required for a driver's license when a driver's license is a condition of employment but at the same time has chosen not to impose any additional reimbursement obligations on the employer such as compensating the employee for the time incurred to get the license. Accordingly, the absence of legislation in California concerning employer reimbursement of licensing costs, except for the limited exception set forth in Labor Code § 231, would strongly support a finding that Shell is not required to compensate its employees for the time they spend to obtain a TWIC.

Another DLSE Opinion Letter supports the conclusion that there is no obligation for an employer to compensate an employee for the time spent in obtaining a TWIC. DLSE Opinion Letter, August 29, 2007. This recent opinion involved pre-employment training of security guards consisting of state mandated courses. DLSE concluded that payment of wages was not required for pre-employment, mandatory training provided by private security operators. In reaching its conclusion, DLSE noted that there appeared to be no work performed directly or indirectly by the participants for the private security operators and:

> The participants' training is for their own advantage (and at no cost) in order to become state-qualified security guards. Participants must receive certificates of completion for the courses successfully completed which can be used in employments with other operators in the industry. (emphasis in original)

Although this scenario involved pre-employment training, consistent with the DLSE opinion letter concerning an insurance license discussed above, the same rule would apply to mandatory training and certification required during employment for the advantage of the employee where a state license is required and the certificate is "portable" because once obtained it can be used with other operators in the industry. Applying this rule here, there should be no requirement that an employer compensate an employee for the time expended by the employee in obtaining the mandatory and "portable" TWIC.

Since obtaining a government required certification such as the TWIC is the responsibility of the employee and for the advantage of the employee unless a statute requires otherwise, an employee is not subject to the "control" of the employer for purposes of Wage Order 1.[5] The decision of the California Supreme Court in *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000), cited in the Weinberg, Roger and Rosenfeld letter of March 4, 2008 on behalf of the United Steelworkers Union ("USW Letter") is factually dissimilar. In *Morillion*, agricultural employees were deemed subject to the employer's "control" during time spent traveling to and from fields on employer-provided

[5] The citation in the USW's March 4, 2008 letter to your office is to the Wage Order regulating wages, hours and working conditions in agricultural occupations. The correct citation for Wage Order 1 is Title 8, § 11010, subdivision 2(G).

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buses where the employer required employees to meet at departure points at a certain time to ride its buses to work, prohibited them from using their own cars and subjected them to verbal warnings and lost wages if they did so.

Federal Guidelines Do Not Suggest that California Employers Must Compensate Employees for Time Spent Obtaining the TWIC

As set forth above, there is no requirement under California law that employers must reimburse employees for the time necessary to obtain the TWIC. Thus, there is no need to resort to federal analysis and any suggestion that federal guidelines require employers to compensate employees for time spent in obtaining the TWIC is incorrect. Indeed, analogous federal guidelines as set forth in Department of Labor ("DOL") opinion letters interpreting the Fair Labor Standards Act ("FLSA") firmly support the conclusion that an employer is not required to compensate an employee for time spent in obtaining the TWIC.

The DOL opinion letters cited in the USW Letter relate to physical examinations and drug testing imposed by the employer for the benefit of the employer the results of which are valid for a limited amount of time and tied to a specific employer. This is much different than the TWIC which is obtained by the employee for the benefit of the employee and remains valid for a five year period. Moreover, as previously noted, the TWIC can be used as the employee moves from employer to employer and therefore unlike a physical examination or specific drug testing, it is "portable."

The USW Letter cites a September 15, 1997 DOL Opinion Letter with regard to physical examinations and drug testing but fails to cite another DOL Opinion Letter of the same date. This separate September 15, 1997 DOL Opinion Letter involved training and testing to obtain state mandated agent licenses in the insurance industry. The DOL concluded that "where the State has imposed the licensing training requirement on the individual and not on the employer, and the training is of general applicability and not tailored to meet the particular needs of individual employers, it is our opinion that non-exempt employees would not have to be compensated for the time spent in training." Likewise, California employers should not be forced to compensate employees for the time it takes to obtain a TWIC where the federal government has imposed the requirement for a TWIC on the individual employee and not on the employer, and where the TWIC is "portable" and not tailored to meet the particular needs of individual employers.

In an opinion letter dated September 30, 1999, the DOL expressed its view that licensed vocational nurses who are required by state law to undergo thirty hours of nursing skills continuing education every two years need not be compensated for time spent in training. The DOL found that where a state requires individuals to take training as a condition of employment with any employer, attendance would be voluntary

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provided the employer does not impose additional requirements. Here the employer does not impose any additional requirements. On the other hand, where a state requires employers to provide training as a condition of the employer's license to remain open for business, the training time is considered involuntary. In the present case, the TWIC is not required for a specific employer and the federal government requires employees to obtain the TWIC on their own behalf and not as a condition of the employer's license to remain open for business.

The DOL has also determined that time spent by corrections officers in attending state-mandated training required by Florida law for certification to work at local and state correctional facilities, jails, and detention centers is not compensable under the FLSA. Florida law required corrections officers to be certified and in order to obtain such certification, they were required to meet minimum qualifications established by the state. Where state law requires the training in question and the training is of general applicability, the time required for such training is not compensable under the FLSA. DOL Opinion Letter, August 2, 1989. This same rationale should apply to the requirement for obtaining a federally mandated TWIC which is of general applicability and not linked to a specific employer as in the case of a physical examination or drug testing.

Thus, the DOL opinion letters discussed above, even though not applicable, also point in the direction that there is no basis under federal guidelines that requires an employer to compensate an employee for time spent in obtaining a TWIC.

Again, thank you for the opportunity to provide your office with this information, and we would look forward to responding to any further requests for information.

Sincerely,

Angel Gomez

Angel Gomez, III

2008.11.25

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June 30, 2008

Robert Roginson, Chief Counsel
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San Francisco, CA 94102

Re: Rebuttal to Shell Oil Products US (Shell's) Argument that it Has No Obligation to Compensate its Employees for the Time They Spend Securing a Mandatory Transportation Worker Identification Credential ("TWIC")

Dear Mr. Roginson:

On behalf of the United Steel Workers, Local 5 ("Local 5") our office rebuts the arguments presented by Shell Oil Products US ("Shell") in its letter to you dated May 23, 2008. Local 5 disputes Shell's argument that it is under "no obligation" to compensate employees for the time needed to obtain a TWIC. The Opinion Letters and Labor Code provision relied upon by Shell do not apply to the facts in the refinery industry and more particularly at the Martinez Refinery.

Shell alleges that the TWIC is analogous to a "license" and that it is portable and its employees can "take it with them" to another job opportunity. Shell also likens the time one of its employees spends obtaining a TWIC to time spent in "pre-employment training". As this discussion will show neither of these analogies are apt. Shell asks the Labor Commissioner to place the financial burden for compliance onto its current employees' shoulders despite the facts and despite the law that places both the duty to comply with these new federal security requirements and the duty to provide its employees with a safe workplace squarely on Shell's shoulders.

This letter explains the facts that surround employment at the Martinez refinery, discusses Shell's legal duties, and shows how Shell benefits from the time its existing employees spend obtaining their TWIC clearances.

I. FACTUAL BACKGROUND

Shell makes much of the "portability" of the TWIC and the value of this feature to its employees. Shell's May 23, 2008 letter implies that its Martinez refinery employees are clamoring to get their TWIC clearances so they can go out into the open market and make themselves more

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valuable to some other unnamed employers. Nothing could be further from the truth. The employees who Shell is requiring to spend their personal time and effort to secure TWIC clearances are currently-employed Shell employees at the Martinez refinery who are more than 75% likely to stay at the Martinez refinery for the 5-year period that the TWIC is valid.

A. The Employment Facts at the Shell Martinez Refinery

According to Jim Payne, Representative of United Steel Workers, Local 5[1], the Union which represents the approximately 450 refinery workers at the Martinez Refinery, turnover is low at the refinery. Many of the workers stay at the Martinez refinery until they retire. Unlike the scenarios in the Opinion Letters cited by Shell, the Martinez refinery employees already have jobs and are not entrepreneurs like those in the DLSE Opinion Letter, November 17, 1994 who were seeking licenses to sell insurance. The employees who will be affected by this decision are hourly paid workers already employed in reasonably secure jobs, in an industry that by all measures is doing well. The employees receive health and retirement benefits and have little incentive to use the TWIC as an impetus to go out into the open market and seek another job. And Shell offers no evidence that the TWIC clearance would make the employee more marketable or benefit the worker in any tangible way.

B. Local 5's Member Records Show that 77% of Shell's Refinery Workers Have Been Employed 5 or more Years at the Martinez Refinery.

Mr. Payne has examined Local 5's member records and determined that 77% of Local 5's members[2] have been employed for five (5) or more years at the Martinez Refinery. This statistic bears out Mr. Payne's observation that turnover is low in this industry and employees tend to stay in their jobs at the Martinez refinery for at least the period of time that the TWIC clearance is effective.

II. Legal Argument

A. Shell Has a Clear Duty to Comply With the Federal Mandates Under the Maritime Transportation Security Act

Shell submitted a security plan for the Martinez refinery to the United States Coast Guard (USCG) and the USCG has approved the plan. Shell's May 23, 2008 letter to the DLSE admits that it has implemented a plan that arguably goes beyond the strict requirements of the Maritime Transportation Security Act in terms of who it requires to obtain a TWIC. As Shell discusses in

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[1] Jim Payne was hired in 1977 as an employee of Shell Chemical Plant, became a steward in 1981 and in 1984 became a union representative for the Shell refinery workers at the Martinez refinery, first on the staff of the Oil Chemical and Atomic Workers ("OCAW") and then on the staff of Paper, Allied-Industrial, Chemical and Energy Workers (PACE). Mr. Payne now works as a representative on the staff of the United Steel Workers, Local 5, where he continues his 24 year career representing the employees of Shell's Martinez Refinery.

[2] Of the approximately 450 employees at the Martinez refinery, 403 are members of Local 5. The remainder are represented by Local 5 but do not pay dues to Local 5 so Local 5 does not have employment records for these employees.

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footnote 1, it made a business decision to require "all employees at the Martinez refinery" to obtain a TWIC. As the employer with the duty to design a plan, Shell chose the plan that included security clearances for all employees because in its judgment, "there was no practical method of preventing any refinery employee from having access to the secure areas." Generally when a company is considering what is "practical", it is taking expense into consideration. It is possible that Shell designed a plan that was more onerous on the employees but less onerous on itself, in part because it did not plan to compensate its employees for the time they spent obtaining a TWIC.

According to the TWIC website, a facility owner/operator may require additional security protocol if it wishes to do so. The TWIC program, however, is a minimum requirement that every owner/operator must implement as a condition of operating a maritime transportation facility. The duty to ensure safety at such a facility rests on the shoulders of the employer. (DLSE v. Texaco (1983) 152 Cal.App.3d Supp.1.)

The purpose of the TWIC program is most decidedly not to facilitate a security credential application process for whoever wants one. Such a program *would* be analogous to getting a driver's license. Instead, TWIC is a federally mandated program designed to insure the safety of the nation's maritime transportation facilities. In fact, the first stated goal of the program is to "[p]ositively identify authorized individuals who require unescorted access to secure areas of the nation's maritime transportation system." (TWIC website) The requirement is based on work location access and not on individual mobility.

B. Neither Labor Code Section 231 nor the DLSE Opinion Letters Cited by Shell Apply to the Circumstances Now Before the Labor Commissioner

The TWIC is not a license in the sense of having a driver's license or license to sell life insurance. The credential is a safety precaution meant to insure the safety of the owner/operator's facility and the workers themselves. While similarities to the driver's license procedure do exist, an "authorized individual" does not demonstrate that she or he has any special expertise, knowledge, or skill to obtain a TWIC. The enrollment process for the TWIC requires only that individuals demonstrate that they are not a security risk. This determination is made not based on what a transportation worker can do, but rather who that worker is and what he has done. Biographical information and identity confirmation are all that the TSA requires so that the appropriate agencies may check criminal history, immigration status, and possible terrorist affiliations. Indeed, the TWIC enrollment procedure includes fingerprinting and photo ID, as does driver's license procedure, but the DMV requires applicants to be able to drive, not simply prove that they are who they say they are.

It is telling that the TSA has described the process for obtaining a TWIC as an "enrollment" process, not an application. One applies for a license. One need only enroll in the TWIC program to receive consideration for a security credential. For this reason Labor Code § 231 has no bearing on the question of whether an employer must cover the costs of time spent obtaining a TWIC.

C. Shell Has An Affirmative Duty to Proved its Employees with a Safe Workplace

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As the DLSE explained in its January 19, 1993 Opinion Letter, the appropriate Labor Code sections that apply to this situation are those that deal with "safety in the workplace." (6400-6405) The question presented in that opinion involved the costs and time involved for current employees to take a course and get a certain certification "as a condition of continued employment." Because an employer has "an affirmative duty" to ensure a safe work environment under Labor Codes 6400-6405, the DLSE was of the opinion that employer could not require a current employee to cover the costs of getting the certification.

Labor Code § 6401 reads in its entirety:

> Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.

The TWIC program certainly falls within the broad protections provided for in this statute. The program's purpose is unquestionably national security. This security includes the safety of the employees who work in the Martinez refinery.

Shell has every incentive to bring its workforce up to speed with the TSA requirements. As the DLSE has noted, "safety benefits inure to *employer* as well as employee." (OL citing DLSE v. Texaco, emphasis in original) The TSA has not, to date, set a compliance deadline for the Port of Martinez and adjacent facilities. By complying efficaciously, however, the Shell refinery can promote itself as a safer working environment to potential employees and clients. In addition, Shell avoids any potential sanctions that would result from not following its Coast Guard-approved security plan. So not only is Shell responsible for compliance with the TWIC program, it clearly benefits from it.

In closing, Local 5 argues that the time that Martinez refinery workers spend to complete the application, travel to and from the application site, at least twice, and provide the documents and biometric information to obtain the TWIC is "indispensable to the performance of the principal activity the employee is hired to perform." It is time spent for the benefit of the employer and it is compensable under California law.

Sincerely,

Patricia M. Gates

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