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November 25, 2008

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Re: Compensability of Time Spent Obtaining a Transportation Worker Identification Credential (TWIC) Card Required Under Federal Law

Dear Mr. Boone and Ms. Gates:

This responds to your letter dated March 4, 2008, requesting an opinion letter concerning the compensability of time spent by workers at port facilities in obtaining a federally-issued Transportation Worker Identification Credential (TWIC) which is a security card.

You assert that workers at an oil refinery operated by Shell Oil Products US (Shell) who are covered by Industrial Welfare Commission Order 1-2001 (regulating wage, hours, and working conditions in the manufacturing industry) are being required by Shell to obtain TWIC cards as a condition of employment. Your letter states that, currently, the employer reimburses employees for mileage expense and the application fee but does not compensate for the time spent completing the application process. You asked for an opinion on whether employees required to apply for TWIC cards are entitled to be compensated for what is contended the "time spent on the application process during which they are under the control of the employer performing mandated activities related to their productive work."[1]

According to Shell, the facility at issue is connected to the Port of Martinez in the 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 Martinez. Shell states that 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. Shell has submitted a security plan to the United States Coast Guard and the Coast Guard has approved the 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] Following your letter, our office requested and received written input on the issues raised in your letter from counsel for Shell and you sent a subsequent written reply. All letters were reviewed and considered in connection with your request.

As discussed more fully below, TWIC cards are mandated by federal law and issued by the Transportation Security Administration (TSA). A review of the applicable federal law is fundamentally relevant to determining both the nature of *the enrollment requirement* as a working condition and whether *time spent enrolling* for a TWIC card constitutes "hours worked" by an employee under the IWC Order for which an obligation of compensation rests under State law. We conclude for the following reasons that the enrollment requirement is not a working condition subject to the control of Shell nor is the time spent by Shell's employees in obtaining the federally mandated credential compensable under the IWC Order.

The TWIC Program

Following the 9/11 tragedy in 2001, Congress enacted the Maritime Transportation Security Act of 2002 (MTSA) for the purpose of establishing a national policy and standard for securing the nation's ports.[2]

The responsible agencies are the TSA which administers the enrollment procedure and the United States Coast Guard which administers compliance with MTSA at ports. Pursuant to MTSA, the Secretary of the Department of Homeland Security (where both the Coast Guard and TSA reside) promulgated regulations implementing MTSA programs and requirements. Specifically, the Secretary is authorized to promulgate regulations to prevent unauthorized individuals from entering an area of a facility that is designated as a secure area by the Secretary for purposes of a security plan for the facility. To have access, an individual must hold a transportation security card issued under the act and be authorized to be in the secure area in accordance with the facility security plan or be accompanied by another individual who holds such card and is authorized to be in the area in accordance with the plan. (46 U.S.C. §70105(a)). TSA regulations regarding TWIC are at 49 CFR Parts 1570 and 1572.

On TSA's website, TWIC is described as a required tamper-resistant biometric security identification credential for all personnel (e.g., port facility employees, long shore workers, truck

[2] The following are among the declared Congressional findings for MTSA (Public Law 107-295, Nov. 25, 2002):

> (1)There are 361 public ports in the United States that are an integral to our Nation's commerce.
> …
> (6) Ports often are a major locus of Federal crime, including drug trafficking, cargo theft, and smuggling of contraband and aliens.
> (7) Ports are often very open and exposed and are susceptible to large scale acts of terrorism that could cause a large loss of life or economic disruption.
> …
> (10) Securing entry ports and other areas of port facilities and examining or inspecting containers would increase security at United States ports.
> (11) Biometric identification procedures for individuals having access to secure areas in port facilities are important tools to deter and prevent port cargo crimes, smuggling, and terrorist actions.
> (12) United States ports are international boundaries that—(A) are particularly vulnerable to breaches in security; (B) may present weaknesses in the ability of the United States to realize its national security objectives: and (C) may serve as a vector or target for terrorist attacks aimed at the United States.
> (13) It is in the best interests of the United States—…(C) to formulate requirements for physical port security, recognizing the different character and nature of Unites States port facilities, and to require the establishment of security programs at port facilities.; … (46 USC §70101 Note)

drivers, merchant mariners, etc.) *requiring unescorted access to secure areas* of regulated facilities and vessels and all mariners holding Coast Guard-issued credentials.[3] The card contains the worker's biometric (fingerprint template) allowing for a positive link between the card and the individual. (TSA website - Frequently Asked Questions (FAQs))

TSA describes on its website the procedure for obtaining a TWIC card. TSA is currently implementing the TWIC program pursuant to a time table and will designate the deadline for compliance with the TWIC program for each of the nation's port areas.[4] Applicants for a TWIC card must schedule an appointment at a TWIC enrollment center (an option to save time allows applicants to pre-enroll online at TSA's website in order to enter biographic information prior to the appointment). At the appointment, applicants are required to bring necessary identity documents, provide biographic information (if not pre-enrolled), complete a TWIC Disclosure and Certification Form, pay the enrollment fee, and sit for a photograph. At its website, TSA estimates that the enrollment process for a pre-enrolled applicant takes approximately 10 minutes and 15 minutes for those who do not pre-enroll.[5]

Following a security threat assessment by TSA,[6] applicants are notified when their TWIC card is available at the enrollment center and must return to the center to pick up their TWIC card. There may be a wait time at the center which depends on the amount of workers choosing to enroll at any particular time.

The TWIC program expressly requires that covered workers enroll in the program—not that employers enroll their workers in the program. (49 CFR §§ 1572.1, 1572.3(b), 1572.9, 1572.17, and 1572.19) The cards are the property of the TSA and cannot be confiscated or taken away from a worker by an employer. (TSA website-FAQs; 49 CFR §1572.19 (c)-(d))[7]. The holder applies for and uses it and an employer cannot take or otherwise hold the card without the employee's consent, regardless of who paid for it. (TSA website - FAQs)

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[3] Secure area is defined as "the area on board a vessel or at a facility, over which the owner/operator has implemented security measures for access control, as defined by a Coast Guard approved security plan. … Facilities subject to 33 CFR, chapter I, subchapter H, part 105, may with approval of the Coast Guard, designate only those portions of their facility that are directly connected to maritime transportation or at risk of being involved in a transportation security incident as their secure areas. (49 CFR §1570.3)

[4] Compliance dates are currently set for the California port areas as follows: San Diego – December 30, 2008, San Francisco Bay Area – February 28, 2009, and Los Angeles/Long Beach – April 14, 2009.

[5] TSA elsewhere "estimates that the total average burden per response associated with this collection [of information] for enrollment is approximately 90 minutes." (TSA Form 2212, July 2008, TWIC Disclosure and Certification, Paperwork Reduction Act Statement; bracketed material added)

[6] The security threat assessment performed by TSA includes a fingerprint-based criminal history records check (CHRC), an intelligence-related check, and a final disposition. (49 CFR §1572.21)

[7] Information obtained during the security threat assessment may <u>not</u> be made available to the public, *including the individual's employer* and his or her employer may only be informed of whether or not the individual has been issued a TWIC card. (46 USC §70105(e))

While employers direct which employees are required to enroll for a TWIC card (49 CFR §1572.19(a)), TSA asserts that an employer *cannot require* their employee to enroll if their job does not require them to have unescorted access to facilities regulated by MTSA. (FAQs; TSA Informational Bulletin, 8/28/08; see also 49 CFR §1572.17(a)(10) [applicant must provide current employer information if working for employer requires a TWIC]) Applicants must certify that they need a TWIC card to perform their job, i.e, that they are currently are, or are applying to be, a port worker who requires unescorted access to secure areas of maritime facilities or vessels. Thus, the TWIC program limits the requirement to allow only enrollment of workers whose work requires unescorted access to covered secure areas.

Both your client and Shell represent that the TWIC card is issued to the individual employee and is "portable" such that it can be used in other port facility employments. Presumably, any transferability to another port facility where the federal criteria for requiring a TWIC card still exists would require updating the information maintained by TSA.

The TWIC Enrollment Requirement Is Not A Working Condition Controlled By Shell

DLSE recognizes the impact government-mandated requirements may have on the employment relationship. Consequently, the obligations under the government-mandated requirements must be viewed under the specific facts presented to determine its effect upon employment obligations under applicable the IWC and Labor Code provisions.

IWC Order 1-2001 (8 CCR §11010) regulates the wages, hours, and working conditions in the manufacturing industry. Coverage of the IWC Orders extends only to employees and employers as defined in the regulation. For purposes of the Wage Order, "employ" means "to engage, suffer, or permit to work;" "employee" means "any person employed by an employer;" and "employer" means "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, and working conditions of any person. (IWC Order 1-2001, §2(E) and (F))

These definitional provisions contemplate that an employer subject to the provisions of the order must be the person (as defined in Labor Code §18) who either engages, suffers, or permits work, or controls the wages, hours, and working conditions in the employment relationship. DLSE recognizes that employment may be controlled by both employer-imposed conditions and also subject to governmental requirements. It is necessary, therefore, to determine the source and extent of the employer's role with respect to the specifically identified condition in order to determine whether that condition is controlled by the employer as contemplated in the scope of regulated employment under the wage order.

As previously stated, your letter asserts that oil refinery workers are being required by Shell to obtain a TWIC as a condition of employment. This assertion appears to overstate, as a legal matter, Shell's role with respect to the enrollment requirement for TWIC cards. An examination of the federal program reveals that it is not an *employer-imposed* requirement or condition of

employment, but a federally mandated requirement and process for controlling access to secure areas of public ports under implementation of a national security policy.

Regarding enrollment for TWIC cards, however, facility owners and operators are required to notify employees of their responsibility to possess a TWIC card based upon the employee's need to have unescorted access to secure areas of facilities. (TSA website – FAQs) According to TSA, an employer is obligated to inform employees that they must obtain a TWIC card, how to apply, and the deadline for application. (*Id.*) When operative in a particular area, unescorted access to secure areas by an individual without a TWIC card is prohibited by federal law. [8]

As previously stated, the federal *obligation to enroll is placed upon individuals* whose work requires unescorted access to secure areas of a port facility. The need for a particular person to enroll is based solely on the federally established criteria which mandate that any person requiring unescorted access to secure areas of a facility must obtain a TWIC card. Also, the security threat assessment performed by TSA for enrollment does not evaluate the individual's qualifications for a position or the duties an employee performs for the employer. (See 49 CFR §§ 1572.17, 1572.21) The TWIC program does not mandate to the employer which personnel have access to the employer's premises. Rather, it simply requires that those workers who are required to access secure areas have a TWIC card.[9]

The fact that employers notify their workers who must enroll based upon the federal criteria for TWIC cardholders does not diminish the fundamental source of that directive which is based upon TWIC program requirements under a port security system that has general application. Nor does the fact that an employer is the one communicating the requirement transform the federal requirement for enrollment to an employer-imposed working condition. The apparent portability of the TWIC card to other port facility employments underscores the general federal regulatory aspect of the program which is not confined to a specific employer.

As pointed out in your reply letter, an employer who is an owner or operator of a port facility regulated under MTSA does have a role in determining the secure and restricted areas of a facility (see, 33 CFR §105.305(a)(1)(iv)). You then maintain that such role determines or directs which worker positions will be subject to the TWIC enrollment requirement at the particular

[8] TWIC enrollment is also not a condition for hiring an employee. Newly hired employees who do not have a TWIC card must comply with specific provisions for compliance with the program while enrolling. Thus, an employer can hire an employee for immediate work and allow access to secure areas under special rules while applying for a TWIC card. (TWIC Program: Small Entity Guide for Applicants, 9/14/07, pp. 17-18)

[9] TSA states that TWIC enrollment also extends to contractors who are *not* direct employees of a facility owner or operator as long as they meet the TWIC eligibility requirements and, at a minimum, are expecting to pursue contracts at MTSA-regulated vessels and facilities where the owners or operators have determined a need for unescorted access in secure areas. (TSA website–FAQs) Additionally, even if federal rules specify that an individual must have a TWIC, owners and operators decide who may enter a secure area. Thus, having a TWIC is not a *right* to unescorted access. The owner or operator must give permission to be in a secure area without an escort. (TWIC Program: Small Entity Guide for Applicants, 9/14/07, pp. 10 & 12)

facility.[10] However, the several levels of review and necessary adoption by the federal government of a Facility Security Plan as well as the extensive regulation of mandatory components for such plans necessarily and logistically depend on input and implementation by facility owners and operators for meeting federal security objectives. The ultimate required approval of the FSP by the federal government based upon security considerations under the MTSA and implementing regulations effectively displaces any initial discretion-based designation by the owner or operator. The federal adoption renders the designated secure areas security-based determinations by the government (46 USC §70105(a)) which is made independent of the employment relationship between an owner or operator and its employee. Once the designated secure areas are approved by the federal agency, they must be adhered to unless subsequently modified with the approval of the government. (33 CFR §105.415)

Based upon all of the facts presented in this matter, it is clear that the TWIC enrollment *requirement* is not an employer-imposed requirement. Rather, the enrollment obligation is based, both fundamentally and pervasively, upon the federal TWIC program. Since Shell is obligated to direct an employee to enroll for a TWIC and can only direct employees who fall within government established criteria, Shell does not effectively control the enrollment requirement. Accordingly, the enrollment requirement is not a *working condition* subject to the direct or indirect control *of the employer* within the definitional language for "employer" contained in Wage Order 1, §2(F).

Since the condition or activity (enrollment requirement) is beyond the scope of the employment as defined and regulated in the wage order, Shell cannot be subject to its provisions with respect to compensation based upon the status of the enrollment requirement as a condition of employment.

Time Spent By Shell's Workers During The TWIC Enrollment Process Does Not Constitute "Hours Worked" Under The Wage Order

Your letter also raises the question regarding the "hours worked" requirement under Wage Order 1 and seeks an opinion regarding the compensability for time spent enrolling for a TWIC card. Although the preceding analysis simply determines that *the enrollment requirement* alone is not a working condition subject to the control of the employer, we now address the "hours worked" requirement for *time spent by workers enrolling* for a TWIC card.

Section 4(a) of IWC Order 1-2001 requires that "[e]very employer shall pay to each employee wages not less than [the minimum wage] for all hours worked…" Section 2(G) of the

[10] The owner or operator of a facility must conduct a Facility Security Assessment (FSA) (33 CFR §105.305) and report (33 CFR §105.305(d)). In the FSA, the facility owner or operator designates restricted areas of a facility. (33 CFR §105.305(a)(1)(iv)) The owner or operator also must prepare and submit a Facility Security Plan (FSP) (33 CFR §105.200(b), §105.405) which is reviewed for mandatory elements and approved by the Secretary. (46 USC §70103(c)) The FSP must be consistent with an established Maritime Transportation Security Plan prepared by the Secretary and the applicable regional Area Maritime Transportation Security Plan prepared by the assigned Federal Maritime Security Coordinator. (46 USC §70103(c)(3)) The FSA, FSA Report, and FSP must be protected from unauthorized access or disclosure. (33 CFR §106.305(e))

order defines "hours worked" as "the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

The seminal case interpreting the "hours worked" language under the IWC Orders is *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 587. In *Morillion,* the Supreme Court held that compulsory travel time spent by agricultural workers was compensable "hours worked" where workers were required to meet at designated departure points at a certain time to ride employer's buses to work and for return to the departure point after work. By requiring employees to take certain transportation to a work site, the employer subjects those employees to its control by determining when, where, and how they are to travel, and thus, such time is "hours worked" under the definition and compensable. (*Id.,* at 588)[11] In an extensive analysis, the court found that the "suffered or permit to work" clause in the wage order definition of "hours worked" does not limit the "subject to control" clause in the definition. (*Morillion,supra,* 22 Cal.4th at 582) Each clause can be interpreted as independent factors, each of which defines whether certain time spent is "hours worked" under the Wage Order.[12] Satisfaction under either clause renders the time compensable.

Under the "subject to control" clause, time during which an employee is subject to an *employer's control* is compensable and the employee does not have to be working during that time to be compensated. (*Morillion, supra,* 22 Cal.4th at 582, citing *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 974-975, disapproved on other grounds in *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 573-574 and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 30) These cases further establish that the employee does not have to be actually working if their activity is controlled or their freedom to do as they choose is restrained by the employer. Under the "subject to control" clause, it is the level of the employer's control over its employees which is determinative, rather than the mere fact that the employer requires the employees' activity. (*Morillion, supra,* 22 Cal.4th at 587)

Regarding the "suffered or permitted to work" clause for establishing compensability within the hours worked language in the IWC Order, the *Morillion* court noted that it encompasses a meaning distinct from merely working. (*Morillion, supra,* 22 Cal.4th at 584) It includes time an employee is "suffered or permitted to work, whether or not required to do so." Thus, it may

[11] The court also determined in a separate analysis that the relevant portions of federal provisions in the FLSA and Portal-to-Portal Act differed substantially from the IWC Order and related state authority, concluding that reliance upon federal authority, and deference given by the Court of Appeal, were not persuasive. (*Id.,* at 594) For example, the federal regulations establish different rules for compensability of out-of-town travel during working hours and after working hours. (See DLSE Op. Ltr. 2002.02.21)

[12] In discussing the independence of the two clauses, the Supreme Court agreed with previous opinion letters of DLSE's interpretation of "hours worked" which contained the general statement that "Under California law it is only necessary that the worker be subject to the 'control of the employer' in order to be entitled to compensation." (*Id.,* at 585)

include time an employee is working but who is not subject to the employer's control such as when an employee works unauthorized overtime and the employer knows or has reason to believe that the employee is continuing to work. (*Morillion, supra,* 22 Cal.4th at 585)

Thus, if the activity is performed under (1) the control of the employer, or (2) performed under less or no control but the employer knows or has reason to know that the employee is working, the activity constitutes compensable "hours worked" under the IWC Order.

Significantly, your request letter maintains that the *time spent to enroll* for a TWIC card is "indispensable to the performance of the principal activity the employee is hired to perform." This position speaks to the status of the requirement for enrollment rather than being probative of the actual *level of employer control* during the enrollment process, which is the appropriate inquiry under the "hours worked" analysis. The facts presented indicate no control by Shell of the employees during the actual TWIC enrollment process. Applicants for the TWIC card are able to pre-enroll on line at TSA's website and otherwise schedule an appointment at the TWIC enrollment center at a time that is convenient for the applicant. We cannot conclude that time spent by Shell's employees enrolling for a TWIC card is time during which the employee is subject to the control of the employer simply because the employer requires the employee's possession of the TWIC card or that the possession of the card is indispensable to the performance of the principal activity.

Additionally, since the "suffered or permitted to work" clause can be an alternative to establishing compensability within the hours worked language in the IWC Order, review of the enrollment process under this factor is appropriate. The enrollment process conducted by TSA, as described both in your letter and the program rules and guidelines, indicates that the process is completely managed and performed pursuant to federal requirements and procedures. Further, the activities performed by employees required for enrollment (setting and attending of an appointment at a TSA enrollment center, providing biographical information finger-printing, sitting for photograph, and subsequent return to pick up the TWIC card) involves a process which solely relates to the federal agency's enrollment requirement and its role in performing a security threat assessment on the individual who is or will be allowed unescorted access to secure areas at a port facility. These activities performed by the employee are not activities for which the employee is "suffered or permitted to work" *for the employer*.[13]

While there may be some benefit to Shell insofar as TWIC enrollment of covered employees also contributes to Shell's compliance with its federally mandated security obligations,

[13] The above analysis is conceptually consistent with a recent DLSE opinion letter which opined that pre-employment state mandated security officer training is not compensable under IWC Order 4-2001 and MW-2007 where *no work is performed directly or indirectly for security operators* authorized to conduct such required training by the participants who were trained. (DLSE Op. Ltr. 2007.08.29) Under the security guard training program reviewed in the opinion letter, the training was for their own advantage (and at no cost) in order to become state-qualified security guards. Participants received certificates for courses successfully completed which could be used in other employments with other operators in the industry.

the fundamental nature and effect of the TWIC enrollment process is a matter of port security established by federal public policy and subordinates such ancillary benefit to the employer. (Cf. DLSE Op. Ltr. 2002.01.29 [employer's decision that transit operators end their shift at a different location than where shift began forced employee to spend some fixed amount of time traveling was purely for benefit of employer and compensable])

TWIC enrollment is *not* an employer-imposed activity but a government mandated procedure requiring compliance with established enrollment procedures at specified centers for the purpose of performing threat assessment under federal law. The actual *time spent enrolling* is not performing work for Shell because the employee is not subject to the control of the Shell nor suffered or permitted to work for Shell within the meaning of the State's hours worked requirement.[14]

Your letter also maintains that the TWIC requirement is "a special requirement or condition for continued employment similar to a required drug test or a physical examination" which is compensable. You cite two U.S Department of Labor (DOL) opinions that determined that time spent on mandatory physical examinations and drug testing must be compensated where the subject activity is beneficial to the employer. (DOL Op. Ltr. 9/15/97 [mandatory drug testing & physical exams] & 1/26/98 [mandatory drug & alcohol testing])

As noted in *Morillion,* the FLSA does not include an express definition of "hours worked" but the phrase is defined in federal regulation utilizing language different from the IWC Orders. (*Morillion, supra,* 22 Cal.4th at 588-589; see also, DLSE Op. Ltr. 2002.01.29) Notwithstanding the improper reliance upon federal interpretations of different language to interpret the IWC definition of hours worked, the DOL opinions are distinguishable.

The DOL opinions are based upon a premise that 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*, such tests are for the benefit of Shell. DOL indicated that the 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. Since the testing are essential requirements of the job and primarily for the benefit of the employer, the time so spent must be counted as hours worked under the FLSA.

Here, our reading of the underlying federal law for TWIC and the facts described compels the conclusion that the TWIC program is not *primarily* for the benefit of Shell but is required for public policy objectives in implementing national port security. Again, enrollment for TWIC

[14] Similarly, Labor Code §2802 obligates employers to reimburse employees for all necessary expenditures or losses incurred in the direct consequence of the discharge of his or her duties. DLSE has interpreted this obligation as not requiring an employer to pay for training leading to licensure or the cost of licensure. (DLSE Op. Ltr. 1994.11.17). In the opinion letter, DLSE stated that "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 which requires the employer to assume part of the cost, the cost of licensing must be borne by the employee." (*Id.*) In the instant matter, the employer has chosen to pay the TWIC enrollment fee for its employees and, in certain circumstances, reimburses for mileage.

cards is based solely on the presence of an employee at a location covered by federal law—regardless of their abilities or job duties. The requirement is based solely on whether, in the performance of his or her job, the employee is required to be in a designated secured area in a covered port facility. While there is an obvious ancillary benefit to owners or operators who will have a security screened workforce, the findings of Congress for enacting MTSA do not recognize or declare a benefit to an employer as an expressed objective of the legislation.

Drug testing and physical examinations are intended to reveal physical conditions of the drivers that directly impact their ability to effectively and safely perform their job. Enrollment in the TWIC program is required for evaluation of the individual as a security threat which is based only upon their need to be at a regulated location at a port facility while performing their job. TSA's assessment does not depend on job abilities or performance.

Additionally, unlike the mandatory drug testing and physical examinations discussed in the DOL opinions which requirement is linked to a particular employer whose license *to conduct its business* is conditioned upon testing, the TWIC enrollment is a type of certification or determination by the government that the individual does not pose a security threat under federal criteria. The card is valid for five years from the date of issuance and is subject to surrender only to the TSA for specified conditions. The TWIC card is portable for application in other covered port employments where access to secure areas is required, and thus, not linked to continued employment with a specific employer. Thus, the effect of the underlying testing requirement on the employment relationship and the facts present in the DOL opinions fundamentally differ from the TWIC enrollment requirement.

As pointed out in Shell's letter, other federal interpretations under the FLSA, although not controlling, which address compensability for time spent in government-mandated training or licensing contexts supports the view that such time is not compensable.[15] The salient points in these federal interpretations are that the government program is mandated, the requirement is for the advantage of the employee, and is not a condition of employment for a specific employer.

While the TWIC card enrollment is technically not a "license" it is a government mandated requirement which is a type of certification by the government based upon a determination that an individual has undergone a threat assessment and is authorized (pursuant to the TWIC card issued by TSA) to access unescorted secure areas at port facilities. There are no facts asserted which indicate that the employer imposes requirements for enrolling in TWIC which are additional to or beyond the federal government's requirements. Thus, these DOL interpretations under the FLSA similarly point in the direction consistent with our interpretation and also demonstrate that state law requirements are not undercutting minimum federal requirements.

[15] See DOL Op. Ltr. 9/15/97 [non-exempt employees not required to be compensated for training for state-imposed license requirement]; DOL Op. Ltr. 9/30/99 [licensed vocational nurses required to undergo continuing education every two years not required to be compensated; state-required training which is not a condition of employment for a specific employer deemed to be voluntary provided the employer does not impose additional requirements]; DOL Op. Ltr. 8/2/97 [time spent by corrections officers in attending state-mandated training for certification to work at correctional facilities is not compensable].

Lastly, you maintain that the employer has an affirmative duty to provide its employees with a safe workplace and, in bringing its workforce into compliance with the TWIC program, the employer benefits because it can promote itself as a safer working environment to potential employees and clients it can avoid potential sanctions from not following its Coast Guard approved security plan. You recognize that the TWIC program's purpose is unquestionably national security but further maintain that such security includes safety of the employees who work in the refinery. You rely upon DLSE Opinion Letter 1993.01.19 which underscores the affirmative obligation for employees to furnish a safe workplace under Labor Code §6401 and the recognition that safety benefits inure to the employer as well as the employee.

The 1993 DLSE opinion letter addressed compensability of safety training *required by industry participants* in a trust which created a safety program designed to implement specific health and safety laws, including Labor Code §7850, et seq., under the California Occupational Safety & Health Act. DLSE's analysis recognized that the Legislature placed the onus upon the employer to furnish a place of employment which is safe and healthful. Pursuant to several cited Labor Code provisions regarding workplace safety and health laws which place the onus for compliance on the employer, DLSE concluded that the rationale for imposing the obligation to pay for safety training was based upon the clear obligation of employers to provide a safe workplace and do all things necessary to carry out that mandate as required under state safety laws. DLSE further concluded that the same rationale applied to applicants such that the employer could not escape its obligations under safety and health laws simply by requiring that the potential employee acquire the required training at his own cost as a condition of employment since such effort would thwart the legislative mandate. We further noted in the opinion letter that there was no provision in the Labor Code which would require that the employee must obtain any safety certification or meet any credential requirements.

In the instant matter, the TWIC card enrollment, as extensively discussed above, implements legislative policy to address and improve security at the nation's port facilities. The enrollment requirement imposes the obligation to have a government issued security credential on the employee. Unlike the trust consisting of industry participants who created the certification requirement, the source of the obligation to enroll in TWIC is solely contained in federal law. And unlike a safety training requirement imposed by industry participants designed to implement jobsite safety goals set by the legislature in the context of a statutory scheme which clearly obligates the employer to provide workplace safety, TWIC enrollment requirement consists of the federal government *directly* implementing a security measure for a port facility under a national policy based upon security objectives.

There is no doubt that implementation of federal security objectives at a facility may have an ancillary benefit for employers who are independently obligated to provide a safe workplace under the state's safety and health laws. Any overlap of the two laws, however, cannot be the basis for blurring the fundamental nature of the TWIC enrollment requirement and process mandated by

the federal government with state safety and health obligations placed on employers in view of the inherent differences between the source and nature of the respective statutory obligations. Any ancillary benefit to the employer who will have a compliant facility by successful TWIC enrollment does not provide the basis for concluding that, as a legal matter, the time spent by workers who are required to obtain the TWIC card is compensable as a direct discharge of the employer's state safety obligations. Such interpretation would require an expansion of the scope of the federal law which is beyond state authority as well as interpose a position that TWIC enrollment satisfies specific obligations under Cal/OSHA provisions which is beyond the enforcement role of DLSE.

We conclude that based upon the facts presented in this matter, the time spent by Shell's employees in enrolling for a TWIC card is not compensable under the "hours worked" requirement of IWC Order 1. The TWIC program which requires a prescribed card for employees who in the performance of their jobs have unescorted access to secured areas of a port facility is not a working condition which Shell controls. Rather, the requirement and enrollment process is fundamentally and pervasively a federally mandated obligation which implements an independent public policy to establish security in the ports fundamental to national security. The activities for enrollment to be performed by employees are governed by federal procedures for which Shell does not control within the meaning of the State's "hours worked" requirement.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

We hope that the above responds to your inquiry.

Very truly yours,

Robert R. Roginson
Chief Counsel

RRR:

Cc: Labor Commissioner Angela Bradstreet
Angel Gomez, Epstein, Becker & Green

2008.11.25