



January 17, 2007

Dear **Name***:

The **Name*** Mass Transportation Program has posed several questions concerning the implementation of a pilot program designed to provide safe and efficient transportation services to seasonal farm workers commuting to/from the multiple work sites within the Central Valley. Our understanding of the program, which follows, is based on your July 15, 2003 correspondence, meetings between representatives from **Name*** and **Name*** and Wage and Hour Division (WHD) staff in California, and the sample written agreement between **Name*** and an individual driver you provided.

Name* has used a federal grant to purchase 50 vans to transport workers to packing sheds/processing plants and to field work sites in the Central Valley. Each van is equipped with a global positioning system chip so that **Name*** will know the coordinates of each van's location. **Name*** also has a means for monitoring the speed at which the van is traveling. **Name*** seeks to limit the vans to a daily roundtrip of 60 miles, but this has been exceeded in some cases. **Name*** ensures that the vans meet all applicable state and local safety and insurance requirements.

You indicate that it is imperative that the program be financially self-supporting because **Name*** County cannot subsidize the program. **Name*** sets a fee to be collected by the van driver from each passenger, and the driver turns over that fee to **Name***. The driver does not have to pay the fare for the commute. The driver is not allowed to keep any of the fare money received and must turn over all fares collected to **Name***. The maximum fare for rides to packing sheds or processing establishments is \$60 per month per rider and for rides to field sites \$80 per month per rider.¹ Riders receive a fare agreement that details the cost of the ride. To ensure that riders are not being overcharged, **Name*** conducts unannounced "ride alongs" where its staff will show up at the end of the workday at the work site and ride home in the agency provided van. **Name*** staff count the number of riders in the van and compares that number to the log of riders maintained by the driver. **Name*** also supplies each van with questionnaires for riders to complete.

The driver and riders are allowed to transport their children at the beginning of the day and at the end of the day in the event the driver or workers need to drop their child or children off at a daycare or childcare facility. Similarly, the driver and riders may stop at a grocery store on the way to or from work to buy groceries. The driver may use the van outside of the commute time only for a medical emergency.

¹ Riders to packing sheds or processing establishments pay \$5 per day for the first three days of the week. After the third day the rider pays no more that week. Riders to field sites pay \$5 per day up to a maximum of four days per week except in the Orosi farm area, where the charge is \$4 per day up to five days a week.

Name* has developed a video to promote the program and also markets the program through radio advertisements, tables at flea markets, and talking to workers at work sites and common pay points. **Name*** has spoken to workers at fields and packing sheds during workers' meal breaks or at the end of the workday. So far, **Name*** has spoken to workers of approximately fifty of the larger growers in the area. **Name*** advises workers of the availability of the vans and seeks riders and drivers.

Each agricultural worker who agrees to be a driver must pass a drug screening, have a check of their driving record, have no felony conviction within the past five years, and pass a medical examination. Drivers of vans to packing sheds or processing establishments must possess a Class C license. Drivers of vans to fields must possess a Class B license. All drivers must find a sufficient number of riders in order to keep their van. **Name*** has established a Web site to facilitate matching riders with drivers and vans. Van drivers agree to check vehicle fluids, pick up riders, and drive the van to and from the work site each workday. Van drivers are not expected to perform any maintenance on the vehicle, but the driver is expected to clean and wash the van. Each driver is to give **Name*** 30 days' notice if the driver no longer wishes to drive the van. The program encourages having a "back up" driver from each van's ridership in the event the primary driver is sick or cannot drive for a period of time.

Although the program is designed so that participation of drivers and riders is voluntary rather than required or influenced by the employer of the driver or riders, there are no specific program provisions to prevent the employer of a driver or rider from requiring or influencing the employee's participation. There are also no program provisions addressing the participation of farm labor contractors or agents (*i.e.*, foremen or supervisors) of agricultural employers (growers, packing sheds or processing establishments) or agricultural associations.

The two statutes enforced by WHD that are most relevant to this program are the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The FLSA establishes federal minimum wage and overtime pay requirements for covered employees. MSPA establishes wage, housing, transportation, disclosure, and recordkeeping standards for migrant and seasonal agricultural workers. MSPA also requires farm labor contractors to register with the U.S. Department of Labor (the Department).

The FLSA recognizes the generosity and public benefits of volunteering and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. The Department is committed to ensuring that citizens are able to volunteer their services freely for charitable and public purposes within the legal constraints established by Congress. However, given the information provided, it remains unclear as to whether the drivers of the program vans are *bona fide* volunteers or, in actuality, should be considered employees of **Name*** County. In defining the term "employee," Section 3(e)(4)(A) of the FLSA states:

The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State or an interstate government agency, if -

- (i) the individual receives no compensation or is paid expenses, reasonable benefits or a nominal fee to perform services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

The Department’s regulations indicate that an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for the services rendered is considered a volunteer during such hours. *See* 29 C.F.R. § 553.101. Individuals are considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer. We are unable to determine whether any of the drivers meets the above statutory and regulatory criteria to be considered a volunteer. The limited use of the van described in your program does, however, appear to be a “reasonable benefit” for the drivers, as envisioned in Section 3(e)(4)(A) of the FLSA. Therefore, the limited use of the vans for personal purposes would not serve, in and of itself, as a basis for concluding that the drivers are not volunteers.

Applying MSPA to your program requires full consideration of the statute’s purpose, which is “to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.” 29 U.S.C. § 1812.

MSPA establishes certain safety and health standards for the transportation of migrant and seasonal agricultural workers. These transportation standards—which include vehicle safety, vehicle insurance, and driver licensure—impose responsibility on any agricultural employer (AGER)², agricultural association (AGAS)³, or farm labor contractor (FLC)⁴ that is using or causing to be used any vehicle for providing transportation of such workers. As a government component, **Name*** does not meet the definition of an AGER, AGAS, or FLC; therefore, neither **Name*** nor its employees are covered by MSPA’s transportation standards.

² “Agricultural employer” means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits hires, employs, furnishes or transports any migrant or seasonal agricultural worker. *See* MSPA § 3(2).

³ “Agricultural association” means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes or transports any migrant or seasonal agricultural worker. *See* MSPA § 3(1).

⁴ “Farm labor contractor” means any person—other than an agricultural employer, or agricultural association, or an employee of an agricultural employer or agricultural association—who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker. *See* MSPA § 3(7).

Vehicle drivers who are considered volunteers (as opposed to employees of **Name***) may, however, be covered as farm labor contractors by MSPA § 3(7) if they receive a fee or *valuable consideration* for the transportation, or engage in any other farm labor contracting activity⁵, such as recruiting or furnishing riders to work for agricultural employers or associations.

Review of your correspondence and the sample written agreement indicates that drivers would receive no money/fee for their driving, and their personal use of the van would be limited to personal emergencies. Meetings between **Name*** and WHD staff revealed that the drivers *and* their riders may also use the van to transport their children to/from day care facilities and stop at grocery stores. Such personal use of a van may, in some circumstances, rise to the level of a *valuable consideration*, thus requiring that the driver meet the applicable MSPA provisions.

Viewed in light of **Name*** County's special role and humanitarian interest in this program, we will not consider the limited personal use of the van described above to be a *valuable consideration* under MSPA, to the extent that such use of the van to pick up/drop off children and stop for groceries:

1. Is available for all riders, and not limited to the driver; and
2. Occurs only during the home-to-work and work-to-home commutes of the driver and the riders.

With respect to compliance with the MSPA transportation standards, nothing in MSPA is intended to prevent an employer from encouraging workers to participate in voluntary arrangements designed to provide safe and efficient transportation. However, if any of the following circumstances is found to exist, the employer (AGER, AGAS, or FLC) of the vehicle driver would be considered to be causing the transportation and therefore responsible for compliance with MSPA's transportation standards:

1. The AGER, AGAS, or FLC employer organizes or helps to organize the transportation;
2. The AGER, AGAS, or FLC employer directs or requests such transportation arrangements or provides money or other valuable consideration for the transportation;
3. The AGER, AGAS, or FLC employer makes such transportation (driving or riding) a condition of employment; or
4. An agent of the AGER, AGAS, or FLC employer (*i.e.*, foreman or supervisor) is a driver and the transportation provided can reasonably be perceived as an activity on behalf of his employer (*i.e.*, all riders of the van driven by the agent work for the agent's employer).⁶

⁵ The term "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker. *See* MSPA § 3(6).

⁶ *See* WH opinion letter July 17, 1998 (copy enclosed); 29 C.F.R. § 500.103(c); and 61 Fed. Reg. 24681, 24682 (May 16, 1996).

It is important to note that the existence of one or more of the above circumstances may result in a monetary obligation under the FLSA for wages owed to the driver by the employing AGER, AGAS, or FLC.

We trust that the above is responsive to your questions regarding the application of MSPA and the FLSA to the program. You have also asked whether the existence of a written agreement between **Name*** and the driver would affect the analysis of whether an employment relationship exists. The determination of an employment relationship depends on all the facts of that relationship. Although the existence of an agreement such as the one you provided would clarify the responsibilities and obligations of each party, it would not alter the existence of an employment relationship.

You also asked whether MSPA distinguishes between vehicles used to transport packing shed or processing plant employees to their packing shed or processing plant work sites and vehicles used to transport field employees to their field work sites. With limited exceptions⁷, each AGER, AGAS, or FLC that uses or causes to be used any vehicle to transport migrant or seasonal agricultural workers must ensure compliance with the MSPA's transportation provisions, without regard to the destination of the worker. We agree with your conclusion that the program would not meet the definition of a day-haul operation provided the transportation of farm workers to and from their work sites includes only those workers for whom an employment relationship already exists with their field, packing shed, or processing plant employer and does not include those workers assembled at a pick-up point waiting to be hired and employed.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express 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 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 issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between an employer and the Wage and Hour Division or the Department of Labor.

The Department supports your efforts in providing safe, reliable, and economical transportation to farm workers in the Central Valley and is willing to assist you with your compliance questions. If you require more information or have additional questions, please feel free to

⁷ MSPA's vehicle safety standards and insurance requirements do not apply to the transportation of any seasonal or migrant agricultural worker on a tractor, combine, harvester, picker, or other similar equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry; to any individual migrant or seasonal agricultural worker when the only other occupants of that individual's vehicle are immediate family members; or to *bona fide* carpooling arrangements. See 29 C.F.R. § 500.103.

have a member of your staff contact Michael Ginley, Office of Enforcement Policy at (202) 693-0745.

Sincerely,

Paul DeCamp
Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**