U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 7, 2002 **FLSA2002-9**

Dear ***Name****,

This is in response to your correspondence addressed to Ms. Kristine Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, on behalf of ***Name**** Principal. Mr. ***Name**** has concerns over a decision made by his local supermarket, ***Name**** to discontinue charity bagging as a fundraiser for his school. Under this program, students bagged customers' groceries at local food stores and carried the bags to people's cars for tips and donations, but without receiving any wages from the stores. ***Name**** discontinued the program, which took place periodically on weekends, due to concerns that it violated the minimum wage, record-keeping, and child labor provisions of the Fair Labor Standards Act (FLSA) and possibly state law.

Please know that the Administration of President George W. Bush fully supports the principles of volunteerism. As you may recall from his State of the Union address earlier this year, President Bush issued a call to service for all Americans to dedicate at least two years of their lives – the equivalent of 4,000 hours over a lifetime – to serve their communities, our Nation and the world. The President established the USA Freedom Corps and brought together the broadest group of service organizations ever assembled to create the USA Freedom Corps Network as a comprehensive clearinghouse to help citizens find volunteer service opportunities within their neighborhoods and communities at home, and in countries around the globe. The USA Freedom Corps is matching potential volunteers with local service opportunities that strengthen our communities, help people in need, and extend American compassion throughout the world.

It is also important to note that the FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes. The Wage and Hour Division has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Such a person will not be considered an employee for FLSA purposes if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.

The FLSA defines the concept of employment very broadly with respect to activities performed for the benefit of a for-profit employer covered by the FLSA. In prior opinion letters, for example, the Wage and Hour Division considered whether the FLSA permitted covered retailers to use members of a charitable organization to wrap Christmas presents or to count inventory in exchange for payments to the charities in lieu of paying wages directly to the workers. The Division concluded that the protections of the FLSA applied to the members of the charitable organization. In both cases the individuals engaged in activities that were an integral part of the FLSA-covered, for-profit retailer's business. Accordingly, the company's costs of doing business and profitability were favorably enhanced by the proposed "volunteer" activity.

This distinction between "ordinary volunteerism" and the performance of FLSA-covered "work" by employees for commercial profit-making companies has been acknowledged by the Supreme Court of the United States. The Supreme Court has recognized that a fundamental purpose of the FLSA was to prevent covered employers from gaining an unfair competitive advantage through payment of substandard wages. The Court has also recognized that individuals may not choose to decline or waive their statutory entitlements under the FLSA by characterizing the activities they perform for a covered employer as "volunteer." See Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 299 (1984); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945). In its only decision directly addressing the status of volunteers under the FLSA, the Supreme Court stated that the purposes of the FLSA

"require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. ***Name**** Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." Alamo Foundation, 471 U.S. at 302.

In *Alamo Foundation,* a non-profit religious organization operated commercial businesses staffed by the Foundation's "associates," who were mostly drug addicts, derelicts or criminals before their conversion and rehabilitation by the Foundation. The Foundation provided food, clothing, shelter, and other benefits to the workers, but no cash wages. One associate, for example, testified that she considered her work in the Foundation's businesses as part of her ministry and that she did not work for material rewards. *Id.* at 300. This same associate also testified that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul." *Id.* at 300-01.

In *Alamo Foundation*, the district court held that the Foundation was a covered "enterprise" under the FLSA and, despite its incorporation as a non-profit religious organization, its businesses were engaged in ordinary commercial activities in competition with other commercial businesses. While "associates" who worked in the businesses testified at trial that they vigorously protested the payment of wages, asserting that they considered themselves volunteers working only for religious and evangelical reasons, the court nevertheless found they were "employees" under the FLSA's economic reality test of employment. The Court of Appeals for the Eighth Circuit affirmed the district court's interpretation.

The Supreme Court also upheld the Court of Appeals decision. In so doing, the Court distinguished the activities of nonprofit groups that may be excluded from coverage under the FLSA on the basis that they lack a business purpose, citing the Department of Labor's regulations at 29 C.F.R. §779.214. The Court observed that both lower courts had found that the Foundation's businesses served the general public in competition with ordinary commercial enterprises, and that the payment of substandard wages would give the Foundation and similar organizations an advantage over their competitors. The Court noted that "it is exactly this kind of 'unfair method of competition' that the Act was intended to prevent, see 29 U.S.C. §202(a)(3), and the admixture of religious motivations does not alter a business' effect on commerce." 471 U.S. at 299. Moreover, the Court affirmed the finding that "the associates must have expected to receive in-kind benefits – and expected them in exchange for their services …"

While certain differences may be noted between the *Alamo Foundation* case and the charity bagging activities at ***Name**** we believe that the Supreme Court's holdings control the conclusions reached in this matter. Our review revealed that the local supermarket involved, which is a commercial for-profit retailer subject to the requirements of the FLSA, reduced the working hours of some of its paid employees in order to have the students bag the customers' groceries. The Wage and Hour Division found that the bagging activities were an integral part of the employer's provision of customer service because the employer paid regular employees to do the activities when the students were not present. The retail supermarket is organized for a business purpose, engages in ordinary commercial activities, and serves the general public in competition with other commercial enterprises. The students expected to receive compensation for their services in the form of customer tips. Their services were not in themselves devoted to their community programs, but instead were being provided directly to a commercial for-profit business enterprise that derived an economic benefit from their services. It does not matter that the students indicated a desire that payment of the tips they received in exchange for performing their services for the supermarket should go to their particular community organizations. In this situation, it is our view that the students would have to be considered employees of the retail supermarket and not volunteers. Consequently, the retail supermarket would be responsible for complying with the FLSA with respect to the students who bag the customers' groceries at the supermarket and carry them to the customers' cars.

Our conclusion is based on the specific facts of this scenario. Charitable activities performed in another set of circumstances might require a different analysis and conclusion. Of course, after being paid their

wages, employees are certainly free to donate part or all of their wages to charitable causes of their choosing. In addition, there are many other types of fundraising activities that the students could consider that would not raise concerns under the FLSA – such as holding a car wash, bake sale, or spaghetti dinner, or just soliciting contributions for their various charitable causes, among other possibilities.

It is truly unfortunate that in the scenario described the students may not perform this specific activity as a fundraiser for their schools without implicating compliance issues under the FLSA. However, as explained above, the principles of law established by the courts do not permit them to perform uncompensated services on a volunteer basis for a commercial for-profit employer subject to the FLSA in circumstances like those of the baggers at ***Name****.

Sincerely,

Eric S. Dreiband
Deputy Administrator

*Note: * The actual name(s) was removed to preserve privacy.*