U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Nicole

JAN 17 2007

Ms. Gale Ogawa, Acting Division Chief
California Department of Transportation
Mass Transportation Program
P.O. Box 942874 MS 39
Sacramento, California 94274-0001

Mr. Ronald Hughes
Kings County Area
Public Transit Agency/AITS
1340 N. Drive
Hanford, California 93230

Dear Ms. Ogawa and Mr. Hughes:

The California Department of Transportation (CALTRANS) 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 CALTRANS and Kings County Area Public Transportation Authority (KCAPTA) and Wage and Hour Division (WHD) staff in California, and the sample written agreement between KCAPTA and an individual driver you provided.

KCAPTA 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 KCAPTA will know the coordinates of each van's location. KCAPTA also has a means for monitoring the speed at which the van is traveling. KCAPTA seeks to limit the vans to a daily roundtrip of 60 miles, but this has been exceeded in some cases. KCAPTA 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 Kings County cannot subsidize the program. KCAPTA sets a fee to be collected by the van driver from each passenger, and the driver turns over that fee to KCAPTA. 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 KCAPTA. 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, KCAPTA conducts unannounced "ride alongs" where its staff will show up

[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.

at the end of the workday at the work site and ride home in the agency provided van. KCAPTA staff count the number of riders in the van and compares that number to the log of riders maintained by the driver. KCAPTA 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.

KCAPTA 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. KCAPTA has spoken to workers at fields and packing sheds during workers' meal breaks or at the end of the workday. So far, KCAPTA has spoken to workers of approximately fifty of the larger growers in the area. KCAPTA 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. KCAPTA 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 KCAPTA 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 Kings 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 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, KCAPTA does not meet the definition of an AGER, AGAS, or FLC; therefore, neither KCAPTA nor its employees are covered by MSPA's transportation standards.

Vehicle drivers who are considered volunteers (as opposed to employees of KCAPTA) 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 activity[5], 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 KCAPTA 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 Kings 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

---

[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).

[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).

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]

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 KCAPTA 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 exceptions[7], 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

---

[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).

[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.

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

Sincerely,

Paul DeCamp

Paul DeCamp
Administrator

U.S. Department of Labor

Employment Standards Administration
Wage & Hour Division
Washington, D.C 20210

JUL 17 1998

Thank you for your letter requesting clarification of the Department's regulations concerning "carpools" under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. 1801 et seq. The guidance provided in this letter is based only on the facts as stated in the hypothetical situations presented in your letter; any modification in the facts could yield different results under the regulations. Further, the guidance assumes that all other applicable labor standards and safety requirements are satisfied, or are not at issue.

The MSPA and the Department's regulations issued thereunder establish 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"), agricultural association ("AGAS"), or farm labor contractor ("FLC") which is "using or causing to be used, any vehicle for providing transportation" of such workers. 29 U.S.C. 1841(b)(1). The Department recognizes that bona fide "carpools" are outside the scope of these MSPA requirements, and has provided regulatory and interpretative guidance for the identification of such carpools. 29 CFR 500.100(c), 500.103(c), 500.70(c); 61 Fed.Register 10913-14 (March 18, 1996); 61 Fed.Register 24861-62 (May 16, 1996). A bona fide carpool may exist so long as the ridesharing arrangement is voluntary among the workers using the workers' own vehicles,

yields no more than the cost of the operation for the person providing the vehicle, is not "specifically directed or requested" by an AGAS or AGER and does not include a farm labor contractor as a participant.

You have presented several hypothetical situations involving transportation arrangements. The following responses take into account the specific facts of each situation, as well as your introductory statement that, in all the situations, the vehicle operator is reimbursed for no more than the actual operating costs, the persons designated "C" and "E" are non-supervisory MSPA-covered agricultural workers; and the person designated "G" is an AGER. For some of the situations, as indicated in the responses, the Department in an actual investigation would seek further information in order to have a clearer understanding of the circumstances and make a more conclusive determination as to the existence of a bona fide carpool.

Hypothetical No. 1: C is an employee of G. C gives migrant agricultural workers who are also employed by G rides to and from work each day in C's vehicle. While G knows about this situation, G neither directed nor requested C to allow C's co-workers to commute with C. Is this carpooling as defined under 29 CFR 500.103(c)?

DOL Response: Yes. It appears that this is a totally voluntary ridesharing arrangement among the workers and that G (the AGER employer of the workers) is totally separated from the transportation function.

Hypothetical No. 2: E is an employee of G. E tells F, one of G's foremen, that E needs a ride to and from work. F suggests to E that E ask E's co-worker, C, about commuting with C in C's vehicle. Upon being asked by E, C gives E rides to and from work. Is this carpooling, despite F's suggestions?

DOL Response: Yes. While a carpool would not exist if the AGER or one of his foremen/supervisors were involved in the ridesharing arrangement, an AGER or his foremen/supervisors may encourage workers to make such an arrangement without such encouragement subjecting the AGER to responsibilities under the MSPA transportation provisions. See 61 Fed. Reg. 24858, 24862 (May 16, 1996), Preamble to the MSPA Final Rule

on vehicle liability insurance). Since it is the worker E who has initiated the inquiry, and the foreman F has merely identified another worker C as someone whom E could contact regarding ridesharing, the AGER (through his foreman/ supervisor) has not gone beyond encouragement into "causing" the transportation by "specifically direct[ing] or request[ing]" the ridesharing arrangement.

Hypothetical No. 3: Same facts as Hypothetical No. 2, except that F, rather than suggesting that E ask C about riding with C, tells E, "Maybe you should ask one of your co-workers about riding with them." After asking a few of these co-workers about riding with them in their vehicles, C allows E to ride in C's vehicle. Is this carpooling, despite F's suggestion?

DOL Response: As with Hypothetical No. 2, this situation would be a bona fide carpool. The AGER and his foreman/ supervisor may encourage the workers to make ridesharing arrangements, without such encouragement subjecting the AGER to responsibility for the transportation under the regulations.

Hypothetical No. 4: G issues a policy stating that while G does not request or direct any employee to ride with any other employee, employees are encouraged to commute to work together in vehicles that are mechanically safe and insured as required by law. In response to G's policy, two of G's employees, E and C, decide to commute together in C's vehicle. Is this carpooling, despite the issuance of this policy?

DOL Response: Same response as for Hypothetical No. 3.

Hypothetical No. 5: L is a crew leader employed by G. The members of L's crew are seasonal or migrant agricultural workers. L tells his crew members in which field rows to work, monitors his crew members' work activities, including their compliance with safety rules and, with the input of each crew member, records for G's records that member's time worked and piece-rate output. L gives some of his crew members rides to and from work in L's vehicle. No crew member is either specifically directed or requested to ride with L. Is this carpooling?

DOL Response: This situation would probably be considered to be a bona fide carpool, since L is described as "a crew leader employed by G" but not as a foreman or supervisor (in contrast to other hypotheticals). So long as G (the AGER employer) is totally separated from the transportation function and L is not an agent of G (i.e., not a foreman or supervisor), then L's providing his crew member co-workers with rides would not render G liable under MSPA's transportation provisions. In an investigation with facts such as this hypothetical, the Department would seek further information to determine whether, in fact, crew leader L is an agent of the AGER such that L's activities in operating the ridesharing would be perceived as activities on behalf of G. Pertinent information would include the relationship between L and the workers, the nature and extent of L's authority over the workers, and the workers' perception of the authority which L has been granted by G.

Hypothetical No. 6: G has a policy forbidding supervisors from giving any other employee a ride in the supervisor's vehicle. Despite this policy, S, a supervisor of G, lets seasonal agricultural workers commute to work with him in S's vehicle, although they are neither directed nor requested to do so. Neither G nor any other supervisor of G knows that S is giving employees rides. Is this carpooling?

DOL Response: Based on these facts, this ridesharing probably would not be considered to be a bona fide carpool for purposes of MSPA. The AGER's acknowledged agent -- supervisor S -- provides the shared transportation, which would reasonably be perceived to be provided on behalf of the AGER. The existence of G's policy forbidding supervisors to give such rides would not, in itself, be enough to dispel the agency authority of S to act on G's behalf in this matter. Allowing G to avoid MSPA transportation responsibilities simply by declaring this policy would encourage willful ignorance on the part of the AGER and would frustrate the intentions of the MSPA transportation requirements. In an investigation with facts such as this hypothetical, the Department would seek further information to determine, among other pertinent matters, the nature and extent of supervisor S's agency authority, the means by which the "no rides" policy was communicated to the workers, the extent to which the workers understood the policy and, thus, understood that supervisor S was not acting on behalf

of the AGER in this particular matter despite S's agency authority. It would likely be difficult for the AGER to demonstrate that he had not "caused" the transportation which was provided by supervisor S, even though that supervisor had acted contrary to a stated policy of the AGER.

Hypothetical No. 7: C is an employee of FLC. C gives migrant and seasonal agricultural workers who are also employed by FLC rides to and from work each day in C's vehicle. While FLC knows about this situation, FLC neither directed nor requested C to allow C's co-workers to commute with C. Is this carpooling? If not, is C a farm labor contractor employee [FLCE] who must obtain under 29 CFR 500.40 a Farm Labor Contractor Certificate of Registration authorizing transportation activity?

DOL Response: Yes, the arrangement would be considered a bona fide carpool. The ridesharing appears to be strictly voluntary, to be done for the convenience of the workers involved, not done at the direction or request of the FLC, and not an arrangement in which the FLC participates. Inasmuch as this arrangement is considered carpooling, then C is not engaging in these transportation activities on behalf of the FLC, and is therefore not deemed a farm labor contractor employee who must comply with the FLCE registration requirements.

Hypothetical No. 8: L is a crew leader employed by FLC. The members of L's crew are seasonal or migrant agricultural workers. L tells his crew members in which field rows to work, monitors his crew members' work activities including their compliance with safety rules and, with the input of each crew member, records for FLC's records that member's time worked and piece-rate output. L gives some of his crew members rides to and from work in L's vehicle. No crew member is either specifically directed or requested to ride with L. Is this carpooling? If not, is L a farm labor contractor employee [FLCE] who must obtain under 29 CFR 500.40 a Farm Labor Contractor Certificate of Registration authorizing transportation activity?

DOL Response: This arrangement probably would be considered a bona fide carpool, as was the similar arrangement in Hypothetical No. 5 (where the person providing the rides is

an employee of an AGER, rather than of an FLC). It appears from the facts as stated that the FLC has no involvement in the ridesharing arrangement. As a practical matter, it would seem that such a situation would be unlikely to occur, since the FLC -- in his efforts to assure that the work crew is available at the time and place needed by the AGER -- would usually or ordinarily be involved in organizing and overseeing transportation such as ridesharing provided by crew leaders such as L. If crew leader L were providing ridesharing for workers on behalf of his employer FLC, then crew leader L would be required to comply with the FLCE registration requirements and the FLC would be responsible for all MSPA obligations concerning transportation. In an investigation with facts such as this hypothetical, the Department would seek additional information to determine, among other pertinent matters, the nature and extent of the communications between the FLC, L, and/or the workers regarding the means by which the workers will reach the site of work. In addition, in an investigation where the Department determines that the ridesharing was provided or caused by the FLC, the Department would seek further information to determine whether the AGER has met his affirmative obligation to take reasonable steps to determine that the FLC is authorized to perform each activity for which the contractor is utilized (including transportation) (29 U.S.C. 1842); this AGER responsibility would be independent of any AGER responsibility based on his own involvement in the transportation through "causing" the transportation by "specifically direct[ing] or request[ing] the arrangement (29 U.S.C. 1841). See Metzler v. Lykes Pasco, 1997 WL 420450 (S.D. Fla. Apr. 14, 1997) (the court enjoined AGER to take reasonable steps under § 1842 to insure that the FLC was engaging in authorized transportation activities, even though AGER was not directly responsible for transportation under § 1841).

I trust that this response satisfactorily addresses your concerns. If you have further questions, please feel free to have a member of your staff contact Michael Hancock, Office of Enforcement Policy, Farm Labor Team, at (202) 219-7605.

Sincerely,

Corlis L. Sellers

Corlis L. Sellers
National Office Program Administrator