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September 8, 2015

Dr. David Weil, Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Administrator Interpretation Regarding "Volunteers" and Meeting

Dear Dr. Weil:

The Association of Corporate Counsel and its Nonprofit Organizations Committee ("Committee") urge you to issue an Administrator's Interpretation ("AI") regarding the definition of "volunteers" for private nonprofit organizations under the Fair Labor Standards Act ("FLSA"). To help you and your staff with the preparation of this "volunteers" AI, we request a meeting with you and other appropriate senior Wage & Hour Division ("WHD") leaders not later than October 1, 2015. In this meeting, the Committee's representatives will discuss the issues associated with the definition of "volunteer," provide examples drawn from their organizations' experiences with volunteers, and offer any other information and analysis you may need to expedite the AI.

While the WHD has provided detailed guidance regarding the FLSA's application to volunteers supporting public-sector agencies, *see, e.g.,* U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter FLSA 2003-2 (Apr. 14, 2003), and unpaid interns working in for-profit corporations, *see, e.g.,* U.S. Dep't of Labor, Wage & Hour Division, Fact Sheet No. 71 (April 2010) ("Fact Sheet No. 71"), the WHD has offered very little guidance with regard to volunteers assisting private nonprofits. The resulting confusion and ambiguity have had a serious deleterious effect on many private nonprofits, including the signatories of this letter. The risk and uncertainty of potential FLSA liability forces these organizations to reject or limit needed volunteer support from the public and their own employees. We urge you to act quickly to resolve the ambiguities in a manner that will help private nonprofit organizations fulfill their missions to the fullest extent possible.

Who Are Volunteers?

Volunteers are fundamentally different from "employees." As WHD has defined them under the FLSA, "employees" are economically dependent upon their employers. See Administrator David Weil, Administrator's Interpretation No. 2015-1 (July 15, 2015). With one very limited exception discussed below, volunteers are not economically dependent upon the nonprofit organizations they support with their efforts. Relationships between volunteers and nonprofit organizations are rarely economic. Instead, they are driven by altruism, mission, and a commitment to investing time and effort to create a better society. Volunteers do not expect to be paid or to receive common employment-related benefits like pensions or paid leave. Their efforts are not rendered with the expectation of any return benefit other than the knowledge and satisfaction that they have a made a meaningful contribution and helped an organization they support to achieve its mission. While they may derive an incidental benefit that strengthens particular job-related skills or experiences, or occasional expense money to facilitate their efforts, these are not volunteers' principal purposes. Their purpose is to serve.

Legal Background

The wage and hour requirements of the FLSA apply only to an employer's "employees." The FLSA's definition of "employee" is relatively vague, and courts have interpreted the term broadly. The Act defines an employee as any person who is employed by an "employer." 29 U.S.C. §203(e)(1). This circular statement is supplemented by a definition of "employ": to "suffer or permit to work." 29 U.S.C. §203(g). Yet, the WHD has long recognized that many individuals who lend their time and labor to private nonprofits are not "employees" even though their work may be "suffered or permitted" by the private nonprofit.

The criteria to determine employee status differ depending on whether the employer is a private nonprofit organization, public-sector agency, or private for-profit organization. The literal text of the FLSA exempts only "volunteers" working with state or local government agencies and private non-profit food banks where workers receive groceries. *See* 29 U.S.C. §§ 203(e)(4)-(5). The Act provides no express exemption for volunteers assisting private nonprofits. "Enterprises" that are not engaged in a "common business purpose," including some private nonprofits, are not subject to "enterprise coverage" under the FLSA. See 29 U.S.C. 203(r). However, the WHD has also confirmed at least since 1955 that unpaid volunteer relationships with nonprofit organizations do not create an employment relationship for FLSA purposes. *See, e.g.,* U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter (July 18, 1996); U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter on Volunteer/Employee Status (Nov. 9, 1998); *see* also 29 C.F.R. section 785.44 ("Time spent in work for public or charitable purposes . . . voluntarily . . . outside of the employee's normal working hours is not hours worked.").. As the WHD has explained, "[u]npaid internships in . . . non-profit charitable organizations,

where the intern volunteers [are] without expectation of compensation, are generally permissible." Fact Sheet No. 71, note.

The WHD has provided examples of private nonprofit volunteer services that the FLSA does not cover:

> [M]embers of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.

U.S. Dep't of Labor, eLaws FLSA Advisor, http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp (Feb. 9, 2015).

The Supreme Court has tacitly upheld this interpretation of the FLSA's exclusion of volunteers involved with private nonprofits. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), the Court found volunteers working for commercial businesses within a tax-exempt religious foundation to be subject to the FLSA because of enterprise coverage. The Court based its conclusion on its determination that the FLSA contains no express or implied exception for money-making activities conducted by religious or other nonprofit organizations and the WHD's consistent interpretation of the Act as covering such commercial businesses. *Id.* at 297. The Court's analysis also strongly suggested, however, that the result would have been different had the volunteers engaged in the organization's charitable or religious activities, rather than commercial activities. The Court, in examining the legislative history of the FLSA, noted that when Congress expanded the Act to cover "enterprises" as well as individuals, the Senate Committee Report indicated that the activities of nonprofit groups were excluded from coverage insofar as they were not performed for a "business purpose." The Senate Committee Report cited by the Court states:

> [T]he definition would not include eleemosynary, religious, or educational organizations not operated for profit. The key word in the definition which supports this conclusion is the word `business.' Activities of organizations of the type referred to, if they are not

> operated for profit, are not activities performed for a `business' purpose.

S. Rep. No. 1744, 86th Cong., 2d Sess., 28 (1960). 471 U.S. at 298 n.14.

The Court also strongly suggested that the FLSA does not cover individuals (as distinct from the organizations for which they work) engaged in a public service, religious, or humanitarian pursuit. In *Tony & Susan Alamo Foundation*, the Court explained that "[o]rdinary volunteerism," such as volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy, was not threatened by the application of the FLSA to the foundation's commercial enterprises. 471 U.S. at 303. This is consistent with the WHD's view that the FLSA does not apply to volunteers at private nonprofits when the worker, without expectation of pay, "donate[s] . . . services, usually on a part-time basis, for public service, religious or humanitarian objectives." U.S. Dep't of Labor Opinion Letter, Volunteer/Employee Status (Nov. 9, 1998).

Thus, individuals suffered or permitted to work in a non-commercial, charitable activity by a private nonprofit who do not have an expectation of compensation are not covered "employees," according to the WHD with the assent of the Supreme Court.

Unfortunately, this limited jurisprudence of "volunteers" in the private nonprofit sector raises as many questions as it answers. Nonprofit organizations frequently characterize valuable contributors to their endeavors as non-employee volunteers. In the existing legal environment, misclassification of an employee can result in serious consequences under the FLSA, including back wages, interest, liquidated damages, and attorneys' fees, as well as other consequences outside the FLSA context. This is a risk that private nonprofits cannot bear.

WHD has stated it is "reviewing the need for additional guidance on internships in the public and non-profit sectors." *See* Fact Sheet No. 71 note. As entities and representatives of entities that will be principally affected by the WHD's decision in this regard, we urge you to issue new guidance that is not limited to "internships." Rather, we strongly urge you to issue guidance as soon as possible that answers several open questions and clarifies existing interpretations regarding volunteers under the FLSA.

Simply, the WHD's failure to issue guidance would keep in place a significant barrier to the successful operation of some private nonprofit organizations, and other organizations' efforts to expand their important work. It is therefore imperative that WHD issue clear guidance that addresses the following questions and helps private nonprofits to decide whether workers must be treated as employees under the FLSA or may properly be characterized as non-employee volunteers.

Issues Requiring Further WHD Guidance

1. Declare Unmistakably that "Volunteers" Are Not Interns

Volunteers are not interns or "trainees." The WHD's own six-part test that defines "trainee" (nee intern), and therefore a class of workers who are not covered by the FLSA, essentially holds that an internship must be for the exclusive professional benefit of the trainee. *See* Fact Sheet No. 71; *see also* Letter from M. Patricia Smith, Solicitor of Labor, to Laurel G. Bellows (Sept. 12, 2013). Even the courts of appeals that have rejected the WHD six-part test have determined coverage by balancing the benefits provided to the trainee against those derived by the employer. *See Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3e 578 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989). By contrast, volunteers are not motivated by professional benefit and, typically, do not derive any such benefit.

Instead, volunteers are motivated by a strong, altruistic, and personal commitment to the mission of the private nonprofit. The shape and quality of volunteers' work for the nonprofit is entirely defined by this commitment. The only benefit volunteers expect in return is the satisfaction of making a meaningful contribution to improving society. The principal --- sometimes exclusive --- beneficiaries of volunteers' efforts are the nonprofits' charges, not the volunteers themselves. For example, volunteers distributing water to thirsty victims of natural disasters under the auspices of a disaster relief nonprofit seek no vocational or other professional benefits. The volunteers simply want to help desperate members of their communities. The exclusive beneficiaries are the community members served by the nonprofit.

If there is any professional benefit to the volunteer, it is entirely incidental and unrelated to the central purpose of the relationship. For example, a junior accountant employed by an accounting firm may choose to volunteer to assist his preferred private nonprofit with managing its finances. The junior accountant may derive some additional accounting knowledge or skill from this hands-on volunteer experience, but it is incidental to his contribution to the smooth and successful operation of an organization he supports. As the Supreme Court made clear, the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). In sum, volunteer status is qualitatively different from trainee status at its very core.

Some volunteers working for private nonprofit organizations might satisfy the WHD's six-part "trainee" test, but many would not. The junior accountant in our example would not, for example.. In fact, non-student volunteers almost certainly would not satisfy the WHD's test in most circumstances. Simply, the WHD six-part test and the courts of appeals' balancing test are and should be entirely irrelevant to determining whether a volunteer is covered by the FLSA. The WHD should make

this fact explicit and thereby clear up significant confusion among private nonprofits, volunteers, and the courts.

2. Clarify that Volunteers May Contribute to All Types of Private Nonprofits

As noted above, a Senate Committee explained that "eleemosynary, religious, or educational organizations not operated for profit" may accept the assistance of non-employee volunteers without treating them as "employees." The WHD listed the same types of organizations for the same purpose, but has also used the phrases "public service" and "charitable." The WHD's compliance assistance materials discuss volunteers assisting public, charitable, educational or religious organizations and, more specifically, sheltered workshops, hospitals, nursing homes, schools, the Red Cross, youth programs, camps, scouts, child care assistance for needy mothers, and other specific settings as being able to employ volunteers, although not necessarily in every capacity. *See, e.g.,* U.S. Dep't of Labor, eLaws FLSA Advisor, http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp (Feb. 9, 2015).

These lists of organizations that may be supported by volunteers beg the question of whether other private nonprofit organizations that are not included on the lists may also accept volunteer assistance from non-employees. Private nonprofits are diverse, serve a wide range of missions, and organize under a variety of tax code provisions. Organizations that seem to be included on the WHD's list --- religious, charitable, scientific, and educational purposes --- are tax exempt under 26 U.S.C. section 501(c)(3) along with organizations engaged in testing for public safety or literary activities, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. But nonprofit civic leagues or organizations operated exclusively for the promotion of social welfare, or local associations of employees that are devoted exclusively to charitable, educational, or recreational purposes are tax exempt under 26 U.S.C. section 501(c)(4). Labor unions and agricultural or horticultural organizations are tax exempt under 26 U.S.C. section 501(c)(5) while nonprofit business leagues, chambers of commerce, real-estate boards, boards of trade, and professional football leagues are tax exempt under 26 U.S.C. section 501(c)(6) and fraternal or sororal beneficiary societies, orders, or associations are tax exempt under 26 U.S.C. section 501(c)(7). Of course, there are many similarly situated organizations --- that is, they have the same or similar missions --- that have not been formally adjudged tax exempt under the U.S. tax code

There is no reason why volunteer status should be limited to supporters of "501(c)(3)" organizations, or only a subset of that list of organizations. Labor union activists should be permitted to volunteer their time to organize their co-workers for mutual aid or benefit just like the alumna who volunteers to interview college applicants as part of her alma mater's process for admitting and recruiting new students. Supporters of marriage equality should be permitted to volunteer for a LGBT rights organization just as business leaders should be able to volunteer their time to organize a veterans' jobs fair for their local chamber of commerce. We

expect that the President and members of Congress would be shocked to learn that volunteers for their campaigns and supportive "527" organizations must be paid for their efforts simply because these groups are neither charitable, religious nor educational. Grass-roots supporters of ballot initiatives and legislative campaigns are exercising their First Amendment rights to speak freely and petition their government, and should not be confined to traditional employment relationships as a means of vindicating those rights.

None of the volunteer activities discussed in the preceding paragraph has a "business purpose." Nonetheless, the WHD has left open the question of whether volunteers engaged in these activities, or others, in support of their preferred tax exempt organization or similarly situated organizations are employees or volunteers. The WHD should make clear in formal guidance that, as long as volunteers support an organization that is tax exempt under the federal tax code or similarly situated to those who are tax exempt, they should not be covered by the FLSA.

3. State Explicitly That the Criteria for Determining "Volunteer" Status Are Designed to Protect Against The Kind of Worker Exploitation and Coercion Contemplated by the FLSA

The Committee and all of the organizations signing this letter share the WHD's concern about protecting vulnerable workers from exploitation, wage theft, and excessive work hours without fair compensation. No organization in any sector should be permitted to deprive bona fide employees of their hard-earned wages or overtime pay by misclassifying them as volunteers. For this reason, we believe firmly that the WHD's guidance for determining which workers are "volunteers" should contain strong, enforceable safeguards:

- Volunteers should work only in the private nonprofit and public sectors. Removing the profit motive eliminates an important contributor to exploitation.
- In the private nonprofit sector, the organization for which the volunteer works must have tax exempt status under the federal tax code. This limitation ensures that the organization has a public-focused mission from among those listed in the tax code's section 501 or related sections.
- Volunteers and the organizations they support must have a clear, convincing and mutual understanding that the volunteer will not receive compensation for any of his/her efforts.
- Volunteers must not receive a direct benefit or the promise of a direct benefit --- for example, a future employment prospect --- in exchange for volunteering. Circumstances involving unpaid job training or apprenticeship should be analyzed under the WHD's six-part trainee test. Volunteers who receive indirect professional benefits, like the junior accountant who gains

hands-on financial management experience incidental to volunteering for his favorite private nonprofit, should not lose their status under the FLSA.

- Volunteers must not experience any coercion, intimidation, retaliation, or threat of retaliation associated with their unpaid relationship with a private nonprofit. These protections should apply against third parties, like private-sector employers, as well as the private nonprofit organization for which the volunteer works. Simply, no one should be forced to work for free regardless of the force's source. While the FLSA's section 15(a)(3) likely does not cover most of these circumstances, these protections can be enforced by clear WHD guidance stating that coercion, intimidation, retaliation, or threat of retaliation is *per se* evidence that the individual is an employee, not a volunteer. Bona fide volunteers work for their chosen private nonprofit because of their commitment to the organization's mission, not because anyone has required it.
- Incumbent employees must not be permitted to volunteer for their employer in the same job (see further discussion below).

4. Explain that Volunteers Do Not Lose Their Status When They Augment an Organization's Work, Even When They Work Alongside an Organization's Paid Employees, or Take the Place of Paid Employees

For many of the same reasons discussed in #2 above, elements of the "trainee" test should not be allowed to creep into determinations of volunteer status. In particular, bona fide volunteers must not lose their status simply because their efforts augment paid employees' work or because volunteers displace employees. Both of these concepts are drawn from the WHD's six-part test for determining trainee status. They are relevant to trainee status because augmentation or displacement of paid employees suggests the employer is deriving an immediate advantage from the worker's efforts rather than providing a bona fide training experience that exclusively or primarily benefits the worker. For private nonprofits supported by volunteers, the entire purpose in welcoming volunteers' efforts is to augment the work of the organization and expand its reach in those circumstances in which hiring or keeping paid employees to perform the same functions is not possible. Absent augmentation, the organization's mission will be frustrated.

For example, an animal shelter recently received more than 20 orphaned bottle-feeder kittens. Paid staff earlier had been dispatched by their employer on a long-distance transport task. Because no paid staff were available to transport the kittens, all of the kittens were euthanized. Had the nonprofit organization been able to utilize volunteers to augment the work of its paid employees (who often performed the same function), it could have had a volunteer transport the kittens to a partner shelter able to care for the animals and provide good adoption prospects. Animal shelters have limited resources, staff, and vehicles serving a large number of high-volume, high-kill municipal shelters. Transport vehicles are filled to capacity

each trip and the animals that cannot fit in the truck are frequently euthanized to make room for the unrelenting influx of new animals every day. Volunteers working alongside or in place of paid employees could assist with moving, caring for, and providing life-saving services to these animals.

In nonprofit institutions, volunteers sometimes perform the same work as some of the few paid staff members. Sometimes, paid employees and volunteers work side-by-side. For example, private nonprofits involved in helping communities to recover from natural disasters may have paid supervisors and paid front-line disaster assistance employees working in communities affected by hurricanes, floods, earthquakes, or tornadoes. In order to meet urgent needs in short order, the disaster assistance nonprofit invariably welcomes the help of local volunteers and volunteers traveling to the affected region who work alongside the paid front-line disaster assistance employees. Simply, without the help of these volunteers, the disaster recovery and assistance efforts could not have the same reach and provide the same amount of help. Developing a system that somehow segregates the volunteers from the paid employees to meet real or perceived limits imposed by the FLSA would be too burdensome and disruptive for already overtaxed supervisors.

Unlike for-profit corporations where the augmentation or replacement of employees means that the corporation makes greater profits, augmentation or replacement of employees in nonprofits means that the organization can provide greater service to the community and help more people. The WHD should make this point explicit in guidance.

5. Clarify that Volunteers' Contributions Need Not Be Limited to An Arbitrary Cap on Hours

Neither the duration of the relationship between the volunteer and the private nonprofit, nor the length of the volunteer's "work day," should be relevant to the volunteer's status under the FLSA. Many nonprofits have devoted volunteers who serve for years or decades to advance the organization's mission. For example, a coastal environmental nonprofit engages in education and remediation efforts along several miles of a beach. The organization has two paid staff members but 20-30 regular volunteers at any given time who are supportive of the mission of the nonprofit. While some of the volunteers are students, a substantial number are not. Some of the volunteers serve on shifts in a small local aquarium where the public may, for no charge, view local marine life and talk to the volunteers about the displays. Some volunteers meet one Saturday a month at a pre-designated stretch of beach to engage in beach clean up. The nonprofit treats all such volunteers as nonemployees, but the fact that some of these volunteers are long-tenured puts this status in doubt.

Similarly, the fact that a volunteer engages in her activities for a full day, rather than "part-time," should not be relevant to her status. In its 1998 opinion letter on private nonprofit volunteers, the WHD suggested that volunteers "usually" work

part-time. No explanation for this qualification was provided, but it can be detrimental to important charitable work. For example, supporters of an organization dedicated to building houses for disadvantaged families sometimes had volunteers working in rural locations that can be difficult to reach. In some circumstances, the long days save the volunteers from lengthy commutes into and out of the rural areas to which they are contributing. More fundamentally, residential construction in any setting is a time-consuming activity. Volunteers often spend full days working on a house because the tasks require it. It is difficult to see how imposing an arbitrary time limit on their volunteer efforts --- even a vague "usually part-time" qualification --- serves a valid purpose under the FLSA. The WHD should expressly disavow this early misstatement of the rules governing "volunteers."

6. Clarify that, Absent Indicia of Coercion or Exploitation, Former Employees of Nonprofits May Return to their Organizations to Volunteer in Similar Roles

The WHD has taken the position that incumbent employees may not volunteer for their employers by performing the same job. We strongly support this protection against depriving employees of wages for hours worked, with some qualifications discussed below. However, upon retirement or separation from the private nonprofit, some long-term paid employees of nonprofits have such a strong connection to the organization that they continue working with the nonprofit on a volunteer basis. For example, after 23 years of employment, the pastor of a church retired and the church hired a new pastor. Missing his congregation and the church's mission, the retired pastor decided to return to the ministry for 10 to 15 hours per week to volunteer the same type of services he performed as an employee: counseling parishioners and visiting the ill and disabled in their homes and care facilities. In another example, the assistant director of the local chapter of an after-school child care program resigned after 11 years of employment to work for a private employer. Eager to continue supporting the program in her spare time, the former assistant director frequently volunteers with the child care program to organize special events. She also voluntarily attends board and executive meetings on occasion to provide training and assistance to new employees.

In both of these instances, despite the fact that the volunteers perform activities that paid staff also perform, the nonprofit institutions considered these former employees to be non-employee volunteers. The WHD should endorse this view in guidance. Unlike with incumbent employees, there is no reason to believe that former employees are the victims of wage theft or excessive work hours unless there is evidence that a private nonprofit has discharged or coerced the retirement of an employee for the purpose of changing his/her status under the FLSA. To the contrary, these cases offer further evidence of the central fact of volunteer status: individuals want to support the mission of a private nonprofit and do not expect to be paid for their efforts.

7. Clarify that, Absent Indicia of Coercion or Exploitation, Incumbent Employees May Volunteer for Their Private Nonprofit Employers in Limited Roles

Large nonprofit institutions may have a variety of programs, and persons employed in one capacity sometimes wish to volunteer for their organizations in other capacities. Generally, current employees of private nonprofits may volunteer to engage in charitable activities for the same organization only when the activity is (a) voluntary, (b) outside the employee's normal work hours, and (c) not within the duties the employee is paid to perform. The department has explained in its unofficial compliance assistance materials that employees of "a work center or hospital cannot volunteer to perform the same services they are normally employed and paid to perform. For example, a secretary cannot volunteer to respond to correspondence generated by a special fund-raising job." U.S. Dep't of Labor, eLaws Fair Labor Standards Act Advisor, http://www.dol.gov/elaws/esa/flsa/14c/2d2.htm (Feb. 9, 2015). This interpretation of the FLSA for the private nonprofit sector appears to be similar to the interpretation of the FLSA's section 3(e)(4)(a) governing volunteers in the public sector.

This protection against exploitation of incumbent employees needs clarification and careful narrowing. The goal should be to balance concerns about worker exploitation against the desire of employees to lend their support to their employers' missions, perhaps beyond their usual work. Three real-world experiences illustrate the problem. At one private nonprofit, paid employees who work in caregiver roles for animals frequently bond with those animals (particularly with dogs) and want to take them home to socialize them in preparation for adoption. The nonprofit organization allows this activity, but does not require or ask employees to engage in it. The organization does not consider the time spent with an animal at home to be paid time. In a second example, an urban children's hospital adopted a "No One Dies Alone" (NODA) program patterned after similar programs at other facilities. The program assembles volunteers to serve in approximately four-hour shifts at the bedside of a dying child who, for a variety of reasons, has no family or loved ones nearby. Although a paid chaplain will sometimes serve this function, approximately once per month a dying child will need bedside companions for more hours than a chaplain can devote to a single patient. The NODA program provides this support. Volunteers for the NODA program include some nurses and other paid caregiving staff of the children's hospital even though the paid duties of nurses and care-giving staff include sitting bedside with patients. Regardless, the hospital does not consider time spent volunteering in the NODA program to be paid hours worked.

A third, more complex set of examples clearly illustrates the difficult line-drawing challenge private nonprofits encounter when faced with this issue. During the summer months, there are a host of summer camps that serve children with medical diagnoses like spina bifida, transplants, gastrointestinal issues, and others. The camps ask for volunteers; however, unlike other summer camps, camps for children with illnesses and disabilities need some number of volunteers who are able to

perform certain medical procedures (e.g., catheterizing for spina bifida camp, changing a G-tube for gastrointestinal issues, training in CPR-like procedures). Nurses employed by nonprofit hospitals would like to volunteer for these camps, largely as a means of seeing and interacting with their child patients outside a clinical setting. Some camps are sponsored by non-hospital affiliated nonprofits, but host campers who are patients in the hospital. Other camps are directly sponsored by the hospital in which the nurse is employed. Another category of camps receive financial support from the hospital, but the hospital does not directly sponsor the camp.

In these examples, employees volunteer to perform charitable activities that relate to their paid job duties outside of ordinary work hours. The involved nonprofit organizations do not coerce employees to volunteer to perform this limited work. Yet, the law is unclear whether the private nonprofit employees in the last two examples must be paid for this volunteer work for their organizations. *See, e.g.,* U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter (July 31, 2001); U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter (June 1, 2006). In the first example, nurses volunteering for summer camps that are entirely unaffiliated with the hospitals that employ them seem to be able to volunteer, but it is less clear whether nurses assisting camps sponsored or financially supported by their hospitals may volunteer. This is where the dilemma for private nonprofits rests. Private nonprofits should not be asked to bear the risk of liability because it is unclear how the law should be interpreted. We would like to work with you to develop guidance that would balance these worthy goals, perhaps with reference to the extensive guidance that the WHD has provided for public-sector volunteers adapted to the realities of the private nonprofit sector.

8. Clearly Distinguish Permissible from Impermissible Commercial Activities

As noted above, the FLSA's enterprise coverage applies to nonprofits that engage in "related activities performed (either through unified operation or common control) . . . for a common business purpose." 29 U.S.C. § 203(r)(1). A nonprofit meets this business purpose requirement when it engages in "ordinary commercial activities" which essentially compete with for-profit businesses. 29 C.F.R. § 779.214; *see also Tony & Susan Alamo Foundation*, 471 U.S. at 297-98. However, the line between charitable and religious activities and a "business purpose" as defined by the WHD's regulations and *Tony and Susan Alamo Foundation* is not always clear. The WHD could clarify this issue in guidance.

In addition, a long list of bona fide religious organizations run nonprofit hospitals and health care organizations as an extension of their religious missions to heal the sick and tend to the poor. Many of these organizations depend upon volunteers to perform a long list of functions that are necessary to the care of their patients ranging from high school students volunteering as "candy stripers" to volunteers who support fundraising activities. While these nonprofit hospitals are arguably subject to enterprise coverage because of the FLSA's section 2(r)(2), they should be

permitted like other private nonprofits to accept these services from volunteers. The WHD should issue guidance to this effect.

This difficult line-drawing exercise is not limited to nonprofit hospitals run by religious organizations. For example, some charities run thrift shops that collect donations from the public and re-sell donated items as a means of raising money for the organizations. Volunteers for these organizations who, without expectation of compensation, help to sort the donated goods and display them for the public should not face the risk of losing their status because they compete with consignment shops or, arguably, retail outlets. We would like to work with you to find a path forward on this issue that respects the Supreme Court's decision in *Tony and Susan Alamo Foundation* and the WHD's historic approach, but also clarifies the rules in a manner that reflects the reality of the private nonprofit world and its operations.

Conclusion and Requested Action

Once again, we urge you to issue an AI to clarify the definition of "volunteers" for private nonprofit organizations under the FLSA consistent with our discussion above.

Volunteerism is a pillar of American society and critical to achieving our shared vision of a more just, fair, and humane world. President Obama highlights this fact annually when he declares the celebration of Martin Luther King, Jr.'s birthday to be a day of public service and engages in acts of volunteerism with the First Lady and their daughters. Millions of Americans share the President's commitment to the work of nonprofit organizations and lend a hand to support them throughout the year. We ask you to help the organizations that foster and channel the American volunteer spirit. Please clarify the law so that Americans can live their values as they define them, and the organizations they support can be free of the risk and uncertainty that has hampered their efforts.

There is a genuine and great need for guidance from the WHD regarding the proper classification of "volunteers" under the FLSA. We are eager to work closely with you to produce guidance that will accurately reflect the day-to-day reality of the work environments in our organizations and those like them. Please meet with us at your earliest convenience both to discuss the issues raised above, and any others you consider necessary to a comprehensive treatment of the volunteers question, and to establish a work plan that will result in the issuance of an AI as quickly as possible.

Thank you for your generous attention to this letter. Your response to this letter should be directed to our attorney, Mark Weller from Dentons, who will work with you to arrange a meeting and to share any additional information you may need. You can reach Mr. Weller at Mark.Weller@dentons.com or (202) 408-3933. We look forward to meeting with you.

Sincerely,

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