Congress of the United States

Washington, D.C. 20515

April 12, 2021

The Honorable Marty J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA37, Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule

Dear Secretary Walsh:

We write in strong support of the Department of Labor's (Department or DOL) proposal to rescind the January 2020 final interpretative rule "Joint Employer Status Under the Fair Labor Standards Act" (Joint Employment Rule or Rule).[1]

The *Fair Labor Standards Act* (FLSA)[2] has a broad employment standard that ensures its protections are extended to a wide range of workers. The Joint Employment Rule conflicts with the FLSA's text and congressional intent by narrowing the Department's interpretation of joint employment liability under the Act. This Rule would lead to workplace fissuring and subject vulnerable workers to wage theft. We strongly support the Department's proposal to rescind this harmful rule.

The Joint Employment Rule narrows the Department's interpretation of joint employment status, directly conflicting with the FLSA's text and congressional intent.

Under the FLSA, an employee can have joint employers who are both responsible, individually and jointly, for complying with the law's minimum wage, overtime, and child labor requirements.[3] Congress established a broad definition of "employ" to include "to suffer or permit to work."[4] In using this definition, Congress rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee.[5] The "to suffer or permit to work" definition of employment was adopted specifically to prevent

[1] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020).
[2] 29 U.S.C. §§201 et seq.
[3] See 29 C.F.R. § 791.2 (2018); 29 U.S.C. §§ 206–207 (2018); *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973).
[4] 29 U.S.C. § 203(g).
[5] "[T]he broad language of the FLSA, as interpreted by the Supreme Court . . . demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).

employers from using "middlemen" to shirk responsibility for compliance with the law. Employment, including joint employment, under the FLSA's "suffer or permit to work" standard is the "broadest definition that has ever been included in any one act."[6]

For decades, courts have effectuated congressional intent to define joint employment status broadly by applying an "economic realities" test to help ascertain whether the employee is economically dependent on the potential joint employer.[7] While different courts use slightly different factors, the ultimate question is that of economic dependence.[8]

The Joint Employment Rule set out four factors that are relevant to the determination of joint employment status.[9] While the Rule's factors are similar, but not identical to the four factors used by federal courts, the Rule's narrow focus on control and the rejection of the economic dependence inquiry renders it inconsistent with the law and congressional intent.[10] The Department does not have authority to undermine congressional intent by defining joint employment under the FLSA so narrowly. The Department only has interpretive rule, or guidance, authority on this issue, but such interpretations cannot conflict with the text or intent behind the FLSA, as this rule does.

On September 8, 2020, a New York federal district court agreed that the Rule improperly narrowed joint employment liability, invalidating most of the Joint Employment Rule.[11] The court concluded that "the Department's test for joint employer liability is impermissibly narrow"[12] and the Rule's four-factor test is "a proxy for control."[13] The court also noted that "[e]xcluding economic dependence as irrelevant to joint employer status contradicts caselaw and the Department's own views."[14]

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[6] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).
[7] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961).
[8] *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).
[9] "In the joint employer scenario where another person is benefitting from the employee's work, the Department is adopting a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* to assess whether the other person: (1) Hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records." Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2820 (Jan. 16, 2020).
[10] *Id*. The Department's factors are similar, but not identical to, the four factors used in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).
[11] The court sets aside the final rule's test for vertical joint employment but leaves the rule's technical changes for the less common horizontal joint employment in place. State of New York v. Scalia, 2020 U.S. Dist. LEXIS 163498 (S.D.N.Y. Sept. 8, 2020).
[12] *Id*. at 70.
[13] *Id*.
[14] *Id*. at 78.

The Joint Employment Rule incentivizes workplace fissuring and costs workers billions of dollars in lost wages each year, but the Rule failed to quantify or consider these costs.

Much of the 20th century was dominated by the direct employment relationship: large, national companies, or lead businesses, directly hired workers to perform services or produce goods.[15] However, over the past three decades, many lead businesses have increasingly moved away from the direct hiring of employees. Instead, they have opted to shift employment to lower-level businesses, such as subcontractors, temp agencies, or franchisees.[16] In this "fissuring" of the workplace, "earnings fall significantly when a job is contracted out—even for identical kinds of work and workers."[17] For example, in May 2017, the median usual weekly earnings for full-time temporary help agency workers was $521, compared to $884 for workers in traditional arrangements.[18] Lower-level businesses competing to provide services to lead businesses may also skirt basic wage and hours standards to cut cost, leaving workers worse off.[19]

This Rule incentivizes fissuring of the workplace by limiting who an employee can hold responsible for FLSA violations. This rule promotes business models that rely on subcontracting with businesses that pay lower wages to cut costs or with thinly capitalized lower level businesses that cut corners on FLSA compliance. If a thinly capitalized subcontractor is unable to pay back wages or judgements owed, workers would be unable to recover from *any* employer under this Rule, leaving vulnerable workers without the minimum wage and overtime pay to which they are entitled.

In comments to the proposed rule, the Economic Policy Institute estimated that the Rule will cost workers "more than $1.0 billion annually—more than $954.4 million due to wage suppression from an increase in workplace fissuring and more than $138.6 million from an increase in wage losses due to wage theft by employers."[20]

Puzzlingly, the preamble to the *proposed rule* contends the rule would not impose costs onto workers, even if the Rule reduced the number of joint employers, based on the assumption that

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[15] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* 8 (2014).
[16] *Id.*
[17] *The Future of Work: Preserving Worker Protections in the Modern Economy*: *Hearing Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and Labor*, 116th Cong. (2019) (written testimony of Hon. David Weil, Ph.D., Dean and Professor Heller School for Social Policy and Management, Brandeis University, at 2) [hereinafter Weil Testimony].
[18] Bureau of Labor Statistics, *Table 13. Median usual weekly earnings of full- and part-time contingent and noncontingent wage and salary workers and those with alternative work arrangements by sex, race, and Hispanic or Latino ethnicity, May 2017*, https://www.bls.gov/news.release/conemp.t13.htm.
[19] Weil Testimony at 3.
[20] Celine McNicholas and Heidi Shierholz, *EPI comments regarding the Department of Labor's proposed joint-employer standard*, Economic Policy Institute (June 25, 2019), https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/

"all employers always fulfill their legal obligations under the [FLSA],"[21] and thus the final rule would not decrease wages.[22] As the New York federal district court judge court stated, "This is silly."[23] As the New York federal court notes, "That is the whole point of joint employer liability: Workers can recover from a joint employer when their primary employer flakes on its legal obligations."[24]

Ultimately, the preamble to the final Joint Employment Rule concedes this negative impact of the rule:

> The Department agrees that because this rule provides new criteria for determining joint employer status under the FLSA . . . it may reduce the number of businesses currently found to be joint employers from which employees may be able to collect back wages due to them under the Act. This, in turn, may reduce the amount of back wages that employees are able to collect when their employer does not comply with the Act and, for example, their employer is or becomes insolvent.[25]

However, rather than quantifying these impacts to workers, the preamble to the Rule brushes aside estimates offered by EPI.[26]

The Rule also undermines child labor standards that keep our nation's children safe and healthy. Additionally, because the *Equal Pay Act of 1963*[27] shares the FLSA's definitions of employment, the proposal would make it harder for women to hold all responsible employers accountable when bringing equal pay claims.

Finally, while the Rule clarifies that "[o]perating as a franchisor. . . does not make joint employer status more likely,"[28] we note that the Rule would actually hurt *franchisees*.[29] The Rule would only serve to insulate *franchisors* with indirect control over a franchisee's employee from potential liability as a joint employer, leaving *franchisees* solely on the hook for potential violations.

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[21] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043, 14054-55 (proposed April 9, 2019).
[22] *Id*.
[23] *State of New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498, at *87.
[24] *Id*.
[25] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. at 2853.
[26] *Id*.
[27] 29 U.S.C. § 206(d).
[28] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. at 2859.
[29] Some have argued that narrowing joint employment liability is needed to protect the franchising business model and protect the independence of small franchisees by ensuring that franchisors would not feel compelled to take control of franchisees' labor relations in order to limit their own potential liability. *See, e.g.*, Testimony of Mary Kennedy Thompson on Behalf of the International Franchise Association, Hearing entitled "*Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship"* before H. Comm. on Educ. and the Workforce, 115th Cong. (July 12, 2017).

For these reasons, we strongly support the Department's proposal to rescind the Joint Employment Rule.

Sincerely,

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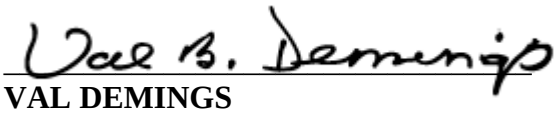

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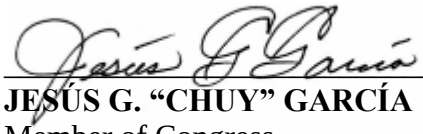

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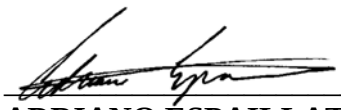

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