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June 22, 2026

The Honorable Keith Sonderling
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA48, Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Acting Secretary Sonderling:

We write to urge the Department of Labor (Department) to withdraw its proposed rule, Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, RIN 1235-AA48; Fed. Reg. Vol. 91, No. 78 (April 22, 2026) (Proposed Rule), which would amend the Department's interpretative regulation to narrow joint employment liability under the *Fair Labor Standards Act* (FLSA), *Family and Medical Leave Act* (FMLA), and *Migrant and Seasonal Agricultural Worker Protection Act* (MSPA).

As you may be aware, in recent years, an increasing number of workers are employed by intermediaries as leased employees and permatemps, and by subcontractors, rather than directly employed. The Proposed Rule conflicts with Congress' intent to define the employment relationship broadly to better protect these types of workers from substandard labor conditions.

This Proposed Rule closely tracks a previous rule published in 2020 (2020 Rule).[1] While the 2020 Rule only impacted the FLSA, the central arguments against this Proposed Rule's attack on workers' rights remain the same. Both diverge from longstanding precedent to narrow the tests used to find joint employment liability. However, unlike the 2020 Rule, this Proposed Rule's narrowing of the interpretation of joint employment liability goes beyond the FLSA and expands to both the FMLA and MSPSA. Doing so further exacerbates previously stated concerns.

[1] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (finalized on January 16, 2020) (codified at 29 CFR 791). The Department rescinded this final rule on July 30, 2021, *see* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939 (finalized July 30, 2021) (codified at 29 CFR 791).

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.[2] Congress established a broad definition of "employ" to include "to suffer or permit to work."[3] 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.[4] In fact, 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."[5] The FLSA's definition of employment is also shared by the FMLA,[6] which provides basic family and medical leave protections for employees, and the MSPA,[7] which provides protections for migrant and seasonal agricultural workers.

For decades, the 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.[8] While different courts use different factors, the ultimate question is that of economic dependence.[9] This is broader than the common law analysis of the degree to which the employer has control, whether exercised or reserved, over an employee—a standard Congress rejected by using the "to suffer or permit to work" standard.

Just as in its previous 2020 Rule[10], the Department's Proposed Rule conflicts with the law and congressional intent by narrowly restricting joint employment.[11] The Department does not have authority to undermine congressional intent by defining joint employment under federal labor laws so narrowly through its focus on four primary factors. In fact, a federal court found the 2020 Rule's narrowing of the Department's joint employment test to only four factors to be unlawful under the Administrative Procedure Act (APA).[12] The Proposed Rule attempts to navigate around this previous court ruling by considering those four factors as more dispositive than others, and other factors—including those that could establish economic dependence or indirect control—will only be considered when the Department deems it necessary. However, by still uniformly considering certain factors as more important than others, the Proposed Rule undermines the intent of a more holistic consideration of all factors that could establish joint employer liability.

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[2] *See* 29 C.F.R. § 791.2 (2021); 29 U.S.C. §§ 206–207; *Falk v. Brennan*, 414 U.S. 190, 195 (1973).
[3] 29 U.S.C. 203(g).
[4] "[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).
[5] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).
[6] 29 U.S.C. § 2611(1).
[7] 29 U.S.C. § 1802(5).
[8] *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).
[9] *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).
[10] 85 Fed. Reg. 2820, *supra* note 1.
[11] The Department proposes four core factors that are relevant to the determination of joint employment status. The Department's proposed 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). However, the Department's narrow focus on control renders its proposal inconsistent with congressional intent.
[12] *New York* v. *Scalia,* 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

The Department's Proposed Rule, even though it is an interpretative regulation, could create confusion in the courts and undermine the Department's enforcement actions. For example, by limiting who an employee can hold responsible for federal labor law violations, the Department's proposal would shield larger businesses whose business model relies on subcontracting with thinly capitalized subcontractors or farm labor contractors that cut corners on federal labor law compliance. If the thinly capitalized subcontractor or farm labor contractor is unable to pay back wages or judgements owed, then workers would be unable to recover from *any* employer. This would leave vulnerable workers without the minimum wage and overtime pay to which they are entitled. Limiting joint employment liability in the way the Department seeks could also shield from liability an employer that has the sole ability to implement workplace policy changes needed to comply with federal labor laws.

The Proposed Rule also threatens the wages of American workers. When estimating the costs to workers of the similar 2020 Rule, the Economic Policy Institute (EPI) found that the rule would cost workers more than $1 billion annually.[13] Notably, EPI's analysis only accounted for a narrowing of the joint employment standard under the FLSA, while the Proposed Rule expands its scope to include the MSPA and FMLA. It stands to reason the costs imposed on workers by this Proposed Rule would be even higher.

We also note that the Department's efforts to narrow joint employment liability would hurt small businesses operating under the franchise model. The Department's Proposed Rule would only serve to insulate *franchisors* with indirect or reserved control over a *franchisee's* employee from potential liability as a joint employer, leaving *franchisees* solely on the hook for potential violations, even in circumstances where the franchisor helped create the violation. While the Proposed Rule does allow for the consideration of indirect or reserved control, its emphasis on "direct control over reserved control and economic dependence provides opportunities for franchisors to evade liability for potentially unlawful procedures and policies they require their franchisees to follow. Holding certain factors and types of "control" in its analysis as more dispositive will inevitably result in a less sophisticated and complete, and therefore less equitable, analysis to ensure every employer is held accountable.

For these reasons, we strongly urge the Department to withdraw the Proposed Rule.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

ILHAN OMAR
Ranking Member
Subcommittee on Workforce Protections

[13] Celine McNicholas and Heidi Shierholz, "EPI Comments Regarding the Department of Labor's Proposed Joint-Employer Standard," comments submitted on behalf of Economic Policy Institute to U.S. Department of Labor (June 25, 2019), https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/.