

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

June 25, 2019

The Honorable R. Alexander Acosta  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA26, Joint Employer Status  
Under the Fair Labor Standards Act

Dear Secretary Acosta:

We write to urge the Department to withdraw its proposal to amend its interpretative regulation to narrow joint employment liability under the Fair Labor Standards Act of 1938 (FLSA).

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 Department's proposal conflicts with Congress's intent to define the employment relationship broadly to better protect these types of workers from substandard labor conditions.

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.<sup>1</sup> Congress established a broad definition of "employ" to include "to suffer or permit to work."<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup>

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.<sup>5</sup> While different courts use different factors, the ultimate question is that of economic dependence.<sup>6</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> 29 U.S.C. 203(g).

<sup>3</sup> "[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).

<sup>4</sup> *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).

<sup>5</sup> *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).

<sup>6</sup> *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).

The Department's proposed rule conflicts with the law and congressional intent by narrowly restricting joint employment to a question of control and rejecting the economic dependence inquiry.<sup>7</sup> The Department does not have authority to undermine congressional intent by defining joint employment under the FLSA so narrowly.

The Department's proposal, even though it is an interpretative regulation, could create confusion in the courts and undermine the Department's enforcement actions. By limiting who an employee can hold responsible for FLSA violations, the Department's proposal would shield larger businesses whose business model relies on subcontracting with thinly capitalized subcontractors that cut corners on FLSA compliance. If the thinly capitalized subcontractor is unable to pay back wages or judgements owed, workers would be unable to recover from *any* employer, leaving 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 the FLSA.

The proposal also could undermine child labor standards that keep our nation's children safe and healthy. Additionally, because the Equal Pay Act of 1963 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 Department's proposal also seeks to clarify that the franchise model "does not itself indicate joint employer status under the FLSA",<sup>8</sup> we note that the Department's efforts to narrow joint employment liability would actually hurt *franchisees*.<sup>9</sup> The Department's proposal 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.

For these reasons, we strongly urge the Department to withdraw the proposed rule.

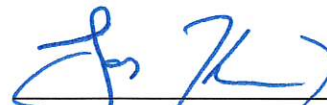
Sincerely,



**ROBERT C. "BOBBY SCOTT"**  
Chairman  
Committee on Education and Labor



**ALMA S. ADAMS**  
Chairwoman  
Subcommittee on Workforce  
Protections  
Committee on Education and Labor

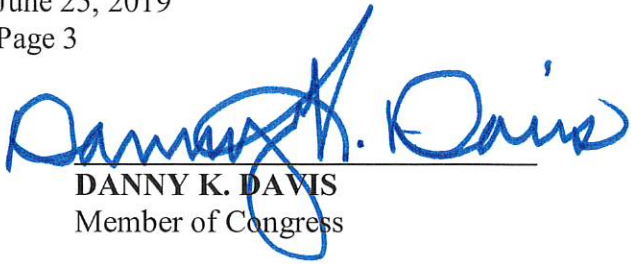


**JOSEPH P. KENNEDY III**  
Member of Congress

<sup>7</sup> The Department proposes four factors that are relevant to the determination of joint employment status. Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043, 14059 (proposed April 9, 2019). 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.

<sup>8</sup> *Id.* at 14047.

<sup>9</sup> 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).



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**MARK TAKANO**  
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**ELEANOR HOLMES NORTON**  
Member of Congress



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**MARK POCAN**  
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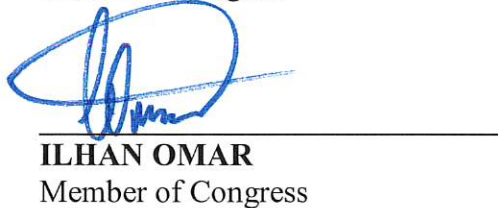
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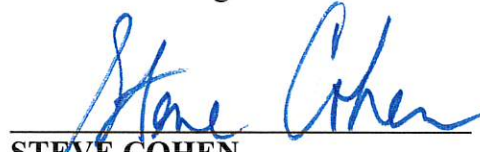
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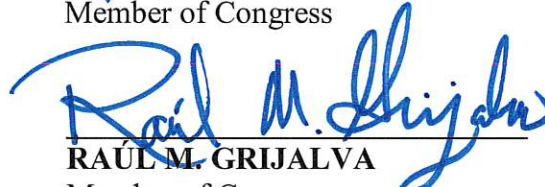
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