NFIB

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April 24, 2019

Hon. R. Alexander Acosta, Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Rm. S-3502
Washington, DC 20210

Dear Mr. Secretary:

RE: Comments in Response to Notice of Proposed Rulemaking Titled "Joint Employer Status Under the Fair Labor Standards Act," RIN 1235-AA26, 84 *Fed. Reg.* 14043 (April 9, 2019)

The National Federation of Independent Business (NFIB) submits these comments in response to the notice of proposed rulemaking titled "Joint Employer Status Under the Fair Labor Standards Act" (FLSA) and published by the U.S. Department of Labor (Department) in the *Federal Register* of April 9, 2019. The proposed rule would revise part 791 of title 29 of the Code of Federal Regulations (CFR) to establish clearer standards to determine whether a business has "joint employer status" with respect to an employee of another business and therefore has liability for wages due to the employee under the FLSA.

NFIB is an incorporated nonprofit association with about 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty States hear the voice of small business as they formulate public policies. Because the FLSA applies to many small businesses, including many involved in franchisor-franchisee, labor supplier-labor user, contractor-subcontractor, lessor-lessee, and similar relationships that the joint employer doctrine may affect, NFIB and its members have a substantial interest in the proposed rule.

Difficulties in Applying Current FLSA Joint Employer Doctrine

The FLSA requires, among other things, that an employer covered by the Act: (1) pay not less than a specified minimum to the employer's employee for each hour worked ("minimum wage requirement"),[1] (2) pay one-and-a-half times the employee's regular rate to the employee for hours in excess of forty worked in a week ("overtime pay requirement"),[2] and (3) keep records of the employer's compliance with those requirements ("recordkeeping requirement").[3] Under the FLSA, "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . " and "employee" means "any individual employed by an employer . . . ."[4]

The Department of Labor and the U.S. Supreme Court have determined that, with respect to a given employee, there may be two or more "joint employers," each of whom has the duty to ensure compliance with the minimum wage, overtime pay, and recordkeeping requirements with respect to that employee.[5] The joint employer doctrine "(1) treats a worker's employment by joint employers as 'one employment' for purposes of determining compliance with the FLSA's wage and hour requirements and (2) holds joint employers jointly and severally liable for any violations of the FLSA."[6] Because the FLSA imposes significant costs and burdens on a business with respect to its employees, businesses have a vital interest in knowing for certain whether they have or do not have joint employer status with respect to the employees of other businesses.

Unfortunately, the federal courts have disagreed among themselves on what tests to apply to determine whether a business is a "joint employer" under the FLSA, resulting in business uncertainty and increased compliance costs.[7] Fortunately, the Department's proposed 29 CFR 791.2 establishes a clearer set of standards for determining whether a business is a "joint employer" of another employer's employees for FLSA purposes.

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[1] Section 6(a) of the FLSA, 29 U.S.C. 206(a).

[2] Section 7(a)(1) of the FLSA, 29 U.S.C. 207(a)(1). Because the pay rate for overtime is one and one-half times the regular rate, the pay rate for overtime is commonly called "time-and-a-half."

[3] Section 11(c) of the FLSA, 29 U.S.C. 211(c).

[4] Section 3(d) and (e) of the FLSA, 29 U.S.C. 203(d) and (e).

[5] 29 CFR 791.2 (Department of Labor) ("A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. . . ."); see also *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (a person with "substantial control of the terms and conditions of the work" of employees is an "employer" under FLSA of those employees, even if another person also is their "employer").

[6] *Salinas v. Commercial Interiors, Inc.*, 848 F. 3d 125, 134 (4th Cir. 2017).

[7] For a survey of the wide range of different multi-factor tests applied by various federal courts in determining "joint employer" status, see Part II. B. and C. of the opinion in *Salinas v. Commercial Interiors, Inc.*, 848 F. 3d 125 (4th Cir. 2017).

If the Department adopts the proposed standards, and the courts afford them a degree of deference, the standards should help alleviate business uncertainty and decrease compliance costs.

Small and independent businesses in particular need standards for determining joint employer status that are easier to understand, and simpler and less expensive to administer, than the current standards. Small and independent businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations; small and independent businesses mostly engage in do-it-yourself compliance. The owner of a small and independent business who concludes incorrectly that the business is not a joint employer with respect to the employees of another business faces significant adverse consequences. Among other things, the owner faces the risk of personal liability for the wages owed to the employees of the other business.[8]

Key First Step in Reducing Difficulties: Distinguish Two Different Situations Potentially Involving Joint Employers

The proposed rule begins with a single, crucial, and correct analytical step. The proposed rule recognizes that the question of joint employer status arises under the FLSA in two different situations that call for two different standards tailored to those situations. The first situation involves one employer who employs a worker but another person simultaneously benefits from the worker's work, e.g., a staffing agency that assigns workers it employs to a company temporarily in need of additional labor ("Another-Benefits Situation"). The second situation involves an employer who employs a worker for one set of hours in a workweek and another person who employs the same worker for a separate set of hours in the same workweek ("Different-Hours Situation"). The current provisions of 29 CFR 791.2 attempt to cover both the Another-Benefits Situation and the Different-Hours Situation with a single standard, by treating the employer and the other person as "joint employers" unless the employer and the other person are "completely disassociated with respect to the employment of a particular employee,"[9] with no definition of "completely disassociated."

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[8] See *Acosta v. At Home Personal Care Services, LLC*, 2019 WL 1601997 (E.D. Va. April 15, 2019) ("Wright was the sole owner and president of AHPC during the relevant time period and exercised substantial control over the policies, job responsibilities, and day-to-day functioning of the PCAs [personal care aides] at issue in this lawsuit. . . . Accordingly, she too is an 'employer' for purposes of the FLSA, and she will be equally liable for the back wages and liquidated damages to be awarded in favor of the Secretary.").

[9] Current 29 CFR 791.2 (". . . If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. . . .") (footnote omitted).

The "completely disassociated" standard makes sense in the Different-Hours Situation, where the practical issue is whether the employee is involved in two separate part-time employments for two employers (reducing the likelihood of triggering overtime) or in one full-time employment for two related employers (increasing the likelihood of triggering overtime).[10] But the "completely disassociated" standard makes less sense in the Another-Benefits Situation, such as contractor-subcontractor or labor supplier-labor user relationships. In the Another-Benefits Situation, the putative employers rarely if ever are "completely disassociated;" typically they have at least a contractual relationship. So the "completely disassociated" standard helps very little in determining when organizations in the Another-Benefits Situation should or should not have joint employer status.

Department's Solution: Two Properly-Tailored Standards for the Two Different Situations Potentially Involving Joint Employers

Proposed 29 CFR 791.2 solves difficulties that arise in trying to administer an ill-fitting, one-size-fits-all "completely disassociated" standard by providing two separate standards, one properly tailored for the Another-Benefits Situation and one properly tailored for the Different-Hours Situation.

Under the proposed rule, in the Another-Benefits Situation, in which the employee works for the employer but another business simultaneously benefits, the joint employer status of the simultaneously-benefitting business depends upon a four-factor test of whether the latter business: "(i) Hires or fires the employee; (ii) Supervises and controls the employee's work schedule or conditions of employment; (iii) Determines the employee's rate and method of payment; and (iv) Maintains the employee's

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[10] To illustrate how the "completely disassociated" standard applies in the Different-Hours Situation, consider a worker who works part-time 25 hours a week for a construction company carrying bricks to masons at construction sites and works 25 hours a week cleaning tables at a fast food restaurant, for a total of 50 hours per week of work. Assume the FLSA applies to both the construction company and the fast food restaurant. If the construction company and the fast food restaurant have nothing whatever in common except that they happen to be in the same city, most people would consider them not to be joint employers of the worker, would consider the worker as having taken two separate part-time jobs, and would not expect either of the employers to pay time-and-a-half overtime pay, instead of the regular rate, for the ten hours each week that the worker ends up working above a forty-hour workweek. However, if the fast food restaurant were a wholly-owned subsidiary of the construction company, most people would consider them as joint employers, would consider the worker as having one job, and would expect the employers to pay time-and-a-half overtime pay for the ten hours each week that the worker works above a forty-hour workweek. If the construction company and its wholly-owned fast food restaurant subsidiary were treated instead as not being joint employers, they could easily circumvent the FLSA requirement to pay overtime to their less-skilled employees. To avoid the overtime requirement, the employers could move the less-skilled employees back and forth between brick-carrying for the parent company and table-cleaning for the subsidiary so as to ensure that the less-skilled employees never get any overtime pay, even if they perform 39 hours of brick-hauling and 39 hours of table-cleaning in a workweek. If treating closely-related companies as separate for FLSA purposes were permissible, many employers could simply restructure their companies to have subsidiaries so as to escape overtime pay requirements and reduce their labor costs.

employment records."[11] For the Different-Hours Situation, the proposed rule preserves much of the current "completely disassociated" standard, by providing that "if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its own responsibilities under the Act."[12]

What an Employer Actually Does, and Not What the Employer Theoretically Might Do, Should Determine Joint Employer Status

Both the Department of Labor, in administering the Fair Labor Standards Act, and the National Labor Relations Board (NLRB), in administering the National Labor Relations Act (NLRA), have developed joint employer doctrines. Although the differing texts of the two Acts may require some differences in the two joint employer doctrines, the Department and the NLRB should, whenever the Acts permit, harmonize their joint employer doctrines so as to minimize compliance burdens and costs imposed on employers.

NFIB welcomes the Department's statements in proposed 29 CFR 791.2(a)(2) (addressing the four-factor test applicable in the Another-Benefits Situation) that:

> The potential joint employer must actually exercise -- directly or indirectly -- one or more of these indicia of control to be jointly liable under the Act. *See* 29 U.S.C. 203(d). The potential joint employer's ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status.

The Department's proposed regulatory language harmonizes with the NLRB's pending proposal, in "The Standard for Determining Joint Employer Status," 83 *Fed. Reg.* 46681 (Sept. 14, 2018), that says, in proposed 29 CFR 103.40: "A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." Small and independent businesses would benefit significantly from having the joint employer doctrines of both the Department of Labor under the FLSA and of the National Labor Relations Board under the NLRA recognize that what a putative joint employer actually does, and not what it theoretically could do, determines whether or not it has joint employer status with respect to an employee.

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[11] Proposed 29 CFR 791.2(a)(1). The proposed rule also states that additional factors may be relevant if they indicate that the potential joint employer is: "(1) Exercising significant control over the terms and conditions of the employee's work; or (2) Otherwise acting directly or indirectly in the interest of the employer in relation to the employee." Proposed 29 CFR 791.2(b).

[12] Proposed 29 CFR 791.2(e)(2). The proposed provision also makes clear that the putative joint employers are treated as "sufficiently associated" rather than "disassociated," and therefore have joint employer status, if: "(i) There is an arrangement between them to share the employee's services; (ii) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (iii) They share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

Business Models, Standards-Setting, and Limited Cooperation Should Not Trigger Joint Employer Status

Proposed 29 CFR 791.2(d) specifically addresses business practices that will not result in joint employer status. The proposed provision reduces uncertainty arising from practices that provide some degree of influence by one business over another business but should not give rise to joint employer status. Thus, under the proposed rule, the following do not make joint employer status more or less likely under the FLSA: (a) operating as a franchisor; (b) having contractual agreements on wage floors, sexual harassment policies, workplace safety practices, morality, or similar generalized business practices; (c) providing sample handbooks or forms; (d) allowing another to operate a business on one's premises; (e) offering association retirement or health plans; or (f) participating with others in apprenticeship programs. The Department appropriately makes clear that such actions are irrelevant to the determination of joint employer status because they do not indicate either the presence or absence of the determinant of joint employer status: "substantial control of the terms and conditions of the work."[13]

Illustrative Examples Assist Small Businesses in Understanding the Rules

Proposed 29 CFR 791.2 includes examples that illustrate how the proposed rule would apply to specific facts. As indicated above, small businesses generally lack the resources to employ attorneys, accountants, and clerks to help with compliance; in small businesses the compliance burden most often falls directly on the owner or primary manager. Inclusion in the final rule of illustrative examples will assist small businesses in gauging whether a situation they face involves joint employer status.

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The National Federation of Independent Business appreciates the Department's efforts to execute the Fair Labor Standards Act faithfully, with clearer and easier-to-apply standards for determining joint employer status. Adoption of the Department's proposed part 791 of title 29 of the Code of Federal Regulations would benefit America's small and independent businesses.

Sincerely,

David S. Addington
Senior Vice President and General Counsel

[13] *Falk v. Brennan*, 414 U.S. 190, 195 (1973).