United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

June 25, 2019

The Honorable R. Alexander Acosta
Secretary
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:

I write to respond to the Department of Labor's ("the Department") April 9, 2019 Notice of Proposed Rulemaking Joint Employer Status Under the Fair Labor Standards Act ("the proposal").

The Department's proposal to narrow its interpretation of joint employment liability under the Fair Labor Standards Act runs counter to congressional intent, would leave workers vulnerable to wage theft and children vulnerable to child labor violations, and would undermine Equal Pay Act claims. For these reasons, we urge the Department to withdraw its proposal.

The Department's Interpretation of Joint Employment Under the FLSA Directly Conflicts with Statutory Text, Congressional Intent, And Decades of Judicial Precedent

Congress Intended to Adopt a Broad Definition of Employ, Employee, and Employer in the FLSA – A Fact the Courts Have Consistently Recognized

The Fair Labor Standards Act of 1938 (FLSA) sets minimum wage, overtime, and child labor standards for covered employees. It has long been held that, under the FLSA, an employee may have more than one employer, jointly liable for any violation.[1] This means the employee is employed by two or more employers who are both responsible, both individually and jointly, for complying with its requirements.[2] The text of the FLSA supports this construction. Under the FLSA, an "employee" is defined as "any individual employed by an employer."[3] An "employer" is defined as including "any person acting *directly or indirectly* in the interest of an employer in

[1] *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).
[2] *See* 29 C.F.R. § 791.2 (2018); 29 U.S.C. §§ 206–07 (2018); *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973).
[3] 29 U.S.C. 203(e)(1).

relation to an employee."[4] Under the FLSA, "employ includes to suffer or permit to work."[5] Incredibly, the Department refuses to consider the "suffer or permit to work" statutory definition for purposes of determining employer status.

Congress intentionally drafted the FLSA to incorporate the more expansive "to suffer or permit to work" standard over the narrower common law standard, expanding the FLSA's coverage to hold a broader range of employers accountable.[6] The "suffer or permit to work" standard drew from numerous child labor state laws,[7] which held "any person in a position to prevent the performance of the work itself" as accountable for violations.[8] In so doing, Congress rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over or the right to control an employee.[9] This means employment, and thus joint employment, under the FLSA has the "broadest definition that has ever been included in any one act."[10]

Recognizing Congress' intent in the FLSA, federal courts have appropriately rejected the common law test in favor of a broader analysis. Over seventy years ago, the Supreme Court issued its landmark decision in *Rutherford Food Corporation* holding that an employee may have more than one employer under the FLSA.[11] Since then, the Circuit Courts of Appeals have effectuated Congress's intent to define employment—and, thus, joint employment—broadly by applying an economic realities test to determine whether an employee is economically dependent on the potential joint employer.[12] As the Second Circuit has said, "the 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."[13] While the specific factors used to determine employer status differ from court to court, ultimately the courts use the factors as indicators of economic dependence.[14]

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[4] 29 U.S.C. 203(d) (emphasis added).
[5] 29 U.S.C. 203(g).
[6] Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 991 (1999).
[7] *Rutherford Food Corp.*, 331 U.S. at 729 n. 7 ("At the time of the enactment of the Fair Labor Standards Act, the phrase 'employed, permitted or suffered to work' was contained in the child labor statutes of thirty-two States and the District of Columbia. . . .").
[8] Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1037 (1999).
[9] The common law test states that an individual is an employee of an employer if that employer "controls or has the right to control" the individual's work. Restatement (Second) of Agency § 220 (1958).
[10] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1937) (remarks of Sen. Hugo Black); *see also* Fireside Chat #13 of Franklin D. Roosevelt, "Report to the Nation on National Affairs" June 24, 1938 (describing the FLSA as "[t]he most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any other country.").
[11] *Rutherford Food Corp.*, 331 U.S. at 730.
[12] *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).
[13] *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).
[14] *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).

In the 1983 case *Bonnette v. California Health & Welfare Agency*,[15] the Ninth Circuit Court of Appeals used four factors for determining whether a joint employment relationship exists: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[16] In applying these factors, the court clarified that, "We agree that this is not a mechanical determination. The four factors considered by the district court provide a useful framework for analysis in this case, but they are not etched in stone and will not be blindly applied. The ultimate determination must be based 'upon the circumstances of the whole activity.' *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477."[17] While courts have amended and added to this list of factors, including in subsequent cases in the Ninth Circuit itself, the economic realities test has remained broader than the common law.[18]

The Department's Proposal Ignores Congressional Intent and Relies on Flawed Legal Reasoning

The Department's proposal contravenes Congressional intent and court precedent. The Department proposes to narrowly restrict joint employment to a question of actual exercised control—contrary to the FLSA and even to the common law, which looks to the right to control. The Department states incorrectly that the "ultimate inquiry in determining joint employer status" is "[w]hether a potential joint employer … *actually* exercises sufficient control over an employee to qualify as a joint employer…."[19] Not only is this restriction not in accord with the statute and economic reality test long-used for joint employment analysis, it does not even comport with the narrower common law test, which provides that consideration of the *right* to control is relevant to establishing an employment relationship.[20]

While not cited to by the Department, the Restatement of Agency and the common law are relevant as they were the baseline from which Congress crafted the FLSA's more expansive coverage. As such, they demonstrate the standards which the Department's interpretations may not be more restrictive than. By explicitly limiting consideration of evidence to only that which demonstrates actually exercised control, the Department's proposal impermissibly falls below even the common law standards.[21] As Congress intentionally drew the FLSA's definition of employment to be more expansive than the common law, the Department's proposal to narrow the standard is clearly and directly opposed to congressional intent.

While the Department states its proposal is derived from the factors used in the application of the economic reality test in *Bonnette*, the Department's focus on exercised control renders its

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[15] 704 F.2d 1465, 1470 (9th Cir. 1983).
[16] *Id.* at 1470.
[17] *Id. See also Torres-Lopez v. May*, 111 F.3d 633, 646 (9th Cir. 1999) (examining additional factors).
[18] *Id.*
[19] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14044 (emphasis added).
[20] Restatement (Second) of Agency § 220; *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) ("under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1209-12 (D.C. Cir. 2018) (discussing common law acceptance of evidence of unexercised right to control in determining joint employer status in examining both employment and dual master doctrine under the Restatement (Second) of Agency § 226).
[21] Restatement (Second) of Agency § 220. *See also Browning-Ferris Indus.*, 911 F.3d at 1211 (discussing right to control in the Restatement).

proposal inconsistent with the statutory language, congressional intent, and Supreme Court precedent. Specifically, the Department proposes that four factors are relevant to the determination of joint employment status: whether the person (1) "[h]ires and fires the employee," (2) "[s]upervises and controls the employee's work schedules or conditions of employment," (3) "[d]etermines the employee's rate and method of payment," and (4) "[m]aintains the employee's employment records."[22] *The proposal absurdly indicates that the potential joint employer must actually exercise one or more of these factors, directly or indirectly, to be jointly liable under the FLSA.*[23]

The Department in fact proposes to *alter* the first *Bonnette* factor, removing an employer's right to control from the factor entirely and, instead, making the factor solely focused on actual exercised control. Specifically, the Department states "Only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act."[24] This reasoning has no basis in the text of the FLSA, no basis in Supreme Court doctrine or circuit court law, and—as was already established—no basis even in the common law test that Congress purposely rejected in crafting the FLSA.

In an attempt to justify its position, the Department misstates the Supreme Court's decision in *Falk v. Brennan*, stating that

> The Supreme Court held in *Falk v. Brennan* that under 3(d) another person is jointly liable for an employee if that person exercises 'substantial control' over the terms and conditions of the employee's work. The Department's proposed four-factor balancing test, which weighs the potential joint employer's exercise of control over the terms and conditions of the employee's work, uses the same reasoning as *Falk* to determine joint employer status under 3(d).[25]

However, the Court made no such holding in *Falk*. Instead, the Court merely stated that "the Court of Appeals was *unquestionably correct* in holding [the potential joint employer] is also an 'employer' of the maintenance workers… In view of the expansiveness of the [FLSA's] definition of 'employer' and the extent of the [potential joint employer's] managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees,…."[26] Contrary to the Department's claim, the Court did not hold that "substantial control" was a requirement to be found a joint employer. Further, there is no reasonable reading of the Court's language that would allow the Department to conclude the Court was even indicating, hinting, or implying that a potential joint employer *must* exercise substantial control over employees in order to be a joint employer under the FLSA.[27]

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[22] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14048.
[23] *Id.*
[24] *Id.* at 14044.
[25] *Id.* at 14048-49 (citation omitted).
[26] *Falk*, 414 U.S. at 195 (emphasis added).
[27] As part of its analysis, the Court discussed the contractual relationship between the two putative joint employers. *Id.* at 192-93. Despite that clear indicator of such evidence's value to the analysis, the proposal would find that evidence related to franchisee/franchisor relationships, other contractual arrangements, and allowing employees to

Rather, the Court was merely stating the lower court was "unquestionably correct" in this instance, which was demonstrated in part by the extent of the control—not that such control was a requirement of satisfying the standard.

The Department notes the possible consideration of additional factors. Once again, however, it impermissibly narrows the standard, stating that such factors may be considered only if they are indicative of the employer exercising *significant control* over the terms and conditions of the employee's work or otherwise acting directly or indirectly in the interest of the employer in relation to the employee.[28] The Department attempts to cite to *Bonnette* and *Falk* to justify narrowing the possible review of additional factors to those that indicate "significant control," but these cases do not support that proposition. In neither case did the courts limit the factors that could be considered in making a joint employment determination—nor did they hold or lend credence to a view that only factors indicating "significant control" were to be considered. In fact, the Department can cite to no portion of either holding that expresses this view. Rather, the Department cites generally to language in the holdings that state the employers had "substantial control" and "considerable control" without holding that those are the minimums to be met for any case of joint employment to be found.[29]

The Department proposes the view that an employee's economic dependence on a potential joint employer does not determine potential joint employment liability.[30] As was explained above, economic dependence is not only central to the analysis of whether the joint employment standard is met in a particular instance, it is the crux of the standard.[31] The Department, instead, proposes that "joint employer status is determined by the actions of the potential joint employer."[32] It defies logic to propose to ignore an employee's economic dependence on the potential joint employer in determining whether the potential joint employer satisfies the joint employer standard. In fact, even those cases the Department cites recognize the centrality of economic dependence to the inquiry.[33]

In the first case, *Layton v. DHL Exp.*, the court explicitly reaffirmed economic dependence's centrality to the standard, stating that in applying the 11th Circuit's eight-factor test "the factors are used because they are indicators of economic dependence. They are aids—tools to be used to gauge the degree of dependence of the alleged employees on the business to which they are connected"[34] and "in considering a joint-employment relationship, we must not allow common-law concepts of employment to distract our focus from economic dependency."[35] In the second case, *Baystate v. Herman*, the court again explicitly stated that "to determine whether an

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participate in one another's benefit programs carries no probative value. *Id.* at 14051. Accordingly, the Department's proposal is wholly inconsistent with *Falk* in this additional regard.

[28] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14048.

[29] *See id.* at 14049 n. 74.

[30] *Id.* at 14050.

[31] *See* footnotes 11-13.

[32] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14050.

[33] *But see Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 137-40 (4th Cir. 2017) (rejecting employees' economic dependence as a relevant analytical approach and instead focusing on the relationship between the employers themselves).

[34] *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1177 (11th Cir. 2012).

[35] *Id.* at 1177-78.

employment relationship exists … courts look not to the common law conceptions of that relationship, but rather to the 'economic reality' of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer," going on to apply the *Bonnette* factors to determine economic dependence and, therefore, joint employer status.[36] These cases, therefore, do not support the Department's position.

The Department further proposes joint employment to be based exclusively on section 3(d) of the FLSA and not sections 3(e)(1) or 3(g). Joint employment decisions would be made therefore *without* reference to the definition of "employ" from Congress, including the key language "to suffer or permit to work"— a core component of the FLSA. Incredibly, the Department claims the definition of "employ" is central to the decision about whether a worker is an "employee" and, therefore, whether the organization in question is his or her "employer," yet is *not* relevant to determining whether another organization is *also* the individual's employer (or joint employer).[37] For support, the Department cites to the Supreme Court's holding in *Falk* once again, stating the Court cited to the definition of "employer" in 3(d) and not to 3(g).[38] In this conclusory statement, the Department obscures the Court's actual statement. In full, the Court stated "we think that the Court of Appeals was unquestionably correct in holding that D&F is also an 'employer' of the maintenance workers under 3(d) of the Act, which defines 'employer' as 'any person acting directly or indirectly in the interest of an employer in relation to an employee.' 29 U.S.C. 203(d). Section 3(e) defines 'employee' to include 'any individual employed by an employer.' 29 U.S.C 203(e)."[39] The Court did not state, as the Department proposes to, that joint employment was to be decided with the exclusion of the FLSA's definition of "employ"; in fact, the Court used the definition of "employee" at 3(e)(1) that the Department proposes to exclude. This is particularly important, as the definition of "employee" includes the word "employed," which, within the context of the FLSA, Congress gave a definition that is required to be read into each and every instance of the word's use within the Act. Therefore, to claim that the Court somehow limited joint employer analysis to 3(d) by being silent on 3(g) is without merit.[40]

The Department's narrow focus on control and its rejection of an economic dependence inquiry directly contravenes the FLSA and violates Congress's intent to expand the employment relationship beyond the common law standard. This has been and continues to be vitally important to workers across the country. Congress enacted the FLSA as "[t]he most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any other country" in order "to end starvation wages and intolerable hours"[41] and designed the Act with the breadth and reach to achieve those ends. Today, the FLSA's broad reach is as important as ever, as workers experience wage stagnation, stunning inequality, and an epidemic of wage theft.

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[36] *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).
[37] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14050.
[38] *Id.* at 14051.
[39] *Falk*, 414 U.S. at 195.
[40] In fact, the Department's brief to the Court in *Falk* extensively discussed the very definitional provisions at issue here and specifically relied on their interconnectedness, just as congress intended. Br. for the Respondent, 1973 WL 173856 (1973).
[41] Public Papers & Addresses of Franklin D. Roosevelt, 1938 (New York, NY, Macmillan Co., 1941), p. 6.

These challenges are intensified and made more complex by the "fissuring" of the workplace.[42] As the Department explained just three years ago,

> More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. ... [The Wage and Hour Division of the Department of Labor] encounters these employment scenarios in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries. ...The growing variety and number of business models and labor arrangements have made joint employment more common.[43]

The Department's Proposed Rule Would Harm Workers

The Department does not have authority to circumvent the statute or Congress's intent and issue an interpretation that restricts coverage of employers in this manner. As an interpretive regulation, this proposal does not have the force of law, but may nonetheless leave workers worse off. Taken together, this proposal gives "low-road" employers a roadmap to evading their legal responsibility to workers as joint employers. This would exacerbate what is already an epidemic of wage theft, encourage outsourcing to undercapitalized subcontractors, and impact vulnerable workers, including construction workers, service workers, and workers employed by staffing agencies.

The Department's Proposal Would Negatively Affect Equal Pay Act Claims

This proposal would also impact workers' abilities to bring equal pay claims when multiple employers are responsible for a violation. The Equal Pay Act of 1963 (EPA) amended the FLSA to prohibit sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. Because the EPA is a part of the FLSA, the same definitions of "employer," "employ," and "employee" apply. Thus, the Department's proposal to narrow joint employment status under the FLSA would similarly create confusion about who is considered a joint employer for a worker bringing an equal pay claim under the EPA.

Conclusion

The Department's interpretation of joint employer status under the FLSA is in direct conflict with statutory text, congressional intent, and decades of judicial precedent. The proposal would leave workers vulnerable to wage theft and children vulnerable to child labor violations, and have a negative impact on Equal Pay Act claims. For these reasons, we urge the Department to withdraw its harmful proposal to narrow joint employer liability under the FLSA.

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[42] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014).

[43] Administrator's Interpretation No. 2016-1. (Dep't of Labor Jan. 20, 2016).

For any questions or further communication, please contact Joe Shantz with my Senate Health, Education, Labor, and Pensions Committee Minority Staff at Joseph_Shantz@help.senate.gov or (202) 224-0767.

Sincerely,

Patty Murray
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions