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VIA Federal eRulemaking Portal

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: National Employment Lawyers Association Amended Comments On Notice Of Proposed Rulemaking Regarding Joint Employer Status Under The Fair Labor Standards Act *RIN 1235-AA26*

Dear Ms. DeBisschop:

The National Employment Lawyers Association ("NELA") is submitting these comments regarding the U.S. Department of Labor ("Department")'s proposed rulemaking regarding joint employer status ("Proposed Rules" or "Interpretive Bulletin") under the Fair Labor Standards Act ("FLSA" or "Act"). As written, the Proposed Rules are contrary to the language in the FLSA, conflict with United States Supreme Court precedent interpreting the FLSA, and describe as irrelevant, the factors circuit and district courts reasonably find instructive in the joint employer analysis. The Proposed Rules would have several adverse effects, including, but not limited to, encouraging employers to outsource responsibility for wage and hour compliance to labor brokers and staffing agencies, creating an uneven playing field for those employers that treat their workers as employees, fostering unsafe workplaces, and creating an inability for workers and the Department to collect earned wages from an entity that can afford to pay.

NELA has an important interest in the Department's proposal. NELA is the largest professional membership organization in the country, which is comprised of attorneys who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated

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illegally in the workplace. NELA members represent thousands of workers from around the country in wage theft cases in every state and circuit, which provides NELA with an important and insightful perspective on how issues regarding joint employment impact workers across the country. NELA members also have the experience to comment on the adverse impact the Department's proposal will have on these workers, and on enforcement of our nation's wage theft laws.

These comments were drafted by members of NELA's Wage and Hour Committee, who have been involved in wage and hour litigation for decades and are familiar with the history, regulations, and law surrounding joint employer status under the FLSA. They are also familiar with the practical nuances of prosecuting wage theft where multiple entities are involved in the employment relationship. These comments represent a consolidation of the views of all NELA members who fight every day to uphold and enforce the rights of working people. In submitting these comments, NELA seeks to protect the rights of workers by ensuring that the goals of the FLSA are fully realized, and not diminished or extinguished, by the Department's proposal.

I. THE DEPARTMENT DOES NOT HAVE AUTHORITY TO CREATE RULES THAT NARROW THE STATUTORY PROTECTIONS THE FLSA PROVIDES TO WORKERS.

Rules issued by an agency to advise the public of the agency's construction of the statutes and rules it administers are "interpretive rules." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1201 (2015). As recognized by the Department, it is axiomatic that any of its interpretations of the FLSA must begin with the text of the statute, following well-settled principles of statutory construction by "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. 84 Fed. Reg. 14043–02, at 14047 n.49 (citing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7, (2011)).

29 C.F.R. sections 791.1 and 791.2 were originally implemented in 1958, *see* 23 Fed. Reg. 5905 (Aug. 5, 1958), and amended in 1961, *see* 26 Fed. Reg. 7732 (Aug. 18, 1961). The regulation is merely an Interpretive Bulletin. As such, it "do[es] not rise to the level of a regulation and do[es] not have the effect of law." *Brooks v. Village of Ridgefield Park*, 185 F.3d 130, 135 (3d Cir. 1999).

An Interpretive Bulletin may not override the FLSA's text or be used by courts to stray from appellate or Supreme Court decisional law interpreting the FLSA. In fact, the Department's regulations acknowledge this. *See* 29 C.F.R. § 785.2 ("The ultimate decisions on interpretations of the act are made by the courts."). When this rule is violated, the Interpretive Bulletin will not be followed. *See, e.g., Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 141 (1st Cir. 2002) (refusing to follow 29 C.F.R. § 785.27 to the extent it would be inconsistent with the appellate court's reading of the statute and precedent); *Howard v. City of Springfield*, 274 F.3d 1141, 1146–47 (7th Cir. 2001) (refusing to follow a portion of 29 C.F.R. § 778.204(b) that was inconsistent with court's independent analysis of FLSA's statutory text); *Henson v. Pulaski County Sheriff Dept.*, 6 F.3d 531, 533–34 (8th Cir. 1993) (refusing to follow a portion of 29 C.F.R. § 785.19(a) because it was inconsistent with principles "[e]stablished in the earliest Supreme Court case interpreting the FLSA"); *Wirtz v. Hebert*, 368 F.2d 139, 141 (5th Cir. 1966) (refusing to rely on 29 C.F.R. § 791.2 because"[t]he Act and case law is entirely sufficient").

Based on the above, any Interpretive Bulletin addressing joint employment must comport with the text of the statute, and courts should not consider it to the extent it is inconsistent with existing Supreme Court and Circuit Court jurisprudence. These decisions are the "law of the land" and cannot be contradicted through the issuance of administrative guidance.

The FLSA defines an "[e]mployer" to include any company "acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and defines an "employee" as "any individual employed by an employer," *id.* at § 203(e)(1). It defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). The Supreme Court has made the following observations regarding the extreme breadth of these definitions:

- The FLSA's definition of employee is "'the broadest definition that has ever been included in any one act,'" and "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

- The FLSA is "comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947).

- The FLSA's "definition of 'employ' is broad." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

- The FLSA "goes beyond its ERISA counterpart" and "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

The above-quoted Supreme Court dictates serve as the cornerstone of this Nation's FLSA joint employment jurisprudence. Indeed, these Supreme Court passages are regularly cited and followed by Circuit Courts addressing joint employment under the FLSA. *See, e.g.*, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) (quoting *Darden* and *Rosenwasser*); *In re Enter. Rent-a-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 467–68 (3d Cir. 2012) (quoting *Darden*, *Rosenwasser*, and *Rutherford Food*).

The Department—like this Nation's appellate courts—should act consistently with Supreme Court jurisprudence in issuing guidance addressing joint employment. Yet, the proposed Interpretive Bulletin admittedly defines joint employment in a manner that is narrower than existing law. For example, the Department admits that its new joint employment test is narrower than the existing test utilized by the Ninth Circuit in *Bonnette*. *See* 84 Fed. Reg. 14043–02 at 14048. This restrictive approach cannot be squared with repeated Supreme Court pronouncements regarding the striking breadth of employment under the FLSA. For this reason, standing alone, the proposed Interpretive Bulletin lacks any legitimacy. No one is above the law, and that includes the Department.

Moreover, it is not the Department's prerogative to modify the Ninth Circuit's *Bonnette* test or to create a "*Bonnette*-lite" test over the tests followed by other Circuit Courts. Why, for example, would any responsible employer in North Carolina follow the Department's "*Bonnette*-lite" proposed test knowing that the Fourth Circuit endorsed an entirely different test in *Salinas*? Does the Department really expect a judge on the Fourth Circuit to abandon the *Salinas* precedent just because the Department chose a modified version of another Circuit's test?

The Department is not empowered to rummage through this Nation's decisional law and pick and choose which decisions are worthy and which are not. Only nine individuals get to play that role, and the Department is not one of them.

II. THE DEPARTMENT'S PROPOSED RULES SHOULD NOT BE ADOPTED.

In its Notice of Proposed Rulemaking, the Department seeks comments on its Proposed Rules. NELA provides its comments specific to those proposals below.

A. The Department Should Not Adopt Its Proposed Modified Version Of The Four-Factor *Bonnette* Test Because The FLSA's Employer/Employee Definitions Are Substantially Broader And Require Consideration Of All Facts Relevant To The Economic Reality Of The Relationship.

The Department proposes to revise part 791 of its joint employment regulations "to adopt a four-factor balancing test to determine joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work." Joint Employer Status Under the Fair Labor Standards Act, 84 Red. Reg. 14043–2 at 14046, 2019 WL 151401 (Proposed Apr. 9, 2019) (to be codified at 29 C.F.R. 791). This would eliminate the language in the current regulations which states that a joint employment relationship generally will be considered to exist in situations where the employers "are not completely disassociated with respect to the employment of a particular employee." *See* 29 C.F.R. § 791.2(b)(3). More specifically, the Department "proposes to replace the 'not completely disassociated' standard with a four-factor balancing test derived (with one modification) from *Bonnette v. California Health & Welfare Agency* [, 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)]." The Proposed Rules would include a four-factor balancing test to assess whether the "other person:"

- hires or fires the employee;
- supervises or controls the employee's work schedules or conditions of employment;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Proposed § 791.2(a). The Department noted that while "the *Bonnette* test considers whether the potential joint employer had the 'power' to hire and fire, the Department proposes a test that considers whether the employer actually exercised the power to hire and fire." 84 Fed. Reg. 14043–2 at 14048. Thus, the Proposed Rules modify the first *Bonnette* factor from "power to hire

and fire" to *actual exercise* of that power. The Department's rationale for a test to determine who is an employer that is narrower than even the common law agency test for employment is indefensible and inconsistent with the history and purpose of the Act.

Prior to the enactment of the FLSA, courts evaluated whether an employment relationship existed using common law agency principles that focused on the putative employer's *right to control* the putative employee. *See* Restatement (First) of Agency § 220 (1933) ("A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or *right to control*."); *id.* (listing factors for "determining whether one acting for another is a servant or an independent contractor").

With the FLSA, Congress sought to broaden this common law understanding by expansively defining the terms "employee," "employer," and "employ." *See* 29 U.S.C. § 203(e)(1), (d), (g); *Walling*, 330 U.S. at 150–51 (noting that the FLSA's definitions encompass employment relationships that, prior to the FLSA's enactment, "were not deemed to fall within the employer-employee category").

The Department claims that the word "acting" in the definition of "employer"— "any person acting directly or indirectly in the interest of an employer in relation to an employee,"— requires evidence of the actual exercise of authority on the part of the employer and not the mere reservation of authority. However, this is not a reasonable interpretation of the quoted language. It is inconsistent with long-standing Supreme Court precedent that Congress intended for the FLSA to reach well beyond the common law standard, which considers the right to control as a relevant factor. *See* Restatement (First) of Agency § 220 (1933); *see also Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 676 (1st Cir. 1998) (considering fact that "Baystate retained the authority to intervene if problems arose with a worker's job performance" in joint employer analysis).

Because the *Bonnette* factors mirror the "common-law test for determining whether an agency relationship exists," *Salinas*, 848 F.3d at 135, it would be contrary to Congress's intent and the FLSA's express language to adopt a test that is even narrower than *Bonnette*, or to limit the joint employer inquiry to the *Bonnette* factors alone. As the Second Circuit explained in *Zheng v. Liberty Apparel Co.*:

> Measured against the expansive language of the FLSA, the four-part test [derived from *Bonnette*] . . . is unduly narrow, as it focuses solely on the formal right to control the physical performance of another's work. That right is central to the common-law employment relationship, and, therefore, the four-factor test may approximate the common-law test for identifying joint employers. However, the four-factor test cannot be reconciled with the "suffer or permit" language in the statute, which necessarily reaches beyond traditional agency law.

355 F.3d 61, 69 (2d Cir. 2003) (quoting Restatement (First) of Agency § 220(1) (1933)); *see also Hall v. DIRECTV, LLC*, 846 F.3d 757, 769 (4th Cir. 2017) (noting that "the *Bonnette* Court's reliance on common-law agency principles ignores Congress's intent to ensure that the FLSA protects workers whose employment arrangements do not conform to the bounds of common law agency relationships"), *cert. denied*, 138 S. Ct. 635 (2018).

Courts, including the Supreme Court, have repeatedly affirmed the enormous breadth of the FLSA's definitions of who is covered—including its definition of who is an "employer." *See Rutherford Food Corp.*, 331 U.S. at 728 (The FLSA is "comprehensive enough to require its application to many persons and working relationships, which prior to [the FLSA] were not deemed to fall within an employer-employee category"); *see also Falk v. Brennan*, 414 U.S. 190, 195 (1973) (referencing the "expansiveness" of the FLSA's definition of employer); *Salinas*, 848 F.3d at 133 (Congress defined "employer" in an "expansive fashion"); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) ("expansive interpretation of . . . employer").

The FLSA's definitions reflect its "remedial and humanitarian" purpose. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Congress sought to maximize protections for employees:

> We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Id. at 598. Thus, in an early joint employment case, the Supreme Court announced the rule that continues to this day under which all facts bearing on the relationship between a putative employer and employee must be considered in determining whether an employment relationship exists and rejected an approach limited to "isolated factors." *Rutherford Food Corp.*, 331 U.S. at 730.

Consistent with *Rutherford Food*, in the decades that followed, courts have considered a variety of factors to evaluate joint employment cases. These factors are not static. Instead, they depend on the context of the case. While the court in *Bonnette* found the four-factors were "relevant to this particular situation," they are not necessarily relevant in every case or dispositive of whether a joint employment relationship exists. *See Bonnette*, 704 F.2d at 1470. Rather, as the Ninth Circuit held, each case requires "consideration of the total employment situation and the economic realities of the work relationship." *Id.*

After *Bonnette*, the majority of Circuit Courts have rejected using any one set of factors and have favored using a range of factors that depend on the particular circumstances of the case. *See, e.g.*, *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141–45 (2d Cir. 2008) (applying both the formal control and functional control tests); *Zheng*, 355 F.3d at 69 ("the broad language of the FLSA, as interpreted by the Supreme Court in *Rutherford Food*, 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 and considering additional factors); *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d at 469–70 (considering additional factors because simply applying the four-factor test "would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well.") (emphasis in original); *Hall v. DIRECTTV, LLC*, 846 F.3d 757, 769–70 (4th Circ. 2017) (creating new test of six non-exhaustive factors to determine if relationship between two entities gives rise to joint employment status,

whether formally or as a matter of practice, or directly or indirectly); *Salinas*, 848 F.3d at 135, 141–42 (discussing a six factor test that focuses on whether employers share or co-determine matters governing essential terms and conditions of employment, explaining factors are not exhaustive and other factors that speak to the fundamental threshold question of whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment should be considered as well); *Wirtz*, 405 F.2d at 669–70 (applying additional factors); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (same); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1175–81 (11th Cir. 2012) (same). These courts agree that the automatic application of *Bonnette*'s four factors would improperly narrow the joint employer inquiry and carve out circumstances that reflect joint employer relationships. The Ninth Circuit too has relied on factors beyond those it considered in *Bonnette* to address different joint employer contexts. *See, e.g.*, *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997) (considering additional factors in case involving farmworkers).

Zheng exemplifies why the *Bonnette* test does not fit many circumstances that the FLSA was plainly meant to reach. In *Zheng*, garment workers claimed that the garment manufacturer who contracted out the last phase of its production process was their joint employer. 355 F.3d at 64. The workers worked at the manufacturer's warehouse, signed an agreement with the manufacturer, spent 70 to 75% of their working time assembling garments for the manufacturer, and were monitored by an employee of the manufacturer. *Id*. at 64–65. Despite these indicia of control, the district court granted summary judgment to the manufacturer based on the absence of evidence satisfying the four *Bonnette* factors. *Id*. at 66–69. The Second Circuit vacated and remanded the decision, holding that even if, in certain cases, the *Bonnette* factors were "*sufficient* to establish employer status," they were not "*necessary* to establish an employment relationship" in every case. *Id.* at 71; *see also Salinas*, 848 F.3d at 137–38 ("even if two entitles do not independently constitute employers under the *Bonnette* test, their combined influence over the terms and conditions of a worker's employment may give rise to liability under the FLSA").

If enacted, the Proposed Rules will result in the loss of protections to workers whom Congress sought to protect by expansively defining the FLSA's coverage. It sends the message that employers—not workers—are the Department's priority, despite this Administration's pledge to support and lift up American workers. Moreover, a test that deviates from long-standing Supreme Court and Circuit Court precedent, by definition, is not persuasive or worthy of deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

B. The Department's Proposal Limiting The Additional Joint Employer Factors That Could Be Relevant Is Contrary To Law.

The Department's Proposed Rules also severely narrow the range of factors that may be considered in addition to the *Bonnette* factors. The Department appears to recognize that the *Bonnette* test alone (or its modified *Bonnette*-test) is too narrow to determine joint employer status in some circumstances. Therefore, the Department proposes two additional factors "that may be relevant for determining joint employer status . . ., but only if they are indicia of whether 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 § 791.2(b).

This proposal contravenes the fundamental principle that the Supreme Court articulated in *Rutherford Food*—that "the determination of the [employment] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity." 331 U.S. at 730. Courts have relied on this principle for decades in determining joint employer status. *See, e.g.*, *Bonnette*, 704 F.2d at 1470 (noting that the factors considered in a joint employment analysis "are not etched in stone and will not be blindly applied" and that the "ultimate determination must be based 'upon the circumstances of the whole activity'"); *Salinas*, 848 F.3d at 142 (emphasizing, "'[t]the ultimate determination of joint employment must be based upon the circumstances of the whole activity.'"); *In re Enter. Rent-A-Car*, 683 F.3d at 469 (the court must consider "all the relevant evidence, including evidence that does not fall neatly within one of the above factors"); *Zheng*, 355 F.3d at 71–72 ("[t]he court is free to consider any other factors it deems relevant to its assessment of the economic realities"); 29 C.F.R. § 791.2(a) (providing that whether a joint employment relationship exists "depends on all the facts in the particular case"). Congress's remedial and humanitarian goals will not be achieved under the Department's proposed standard.

Furthermore, the Department's restrictions on the factors that may be considered will create uncertainty and confusion, as it is unclear which additional factors would arguably fit within the two categories it provides for inclusion, and which would be excluded as irrelevant "economic dependence" factors. *See infra*, Section II.C (discussing proposed section 791.2(c)).

To the extent the Department does not eliminate its proposed restrictions on what factors can be assessed, as it should, the wording of proposed section 791.2(b), should be revised as follows:

(b) Additional factors may be relevant to determining joint employer status in this scenario, ~~but only~~ if they are, for example, indicia of whether the potential joint employer ~~is~~:

(1) ~~exercising significant~~ has the power or authority to control ~~over the~~ terms and conditions of the employee's work; or

(2) is otherwise acting directly or indirectly in the interest of ~~the~~ an employer in relation to the employee.

The phrase "but only" should be removed, to permit consideration of other factors that may not be contemplated but might, in viewing the workplace relationship as a whole, be relevant to establishing joint employer status. It should also be made clear these are examples of factors that may be considered, and not a limitation on assessing the whole activity.

Next, the phrase "exercising significant control over" should be revised to say, "has the power or authority to control terms and conditions of the employee's work." As previously mentioned, the Department's narrowed-*Bonnette* test requiring that for joint employer status to apply an employer must take action to control the employment relationship, rather than possessing the power or authority to do so, is inconsistent with the law. And, as also discussed, it is even more rigid than the common law approach to determining employment status that focuses on the formal ***right to control***. Restatement (First) of Agency § 220 (1933). In addition, the word "significant" is vague and might arguably prevent control factors from being weighed as a whole. What is considered "significant" is not defined, is subjective, and could lead to confusion in its application. For example, is evidence that the company-controlled worker schedules significant? What if the company had control over hiring, but not firing; is that considered significant? When a payroll company controls how much the worker is paid; is that significant? What if a franchisor requires its franchisees to use a handbook that says overtime will only be paid if preapproved and consistent with that mandate, the franchisee refuses to pay for time worked; does that rise to the level of significant control? Any evidence that may indicate control should be permitted to be weighed in the analysis. Less significant control can be afforded less weight than more significant control.

Last, "the" should be replaced with "an" when describing "an employer," as provided in the statute (*see* 29 U.S.C. § 203(d)). As written, the Department appears to assume there is already a "primary" employer, and whether there is a "secondary" employer is what is being assessed. When companies share or split responsibilities for the working relationship, primary versus secondary employer may not be decisive. For instance, a large debt collection company outsources its debt letter delivery service to multiple contractor delivery companies who in turn hire subcontractor drivers to perform the delivery work. The debt collection company provides the policies and procedures to be followed, makes the daily assignments, requires the drivers to submit daily reports to it, and retains the right to discontinue using subcontractors who do not adequately perform. The debt collection company pays the delivery companies based on a piece rate system, which in turn pay the drivers (who are classified as independent contractors) the same way with no overtime payments, or any minimum wage guarantee. Likewise, many companies share responsibility over workers employed through staffing agencies. While the company may supervise and control the working conditions, the staffing agency may hire and fire the workers, set pay rates, issue paychecks, and maintain the employment records. These scenarios for sharing responsibility for workplace conditions are not uncommon.

C. <u>The Department's Proposal Renders Economic Dependence Irrelevant. This Is Contrary To Law.</u>

NELA opposes the Department's proposal that provides that "whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the Act, and that no such factors should be used to assess economic dependence. Proposed § 791.2(c). The Department provides three examples of such factors it states are not relevant to the joint employer analysis:

> (1) is in a specialty job or a job that otherwise requires special skill, initiative, judgement, or foresight;

(2) has the opportunity for profit or loss based on his or her managerial skill; and

(3) invests in equipment or materials required for work or the employment of helpers.

Proposed § 791.2(c). These factors, while not determinative alone, should not be precluded simply because they may show economic dependence.

Courts have routinely found factors related to economic dependence useful and relevant in their analysis of joint employment. Considering these factors does not only benefit workers, it can also benefit the alleged employer. For instance, in *Wirtz v. Lone Star Steel Co.*, the Fifth Circuit affirmed that truckers hired by a contractor to haul iron ore from a mine to a steel plant were not employees of the steel mill operator. 405 F.2d 668 (5th Cir. 1968). The fact that the contractors, and not the steel mill operator, bought and maintained their own trucks, was one of several factors the court found useful in determining the steel mill operator was not a joint employer. As written, the Proposed Rules would find this factor to be irrelevant.

Similarly, the test should not ignore as irrelevant, the fact that a person worked on the premises of a company and that the company provided them with equipment and materials to do their job. This fact, when weighed with other evidence, may make it more likely than not the company is directly or indirectly controlling the working conditions. "[S]hared use of premises and equipment may support the inference that a putative joint employer has functional control over the plaintiffs' work." *See Zheng*, 355 F.3d at 72. This was the case in the Supreme Court's finding of joint employer status in *Rutherford Food Corp.* 331 U.S. at 730. While the slaughterhouse in that case used an intermediary labor contractor who hired, paid, and supervised the workers, the Supreme Court afforded weight to the fact the deboners did a specialty job on the slaughterhouse production line that was an integrated unit of production, and that the work took place on the slaughterhouse premises using its equipment. *Id.* The Department's proposed exclusions from consideration would incorrectly find those facts to be irrelevant to the analysis.

As previously explained, several circuits, in addition to applying a four-factor *Bonnette* or *Bonnette*-style test in analyzing joint employer status, also weigh additional factors. The Department should endorse this, as it is consistent with *Bonnette*, which made clear that the four-factor test did not constitute an exhaustive list of all potentially relevant facts and should not be blindly applied. *See Bonnette*, 704 F.2d at 1469–70. The determination as to whether a defendant is a joint employer "must be based 'upon the circumstances of the whole activity.'" *Id.* (citing *Rutherford Food Corp.*, 331 U.S. at 730 (explaining that whether an employment relationship exists under the FLSA "does not depend on . . . isolated factors but rather upon the circumstances of the whole activity")); *see Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961) (looking to "economic reality" rather than "technical concepts"). The joint employer analysis should not be confined to "narrow legalistic definitions" and must instead consider all the relevant evidence, including evidence that does not fall neatly within one of the above factors. *See Zheng*, 355 F.3d at 71; 29 C.F.R. § 791.2(a) (stating that the determination "depends upon all the facts in the particular case.").

Other than the three factors the Department incorrectly lists as irrelevant, it is unclear whether the Department plans to take the position that other additional factors courts have

considered are irrelevant. For instance, courts in the Second Circuit, in addition to applying the four-factor "formal control" test, apply a "functional control" test to determine whether a person or entity, even if lacking formal control, exercised "functional control" over an employee. That test consists of the following additional non-exclusive factors that derive from *Rutherford Food*:

> (1) whether the alleged employers' premises and equipment were used for the plaintiffs' work;
>
> (2) whether the [subcontractors] had a business that could or did shift as a unit from one putative joint employer to another;
>
> (3) the extent to which plaintiffs performed a discrete line job that was integral to [the alleged employers'] process of production;
>
> (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes;
>
> (5) the degree to which [the alleged employers] or their agents supervised plaintiffs' work; and
>
> (6) whether plaintiffs worked exclusively or predominantly for [the alleged employers].

See Martin v. Sprint United Mgmt. Co., 273 F. Supp. 3d 404, 422 (S.D.N.Y. Sept. 27. 2017) (finding no joint employer status after applying both tests) (citing *Zheng*, 355 F.3d at 71–72) (brackets in original). As stated above, most courts do the same.

Permitting consideration of additional factors helps prevent unscrupulous employers from subverting FLSA liability by simply outsourcing direct supervision of workers to labor brokers or staffing agencies. The additional factors consider that an entity may have functional control over workers even in the absence of formal control. These protections are important, for instance, to low wage workers in the garment, slaughterhouse, and other industries where labor brokers can readily cease doing business rather than face a lawsuit or Department investigation. *See, e.g.*, *Zheng*, 355 F.3d at 64 (stating contractor defendants in garment industry ceased doing business or could not be located); *Rutherford Food Corp.*, 331 U.S. at 725 (labor brokers who supervised boners for slaughterhouse were individuals and varied over time); *see also Reyes*, 495 F.3d at 408 (finding seed corn company responsible for workers hired, recruited, and supervised by labor broker to detassel corn plants, considering additional factors such as that detasseling was a specialty job, contractor put together crew for company alone and business unit did not shift, and company supplied tools).

The use of labor brokers by some general contractors in the construction industry has not only created an uneven playing field for general contractors who work with legitimate subcontractors who pay their employees correctly and fairly but has also resulted in unsafe job sites (due to no worker's compensation insurance responsibility by the broker). Furthermore, the outsourcing of the workforce to labor brokers has fostered illegal trafficking of construction workers. *See, e.g.*, http://www.fox9.com/news/charges-twin-cities-contractor-used-

undocumented-workers-committed-insurance-fraud. Strong joint employer laws help ensure general contractors pay attention to how these workers are being treated. The Department should not adopt interpretations that incentivize the use of labor brokers.

Another example where the weighing of additional factors mattered, involved a supermarket/drugstore chain that outsourced its delivery needs to a labor broker. *See Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003). The workers worked as individuals, not as a group that passed from one company to another, and the relationship between the store and the labor broker was exclusive for a period of years, showing the chain's consistent dependency on the brokers for delivery services. The work was also integral to the store's delivery service. While in this case the store directed delivery workers in their tasks, under the new Proposed Rules, a company could subvert liability simply by giving supervisory responsibility to the labor broker and claiming it cannot be held responsible for these workers who are otherwise working for it and integral to its business model. This would be inconsistent with the language of the FLSA and legal precedent interpreting it that provides that, "[a]n entity 'suffers or permits' an individual to work, if as a matter of 'economic reality,' the entity functions as the individual's employer." *Zheng*, 355 F.3d at 66 (citing *Goldberg*, 366 U.S. at 33).

NELA wage and hour attorneys have observed that it is not uncommon for companies to outsource their workforce needs to small businesses or brokers that either cannot be located, and/or cannot afford to pay the back wages. The Department should not enact regulations that encourage such subterfuges to enforcement and liability.

D. The Department's Proposal That Only Definitions In Section 203(d) And Not Section 203 (e)(1) Or (g) Of The FLSA Determine Employer Status Is Contrary To The Statute.

The Department proposes that when determining if a person or entity jointly employed an employee under the Act, the FLSA's definition of "employee,"[1] and "employ,"[2] should be disregarded. The Department then goes on to suggest that only the definition of "employer" applies in the joint employer scenario. The Department's proposal is contrary to the way courts, including the Supreme Court, have long applied the joint employer analysis and Congress's intent. In fact, NELA is unaware of any court that has used the Department's proposed approach.

The Department's proposal flies in the face of the history and language of the FLSA. Courts have long analyzed the joint employer question in light of the FLSA's broad definition of "employ" because "[a]n entity 'employs' an individual under the FLSA if it 'suffer[s] or permit[s]' that individual to work." *Zheng*, 355 F.3d at 66 (quoting 29 U.S.C. § 203(g)). There is no reasonable basis for ignoring the definition of "employ" and the caselaw interpreting that term in construing whether an entity or person jointly employed a putative employee.

[1] § 203(e).
[2] § 203(g).

Indeed, *Rutherford Foods*, an early case interpreting the FLSA's coverage, was a joint employment case in which the Supreme Court analyzed that issue in reference to the FLSA's definition of "employ." The Supreme Court held that a slaughterhouse jointly employed workers who de-boned meat on its premises, despite the fact that a boning supervisor, "*rather than the slaughterhouse*, (i) hired and fired the boners, (ii) set their hours, and, (iii) after being paid a set amount by the slaughterhouse for each one hundred pounds of de-boned meat, paid the boners for their work." *Zheng*, 355 F.3d at 70 (citing *Rutherford Foods*, 331 U.S. at 726). As the Second Circuit noted:

> In determining that the meat boners were employees of the slaughterhouse notwithstanding the role played by the boning supervisor, the Court examined the "circumstances of the whole activity," but also isolated specific relevant factors that help distinguish a legitimate contractor from an entity that "suffers or permit[s]" its subcontractor's employees to work.

Id. (internal citation omitted).

In light of the FLSA's broad "suffer or permit" standard, *Rutherford Foods* "held that, in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them." *Id*. *Rutherford Foods* forecloses the Department's proposal to interpret joint employment cases solely based on section 203(d) without reference to section 203(g)'s "suffer or permit" language. *See also Goldberg*, 366 U.S. at 31–32 (applying definitions in sections 203(d), (e), and (g) of the FLSA to determine whether an entity was an "employer"); *Salinas*, 848 F.3d at 135 ("Congress repeatedly has affirmed that the FLSA's definition of 'employ,' 'employee,' and 'employer' dictate that two or more entities can constitute 'joint employers' for purposes of the FLSA."); *Zheng*, 355 F.3d at 79 (relying on definitions of "employ" and "employee" in conducting joint employer analysis); *Reyes*, 495 F.3d at 408–10 (discussing definitions of "employee" and "employ" in joint employer analysis).

The Department is wrong that *Falk v. Brennan*, 414 U.S. 190, 195 (1973), precludes consideration of "employ" under section 203(g) to evaluate joint employment cases. *Falk* did not limit its joint employer analysis to section 203(d)—the Court also referenced the definition of "employee" in its discussion of joint employer status. *See id.* at 195. Moreover, *Falk* simply did not analyze the interplay between sections 203(g) and 203(d) in determining that the defendant in that case was a joint employer. *Id.* It certainly cannot be construed as a determination that section 203(g) is irrelevant to the analysis.

In short, the "suffer or permit" definition is essential to the joint employer analysis, as courts have recognized for decades. No basis exists for interpreting "employer" without reference to the term "employ."

E. <u>The Department's Proposal That Business Model And Certain Contractual Provisions Do Not Make Joint Employer Status More Or Less Likely Should Be Revised.</u>

The Department's language in its proposed section 791.2(d)(2), (3), and (4) should be revised because as written, it appears to prevent what may be relevant information to the joint employment analysis from being considered.

The Department is attempting to ensure that franchisors or other companies can provide information or policies to others, without the risk of being found liable under the FLSA as a joint employer. However, the Department's proposal goes too far, as it gives no weight (or finds irrelevant) factors that may in fact be relevant and indicate a level of control over the working conditions. For instance, the Department proposes that requiring a wage floor, use of policies, or the adoption of general business practices does not make joint employer status more or less likely. As worded, this arguably affords no weight to these facts in the analysis. But, these requirements may indeed provide some indicia of control over the workplace conditions when viewed in light of the working conditions as a whole. Especially if the policies relate to wage and hour matters and their use is mandatory. *See, e.g., Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014) (finding franchisor was not joint employer where franchise agreement stated that franchisee shall comply with all lawful and reasonable policies, and remained ultimately responsible for management and operation of shop, but noting its finding "do[es] not suggest that franchisors can never qualify as the FLSA employer for a franchisee's employees.")

The Department should revise the language in its proposal that currently says, "do[es] not make joint employer status more or less likely under the Act," to state, "while may be considered, might not be determinative of joint employer status under the Act." This is consistent with legal precedent that various factors can, and should be, weighed to make the determination, and takes into account that these factors alone are might not be determinative.

F. The Department's Proposal To Replace Phrase "Joint Employment" With "Joint Employer Status" Is Based On An Erroneous Disregard Of Definitions In The Act.

The Department proposes using the term "Joint Employer Status" rather than "Joint Employment" in its Proposed Rules. It suggests this revision, likely because the Department cannot reconcile the term "Joint Employment" in the current regulations with its position that the definitions for "employ" and "employee" in the FLSA should not be consulted when determining if an entity is a joint employer employing someone. If the Department was not taking this inaccurate position in its Proposed Rules, such a revision to the term would not be necessary.

Further, for the reasons discussed previously, NELA does not agree with the Department's statement that the focus of the inquiry on joint employment status is whether the potential joint employer has taken sufficient action to be held jointly and severally liable. The power or authority to take such action should be considered, along with other factors as well.

G. The Department's Proposed Definition Of "Joint Employer" Is Inconsistent With Definitions In The Act.

In its Proposed Rules, the Department seeks to create its own definition for "joint employer," stating, "a joint employer may be an individual, partnership, association, corporation, business trust, legal representative, or any organized group." Proposed section 791.2(d). While

this mirrors the FLSA's definition of "person" under the Act, *see* 29 U.S.C. § 203(a), it ignores the FLSA's definition of "employer," which (1) includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," and a "public agency," and (2) excludes "any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C § 203(d). The Department cannot create new definitions that disregard and conflict with the definitions in the statute, and thus this proposal should not be adopted.

H . <u>The Department's Examples Should Clarify Rather Than Confuse The Joint Employer Analysis. These Examples Should Be Revised.</u>

NELA does not have comments on the joint employer examples provided in the proposed section 791.2(g), Examples 1, 2, 4, 5, 6, 7. However, Examples 3, 8, and 9 should be reconsidered.

In Example 3, the Department's conclusion that "the reserved right to control the employee's conditions of employment does not demonstrate that it is a joint employer" is an incorrect application of the law, as discussed above. That factor should be weighed with the other factors when assessing joint employer liability and not disregarded.

In Example 8, it is unclear if the sample forms and documents provided by the franchisor to the franchisee are optional or required. This is important because they may contain information related to alleged wage and hour violations. If *required* by the franchisor, this can be evidence of control over the working conditions at issue and should be given weight in the joint employment analysis. If required, the Department's conclusion appears incorrect. If *optional*, the conclusion in the example appears correct based on the facts presented.

With respect to Example 9, on the limited facts presented, the conclusion that joint employment is not present appears correct for the cell phone repair company operating on the premises of a large retail store. However, the statement that allowing a company to "operate on its premises does not make joint employer status more or less likely under the Act" should be revised. It should state that while operating on the premises may be considered, it might not be determinative. Working on the premises of the alleged joint employer makes control more likely than not and should not be disregarded entirely as not making joint employer status more or less likely under the Act.

III. EXAMPLES OF JOINT EMPLOYMENT SCENARIOS DEMONSTRATE THE IMPORTANCE OF A STRONG JOINT EMPLOYMENT RULES.

In the experience of the NELA membership, there are gross abuses where corporations utilize various entities (including, but not limited to, intermediate contractors, temporary agencies, and labor brokers) to create artificial buffers between a company and the workers who provide services that are integral to the business on a daily basis.

These companies continually argue that the only resort for workers who seek to recover unpaid minimum wages, overtime, or illegal deductions are the intermediate entities or persons that often have little or no resources and/or are transient entities that are virtually judgment proof. The following are a few examples from NELA members:

Example 1

Thirty workers performed electrical work renovating and constructing a public hospital. They were hired by a labor broker who was not licensed to perform electrical work, and otherwise did not comply with most legal requirements for business formation. They worked with and performed the same tasks as the individuals hired directly by the electrical contractor, who, pursuant to the contract and prevailing wage laws, were paid about double what they were paid. In addition, the plaintiffs were paid straight time for overtime work. By the time the plaintiffs sought legal assistance, the labor broker was nowhere to be found. Were it not for the joint employer liability of the general contractor, these 30 workers would have not received any remedy.

Example 2

A small subcontractor working on luxury apartments hired six workers to hang drywall for three weeks. They were paid nothing. When they tried to collect their three weeks of wages, the subcontractor refused to pay them, and then stopped answering their calls. The subcontractor had used this business model with other groups of workers employed for relatively short periods of time. When the issue was first raised by worker rights attorneys to the general contractor, who was on site daily, supervised their work, and set their hours, the general contractor claimed it had no responsibility since it had not directly hired them. Without a strong argument for joint liability, the workers would have been unable to recover.

Example 3

A group of six individuals worked cleaning a high-end hotel from 11:00 p.m. to 6:00 a.m. They were paid minimum wage. They wore a uniform bearing the name and logo of the hotel and were supervised by hotel personnel. They were hired and paid by an unregistered, unlicensed contractor who paid them in cash every two weeks. On one pay day the contractor did not show up to pay them, and then did not answer any phone calls from the workers or otherwise communicate with them. Were it not for being able to demonstrate the hotel was a joint employer under the FLSA, these individuals would not have been paid for those two weeks of work.

Example 4

Hundreds of drivers, primarily of East African descent, delivered packages for an online retailer. The retailer contracts with numerous delivery companies to provide drivers. The retailer provided the drivers with the packages to be delivered and required them to use its package tracking device. The drivers loaded the packages at the retailer's warehouse onto their vehicles each day and reported undelivered packages to both the delivery company's dispatcher and the retailer's dispatcher at the end of each day. The delivery companies hired and fired the workers, provided the vehicles, maintained employment records, set pay at a day rate of $180, and did not pay the required overtime premium. When one delivery

company stopped paying the workers and then ceased doing business, another one was created and continued the same pay practice. Service of process against the former delivery company would have been impossible because it ceased doing business. Service on the new delivery company took several weeks, as it had to be made through an unmarked, typically locked door, located at the back of a random building. If the workers were precluded from asserting these relevant facts supporting that the retailer was a joint employer, these workers would have been unlikely to recover.

NELA strongly urges that the Department reconsider its Proposed Rules. Not only will they leave vulnerable workers without an avenue for recovery, but they will create needless confusion and risk for any employer that decides to follow them.

Respectfully submitted,

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