

**UNITED STATES DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Part 791**

**RIN 1235-AA26**

**Joint Employer Status under the Fair Labor Standards Act**

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Labor (the Department) is updating and revising the Department's interpretation of joint employer status under the Fair Labor Standards Act (FLSA or Act) in order to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy.

**DATES:** This final rule is effective [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

The FLSA requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek.<sup>1</sup> To be liable for paying minimum wage or overtime, a person or entity must be an "employer," which the FLSA defines in section 3(d) to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>2</sup>

As the Department has recognized since the FLSA's enactment, an employee can have two or more employers who are jointly and severally liable for the wages due the employee (*i.e.*, joint employers). In 1958, the Department published an interpretive regulation, codified in 29 CFR part 791, which explained that joint employer status depends on whether multiple persons are "not completely disassociated" or "acting entirely independently of each other" with respect to the employee's employment.<sup>3</sup> The regulation provided three situations where two or more employers are generally considered joint employers: where there is an arrangement between them to share the employee's services, as, for example, to interchange employees; where one employer is

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<sup>1</sup> See 29 U.S.C. 206(a), 207(a).

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

<sup>3</sup> See 23 FR 5905 (Aug. 5, 1958) and 29 CFR 791.2(a).

acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or where they are not completely disassociated with respect to the employment of a particular employee and may be deemed to 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.<sup>4</sup> Until this final rule, the Department had not meaningfully revised part 791 since its promulgation over 60 years ago.

The Department is concerned that part 791 does not provide adequate guidance for the most common joint employer scenario under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work. Part 791’s focus on the association or relationship between potential joint employers is not necessarily helpful in determining whether the other person benefitting from the employee’s work is the employee’s employer too, especially considering the text of section 3(d) and Supreme Court and circuit court precedent determining joint employer status based on the degree of control exercised by the potential joint employer over the employee.

Accordingly, in April, the Department published a Notice of Proposed Rulemaking (NPRM) detailing this concern, explaining how section 3(d) provides the textual basis for determining joint employer status under the Act, proposing a four-factor balancing test for determining joint employer status in the scenario where another person benefits from an employee’s work, and proposing additional guidance regarding how to

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<sup>4</sup> See 29 CFR 791.2(b).

apply the test.<sup>5</sup> In addition, the NPRM recognized that part 791's focus on the association between the potential joint employers is useful for determining joint employer status in a second scenario—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek and the issue is whether those separate sets of hours should be aggregated in the workweek. The Department proposed that the multiple employers are joint employers in this scenario if they are sufficiently associated with respect to the employment of the employee. Finally, the NPRM provided illustrative examples describing how the Department's proposal would apply in a number of factual scenarios involving multiple employers.

Having received and reviewed the comments to its proposal, the Department now adopts as a final rule the analyses set forth in the NPRM largely as proposed. In the joint employer scenario where another person is benefitting from the employee's work, the Department is adopting a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency*<sup>6</sup> to assess whether the other person: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances. However, satisfaction of the maintenance of employment records factor alone does not demonstrate joint employer status.

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<sup>5</sup> See 84 FR 14043 (Apr. 9, 2019).

<sup>6</sup> 704 F.2d 1465 (9th Cir. 1983).

The Department believes that this test is consistent with the “any person acting directly or indirectly in the interest of an employer in relation to an employee” language in the Act’s definition of “employer.” That language alone provides the textual basis for determining joint employer status under the Act. Although section 3(e) (defining “employee”)<sup>7</sup> and section 3(g) (defining “employ” as including “to suffer or permit to work”)<sup>8</sup> broadly define who is an employee under the Act, only section 3(d) addresses whether a worker who is an employee under the Act has another employer for his or her work. Moreover, multiple circuit courts apply balancing tests that, similar to the Department’s test, assess the potential joint employer’s control over the employee.

The Department’s final rule provides additional guidance on how to apply this test. For example, to be a joint employer under the Act, the other person must actually exercise—directly or indirectly—one or more of the four control factors. The other person’s ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control. The Department had proposed that the reserved right to act be irrelevant for determining joint employer status, but having reviewed and considered the comments received, it now recognizes that the reserved right to act can play some role in determining joint employer status, though there still must be some actual exercise of control. The Department’s final rule also provides, in response to comments received, guidance on the meaning of

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<sup>7</sup> 29 U.S.C. 203(e)(1).

<sup>8</sup> 29 U.S.C. 203(g).

“employment records” for purposes of applying the fourth factor and on what constitutes indirect acts of control for purposes of applying the factors generally.

Application of the four factors should determine joint employer status in most cases. Nonetheless, the Department recognizes, consistent with longstanding precedent, that additional factors may be relevant for determining joint employer status.

Accordingly, the final rule provides that additional factors may be considered, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee’s work. In addition, the final rule 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. Economic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the Act; however, determining whether a worker who is an employee under the Act has a joint employer for his or her work is a different analysis that is based on section 3(d). Thus, factors that assess the employee’s economic dependence are not relevant to determine whether the worker has a joint employer. Examples of such factors include: (1) whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (2) whether the employee has the opportunity for profit or loss based on his or her managerial skill; (3) whether the employee invests in equipment or materials required for work or the employment of helpers; and (4) the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

The Department’s proposal identified certain business models (such as a franchise model), certain business practices (such as allowing the operation of a store on one’s

premises), and certain contractual agreements (such as requiring a party in a contract to institute sexual harassment policies) as not making joint employer status more or less likely under the Act. The Department received many comments in response to its proposal, and the final rule identifies even more business models, business practices, and contractual agreements as not making joint employer status more or less likely under the Act. This will allow parties to make business decisions and enter into business relationships with more certainty and clarity regarding what actions will result in joint liability under the Act.

In the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ the employee to work separate sets of hours in the same workweek—the multiple employers are joint employers if they are sufficiently associated with respect to the employment of the employee. This approach is consistent with the Department’s focus on the association between the potential joint employers. If the multiple employers are joint employers, they must aggregate the hours worked for each for purposes of determining compliance with the Act.

Finally, the final rule provides even more illustrative examples applying the Department’s analyses to factual situations than did the proposal—again, to provide more certainty and clarity regarding who is and is not a joint employer under the Act.

The Department’s estimates of the economic impacts of this final rule are discussed in sections VI and VII below. The Department estimates that costs in the form of regulatory familiarization with this final rule will range from \$324.2 million to \$416.7 million. Additionally, this final rule may reduce the number of persons who are joint employers in one scenario and as a result, employees will have the legal right to collect

wages due under the Act from fewer employers. For these reasons, the Department acknowledges that there may be transfers from employees to employers. However, the Department lacks the data needed to calculate the potential amount or frequency of these transfers. This final rule is considered to be an Executive Order 13771 deregulatory action and is economically significant for the purposes of Executive Order 12866. Qualitative details of the cost savings, benefits, and other economic impacts are discussed below.

## **II. Background**

### *A. The FLSA*

The FLSA requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek.<sup>9</sup> The FLSA defines the term “employee” in section 3(e)(1) to mean “any individual employed by an employer,”<sup>10</sup> and defines the term “employ” in section 3(g) to include “to suffer or permit to work.”<sup>11</sup> “Employer” is defined in section 3(d) to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>12</sup>

### *B. Regulatory and Judicial History*

In July 1939, a year after the FLSA’s enactment, WHD issued Interpretative Bulletin No. 13 addressing, among other topics, whether two or more companies could be

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<sup>9</sup> See 29 U.S.C. 206(a), 207(a).

<sup>10</sup> 29 U.S.C. 203(e)(1).

<sup>11</sup> 29 U.S.C. 203(g).

<sup>12</sup> 29 U.S.C. 203(d).

jointly and severally liable for a single employee's hours worked under the Act.<sup>13</sup> The Bulletin acknowledged the possibility of joint employer liability and provided an example where two companies arranged "to employ a common watchman" who had "the duty of watching the property of both companies concurrently for a specified number of hours each night."<sup>14</sup> The Bulletin concluded that the companies "are not each required to pay the minimum rate required under the statute for all hours worked by the watchman ... but ... should be considered as a joint employer for purposes of the [A]ct."<sup>15</sup>

The Bulletin provided a second example of an employee who works 40 hours for company A and 15 hours for company B during the same workweek.<sup>16</sup> The Bulletin explained that if A and B are "acting entirely independently of each other with respect to the employment of the particular employee," they are not joint employers and may "disregard all work performed by the employee for the other company" in determining their obligations to the employee under the Act for that workweek.<sup>17</sup> On the other hand, if "the employment by A is not completely disassociated from the employment by B," they are joint employers and must consider the hours worked for both as a whole to determine their obligations to the employee under the Act for that workweek.<sup>18</sup> Relying on section 3(d) of the FLSA, the Bulletin concluded by saying that, "at least in the following

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<sup>13</sup> See Interpretative Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," ¶¶ 16–17. In October 1939 and October 1940, the Department revised other portions of the Bulletin not pertinent here.

<sup>14</sup> *Id.* ¶ 16.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* ¶ 17.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.”<sup>19</sup>

In 1958, the Department published a regulation, codified in 29 CFR part 791, which expounded on Interpretative Bulletin No. 13.<sup>20</sup> Section 791.2(a) reiterated that joint employer status depends on whether multiple persons are “not completely disassociated” or “acting entirely independently of each other” with respect to the employee’s employment.<sup>21</sup> Section 791.2(b) explained, “Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek,” the employers are generally considered joint employers in situations such as:

(1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to 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.<sup>22</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *See* 23 FR 5905 (Aug. 5, 1958).

<sup>21</sup> 29 CFR 791.2(a).

<sup>22</sup> 29 CFR 791.2(b) (footnotes omitted).

In 1961, the Department amended a footnote in the regulation to clarify that a joint employer is also jointly liable for overtime pay.<sup>23</sup> Since this 1961 update, the Department has not published any other updates to part 791 until this final rule.

In 1973, the Supreme Court decided *Falk v. Brennan*, a joint employer case.<sup>24</sup> *Falk* did not cite or rely on part 791, but instead used section 3(d) to determine whether an apartment management company was a joint employer of the employees of the apartment buildings that it managed.<sup>25</sup> The Court held that, because the management company exercised “substantial control [over] the terms and conditions of the [employees’] work,” the management company was an employer under section 3(d), and could therefore be jointly liable with the building owners for any wages due to the employees under the FLSA.<sup>26</sup>

In 1983, the Ninth Circuit issued a seminal joint employer decision, *Bonnette v. California Health & Welfare Agency*.<sup>27</sup> In *Bonnette*, seniors and individuals with disabilities receiving state welfare assistance (the “recipients”) employed home care workers as part of a state welfare program.<sup>28</sup> Taking an approach similar to *Falk*, the court addressed whether California and several of its counties (the “counties”) were joint employers of the workers under section 3(d).<sup>29</sup> In determining whether the counties were

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<sup>23</sup> See 26 FR 7730, 7732 (Aug. 18, 1961).

<sup>24</sup> See 414 U.S. 190.

<sup>25</sup> See *id.* at 195.

<sup>26</sup> *Id.*

<sup>27</sup> See 704 F.2d 1465, *abrogated on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Although the Ninth Circuit later adopted a thirteen-factor test in *Torres-Lopez v. May*, 111 F.3d 633, 639–41 (9th Cir. 1997), many courts have treated *Bonnette* as the baseline for their own joint employer tests.

<sup>28</sup> See 704 F.2d at 1467–68.

<sup>29</sup> See *id.* at 1469–70.

jointly liable for the home care workers under section 3(d), the court found “four factors [to be] relevant”: “whether the alleged [joint] 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.”<sup>30</sup> The court noted that these four factors “are not etched in stone and will not be blindly applied” and that the determination of joint employer status depends on the circumstances of the whole activity.<sup>31</sup> Applying the four factors, the court concluded that the counties “exercised considerable control” and “had complete economic control” over “the nature and structure of the employment relationship” between the recipients and home care workers, and were therefore “employers” under section 3(d), jointly and severally liable with the recipients to the home care workers.<sup>32</sup>

In 2014, the Department issued Administrator’s Interpretation (Home Care AI) No. 2014-2, concerning joint employer status in the context of home care workers.<sup>33</sup> Consistent with § 791.2, the Home Care AI described a joint employer as an additional employer who is “not completely disassociated” from the other employer(s) with respect to a common employee, and cited the breadth of the definitions of “employer” and “employ” in sections 3(d) and (g).<sup>34</sup> The Home Care AI opined that “the focus of the joint employment regulation is the degree to which the two possible joint employers

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<sup>30</sup> *Id.* at 1470.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2014-2, “Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act” (June 19, 2014), *available at*

[http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014\\_2.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf).

<sup>34</sup> *Id.* at 2, 2 n. 2.

share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers.”<sup>35</sup> The Home Care AI opined that “a set of [joint employer] factors that addresses only control is not consistent with the breadth of [joint] employment under the FLSA” because section 3(g)’s “suffer or permit” language governs FLSA joint employer status.<sup>36</sup> The Home Care AI applied the four *Bonnette* factors as part of a larger multi-factor analysis that provided specific guidance about joint employer status in the home care industry.<sup>37</sup>

In 2016, the Department issued Administrator’s Interpretation No. 2016-1 (Joint Employer AI) concerning joint employer status under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which the Department intended to be “harmonious” and “read in conjunction with” the Home Care AI’s discussion of joint employer status.<sup>38</sup> The Joint Employer AI, although also citing the definitions in sections 3(d) and (e), described section 3(g)’s “suffer or permit” language as determining the scope of joint employer status.<sup>39</sup> The Joint Employer AI opined that “joint employment, like employment generally, ‘should be defined expansively.’”<sup>40</sup> It further opined that “joint employment under the FLSA and MSPA [is] notably broader than the common law ... which look[s] to the amount of control that an employer exercises over an

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<sup>35</sup> *Id.* at 3 n.3.

<sup>36</sup> *Id.* at 3 n.4.

<sup>37</sup> *See id.* at 9–14.

<sup>38</sup> U.S. Dep’t of Labor, Wage & Hour Div., WHD Administrator’s Interpretation No. 2016-1, “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” (Jan. 20, 2016).

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* (quoting *Torres-Lopez*, 111 F.3d at 639).

employee.”<sup>41</sup> The Joint Employer AI concluded that, because “the expansive definition of ‘employ’” in both the FLSA and MSPA “rejected the common law control standard,” “the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.”<sup>42</sup> The Department rescinded the Joint Employer AI effective June 7, 2017.<sup>43</sup>

C. *The Department’s Proposal*

On April 9, 2019, the Department proposed revisions to part 791 to update and clarify its interpretation of joint employer status under the FLSA. *See* 84 FR 14043–61.

For the joint employer scenario where an employee has an employer who suffers, permits, or otherwise employs an employee to work and another person simultaneously benefits from that work, the Department proposed that the other person is the employee’s joint employer under the Act only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. The Department proposed to adopt a four-factor balancing test derived (with one modification) from *Bonnette v. California Health & Welfare Agency* assessing whether the potential joint employer:

- Hires or fires the employee;
- Supervises and controls the employee’s work schedule or conditions of employment;
- Determines the employee’s rate and method of payment; and
- Maintains the employee’s employment records.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See* News Release, U.S. Dep’t of Labor, U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), *available at* <https://www.dol.gov/newsroom/releases/opa/opa20170607>.

The Department proposed to modify the first *Bonnette* factor so that a person’s ability, power, or reserved contractual right to act with respect to the employee’s terms and conditions of employment would not be relevant to that person’s joint employer status under the Act.

The Department also proposed that additional factors may be relevant to this joint employer analysis, but only if they are indicia of whether the potential joint employer is:

- 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.

The Department further proposed that, in determining the economic reality of the potential joint employer’s status under the Act, whether an employee is economically dependent on the potential joint employer is not relevant. The Department identified certain “economic dependence” factors that are not relevant to the joint employer analysis, including, but not limited to, whether the employee:

- Is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
- Has the opportunity for profit or loss based on his or her managerial skill; and
- Invests in equipment or materials required for work or for the employment of helpers.

The Department’s proposal noted that a joint employer may be any “person” as defined by section 3(a) of the Act, which includes “any organized group of persons.” It also proposed that a person’s business model (such as a franchise model), certain

business practices (such as allowing an employer to operate a store on the person's premises or participating in an association health or retirement plan), and certain business agreements (such as requiring an employer in a business contract to institute sexual harassment policies), do not make joint employer status more or less likely under the Act.

In the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ the employee to work separate sets of hours in the same workweek—the Department proposed only non-substantive revisions. Believing that part 791's current focus on the association between the potential joint employers is useful for determining joint employer status in this scenario, the Department proposed that the multiple employers are joint employers in this scenario if they are sufficiently associated with respect to the employment of the employee. The Department noted that, if they are joint employers, they must aggregate the hours worked for each for purposes of determining compliance with the Act.

Finally, the Department's proposal included several other provisions. First, it reiterated that a person who is a joint employer is jointly and severally liable with the employer and any other joint employers for all wages due to the employee under the Act. Second, it provided a number of illustrative examples that applied the Department's proposed joint employer rule. Third, it contained a severability provision.

### **III. Need for Rulemaking**

The primary purpose of this final rule is to offer guidance explaining how to determine joint employer status where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work.

In the proposed rule, the Department sought to revise and clarify the standard for joint employer status in order to give the public more meaningful, detailed, and uniform guidance of who is a joint employer under the Act. The Department noted that circuit courts currently use a variety of multi-factor tests to determine joint employer status, which have resulted in inconsistent treatment of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs. To promote greater uniformity in court decisions and predictability for organizations and employees, the Department is adopting with modifications the four-factor test that it proposed for determining joint employer status.

As noted in the Proposed Rule, part 791 is silent on whether a business model can make joint employer status more or less likely, and in this final rule, the Department explains its longstanding position that certain business models—such as the franchise model—do not themselves indicate joint employer status under the FLSA. In addition, the Department presents illustrative examples of the degree of agreements and association between employers that will result in joint and several liability. These updates are intended to assist organizations that may be hesitant to enter into beneficial relationships or engage in worker-friendly business practices for fear of being held liable for the wages of employees over whom they have insignificant control.

#### **IV. Final Regulatory Revisions**

##### *A. Introductory Statement to Part 791*

As explained in the NPRM's preamble, the Department proposed to make "non-substantive revisions" to the introductory statement provided in § 791.1. 84 FR 14047. In relevant part, the proposed statement reiterated the Department's intent for part 791 to

“serve as ‘a practical guide to employers and employees as to how [WHD] will seek to apply [the FLSA],’”<sup>44</sup> and continued to advise that the Department will use the interpretations provided in part 791 to guide its enforcement of the Act unless it “concludes upon reexamination that they are incorrect or is otherwise directed by an authoritative judicial decision.” *Id.*

The Department received no comments specifically addressing its proposed revisions to the introductory statement, but several commenters opined on matters germane to its substance. Senator Patty Murray and several worker advocacy groups, such as National Employment Lawyers Association (NELA) and the Low Wage Worker Legal Network, asserted that part 791 constitutes an interpretive rule that is not binding on courts. Asserting that the proposed rule’s analysis contradicts much of the existing judicial precedent addressing FLSA joint employer status, these commenters stated that the proposal would be entitled to little judicial deference and of limited value for employers seeking to rely upon it. *See, e.g.*, NELA (“Why, for example, would any responsible employer in North Carolina follow the Department’s ... proposed test knowing that the Fourth Circuit endorsed an entirely different test in [*Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017)]?”); Low Wage Worker Legal Network (predicting “a deluge of new litigation to understand whether, and to what extent, the law has shifted”). Many commenters representing employees asserted that the Department’s proposed rule would be unlawful specifically because, in their opinion, it sets forth an analysis that ignores longstanding Supreme Court and circuit court

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<sup>44</sup> 84 FR 14058 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)).

precedent. *See, e.g.*, Coalition of State Attorneys General (Coalition of State AGs); Farmworker Justice; Legal Aid Justice Center.

By contrast, commenters representing employers praised the proposed rule in part for its potential to restore uniformity to the varied analyses currently applied by courts in different jurisdictions to determine FLSA joint employer status. For example, HR Policy Association asserted that ambiguity in the existing regulation has resulted in a “maze of tests” that produce different judicial outcomes in cases with similar facts, creating “substantial uncertainty for employers with national operations.” *See also* International Bancshares Corporation. Describing the same problem, the U.S. Chamber of Commerce asserted that the proposed rule would return “much-needed uniformity to the Act’s enforcement scheme, which Congress intended when it passed the legislation.” As discussed below in greater detail, commenters representing employers overwhelmingly endorsed the proposed rule as a clear and appropriate interpretation of the FLSA.

The Department appreciates commenter feedback addressing the purpose and underlying legal authority of this rulemaking. As explained in greater detail below, the Department believes that the analysis adopted in this final rule is faithful to both the FLSA and to binding Supreme Court precedent. Although the analysis clearly differs, to varying degrees, from the myriad FLSA joint employer tests applied by the federal circuit courts of appeals, the Department has previously promulgated interpretive guidance regarding joint employer liability that overtly conflicts with the approach taken in a particular federal circuit.<sup>45</sup> And given the divergent views of joint employment in the

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<sup>45</sup> For instance, the Department’s withdrawn Joint Employer AI expressly recognized its conflict with the First and Third Circuits’ approach of “apply[ing] factors that address only or primarily the potential joint employer’s control.” U.S. Dep’t of Labor, Wage &

circuit courts, it would not be possible to provide detailed guidance that is consistent with all of them. Moreover, the Department notes that some of the tests used by the circuit courts (including the standard articulated by the Fourth Circuit in *Salinas*) are based in part on the ambiguous guidance provided in the Department’s existing part 791 regulation. And more importantly, some circuit courts use joint employer tests that are expressly grounded in the principle that the FLSA should be read broadly, and thus, any exemptions construed narrowly. For instance, in articulating a joint employer test that is broader than the *Bonnette* factors, the Fourth Circuit explained that “because the [Fair Labor Standards] Act is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals.”<sup>46</sup> The Ninth Circuit likewise explained that “the concept of joint employment should be defined expansively under the FLSA . . . . in order to effectuate the broad remedial purposes of the Act” when adopting a test that gives weight to a wide range of factors.<sup>47</sup>

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Hour Div., WHD Administrator’s Interpretation No. 2016-1, “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” (Jan. 20, 2016); *see also* U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2014-2, “Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act” (June 19, 2014) (disagreeing with “courts [that] apply only the factors addressing the potential joint employer’s control”).

<sup>46</sup> *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 140 (4th Cir. 2017) (quoting *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999) (internal quotation marks and citation omitted)).

<sup>47</sup> *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (quoting *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979)); *see also Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996) (stating that “because the FLSA and AWP are remedial statutes, we must construe them broadly” when determining joint employer liability); *Karr v. Strong Detective Agency, Inc., a Div. of Kane Servs.*, 787 F.2d 1205, 1207 (7th Cir. 1986) (“[W]e need to give this concept [of joint employer] an expansive interpretation in order to effectuate Congress’ remedial intent in enacting the FLSA.”).

While this principle is based in older Supreme Court case law,<sup>48</sup> the Supreme Court’s more recent holding in *Encino v. Navarro* puts some doubt on the continued viability of that principle. In *Encino*, the Court held that barring a “textual indication” to the contrary, the exemptive provisions of the FLSA should be given a “fair reading.”<sup>49</sup> The Supreme Court “reject[ed] th[e practice of construing FLSA exemptions narrowly] as a useful guidepost for interpreting the FLSA” because it rests on “the flawed premise that the FLSA pursues its remedial purpose at all costs.”<sup>50</sup> Instead, “[a] fair reading’ of the FLSA, neither narrow nor broad, is what is called for.”<sup>51</sup>

Accordingly, this update to the part 791 regulations reflects the Department’s consideration of *Encino*, and subsequent circuit courts’ instruction to give the FLSA “a fair reading.”<sup>52</sup> The Department emphasizes that employers may safely rely upon the interpretations provided in revised part 791 under section 10 of the Portal-to-Portal Act unless and until any such interpretation “is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” 29 U.S.C. 259.

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<sup>48</sup> See, e.g., *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985) (“The Court has consistently construed the [Fair Labor Standards] Act ‘liberally to apply to the furthest reaches consistent with congressional direction,’ ... recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.”) (citations omitted) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

<sup>49</sup> 138 S. Ct. 1134, 1142 (2018) (finding “no license to give the exemption [to the FLSA] anything but a fair reading”); see also *id.* at 1143 (finding “no reason not to give the statutory text [of the FLSA exemption] a fair reading”); A. Scalia & B. Garner, *Reading Law* 363 (2012).

<sup>50</sup> *Encino*, 138 S. Ct. at 1142 (internal quotations omitted).

<sup>51</sup> *U.S. Dep’t of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (quoting *Encino*, 138 S. Ct. at 1142).

<sup>52</sup> *Id.*; see also *Diaz v. Longcore*, 751 F. App’x 755, 758 (6th Cir. 2018) (rejecting plaintiffs’ request to “interpret [FLSA] provisions to provide broad rather than narrow protection to employees” because “[w]e must instead give the FLSA a ‘fair interpretation’”) (citing *Encino*, 138 S. Ct. at 1142).

For additional clarity for stakeholders, the Department adopts in the final rule non-substantive revisions to clarify, streamline, and modernize the language of § 791.1. As in the prior rule, the introductory statement will comprise § 791.1 of the final rule.

B. *Two Joint Employer Scenarios*

The proposed rule stated that “[t]here are two joint employer scenarios under the FLSA.” 84 FR 14059. It described the first scenario as occurring when “the employee has an employer who suffers, permits, or otherwise employs the employee to work ... but another person simultaneously benefits from that work.” *Id.* It described the second scenario as occurring when “one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek.” *Id.* In this second scenario (unlike the first), the “jobs and the hours worked for each employer are separate.” *Id.* If the employers are joint employers of the worker, then all of the worker’s hours worked for the employers are aggregated for the workweek, and “both employers are jointly and severally liable for all of the hours the employee worked for them in the workweek.” *Id.* Although the Department did not use such terms in its proposal and does not use such terms in its final rule, some courts have referred to the first scenario as “vertical” joint employment, and the second scenario as “horizontal” joint employment. *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917 (9th Cir. 2003) (using the terms).

Several commenters appreciated the discussion of the two scenarios. National Federation of Independent Business described the proposal’s distinction between the two scenarios as “a single, crucial, and correct analytical step” and agreed 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 Society for Human Resource Management (SHRM) expressed its “support[] [for] the Department’s proposal to clarify and distinguish ‘vertical’ and ‘horizontal’ joint employment” and “the effort to provide clear and understandable explanations of when the two sets of concepts apply.” The Retail Industry Leaders Association (RILA) stated that the proposal “appropriately distinguishes ‘vertical’ from ‘horizontal’ joint employment situations by addressing them separately.” Comments generally did not dispute the proposed rule’s description of the two joint employer scenarios. For example, the National Employment Law Project (NELP) did not specifically comment on this feature of the proposed rule, but attached a copy of the Joint Employer AI to its comment, which similarly distinguished between the two scenarios.

In the final rule, the Department will continue to describe and distinguish between the two joint employer scenarios. This distinction is especially useful given the Department’s position (both in its proposal and, as discussed below, in the final rule) that the prior rule’s standard for determining joint employer status under the Act was not helpful and did not provide an adequate explanation in the first scenario, but is useful (with some non-substantive revisions) for determining joint employer status in the second scenario. Accordingly, the Department has not made any changes in the final rule to the first sentence of proposed § 791.2 or to any of the references to the two joint employer scenarios.

C. *Section 3(d) as the Sole Textual Basis for Determining Joint Employer Status*

Section 3(d) of the FLSA provides that an “employer” “includes any person acting directly or indirectly in the interest of an employer in relation to an employee,”

“includes a public agency,” but “does not include 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). Under the Act, an “employee” is defined to mean, with certain exceptions, “any individual employed by an employer,” 29 U.S.C. 203(e), and “employ” “includes to suffer or permit to work,” 29 U.S.C. 203(g).

The proposed rule (§ 791.2(a)(1)) stated that, in the first joint employer scenario, the other person simultaneously benefitting from the employee’s work “is the employee’s joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee.” 84 FR 14059 (citing 29 U.S.C. 203(d)). The NPRM’s preamble explained that “the textual basis for FLSA joint employer status is section 3(d), not section 3(e)(1) or 3(g); “3(e)(1) and 3(g) determine whether there is an employment relationship between the potential employer and the worker for a specific set of hours worked”; and “3(d) alone determines another person’s joint liability for those hours worked.” *Id.* at 14050. Looking at the definitions’ text, the NPRM’s preamble further explained that sections 3(e)(1) and 3(g) “do not expressly address the possibility of a second employment relationship” and contemplate a single employer, but section 3(d), particularly its “in the interest of an employer” language, contemplates a second employer and “encompasses any additional persons that may be held jointly liable for the employee’s hours worked in a workweek.” *Id.* The Department cited to *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), *Falk v. Brennan*, 414 U.S. 190 (1973), and *Bonnette*, 704 F.2d 1465, to support its “clear textual delineation” and concluded that “[e]xplicitly tethering the joint employer standard in part 791 to section 3(d) will provide

clearer guidance on how to determine joint employer status consistent with the text of the Act.” *Id.* at 14050–51.

A number of comments support adopting section 3(d) as the sole textual basis in the Act for determining joint employer status. For example, the U.S. Chamber of Commerce stated that the Department “properly relies” on section 3(d) “rather than the broader ‘employ’ definition.” According to the Chamber, the definition of “employ” “is broad and intended to identify employees from those who would otherwise be independent contractors under common law,” but “that context is markedly different from the joint employer question, where it is not a question of whether the worker is in the employ of some entity, but rather whether a different, additional entity should also face liability as that worker’s ‘employer.’” Associated Builders and Contractors stated that it “strongly supports the Department’s clarification that only the definition of an ‘employer’ in section 3(d) ... determines joint employer status, not the definition of ‘employee’ in Section 3(e)(1) or the definition of ‘employ’ ... in section 3(g).” RILA “commend[ed] the [Department] for clearly explaining and establishing the statutory basis for its interpretation and application of joint employer status,” “agree[d] that it is useful to ground the regulatory approach to joint employer status on the statutory definition of ‘employer’” in section 3(d), and further agreed that the “statutory construction” of section 3(d) “presumes that an at-issue worker already is employed by at least one employer when assessing whether another person or entity is *also* that person’s employer.” Coalition for a Democratic Workplace asserted that, “contrary to likely critics of the Proposed Rule, its focus on the definition of ‘employer’ as the term most relevant to the joint employer analysis does not undermine the Act’s separate goal of covering a broad

range of working relationships.” Washington Legal Foundation added that “[t]he correctness of DOL’s decision to focus on the statutory definition of ‘employer’ is confirmed by *Falk*, which also focused on [section] 3(d) in arriving at its definition of a ‘joint employer.’”

Finally, the Center for Workplace Compliance (CWC) also supported the Department’s proposed legal analysis: “While some authorities have assessed joint employment status by reference to all three definitions, the clearest textual interpretation is, as expressed by DOL in the preamble, that sections 3(e)(1) and 3(g) ‘determine whether there is an employment relationship between the potential employer and the worker for a specific set of hours worked, and [section] 3(d) alone determines another person’s joint liability for those hours worked’” (quoting 84 FR 14050) (footnotes omitted). CWC added that the Department’s interpretation “is also consistent with Supreme Court precedent, as explained in the preamble, comparing *Falk v. Brennan*, a case that relied on [s]ection 3(d) to find a joint employment relationship, with *Rutherford Food Corp. v. McComb*, a case that found workers to be employees rather than independent contractors.” *Id.* (footnotes omitted). Although it supports the Department’s analysis, CWC, however, asserted that the proposed regulatory text did not clearly enough incorporate that analysis and “urge[d] DOL to include an explicit statement that joint employer status is determined by [s]ection 3(d) in the text of the final rule itself.”

Numerous other comments challenged the Department’s proposed statutory analysis. They argued that that sections 3(d), 3(e), and 3(g) are all relevant for determining joint employment, and that the proposal that joint employer status is based only on section 3(d) is contrary to the Act’s text, judicial precedent, and legislative intent.

Starting with section 3(d)'s text, Southern Migrant Legal Services noted that the definition, compared to most of the other definitions in section 3 of the FLSA, merely provides that "employer" includes certain persons and thus "provides only an incomplete description of the term 'employer.'" It claims that the definition is "circular" and quotes *Irizarry v. Catsimatidis*, 722 F.3d 99, 103 (2d Cir. 2013) for the proposition that the Act "nowhere defines 'employer' in the first instance." See also Low Wage Worker Legal Network ("The language of the [Act] does not support [the Department's proposed] interpretation. The word 'joint' does not appear in § 203(d). However, the word 'includes' in ... § 203(d) would suggest that there are other types of employers under the FLSA than those that meet the statutory definition of § 203(d)."). AFL-CIO stated that, rather than defining the term "employer" itself, section 3(d) "simply makes clear that the term employer includes the employer's agents." See also Southern Migrant Legal Services ("Section 3(d) was not drafted to provide a comprehensive definition of 'employer,' but to simply make clear it included many corporate officers and managers, as well as the business entities for which they worked."). SEIU described how, as a general matter, an employer's individual agents are not liable for the employer's actions, but that section 3(d) "was enacted largely to ameliorate the adverse impact of the ... rule proscribing individual liability in the absence of grounds for piercing the corporate veil" (citing *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)). See also NELP ("[M]ost of the cases interpreting 203(d) consider instances where a 'person'—natural or corporate—is sufficiently involved in a corporation's day-to-day functions to be an 'employer' under the FLSA"). In sum, according to Southern Migrant Legal Services, "[t]he point of

including Section 3(d) in the Act was ‘to prevent employers from shielding themselves from responsibility for the acts of their agents’” (quoting *Donovan v. Agnew*, 712 F.2d at 1513).

Numerous comments also took issue with the Department’s proposal to exclude sections 3(e) and 3(g) from any joint employer analysis. The Coalition of State AGs stated that “[t]he three definitions are interrelated, and courts have considered them together in analyzing joint-employment status” (citing, *e.g.*, *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998)). Greater Boston Legal Services stated that “[c]ourts around the country have ... looked at the intertwined nature of the FLSA definitions for employ (Section 3(e)(1)), employee (Section 3(g)) and employer (Section 3(d)) to guide joint-employer analysis” (citing cases). Comments also discussed the breadth of the definitions. *See, e.g.*, Coalition of State AGs (“Thus, the FLSA’s far-reaching definitions for the terms ‘employer,’ ‘employee,’ and ‘employ’ must be read broadly in light of the statute’s remedial purpose.”) (citing cases); AFL-CIO (asserting that the Department’s proposal fails to acknowledge “the Supreme Court’s repeated admonitions concerning the breadth of the definition of employment under the FLSA.”).

Comments further stated that the history and purpose of section 3(g)’s definition of “employ” as including “to suffer or permit to work,” given the particular meaning of that language and similar language in child labor statutes around the time of the FLSA’s enactment, was to ensure that a business that engaged another to provide it with workers was also an employer of the workers under the Act. *See, e.g.*, NELP (“[I]n fact, the central purpose of [‘suffer or permit’] and its established understanding when inserted by Congress into the FLSA in 1938 was to do just that: to hold companies accountable for

child labor (and minimum wage and overtime) violations even where the workers were directly hired, supervised, and paid by an independent contractor of that company.”); Farmworker Justice (“[W]here businesses took advantage of child labor and substandard labor practices but sought to evade responsibility by claiming an intermediary was the sole employer, the suffer or permit to work standard was applied to hold them accountable as ‘employers.’”); Public Justice Center (“Thus, when the suffer or permit to work language was included in the FLSA, it allowed for joint responsibility of contractors and the businesses for whom they contracted to supply workers. That well-settled meaning was incorporated into the FLSA.”). In addition, comments described the Department’s proposed legal analysis excluding section 3(g) from determining joint employer status as “unique,” *see* Public Justice Center, “irrational[]” and “utterly inconsistent with the statute and the case law,” *see* Farmworker Justice, a “novel and unsupportable proposition,” *see* NELP, and “fundamentally unsound” (Greater Boston Legal Services, pg. 5). *See also* SEIU (“The idea that the § 203(g) definition of ‘employ’ is irrelevant to a determination of the existence of a joint employer relationship is truly remarkable, contradicted as it is by virtually every reported appellate opinion that concerns joint employment under the FLSA.”).

Finally, some commenters viewed the Department as misstating Supreme Court decisions to defend its reliance on section 3(d) and exclusion of sections 3(e) and (g) when determining joint employer status. For example, Senator Patty Murray described the proposal’s discussion of *Falk v. Brennan* as “conclusory” and “obscur[ing] the Court’s actual statement” in that decision. According to Senator Murray, “[t]he Court [in *Falk*] 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.” Senator Murray concluded that the NPRM’s “claim that the Court [in *Falk*] somehow limited joint employer analysis to 3(d) by being silent on 3(g) is without merit.” The Coalition of State AGs asserted that the Department’s proposed legal analysis “presents misleading characterizations of several Supreme Court cases,” particularly *Rutherford Food*. NELP stated that the Department’s proposed interpretation of section 3(g) conflicts with controlling Supreme Court authority, particularly *Rutherford Food*. And Farmworker Justice stated that the NPRM’s description of *Rutherford Food* was “fatally flawed,” “misstate[d] the facts and holding” of that decision, and was “wrong when it states that the ... Court’s invocation of the ‘suffer or permit’ definition in section 3(g) was merely to determine whether the [workers] were independent contractors rather than employees.”

Having considered the comments, the Department adopts as proposed the interpretation that section 3(d) is the statutory basis for determining joint employer status under the Act.

On the one hand, section 3(e) defines an “employee” to mean “any individual employed by an employer.” 29 U.S.C 203(e)(1). This definition, by its plain terms, focuses on the individual’s status as an employee or not under the Act. However, in the first joint employer scenario, the individual’s status as an employee is unquestioned. In the first scenario, the individual is an employee of one employer whose work for that employer happens to simultaneously benefit another person, and the issue is whether that other person is also the employee’s employer. Moreover, section 3(e)—not section 3(d)—incorporates the Act’s definition (in section 3(g)) of “employ” as including “to

suffer or permit to work.” *Compare* 29 U.S.C. 203(e)(1) (defining “employee” as, with certain exceptions, “any individual *employed* by an employer) *with* 29 U.S.C. 203(d) (using neither “employ” nor “employed”) (emphasis added). As the Supreme Court has ruled, the Act’s definition of “employ” was a rejection of the common law standard for determining who is an employee under the Act in favor of a broader scope of coverage. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (“[T]he FLSA ... defines the verb ‘employ’ expansively to mean ‘suffer or permit to work.’”

This ... definition, whose striking breadth we have previously noted, stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”) (citations omitted); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) (“But in determining who are ‘employees’ under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, 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.”) (citations omitted). Thus, sections 3(e) and 3(g) determine whether an individual worker is an employee under the Act.

On the other hand, section 3(d) defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. 203(d). This language, by its plain terms, contemplates an employment relationship between an employer and an employee, as well as another person who may be an employer too—which exactly fits the first joint employer scenario under the Act. In that scenario, there is unquestionably an employee employed by an employer, and the issue is

whether another person is an employer as well. This language from section 3(d) makes sense only if there is an employer and employee with an existing employment relationship and the issue is whether another person is an employer. Indeed, among the Act's definitions, only this language from section 3(d) contemplates the possibility of a person in addition to the employer who is also an employer and therefore jointly liable for the employee's hours worked.

The courts' decisions in *Falk* and *Bonnette* support focusing on section 3(d) as determining joint employer status. In *Falk*, it was "clear that the maintenance workers [were] employees of the building owners." 414 U.S. at 195. The issue thus was whether another person (D & F) was "also an 'employer' of the maintenance workers under [section] 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.'" *Id.* (quoting 29 U.S.C. 203(d)). The Court did not mention section 3(g), and although it referenced section 3(e), it squarely focused on section 3(d) and whether the other person was an "employer" as determining the inquiry. *Id.* The Court concluded: "In view of the expansiveness of the Act's definition of 'employer' and the extent of D & F's managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition, an 'employer' of the maintenance workers." *Id.* Similarly, *Bonnette* framed the issue as whether additional persons were jointly responsible to the employees under the Act, identified and discussed the definition of "employer" under section 3(d) as determining the additional persons' joint responsibility, did not mention sections 3(e) or 3(g), and "conclude[d] that, under the FLSA's liberal definition of 'employer,' the

[additional persons] were employers of the [employees],” *i.e.*, “joint employers.” 704 F.2d at 1469–1470.

*Rutherford Food* is not contrary to this statutory interpretation separating sections 3(e) and (g) from section 3(d). In *Rutherford Food*, the focus was on whether the workers were employees under the FLSA or independent contractors: the Department argued that the workers were “within the classification of employees, as that term is used in the Act,” the district court disagreed and ruled “that they were independent contractors,” and the court of appeals reversed because “the test for determining who was an employee under the Act was not the common law test of control,” and the underlying economic realities showed that the workers were employees. 331 U.S. at 726–27. The Court cited in a footnote the Act’s definitions of “employer,” “employee,” and “employ,” *see id.* at 728 n.6, but in determining the workers’ status as employees or independent contractors, it relied only on section 3(g): “The definition of ‘employ’ is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act.” *Id.* at 728. Looking at “the circumstances of the whole activity,” the Court concluded: “While profits to the [workers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these [workers] were employees of the slaughtering plant under the Fair Labor Standards Act.” *Id.* at 730. *See also id.* at 729 (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”). Indeed, the Court in *Darden* later discussed *Rutherford Food* in the context of

whether certain workers were employees or not and explained how section 3(g) means that the scope of who is an employee under the Act is broader than under other statutes. *See* 503 U.S. at 325–26. The *Darden* Court noted that *Rutherford Food* “adopted a broad reading of ‘employee’ under the [Act],” cited *Rutherford Food* to state that “[t]he definition of ‘employee’ in the [Act] evidently derives from the child labor statutes,” and further cited *Rutherford Food* to conclude that the “striking breadth” of section 3(g)’s definition of “employ” “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” *Id.*

Finally, the statements in the proposed rule and the final rule that another person “is the employee’s joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee” and the citation to section 3(d) make explicitly clear that section 3(d)—not sections 3(e) or 3(g)—is the statutory basis for determining joint employer status under the Act.

For all of the foregoing reasons, the Department has not made any changes in the final rule to the first two sentences of proposed § 791.2(a)(1).

D. *Requests to Adopt the National Labor Relations Act Standard*

A few comments requested that the Department adopt as the joint employer standard under the FLSA the standard that once existed under the National Labor Relations Act (NLRA), or that the Department harmonize its FLSA standard with the NLRA standard. For example, the National Association of Professional Employer Organizations stated that “the test for joint employment should focus on the actual exercise of [direct and immediate] control over the essential terms and conditions of

employment of an employee.” *See also* National Association of Convenience Stores. In other words, as the National Association of Professional Employer Organizations explained, these comments seek application of the standard that the National Labor Relations Board (NLRB) applied under the NLRA “for decades prior to [its *Browning-Ferris* decision], and [which it] presently is proposing to adopt ... in a notice of proposed rulemaking.” A few other comments that generally supported the proposed rule nonetheless referenced a direct and immediate control standard or requested that the FLSA standard be harmonized with the NLRA standard or all federal law standards. *See, e.g.,* National Association of Truckstop Operators; National Association of Home Builders (NAHB); National Federation of Independent Business. Finally, International Franchise Association, in addition to supporting the proposed rule, recommended adopting, “at least in connection with franchising,” “the common law ‘instrumentality’ test” asking whether the potential joint employer has control over the specific behavior or condition of employment relevant in the given case.

The Department rejects these requests because they have no legal basis. As an initial matter, the NLRA defines “employer” differently from the FLSA<sup>53</sup> and does not define “employ” at all.<sup>54</sup> In addition, the NLRB independently enforces the NLRA; the Department has no role in enforcing the NLRA. And although the Court in *Rutherford Food* suggested (over seventy years ago) that NLRA decisions may be “persuasive” when

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<sup>53</sup> Compare 29 U.S.C. 152(2) with 29 U.S.C. 203(d).

<sup>54</sup> Compare *Browning-Ferris Indus. of Cal., Inc. v. Nat’l Labor Relations Bd.*, 911 F.3d 1195, 1206 (D.C. Cir. 2018) (“[T]he National Labor Relations Act’s test for joint-employer status is determined by the common law of agency[.]”) with *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (“The test of employment under the [Fair Labor Standards] Act is one of ‘economic reality[.]’”).

deciding similar FLSA matters, 331 U.S. at 723–24, the NLRA decision cited by the Court was abrogated by Congressional amendments to the NLRA. *See Darden*, 503 U.S. at 324–25 (discussing Congressional amendments to the NLRA as a result of *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). Congress did not similarly amend the FLSA as a result of *Rutherford Food*. Finally, as discussed above, Congress rejected the common law standard when enacting the FLSA. *See Darden*, 503 U.S. at 326; *Portland Terminal*, 330 U.S. at 150–51. For all of the foregoing reasons, the Department has not made any changes in the final rule in response to these comments.<sup>55</sup>

E. *Determining Joint Employer Status in the First Scenario (One Set of Hours Worked)*

Current part 791 determines joint employer status by asking whether two or more persons are or are not “completely disassociated” with respect to the employment of the employee.”<sup>56</sup> The proposed rule explained that this standard is not helpful for determining 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 one set of hours in a workweek, and that work simultaneously benefits another person (for example, where the employer is a subcontractor or staffing agency, and the other person is a general contractor or staffing agency client). *See* 84 FR 14046–47. In this scenario, the employer and the other person are almost never “completely disassociated.” *Id.* As noted in the NPRM, the “not completely disassociated” standard may therefore suggest

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<sup>55</sup> This final rule provides the standards for determining joint employer status under the FLSA. The Department will continue to use the standards in its MSPA joint employer regulation, 29 CFR 500.20(h)(5), to determine joint employer status under MSPA, and will continue to use the standards in its FMLA joint employer regulations, 29 CFR 825.106, to determine joint employer status under the FMLA.

<sup>56</sup> 29 CFR 791.2(a) (2019).

that these situations always result in joint employer status, contrary to long-standing policy. *Id.* Thus, the Department proposed to replace the language of “not completely disassociated” as the standard in such scenarios with a four-factor balancing test derived (with modification) from *Bonnette*, 704 F.2d 1465. *See* 84 FR 14047–48. The four proposed factors considered whether the potential joint employer hires or fires the employee; supervises and 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. *Id.* The NPRM also clarified that the factors were intended to focus on the economic realities of the potential joint employer’s exercise of control over the terms and conditions of the employee’s work. 84 FR 14048.

The Department received robust commentary from a range of stakeholders concerning how to determine joint employer status in the first scenario (one set of hours worked). Below, the Department first addresses comments received regarding the four-factor balancing test, discussing each factor and the final adopted language for the test itself. The Department then discusses the application of the four-factor test and limits on the consideration of additional factors. Finally, the Department provides specific guidance concerning factors and business practices that should be excluded from the analysis, which it believes will provide additional clarity.

1. *The Four-Factor Balancing Test*

Employers and employer representatives widely expressed general support for the adoption of the proposed four-factor balancing test, agreeing that it would provide necessary uniformity, clarity, and certainty for businesses. For example, the HR Policy Association commented that the “Department’s proposed rule, and in particular its

proposed four-factor test, and related guidance expressly identifying key considerations and factors that are relevant and are not relevant, finally fill in the space where businesses confront joint employer issues today.” *See also* Center for Workforce Compliance (“CWC supports the four factor balancing test that DOL has proposed[.]”); Restaurant Law Center and the National Restaurant Association (RLC & the Association) (agreeing “that a multi-factor balancing test is appropriate”); Electronic Security Association (“[T]his four-factor balancing test as outlined will give more clarity and provide courts with firm guidance[.]”); National Council of Agricultural Employers (praising the “four-factor balancing test set forth in” *Bonnette* as “provid[ing] clarity and order”); NAHB (expressing support for the four-factor balancing test). Additionally, commenters noted that this increased clarity would, in turn, promote new and innovative business partnerships and allow for best practices within industries. The National Association of Truckstop Operators commented that the proposed test “would enable NATSO’s members—large and small—to enter into a variety of business relationships with certainty as to whether they may be held responsible for another entity’s employees. They would know that they could provide high-level requirements for their business partners’ employees (*e.g.*, minimum training levels, inspection and delivery methods, *etc.*) and not be considered joint employers provided they do not affect the *terms and conditions of employment* (*e.g.*, hiring, firing, work schedules, wages, *etc.*).” Associated Builders and Contractors explained that inconsistent court rulings “have confused and frustrated efforts of construction employers to maintain longstanding industry practices that have allowed the industry to perform services on a cost-efficient basis, but which are now placed in

jeopardy by the over-broad joint employer standard espoused by some courts and the increased litigation costs resulting from the judicial confusion.”

Employer representatives commented that there was support among circuit court rulings for using these particular factors. The National Retail Federation stated that the “*Bonnette* test has been used for decades by the plurality of U.S. Courts of Appeals, and if adopted, would provide employers with certainty and stability in how the joint employer standard applies to their operations and business relationships.” SHRM agreed, commenting that by “ensuring that the inquiry is directed at a putative joint employer’s *actual control* over critical terms of employment, the proposal stands on solid ground statutorily, and is consistent with the relevant Supreme Court authority.” The International Franchise Association noted that the “*Bonnette* test has stood the test of time and provides the clearest guidance to employers and employees attempting to determine which business entities are or are not joint employers under specific circumstances.” The U.S. Chamber of Commerce further stated that the proposed test would help “rein in courts that have judicially expanded the scope of joint employer liability beyond Congress’s intent” by providing uniformity and properly focusing only on the FLSA’s definition of “employer” to determine joint employer status, rather than the broader definition of “employ.”

The Retail Industry Leaders Association (RILA) and Society of Independent Gasoline Marketers of America expressed general support, but expressed concern that the proposal may be read to indicate that satisfying any single factor would be sufficient to confer joint employer status, and these commenters requested that the Department specify that establishing one factor will typically not be sufficient.

Employee representatives, workers, and worker advocacy groups generally opposed the proposed four-factor test as too restrictive and commented that using this test would harm workers, particularly vulnerable and low-wage workers. *See, e.g.*, Greater Boston Legal Services (“Arbitrarily narrowing the standard to make it more difficult for employees to hold their actual employers accountable for FLSA violations will particularly harm low-wage workers and workers engaged in piecemeal, temporary, or contingent labor.”); NELA (“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.”); Legal Aid Justice Center (“If enacted, the Proposed Rule would cause grievous harm to Virginia’s poorest and most vulnerable workers.”).

Many of these commenters contended that the Department’s proposed test is inconsistent with case law. Southern Migrant Legal Services disagreed with the NPRM’s statement that the proposed four-factor test “finds considerable support in the plurality of circuit courts that already apply similar multi-factor, economic realities tests” and stated that this assertion “badly misstates the law.” Commenters noted that not a single circuit court has adopted the test as precisely formulated by the Department. *See, e.g.*, Coalition of State AGs (“The Proposed Rule incorporates a four-factor test that no court has articulated or implemented and is more restrictive than current joint-employment standards.”). The AFL-CIO also addressed the Department’s legal analysis, commenting that the NPRM misreads *Bonnette* because the court in that case explicitly noted that the circumstances of the whole activity must be considered, not exclusively the four factors; the AFL-CIO noted further that *Bonnette* has been criticized or rejected by several other circuit courts, including the Ninth Circuit. Greater Boston Legal Services commented that

the Department’s proposed test would “wipe out decades of court precedent and create confusion and prolonged litigation. The Department has departed from *Bonnette* and prevailing First Circuit decisions in two ways—by altering the four-prong *Bonnette* test and by adding a series of additional proposals that further restrict criteria that courts may consider when determining joint employment status.”

Commenters also opined that the four-factor test was contrary to Congressional intent, and instead, courts must consider all relevant facts in view of the case law, statutory text, and legislative history. *See, e.g.*, National Women’s Law Center (asserting that it would be contrary to Congressional intent and the language of the FLSA to limit the joint employer inquiry to just the *Bonnette* factors); Low Wage Worker Legal Network (same). Senator Patty Murray stated that because “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.”

Additionally, many commenters stated that the proposed four-factor test was contrary to the plain language of the Act and its broad definitions of “employ” and employee.” *See, e.g.*, 14 U.S. Senators (“But DOL proposes to ignore the plain language of the statute, inventing a new and extremely restrictive standard that employees would have to show to hold their employers liable for abuses for which Congress intended them to be responsible.”); NELP (“[C]ontrolling Supreme Court and Circuit Court authority conflicts with DOL’s novel and unsupportable proposition that the definition of ‘employ’ in section 203(g) does not authorize a court to find joint employment.”). These concerns are addressed in the textual basis discussion of this preamble, *supra*, in which the

Department explains its interpretation of section 3(d) and why it is the most appropriate textual basis for analyzing whether an entity is a joint employer under the Act.

In addition to commenting on the proposed four-factor test generally, commenters also addressed the factors individually. Comments received regarding each individual factor follow below.

Commenters specifically remarked upon the Department's modification of the *Bonnette* test regarding the first factor. The Department proposed that the first factor should be narrowed to consider only whether the potential joint employer hires or fires the employee, rather than whether the potential joint employer has the "power" to hire or fire the employee (as *Bonnette* articulates the factor). Employer representatives supported the modification to require an actual exercise of control in this regard, stating that this would provide clarity for employers and encourage and increase innovative business agreements. For example, the U.S. Chamber of Commerce noted that the change reflected the "recognition that actual control, rather than reserved control, must exist for a joint employee-employer relationship to arise" and that "[i]t is also consistent with the Rule's statement that the facts of the relationship between the employee and employer, rather than the structure of the relationship between cooperating businesses, should govern." Several commenters endorsed the NPRM's assertion that evaluating whether an entity "act[ed]" to exercise control would be consistent with the text of section 3(d) of the Act. *See, e.g.*, RLC & the Association (agreeing that the proposed modification is consistent with section 3(d) and that "[i]f there is no action by the alleged joint employer, then Section 3(d) does not apply, and there can be no joint employment relationship.").

Employee representatives opposed this proposed factor, commenting that by only considering as relevant whether a potential joint employer actually exercises its power to hire and fire, the Department would be in conflict with every court, and would be narrowing the test to be even more restrictive than the common law. *See, e.g.*, Advocates for Basic Legal Equality (“Even under the more restrictive common-law employment test, the DOL’s proposal is too narrow: it fails to consider the right to control, a cornerstone of common-law employment determinations under long-standing Supreme Court and FLSA law.”); NELP (“The restrictive common law control test requires only a showing of the ‘right’ to control, not its exercise.”). Additional discussion concerning the actual exercise of control versus the reserved right to control is included *infra*.

Regarding the second factor, whether the potential joint employer supervises and controls the employee’s work schedule or conditions of employment, several commenters asked the Department to clarify or narrow what is meant by “conditions of employment.” For example, the HR Policy Association suggested that the proposed factor be limited to considering whether the potential joint employer “[s]upervises and controls the employee’s individual work schedule or the employee’s particular, day-to-day tasks.” Similarly, the Retail Industry Leaders Association suggested that the factor be limited to mean “specific hours worked and specific assigned tasks.” *See also* National Retail Federation (same); RLC & the Association (recommending “that a substantial frequency requirement be included in the definition and/or examples with respect to the second factor. Preferably, this would be a ‘day-to-day’ frequency requirement”).

There were few comments specifically addressing the third factor, whether the potential joint employer determines the employee’s rate and method of payment.

There were a number of comments, primarily from employer representatives, concerning the fourth factor, which considers whether the potential joint employer maintains the employee's employment records. Some commenters asked the Department to provide additional guidance regarding what qualifies as maintenance of employment records for purposes of the fourth factor and whether this factor alone can lead to a finding of joint employment. *See, e.g.*, NACS; NAPEO; RLC & the Association; SHRM. Some commenters suggested that records related to the employer's compliance with contractual agreements identified in this rule as not making joint employer status more or less likely should not qualify as employment records under the fourth factor. *See* CDW. Others suggested that for purposes of satisfying the fourth factor, only those records that pertain to the first three factors should be employment records. *See* RILA; SHRM. Commenters also queried whether maintenance of records under the fourth factor means something more than mere possession of or access to those records. *See* SHRM. Finally, some commenters suggested that the fourth factor be deleted in the final rule. *See* NACS; NAPEO; RLC & the Association.

After review and careful consideration, the Department adopts the proposed four-factor balancing test, derived from *Bonnette* and supported by other case law, as the test for analyzing joint employer status under this scenario, with a revision to the supervision and control factor and additional guidance regarding the maintenance of employment records factor. The Department believes that these four factors—which weigh the economic reality of the potential joint employer's control, direct or indirect, over the employee—are not only the most relevant factors to the joint employer analysis, but also afford stakeholders greatly needed clarity and uniformity.

As a matter of statutory interpretation, these factors are fully consistent with the text of section 3(d) of the Act. As explained in detail *supra*, the Department believes that language in section 3(d) is the textual basis for joint employer status. When another person exercises control over hiring and firing, schedules, conditions of employment, rate and method of payment, and employment records, that person is “acting . . . in the interest of” the employer “in relation to” the employee, as contemplated by section 3(d). Recognizing this provision, *Bonnette* adopted a similar four-factor test to determine whether a potential joint employer is liable. Contrary to some comments, these factors are consistent with Supreme Court and circuit court precedent. The Supreme Court concluded in *Falk*, 414 U.S. at 195, that pursuant to section 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 four-factor balancing test, which weighs the potential joint employer’s exercise of control over certain terms and conditions of the employee’s work, uses the same reasoning as *Falk* to determine joint employer status under section 3(d). In *Falk*, the Court explained that “[i]n view of the expansiveness of the Act’s definition of ‘employer’ [in section 3(d)] and the extent of D & F’s managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition [in 3(d)], an ‘employer’ of the maintenance workers.” 414 U.S. at 195.

Additionally, multiple circuit courts have adopted multi-factor balancing tests derived from *Bonnette* in order to analyze potential joint employer scenarios. The First and Fifth Circuits apply the *Bonnette* test, which is very close to the Department’s

proposed test. See *Baystate*, 163 F.3d at 675–76; *Gray v. Powers*, 673 F.3d 352, 355–57 (5th Cir. 2012). Although *Gray* involved whether an individual owner of the employer corporation was jointly liable under the FLSA, the court noted that it “must apply the economic realities test to *each individual* or entity alleged to be an employer and each must satisfy the four part test.” 673 F.3d at 355 (emphasis added) (quotation marks and citation omitted).<sup>57</sup> The Third Circuit also applies a similar four-factor test that considers whether the potential joint employer has the authority to hire and fire, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; it also considers whether the potential employer exercises day-to-day supervision, including employee discipline; and controls employee records, including payroll, insurance, and tax records. See *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 469–71 (3d Cir. 2012). As the Third Circuit noted, “[t]hese factors are not materially different” from the *Bonnette* factors, which are not significantly different from the Department’s adopted factors. *Id.* at 469. The Seventh Circuit has also suggested that joint employment depends on the measure of control exercised over the employee and that the *Bonnette* factors are relevant when assessing control. See *Moldenhauer v. Tazewell-Pekin Consol. Commc’ns Ctr.*, 536 F.3d 640, 643–45 (7th Cir. 2008) (FMLA case addressing joint employment and using FLSA principles).

The Department, of course, acknowledges that several other circuits currently apply varying joint employer tests. Indeed, this variance across the country is one of the

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<sup>57</sup> Two older Fifth Circuit decisions applied a different test to determine whether an entity was a joint employer under the Act, and the Fifth Circuit has not yet overruled those decisions—creating some uncertainty about what joint employer test applies in the Fifth Circuit. See *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237–38 (5th Cir. 1973); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669–70 (5th Cir. 1968).

primary reasons for this rulemaking; by promulgating a clear and straightforward regulation, the Department hopes to encourage greater consistency for stakeholders. Of the circuits that apply different joint employer tests, however, each of them applies at least one factor that resembles one of the factors from the Department's test. In *Salinas*, 848 F.3d at 141–42, three factors of its six-factor test are similar to *Bonnette* factors; in *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1176 (11th Cir. 2012), more than half of the factors in its eight-factor test are similar to *Bonnette* factors, and in *Torres-Lopez*, 111 F.3d at 639–40, the court applied factors similar to the *Bonnette* factors but also added eight additional factors for consideration. *See also Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 71 (2d Cir. 2003) (acknowledging that the *Bonnette* factors can be sufficient to establish joint employer status, although a six-factor test with one factor resembling one of the *Bonnette* factors applies if the *Bonnette* factors do not establish joint employer status).<sup>58</sup>

Moreover, these factors are simple, clear-cut, and easy to apply. One of the most prevalent themes among the comments from employer representatives was the great need for clarity and consistency in this area of the FLSA. The Department believes that the greater the number of factors in a multi-factor test, the more complex and difficult the analysis may be in any given case, and the greater the likelihood of inconsistent results in other similar cases. By using factors that focus on the exercise of control over the most essential and common terms and conditions of employment, the Department believes its

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<sup>58</sup> The Second and Fourth Circuits rejected the *Bonnette* test as the only test and the test, respectively, because they did not believe it could be reconciled with the broad “suffer or permit” standard of the Act. Because, however, the Department believes that section 3(d), not section 3(g), is the touchstone for joint employer status, a *Bonnette*-based four-factor balancing test is preferable and consistent with the text of that statutory provision.

proposed test will assist stakeholders, as well as courts, in determining FLSA joint employer status with greater ease and consistency. This simplicity will provide greater certainty to both employers and workers as to who is and is not a joint employer under the Act, before any investigation or litigation begins.

Regarding the first factor specifically, the Department is adopting the factor considering whether the potential joint employer hires or fires the employee as proposed. The Department also adopts the third factor as proposed.

Regarding the second factor, supervision and control over schedules or conditions of employment to a substantial degree, the Department believes that the majority of existing legal precedent does not support commenters' suggestion to limit supervision to a day-to-day basis to indicate joint employer status. Circuit courts articulate different tests, but they all agree that only supervision of a sufficient degree is indicative of joint employer status.<sup>59</sup> For example, under the Third Circuit's joint employer test, supervision is one probative factor in favor of finding joint employer status to the extent it constitutes "day-to-day" involvement.<sup>60</sup> While several courts outside of the Third Circuit have rejected a finding of joint employer status after noting the lack of day-to-day supervision,

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<sup>59</sup> *Salinas*, 848 F.3d at 150 (noting that the putative joint employer "went beyond double-checking to verify that the task was done properly," amounting to "extensive supervision ... indicative of an employment relationship, rather than an assessment of compliance with contractual quality and timeliness standards" (citations and some punctuation omitted)); *Zheng*, 355 F.3d at 74–75 ("Although *Rutherford* indicates that a defendant's extensive supervision of a plaintiff's work is indicative of an employment relationship, *Rutherford* indicates also that such extensive supervision weighs in favor of joint employment only if it demonstrates effective control of the terms and conditions of the plaintiff's employment." (citations omitted)); *Layton*, 686 F.3d at 1179 ("[I]nfrequent assertions of minimal oversight do not constitute the requisite degree of supervision." (citation omitted)); *In re Enter.*, 683 F.3d 462, 468 (3d Cir. 2012) (requiring "involvement in day-to-day employee supervision").

<sup>60</sup> *In re Enter.*, 683 F.3d at 469.

those courts did not explicitly hold that day-to-day supervision was necessary for joint employer liability.<sup>61</sup> The Department notes that a “day to day” analysis may be a reasonable means to distinguish between “extensive supervision [that] ... is indicative of an employment relationship” and limited supervision that “has no bearing on the joint employment inquiry,” such as “supervision with respect to contractual warranties of quality and time of deliver” and other “supervision [that] is perfectly consistent with a typical, legitimate subcontracting arrangement.”<sup>62</sup> Nonetheless, a general point of agreement among courts is that only substantial supervision is indicative of joint employer status. Accordingly, the Department is revising § 791.2(a)(1)(ii) to state: “Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree.”

Additionally, in response to comments received, the Department is modifying the regulatory language in § 791.2(a)(3), discussed *infra*, to explain that evidence of a right to control regarding the first, second, and third factors may have some relevance to a joint employer analysis.

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<sup>61</sup> See, e.g., *Johnson v. Serenity Transp., Inc.*, 141 F. Supp. 3d 974, 992 (N.D. Cal. 2015) (finding against joint employer status where, “for example, there are no allegations here that the Customer Defendants were involved in day-to-day oversight of driver’s work”); *Hugee v. SJC Grp., Inc.*, No. 13 Civ. 0423(GBD), 2013 WL 4399226, at \*6 (S.D.N.Y. Aug. 14, 2013) (“In the economic realities test, the pertinent inquiry is whether the purported joint employer exercised control over the employee’s day-to-day conditions of employment.” (quotation marks omitted)); *Zampos v. W & E Commc’ns, Inc.*, 970 F. Supp. 2d 794, 806 (N.D. Ill. 2013) (“Relevant factors in determining whether a joint-employer relationship exists include ... actual day-to-day supervision and direction of employees on the job.”); *Jean-Louis v. Metro. Cable Commc’ns, Inc.*, 838 F. Supp. 2d 111, 127 (S.D.N.Y. 2011) (finding no joint employer status where the “evidence does not show that Time Warner controls the day-to-day manner in which technicians provide ... service”).

<sup>62</sup> *Zheng*, 355 F.3d at 75.

Given the breadth of comments addressing the maintenance of employment records, the Department agrees this fourth factor needs additional clarification. Courts have frequently looked to maintenance of employment records as one of many factors appropriate for consideration in determining potential joint employer status.<sup>63</sup> As such, the Department declines commenter requests to delete the fourth factor. However, courts have not found joint employer status when maintenance of employment records is the only evidence to support such a finding.<sup>64</sup> In line with case law and Department practice, the Department has added regulatory language clarifying that, although the maintenance of employment records is a relevant factor, satisfaction of the fourth factor alone cannot lead to a finding of joint employer status. The Department is also adding regulatory language narrowing the scope of “employment records” to those records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the first three factors (*i.e.*, hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment). Further, unless they are part of any of the above categories, records maintained by the potential joint employer related to the employer’s compliance with contractual agreements identified in sections (d)(3) and (4) of this final rule as not making joint employer status more or less likely under the Act are not employment records for purposes of the fourth factor.

For all of the foregoing reasons, the Department adopts § 791.2(a)(1) as proposed, but has added a new paragraph codified at § 791.2(a)(2) providing guidance regarding application of the fourth factor.

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<sup>63</sup> See, *e.g.*, *Bonnette*, 704 F.2d at 1470.

<sup>64</sup> See *Maddock v. KB Homes, Inc.*, 631 F. Supp. 2d 1226, 1234 (C.D. Cal. 2007); *Beck v. Boce Group, L.C.*, 391 F. Supp. 2d 1183, 1191 (S.D. Fla. 2005).

## 2. *Application of the Four-Factor Balancing Test*

In addition to comments regarding the NPRM's proposed factors, the Department also received comments addressing how those factors should be applied or analyzed. In the proposed rule, the Department explained that the four factors comprised a balancing test, and that the factors were intended to focus on the economic realities of the potential joint employer's exercise of control over the terms and conditions of the employee's work.

The proposed regulatory text (§ 791.2(a)(2) of the NPRM) explained that the potential joint employer must actually exercise one or more indicia of control (either directly or indirectly) in order to be jointly liable, and the potential joint employer's power or reserved contractual right to exercise a form of control over the employee is not relevant to the analysis. The text also stated that no one factor of the joint employer test is dispositive; rather, whether a person is a joint employer depends on an evaluation of all the facts in a given case, and the weight given to each factor will vary depending on the circumstances of a particular case.

The NPRM's preamble explained that the Department was proposing a four-factor balancing test, which would weigh the potential joint employer's exercise of control over the terms and conditions of the employee's work. The Department further explained that the four proposed factors were intended to weigh the economic reality of the potential joint employer's active control, direct or indirect, over the employee.

Commenters questioned certain aspects of how the factors should be considered or analyzed. For example, the National Association of Truckstop Operators requested that the Department "clarify that all four factors of the test must be met to indicate joint

employment.” *See also* Society of Independent Gasoline Manufacturers of America (“In the final rule, the Department should clarify that whether a person is a joint employer under FLSA depends on whether all four factors of the test have been met given the totality of circumstances.”) Seyfarth Shaw expressed concern that the proposed regulatory language could “be misconstrued by enforcement personnel or courts to suggest that any single factor ... could suffice to confer joint employer status.”

The Department also received numerous comments from both employer and employee representatives regarding the proposed regulatory language stating that 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.”

Employer representatives praised the requirement of an actual exercise of control, and applauded the proposal’s statement that reserved rights to control should not be considered relevant to the analysis. The National Retail Federation commented that it “strongly agrees with the Department’s view that reserved but unexercised control should not affect joint employer status.” The Coalition for a Democratic Workforce noted that the emphasis on the actual exercise of control “is also consistent with Section 3(d) of the Act.” *See also* Retail Industry Leaders Association (“This modification is consistent with the FLSA’s statutory admonition that a person or entity must “act[.]” in the interest of an employer in relation to an employee to be an employer under the FLSA.”) (citation omitted).

Employer representatives also appreciated that the requirement of active control would be “similar to the test proposed by the National Labor Relations Board ... related to the National Labor Relations Act ... which would provide more uniformity among

federal employment laws.” *See* CDW. Similarly, the National Federation of Independent Business also “welcomed” the Department’s proposal and commented that the proposed language “harmonizes with the NLRB’s pending proposal” and as such, “[s]mall 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.”

SHRM commented that the proposal would be very helpful in clarifying employer obligations, because “actual exercise of power demonstrates control with a clarity that latent power can never achieve. By focusing on the actual exercise of power, the Department allows businesses to understand their FLSA obligations without worrying that the existence of boilerplate reservations of rights (*e.g.*, to terminate an employee of a staffing agency) or similar rarely-or-never-used contractual provisions might unexpectedly trigger overtime obligations for a group of workers who were never anticipated to be employees (of the secondary employer).” The U.S. Chamber of Commerce also supported the requirement for active exercise of control because, among other things, it is “consistent with the Rule’s statement that the facts of the relationship between the employee and employer, rather than the structure of the relationship between cooperating businesses, should govern.” The Chamber explained that routine contractual reservations of control, such as contractual clauses that require contractors or business partners to meet certain goals and enforce certain criteria regarding their employees, “are not probative of the relationship between the employer and the putative employee – the

touchstone of the joint employer analysis—if the putative employer never exercises such control.”

Employee representatives expressed strong opposition to the elimination of reserved rights of control from the joint employer analysis. Several commenters stated that the proposed elimination of the reserved right to control would be contrary not only to the Act, but also to the common law. The AFL-CIO, relying in part on sections 2 and 220 of the Restatement (Second) of Agency, stated that the common law “clearly recognizes reserved control as relevant to determining if an employment relationship exists.” Relatedly, NELP commented that “[t]he common law test for employment and joint employment does not require control to be exercised, direct, and immediate; only that the proposed joint employer have the right to control how the work is done.” NELP further observed that the NPRM narrows *Bonnette*’s common-law factors to an even narrower test, an interpretation under which “even many single-company direct employees would not be considered employees, despite the fact that they would be considered employees under the common law agency doctrine.” Sen. Patty Murray commented that “[t]he 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” and stated that the Department’s rationale for the proposal had “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.”

The AFL-CIO discussed a number of Supreme Court and circuit court cases recognizing reserved right to control in employment cases, and concluded that

“considering a putative joint employer’s right of control relevant to the analysis is mandated by the common law and the Department cannot establish a standard narrower than the common law.” *See also* NELP (“The DOL has no authority to so restrict settled law.”); SEIU (discussing federal court decisions applying section 3(g) that recognize that a company’s right, power or ability to exercise control over an individuals’ wages, hours and/or working conditions is relevant to determining if the company employs that worker). Greater Boston Legal Services commented that “[h]aving the ability, albeit unrealized, to fire an employee is clearly a mechanism of control over the nature of the relationship between the employee and the putative employer.” GBLS continued, stating that because the Department’s proposal requires actual, exercised control, “under many conceivable circumstances will result in very different outcomes from cases analyzed under *Baystate*,” a case upon which the Department relied in the NPRM.

Referring to the Department’s 1997 MSPA rulemaking, 62 FR 11739 (Mar. 12, 1997), Southern Migrant Legal Services commented that the proposed regulation “represents a complete reversal of the Department’s position the last time it engaged in rulemaking regarding joint employer status.” SMLS stated that in that rulemaking, the Department rejected limiting control to an actual exercise of control, and concluded that where an employer retains any right to control the workers or the work, this would constitute control indicative of an employment relationship.

Additionally, several commenters requested that the Department clarify the limits of indirect control. *See* Seyfarth Shaw; RLC & the Association; Coalition for a Democratic Workplace; National Retail Federation; Retail Industry Leaders Association; World Floor Covering Association. For example, Seyfarth Shaw warned that, absent

limiting principles, the “‘indirectly’ modifier could invite litigation in a wide array of circumstances,” such as where “a shipping facility indirectly controls a worker’s schedule by cutting back on its staffing needs during a slow period, or that it indirectly fires a worker by relaying to the direct employer that the worker violated a rule.” *See also* RILA (“this modifier could invite litigation whether a particular action by a ‘benefited entity’ constitutes ‘indirect’ actual exercise of one of the *Bonnette* factors”). Seyfarth further requested that the Department “clarify that a benefited entity’s legitimate business decision that has *incidental* impact on a worker’s employment does not constitute acting indirectly in the interest of the employer.”

Other commenters agreed. *See* RILA; RLC & the Association. RLC & the Association explained their concern regarding indirect control in the context of when a restaurant “contract[s] out for cleaning services.” According to these commenters, “[i]f an individual whom the cleaning services assigns to perform that work does not do a good job, does not show up, is rude to the restaurant’s customers, harasses the restaurant’s employees or demonstrates other deficiencies, the restaurant must be able to report that to the cleaning service and to ask that someone else be assigned to perform such services. In this context, it is still the cleaning service’s decision as to whether to fire the employee or assign him or her to some other account.” RLC & the Association thus requested that the Department clarify that “customer preferences and feedback do not constitute [indirect] hiring and firing, and that providing such feedback is not a factor that makes a joint employment relationship more or less likely.”

Upon careful consideration, the Department adopts a modified version of proposed § 791.2(a)(2) in response to the comments received, codified as § 791.2(a)(3) of

this final rule. As an initial matter, as a point of clarification, all four factors need not necessarily be satisfied in order for an entity to be deemed a joint employer. The Department made clear in its proposal that, consistent with case law, the four factors represent a balancing test. Moreover, as noted many times by the Department and now embodied in this regulation, whether a person is a joint employer under the Act will depend on how all the facts in a particular case are tied to the factors, and the appropriate weight to give each factor will vary depending on the circumstances.

In addition, the regulation now makes clear that an actual exercise of control, directly or indirectly, is required for at least one of the factors and is the clearer indication of joint employer status. The regulation also states, however, that a potential joint employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control. For example, if a potential joint employer sets the wage rate for an employee and sets his or her weekly work schedule, and there was also evidence that this entity has authority to fire the employee at any time, then this reserved power would be relevant to the analysis and could properly be considered. The regulation also explains that standard contractual language reserving a right to act is alone insufficient for determining joint employer status; there still must be some actual exercise of control.

This more nuanced approach is responsive to comments stating that the Department proposed a regulation narrower than the common law—this is not the Department's intent. This approach is consistent with the type of fact-specific, totality of circumstances analyses required for potential joint employer scenarios, as well as the

requirement that no single factor is dispositive in determining joint employer status under the Act. Finally, the Department is removing the reference to “economic reality” from § 791.2(a)(3) of the final rule to clarify that the focus of the fact-specific, totality of circumstances analysis that the Department is adopting is to determine joint employer status; “economic reality” is an interpretive principle – not the inquiry itself.

The Department agrees with the commenters that the concept of indirect, actual control requires further clarification. As an initial matter, it is necessary to distinguish direct from indirect control in the context of the first joint employer scenario. A potential joint employer may exercise direct control by, for instance, hiring or firing an employee; setting an employee’s schedule; or determining an employee’s pay. In each case, the inquiry focuses on the relationship between the potential joint employer and the employee. In contrast, indirect control must be exercised through another, intermediary employer. For example, the potential joint employer may exercise indirect control by directing the intermediary employer to fire or hire an employee; set an employee’s schedule; or determine an employee’s pay. In other words, indirect control refers to control that flows from the potential joint employer through the intermediary employer to the employee.

There are two relevant relationships in determining indirect control. The first relationship is between the intermediary employer and the employee: the intermediary employer must exercise direct control over the employee, *e.g.*, by firing, hiring, setting schedules, or determining pay. The second relationship is between the potential joint employer and the intermediary employer: if the potential joint employer directs the intermediary employer’s exercise of control over the employee, indirect control exists.

But agreeing to a mere request or recommendation, alone, is not enough for indirect control, but can be indicative in rare circumstances.

When presented with this scenario, many federal court decisions have drawn a sensible distinction between mandatory directions and mere suggestions or requests when analyzing indirect control.<sup>65</sup> For example, the Third Circuit articulated this distinction in *In re Enterprise* and held that such recommendations are not relevant to joint employer status. In that case, Enterprise Holdings lacked the necessary direct control or authority over a subsidiary’s assistant managers for joint employer status.<sup>66</sup> The plaintiffs sought to demonstrate joint employer status on the basis of indirect control by arguing that Enterprise Holdings “functionally held many of these [authority] roles by way of the guidelines and manuals it promulgated to its subsidiaries.”<sup>67</sup> But the Third Circuit found “no evidence that Enterprise Holdings, Inc.’s actions at any time amounted to mandatory

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<sup>65</sup> See *In re Enter.*, 683 F.3d at 470–71; see also *Martin v. Sprint United Mgmt.*, 273 F. Supp. 3d 404, 436 (S.D.N.Y. 2017) (recognizing that a putative joint employer’s mandatory payments rates would involve the exercise of control over a subcontractors’ field agents rate of payment, but that mere suggestions that the subcontractor could ignore would not show control); *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 309–10 (S.D.N.Y. 2011) (weighing against joint employer status where the facts that a putative joint employer “sometimes makes recommendations on hiring” but the hirer “is free to disregard them,” and there was no other evidence indicating “that her recommendations played a material role”); *Dixon v. Zabka*, No. 3:11-cv-982 (MPS), 2014 WL 6084351, at \*11 (D. Conn. Nov. 13, 2014) (“None of this evidence demonstrates that [the putative joint employer] exercised control over ... wages or method of payment beyond mere suggestions and recommendations. Such evidence is not sufficient to create a genuine issue of fact ....”).

<sup>66</sup> *In re Enter.*, 683 F.3d at 471 (“Enterprise Holdings, Inc. had no authority to hire or fire assistant managers, no authority to promulgate work rules or assignments, and no authority to set compensation, benefits, schedules, or rates or methods of payment. Furthermore, Enterprise Holdings, Inc. was not involved in employee supervision or employee discipline, nor did it exercise or maintain any control over employee records.”).

<sup>67</sup> *Id.*

directions rather than mere recommendations.”<sup>68</sup> Therefore, “[i]nasmuch as the adoption of Enterprise Holdings, Inc.’s *suggested* policies and practices was entirely discretionary on the part of the subsidiaries, Enterprise Holdings, Inc. had no more authority over the conditions of the assistant managers’ employment than would a third-party consultant who made suggestions for improvements to the subsidiaries’ business practices.”<sup>69</sup> The Third Circuit’s reasoning is grounded in common sense: if Enterprise Holdings lacks authority to require a subsidiary to adopt certain employment practices, it could not indirectly require the subsidiary’s employee to adopt such practices. Conversely, courts have been willing to find joint employer status based, at least in part, on indirect control where the potential joint employer does have authority to require the intermediary employer to adopt employment policies and practices not related to quality control, legal obligations, or standards to protect the health and safety of the employees or public.<sup>70</sup>

In short, a potential joint employer exercises indirect control over an intermediary employer’s employee by issuing “mandatory directions” to the intermediary employer. But the potential joint employer’s request for an employment action is rarely evidence of indirect control because the intermediary employer has discretion to grant or refuse the request. In rare circumstances, such as when an intermediary employer repeatedly follows without question a potential joint employer’s requests regarding employees, it

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<sup>68</sup> *Id.* at 470.

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g., Zachary v. Rescare Okla.*, 471 F. Supp. 2d 1175, 1177, 1181 (N.D. Okla. 2006) (finding joint employer status where the parent company “had the authority to exercise control over [the subsidiary’s] employment decisions” and parent’s “executives were actively involved in setting and implementing policies that governed [the subsidiary’s employees]”).

may be inferred that the intermediary employer lacked discretion to refuse those requests, and therefore, indirect control exists.<sup>71</sup> Determining when a potential joint employer's request, recommendation, or suggestion is in effect a mandatory direction can be a complex, fact-specific analysis.

In order to provide clearer guidance, the Department is adding § 791.2(a)(3)(ii) to clarify that “[i]ndirect control is exercised by the potential joint employer through mandatory directions to another employer that directly controls the employee. But the direct employer’s voluntary decision to grant the potential joint employer’s request, recommendation, or suggestion does not constitute indirect control that may demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status.” This language directly responds to commenters’ concerns that a potential joint employer’s complaint concerning a business partner’s employee may indicate joint employer status if the business partner thereafter takes action to discipline or terminate the employee.<sup>72</sup> Seyfarth; RLC and the Association. Under § 791.2(a)(2)(ii),

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<sup>71</sup> Whether and the extent to which a pattern of following recommendations indicates indirect control depends on the circumstances of each case. For instance, blind adherence to repeated recommendations from a company’s sole client may indicate the recommendations were actually mandatory directions. But repeatedly following the recommendations of a consulting firm hired to provide advice regarding employment decisions would not indicate indirect control. *See In re Enter.*, 683 F.3d at 471 (noting that “third-party consultant who made suggestions for improvements to [a client’s] business practices” is an obvious example where joint employer liability would not apply).

<sup>72</sup> The language further responds to commenters’ concerns that general business decisions of a potential joint employer that incidentally impact the employees of the entities with whom it contracts or who are its business partners could indicate joint employer status. For instance, a shipping facility that cuts back on its staffing needs during a slow period may incidentally impact the work schedules of its staffing agency’s employees, but that general business decision would fall short of control over the employees’ work schedules that would indicate joint employer status.

the complaint would be at most a strongly worded suggestion, and any actions taken against the employee would not indicate joint employer status because such actions would have been “entirely discretionary on the part of the” business partner.<sup>73</sup> The result would be the same with respect to joint employer factors other than firing and hiring. For example, a restaurant could request lower fees from its cleaning contractor, which if agreed to, could impact the wages of the cleaning contractor’s employees. But this request would not constitute an exercise of indirect control over the employee’s rate of payment because the cleaning service has discretion to lower its employees’ wages or not.

3. *Limits on Consideration of Additional Factors*

After proposing a four-factor balancing test to determine joint employer status in the first scenario, the proposed rule identified two situations in which additional factors may be considered (§ 791.2(b)) and addressed the role of economic dependence in determining joint employer status (§ 791.2(c)).

i. *Considering Additional Factors*

The proposed rule (§ 791.2(b)) stated that “[a]dditional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer”: (1) exercises “significant control over the terms and conditions of the employee’s work,” or (2) otherwise “act[s] directly or indirectly in the interest of the employer in relation to the employee.” 84 FR 14059. The NPRM’s preamble explained that, “[b]ecause joint employer status is determined by 3(d) ... any additional factors must be consistent with the text of 3(d).” 84 FR 14049. The proposed

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<sup>73</sup> *In re Enter.*, 683 F.3d at 471.

limitation on additional factors parroting section 3(d) differs from the text of section 3(d) by changing “an employer” to “the employer” and “an employee” to “the employee.” *Compare* 29 U.S.C. 203(d) *with* 84 FR 14059. The NPRM’s preamble further explained that “any additional factors indicating ‘significant control’ are relevant because the potential joint employer’s exercise of significant control over the employee’s work establishes its joint liability under Section 3(d).” *Id.* (footnotes omitted) (citing *In re Enter.*, 683 F.3d at 470; *Falk*, 414 U.S. at 195; *Bonnette*, 704 F.2d at 1470).

A few comments expressed explicit support for one or both of the proposed limitations on consideration of additional factors. For example, Independent Association of Franchisees and National Multifamily Housing Council/National Apartment Association “strongly support” the proposed limitations. The U.S. Chamber of Commerce suggested that, “[i]f the answer to the joint employer question is not clear from consideration of [the] four factors, then factfinders can move to ... consider more general indicia of control.” The Chamber did not comment on allowing consideration of additional factors indicating whether the potential joint employer otherwise acts directly or indirectly in the interest of the employer in relation to the employee.

Some comments supported the proposed limited consideration of additional factors but requested modifications. For example, SHRM was supportive but stated that any additional factors “must, in order to ensure consistency both with the four *Bonnette* factors and with the statutory definition of employer under the FLSA, address the *actual* exercise of control,” and urged the Department in the final rule to “specifically identify the types of ‘additional factors’ to be considered” and to “articulate that all ‘additional factors’ to be considered must be consistent with four *Bonnette* factors.” Similarly,

Seyfarth Shaw was supportive but “wonder[ed] whether the phrase ‘additional factors’ could lead courts to consider an overly broad range of factors,” and urged the Department to “clarify that the factors expressly deemed not relevant in the final rule are never permissible ‘additional factors’ for consideration” and that “additional factors should be considered only if, among other things, they are consistent with the other factors set forth in the rule.” World Floor Covering Association requested that the Department define “significant control”<sup>74</sup> and “indirect control” in the context of consideration of additional factors and provided suggested definitions. Washington Legal Foundation requested that the Department not allow consideration of additional factors indicative of whether the joint employer otherwise “act[s] directly or indirectly in the interest of the employer in relation to the employee.” According to WLF, “[t]here is no justification for that alternative basis; if the additional factors do not indicate that [the potential joint employer] is exercising significant control over the terms and conditions of the work of [the employer’s] employees, then it is not relevant to the joint-employer determination.” *See also* Coalition for a Democratic Workplace (suggesting modifications).

Other comments criticized allowing consideration of other factors. For example, FedEx asserted that “no other factors need be introduced” and that permitting consideration of additional factors would “leav[e] the door open for the next generation’s patchwork of judge-made tests to emerge.” FedEx suggested, in the alternative if the final rule allows consideration of additional factors, that the Department clarify that the four factors “are the most important to any joint employer status analysis under the FLSA,”

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<sup>74</sup> The comment used the phrase “substantial control” but presumably meant “significant control” based on the context.

that “any other factor must result from actions that are material to FLSA compliance *and* regular in frequency to the relationship (rather than merely occasional or incidental),” and that any additional factors “carry less weight” than the four factors. Society of Independent Gasoline Marketers of America requested that the Department “remove” or “drastically revise” the provision allowing limited consideration of additional factors because it will “undercut” the clarity that the proposal would otherwise provide, “will inject significant uncertainty into any joint employment analysis (exactly what the Department is looking to do away with here),” and “will likely increase the instances of joint employment litigation.” RLC & the Association “recommend[ed] that no broad catch-alls be added” and was “concerned that having an ‘additional factors’ aspect to the balancing test has the potential to open the floodgates, particularly because the terms ‘significant control’ and ‘acting directly or indirectly’ could be broadly construed.”<sup>75</sup> National Association of Professional Employer Organizations characterized the proposed limits on considering additional factors as an “alternative,” “catch-all” test that would “create[] a much broader analysis for joint employment than is currently recognized by either USDOL or federal courts analyzing the FLSA,” and requested that this alternative test be removed or rewritten. NAPEO expressed particular concerns that there is “no explanation of ‘otherwise acting directly or indirectly in the interest of the employer in relation to the employee,” that “a fair interpretation is that this language is at least as broad as the ‘not completely disassociated’ language currently in the regulations,” and

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<sup>75</sup> National Restaurant Association added, in the alternative: “To the extent additional factors are considered, they should be applied with caution, and it is crucial that the DOL identify in greater detail examples of business practices that should not be given any weight as part of the balancing test.”

that “[t]his language creates an end around argument to apply joint employment in almost any situation.” The National Association of Convenience Stores expressed nearly identical concerns.

A number of comments challenged the proposed limitations, arguing that they were too narrow and lacked any legal basis. For example, NELA asserted that the proposed limitations “contravene[] 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’” (alterations made by commenter). NELA further asserted that “[c]ourts have relied on this principle for decades in determining joint employer status” (citing, *e.g.*, *Bonnette*, 704 F.2d at 1470; *Salinas*, 848 F.3d at 142; *In re Enter.*, 683 F.3d at 469; *Zheng*, 355 F.3d at 71–72).<sup>76</sup> Senator Murray argued that the Department’s reliance on *Falk* and *Bonnette* to support the proposed limitations is misplaced.<sup>77</sup>

In addition, the Coalition of State AGs contended that the proposed limitations on consideration of additional factors “preclude[] consideration of categories of relevant evidence” and are “based on a misreading of *Bonnette*.” As explained by the Coalition of

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<sup>76</sup> To the extent that the Department retains the proposed limitations in the final rule, NELA suggested many revisions.

<sup>77</sup> Specifically, Senator Murray argued: “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.”

State AGs, the court in *Bonnette* acknowledged that, although its four factors “provide a useful framework for analysis in this case, ... 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.’” *Bonnette*, 704 F.2d at 1470 (quoting *Rutherford Food*, 331 U.S. at 730). Finally, SEIU stated that the proposed limitations on considering additional factors are, like the proposed four-factor test, “hopelessly flawed as a matter of law” because they too exclude section 3(g)’s definition of “employ” from the analysis (citing *Rutherford Food*), and that the proposed limited consideration of additional factors does not “redeem” the proposed rule.

After careful consideration of the comments, the Department adopts the text of § 791.2(b)(1)—which permits consideration of additional factors indicating whether the potential joint employer is “[e]xercising significant control over the terms and conditions of the employee’s work”—as proposed. But the Department is eliminating § 791.2(b)(2), which permits consideration of additional factors indicating whether the potential joint employer is “acting directly or indirectly in the interest of the employer in relation to the employee.”

As discussed above, the Department is adopting a four-factor balancing test to determine joint employer status under the Act in the first scenario. Courts that apply multi-factor balancing tests leave open the possibility of considering other factors. *See, e.g., Bonnette*, 704 F.2d at 1470 (“The four factors ... 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.’”) (quoting *Rutherford*, 331 U.S. at 730); *In re Enter.*, 683 F.3d at 469 (“We emphasize,

however, that these factors *do not constitute an exhaustive list* of all potentially relevant facts, and should not be ‘blindly applied.’ A determination as to whether a defendant is a joint employer ‘must be based on a consideration of the total employment situation and the economic realities of the work relationship.’”) (quoting *Bonnette*, 704 F.2d at 1470) (emphasis in original) (internal citation omitted); *Baystate*, 163 F.3d at 675 (finding the factors used in *Bonnette* to “provide a useful framework”); *Wirtz*, 405 F.2d at 669–70 (“In considering whether a person or corporation is an ‘employer’ or ‘joint employer’, the total employment situation should be considered with particular regard to the following [five factors].”). There is no basis for the Department to depart from this legal precedent of allowing the consideration of additional factors.

However, there must be limits on the consideration of additional factors when determining joint employer status, and the Department’s limits under proposed § 791.2(b)(1) are reasonable. Because evaluating control of the employment relationship by the potential joint employer over the employee is the purpose of the Department’s four-factor balancing test, it is sensible to limit the consideration of additional factors to those that indicate control. This limit is supported by the Third Circuit’s decision in *In re Enterprise*, which recognized that “other indicia of ‘significant control’” beyond the four factors that it enumerated may be relevant to determining joint employer status under the Act. 683 F.3d at 470. Accordingly, the Department’s final rule adopts proposed § 791.2(b)(1), which allows for consideration of additional factors that indicate whether the potential joint employer has “significant control over the terms and conditions of the employee’s work.” In response to comments asking about the interplay between this limit and the second factor of the Department’s test (which assesses whether the potential joint

employer “controls the employee’s ... conditions of employment to a substantial degree”), “significant control over the terms and conditions of the employee’s work” must include something more than control over the employee’s “conditions of employment” or the limit would be superfluous. Thus, “terms and conditions of the employee’s work” may include aspects of the potential joint employer’s relationship with the employee that are not encompassed when applying the second factor and looking at the “conditions of employment”—but only if the additional aspect indicates significant control by the potential joint employer. For instance, the second factor is limited to supervision and control to a substantial degree of an employee’s work schedule or work conditions. But in certain situations—for example, where an employee performs substantial remote work without opportunity for oversight—less supervision and control may constitute an indicator of significant control.

Proposed § 791.2(b)(2), however, does not provide meaningful limitation on the consideration of additional factors that do not indicate control because it simply repeats verbatim section 3(d) of the FLSA. And any future attempt by the Department to identify specific additional factors which fall within § 791.2(b)(2) through sub-regulatory guidance would be ineffective because the Department “does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.” *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (declining to defer to agency interpretation of “a parroting regulation”). Accordingly, the Department is not adopting proposed § 791.2(b)(2) in this final rule.

### *Economic Dependence*

The proposed rule § 791.2(c) stated that “[w]hether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer’s liability under the Act.” 84 FR 14059. It further stated that “no factors should be used to assess economic dependence” when determining joint employer status, and identified examples of “factors that are not relevant because they assess economic dependence” as including whether the employee: (1) “[i]s in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight”; (2) “[h]as the opportunity for profit or loss based on his or her managerial skill”; and (3) “[i]nvests in equipment or materials required for work or the employment of helpers.”

*Id.*

The NPRM’s preamble explained that, because under section 3(d) joint employer status is determined by the actions of the potential joint employer and not by the actions of the employee or his or her employer, any factors that focus on the actions of the employee or his or her employer are not relevant to the joint employer inquiry, including those focusing on the employee’s “economic dependence.” 84 FR 14050. The NPRM’s preamble stated that the three economic dependence factors identified as not relevant focus on whether the employee is correctly classified as such under the Act—and not on whether the potential joint employer is acting in the interest of the employer in relation to the employee. *Id.* While courts have used these factors for determining whether a worker is an employee or independent contractor, they are not relevant for determining whether additional persons are jointly liable under the Act to a worker whose classification as an employee has already been established. *Id.* In support, the NPRM’s preamble cited the

Eleventh Circuit’s exclusion in *Layton*, 686 F.3d at 1176, of two of the three factors as not relevant to the joint employer inquiry. *Id.* It further stated that courts have found that the “usefulness” of the traditional employment relationship test—which includes factors such as the skill required, opportunity for profit or loss, and investment in the business—is “significantly limited” in a joint employer case where the employee already has an employer and the question is whether an additional person is jointly liable with the employer for the employee. *Id.* (quoting *Baystate*, 163 F.3d at 675 n.9).

Numerous comments expressed general support for excluding economic dependence as irrelevant when determining joint employer status. *See, e.g.*, American Bakers Association (factors that are used to determine whether a worker is an employee or an independent contractor “certainly are less relevant in a setting in which the worker has an acknowledged relationship with an employing entity”); Associated Builders and Contractors (agreeing that “‘economic dependence’ on the potential joint employer should not determine the potential joint employer’s liability” and “particularly support[ing] the three examples of ‘economic dependence’ factors that the Department proposes to exclude from the joint employer analysis”); International Franchise Association (“strongly agree[ing] with the Department’s rejection of [a standard] stating or implying that anyone who is ‘economically dependent’ on another employer somehow becomes that employer’s employee). Center for Workplace Compliance noted that, “[u]nfortunately, some authorities have found economic dependence to be relevant or even controlling in joint employment cases,” but asserted that a “sound textualist reasoning” of section 3(d) shows that the employee’s economic dependence is not relevant to the joint employer inquiry. Seyfarth Shaw likewise agreed that “factors

bearing on a worker's 'economic dependence' relate to whether the worker is an 'employee' under the FLSA and are not germane to the joint employment inquiry," and it suggested five additional economic dependence factors to identify as irrelevant for determining joint employer status. *See also* RILA (suggesting exclusion of the same five factors); SHRM (suggesting exclusion of three similar factors).<sup>78</sup>

Numerous comments disputed the Department's legal basis for excluding economic dependence from the joint employer analysis. For example, Senator Murray explained that "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," and that "[i]t 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." Quoting *Layton*, 686 F.3d at 1177–78, and *Baystate*, 163 F.3d at 675, she claimed that "even those cases the Department cites recognize the centrality of economic dependence to the inquiry." Greater Boston Legal Services similarly challenged the NPRM's reliance on *Baystate*, argued that the NPRM was "selective in its *Baystate* quotations," and concluded that the NPRM "therefore

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<sup>78</sup> Seyfarth Shaw suggested excluding: (1) The percentage or amount of the direct employer's income that is derived from its relationship with the putative joint employer; (2) The percentage or amount of an employee's income that is derived from assignment to perform work for a particular benefitted entity; (3) The number of contractual relationships, other than with the putative joint employer, that the direct employer has entered into to provide similar services; (4) The length of the relationship between the direct employer or its employees and the putative joint employer; and (5) The number of contractual relationships, other than with the direct employer, that the benefitted party has entered into to receive similar services. SHRM suggested excluding: (1) The percentage or amount of the direct employer's income that is derived from its relationship with the putative joint employer; (2) The length of the relationship between the direct employer or its employees and putative joint employer; and (3) The number of contractual relationships that one party has with other parties to provide or receive similar services.

obfuscate[ed] the actual details of *Baystate* to narrow the joint employer standard when instead the Department's Proposed Rule directly contradicts *Baystate* itself." NELA asserted that "[c]ourts have routinely found factors related to economic dependence useful and relevant in their analysis of joint employment." Moreover, Farmworker Justice asserted that, by eliminating economic dependence from the joint employer inquiry, the Department is "rejecting an aspect of the inquiry that courts have used for decades" (citing cases). Farmworker Justice further asserted that it would be "remarkably inappropriate" for the Department to eliminate from the inquiry "several important factors that are commonly used to apply the FLSA test," and especially whether the worker is in a specialty job given that *Rutherford Food* considered that factor. *See also* SEIU (describing as "wholly illogical" the notion that "simply because the stated circumstance would be relevant to a determination whether an individual is an employee or an independent contractor, that circumstance could not also be relevant to a determination whether that same individual is jointly employed by a second employer"). Nichols Kaster suggested an internal inconsistency in the Department's proposal because the economic dependence factors that it excludes may be relevant to showing control. "[E]conomic dependence factors such as who provides the materials and whether the work was performed on the alleged employer's premises should not be precluded from the analysis as the Department suggests. They could be highly relevant evidence of control or the power to control." NELA agreed, stating that "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 ... may make it more likely than not the company is directly or

indirectly controlling the working conditions” (citing *Zheng*, 355 F.3d at 72; *Rutherford Food*, 331 U.S. at 730).

Having reviewed and considered the comments, the Department adopts its proposed analysis of the role of economic dependence in determining joint employer status under the Act and makes one change to the text of § 791.2(c) in the final rule to add a fourth example of “factors that are not relevant because they assess economic dependence.”

Consistent with the Department’s bifurcation of sections 3(e) and (g) to determine whether a worker is an employee under the Act and section 3(d) to determine whether additional persons are joint employers of an employee, economic dependence is indicative of a worker’s status as an employee or not, but not indicative of whether an employee has a joint employer. Economic dependence as compared to the degree to which the worker is in business for himself or herself determines whether the worker is an employee under the Act or an independent contractor. *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379–80 (5th Cir. 2019); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987) (noting that the multiple factors of the test that distinguishes between employees and independent contractors “must always be aimed at an assessment of the ‘economic dependence’ of the putative employees, the touchstone for this totality of the circumstances test.”); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (“The [multiple factors of the test that distinguishes between employees and independent contractors] are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied

with that ultimate notion in mind.”). Thus, a worker who is an employee is necessarily economically dependent on the employer with regard to the work. When determining whether that employee has another person who is a joint employer for the work, considering the employee’s economic dependence as well will only lead to a false positive and will not be indicative. The typical laborer working drywall on a construction site, the typical staffing company employee sent to a client, and the typical driver driving a company vehicle, by virtue of their employee status, are not exercising special skill, initiative, judgment, or foresight, do not have the opportunity for profit or loss based on their managerial skill, and are not investing in equipment or materials required for work or employing helpers (notwithstanding any technical skills that they may have). Considering such economic dependence factors as part of a joint employer analysis would focus on the employee’s own status, would almost always suggest economic dependence when the worker is already employed by an employer for the work, and would not be helpful in determining whether the other person is also the employee’s “employer” (*i.e.*, a joint employer) for the work. *Cf. Layton*, 686 F.3d at 1176 (“Because it had been determined that the farm workers were employees of the contractor, there was no need to evaluate whether hallmarks of an independent-contractor relationship existed.”) (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 443–44 (11th Cir. 1994)). Thus, determining whether the other person is the employee’s joint employer necessitates looking beyond the employee’s own economic dependence, looking at the relationship between the employee and the other person, and resolving whether that other person is the employee’s employer too. The Department’s proposed four-factor balancing test does exactly that, and accordingly, economic dependence should not be considered.

Finally, the Department believes that the three examples of “factors that are not relevant because they assess economic dependence” identified in proposed § 791.2(c) strike an appropriate balance and that identifying many additional factors in the text of the final rule is not warranted. Nonetheless, although the additional factors suggested by Seyfarth Shaw and others are not part of courts’ economic dependence analysis when determining whether a worker is an employee or independent contractor under the Act, the Department is of the view that one of the suggested factors— the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services—is not encompassed by the joint employer test that the Department is adopting for the first scenario. Specifically, this suggested factor is not relevant to the four-factor balancing test that the Department is adopting and does not otherwise indicate that the potential joint employer is exercising significant control. Whether a business needs only one vendor or supplier or many to provide a particular product or service at a time does not indicate whether that business is exercising significant control over the employees of any particular vendor or supplier. The Department is therefore adding this factor to the list of irrelevant factors in § 791.2(c).

On the other hand, the Department believes that the other suggested factors may sometimes touch on whether the potential joint employer is exercising significant control,<sup>79</sup> and thus may indicate that the potential joint employer is acting directly or indirectly in the interest of an employer in relation to an employee.

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<sup>79</sup> The other suggested factors include: (1) The percentage or amount of the direct employer’s income that is derived from its relationship with the putative joint employer; (2) The percentage or amount of an employee’s income that is derived from assignment

#### 4. *Joint Employer May Be Any Person*

Because section 3(d) defines “employer” as “any *person* acting directly or indirectly in the interest of an employer in relation to an employee,” the Department proposed adding in § 791.2(d)(1) the Act’s definition of “person” in section 3(a) to make it clear that a joint employer under section 3(d) broadly encompasses every kind of person contemplated by the Act. NELA commented that the full definition of “employer” in section 3(d) states that an employer includes ““any person acting directly or indirectly in the interest of an employer in relation to an employee”” and includes a public agency, but does not include “any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization” (quoting section 3(d)). NELA expressed concern that by mirroring the language in section 3(a) that defines person without putting it in the context of the complete definition of employer as found in section 3(d), the proposed section could read as excluding public agencies from the definition of joint employer, and impermissibly including labor organizations, even when not acting as an employer. After reviewing this comment, the Department acknowledges that the full definition of employer in section 3(d) is applicable to a joint employer. The definition of “person” from section 3(a) was incorporated into proposed § 791.2(d)(1) to clarify that the joint employer concept includes every kind of person contemplated by the Act, and was not intended to alter the definition of what type of entity could be considered a joint employer. Accordingly, the Department has

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to perform work for a particular benefitted entity; (3) The number of contractual relationships, other than with the putative joint employer, that the direct employer has entered into to provide similar services; and (4) The length of the relationship between the direct employer or its employees and the putative joint employer.

incorporated into § 791.2(d)(1) additional language from section 3(d) of the Act to ensure that the definition of person in this section is read within that context.

5. *Business Models, Contractual Provisions, and Business Practices that Do Not Make Joint Employer Status More or Less Likely*

In the NPRM, the Department proposed to clarify that a person’s business model—for example, operating as a franchisor—does not make joint employer status more or less likely under the Act, because a person’s business model does not indicate whether it is “acting ... in relation to” an employee of an employer. 84 FR 14051. The Department also proposed excluding as irrelevant to the joint employer inquiry certain contractual provisions intended to encourage legal compliance or promote desired societal effects, such as provisions requiring an employer to institute workplace safety practices, sexual harassment policies, wage floors, morality clauses, or other provisions encouraging the employer’s compliance with their legal obligations. To the extent that a business merely requires the employer to institute such general policies, and does not itself enforce the contractual provisions with respect to the workers, the Department proposed that such contractual provisions do not make joint employer status more or less likely. *See id.* Similarly, the Department proposed clarifying that certain business practices where a potential joint employer merely provides or shares resources or benefits with an employer—such as providing sample handbooks or other forms to the employer, allowing an employer to operate a facility on its premises, offering an association health or retirement plan to the employer or participating in such a plan with the employer, or jointly participating with an employer in an apprenticeship program—do not make joint employer status more or less likely. *Id.* The Department explained that merely providing or sharing the resources or benefits, in the absence of any action by a potential joint

employer to control the use of the resources or benefits by the employer's employees, does not constitute "acting ... in relation to" the employees. *Id.*

Many employer representatives supported the proposals described above, agreeing that such business interactions do not involve exercising control over the employees or otherwise acting directly or indirectly or indirectly in the interest of an employer to an employee. *See, e.g.,* American Hotel and Lodging Association; Center for Workplace Compliance; Coalition for a Democratic Workplace; International Franchise Association; RLC & the Association; Retail Industry Leaders Association; Society for Human Resource Management; U.S. Chamber of Commerce. Many of these commenters asserted that this proposed language would provide additional clarity and encourage mutually beneficial business relationships that would ultimately also benefit workers by allowing larger businesses to provide guidance, resources, and best practices to smaller businesses without inadvertently risking joint employer liability. *See, e.g.,* American Hotel and Lodging Association; Coalition for a Democratic Workplace; Society for Human Resource Management; U.S. Chamber of Commerce. Several other commenters, including the American Hotel and Lodging Association, HR Policy Association, Society of Independent Gasoline Marketers of America, and several members of Congress, also noted that these provisions will further encourage businesses to be good corporate citizens by promoting or requiring higher legal or ethical standards in their relationships with other businesses, to take the appropriate steps to ensure the safety of all employees, or to foster safe and informed workplaces.

Although few worker representatives commented specifically on this portion of the NPRM, those that did were unanimously opposed to the proposal to consider these

factors as making joint employer status neither more or less likely. *See* AFL-CIO; Center for Law and Social Policy; Greater Boston Legal Services; NELA; United Brotherhood of Carpenters and Joiners of America. These commenters indicated that the proposed provisions would eliminate potentially relevant factors from consideration, as there may be circumstances in which these business models, business practices, or contractual provisions involve the exercise of direct or indirect control over employees' schedules, conditions of employment, rates and methods of payment, or the maintenance of employee records, particularly when considered in light of the totality of the circumstances. Commenters noted that as courts have repeatedly stated, whether a person is a joint employer under the FLSA will depend on all of the facts in a particular case, and they therefore objected that to exclude certain facts, such as business models, contractual agreements, or business practices, as irrelevant in all instances impermissibly prevents those facts from being considered in that broader context. *See* Greater Boston Legal Services (“[T]he Department’s proposal shreds the reasoning of *Baystate* as applied in its progeny decisions, explicitly excluding consideration of ways in which a putative employer controls the terms and conditions of work that have been important to courts when deciding joint employer questions.”); AFL-CIO (“The proposed rule departs from the Supreme Court’s, the common law’s, and its own command by wholly discounting elements of the relationship between the putative joint employers and between the employees and the alleged joint employer.”) These comments were often made in the context of the worker representatives’ broader objections to the Department’s proposed language indicating that the textual basis under the FLSA for joint employer status is section 3(d), rather than sections 3(e)(1) or 3(g), or objections that the

Department's proposed four-factor test is an impermissibly narrow interpretation of joint employer status, as discussed above.

After carefully considering the comments on this issue, the Department has determined that the part 791 regulations should appropriately categorize certain business models, business practices, and contractual provisions as making joint employer status neither more or less likely. As previously discussed, the Department has determined that section 3(d) is the textual basis for joint employer status in the FLSA, and that its four-factor test derived from *Bonnette* is the appropriate analysis for determining joint employer status in situations where a potential joint employer benefits from the work performed by another business' employees. Therefore, the relevance of additional factors should only be considered in the context of whether these factors could potentially indicate that a potential joint employer is "acting directly or indirectly in the interest of an employer in relation to an employee," not whether some other standard or test is being met. However, the business models, business practices, and contractual provisions identified in the NPRM, as revised and finalized here, do not involve a potential joint employer "acting directly or indirectly in the interest of an employer in relation to an employee." Instead, they involve businesses acting in relation to each other to develop or strengthen a mutually beneficial business relationship, improve the work products used in that business relationship, or encourage compliance with legal obligations or health and safety, standards. In any event, for a potential joint employer to use such general business models, practices or contractual provisions to exercise direct or indirect control over another employer's employees, the potential joint employer would have to take some action toward those employees to require or enforce these general practices and policies

in relation to those particular employees. In that case, the relevant factor would be that action on the part of the potential joint employer, not the general practice or policy that the potential joint employer imposed on the employees themselves, and the action would be considered in determining the extent to which the potential joint employer acted to exercise control over the employees' terms or conditions of employment.

In addition to generally supporting the proposals identified in proposed § 791.2(d) of the NPRM, many employer representatives requested clarification as to those items or suggested additional business models, contractual agreements, or business practices that should also be identified as not making joint employer status more or less likely. *See, e.g.*, Associated Builders and Contractors; Center for Workplace Compliance; International Franchise Association; RLC & the Association; Seyfarth Shaw; Society for Human Resource Management; U.S. Chamber of Commerce; World Floor Covering Association.

For example, several commenters requested clarification as to whether business models other than the franchise model should also be considered as not making joint employer status more or less likely. The National Association of Convenience Stores and the Society of Independent Gasoline Marketers of America both commented that the brand and supply business model—in which one business agrees to sell another business' products under that business' brand name and comply with certain brand standards and signage requirements, without agreeing to limitations or requirements for other products or services offered—should be identified as not making joint employer status more likely. RLC & the Association also requested clarification as to whether certain features common to various business models, such as establishing a profit-sharing arrangement

with a franchisee in lieu of a franchise fee, would make joint employer status more likely. In contrast, the Independent Association of Franchisees requested the Department to clarify that the presence of various economic features found in franchise agreements, including various franchise fees charged or capital expenditures required of the franchisee under the terms of the agreements, would be sufficient to indicate that the franchisor was the employer of the franchisee. Relatedly, the Department received several comments from employer representatives stating that the regulation should specify that certain business practices involving the location and time period during which work is performed do not make joint employer status more or less likely, where those location or timing requirements are dictated by the nature of the work itself. Examples of such requirements that were mentioned in the comments include specifying the location and approximate time period when work is to be performed at a customer's home, requiring certain operating hours or time periods during which services must be provided to customers, or requiring that work be performed in a coordinated schedule with other businesses performing related work where the nature of the work is such that items of work must be completed in a certain order, as on a construction site. *See* Associated Builders and General Contractors, Inc.; Coalition for a Democratic Workplace; International Franchise Association; RLC & the Association; World Floor Covering Association. Commenters felt that these business practices did not involve any control over workers' terms or conditions of employment, but merely represented businesses contracting for the work necessary to meet their specific needs.

In contrast, worker representatives who commented directly or indirectly on this provision felt strongly that business models should not be generally excluded from

consideration of joint employer status. AFL-CIO asserted that a putative joint employer's business model is obviously relevant, because it determines the potential joint employer's relationship with the alleged employer and its employees. AFL-CIO further claimed that certain business models, such as temporary staffing agencies, labor supply firms, or franchisors, are empirically more likely to be joint employers. Other commenters, while not specifically addressing this proposed item, noted that business models involving the outsourcing of work increase workers' vulnerability to misclassification and wage theft. *See* NELA ("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."); Center for Law and Social Policy ("The growing variety and number of business models and labor arrangements have made joint employment more common."); United Brotherhood of Carpenters and Joiners of America ("[T]here are employers in the construction industry ready, willing, and able to construct sophisticated labyrinths to confound law enforcement, cheat employees, and make fair competition an uphill battle.").

The Department has carefully considered the comments on this provision. Although worker representatives may be correct that some business models could be more likely to involve joint employers, other factors remain the true test of whether a particular business using such models is indeed a joint employer. While the Department appreciates concerns regarding the vulnerability of low-wage workers in certain business models, there is nothing inherent in the decision to enter into a brand-and-supply agreement, operate as a franchisor, or use a similar business model that is indicative of

joint employer status under the FLSA.<sup>80</sup> Accordingly, the Department maintains its analysis that the franchise business model and other similar business models, such as brand and supply agreements, do not make joint employer status more likely. However, the Department recognizes the validity of commenters' concerns that it is overly broad to state that any business model adopted by a potential joint employer does not make joint employer status more likely, as business models may exist that do involve the exercise of direct or indirect control over workers' conditions of employment. In light of these comments, the Department has decided to modify proposed § 791.2(d)(2) to make it clear that the franchise business model, the brand and supply business model, and other similar business models do not make joint employer status more likely, while still allowing for the possibility that business models could be devised that, unlike these models, would involve the exercise of control over employees' conditions of employment and would thus make joint employer status more likely. Specifically, the Department has revised § 791.2(d)(2) to state that "[o]perating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely under the Act."

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<sup>80</sup> See, e.g., *Salazar v. McDonald's Corp.*, 939 F.3d 1051, 1056 (9th Cir. 2019) ("McDonald's involvement in its franchises and with workers at the franchises is central to modern franchising and to the company's ability to maintain brand standards, but does not represent control over wages, hours, or working conditions" such that it is a joint employer under California's wage and hour law), *rehearing denied and opinion amended* (Dec. 11, 2019); *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014) (noting that the employee "concede[d] that the Franchise Agreement is insufficient, by itself, to establish that [franchisor] qualifies as [employee's] employer under the FLSA"); *Chen v. Domino's Pizza, Inc.*, No. 09-107 (JAP), 2009 WL 3379946, at \*3 (D.N.J. Oct. 16, 2009) (collecting cases and noting that "[c]ourts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee's employees").

The Department has also considered commenters' concerns regarding specific features of the business models identified, and agrees that to the extent various features of franchise and other similar business models are merely an economic feature of the business model, such as the use of profit sharing or the eventual hiring of temporary workers, those factors would not affect these business models' lack of relevance to joint employer status, so long as such features do not involve acting directly or indirectly to control the employees. Similarly, the Department agrees that where the location or timing of the work is dictated by the nature or circumstances of the work itself, requiring the supplier, vendor, subcontractor, or other entity who is performing the work to meet those time and location requirements does not make joint employer status either more or less likely. As a general matter, businesses that contract for work to be performed by other entities must of necessity be able to indicate or even mandate the time and place of performance of that work that best meets their business needs, and should be able to do so without incurring joint employer liability.<sup>81</sup> This is particularly true where the work takes place, as in the examples above, in areas that are not under the control of the employer. However, where the work takes place at the potential joint employer's premises, that fact may be relevant to the potential employer's control of working conditions.<sup>82</sup> Likewise, where a potential joint employer does not merely contract for

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<sup>81</sup> See, e.g., *Aimable*, 20 F.3d at 441 ("It is not surprising that [a farm] would (and, despite [the FLSA], should be able to) give general instruction to [a farm labor contractor] as to which crops to harvest at a particular time."); *Jean-Louis*, 838 F. Supp. 2d at 125–26 (S.D.N.Y. 2011) (finding that providing windows of time in which technicians had to perform cable installation in customers' homes did not constitute supervision or control of employees' work schedules).

<sup>82</sup> See, e.g., *Layton*, 686 F.3d at 1180 (noting that ownership of facilities where the work occurs is relevant to joint employer analysis because a business that owns or controls the

work to take place at the locations and times necessary to achieve their business objectives, but actually acts directly or indirectly to determine how employees' schedules, routes, or other working conditions will be altered or changed so that the potential joint employer's time and location needs can be met, rather than leaving such decisions to the employer's discretion, such actions may still be relevant to an analysis of joint employer status.<sup>83</sup> The determination of whether a potential joint employer has merely contracted for performance of work at certain times or locations as dictated by the nature of the work, as opposed to acting directly or indirectly to exercise control over employees' schedules, routes, or other working conditions will of necessity be a fact-specific determination.

Multiple employer representatives supported the inclusion of § 791.2(d)(3) in the regulatory text, agreeing that contractual agreements requiring an employer to set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, or otherwise comply with the law do not make joint employer status either more or less likely. *See, e.g.*, Associated General Contractors of America; Center for Workplace Compliance; Coalition for a Democratic Workforce; HR Policy Association; Retail Industry Leaders Association; Society for Human Resource Management; U.S. Chamber of Commerce. Commenters emphasized that such contractual provisions or business policies allow businesses to

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worksite will likely be able to prevent labor law violations even if it delegates hiring and supervisory responsibilities to labor contractors).

<sup>83</sup> *See, e.g., id.* at 1179 (finding the fact that the potential joint employer “communicated with Drivers ... if a non-routine situation occurred and Drivers were needed to re-deliver a package or respond to a customer complaint .... evidence[d] a small amount of supervision”).

positively affect the well-being of consumers and workers by using their influence with suppliers, vendors, franchisees, and other related parties to require enhanced compliance with legal and ethical standards. *See* Association of General Contractors; Center for Workplace Compliance; HR Policy Association. These commenters further noted that such agreements or policies, while often improving conditions for workers across a web of connected businesses, do not constitute acting directly or indirectly in relation to an employee and do not involve the exercise of control over employees' daily activities or conditions of employment.

Although this provision received general support from employer representatives, many of these commenters requested clarification as to the extent of this provision and provided examples of typical contractual agreements or general policies that they felt should fall within its scope. Commenters indicated that the provision should be expanded to make clear that business practices related to the contractual agreements, such as monitoring workplaces for compliance with the legal obligations or policies specified by the contractual agreements, requiring businesses to ensure that workers receive training related to compliance with such legal obligations or policies, requiring background checks for employees, requiring the removal of products that pose a safety hazard, or penalizing businesses that do not comply with the contractual agreements, would also not make joint employer status more or less likely. They also requested that the provision specify that contractual agreements or practices mandating compliance with legal obligations under employment laws such as the FLSA itself or the Davis-Bacon Act fall within the scope of this provision. *See* Associated Builders and Contractors; Center for Workplace Compliance; Coalition for a Democratic Workplace; HR Policy Association;

Retail Industry Leaders Association; Society for Human Resource Management; U.S. Chamber of Commerce. Commenters also suggested that the regulatory text be revised to indicate that in addition to the wage floors specifically mentioned in the text, contractual agreements requiring businesses to provide a minimum level of paid leave or other benefits to workers do not make joint employer status more or less likely.

In contrast, worker representatives who commented on this provision indicated that contractual agreements such as setting wage floors, requiring sexual harassment policies, or setting workplace safety standards impermissibly excluded potentially relevant facts from consideration when determining joint employer status. *See* AFL-CIO; NELA; Greater Boston Legal Services. Commenters specifically highlighted that contractually requiring a wage floor can be relevant to consideration of whether a potential joint employer determines employees' rates of pay. *See* United Brotherhood of Carpenters and Joiners ("DOL states that establishing rates of pay indicates joint employer status, but then diminishes its weight if it is included in a contract as a 'wage floor'"); AFL-CIO ("Setting a wage floor, most obviously, is not a 'generalized business practice' or a requirement that another entity 'comply with the law'. Rather, it is the exercise of control over employees' wages.")

Having reviewed the commenters' suggestions regarding this provision, the Department recognizes the value of contractual agreements and related business practices that encourage compliance with legal obligations and health or safety standards. Several commenters stated that businesses are increasingly choosing to take on certain responsibilities that are not required by law, but as part of the business' "corporate social responsibility" (CSR) initiatives. *See* HR Policy Association ("Many corporations choose

to act as good corporate citizens by adopting ethical standards that exceed their legal obligations.”); National Retail Federation; Center for Workplace Compliance. A commenter noted that some of these CSR initiatives include seeking to improve the working conditions for employees throughout the business’s supply chain. *See* Center for Workplace Compliance.

Businesses should not be discouraged from entering into and enforcing against other businesses such contractual agreements out of fear that encouraging compliance with health, safety, or legal obligations among their suppliers, vendors, sub-contractors, or franchisees will cause them to be considered joint employers of the employees of these other businesses.<sup>84</sup> Many courts have also recognized that measures to ensure compliance with legal, safety, or other similar obligations are not relevant to determining joint employer status.<sup>85</sup> The Department further agrees with the commenters who stated that businesses that act to monitor or enforce these types of contractual agreements against other businesses are not acting directly or indirectly toward an employee, but are instead

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<sup>84</sup> *See Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1160–61 (C.D. Cal. 2003) (clothing store’s monitoring efforts to ensure garment manufacturer’s compliance with anti-sweat shop measures should not be considered when determining joint employer status).

<sup>85</sup> *See, e.g., Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2004) (distinguishing strict controls “to ensure compliance with various safety and security regulations” for airline passengers as “qualitatively different from” oversight that evinced joint employer status in another case); *Zampos*, 970 F. Supp. 2d at 803 (requiring installation contractors to subject applicants to background checks and drug tests does not implicate “hiring and firing” factor because “this purported control, relating to the safety and security of Comcast customers, is qualitatively different from the control exercised by an employer”); *Godlewska v. HDA*, 916 F. Supp. 2d 246, 259–60 (E.D.N.Y. 2013), *aff’d sub nom. Godlewska v. Human Dev. Ass’n, Inc.*, 561 F. App’x 108 (2d Cir. 2014) (contrasting “quality control[] ... to ensure compliance with the law or protect clients’ safety” with “control over the employee’s ‘day-to-day conditions of employment’ [that] is relevant to the joint employment inquiry”).

acting to preserve the terms of their contractual agreement. Therefore, such monitoring or enforcement against other businesses does not make joint employer status more or less likely, so long as the monitoring and enforcement are focused on the employer's compliance with the contractually agreed upon policies, rather than supervision and control of individual employees' working conditions. The Department has accordingly added to the regulatory text to clarify that this provision applies not only to contractual agreements that require compliance with legal obligations and health or safety standards, but also to monitoring and enforcement against other businesses and similar activities necessary to ensure that the contractual agreements are being fulfilled, and has provided additional examples in the regulatory text to illustrate this principle. The Department is also clarifying that such similar activities include requiring that an employee handbook include standards, policies, or procedures that improve compliance with legal obligations.

After carefully considering commenters' concerns, however, the Department acknowledges that although contractually requiring a wage floor or similar measures will generally not be determinative of joint employer status, there may be situations where such requirements may be relevant to a determination of joint employer status in combination with other factors. Therefore, the Department has deleted the language that it had proposed relating to wage floors from § 791.2(d)(3). The Department has also made a non-substantive change by moving the language regarding the requirement of morality clauses from proposed § 791.2(d)(3) to § 791.2(d)(4), as after further analysis the Department considers that requiring the direct employer to have and enforce morality clauses is more a matter of protecting the potential joint employer's brand reputation than requiring compliance with legal obligations or health and safety standards.

Several employer representatives also commented on how important it is for businesses to be able to require, maintain, and enforce quality standards in relation to the work performed on their behalf or under their brand name. The commenters emphasized that quality control measures are commonly included in a variety of business relationships to allow businesses to enter into mutually beneficial business relationships while still protecting their reputation for quality with their customers, and do not involve any direct or indirect control of the employees' schedule, pay rates, or conditions of employment. These commenters suggested changes to proposed § 791.2(d)(4) to specify the extent to which potential joint employers can require franchisees, sub-contractors, or other entities to comply with quality control standards instituted by the potential joint employer without making joint employer status more likely. Several commenters also provided additional examples of quality control measures that they believe should be included in the regulatory text as examples of business practices that do not make joint employer status more or less likely, such as providing quality or outcome standards, requiring employees to maintain a professional appearance or courteous demeanor with customers, or providing feedback to the employer when work has not been performed in accordance with the required quality standards. *See, e.g.,* Coalition for a Democratic Workplace; International Franchise Association; Retail Industry Leaders Association; Seyfarth Shaw LLP; U.S. Chamber of Commerce. However, the Independent Association of Franchisees commented that the use of certain quality control practices common to franchise agreements, such as requiring franchisees to purchase supplies from certain vendors, should be sufficient to create an employment relationship between the franchisor and franchisee.

The Department agrees with commenters that requiring, monitoring, and enforcing other businesses' compliance with quality control standards to ensure the consistent quality of a work product, brand, or business reputation is not a business practice that makes joint employer status more or less likely. Such quality control measures stem from a business' desire to protect its reputation, protect the quality of the ultimate work product, and ensure that customers continue to receive a high standard of service, and are thus of a very different nature than actions where a potential joint employer acts directly or indirectly in the interest of an employer in relation to an employee. Quality control measures are focused on the goods and services themselves by determining criteria for an acceptable work product or service and evaluating the end work product in light of those criteria, as opposed to actions directed toward day-to-day management of the workers. Many courts have recognized that "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry[.]"<sup>86</sup> Therefore, businesses are able to require and oversee

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<sup>86</sup> *Zheng*, 355 F.3d at 75. *See also Godlewska*, 916 F. Supp. 2d at 260 ("Quality control and compliance monitoring ... are qualitatively different from control that stems from the nature of the relationship between the employees and the putative employer." (quotation marks omitted)); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 691–92 (D. Md. 2010) ("Comcast's quality control procedures ultimately stem from the nature of their business and the need to provide reliable service to their customers, not the nature of the relationship between the technicians and Comcast .... it is qualitatively different from the control exercised by employers over employees."); *Mendez v. Timberwood Carpentry & Restoration*, No. H-9-490, 2009 WL 4825220, at \*6 (S.D. Tex. Dec. 9, 2009) (finding that supervisory rights that "extend only to securing satisfactory completion of the terms of [an] Agreement or [the] quality of the work to be performed ... ha[ve] no bearing on [an entity's] 'employer' status") (quotation marks omitted)); *Chen v. Street Beat Sportswear*, 364 F. Supp. 2d 269, 286 (E.D.N.Y. 2005) ("The Court will not consider evidence plaintiffs present with respect to [the control] factor to the extent it concerns the presence of Street Beat quality control personnel at the contractors' factories to monitor the quality of the work."); *Zhao*, 247 F. Supp. 2d at 1160 (finding that performing quality

quality control measures without that fact indicating liability as a joint employer.

However, if a potential joint employer engages in supervision and becomes involved with employees' firing or disciplinary actions, scheduling, or other conditions of employment, such actions would of course still be relevant to an inquiry into joint employer status. To address confusion about whether businesses can merely require quality control standards, or whether they can also monitor and enforce those standards against other businesses without that fact indicating joint employer liability, the Department has added regulatory text to § 791.2(d) to clarify that merely requiring quality control standards and ensuring that the work actually meets the required standards does not make joint employer status more or less likely. This additional text will now be § 791.2(d)(4).

Employer representatives also provided feedback supporting the regulatory text identifying certain business practices, such as providing another employer with a sample handbook or forms, allowing an employer to operate a facility on its premises, offering or participating in an association health plan, or participating with an employer in an apprenticeship program as business practices that do not make joint employer status more or less likely. These commenters emphasized that by providing additional resources to employers and their employees, potential joint employers are giving employers access to a greater degree of business expertise, training resources, and benefit plans than they would be able to attain on their own. The commenters stated that by making it clear that such practices were not indicative of joint employer status, the proposed regulatory text will encourage businesses who had become wary of providing such resources to their

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control at factory where employees worked did not constitute the control or supervision typical of an employer).

franchisees, subcontractors, or other entities to continue to make those resources available to the benefit of those employers and their workers. Some commenters provided examples of additional business practices that they felt should also be specifically recognized as not making joint employer status more or less likely. For example, in addition to sample handbooks and forms, several commenters wanted clarification as to whether businesses could also provide or recommend other materials, such as sample operational or business plans, marketing materials, and suggested hiring or interview guidelines. They pointed out that such materials can assist businesses to improve their operating procedures and develop legally compliant workplace policies. *See* RLC & the Association; U. S. Chamber of Commerce; World Floor Covering Association. RLC & the Association asserted that franchisors frequently provide franchisees with a platform to post job advertisements and collect job applications, and often recommend or provide analytical systems and tools to increase efficiency, and stated that these common business practices should also not make joint employer status more or less likely.

Commenters also inquired whether a potential joint employer could provide certain optional resources and benefits to employees without making joint employer status more or less likely. For example, commenters indicated that potential joint employers frequently offer training or educational opportunities to employees, either directly or through a cooperative business group, or allow employees free access to the potential joint employer's common areas, such as the cafeteria, break areas, nursing mother facilities, or company intranet, and they believed that these common practices should not make joint employer status more or less likely. *See* Retail Industry Leaders

Association; Society for Human Resource Management; World Floor Covering Association.

Commenters representing employees opposed the proposed identification of business practices considered not indicative of joint employer status. These commenters, including the AFL-CIO, asserted as a general matter that such provisions would be contrary to case law encouraging a holistic evaluation of “*all* evidence of control of terms and conditions of employment.” AFL-CIO (emphasis in original); *see also* Greater Boston Legal Services; Low Wage Worker Legal Network; United Brotherhood of Carpenters and Joiners. Several commenters specifically objected to the proposal to exclude from consideration an entity’s decision to “allow[] the employer to operate a business on its premises,” asserting that commenters objected to specific items listed in proposed § 791.2(d)(4). *See* Low Wage Worker Legal Network (“Who owns the property where work is carried out has long been recognized as a significant factor in evaluating employment under the FLSA.”); Nichols Kaster (“[W]hether the work was performed on the alleged employer’s premises should not be precluded from the analysis ... [as it] could be highly relevant evidence of control or the power to control.”). The United Brotherhood of Carpenters and Joiners asserted that proposed § 791.2(d)(4)’s residual exclusion of “any other similar business practices” would be “a clarion call for creative contracting that will shelter contractors who control a labor broker’s workforce.”

After carefully reviewing these comments, the Department believes that where one business provides another business with benefits or resources (including allowing it to operate a store-within-a-store), that the other business can use at its discretion, such sharing does not make joint employer status either more or less likely. For example,

suggesting methods or providing materials that a franchisee, sub-contractor, or other entity can use to improve their business strategies or profitability does not involve acting directly or indirectly in relation to employees; the potential joint employer provides those suggestions, samples, or resources to the employer, who may then determine how they should be implemented with respect to their own employees. An entity does not become a joint employer merely because another business chooses to follow that entity's business advice.<sup>87</sup> Similarly, providing employees with access to resources or benefits to which they may not otherwise have access, such as optional educational or training opportunities, common areas, or additional benefit plan options, does not involve the exercise of direct or indirect control over employees' terms or conditions of work, whether those resources are provided to the employer or directly to the employees. To make joint employer status more or less likely, the potential joint employer would have to not only provide such resources, but would also have to somehow exercise control over the employees in relation to those resources. For example, if the potential joint employer disciplined a worker for not following certain policies, insisted that the employer hire specific job applicants or required employees to participate in a particular apprenticeship program, the potential joint employer would then be exercising control over the

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<sup>87</sup> See *Orozco*, 757 F.3d at 449–51 (holding that there was insufficient evidence to legally find that the potential joint employer supervised and controlled workers' schedules, pay rates, or other conditions of employment, where the potential joint employer advised a franchisee on how to increase profitability, including a review of employees schedules, and the franchisee then adjusted workers' hour and pay, where the decision as to whether or how workers' schedules and pay would be adjusted was still up to the franchisee); *Affo v. Granite Bay Care, Inc.*, Nos. 2:11-CV-482-DBH & 2:12-CV-115-DBH, 2013 WL 2383627, at \*10 (D. Me. May 30, 2013) (finding that the employer's use of the potential joint employer's staffing model and handbook does not suggest that the potential joint employer exercised control over the employer's workers).

employees' conditions of employment beyond merely making resources available. Therefore, the Department has decided to retain this provision from the proposed rule. The Department has also moved this provision to § 791.2(d)(5) to accommodate the additional text now incorporated at § 791.2(d)(4), described above.

F. *Test for Determining Joint Employer Status in the Second Scenario*

In the second joint employer scenario, the employee works separate jobs and hours for multiple employers, and the issue is whether the employers are joint employers of the employee such that all of the employee's hours worked for the employers are aggregated for the workweek and the employers are jointly and severally liable for all of the hours worked. Proposed § 791.2(e) stated that, in this scenario, "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." 84 FR 14059. On the other hand, "if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act." *Id.* The proposed rule further stated that the employers "will generally be sufficiently associated" if there is "an arrangement between them to share the employee's services;" "[o]ne employer is acting directly or indirectly in the interest of the other employer in relation to the employee;" or [t]hey 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." *Id.* The proposed rule noted that "[s]uch a determination depends on all of the facts and circumstances" and that "[c]ertain business relationships ... which have

little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers.” *Id.* As explained in the NPRM’s preamble, these proposals would amount to “non-substantive revisions” to the current regulations’ “not completely disassociated” analysis for determining joint employer status in this scenario. 84 FR 14052.

The proposed revisions to the analysis for determining joint employer status in the second scenario did not engender many comments. Several comments asserted that the current regulations’ “not completely associated” standard is ill-suited for the first joint employer scenario and/or supported application of the proposed “sufficiently associated” analysis to the second joint employer scenario. *See, e.g.*, SHRM (supporting the proposal); National Federation of Independent Business (current regulations’ standard “makes sense” in the second scenario and the proposed revisions preserve much of that standard and would provide a “properly tailored” standard for the second scenario); Center for Workplace Compliance (current regulations’ focus on the relationship between the two potential joint employers is relevant to the second scenario, but not the first). Two comments agreed that the current regulations’ standard is useful for determining joint employer status in the second scenario, but also suggested some “non-substantive revisions” to the proposed “sufficiently associated” analysis, including a statement that the proposed analysis is “meant to be in line with past application” of the current regulations’ analysis and affirming that (even in the second scenario) the analysis must focus on whether an employer “controls the terms and conditions of work utilizing the *Bonnette* factors.” *See* Seyfarth Shaw; RILA. These comments also asked that the final

rule address situations where one employee (for example, a watchman) simultaneously works one set of hours for two related employers. *See id.* Finally, several comments defended the current regulations' "not completely disassociated" standard, which would ostensibly govern both scenarios in the view of these commenters. *See, e.g.,* Southern Migrant Legal Services and Washington Lawyers' Committee.

Having carefully considered the comments, the Department continues to be of the view that, in the second joint employer scenario, focusing on the relationship between the two employers is the correct approach. In the second scenario, the employee is employed by both employers and works separate jobs and hours for each employer. To the extent that the two employers are acting as one with respect to the employee, the employees' hours worked for the two employers should be treated as one set of hours worked. As explained in the NPRM's preamble, the current regulations' focus on the relationship between the two employers has been useful to both the public and courts. *See* 84 FR 14051–52. Non-substantive revisions articulating the focus as whether the two employers are "sufficiently associated," providing three situations where the two employers are generally sufficiently associated, and stating that certain business relationships which have little to do with the employment of specific workers are insufficient should make the regulations even more useful to both the public and courts. Accordingly, the Department adopts the analysis for determining joint employer status in the second scenario as proposed and does not make any changes to proposed § 791.2(e).

In response to requests from commenters for further revisions to the examples, the Department reiterates that its revisions to the current regulations are non-substantive and should not change the outcome in particular cases, and thus are "in line" with how joint

employer status has been determined in the past in the second scenario. However, incorporating the *Bonnette* factors into the joint employer analysis in the second scenario would be inconsistent with the longstanding approach to focus on the relationship and association between the two potential joint employers. The *Bonnette* factors, by contrast, focus on the relationship between the potential joint employer and the employee of another employer. Finally, the Department has not changed its views of a situation where two employers arrange to employ a common watchman who watches both employers' properties concurrently. Although the employee works one set of hours for the two separate employers, the employers are joint employers because they have arranged to share the employee's services. This result is the same under the Department's 1939 Interpretative Bulletin No. 13, its current regulations, and this final rule. Of course, as explained previously, the two employers are not both required to pay the employee at least the minimum wage due under the Act because of their joint and several liability.

G. *Liability of Joint Employer*

The proposed rule (§ 791.2(f)) explained that a joint employer "is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the Act." 84 FR 14059. This provision merely restates the longstanding principle of joint and several liability under the Act. The Department received no comments regarding its proposed § 791.2(f), and it adopts that proposed section in the final rule.

H. *Illustrative Examples*

In the NPRM, the Department proposed to add nine illustrative examples to the regulatory text applying the Department's proposed analysis to determine joint employer

status. The proposed examples addressed each of the two potential joint employer scenarios (*i.e.*, where an employee’s work for an employer simultaneously benefits another entity, and where an employee works separately for two or more employers), and involved a variety of different industries and specific facts. The proposal cautioned that the conclusions following each of the nine proposed examples would be limited to substantially similar factual situations.

Commenters representing employers overwhelmingly supported the proposal to add illustrative examples to the regulations, asserting that examples would bring added clarity. *See, e.g.*, Association for Corporate Growth; Fed Ex; HR Policy Association; World Floor Covering Association. The American Hotel & Lodging Association and National Federation of Independent Businesses each noted that including examples in the regulatory text would be particularly helpful for small businesses that have fewer resources to spend on compliance and legal support. Several commenters, including the Retail Industry Leaders Association (RILA) and the Washington Legal Foundation, urged the Department to adopt more examples in its final rule, for even greater clarity.

Few commenters representing employees addressed the proposed examples, but two commenters, the AFL-CIO and the Coalition of State AGs, criticized the proposed examples as collectively inadequate. Both commenters asserted that several of the proposed examples fail to provide enough information to determine whether a joint employment relationship exists, while the Coalition of State AGs asserted that other proposed examples were so “unquestionably demonstrative of a joint-employment relationship [that they would be] unhelpful to someone trying to apply the new joint-employment standard to ‘close calls.’” Several commenters, including commenters

representing employers, had substantive concerns or suggested edits to the specific proposed examples, as discussed in greater detail below.

After considering commenters' general feedback to the proposed examples, the Department has decided to adopt illustrative examples in this final rule. The Department believes that codifying factual examples in the regulations can provide helpful insight into how the Department intends for its FLSA joint employer analysis to be applied, particularly for smaller businesses who have (or might be contemplating) similar labor arrangements. Specifically, and as described in greater detail below, the Department has decided to adopt four of its proposed examples without edit, to adopt five of its proposed examples with some changes, and to add two new examples.

1. *Commenter feedback to the example in proposed § 791.2(g)(1)*

Proposed Example 1 described a cook working separate hours for two different restaurant establishments affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the cook. Under these facts, the proposed example advised that the two restaurant establishments are not joint employers of the cook, because they are not associated in any meaningful way with respect to the cook's employment.

The Society of Independent Gasoline Marketers of America (SIGMA) commented that proposed Example 1 "provides excellent context and clarity surrounding joint employment as it relates to franchises." The Fisher Phillips law firm agreed with the analysis provided in proposed Example 1, but requested the Department to either modify the example or add a new example to illustrate that use of a third-party "virtual

marketplace platform” (VMP) to schedule the same worker would not extend joint liability to the two restaurants, or to the third party administering the VMP. Finally, HR Policy Association suggested adding language to the proposed analysis subsection clarifying that this example implicates the second joint employer scenario described in proposed § 791.2(e) “because the cook is employed by two different employers.”<sup>88</sup> The Department did not receive any other comments on this example.

The Department has decided to adopt Example 1 as originally proposed in § 791.2(g)(1). The Department agrees with Fisher Phillips that uncoordinated use of a common third party service to schedule workers does not establish that otherwise separate employers are associating with the respect to any particular worker, but believes that evaluating the joint employer status of the third party administering the scheduling service requires the consideration of additional facts that would complicate the example and detract from its focus on the franchise business model. Similarly, the Department agrees with HR Policy Association that Example 1 implicates the joint employer scenario described in § 791.2(e) because it involves an employee working separate hours for separate employers in the same workweek, but language identifying which of the two potential joint employer scenarios described in § 791.2(a)–(e) each example implicates is unnecessary and potentially confusing for lay readers. The Department therefore rejects HR Policy Association’s similar suggested edits to the other proposed examples.

2. *Commenter feedback to the example in proposed § 791.2(g)(2)*

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<sup>88</sup> HR Policy Association suggested similar clarifying edits to all of the proposed examples, to specify whether each example implicates the first and/or second joint employer scenario described in the Department’s proposed analysis.

Proposed Example 2 described a cook working separate hours for two different restaurant establishments owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location on a weekly basis, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Here, the proposed example advised that the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate.

The Nisei Farmers League expressed concern that the analysis for proposed Example 2 identified the fact that the restaurants jointly determined the cook's hourly pay rate as evidence indicating the existence of a joint employer relationship. Noting how common such a practice is in the agricultural industry, Nisei Farmers League asserted that a potential joint employer's role in setting a worker's pay rate should not be relevant to the analysis, because otherwise "the business model between a grower and [a farm labor contractor] automatically weighs towards finding joint employment before the facts of the situation are reviewed." The Department did not receive any other comments on proposed Example 2.

The Department has decided to adopt Example 2 as originally proposed in § 791.2(g)(2). The Department disagrees with the Nisei Farmers League that "jointly determining worker's pay rate should be given no weight" in the analysis, especially in the second scenario where (as described in Example 2) the same individual works separate hours for ostensibly separate employers in the same workweek. The Department

notes that, for FLSA purposes,<sup>89</sup> growers utilizing farm labor contractors in the agricultural industry would be evaluated as potential joint employers under the first scenario described in § 791.2(a). Here, although determining the employee's rate and method of payment is one of the four main factors that determine whether an entity is a joint employer, no single factor is dispositive in determining joint employer status under the Act.

3. *Commenter feedback to the example in proposed § 791.2(g)(3)*

Proposed Example 3 described an arrangement between an office park company and a janitorial services company hired to clean the office park building after normal work hours. Their contract stipulates that the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Under these facts, the proposed example advised that the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The proposed example elaborated that the office park's reserved contractual right to control

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<sup>89</sup> Most agricultural employers, agricultural associations, and farm labor contractors are also subject to MSPA. As noted earlier, the Department will continue to use the standards in its MSPA joint employer regulation to determine joint employer status under MSPA. *See supra* note 55. Among other factors, the MSPA joint employer regulation considers an agricultural employer's "power, either alone or in addition to another employer, directly or indirectly, to ... determine the pay rates or the methods of wage payment for the worker(s)." 29 CFR 500.20(h)(5)(iv)(B).

the employee's conditions of employment does not demonstrate that it is a joint employer.

The American Bakers Association said it appreciated proposed Example 3, which it viewed as representative of janitorial service arrangements common in the wholesale baking industry that should not constitute joint employment. SIGMA was generally supportive of Example 3, but requested the Department to remove the phrase “in any way,” which they asserted “is very strong and appears to limit instances—such as where a company sets a sexual harassment policy—where a business may have a modicum of oversight.” To help illustrate other elements of the proposed rule, RILA suggested inserting additional facts to Example 3 that would not affect the outcome of the analysis, such as contractual terms requiring the janitorial services company to complete the services within specified hours and to comply with all applicable health and safety laws, rules, and regulations. Consistent with its criticism of the Department's proposed treatment of reserved control, NELA criticized proposed Example 3's statement that “the reserved right to control the employee's conditions of employment does not demonstrate that it is a joint employer” as an incorrect application of the law. The Coalition of State AGs specifically identified proposed Example 3 as one of several examples it said “fail to provide enough information for an accurate determination of joint employment under current court precedent.”

The Department has decided to adopt proposed Example 3 with one modification at § 791.2(g)(3). Consistent with the Department's change to its proposed treatment of reserved control, it has changed the sentence advising that the office park's reserved right to control the janitorial workers “does not demonstrate that it is a joint employer” to read,

in relevant part, that the such reserved control “*is not enough to establish* that it is a joint employer.” In other words, while an entity’s reserved right to control workers is relevant to the inquiry and indicative of joint employer status to some degree, it is far from dispositive where, as in this example, an entity does not otherwise exercise significant control over the terms and conditions of an employee’s work. The Department declines RILA’s suggested edits to Example 3, because inserting additional facts—including facts identified as irrelevant to the FLSA joint employer inquiry in § 791.2(d)—risks complicating the analysis and detracting from the example’s focus on the relatively minimal importance of the office park’s reserved right to control the workers. For similar reasons, the Department declines SIGMA’s request to delete the phrase “in any way” from the example’s description of the facts.

4. *Commenter feedback to the example in proposed § 791.2(g)(4)*

Proposed Example 4 described an arrangement between a country club and a landscaping company hired to maintain its golf course. The country club lacks authority to fire, hire, or supervise the landscaping employees. But in practice, it “sporadically assign[s]” tasks, provides “periodic instructions,” and “keep[s] intermittent records” of landscape employees’ work. Furthermore, the landscaping company terminates a worker “at the country club’s direction” because that worker failed to follow the country club’s instructions. The application section of the example concluded that “the country club is a joint employer of the landscaping employees” based on the country club’s direct supervision of the landscaper’s employees and the indirect firing of one employee.

Commenters found this example “demonstrates the difficulty in applying the concept of ‘indirect, actual control.” Coalition for Democratic Workplace; National

Retail Federation; *see also* RLC and the Association. The National Retail Federation noted that “the example does not provide any guidance on what it means to ‘direct’ a termination for which the club has no contractual authority.” The Coalition for Democratic Workspace expressed concern that the example’s “vague limiting terms”—*i.e.*, “sporadic,” “periodic,” and “intermittent”—leave it unclear whether the club’s supervision of the landscaping employee triggers joint employment status. And the Retail Industry Leaders Association complained that the example “leaves unresolved whether the worker was causing damage to club property or violating safety rules (or by contrast, merely completing a task in a different order than the club official may have preferred).” *See also* RLC and the Association (requesting an example specific to the restaurant industry involving a cleaning company employee who “does not do a good job, does not show up, is rude to the restaurant’s customers, harasses the restaurant’s employees or demonstrates other deficiencies”).

The Department has reconsidered the example set forth in proposed § 791.2(g)(4) in light of its revised description of “indirect control” in § 791.2(a), and has decided to revise the example for several reasons. As an initial matter, the Department has decided to replace the county club and landscaping company described in the proposed example with a restaurant and cleaning company, respectively. This change responds to the RLC and Association’s request for an example relevant to the restaurant industry, but does not otherwise affect the analysis. For the sake of simplicity, our discussion of other changes to the proposed example will use the terms “restaurant” and “cleaning company” as if those were the entities described in the proposed example.

Other changes to proposed Example 4 are more substantive. For example, the proposed description of the facts states that the cleaning company terminated an employee “at the [restaurant’s] direction.” But the proposed facts also specifically state that the restaurant lacks authority to direct the cleaning company’s firing or hiring decisions. The Department is therefore revising § 791.2(g)(4)(i) to state the termination was “[a]t the restaurant’s *request*” (emphasis added).

The Department is further revising the example to clarify two factual matters that commenters found vague or ambiguous. First, the Department is removing the terms “sporadic,” “periodic,” and “intermittent” because these vague terms obscure “the degree of supervision” on which joint employer status depends.<sup>90</sup> The Department is instead specifying that the restaurant provides general instructions to a team leader from the cleaning company each workday and monitors the performance of the work, while a team leader from the cleaning company provides detailed supervision. The Department believes these revisions remove ambiguity and also make the example reflect real world business practices more accurately. Second, the Department is clarifying that the terminated employee failed to follow an instruction that related to guest safety.

Proposed § 791.2(g)(4)(ii) concluded that the restaurant “indirectly fired one of the [cleaning company] employees.” However, it is the Department’s view that a single request to fire an employee in this example was not significant enough to exercise indirect control over hiring or firing. Importantly, the cleaning company was not necessarily obligated to comply with the requested firing. Rather, it could have sent that employee to a different client or even continued to send him to the restaurant. The

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<sup>90</sup> *Layton*, 686 F.3d at 1178.

Department is therefore revising § 791.2(g)(4)(ii) to state that the termination of the cleaning company employee under these facts is not an exercise of indirect control by the restaurant.

Proposed § 791.2(g)(4)(ii) further states that the restaurant “directly supervises the [cleaning company] employees’ work and determines their schedule.” Joint employer status depends, in part, on whether supervision “goes beyond general instructions ... and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work.”<sup>91</sup> This question cannot be answered under proposed § 791.2(g)(4)(i) because the restaurant official provides assignments and instructions on a “sporadic” and “periodic” basis. And it is unclear whether those assignments and instructions are directed toward specific employees, or relayed to the cleaning company employees through a supervisor working for the cleaning company. In contrast, revised § 791.2(g)(4)(i) provides concrete facts regarding the restaurant’s supervisory actions and distinguishes such actions from the detailed supervision that is provided by the cleaning company’s team leader. Under those facts, the restaurant’s actions do not “go beyond general instructions” and therefore, although relevant, are not enough for joint employer status. The Department is therefore revising § 791.2(g)(4)(ii) to conclude that, based on the facts presented in revised § 791.2(g)(4)(i), the restaurant’s supervision of the cleaning company’s employees does not give rise to joint employer status. The Department is

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<sup>91</sup> *Layton*, 686 F.3d at 1178 (“DHL had certain objectives—having its packages delivered on time, serving its customers—that ... [plaintiffs] were tasked with accomplishing. DHL did not involve itself with the specifics of how those goals would be reached—it did not apportion tasks to individuals, specify how many individuals should be assigned to each delivery route, or structure the chain of command among [plaintiffs]. Overall, this factor weighs against a finding of joint employment because DHL did not exert control as an employer would have.”).

further revising § 791.2(g)(4)(ii) to explain that keeping a record of the cleaning company's completed assignments is not relevant, because such records are not an "employment record" within the meaning of § 791.2(a)(1)(iv). However, to provide greater clarity, the Department has decided to add a contrasting example, codified in § 791.2(g)(5), illustrating where joint employer status would exist, in part, due to an entity's indirect control over the hiring and firing of another employer's employees.

5. *Commenter feedback to the example in proposed § 791.2(g)(5)*

Proposed Example 5 described a packaging company requesting workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Under these facts, the proposed example advised that the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

The International Warehouse Logistics Association (IWLA) expressed concern that proposed Example 5 could "create confusion among entities that engage in similar practices to the hypothetical packaging company, as they may assume that participating in any of the practices mentioned in the example would trigger a joint employer relationship." Accordingly, IWLA requested the Department to either remove proposed Example 5 or add language at the end of the analysis subsection clarifying that "an entity found only to be engaged in some of the practices listed in the example may not

automatically be considered to be a joint employer.” RILA did not object to proposed Example 5, but asserted that employers would benefit from the addition of a converse example to the final rule illustrating the circumstances where a staffing agency client would *not* qualify as an FLSA joint employer.

The American Staffing Association (ASA) criticized proposed Example 5 as an unrealistic depiction of the staffing industry, asserting that staffing agencies (and not their business clients) typically set a temporary worker’s rate of pay. ASA expressed concern that “using an atypical example to illustrate joint employment in such arrangements may cause some staffing firms and clients to infer that a client cannot be a joint employer unless it sets the pay rates.” Accordingly, ASA urged the Department to delete Example 5’s references to pay rates entirely, believing that the example should illustrate that “the two most common, and legally significant, forms of control exercised by staffing firm clients over the staffing firm’s employees—supervision over their work and controlling their work schedules—are sufficient to establish [a staffing agency] client as a joint employer.” Relatedly, the Coalition of State AGs identified Example 5 as one of several examples featuring so many facts indicating joint employment that it would be of little practical use in most instances.

The Department appreciates ASA’s criticism that proposed Example 5 is not a realistic depiction of the staffing industry, and the related argument from the Coalition of State AGs that the proposed example is unhelpfully lopsided. Accordingly, the Department has decided to revise the example to illustrate that a staffing agency client exercising significant control over the scheduling and work performed by a temporary worker can qualify as an FLSA joint employer even though the staffing agency—rather

than the client—determines the worker’s specific rate of pay. These edits are consistent with the accepted understanding that not all of the factors in the four-factor balancing test need to be satisfied to establish that an entity qualifies as a joint employer. *See, e.g., Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 144–45 (2d Cir. 2008) (“The traditional four-factor test ... strongly indicates that Bellevue should be deemed Barfield's joint employer .... [even though] the third [*Bonnette*] factor, relating determination of the rate and method of a worker's payment, is inconclusive.”); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999) (finding joint employer status under the *Bonnette* test despite “[l]ittle evidence suggest[ing]” that the defendant was involved in determining the worker’s rate of payment). However, the Department agrees with RILA that the public would benefit from an example illustrating a scenario where a staffing agency client would *not* qualify as a joint employer, notwithstanding some limited supervision over the work performed by temporary workers to ensure basic quality, quantity and safety standards.

Accordingly, the Department adopted an edited version of proposed Example 5 in § 791.2(g)(6) and added a new example arriving at a different outcome in § 791.2(g)(7). Similar to the juxtaposition of proposed Examples 1 and 2, the Department believes that providing a contrasting pair of examples involving staffing agency clients would be particularly helpful for showing how the Department’s joint employer analysis applies to temporary staffing agencies.

6. *Commenter feedback to the example in proposed § 791.2(g)(6)*

Proposed Example 6 described an Association, whose membership is subject to certain criteria such as geography or type of business, providing optional group health

coverage and an optional pension plan to its members to offer to their employees. The example further described two employer members of the Association, B and C, who decide to offer the Association's optional group health coverage and pension plan to their respective employees who choose to opt in to the health and pension plans. The proposed example offered two conclusions. First, the example advised that the Association is not a joint employer of B and C's employees because participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. Second, the example advised that B and C are not joint employers of each other's employees because, while they independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees.

SIGMA complimented proposed Example 6 for illustrating the proposition that merely offering certain benefits to employees, such as health care or retirement plans, does not constitute joint employment. WFCFA expressed concern that readers might interpret the proposed example and its analysis as confined to benefit plans offered by associations, and requested the Department to clarify that the analysis is equally applicable to benefit plans offered by franchisors or general contractors.

The Department has decided to adopt Example 6 as originally proposed in § 791.2(g)(8). The Department agrees with WFCFA that the reasoning of Example 6 could also apply to a franchisor or general contractor that offers optional benefit plans to its franchisees or subcontractors, respectively. Because the examples provided in § 791.2(g) are not exhaustive illustrations of the permissible business practices identified in

§ 791.2(d), the Department does not believe that any edits to this proposed example are necessary.

7. *Commenter feedback to the example in proposed § 791.2(g)(7)*

Proposed Example 7 described a large national company, Entity A, contracting with multiple other businesses in its supply chain. As a precondition of doing business with Entity A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Here, the example advised that such contractual provisions are not enough to establish that Entity A is a joint employer of its contractors' employees.

SIGMA commented that it fully supported the analysis provided in proposed Example 7, asserting that such contractual standards are “*routine* in the franchise space and should be acceptable under the joint employer standard” (emphasis in original). HR Policy Association suggested adding to the facts that Entity A requires its contracting businesses to provide “certain levels of paid leave,” in addition to a wage floor above the federal minimum wage, to illustrate that a paid leave requirement would be equally irrelevant to the analysis. The Department received no other comments on Example 7.

The Department agrees with HR Policy Association that a contractual provision insisting that suppliers provide their workers with a minimum amount of paid leave is no more indicative of joint employer status than a similar provision setting a wage floor above the federal minimum wage. However, in light of our agreement with other commenters that wage floors may be relevant to the “rate or method of payment” factor described in § 791.2(a)(1)(iii), we decline to add a similar contractual provision to the

example that would further complicate the analysis. To the contrary, we have amended the example's description of the facts to make clear that Entity A does not implicate any of the other three factors enumerated in § 791.2(a)(1)—*i.e.*, hiring and firing, supervision, and the maintenance of employment records—and added language explaining the role of the wage floor in the analysis. This modified version of proposed Example 7 is codified at § 791.2(g)(9).

8. *Commenter feedback to the example in proposed § 791.2(g)(8)*

Proposed Example 8 described Franchisor A as a global organization representing a hospitality brand with several thousand hotels under franchise agreements, including Franchisee B. Franchisor A provides Franchisee B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Under these facts, the proposed example advised that Franchisor A is not a joint employer of Franchisee B's employees, explaining that providing such samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

The American Bakers Association and SIGMA strongly supported proposed Example 8, agreeing with its analysis and predicting that it would have a clarifying effect for franchisors. RLC & the Association supported the outcome of the proposed example but urged the Department to expand the list of franchisor resources discussed in the example to “reflect the true scope and nature of the franchising relationship in the 21st

century,” identifying training services, labor scheduling tools, and “certain point of sale, inventory management, and other software, products or equipment” as potential items for inclusion. WFCFA similarly suggested expanding the list of sample items discussed in the example to include “suggested or sample operational plans, business plans, marketing materials, and similar items ... [including] hiring guidelines and interview questions, provided they do not dictate who is hired or their wages and other conditions of employment.” Finally, one commenter representing employees, NELA, asked the Department to specify that the sample forms and documents discussed in the proposed example are optional. NELA asserted that forms and documents that a franchisor requires its franchisees to use “can be evidence of control over the working conditions at issue and should be given weight in the joint employment analysis,” but stated that they would agree with the outcome of the proposed example if the forms and documents were stipulated to be optional.

The Department appreciates RLC & the Association and WFCFA’s request to expand on the list of franchisor resources discussed in proposed Example 8. In response to these comments, as well as the IFA’s request for additional content in the final rule addressing permissible franchisor practices, the Department has decided to elaborate on the facts provided in the example. At the same time, the Department agrees with NELA’s suggestion to emphasize that the franchisor resources provided in the example that relate specifically to staffing and employment, such as the employee handbook, are optional. The Department notes that several commenters representing employers seemed to endorse a distinction between employment-related resources that are provided as an optional matter to a business partner, and those that are imposed. *See e.g.*, U.S. Chamber

of Commerce (suggesting regulatory text advising that “[a] potential joint employer’s practice of offering *optional* business resources to another employer that do not result in actual control by the potential joint employer over the other employer’s employees, does not make joint employer status more or less likely under the Act.”) (emphasis added). Accordingly, the Department has adopted an edited version of proposed Example 8 in § 791.2(g)(10).

9. *Commenter feedback to the example in proposed § 791.2(g)(9)*

Proposed Example 9 described a large retail company that owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Under these facts, the proposed example advised that the retail company is not a joint employer of the cell phone repair company’s employees. The example elaborated that that the leasing agreement and code of conduct are irrelevant to the joint employer analysis, and that the retail company’s uniform policy does not, on its own, demonstrate substantial control over the repair company’s employees’ terms and conditions of employment.

SIGMA complimented the outcome and analysis of proposed Example 9, but requested an additional co-location example specific to the fuel retailing industry (*e.g.*, a

fast food establishment operating an independent kiosk within a gas station convenience store). WFCAs described the proposed example as “very insightful,” but requested an additional example to illustrate that “requiring or supplying specific shirts and instituting a code of conduct is not limited to situations where the subcontractor is on the retailer’s property.” HR Policy Association suggested adding language to the analysis clarifying that the retail company’s uniform requirement “does not make joint employer status more likely.” NELA stated that the proposed example’s “conclusion that joint employment is not present appears correct,” but requested the Department to amend the statement in the analysis advising that “allowing the repair company to operate on its premises does not make joint employer status [for the retail company] more or less likely under the Act.” Specifically, NELA requested the Department to characterize the store-within-a-store arrangement as a relevant but non-determinative fact for determining the retail company’s status as a joint employer.

The Department has decided to adopt Example 9 as originally proposed in § 791.2(g)(11). The Department did not intend to imply that a uniform requirement imposed on another employer’s employees is irrelevant to the joint employer analysis; the example merely illustrates that such a requirement is insufficient to establish joint employer status where, as the analysis underscores, “there is no indication that [an entity] hires or fires the [another employer’s] employees, controls any *other* terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records” (emphasis added). The Department agrees with WFCAs that the relevance of a uniform requirement does not depend upon where the workers perform their work. However, the Department disagrees with NELA that an

entity's decision to allow an employer to operate on their premises has any relevance in determining whether the entity is an FLSA joint employer. This kind of arrangement does not "relat[e] to an employee," 29 U.S.C. 203(d), and concluding otherwise, even by characterizing such arrangements as minimally indicative of joint employer status, could deter entities from entering into such arrangements going forward. Consistent with the Department's decision to implement its proposed identification in § 791.2(d) of "store-within-a-store" arrangements as not making joint employer status more or less likely under the Act, the Department declines to edit the proposed treatment of the kind of arrangement at issue in this example.

10. *Other commenter requests for new examples*

Some commenters representing employers requested or suggested additional illustrative examples, in addition to those discussed earlier. For example, the National Association of Convenience Stores (NACS) requested an example "explaining the effect (or lack thereof) of a brand and supply contract relationship on the joint employer analysis," such as an agreement between a gasoline supplier and a convenience store. Associated General Contractors of America (AGC) and the NAHB separately requested one or more examples addressing potential joint employment situations in the construction industry. Like the Nisei Farmers League, the National Council of Agricultural Employers (NCAE) asked the Department to consider adding examples involving "agriculture, generally, and farm-labor contracting, specifically." Finally, HR Policy Association, RILA, and the Washington Legal Foundation drafted several suggested examples involving a variety of facts and industries for the Department's consideration.

The Department declines these commenter requests and suggestions for additional illustrative examples. Including the new staffing agency example that will appear in § 791.2(g)(7), the Department is implementing eleven illustrative examples in this final rule. The Department believes that these eleven examples are diverse enough to cover a wide variety of similar factual circumstances, regardless of the particular industry they describe. Finally, the Department notes that the final rule's elaboration in § 791.2(d) of business models, contractual provisions, and business practices that do not make joint employer status more or less likely under the Act addresses the concerns of some of the commenters who requested additional examples. For example, in response to the NACS' request for an example involving a brand and supply agreement, the Department notes that § 791.2(d)(2) specifically identifies "brand and supply" agreements as business models which do not make joint employer status more or less likely.

#### **V. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act.

#### **VI. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and

safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is a “significant regulatory action,” which includes an action that has an annual effect of \$100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this final rule is economically significant. Therefore, the Department has prepared a Regulatory Impact Analysis (RIA) in connection with this final rule as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule.

By clarifying the standard for determining joint employer status, this final rule would reduce the burden on the public. This final rule has been determined to be an Executive Order 13771 deregulatory action.

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as a 'major rule', as defined by 5 U.S.C. 804(2).

## A. *Introduction*

### 1. *Background*

The FLSA requires a covered employer to pay its nonexempt employees at least the federal minimum wage for every hour worked and overtime premium pay of at least 1.5-times their regular rate of pay for all hours worked in excess of 40 in a workweek. The FLSA defines an “employer” to “include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.” These persons are “joint”

employers who are jointly and severally liable with the employer for every hour worked by the employee in a workweek. 29 CFR part 791 contains the Department's official interpretation of joint employer status under the FLSA. In this rule, the Department revises part 791 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. This final rule explains what additional factors should and should not be considered, and provides guidance on how to apply this multi-factor test. The Department makes no substantive changes to part 791's guidance in the other joint employer scenario—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. The Department believes that these revisions make it easier to determine whether a person is or is not a joint employer under the Act, thereby promoting compliance with the FLSA.

## 2. *Need for Rulemaking*

For the reasons explained above, the Department has determined that its interpretation of joint employer status requires revision as it applies to the first joint employer scenario identified above (one set of hours worked in a workweek). The Department is concerned that the current regulation does not adequately address this scenario, and believes that its revisions provide needed clarity in this scenario. The Department also believes this rule:

- Helps bring clarity to the current judicial landscape, where different courts are applying different joint employer tests that have resulted in inconsistent treatment

of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs;

- Reduces the chill on organizations who may be hesitant to enter into certain relationships or engage in certain kinds of business practices for fear of being held liable for counterparty employees over which they have insignificant control;
- Better grounds the Department's interpretation of joint employer status in the text of the FLSA; and
- Is responsive to the current public and Congressional interest in the joint employer issue.

The Department believes that the current regulation provides clear and useful guidance to determine joint employer status in the second scenario, but that non-substantive revisions to better reflect the Department's longstanding practice would be desirable.

#### B. *Economic Impacts*

The Department estimated the number of affected firms and quantified the costs associated with this final rule. The Department expects that all businesses and state and local government entities would need to review the text of this rule, and therefore would incur regulatory familiarization costs. However, on a per-entity basis, these costs would be small (see section V.2 for detailed analysis of regulatory familiarization costs).

Because this rule does not alter the standard for determining joint employer status in the second joint employer scenario where the employee works separate sets of hours for multiple employers in the same workweek, the Department believes that there would be

no change in the aggregation of workers' hours to determine overtime hours worked.<sup>92</sup> Therefore, there would be no impact on workers in the form of lost overtime, and no transfers between employers and employees. Although this rule would alter the standard for determining joint employer status where the employee works one set of hours in a workweek that simultaneously benefits another person, the Department believes that there would still be no impact on workers' wages due under the FLSA. This standard would not change the amount of wages the employee is due under the FLSA, but could reduce, in some cases, the number of persons who are liable for payment of those wages. To the extent this rule provides a clearer standard for determining joint employer status where the employee works one set of hours for his or her employer that simultaneously benefits another person, this rule may make it easier to determine who is liable for earned wages.

1. *Costs*

Updating the Department's interpretation of joint employer status will impose direct costs on private businesses and state and local government entities by requiring them to review the new regulation. To estimate these regulatory familiarization costs, the Department determined: (1) the number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the regulation, and (3) the amount of time required to review the regulation.

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<sup>92</sup> In this scenario, the employee's separate sets of hours are aggregated so that both employers are jointly and severally liable for the total hours the employee works in the workweek. As such, a finding of joint liability in this situation can result in some hours qualifying for an overtime premium. For example, if the employee works for employer A for 40 hours in the workweek, and for employer B for 10 hours in the same workweek, and those employers are found to be joint employers, A and B are jointly and severally liable to the employee for 50 hours worked—which includes 10 overtime hours.

It is uncertain whether private entities will incur regulatory familiarization costs at the firm or the establishment level. For example, in smaller businesses there might be just one specialist reviewing the regulation. Larger businesses might review the rule at corporate headquarters and determine policy for all establishments owned by the business, while more decentralized businesses might assign a separate specialist to the task in each of their establishments. To avoid underestimating the costs of this rule, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the regulation, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this final rule was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 6.1 million private firms and 7.8 million private establishments with paid employees.<sup>93</sup> Additionally, the Department estimates 90,126 state and local governments (2017 Census of Governments) might incur costs under this rule.<sup>94</sup>

The Department believes that even entities that do not currently have workers with one or more joint employers will incur regulatory familiarization costs, because they will need to confirm whether this final rule includes any provisions that may affect them or their employees.

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<sup>93</sup> Statistics of U.S. Businesses 2016, <https://www.census.gov/programs-surveys/susb.html>, 2016 SUSB Annual Data Tables by Establishment Industry

<sup>94</sup> 2017 Census of Governments - Organization. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

The Department judges one hour per entity, on average, to be an appropriate review time for the rule. The relevant statutory definitions have been in the FLSA since its enactment in 1938, the Department has recognized the concept of joint employer status since at least 1939, and the Department already issued a rule interpreting joint employer status in 1958. Therefore, the Department expects that the standards applied by this rule should be at least partially familiar to the specialists tasked with reviewing it. Additionally, the Department believes many entities are not joint employers and thus would spend significantly less than one hour reviewing the rule. Therefore, the one-hour review time represents an average of less than one hour per entity for the majority of entities that are not joint employers, and more than one hour for review by entities that might be joint employers. The Department did not receive any comments providing a better estimate of the time to review this rule.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The mean hourly wage for these workers is \$32.65 per hour.<sup>95</sup> In addition, the Department also assumes that benefits are paid at a rate of 46 percent<sup>96</sup> and overhead costs are paid at a rate of 17 percent of the base wage, resulting in an hourly rate of \$53.22.

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<sup>95</sup> Occupational Employment and Wages, May 2018, <https://www.bls.gov/oes/2018/may/oes131141.htm>.

<sup>96</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

Table 1: Total Regulatory Familiarization Costs, Calculation by Number of Firms and Establishments (\$1000s)

NAICS Sector	By Firm		By Establishment	
	Firms	Cost [a]	Estab-lishments	Cost [a]
Agriculture, Forestry, Fishing and Hunting	21,830	\$1,162	22,594	\$1,202
Mining, Quarrying, and Oil/Gas Extraction	20,309	\$1,081	27,234	\$1,449
Utilities	5,893	\$314	18,159	\$966
Construction	683,352	\$36,368	696,733	\$37,080
Manufacturing	249,962	\$13,303	291,543	\$15,516
Wholesale Trade	303,155	\$16,134	412,526	\$21,954
Retail Trade	650,997	\$34,646	1,069,096	\$56,897
Transportation and Warehousing	181,459	\$9,657	230,994	\$12,293
Information	75,766	\$4,032	146,407	\$7,792
Finance and Insurance	237,973	\$12,665	476,985	\$25,385
Real Estate and Rental and Leasing	300,058	\$15,969	390,500	\$20,782
Professional, Scientific, and Technical Serv.	805,745	\$42,881	903,534	\$48,086
Management of Companies and Enterprises	27,184	\$1,447	55,384	\$2,948
Administrative and Support Services	340,893	\$18,142	409,518	\$21,794
Educational Services	91,774	\$4,884	103,364	\$5,501
Health Care and Social Assistance	661,643	\$35,212	890,519	\$47,393
Arts, Entertainment, and Recreation	126,247	\$6,719	137,210	\$7,302
Accommodation and Food Services	527,632	\$28,080	703,528	\$37,441
Other Services (except Public Admin.)	690,329	\$36,739	754,229	\$40,140
State and Local Governments	90,126	\$4,796	90,126	\$4,796
All Industries	6,092,327	\$324,231	7,830,183	\$416,718
Average annualized costs, 7 percent discount rate				
Over 10 years		\$43,143		\$55,450
In perpetuity		\$21,211		\$27,262
Average annualized costs, 3 percent discount rate				
Over 10 years		\$36,903		\$47,429
In perpetuity		\$9,444		\$12,137

[a] Each entity is expected to allocate one hour of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The mean hourly rate for this occupation is \$32.65 based on BLS's May 2018 Occupational Employment Statistics, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is \$53.22.

The Department estimates that the lower bound of regulatory familiarization cost range would be \$324.2 million, and the upper bound, \$416.7 million. Additionally, the Department estimates that the Retail Trade industry would have the highest upper bound

(\$56.9 million), while the Professional, Scientific and Technical Services industry would have the highest lower bound (\$42.9 million). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this rule over 10 years and in perpetuity. Over 10 years, this rule would have an average annual cost of \$43.1 million to \$55.4 million, calculated at a 7 percent discount rate (\$36.9 million to \$47.4 million calculated at a 3 percent discount rate). In perpetuity, this rule would have an average annual cost of \$21.2 million to \$27.3 million, calculated at a 7 percent discount rate (\$9.4 million to \$12.1 million calculated at a 3 percent discount rate).

## 2. *Potential Transfers*

There are two joint employer scenarios under the FLSA: (1) employees work one set of hours that simultaneously benefit the employer and another person, and (2) employees work separate sets of hours for multiple employers.

Employees who work one set of hours for an employer that simultaneously benefit another person are not likely to see a change in the wages owed them under the FLSA as a result of this rule. In this scenario, the employer is liable to the employee for all wages due under the Act for the hours worked. If a joint employer exists, then that person is jointly and severally liable with the employer for all wages due. To the extent that this standard for determining joint employer status reduces the number of persons who are joint employers in this scenario, neither the wages due the employee nor the employer's liability for the entire wages due would change. The employee would no longer have a legal right to collect the wages due under the Act from the person who

would have been a joint employer under a different standard, but would still be able to collect the entire wages due from the employer.

When discussing potential transfers in the NPRM, the Department stated that the proposed rule would not have any impact on employees' wages, because it would not change the amount of wages due to an employee under the Act. For purposes of the analysis, the Department assumed that employers always fulfill their legal obligations under the Act and pay their employees in full.

Employee representatives criticized that assumption, contending that the NPRM's economic analysis was flawed because it failed to capture the costs to workers.<sup>97</sup> The commenters asserted that the assumption that all employers always comply with their legal obligations under the Act is demonstrably false, because if it were true, there would be no successful FLSA investigations or cases.<sup>98</sup> They also asserted that the rule would limit the ability of workers to collect wages due to them under the FLSA because when there is only one employer liable, it is more likely that the sole employer will lack sufficient assets to pay.<sup>99</sup> The Department agrees that because this rule provides new criteria for determining joint employer status under the FLSA in the first scenario, it may reduce the number of businesses currently found to be joint employers from which employees may be able to collect back wages due to them under the Act. This, in turn, may reduce the amount of back wages that employees are able to collect when their

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<sup>97</sup> EPI, AFL-CIO, and Farmworker Justice, for example.

<sup>98</sup> AFL-CIO.

<sup>99</sup> AFL-CIO and Farmworker Justice. Additionally, Farmworker Justice noted that workers will be less likely to report FLSA violations to the Department because they will not expect to collect any back pay.

employer does not comply with the Act and, for example, their employer is or becomes insolvent.

EPI submitted a quantitative analysis of transfers, estimating that transfers will result from both an increase in workplace fissuring and increased losses due to wage theft by employers.<sup>100</sup> The Department appreciates EPI's quantitative analysis, but does not believe there are data to accurately quantify the impact of this rule. The Department lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses and therefore is unable to estimate the magnitude of a decrease in the number of employers liable as joint employers.

Employees who work separate sets of hours for multiple employers are not affected because the Department is not making any substantive revisions to the standard for determining joint employer status in this scenario. Therefore, joint liability (or lack thereof) in this scenario should not be altered by the promulgation of this rule.

### 3. *Other Potential Impacts*

To the extent revising the Department's regulation provides more clarity, the revision could promote innovation and certainty in business relationships, which also benefits employees. The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships. When an employer contemplates a business relationship with another person, the other person may not be able to assess what degree of association with the employer will result in joint and

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<sup>100</sup> Workplace fissuring refers to increased reliance by employers on subcontractors, temporary help agencies, and labor brokers rather than hiring employees directly.

several liability for the employer's employees. Indeed, the other person may be concerned with such liability despite having insignificant control over the employer's employee. This uncertainty could impact the other person's willingness to engage in any number of business practices vis-à-vis the employer—such as providing a sample employee handbook, or other forms, to the employer as part of a franchise arrangement; allowing the employer to operate a facility on its premises; using or establishing an association health plan or association retirement plan used by the employer; or jointly participating with an employer in an apprenticeship program—even though these business practices could benefit the employer's employees. Similarly, uncertainty regarding joint liability could also impact that person's willingness to bargain for certain contractual provisions with the employer, such as requiring workplace safety practices, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices. The Department's revisions may provide additional certainty as businesses consider whether to adopt such business practices.

Commenters agreed that the additional clarity would promote business relationships. For example, the International Franchise Association (IFA) explained how the current outdated regulations have caused a reduction in franchising opportunities. They wrote: "Franchisors are less inclined to work with newer franchisees or economically disadvantaged franchisees given the heightened risk of joint employer liability." In addition to increasing franchisee opportunities, the IFA argues that this rule would also increase the support that franchisors offer to their franchisees, which has been curtailed due to joint employment concerns. "In the IFA Franchise Survey, 60% of

franchisee respondents reported that they'd seen their interactions with franchisors regarding training affected, and close to half of the respondents witnessed changes in the advice and guidance around personnel policies and suggested templates offered them by their franchisors.” The Chamber of Commerce and IFA cited a study conducted by a Chamber of Commerce economist that evaluated the impacts of the NLRB’s proposed rule on joint employment status under the National Labor Relations Act. Dr. Ron Bird quantified the cost of franchisors “distancing” themselves from franchisees to be between \$17.2 billion and \$33.3 billion annually. Because this study was associated with the NLRB’s proposed rule, the Department has not addressed these costs in the economic analysis.

The Department expects that this rule would reduce burdens on organizations. After initial rule familiarization, these revisions may reduce the time spent by organizations to determine whether they are joint employers. Likewise, clarity may reduce FLSA-related litigation regarding joint employer status, and reduce litigation among organizations regarding allocation of FLSA-related liability and damages. The rule may also promote greater uniformity among court decisions, providing clarity for organizations operating in multiple jurisdictions. This uniformity could reduce organizations’ costs because they would not have to consider multiple, jurisdiction-specific legal standards before entering into economic relationships.

Because the Department does not have data on the number of joint employers, and the number of joint employer situations that could be affected, cost-savings attributable to this rule have not been quantified. The Department did not receive any comments providing data needed to quantify these impacts.

## **VII. Final Regulatory Flexibility Analysis**

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM. The Chief Counsel for Advocacy of the Small Business Administration was notified of this proposed rule upon submission of the rule to OMB under Executive Order 12866.

### *A. Objectives of, and Need for, the Final Rule*

The Department has determined that its interpretation of joint employer status requires revision as it applies to one of the joint employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person). The Department is concerned that the current regulation does not adequately address this scenario, and the Department believes that its revisions would provide needed clarity and ensure consistency with the Act's text.

29 CFR part 791 contains the Department's official interpretations for determining joint employer status under the FLSA. It is intended to serve as a practical guide to employers and employees as to how the Department will look to apply it. However, the Department has not meaningfully revised this part since its promulgation in 1958, over 60 years ago.

The Department's objective is to update its joint employer rule in 29 CFR part 791 to provide guidance for determining joint employer status in one of the joint

employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person) in a manner that is clear and consistent with section 3(d) of the Act.

B. *The Agency's Response to Public Comments*

Some commenters argue that the additional clarity of this rulemaking will be beneficial to small businesses. The National Federation of Independent Business wrote: “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.” Similarly, the American Hotel and Lodging Association wrote: “This clear rule would provide predictability and stability in the law, resulting in increased investment from the business community and economic growth across all sectors of the economy. Stable legal arrangements would encourage economically fruitful business-to-business relationships, which are particularly beneficial to small businesses.”

Other commenters argue that this proposed rule would hurt small businesses because the full liability for labor law violations will now fall on small businesses, whereas before some of the liability was with the larger joint employer. The Center for American Progress wrote: “the draft regulations could let large corporations off the hook when they infringe on workers’ rights, and, consequently, leave smaller companies solely liable for any workplace misdeeds and workers unprotected.” The National Employment

Law Project argues that small businesses will bear the liability without having the ability to prevent labor law violations: “small businesses will be left to ensure compliance with the Act alone, without any assistance from the larger employer, in situations where the smaller company may not be able to ensure compliance without the cooperation of the larger lead or worksite employer.” This would hurt both small businesses and their workers. A group of senator wrote: “This makes DOL’s proposal a free pass for large employers, all owing even those that should be joint employers as shown by the economic realities of the situation to walk away from wage-and-hour and child labor violations for which they should be held responsible, leaving smaller businesses on the hook and potentially leaving employees empty-handed.”

Similarly, the AFL-CIO wrote that the “RFA was intended to protect small businesses” but that the proposed rule “is intended to protect big businesses” and the RFA underestimates costs to small employers, including increased legal exposure and increased cost of liability insurance. The Department disagrees that this rule will result in increased liability insurance costs or that this rule favors large businesses. Nor should small businesses face greater legal exposure. Indeed, a small business may be less likely to be liable as a joint employer for wages of another business’s employee under the revised rule, while its liability for wages of its own employees will remain unchanged. Accordingly, the Department acknowledges that this rule could, on average, reduce legal exposure for small businesses; however, the Department lacks data to quantify this effect. The commenter offered no method and, other than a set of questions related to the Department’s processes and litigation records, offered no suggestions for how to quantify asserted costs.

The AFL-CIO also stated that the NPRM failed to analyze these additional costs to small businesses: recordkeeping burdens related to documenting the amount of control exercised by their larger clients, decrease in the competitive ability of small businesses, and costs to assess any potential increased discordance among standards under parallel federal laws. The AFL-CIO further stated that the proposed rule will likely increase the litigation costs of small businesses. The Department disagrees that this rule will cause a competitive disadvantage to small businesses. The AFL-CIO stated that large businesses will no longer need to comply with the FLSA, giving them a competitive advantage. However, this is not true. Any business, regardless of its size, will be a joint employer under the FLSA if it meets the standard set forth in this final rule. Moreover, increased litigation costs can be avoided by ensuring compliance with the FLSA. Lastly, the Department does not believe this rule will increase any already-existing discordance with other federal laws.

The Department believes this rule will create greater willingness to engage in the use of franchising and subcontracting by providing more clarity about what kinds of activities could result in joint employer status, which can create new small businesses and expand business for existing small businesses. These benefits to the small business community are expected to outweigh any costs.

*C. Description of the Number of Small Entities to Which the Final Rule Will Apply*

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of October 1, 2017, to classify entities as small. SBA establishes separate standards for 6-digit NAICS industry codes, and standard

cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than \$7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than \$550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.

The Department obtained data from several sources to determine the number of small entities. However, the SUSB (2012) was used for most industries (the 2012 data is the most recent SUSB data that includes information on receipts). Industries for which the Department used alternative sources include credit unions,<sup>101</sup> commercial banks and savings institutions,<sup>102</sup> agriculture,<sup>103</sup> and public administration.<sup>104</sup> The Department used the latest available data in each case, so data years differ between sources.

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<sup>101</sup> Nat'l Credit Union Ass'n. (2012). 2012 Year End Statistics for Federally Insured Credit Unions, <https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf>.

<sup>102</sup> Fed. Depository Ins. Corp. (2018). Statistics on Depository Institutions - Compare Banks. Available at: <https://www5.fdic.gov/SDI/index.asp>. Data are from 3/31/18. Data is from 3/11/2018 for employment, and data is from 6/30/2017 for the share of firms and establishments that are "small".

<sup>103</sup> U.S. Dep't of Agric. (2019). 2017 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf)

<sup>104</sup> Census of Governments. 2017. Available at: <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>

For each industry, the SUSB data tabulates total establishment and firm counts by both enterprise employment size (*e.g.*, 0–4 employees, 5–9 employees) and receipt size (*e.g.*, less than \$100,000, \$100,000–\$499,999).<sup>105</sup> The Department combined these categories with the SBA size standards to estimate the proportion of establishments and firms in each industry that are considered small. The general methodological approach was to classify all establishments or firms in categories below the SBA cutoff as a “small entity.” If a cutoff fell in the middle of a defined category, the Department assumed a uniform distribution of employees across that bracket to determine what proportion should be classified as small. The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions.

D. *Costs for Small Entities Affected by the Final Rule*

Table 2 presents the estimated number of small entities affected by the final rule. Based on the methodology described above, the Department found that 5.9 million of the 6.1 million firms (99 percent) and 6.3 million of the 7.8 million establishments (81 percent) qualify as small by SBA standards. As discussed in section V.B, these do not exclude entities that currently do not have joint employees, as those will still need to familiarize themselves with the text of the new rule. Moreover, we assume that the cost structure of regulatory familiarization will not differ between small and large entities

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<sup>105</sup>The SUSB defines employment as of the week of March 12th of the particular year for which it is published.

(i.e., small entities will need the same amount of time for review and will assign the same type of specialist to the task).

Table 2: Regulatory Familiarization Costs for Small Entities, Average by Firm and Establishment

NAICS Sector	By Firm			By Establishment		
	Firms	Perc. of Total	Cost per Firm [a]	Estab-lishments	Perc. of Total	Cost per Estab [a]
Agric./Forestry/Fishing/Hunting	18,103	82.9%	\$53	18,717	82.8%	\$53
Mining/Quarrying/Oil & Gas Extraction	19,625	96.6%	\$53	21,974	80.7%	\$53
Utilities	5,487	93.1%	\$53	7,762	42.7%	\$53
Construction	673,521	98.6%	\$53	676,913	97.2%	\$53
Manufacturing	241,932	96.8%	\$53	264,112	90.6%	\$53
Wholesale Trade	292,615	96.5%	\$53	328,327	79.6%	\$53
Retail Trade	636,069	97.7%	\$53	688,835	64.4%	\$53
Transportation & Warehousing	174,523	96.2%	\$53	183,810	79.6%	\$53
Information	73,288	96.7%	\$53	83,559	57.1%	\$53
Finance and Insurance	229,002	96.2%	\$53	269,991	56.6%	\$53
Real Estate & Rental & Leasing	293,693	97.9%	\$53	310,740	79.6%	\$53
Prof., Scientific, & Technical Services	790,834	98.1%	\$53	819,115	90.7%	\$53
Management of Companies & Ent.	18,004	66.2%	\$53	34,124	61.6%	\$53
Administrative & Support Services	332,072	97.4%	\$53	347,167	84.8%	\$53
Educational Services	87,566	95.4%	\$53	90,559	87.6%	\$53
Health Care & Social Assistance	638,699	96.5%	\$53	726,524	81.6%	\$53
Arts, Entertainment, & Recreation	123,530	97.8%	\$53	126,281	92.0%	\$53
Accommodation & Food Services	520,690	98.7%	\$53	556,588	79.1%	\$53
Other Services	681,696	98.7%	\$53	700,496	92.9%	\$53
State & Local Governments [b]	72,556	80.5%	\$53	72,556	80.5%	\$53
All Industries	5,923,504	97.2%	\$53	6,328,152	80.8%	\$53
Average annualized costs, 7 percent discount rate						
Over 10 years			\$7			\$7
In perpetuity			\$3			\$3

Average annualized costs, 3 percent discount rate			
Over 10 years	\$6		\$6
In perpetuity	\$2		\$2

[a] Each entity is expected to allocate one hour of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The mean hourly rate for this occupation is \$32.65 based on BLS's May 2018 Occupational Employment Statistics, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is \$53.22.

[b] Government entities are not classified as firms or establishments; therefore, we use the total number of entities for both calculations.

The Department estimates that in Year 1, small entities will incur a minimum of approximately \$315 million in total regulatory familiarization costs, and a maximum of approximately \$337 million. Professional, Scientific, and Technical Services is the industry that will incur the highest total costs (\$42.1 million to \$43.6 million).

Additionally, the Department estimated average annualized costs to small entities of this rule over 10 years and in perpetuity. Over 10 years, this rule will have an average annual total cost of \$42.0 million to \$44.8 million, calculated at a 7 percent discount rate (\$35.9 million to \$38.3 million calculated at a 3 percent discount rate). In perpetuity, this rule will have an average annual total cost of \$20.6 million to \$22.0 million, calculated at a 7 percent discount rate (\$9.2 million to \$9.8 million calculated at a 3 percent discount rate).

Based on the analysis above, the Department does not expect that small entities will incur large individual costs as a result of this rule. Even though all entities will incur familiarization costs, these costs will be relatively small on a per-entity basis (an average of \$53.22 per entity). Furthermore, no costs will be incurred past the first year of the promulgation of this rule. As a share of revenues, costs do not exceed 0.003 percent on average for all industries (Table 3). The industry where costs are the highest percent of revenues is Management of Companies and Enterprises where costs range from a lower

bound of 0.014 percent to an upper bound of 0.027 percent of revenues. Additionally, the Department calculated the revenue per firm/establishment for entities with 0 to 4 employees, as per SUSB data. The industry that has the smallest revenue per entity is Accommodation and Food Services (NAICS 72)—\$226,700 per firm and \$226,200 per establishment, in 2018 dollars. In this industry, the per-entity cost (\$53) is 0.023% to 0.024% of revenue. Accordingly, the Department does not expect that this rule would have a significant economic cost impact on a substantial number of small entities.

Table 3: Total Regulatory Familiarization Costs for Small Entities, As Share of Revenues

NAICS Sector	Total Revenue for Small Entities (Millions) [a]	Cost as Percent of Revenue [c]	
		By Firms	By Establishments
Agriculture, Forestry, Fishing & Hunting	\$22,481	0.004%	0.004%
Mining, Quarrying, & Oil/Gas Extraction	\$187,432	0.001%	0.001%
Utilities	\$127,789	0.000%	0.000%
Construction	\$771,322	0.005%	0.005%
Manufacturing	\$1,878,572	0.001%	0.001%
Wholesale Trade	\$2,644,028	0.001%	0.001%
Retail Trade	\$1,451,679	0.002%	0.003%
Transportation & Warehousing	\$241,043	0.004%	0.004%
Information	\$202,889	0.002%	0.002%
Finance & Insurance	\$266,724	0.005%	0.005%
Real Estate & Rental & Leasing	\$200,375	0.008%	0.008%
Professional, Scientific, & Technical Services	\$650,998	0.006%	0.007%
Management of Companies & Enterprises	\$6,641	0.014%	0.027%
Administrative & Support Services	\$265,743	0.007%	0.007%
Educational Services	\$81,623	0.006%	0.006%
Health Care & Social Assistance	\$643,098	0.005%	0.006%
Arts, Entertainment, & Recreation	\$95,085	0.007%	0.007%
Accommodation & Food Services	\$376,423	0.007%	0.008%
Other Services (except Public Administration)	\$377,251	0.010%	0.010%
State & Local Governments	[b]	[b]	[b]
All Industries	\$10,491,197	0.003%	0.003%

[a] Revenues estimated based on the 2012 Survey of US Businesses published by the Census Bureau, inflated to 2018 dollars using the GDP deflator.

[b] Government entities are considered small if the relevant population is less than 50,000. Government revenue data are not readily available by size of government entity.

[c] Calculated by dividing total revenues per industry by total costs per industry, by firm and by establishment, as shown in Table 2.

F. *Analysis of Regulatory Alternatives*

The Department considered alternative tests for the first joint employer scenario—where an employee works one set of hours that simultaneously benefits another person. Those alternative tests, such as the Second and Fourth Circuits’ joint

employer tests, have more factors than the Department’s proposed test, may have a second step, and rely substantially on the “suffer or permit” language in FLSA section 3(g).<sup>106</sup> The Department, however, believes that section 3(d), not section 3(g), is the touchstone for joint employer status and that its proposed four-factor balancing test is preferable, in part because it is consistent with section 3(d). The Department’s test is simpler and easier to apply because it has fewer factors and only one step, whereas the alternative tests involve a consideration of additional factors and are therefore more complex and indeterminate.

The Department also considered applying the four-factor balancing test in *Bonnette* without modification. The Department instead specifies a four-factor test that tracks the language of *Bonnette* with modifications to the first and second factors and additional guidance regarding the fourth factor. For example, whereas the *Bonnette* test considers whether the potential joint employer had the “power” to hire and fire, the Department’s test states that whether the employer actually exercised the power to hire and fire is a clearer indicator of joint employer status than having the right to do so. The Department believes that this modification will help ensure that its joint employer test is fully consistent with the text of section 3(d), which requires a potential joint employer to be “acting ... in relation to an employee.”<sup>107</sup> By rooting the joint employer standard in the text of the statute, the Department believes that its rule could provide workers and organizations with more clarity in determining who is a joint employer under the Act, thereby promoting innovation and certainty in businesses relationships.

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<sup>106</sup> See *Zheng*, 355 F.3d at 69; *Salinas*, 848 F.3d at 136.

<sup>107</sup> 29 U.S.C. 203(d).

## VIII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>108</sup> requires agencies to prepare a written statement for rules that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$165 million (\$100 million in 1995 dollars adjusted for inflation using the CPI-U) or more in at least one year. This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

### A. *Authorizing Legislation*

This rule is issued pursuant to the FLSA, 29 U.S.C. 201, et seq.

### B. *Assessment of Quantified<sup>109</sup> Costs and Benefits*

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than \$165 million in at least one year, but the rule will not result in increased expenditures by state, local, and tribal governments, in the aggregate, of \$165 million or more in any one year.

Based on the cost analysis in this final rule, the Department determined that the rule will result in Year 1 total costs for state and local governments totaling \$4.8 million,

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<sup>108</sup> See 2 U.S.C. 1501.

<sup>109</sup> Only the rule familiarization cost is quantified, but the Department believes that there are potential cost savings that it could not quantify due to lack of data at this time.

all of them incurred for regulatory familiarization (see Table 1). There will be no additional costs incurred in subsequent years.

The Department determined that the proposed rule will result in Year 1 total costs for the private sector between \$319.4 million and \$411.9 million, all of them incurred for regulatory familiarization. There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.<sup>110</sup> However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of \$51.5 billion to \$102.9 billion (using 2018 GDP). A regulation with smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's RIA estimates that the total costs of the proposed rule will be between \$324.2 million and \$416.7 million (*see* Table 1). All costs will occur in the first year of the promulgation of this rule, and there will be no additional costs in subsequent years. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

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<sup>110</sup> *See* 2 U.S.C. 1532(a)(4).

C. *Response to Comments*

The Department received few comments on the proposed rule from state and local government entities. The New York City Department of Consumer Affairs took issue with the NPRM's restriction of definitions under the Fair Labor Standards Act, arguing that the proposed rule "would ignore decades of legal precedent in which courts have appropriately combined the three definitions to establish a comprehensive definition of an employment relationship, and the intent of Congress in including such definitions in the Act." The State of Washington Department of Labor and Industries agreed, stating, "Since both Congress and the Supreme Court have spoken on the definition of 'employee' under FLSA, the DOL's proposal conflicts with Congress' intent and with settled law to narrow and limit the test. DOL cannot change an existing statutory definition by issuing a new interpretation or rule." The Coalition of State AGs concurred, writing, "DOL violates long-standing tenets of statutory interpretation and ignores the common law development of the joint-employment doctrine in an attempt to support an overly narrow reading of the FLSA."

The New York City Department of Consumer Affairs also expressed concern that the proposed rule will undercut the protections of the FLSA because "narrowing circumstances when a joint employment relationship is established will have a domino effect on state and local laws, weakening worker protections." The Coalition of State AGs espoused that the proposed rule was also too narrow, stating, "A broad interpretation of joint employment under the FLSA would hold all parties violating labor standards accountable—both subsidiary businesses that are cutting paychecks and lead businesses that control or have the ability to control working conditions and pay."

The Coalition of State AGs was concerned on the NPRM's effect on the workforce as a whole, writing, "Besides the myriad negative effects the fissuring workplace has had on workers' wages, benefits, and safety, it also harms businesses and employers. Most employers want to follow the law and pay their workers a fair wage. However, today's workplace structures incentivize a race to the bottom, leading conscientious employers to lose out on contracts to lower-bidding companies that may be able to offer lower bids, at least in part by violating wage and hour laws and failing to contribute to social safety nets." The State of Washington Department of Labor and Industries was concerned about the NPRM's effect on workers, noting, "Given the realities of the modern workforce, the proposed rule will reduce worker protections, provide less accountability for employers to ensure compliance with labor laws, and is inconsistent with DOL's mandate and with settled law under FLSA." A group of Massachusetts legislators echoed that concern, stating, "By limiting the accountability certain businesses have to their labor force, the proposed change will encourage these businesses to turn a blind eye to the detrimental practices of affiliated entities. In turn, this will mean that even more workers will suffer from wage theft, with few options for potential recourse."

The substantive arguments in these comments are not specific to state and local governments and are similar to arguments made in numerous other comments opposing the proposed rule. As such, the Department has responded to these arguments elsewhere in this final rule.

D. *Least Burdensome Option Explained*

The Department believes that it has chosen the least burdensome but still cost-effective methodology to revise its rule for determining joint employer status under the FLSA consistent with the Department's statutory obligation. Although the regulation would impose costs for regulatory familiarization, the Department believes that its revisions would reduce the overall burden on organizations by simplifying the standard for determining joint employer status. The Department believes that, after familiarization, this rule may reduce the time spent by organizations to determine whether they are joint employers. Additionally, revising the Department's guidance to provide more clarity could promote innovation and certainty in business relationships.

**IX. Executive Order 13132, Federalism**

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**X. Executive Order 13175, Indian Tribal Governments**

This rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**List of Subjects in 29 CFR Part 791**

Wages.

Signed at Washington, D.C. this 27th day of December, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations by revising part 791 to read as follows:

**PART 791—JOINT EMPLOYER STATUS UNDER THE FAIR LABOR STANDARDS ACT**

Sec.

791.1 Introductory statement.

791.2 Joint employment.

791.3 Severability.

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

**§ 791.1 Introductory statement.**

This part contains the Department of Labor's general interpretations of the text governing joint employer status under the Fair Labor Standards Act. *See* 29 U.S.C. 201–19. The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the Act, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the Act. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to joint employer status under the Act are inconsistent or in conflict with the interpretations stated in this part, they are

hereby rescinded. These interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any such act or omission in the course of such reliance, any such interpretation in revised part 791 “is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” 29 U.S.C. 259.

### **§ 791.2 Determining Joint Employer Status under the FLSA.**

There are two joint employer scenarios under the FLSA.

(a)(1) In the first joint employer scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, *see* 29 U.S.C. 203(e)(1), (g), but another person simultaneously benefits from that work. The other person is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. *See* 29 U.S.C. 203(d). In this situation, the following four factors are relevant to the determination. Those four factors are whether the other person:

- (i) Hires or fires the employee;
- (ii) Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
- (iii) Determines the employee's rate and method of payment; and
- (iv) Maintains the employee's employment records.

(2) As used in this section, “employment records” means records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee. Except to the extent they

reflect, relate to, or otherwise record that information, records maintained by the potential joint employer related to the employer's compliance with the contractual agreements identified in paragraphs (d)(3) and (4) of this section do not make joint employer status more or less likely under the Act and are not considered employment records under this section. Satisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employer status.

(3)(i) 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 right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control. Standard contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status. No single factor is dispositive in determining joint employer status under the Act. Whether a person is a joint employer under the Act will depend on how all the facts in a particular case relate to these factors, and the appropriate weight to give each factor will vary depending on the circumstances of how that factor does or does not suggest control in the particular case.

(ii) Indirect control is exercised by the potential joint employer through mandatory directions to another employer that directly controls the employee. But the direct employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status.

(b) Additional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work.

(c) 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.

Accordingly, to determine joint employer status, no factors should be used to assess economic dependence. Examples of factors that are not relevant because they assess economic dependence include, but are not limited to:

(1) Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

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

(3) Whether the employee invests in equipment or materials required for work or the employment of helpers; and

(4) The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

(d)(1) A joint employer may be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization. *See* 29 U.S.C. 203(a), (d).

(2) Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely under the Act.

(3) The potential joint employer's contractual agreements with the employer requiring the employer to comply with specific legal obligations or to meet certain standards to protect the health or safety of its employees or the public do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such contractual agreements against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, mandating that employers comply with their obligations under the FLSA or other similar laws; or institute sexual harassment policies; requiring background checks; or requiring employers to establish workplace safety practices and protocols or to provide workers training regarding matters such as health, safety, or legal compliance. Requiring the inclusion of such standards, policies, or procedures in an employee handbook does not make joint employer status more or less likely under the Act.

(4) The potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such agreements against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, specifying the size or scope of the work project, requiring the employer to meet quantity and quality standards and deadlines, requiring morality clauses, or requiring the use of standardized products, services, or advertising to maintain brand standards.

(5) The potential joint employer's practice of providing the employer a sample employee handbook, or other forms, to the employer; allowing the employer to operate a

business on its premises (including “store within a store” arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer; jointly participating in an apprenticeship program with the employer; or any other similar business practice, does not make joint employer status more or less likely under the Act.

(e)(1) In the second joint employer scenario, one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek. The jobs and the hours worked for each employer are separate, but if the employers are joint employers, both employers are jointly and severally liable for all of the hours the employee worked for them in the workweek.

(2) In this second scenario, 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. However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act. The employers will generally be sufficiently associated 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. Such a determination depends on all of the facts and circumstances. Certain business relationships, for example, which have little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers.

(f) For each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the Act, including the overtime provisions, for all of the hours worked by the employee in that workweek. In discharging this joint obligation in a particular workweek, the employer and joint employers may take credit toward minimum wage and overtime requirements for all payments made to the employee by the employer and any joint employers.

(g) The following illustrative examples demonstrate the application of the principles described in paragraphs (a) through (f) of this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant,

and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3)(i) *Example.* An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement between the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do

not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

(ii) *Application.* Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment is not enough to establish that it is a joint employer.

(4)(i) *Example.* A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. A restaurant official provides general instructions to the team leader from the cleaning company regarding the tasks that need to be completed each workday, monitors the performance of the company's work, and keeps records tracking the cleaning company's completed assignments. The team leader from the cleaning company provides detailed supervision. At the restaurant's request, the cleaning company decides to terminate an individual worker for failure to follow the restaurant's instructions regarding customer safety. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application.* Under these facts, the restaurant is not a joint employer of the cleaning company's employees because the restaurant does not exercise significant direct or indirect control over the terms and conditions of their employment. The restaurant's daily instructions and monitoring of the cleaning work is limited and does not demonstrate that the restaurant is a joint employer. Records of the cleaning team's work are not employment records under paragraph (a)(1)(iv) of this section, and therefore, are not

relevant in determining joint employer status. While the restaurant requested the termination of a cleaning company employee for not following safety instructions, the decision to terminate was made voluntarily by the cleaning company and therefore is not indicative of indirect control.

(5)(i) *Example.* A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. However, in practice a restaurant official oversees the work of employees of the cleaning company by assigning them specific tasks throughout each day, providing them with hands-on instructions, and keeping records tracking the work hours of each employee. On several occasions, the restaurant requested that the cleaning company hire or terminate individual workers, and the cleaning company agreed without question each time. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application.* Under these facts, the restaurant is a joint employer of the cleaning company's employees because the restaurant exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The restaurant directly supervises the cleaning company's employees' work on a regular basis and keeps employment records. And the cleaning company's repeated and unquestioned acquiescence to the restaurant's hiring and firing requests indicates that the restaurant exercised indirect control over the cleaning company's hiring and firing decisions.

(6)(i) *Example.* A packaging company requests workers on a daily basis from a staffing agency. Although the staffing agency determines each worker's hourly rate of pay, the packaging company closely supervises their work, providing hands-on instruction on a

regular and routine basis. The packaging company also uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

(ii) *Application.* Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by closely supervising their work and controlling their work schedules.

(7)(i) *Example.* A packaging company has unfilled shifts and requests a staffing agency to identify and assign workers to fill those shifts. Like other clients, the packaging company pays the staffing agency a fixed fee to obtain each worker for an 8-hour shift. The staffing agency determines the hourly rate of pay for each worker, restricts all of its workers from performing more than five shifts in a week, and retains complete discretion over which workers to assign to fill a particular shift. Workers perform their shifts for the packaging company at the company's warehouse under limited supervision from the packaging company to ensure that minimal quantity, quality, and workplace safety standards are satisfied, and under more strict supervision from a staffing agency supervisor who is on site at the packaging company. Is the packaging company a joint employer?

(ii) *Application.* Under these facts, the packaging company is not a joint employer of the staffing agency's employees because the staffing agency exclusively determines the pay and work schedule for each employee. Although the packaging company exercises some control over the workers by exercising limited supervision over their work, such

supervision, especially considering the staffing agency's supervision, is alone insufficient to establish that the packaging company is a joint employer without additional facts to support such a conclusion.

(8)(i) *Example.* An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

(ii) *Application.* Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(9)(i) *Example.* Entity A, a large national company, contracts with multiple other businesses in its supply chain. Entity A does not hire, fire, or supervise the employees of its suppliers, and the supply agreements do not grant Entity A the authority to do so. Entity A also does not maintain any employment records of suppliers' employees. As a

precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees, and the example does not indicate that the wage floor is accompanied by any other indicia of control. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(10)(i) *Example.* Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand, which gives Franchisee B access to certain proprietary software for business operation or payroll processing. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise, such as sample operational plans, business plans, and marketing materials. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including

hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing optional samples, forms, and documents that relate to staffing and employment does not amount to direct or indirect control over B's employees that would establish joint liability.

(11)(i) *Example.* A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

(ii) *Application.* Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on

its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

### **§ 791.3 Severability**

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from part 791 and shall not affect the remainder thereof.