

June 26, 2019

ATTORNEY GENERAL RAOUL OPPOSES RULE CHANGE THAT ENDANGERS RIGHTS OF MILLIONS OF WORKERS

Raoul & 18 AGs Submit Letter to Department of Labor Challenging Proposed Change to Joint Employer Status

Chicago — Attorney General Kwame Raoul, as part of a multistate group of 19 attorneys general, opposed the U.S. Department of Labor’s proposal to narrow the interpretation of joint employment, thereby complicating how states enforce labor laws and leaving millions of workers vulnerable to labor violations.

In a [letter sent Tuesday](#) to Department of Labor Secretary Alexander Acosta, Raoul and the attorneys general challenge the department’s proposed change to joint employer status under the Fair Labor Standards Act (FLSA). The joint employment rule determines employer liability for wage theft or other workplace violations when two or more entities jointly employ a worker. Raoul and the attorneys general contend that the department has failed to justify the proposed new interpretation and draws on outdated analysis that does not consider the changing nature of today’s workplace relationships, including the fact that a growing number of businesses are changing organizational models by outsourcing integral functions but still maintaining control of workers.

“When businesses are increasingly using contractors, employments agencies or other third parties to meet staffing needs, workplace protections should be clear,” Raoul said. “I am committed to fighting any policy that could compromise the protections our workers deserve.”

Under the proposed rule, joint employment would be determined by whether an employer hires or fires the employee; supervises and controls the employee’s schedule and working conditions; determines the employee’s rate and method of payment; and maintains the employee’s records. But according to Raoul and the attorneys general, this proposal is inconsistent with the purpose of the FLSA – to protect workers – and ignores more than 30 years of private sector development during which the economy and the workplace have changed.

Further, the attorneys general write that the department’s proposed rule does not reflect today’s workplace relationships, where businesses increasingly share employees using third-party management companies, independent contractors, staffing agencies, or other labor providers. By narrowing the scope of joint employment, the department’s change will leave millions of workers vulnerable to unchecked violations of federal and state labor laws.

If the federal standard fails to encompass companies that pay for subcontracted employees while also controlling the terms of employment, the attorneys general contend that gaps in legal compliance will inevitably increase, leaving workers at greater risk of exploitation.

The letter builds on Attorney General Raoul’s efforts to fight unlawful employment practices and end the wage theft crisis. After becoming Attorney General, Raoul initiated Senate Bill 161 to establish a Worker Protection Unit within the Attorney General’s office. The unit will have the authority to enforce existing laws that protect workers’ rights and lawful businesses in Illinois. The Illinois General Assembly passed the legislation in May, and it currently awaits consideration by the governor.

In April, Raoul testified before the Congressional House Appropriations Labor, Health and Human Services, and Education Subcommittee about the wage theft crisis. In his testimony, Raoul highlighted the need for

SB 161, as well as other state-level efforts to respond to the crisis of wage theft and the importance of the federal government as a partner in these efforts.

Joining Raoul in submitting the comment letter were the attorneys general from California, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.



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June 25, 2019

Via Electronic Filing (<http://www.regulations.gov>)

The Honorable Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking (RIN: 1235-AA26)
Joint Employer Status under the Fair Labor Standards Act

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of Massachusetts, New York, Pennsylvania, California, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin to oppose the proposed rulemaking by the U.S. Department of Labor ("DOL") to change the interpretation of joint employment under the Fair Labor Standards Act (the "FLSA"), which governs the status and liability of an employer that shares control over the terms and conditions of workers' employment with another employer. *See* Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043 (Apr. 9, 2019) (the "NPRM" or "Proposed Rule").

The experiences of many of the undersigned state Attorneys General ("State AGs") in enforcing labor laws and protecting workers argue strongly against adopting the Proposed Rule.

Based on our collective experience, we believe that the Proposed Rule does not adequately reflect today's workplace relationships, in which growing numbers of businesses are changing organizational and staffing models by outsourcing functions to third-party management companies, independent contractors, staffing agencies, or labor providers. These practices lead to less accountability for employers and less compliance with labor laws. Notably, the Proposed Rule encourages employers to avoid liability under the law by simply asserting that, although they had the *ability* to exercise control, they did not in fact *exercise* that control. In today's economy, unreasonably narrowing the scope of joint employment will leave millions of workers vulnerable to unchecked violations of the FLSA and corresponding state laws and will unduly complicate labor law enforcement in our states.

As further explained below, the State AGs also believe that the Proposed Rule would, if finalized, likely be arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). The APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). DOL fails to meet this standard for the Proposed Rule in two ways. First, the Proposed Rule contravenes the statutory purposes of the FLSA and established court precedents on joint employment. Second, DOL fails to provide a satisfactory explanation for the Proposed Rule, as it sets forth insufficient evidence and unsupported assertions, claiming that replacing the current joint-employment standard will promote certainty, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy. *See* 84 Fed. Reg. at 14043. Further, these assertions are insufficient justification for a rule that conflicts with the FLSA's remedial purposes of protecting workers.

I. The State AGs' Experience Shows that the Proposed Rule Will Make Labor Law Enforcement More Difficult and Could Result in More Violations.

A. The Undersigned State AGs Include Interested Parties with Expertise in Labor and Employment Issues.

Many State AGs enforce federal, state, and local laws that protect workers' economic security, health, and safety. State AGs may directly investigate and prosecute violators of minimum wage, overtime, and anti-discrimination laws, or they may defend enforcement actions by state departments of labor in administrative or judicial appeals.

State enforcement of wage and hour laws under a joint-employment doctrine is informed by, and often dependent upon, the federal standard for joint employment. *See, e.g., Newell v. Runnels*, 407 Md. 578, 649-654 (2009) (calling the Maryland Wage and Hour Law ("MWHL") the "State parallel" to the FLSA and applying federal law to analyze a joint-employment claim under the MWHL and the FLSA); *Garcia v. Right at Home, Inc.*, 33 Mass. L. Rptr. 346, 354 (Mass. 2016) (acknowledging that because "[t]here are no Massachusetts appellate court decisions establishing the test for joint-employment in the wage and hour context . . . Massachusetts courts look to cases interpreting the . . . FLSA for guidance") (citing *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 170 (2000)). As such, the rulemaking itself directly impacts the ability of State AGs in many states to enforce our labor laws and protect our workers.

Notably, State AGs have held employers jointly accountable in appropriate circumstances. For instance, the Massachusetts Attorney General has applied common-law principles in numerous cases to hold companies jointly liable for wage and hour violations ostensibly committed by third-party staffing agencies, including in two cases simultaneously investigated and settled by the Massachusetts AG and DOL. In one case, the Massachusetts AG concluded that a company called Shield Packaging, Inc. was a joint employer to nearly 500 employees who were employed and paid through various staffing agencies.¹ This conclusion was based on Shield's routine supervision and scheduling of "temporary workers" and the mutual economic dependence between workers and the company. Shield agreed to pay nearly a million dollars in restitution and penalties for its failure to pay minimum wage and overtime to workers. In another case, the Massachusetts AG determined that UnWrapped, Inc., a textile company, was jointly responsible for wage violations against 450 employees that were provided through six staffing agencies.² UnWrapped controlled the terms of employment, including setting the rates that the agencies were paid. As a result of this investigation, UnWrapped agreed to pay \$1.2 million in restitution, penalties, and liquidated damages for minimum wage, overtime, earned sick time, and child labor violations.

Similarly, the New York Attorney General filed suit against Domino's Pizza LLC ("Domino's"), the largest pizza delivery chain in the country, for wage and hour law violations at its franchise stores.³ Though Domino's claimed that it played no role in employment of workers at franchise stores, evidence revealed that Domino's exercised significant control, including requiring franchisees to purchase and use a software system that the company knew under-calculated wages. In this case, the New York AG argues that Domino's is a joint employer because the company controlled employee relations at its franchisee store and, among other things, played a role in the hiring, firing, and discipline of workers; pushed an anti-union position on franchisees; and closely monitored employee job performance through onsite and electronic reviews. New York filed suit against Domino's under a joint-employment theory in order to hold the responsible parties accountable for rampant wage and hour violations and workers' well-being.

Other states have also brought cases holding joint employers accountable for violations of labor and employment laws. *See Potelco, Inc. v. Dep't of Labor & Indus.*, 191 Wash. App. 9, 33 (Wash. Ct. App. 2015) (recognizing that both a temporary employment agency and the site employer may be responsible for workplace violations under the economic realities test). *See People v. Pac Anchor Transportation, Inc., et al.*, Cal. Super. Ct. Los Angeles County, supplemental complaint 2016, No. BC 397600 (alleging defendant corporations "client employer" and "labor contractor" were jointly liable for wage and hour violations).

¹ See Press Release, The Commonwealth of Massachusetts Office of the Attorney General, Factory in Dudley to Pay Nearly \$1 Million for Wage Violations, Hindering AG's Investigation (Nov. 11, 2017) (on file with author), <https://www.mass.gov/news/factory-in-dudley-to-pay-nearly-1-million-for-wage-violations-hindering-ags-investigation>.

² See Press Release, The Commonwealth of Massachusetts Office of the Attorney General, Lowell Reusable Bag Factory to Pay Nearly \$1.2 Million for Numerous Labor Violations, Retaliation Against Employees (March 10, 2017) (on file with author), <http://wayback.archive-it.org/1101/20180102205048/http://www.mass.gov/ago/news-and-updates/press-releases/2017/lowell-bag-factory-labor-violations.html>.

³ See Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Lawsuit Seeking To Hold Domino's And Its Franchisees Liable For Systemic Wage Theft (May 24, 2016) (on file with author), <https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable>.

B. Shifting Employment Relationships in Today’s Economy Make Labor Law Enforcement More Difficult.

The federal standard for joint employment is uniquely impactful given the evolving nature of the labor market, which the NPRM acknowledges. 84 Fed. Reg. at 14055 (“The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships”). As the many State AGs who enforce and defend state wage and hour laws can attest, changing economic realities and workplace relationships make labor enforcement more difficult today than ever before. Unlike the twentieth century economy, when large employers like General Motors, IBM, and Macy’s dominated industry landscapes and employed thousands of workers, today’s labor market is very different. *See* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, 28 (Harvard Univ. Press 2014). As former Wage and Hour Division Administrator David Weil has explained, many lead businesses cause fissuring in the workplace by contracting out their non-core work to subsidiary businesses.⁴ *Id.* These subsidiary businesses, which provide services like janitorial work, housekeeping, human resources, and product delivery, often deepen fissures by shifting contracted activities to other businesses, including subcontractors and independent contractors. *See* David Weil, *Reflecting on a Fissured World*, Perspectives on Work 42, 43 (2017), http://www.fissuredworkplace.net/assets/Weil_POW_OpEdTrumpsLaborPolicy_2017.pdf.

Further, studies and surveys show that alternative work arrangements account for a significant amount of employment growth and that the number of temporary and contracted workers will continue to increase. *See* Lawrence F. Katz and Alan B. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015,” (Nat’l Bureau of Econ. Research, Working Paper No. 22667, 2016), <https://www.nber.org/papers/w22667> (finding that independent contractors, freelancers, on-call workers, contract workers, and workers employed by temp agencies accounted altogether for 94 percent of employment growth; this same group from 2005 to 2015 grew from 10.7 percent to 15.8 percent); Press Release, American Staffing Association, *New Data from Quarterly ASA Staffing Employment and Sales Survey* (Mar. 14, 2019), <https://americanstaffing.net/posts/2019/03/14/staffing-employment-sets-record-high-in-2018/> (finding that in 2018, U.S. staffing companies employed a record high average weekly number of staffing employees for any year since the inception of the survey in 1990).

The States receive voluminous wage complaints each year, many of which stem from the fissured workplace—namely the increased use of subcontracting, staffing agencies, and labor brokers. By outsourcing many non-core functions, lead businesses often limit their legal and monetary liabilities. *See* Weil, *The Fissured Workplace* at 24-25. This outsourcing results in lower wages across job functions and industries. *See* Arindrajit Dube and Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 ILR Review 2, 287 (2010),

⁴ For the purposes of this comment letter, the State AGs use the term “lead businesses” to refer to businesses that contract with other entities—like labor contractors, subcontractors, staffing agencies, and franchisees—for the performance of labor or production of services. In turn, the State AGs use the term “subsidiary businesses” to refer to the entities that lead businesses contract with for said labor and services.

<http://econweb.umd.edu/~kaplan/empiricaloutsourcing.pdf> (finding that pay for janitors fell by 4 to 7 percent and pay for security guards fell by 8 to 24 percent in U.S. companies that outsourced this work).

Not only does outsourcing lead to depressed wages, but workers in heavily subcontracted industries have also experienced increased wage theft. For example, the warehouse and logistics industry consists of workers who ship and transfer goods out of warehouses, unpacking, loading, and shipping goods throughout different parts of the supply chain. *See* Catherine Ruckelshaus et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work* National Employment Law Project, 2014, 15-17, <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

Seventy-seven percent of Fortune 500 companies outsource their warehouse and logistics functions to other companies, which in turn contract with staffing agencies that hire temporary workers to shift these companies' goods from factories to warehouses to stores and to residential homes. *Id.* A survey found that out of the approximately 3.4 million workers in the warehouse and logistics industry, approximately 25% experienced minimum wage violations, 44% experienced overtime violations, and 66% were required to work off-the-clock and were unpaid for this time. *Id.*

Akin to the warehouse and logistics industry workers, construction workers are particularly vulnerable to wage violations in today's economy.⁵ Historically, the construction industry's business model has consisted of a general contractor and a small number of subcontractors performing specialized work in a specific trade. In turn, each subcontractor employed a crew of skilled tradespersons. Today, the States frequently encounter subcontractors that hire dozens or hundreds of workers to perform the general contractors' core work, including non-specialized

⁵ Wage theft in this industry is often accomplished by payroll fraud, in which employers keep workers off formal payrolls by paying them in cash, personal check, or by misclassifying them as independent contractors. By misclassification or paying off the books, employers often fail to pay into workers' compensation and unemployment insurance and fail to withhold and pay payroll taxes. The D.C. Attorney General filed a lawsuit in 2018 against Power Design, Inc., a national electrical company, for misclassifying more than 500 electrical workers. *See* Press Release, Office of the Attorney General for the District of Columbia, AG Racine Sues Power Design for Cheating Hundreds of Electrical Workers Out of Wages and Benefits (Aug. 8, 2018) (on file with author), <https://oag.dc.gov/release/ag-racine-sues-power-design-cheating-hundreds>. In 2017, Universal Drywall, LLC reached a settlement with the Massachusetts AG and agreed to pay \$500,000 for systematically misclassifying its employees as independent contractors. *See* Press Release, The Commonwealth of Massachusetts Office of the Attorney General, New Hampshire Drywall Company Agrees to \$500,000 Settlement to Resolve Claims It Misclassified Workers, (Feb. 2, 2017) (on file with author), <https://www.mass.gov/news/new-hampshire-drywall-company-agrees-to-500000-settlement-to-resolve-claims-it-misclassified>.

labor. Not surprisingly, wage theft in the construction industry is disproportionately high in States that track enforcement by industry.⁶

The increasingly fissured workplace leads to a lack of compliance with labor standards and creates significant barriers to wage enforcement. First, many workers may not know who their direct employer is, especially if they are paid in cash or do not receive paystubs with a company name on them. In contrast, they are well aware of the identity of the lead business, whose name is on their uniforms, the equipment, or the facility where they work. However, in these situations, the lead business often disclaims any knowledge of or responsibility for the complaining worker, even if it ultimately controls the terms and conditions of the subcontracted work. Lead businesses regularly claim that they do not know who cleans their stores, who delivers their merchandise, or who launders their sheets and towels. Finally, even if a State is able to identify the subcontractor or labor broker that the lead business claims is the actual employer, in many cases, it is a fly-by-night entity without reputational interests to maintain and has closed shop and disappeared, making enforcement and collection difficult or impossible.

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 race to bid lower on contracts leads to lower profit margins for those companies, which in turn leads to lower (and unlawful) wages for those workers. Even law-abiding lead businesses are negatively affected by their competitors lowering their costs of doing business by outsourcing job functions to lower-paid workers. A lower-paid workforce also affects the economy because workers have less money to spend and are more in need of assistance. As the Seventh Circuit has observed, "If everyone abides by the law, treating [the lead business] as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator . . . or one who plans to spurn the FLSA . . . is [the lead business] exposed to the risk of liability on top of the amount it has agreed to pay the contractor. And there are ways to avoid this risk: either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full." *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007).

⁶ See The Commonwealth of Massachusetts Office of the Attorney General, Protecting Massachusetts' Workers (2017), <https://www.mass.gov/files/documents/2017/09/07/fy2017-labor-day-report.pdf>, and The Commonwealth of Massachusetts Office of the Attorney General, Protecting Massachusetts' Workers (2018), https://www.mass.gov/files/documents/2018/08/31/6179%20Labor%20Day%20Report18_0.pdf (showing percentage of assessments against construction industry employers to be 21 to 31 percent of all assessments). See also California Labor Commissioner's Office, 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement (2018), https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf (report to the California Legislature identifying construction industry as one of the "major underground economy industries in California where labor law violations are the most rampant" and showing the second highest amount in penalties and wages assessed).

In view of abundant evidence of today’s fissured workplace economy and the way that these shifting employment relations cause significant harms to workers, traditional enforcement of wage and hour violations must adapt and focus on both the subsidiary businesses that are setting wages and cutting paychecks *and* the lead businesses that frequently set the scope of work and terms of payment. The Proposed Rule, however, does the opposite. The Proposed Rule admittedly would “reduce, in some cases, the number of persons who are liable for payment of . . . wages.” 84 Fed. Reg. at 14053. In the face of contradictory evidence, and without any supporting evidence of its own, the NPRM asserts that there will “be no impact on workers’ wages due under the FLSA” because it baselessly assumes that “all employers always fulfill their legal obligations under the [FLSA].”⁷ *Id.* at 14054.

However, the experience of the States shows that if the federal joint-employment standard fails to encompass lead businesses, then unscrupulous employers will be encouraged to find gaps to avoid legal compliance and even law-abiding businesses will structure their labor arrangements to avoid liability under labor and employment laws. In either case, it will be increasingly difficult to make workers whole for any such violations. 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.

II. If Finalized, the Proposed Rule Would Likely Violate the Administrative Procedure Act.

The APA requires agencies to engage in “reasoned decisionmaking” that rests on a “logical and rational” “consideration of the relevant factors.” *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quotation omitted). An agency is required to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” when promulgating a rule. *See State Farm*, 463 U.S. at 43 (quotation omitted). Further, when “its new policy rests upon factual findings that contradict those which underlay its prior policy,” an agency must explain the departure from its existing views. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The Proposed Rule fails to meet the requirements for revising the current joint-employment standard for two reasons. First, the Proposed Rule conflicts with established judicial precedent and is inconsistent with the broad and expansive protections of the FLSA. Second, DOL fails to provide a satisfactory justification for the rule change and offers no evidence to support its asserted rationale for the Proposed Rule, thus failing to demonstrate that its justification does not “run[]

⁷ To the contrary, wage theft at the hands of employers continues to be a prevalent issue for low-wage workers nationwide. *See* Katie Hatt & Laura Huizar, *Ensure Respect For Minimum Wage Laws*, National Employment Law Project (November 7, 2018), <https://www.nelp.org/blog/st-paul-minnesota-ensure-respect-minimum-wage-laws/>. Notably, a 2017 report by the Economic Policy Institute found that 2.4 million workers in the ten most populous states in the country lose \$8 billion annually to minimum wage violations. *See* David Cooper & Teresa Kroeger, Economic Policy Institute, *Employers Steal Billions From Workers’ Paychecks Each Year 1* (2017), <https://www.epi.org/files/pdf/125116.pdf>. Assuming these findings are representative of the remaining forty states, this type of wage theft exceeds \$15 billion each year. *Id.* at 2.

counter to the evidence before [it].” *Fox Television*, 556 U.S. at 552. Accordingly, DOL should withdraw the Proposed Rule.

A. The Proposed Rule Is Inconsistent With Statutory Text and Legal Precedent.

In the Proposed Rule, 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 Supreme Court has explained that, in conducting rulemaking, agencies are required to account for the “preeminent factor” that Congress intended to characterize their statutory authority. *State Farm*, 463 U.S. at 55; *cf. Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 556 (9th Cir. 2016) (“The standard [the agency] followed . . . was in accordance with statutory purpose and hence could not have been arbitrary, capricious, or contrary to law.”). The Supreme Court has long recognized that the FLSA is “remedial and humanitarian in purpose.” *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (superseded by statute on other grounds). More specifically, the FLSA was “specially legislated” by Congress to protect the rights of “those who sacrifice a full measure of their freedom and talents to the use and profit of others.” *Id.* To realize this purpose, the Court further explained that the FLSA “must not be interpreted or applied in a narrow, grudging manner.” *Id.* The Proposed Rule’s narrow interpretation of joint employment is a dramatic departure from this longstanding tradition and statutory remedial purpose of protecting workers and, as such, is not in accordance with the FLSA.

1. The NPRM Misconstrues Legal Precedent.

Under the Proposed Rule, joint employment would be determined by whether the putative joint employer:

- (1) hires or fires the employee;
- (2) supervises and controls the employee’s work schedule or conditions of employment;
- (3) determines the employee’s rate and method of payment; and
- (4) maintains the employee’s employment records.

84 Fed. Reg. at 14044.

The Proposed Rule allows that “[a]dditional factors may be relevant for determining joint employer status. . . .” 84 Fed. Reg. at 14059. It further allows that “[n]o single factor is dispositive in determining the economic reality of the potential joint employer’s status under the [FLSA]. Whether a person is a joint employer under the [FLSA] will depend on all the facts in a particular case, and the appropriate weight to give each factor will vary depending on the circumstances.” *Id.* But the only additional factors for which consideration is permitted are those that indicate whether the potential joint employer exercised “significant control over the terms and conditions of the employee’s work” or acted “directly or indirectly in the interest of the employer in relation to the employee.” 84 Fed. Reg. at 14059.

The Proposed Rule explicitly provides that certain criteria are excluded from consideration: (1) economic dependence; and (2) the reserved right to control the terms and conditions of employment. 84 Fed. Reg. at 14059 (“Whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer’s liability”);

“The potential joint employer must actually exercise—directly or indirectly—one or more of these indicia of control to be jointly liable under the [FLSA]. . . . 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”).⁸

In support of the proposed test, the NPRM argues that it is “derived (with one modification) from *Bonnette v. California Health & Welfare Agency*,” that “a plurality of circuit courts use or incorporate *Bonnette*’s factors in their joint-employer test,” and that courts use the *Bonnette* factors “as the baseline” for joint-employment tests. *Id.* at 14048; 14046, n.30 (referencing *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)). However, in justifying the Proposed Rule, DOL presents a misleading characterization of *Bonnette*. Further, DOL misconstrues how courts have treated the relative importance of the *Bonnette* factors. Moreover, every court, including the Supreme Court, to consider a joint-employment case includes the power to control as a permissible factor in their inquiry. In drastically narrowing the joint-employment test, the Proposed Rule’s test is no longer based on “economic reality.”

a. The NPRM’s Reliance on Bonnette and Other Court Decisions to Support the Proposed Rule is Based on a Misreading of Those Cases.

In purporting to rely on *Bonnette*, the NPRM misconstrues that court’s analysis. First, as recognized by the NPRM, the Proposed Rule admittedly alters the *Bonnette* test. 84 Fed. Reg. 14048. Further, the NPRM mischaracterizes *Bonnette* and other cases, which it claims support the proposed test.

First, the NPRM admits that it has modified *Bonnette*’s four-factor test, but that modification improperly cabins the four-factor test. The first factor announced in *Bonnette* looked at potential control, inquiring whether the alleged employer “had the power to hire and fire the employees. . . .” 704 F.2d at 1470. The factors included in the Proposed Rule omit this key phrase relating to reserved authority and, instead, ask only whether the alleged employer “[h]ires or fires the employee,” 84 Fed. Reg. at 14048, which reframes the test from one of reserved and actual control to one exclusively concerned with exercised control. Indeed, the Proposed Rule explicitly provides that “reserved contractual right to act . . . is not relevant for determining joint employer status.” 84 Fed. Reg. at 14059 (proposed § 791.2(a)(2)).

In addition, the NPRM misconstrues *Bonnette* in ways it does not acknowledge. While the Proposed Rule acknowledges that additional factors may be relevant, that the joint-employment inquiry is based on the facts at hand, and that no one factor is dispositive, the Proposed Rule precludes consideration of categories of relevant evidence and certain additional factors. This is based on a misreading of *Bonnette*, which acknowledges that although its four factors “provide a

⁸ The current joint-employment regulation provides that joint employment exists in three separate scenarios: (1) where there is an arrangement between the employers to share the employee’s services; (2) where one employer is acting directly or indirectly in the interest of the other employers in relation to the employee; and (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. 29 C.F.R. § 791 (emphasis added).

useful framework for analysis in this case, [t]hey 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 1469 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (“More important, these four factors are relevant to this particular situation”)).

The NPRM also claims that “additional precedent supports the Department’s proposed factors.” *Id.* at 14049 (citing *Bacon v. Subway Sandwiches & Salads LLC*, 2015 WL 729632, at *4 (E.D. Tenn. Feb. 19, 2015), and *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957 (8th Cir. 2015)). Contrary to the NPRM’s assertions, neither of these courts created tests for joint-employment status under the FLSA. *See id.* at 14049, n.70. Instead, they give fleeting reference to “potential factors” to apply or suggest that similar factors might be relevant in determining the economic reality of the arrangement but provide little analysis of how those factors might be applied or what additional criteria may be relevant. *See* 84 Fed. Reg. at 14049, n.70; *see also Bacon*, 2015 WL 729632 at *8 (applying three factors from the Sixth Circuit test for joint employment under Title VII as “potential facts to be considered”); *Ash*, 799 F.3d at 961 (affirming dismissal of the complaint and suggesting that facts “such as their alleged employers’ right to control the nature and quality of their work, the employer’s right to hire or fire, or the source of compensation for their work” would sufficiently have alleged the economic reality of the workers’ employment to survive a motion to dismiss). It is misleading for DOL to claim these cases support its overly narrow gloss on the *Bonnette* factors.

b. Most Courts Find the Bonnette Factors Insufficient for Determining Joint Employment under FLSA.

Moreover, the NPRM misconstrues precedent in describing the *Bonnette* test as the “baseline” for the tests of “many courts,” since the majority of courts have found the *Bonnette* factors insufficient to determine joint employment. 84 Fed. Reg. 14046, n.30. Every circuit to consider the *Bonnette* factors has determined that they should not be exclusive and that other factors must be considered when relevant, or has outright rejected them in the joint-employment context. *See, e.g., Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675-76 (1st Cir. 1998) (finding the *Bonnette* factors a “useful framework” in examining economic reality, and noting “it is the totality of the circumstances, and not any one factor, which determines” the issue); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003) (announcing six nonexclusive factors for the particular case); *In re Enterprise Rent-A-Car Wage & Hour Emp’t Practices Litigation*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing non-exhaustive factors when considering total employment relationship); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 136-37 (4th Cir. 2017) (rejecting *Bonnette* and identifying other circuits’ supplementation of it); *Gray v. Powers*, 673 F.3d 352, 354-55 (5th Cir. 2012) (applying nonexclusive *Bonnette* factors in economic realities test); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App’x 587, 594 (6th Cir. 2009) (applying a five factor test that is more open-ended on the question of employer control and based on employee responsibilities); *Moldenhauer v. Tazewell-Pekin Consol. Communications Center*, 536 F.3d 640, 644 (7th Cir. 2008) (considering joint employment under the FMLA, which mirrors the FLSA, and reasoning that “[a]lthough these factors are certainly relevant in deciding whether an employer-employee relationship exists, it would be foolhardy to suggest that these are the *only* relevant factors, or even the most important”); *Torres-Lopez v. May*, 111 F.3d 633, 646 (9th Cir. 1997) (applying a 13-factor test to determine joint employment under the FLSA); *Johns v. Stewart*, 57 F.3d 1544, 1559 (10th Cir. 1995) (nothing that “we have not

adopted the *Bonnette* test in this circuit”); *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1176-77 (11th Cir. 2012) (discussing eight factors as a guide to examining economic reality of relationship).

Each of these courts adopted their tests subsequent to *Bonnette* and ultimately rejected the *Bonnette* factors in those cases because they failed to reflect “economic reality,” and, therefore, were inconsistent with the FLSA. They recognize the complex nature of employment relationships in today’s economy and have endeavored to identify relevant factors to evaluate joint employment appropriately in light of evolving business practices. *See, e.g., Hall v. DIRECTV, LLC*, 846 F.3d 757, 764 (4th Cir. 2017) (explaining that “several circuits (including the Ninth Circuit, itself) have liberalized the *Bonnette* test to reflect Congress’s original intent for the FLSA” and have, as a result, “applied numerous, distinct, multifactor joint employment tests”); *Enterprise*, 683 F.3d at 469 (stating that the *Bonnette* test only finds “joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well,” concluding that although “the factors outlined today . . . are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA,” and explaining that the inquiry requires consideration of “all the relevant evidence, including evidence that does not fall neatly within one of the above factors”).⁹

DOL, on the other hand, intends to update its regulations by adopting a test from over 30 years ago, which has been criticized by many courts, and further narrowing it. By failing to employ a thorough analysis or reflect on the “economic reality” of employment relationships, DOL has failed to adequately justify the Proposed Rule. It does not consider the myriad ways workers are employed today, and Congress’s intent to protect them. Simply put, the Proposed Rule’s narrow, four-factor test is impermissible under the FLSA.

2. The Proposed Rule’s Narrowed Focus on the Definition of Employer Under the FLSA Is Based on A Failure to Apply Basic Principles of Statutory Interpretation and Is Inconsistent with the FLSA.

As further grounds for the Proposed Rule, DOL asserts that Section 3(d) of the FLSA, the definition of “employer,” alone determines joint liability for hours worked, and that Sections 3(e)(1) and 3(g), the definitions of “employee” and “employ” respectively, define the relationship between the potential employer and the worker for a specific set of hours worked. 84 Fed. Reg. at 14050. It eschews long-settled interpretation of the FLSA by separating the definitions for “employee” and “employ”—as the basis for determining “an employment relationship between the potential employer and the worker for a specific set of hours worked”—and the definition for “employer”—as the basis for determining “joint liability for those hours worked.” *Id.* Further, by focusing exclusively on Section 3(d), DOL justifies excluding certain conduct—such as having a reserved contractual right to control essential terms and conditions of employment and to insist on certain business practices like wage floors or sexual harassment policies—from its definition of joint employment on the basis that such conduct is not relevant. *Id.* at 14048. However, DOL’s

⁹ Further, the NPRM counts both the *Moldenhauer* and *Enterprise* courts in its “plurality” that apply the *Bonnette* factors, but these courts explicitly rejected the idea that the four factors are sufficient to determine joint employment under the FLSA.

interpretation of Section 3 contradicts the plain language of the FLSA and ignores established principles of statutory interpretation.

As the NPRM notes, “[i]t is axiomatic that any Department interpretation of the FLSA must begin with the text of the statute, following well-settled principles of statutory construction by ‘reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.’” 84 Fed. Reg. at 14047 (quoting *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011)); see also *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute”) (citation omitted). When the statutory language in question is “plain, [it] must [be] enforce[d] according to its terms.” *Jimenez*, 555 U.S. at 118 (citations omitted).

Under the FLSA, “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). An “employee means any individual employed by an employer.” *Id.* § 203(e)(1). “Employ includes to suffer or permit to work.” *Id.* § 203(g). The three definitions are interrelated, and courts have considered them together in analyzing joint-employment status. See, e.g., *Baystate*, 163 F.3d at 675 (referencing all three definitions in its discussion of the basis for the joint-employment test). The *Baystate* court explained that the FLSA “contemplates several simultaneous employers, each responsible for compliance with the Act,” and did not differentiate among the three definitions in finding a joint-employment relationship. *Id.* at 675, 676 (citations omitted); see also *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 140-41 (2d Cir. 2008) (citing all three definitions and applying an economic realities test). In fact, the NPRM elsewhere concedes that the definitions of employer, employee, and employ “work in harmony.” 84 Fed Reg. at 14050.

Further, the FLSA “is a remedial [statute], written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy.” *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015) (alteration in original) (citation omitted). The statute “must not be interpreted or applied in a narrow, grudging manner.” *Salinas*, 848 F.3d at 140 (quoting *Muscoda Local No. 123*, 321 at 597 (superseded by statute on other grounds)). Rather, it is construed “liberally to apply to the furthest reaches consistent with congressional direction.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

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. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (“Above and beyond the plain language, moreover, the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy” (internal quotations omitted); *Salinas*, 848 F.3d at 133 (“Consistent with the FLSA’s ‘remedial and humanitarian’ purpose, Congress adopted definitions of ‘employ,’ ‘employee,’ and ‘employer’ that brought a broad swath of workers within the statute’s protection” (quoting *Tennessee Coal*, 321 U.S. at 597)); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (“Courts have adopted an expansive interpretation of the definitions of ‘employer’ and ‘employee’ under the FLSA, in order to effectuate the broad remedial purposes of the Act”) (citing, as examples, *Dunlop*

v. Carriage Carpet Co., 548 F.2d 139, 144 (6th Cir. 1977); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 n.6 (5th Cir. 1976)).¹⁰

However, the NPRM proclaims that Section 3(d), defining “employer,” is the only provision relevant to the joint-employment doctrine. 84 Fed Reg. at 14050. In support, the NPRM presents misleading characterizations of several Supreme Court cases. The NPRM argues that the Court “cited section 3(d) only in passing in a footnote” in *Rutherford Food Corp. v. McComb*. 84 Fed. Reg. at 14051 and n.86-87 (citing *Rutherford*, 331 U.S. 722, 727-29 (1947)). In fact, the Court cited all three definitions in that footnote and emphasized that all three were relevant to the joint-employment question, writing that “there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.” *Rutherford*, 331 U.S. at 728 & n.6; see also *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (looking to the definition of “employee” in Section 3(e) to clarify the definition of employer provided in Section 3(d)); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 31-32 (1961) (citing all three definitions).

Hence, the Proposed Rule’s characterization of the statute is just plain wrong. The statutory definition of “employer” incorporates the definitions of “employ” and “employee,” and Congress’s desire that the terms be interpreted together is clear. The FLSA does not create two separate kinds of employers—an “employer” and a “joint employer.” Instead, the text indicates that in any employment situation, the three definitions must be read together to provide the broadest protections for workers. See, e.g., *Salinas*, 848 F.3d at 135 (“Congress repeatedly has reaffirmed that the FLSA’s definitions of ‘employ,’ ‘employee,’ and ‘employer’ dictate that two or more entities can constitute ‘joint employers’ for purposes of the FLSA”); *Zheng*, 355 F.3d at 66 (citing multiple definitions in its analysis of which test to use for joint employment and focusing on the suffer or permit language). Thus, DOL cannot parse the definitions for “employer,” “employee,” and “employ” to provide less protection to workers than Congress intended.

B. DOL Has Failed to Provide a Satisfactory Explanation for the Proposed Rule.

DOL proposes a rule that arbitrarily narrows the scope of joint employment without providing evidence in support of its drastic limitation and change to the current standard. It offers no explanation for how the Proposed Rule accounts for the evolving landscape of employment. Further, DOL’s purported reasons for the Proposed Rule fail to justify this narrowed standard, especially in light of the well-settled statutory purpose of the FLSA to protect workers. The States set forth above concrete evidence that the Proposed Rule will negatively impact workers in direct contravention of the FLSA. If DOL proceeds in the face of this evidence, then the final rule will be arbitrary and capricious.

¹⁰ The Supreme Court’s recent decision in *Encino Motorcars, LLC v. Navarro* determined only that exceptions to the FLSA need not be read narrowly; it did not overrule the many court decisions that have read the definitions section broadly. 138 S. Ct. 1134, 1142 (2018); see *Berry v. Best Transp., Inc.*, No. 16-473, 2018 WL 6830097, *8 (E.D. Mo. Dec. 27, 2018) (holding that “[*Encino*] focuses entirely on exemptions”); *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 228 (2d Cir. 2018) (applying reasoning in *Encino* to “exemptions under the FLSA”); see also *Mosquera v. MTI Retreading Co.*, 745 F. App’x 568, 570-71, 571 n.1 (6th Cir. Aug. 14, 2018) (holding that, “[i]n construing these exemptions, we give them a fair (rather than a narrow) interpretation” and noting that *Encino* overturned circuit precedent regarding exemptions (internal quotation omitted)); *Amaya v. NOYPI Movers, L.L.C.*, 741 F. App’x 203, 204-05, 205 n.2 (5th Cir. July 11, 2018) (holding “the FLSA’s list of exemptions must be given a fair reading” and noting that interpretation of implementing regulations was unaffected by *Encino* (internal quotation omitted)).

1. The NPRM Acknowledges that DOL Lacks Evidence to Analyze the Potential Impact of the Proposed Rule.

Under *State Farm*, the Supreme Court requires that an agency “examine the relevant data and articulate a satisfactory explanation for its action.” 463 U.S. at 43. The *State Farm* Court rejected an agency’s explanation as arbitrary where “there [was] no direct evidence in support of the agency’s finding.” *Id.* at 52. Where an agency fails to reflect upon contrary evidence or treats contrary evidence in a conclusory fashion, the proposed rule will not survive judicial scrutiny. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding conclusory dismissal of empirical data on a critical factor in the decision lacking a reasoned explanation). Courts have found that “a complete failure to . . . grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking.” *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

Here, the NPRM baldly asserts that the Proposed Rule “would not result in any reduction in wages received by the employee because the employer would pay the wages in full.” 84 Fed. Reg. at 14055. However, the NPRM fails to provide any evidence supporting its contentions that: (1) wages would not be reduced; or (2) employers would pay wages owed in full. In fact, DOL acknowledges that it “lacks information about how many individuals or entities would be affected and to what degree” and “requests comments, studies, and data on the prevalence of joint employers, how this proposed rule would affect members of the public, and how to quantify those impacts, if such quantification is possible.” *Id.*¹¹ Thus, DOL admits it lacks the empirical data needed to assess how the narrowed joint-employment standard would impact workers.

In contrast, there is vast evidence of rampant wage theft in fissured industries and evidence strongly suggesting that a narrowed standard for joint-employment liability in those industries would lead to increased wage theft and other harms to workers. As detailed in Section I above, narrowing the joint-employment standard would in fact encourage lead businesses to structure their business relationships in order to avoid joint-employment liability for violations such as minimum wage and overtime under the FLSA and to avoid paying into workers’ compensation and unemployment insurance. (*See* Section I.B., *supra*). Therefore, actual evidence of the realities

¹¹ To the extent that DOL attempts to offer “illustrative examples” aimed at “demonstrate[ing] the application of” the Proposed Rule, 84 Fed. Reg. at 14,059, these too fall short. The examples provided by DOL, *see id.* at 14059-14061, are simplistic, unhelpful, and further highlight the ways in which the Proposed Rule fails to account for the “web of complex interactions” of our modern economy. *Id.* at 14047. In some examples, DOL presents factual scenarios that are unquestionably demonstrative of a joint-employment relationship—and thus, unhelpful to someone trying to apply the new joint-employment standard to “close calls.” *See, e.g., id.* at 14060 ((5)(i) Example and (5)(ii) Application) (where a 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 . . . [the] company is a joint employer of the staffing agency’s employees”). On the other hand, other examples fail to provide enough information for an accurate determination of joint employment under current court precedent. *Compare id.* at 14060 ((3)(i) Example and (3)(ii) Application) (where an “office park agrees to pay [a] janitorial company a fixed fee for [cleaning] services and reserves the right to supervise the janitorial employees . . . [but] do[es] not set the janitorial employees’ pay rates or individual schedules and do[es] not in fact supervise” the work, “the office park is not a joint employer”) with *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (the joint-employment question must focus on “economic reality”) and *Hall v. DIRECTTV, LLC*, 846 F.3d 757, 764 (4th Cir. 2017) (“several circuits . . . have liberalized the *Bonnette* test to reflect Congress’s original intent” and have “applied numerous, distinct, multifactor joint employment tests”).

of workers' experiences in today's economy shows that the Proposed Rule will harm the very workers that the FLSA is meant to protect. If DOL fails to examine, evaluate, and grapple with this evidence, a final rule will be arbitrary and capricious.

2. DOL's Asserted Bases for the Proposed Rule Are Insufficient and Unsupported.

DOL claims that the Proposed Rule is warranted because it will “promote certainty . . . , reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy.” *Id.* at 14043. However, these bases fail to justify, support, or adequately explain the reasoning behind the Proposed Rule. *Cf. Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (holding agency action to be arbitrary because its analysis was “internally inconsistent and inadequately explained”); *see also Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (collecting cases). Further, the NPRM is devoid of empirical evidence or data supporting these bases. In addition, the stated bases are inconsistent with the FLSA's broad, remedial purposes.

First, DOL's claims that the Proposed Rule will result in greater predictability by reducing litigation and creating more uniformity in court decisions is unsupported by the NPRM. *See* 84 Fed. Reg. at 14047, 14055. The Proposed Rule incorporates a four-factor test that no court has articulated or implemented and is more restrictive than current joint-employment standards. *See id.* at 14048 (proposing to use the *Bonnette* four-factor test “with one modification”). The Proposed Rule would leave future adjudications without a principled and developed body of law to direct and guide its application and would still require case-by-case adjudication to clarify its meaning, leading to more—not less—litigation. Employing an entirely new standard, rather than one already applied by numerous courts, will raise additional fact-intensive questions as to which employers qualify as joint employers, and which are shielded from obligations under labor laws, generating more uncertainty about legal obligations.

Next, the NPRM asserts that the Proposed Rule will encourage innovation by encouraging employers to contract with secondary businesses and to take certain actions in that relationship. *See, e.g.*, 84 Fed. Reg. at 14047 (asserting that uncertainty about joint employment may affect an employer's interest in, among other things, providing secondary businesses with sample employee handbooks or requiring that a secondary business institute workplace safety practices). But the NPRM does not cite to any empirical evidence or data demonstrating that employers now hesitate to engage in these practices with secondary businesses because of the current joint-employment standard. In fact, studies and surveys show that employers have significantly *increased* their use of temporary and contract workers and expect to increase this use in the future. *See, e.g.*, Business Wire, “Corporate Finance Leaders Worldwide Expect Uptick in Hiring and Modest Economic Growth, According to New American Express Global Survey,” <https://www.businesswire.com/news/home/20190410005022/en/>, Apr. 10, 2019 (discussing the 2019 Global Business & Spending Outlook survey, which found that 71 percent of companies “will make greater use of temporary and contract workers”; 75 percent of companies “cite the use of these workers as central or important to their company's employment practices two years from now”); *see also* Section I.B., *supra* (citing studies and surveys showing the increasing percentage of temporary and contract workers). Here, DOL fails to reflect upon evidence contrary to its bases

for the Proposed Rule—that employers are not, in fact, hesitant to enter business relationships for labor even with the existing, broader joint-employment standard.

In addition, the stated bases for the Proposed Rule contradict the remedial purpose of the FLSA because DOL’s stated justifications for the rulemaking focus exclusively on better protecting employers, not employees. DOL claims that the Proposed Rule would permit employers to better predict when they would face joint-employer liability and, thus, encourage them to “innovate” in ways that would offload any legal liability to franchisees, subcontractors, or staffing companies. 84 Fed. Reg. at 14047. DOL also claims that it seeks to avoid “unnecessary confusion and uncertainty” by effectively communicating to companies that it will not seek to hold franchisors or clients of staffing agencies responsible for FLSA violations. *Id.* The NPRM thus focuses solely on the Proposed Rule’s benefits to employers, without any corresponding factual findings or evidence that demonstrate any positive impact whatsoever that the Proposed Rule would have on employees.

Further, the focus of the Proposed Rule on employers is especially problematic, since DOL’s originating act provides that the agency’s purposes are to protect workers: “to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.” 29 U.S.C. § 551. The fact that DOL provides no evidence of the impact that the Proposed Rule would have on employees exposes the true purpose of the Proposed Rule—to limit employer liability for FLSA violations, thereby broadening protections for employers over employees.¹² Thus, the Proposed Rule, with its focus on limiting employers’ liability, contravenes not just the statutory purpose of the FLSA, *see Tenn. Coal*, 321 U.S. at 597, but also the overall purpose of DOL.

3. DOL Fails to Justify the Changes to its Interpretation of the FLSA.

Under the APA, “when an agency changes its interpretation of a particular statutory provision, this change . . . will be set aside if the agency has failed to provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 523 (2d Cir. 2017) (quoting *Fox Television*, 556 U.S. at 516); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1200 (2015) (“The APA requires an agency to provide more substantial justification when . . . its prior policy has engendered serious reliance interests that must be taken into account”).

Many states have relied on the FLSA’s joint-employment standard in developing and interpreting their own joint-employment standard under state laws. The Proposed Rule will call into question decades of state law interpretations and require state law enforcement agencies, state

¹² In contrast, DOL’s prior policy on joint employment, which was disseminated in 2016 and withdrawn in 2017 without explanation, observed that “businesses are varying organizational and staffing models by, for instance, sharing employees or using third party management companies, independent contractors, staffing agencies, or labor providers,” and concluded that, “[a]s a result, the traditional employment relationship of one employer employing one employee is less prevalent.” David Weil, Wage and Hour Division, U.S. Dep’t of Labor, Administrator’s Interpretation No. 2016-1: Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act at 1 (January 20, 2016) (“AI”). Accordingly, the AI endeavored to set forth an interpretation of joint employment that would further the FLSA’s goals of protecting workers involved in such workplace arrangements.

courts, and federal courts interpreting state laws to expend considerable resources to reevaluate joint employment under state labor laws. Some state courts have explicitly held that joint-employment standards under state law should be based on those standards under the FLSA. *See, e.g., Yick Wing Chan v. Indus. Bd. of Appeals*, 992 N.Y.S.2d 413, 414 (1st Dep’t 2014) (citing *Herman v. RSR Sec Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) for determining the status of “employer” under the New York Labor Law § 190 (3)); *Ponce v. Lajanie*, 2015 N.Y. Misc. LEXIS 2522, (Sup. Ct. N.Y. Cty. 2015) (citing three different Second Circuit cases to determine the parameters of the “economic reality” test); *Newell*, 407 Md. at 649-654 (calling the Maryland Wage and Hour Law (“MWHL”) the “State parallel” to the FLSA and applying federal law to analyze a joint-employment claim under the MWHL and the FLSA); *Garcia*, 33 Mass. L. Rptr. at 354 (acknowledging that because “[t]here are no Massachusetts appellate court decisions establishing the test for joint-employment in the wage and hour context . . . Massachusetts courts look to cases interpreting the . . . FLSA for guidance”).

Similarly, some federal courts have declined to interpret state laws separately from the FLSA and, instead, have provided a lengthy analysis under federal law before concluding that the same analysis applies under state law. *See, e.g., Murphy v. HeartShare Human Servs. of N.Y.*, 254 F. Supp. 3d 392, 404 (E.D.N.Y. 2017) (“Courts apply the same horizontal joint employment test under federal and New York labor law”) (citing *Chen v. St. Beat Sportswear Inc.*, 364 F. Supp. 269, 278 (E.D.N.Y. 2005)); *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 240 (4th Cir. 2017) (“Because plaintiffs’ claims under Maryland labor laws run parallel to their claims under the FLSA, our analysis of federal law extends as well to the state law claims”); *Zamos v. W&E Communications, Inc.*, 970 F. Supp. 2d 794, 806 (N.D. Ill. 2013) (“[T]he IMWL parallels the FLSA, and the same analysis generally applies to both statutes”).

DOL’s sudden departure from decades of court precedent and regulatory interpretation of the joint-employment standard will upend these reliance interests.

III. Conclusion



For the foregoing reasons, the Proposed Rule is arbitrary and capricious under the APA. DOL’s proposal is inconsistent with the FLSA and court precedent, is contrary to the FLSA’s statutory purposes, lacks evidentiary support, and presents an insufficient and unsupported rationale.

To ensure compliance with wage and hour laws, law enforcement should be putting pressure on the centers of coordination of the fissured workplace rather than allowing lead businesses to outsource labor and liability. By holding both lead businesses and subsidiary businesses responsible for wage and hour violations, the States will be better able to compel contractors, franchisees, and suppliers to meet labor standards. The Proposed Rule would substantially impair the enforcement of wage and hour laws by enabling employers who benefit from wage theft to escape liability. Thus, the Proposed Rule should be withdrawn.

Respectfully submitted,



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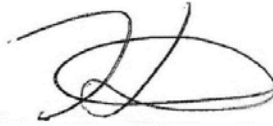
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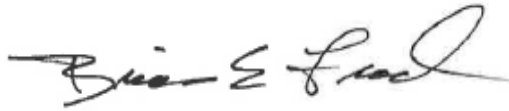
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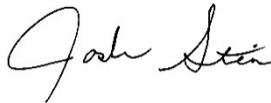
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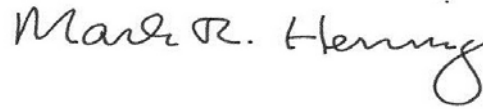
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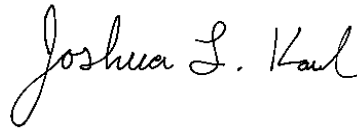
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