Consumer Affairs

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

June 25, 2019

Re: Joint Employer Status Under the Fair Labor Standards Act, RIN: 1235AA26

Dear Administrator Cheryl Marie Stanton:

The New York City Department of Consumer Affairs ("DCA") submits these comments to the United States Department of Labor ("USDOL") in opposition to the proposed rule on the definition of joint employer contained in the April 1, 2019 Notice of Proposed Rulemaking under the Fair Labor Standards Act (the "FLSA" or "the Act") ("Proposed Rule"). The Proposed Rule hurts workers: it fails to consider the realities of the modern workforce; the vulnerability of workers to wage theft and misclassification; the challenges in collecting wage and hour judgments; and the efforts of unscrupulous employers to skirt their legal obligations through the use of judgment-proof subcontractors.

DCA houses New York City's Office of Labor Policy and Standards ("OLPS"). OLPS is charged with enforcing New York City's workplace laws, developing innovative policies to raise job standards, and providing a central resource to help working New Yorkers assert their rights under local, state, and federal laws. In the course of its enforcement and education efforts, OLPS receives and incorporates feedback from the diverse array of workers and employers in New York City. OLPS has expertise in the issues that face workers, including low-wage and immigrant workers, through its enforcement of the City's laws concerning access to paid safe and sick leave, regular and predictable work hours, and freedom from retaliation for asserting their workplace rights. Moreover, OLPS routinely encounters workers who have experienced violations of wage and hour laws or other non-payment for work performed.

New York City's municipal labor laws rely on the definitions of "employee" and "employer" contained in the Fair Labor Standards Act. For example, New York City's predictable scheduling law explicitly refers to FLSA's definition of "employee." The Earned Safe and Sick Time Act incorporates the New York Labor Law's definitions of "employee" and "employer," which rely on the FLSA and its definition of "joint employer." Narrowing circumstances when a joint employment relationship is established will have a domino effect on state and local laws, weakening worker protections. As such, the Proposed Rule hurts workers in New York City, State, and nationally. It contravenes the humanitarian and remedial purpose of the FLSA, as well as the broad joint employer tests that have been articulated by the circuit courts to further the FLSA's purpose.[1]

Employers and employees alike stand to benefit from updated and clear, uniform guidelines to determine joint employer status. However, any update to the rules must be made with the goal of protecting workers, consistent with the purpose of the FLSA. Instead, the Proposed Rule facilitates workers' exploitation by making it easier for employers to escape liability for legal violations. Accordingly, DCA opposes the Proposed Rule.

The Four-Factor Test in the Proposed Rule Provides Employers with a Roadmap to Undermine FLSA's Broad Remedial Purpose.

Current USDOL regulations provide that two or more employers may be deemed joint employers under the FLSA with respect to an employee who performs work for them in the same workweek if the employers are not "completely disassociated" from each other.[2] This broad statutory language is necessary to realize, and consistent with, the FLSA's broad remedial purpose. It leaves room for a fact-specific inquiry into what entity or entities are ultimately liable for violations of labor laws. In doing so, it closes loopholes that would allow employers—particularly those with the deepest pockets—to skirt their obligations under the law by hiding behind subcontractors, staffing agencies, and franchise arrangements. Accordingly, without this flexibility to analyze actual employer practices, compliance and access to rights guaranteed by the FLSA and other labor laws would be compromised.

In applying this broad regulatory language, circuit courts throughout the country have applied a variety of fact-specific tests to determine whether a joint employer relationship exists.[3] While these tests vary from one to the next, they all preserve the flexible, fact-specific, and expansive qualities embodied by the current USDOL regulation and necessary to achieving the FLSA's broad remedial purpose.[4]

The USDOL's Proposed Rule is a sharp pivot away from any test of any circuit. The Proposed Rule would modify a four-factor test articulated in the Ninth Circuit decision *Bonnette v. California Health &*

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[1] The broad, remedial purpose of the FLSA was first articulated in *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), which refers to the provisions of the FLSA as "remedial and humanitarian in purpose," noting that the statute protects the rights of "those who toil" who "Congress has specially legislated to protect" and "must not be interpreted or applied in a narrow, grudging manner." This principle has been adopted by circuit courts in joint employment cases and to support a broad reading of other FLSA provisions. *See, e.g., Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125, 133 (4th Cir. 2017) (joint employer case noting the "remedial and humanitarian purpose" of the FLSA); *Morgan v. Family Dollar Stores, Inc*., 551, F.3d 1233 (11th Cir. 2008) (overtime case stating that "FLSA is a remedial statute that has been construed liberally to apply to the furthest reaches consistent with congressional direction."); *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) ("Over fifty years ago, the Supreme Court determined the approach that must be followed in construing the provisions of the Fair Labor Standards Act. A number of the other circuits have explicitly followed that approach," referencing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123* in a retaliation case).

[2] *See* 29 C.F.R. § 791.2(a).

[3] *See, e.g., Zheng v. Liberty Apparel Co., Inc.*, 355 F. 3d 61 (2d Cir. 2003) (applying a six-factor text); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (applying the four factors articulated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)); *Layton v. DHL Express (USA), Inc*., 686 F.3d 1172, 1176 (11th Cir. 2012) (applying an eight-factor test); *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1160 (10th Cir. 2018) (applying a six-factor test that varies from *Zheng*.)

[4] *Id. See also Real v. Driscoll Strawberry Assocs.,* 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.")

Welfare Agency[5] to make that test more restrictive and less likely to result in a finding of joint employer status—effectively providing employers with a roadmap for exploiting their workers. The four proposed criteria are: whether the putative joint employer 1) hires or fires the employee; 2) supervises and controls the employee's work schedules or conditions of employment; 3) determines the employee's rate and method of payment; and 4) maintains the employee's employment records.[6] Additionally, a putative joint employer's ability, power, or right to act with respect to an employee's terms or conditions of employment will not be relevant to its joint employer status under the Proposed Rule unless the employer *actually exercises that right*.[7] This is particularly problematic because it completely disregards the level of control a putative joint employer holds simply by retaining the ability to exercise these rights. Furthermore, under the Proposed Rule, the USDOL will consider factors in addition to the four *Bonnette* factors *only if* they are indicative 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.[8] In making these changes, the Proposed Rule departs from the *Bonnette* factors and adopts a rigid standard that disregards decades of legal precedent across multiple jurisdictions and again, the entire purpose of the Fair Labor Standards Act.[9]

For New York, the divergence between current law and the Proposed Rule is particularly stark. In *Zheng v. Liberty Apparel Co.,* the Second Circuit articulated a multi-pronged approach that evaluates a range of factors to determine joint employer status. These factors include the extent to which the putative joint employer supervises employees; the nature of the work performed by the employee and whether the employee works exclusively or predominantly for the joint employer; whether the premises and equipment are furnished by the joint employer; and the employer's business model.[10] An entity's actual exercise of its rights with respect to an employee is not necessary for the establishment of a joint employment relationship under the *Zheng* test, which is already more expansive than the four-factor test in *Bonnette*.[11]

The rigidity of the factors that may be considered under the Proposed Rule is contrary to established precedent that has confronted scenarios where unscrupulous employers have sought to exploit loopholes through employment arrangements, including *Bonnette* itself. The *Bonnette* court noted that a joint employer determination does not depend on isolated factors but "upon the circumstances of the whole

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[5] *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).
[6] *See* "Joint Employer Status under the Fair Labor Standards Act," 18 Fed. Reg. 14043 (April 9, 2019) (to be codified at 29 C.F.R. § 791.2), *at* https://www.regulations.gov/document?D=WHD-2019-0003-0001 (hereinafter "Proposed Rule.")
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See Zheng v. Liberty Apparel Co., Inc.*, 355 F. 3d 61 (2d Cir. 2003). Specifically, the *Zheng* test considers the following six factors: 1) whether the putative joint employer's premises and equipment are used for the employee's work; 2) whether the employees are part of a business that shifts as a unit from one putative joint employer to another; 3) the extent to which the employee performs a discrete line-job that is integral to the company's process of production; 4) whether responsibility under a contract between the subcontractor and the company could pass from one subcontractor to another without material change; 5) the degree to which the company or its agents supervise the employee's work; and 6) whether the employee works exclusively or predominantly for the joint employer.
[11] "Accordingly, although an entity's exercise of an employer's formal prerogatives — hiring and firing, supervising schedules, determining rate and method of payment, and maintaining records — may be sufficient to establish joint employment under the FLSA, it is not necessary to establish joint employment." *Zheng*, 355 F. 3d at 79.

activity," and that 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."[12] This was not what the FLSA intended.[13] Other circuits have also held that the definition of a joint employer is broader than the four factors articulated in *Bonnette*. For example, the Seventh Circuit in *Moldenhaur v. Tazewell-Pekin Consol. Commc'ns Center* referenced the limitations of the four factors in a joint employment case under the Family and Medical Leave Act, stating "[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."[14]

Instead of effectuating the broad remedial purpose of the FLSA, the Proposed Rule limits workers' rights substantially by proposing a narrower interpretation than what the courts have already articulated. As the USDOL notes, while several circuits apply some of the factors, most do not use the four factors *exclusively* to determine joint employer status.[15] Currently, no circuit is limited by the four factors in the way that the USDOL proposes. Doing so will ultimately have a detrimental effect on workers because it will make it easier for employers to avoid liability.

By Prohibiting the Consideration of Certain Factors, the Proposed Rule Ignores the Realities of Modern Work Arrangements and Makes it More Difficult to Establish a Joint Employer Relationship.

In addition to the above, the Proposed Rule will make it harder for workers to establish a joint employment relationship by 1) removing consideration of "economic dependence" factors that look at the position of the employee with respect to the joint employer: whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; has the opportunity for profit or loss based on managerial skill; and invests in equipment or materials required for work or the employment of helpers, 2) restricting the FLSA definitions that could be considered in a joint employer analysis, and 3) excluding an employer's business model, practices, or agreements as probative of a joint employer relationship.[16] These changes make even worse the injury inflicted by the restrictive four-part test described above and serve only to undermine the broad remedial purpose of the FLSA.

Although the "economic dependence" factors have traditionally been used to determine whether a worker is an employee or an independent contractor, they are relevant to a joint employment inquiry insofar as that inquiry should be inclusive of a broad range of factors. For example, with the development of the online "sharing economy," where workers are connected to potential jobs via electronic applications and often required to provide their own tools or vehicles, economic dependence factors should certainly be considered, as the enforcement of wage and hour laws is already a challenge in these industries. Moreover, this change signals a tacit approval to employers to use subcontractors and independent contractors to avoid liability under the FLSA.

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[12] *Bonnette,* 704 F.2d at 1470.
[13] *See Bonnette,* 704 F.2d at 1470 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).
[14] *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.,* 536 F.3d 640, 644 (7th Cir. 2008) (citing *Reyes v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir.2007), in which the court found a joint employer relationship between the farm that employed migrant workers and the recruiter who placed the worker in the farm.)
[15] For examples, see cases cited in *supra* note 3.
[16] *See* Proposed Rule.

The Proposed Rule would also restrict the definitions under the FLSA that could be considered in a joint employment determination. Contrary to judicial precedent, the Proposed Rule would *only* look at the definition of "Employer" in Section 3(d) of the FLSA, and not definitions of "Employee" or "Employ," in 3(e)(1) and 3(g), respectively. The language in the Federal Register makes it clear that the purpose of this change is to limit the liability of the putative joint employer. Specifically, the Proposed Rule states: "[a]ccordingly, 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." As with other changes in the Proposed Rule, this would ignore decades of legal precedent in which courts have appropriately combined the three definitions to establish a comprehensive definition of an employment relationship,[17] and the intent of Congress in including such definitions in the Act. To view only one of the definitions in isolation defies all common sense.

Finally, under the Proposed Rule, the USDOL will not consider an employer's business model, practices, or agreements as probative of a joint employer relationship. The examples that accompany the Proposed Rule make it clear that, particularly in the case of franchises or other contractual relationships, a putative joint employer will be protected from being jointly liable with an employer with whom it has a contract or franchise relationship.[18] The examples in the Proposed Rule list a number of factors that could currently point to a joint employment relationship, but would no longer be the case if the Proposed Rule is adopted. For instance, the fact that Employer A contractually requires Employer B to maintain a certain wage floor, a code of conduct, uniform standards for its employees, and provides Employer B's workers with an employment handbook and other forms would no longer be indicative of joint employer status because of the nature of the contractual relationship between the two parties.[19] This limitation creates and extraordinary loophole that employers can exploit to avoid liability, severely undermining the FLSA' intent and harming workers.

The Stricter Standard Imposed by the Proposed Rules Will Unfairly Impact Small Businesses and Disproportionately Affect the Most Vulnerable Workers.

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[17] OLPS is unaware of any cases in which a court has limited its inquiry to one definition. As early as *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-729, fn 6 (1947), the court looked at all three definitions together in establishing the limits of the employer-employee relationship. The *Bonnette* economic reality test is itself based on combining all three definitions. Although *Bonnette* specifically cites 3(d), it references the economic reality test from *Goldberg v. Whitaker House Co-op., Inc*, 366 U.S. 28, 333 (1961), in formulating its four-factor test. 704 F.2d at 1469. *Goldberg*, in turn, evaluated all three definitions to determine that a group of workers were employees ("By s 3(d) of the Act an 'employer' is any person acting 'in the interest of an employer in relation to an employee.' By s 3(e) an 'employee' is one 'employed' by an employer. By s 3(g) the term employ 'includes to suffer or permit to work'). In *Salinas*, the Fourth Circuit evaluated the language in section 3(g) to capture vertical employment relationships where an employee is hired through a contracted intermediary as joint employers. 848 F.3d at 133. ("In particular, Congress defined 'employ' as 'to suffer or permit to work.' …This definition derived from state child-labor laws, which imposed liability… on "businesses that used middlemen to illegally hire and supervise children"). The Eleventh Circuit test is derived from 3(g) as well. *See Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016) ("This Court has identified eight factors to be considered in determining whether an entity qualifies as an employer under the FLSA 'suffer or permit to work' standard"). In *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014), the Fifth Circuit directly cited 3(d), but used the economic reality test derived from *Goldberg*.

[18] *See* Proposed Rule.

[19] *See* Proposed Rule.

Small businesses and the most vulnerable employees will bear the brunt of these changes. Many franchise owners are small local businesses under significant control of the national or multi-national franchisor. The franchisor controls staffing, uniforms, and training; inspects franchise locations, has the authority to hire and fire employees; and the relationship presents many other factors indicating joint control. Currently, these factors have the potential to indicate a joint employment relationship,[20] but would essentially be exempt under the Proposed Rule.

Small businesses are also more likely to bear full liability in a subcontractor-general contractor relationship under the Proposed Rule. The Proposed Rule makes it more difficult to hold employers who have resources accountable and encourages the use of subcontractors by removing the general contractor's likelihood of being found liable as an employer. Since small employers tend to have fewer resources, workers who prevail against them in a judgment for wages owed under the Fair Labor Standards Act will have greater difficultly collecting on those judgments. For the small business, a large judgment of this kind may put the enterprise out of business.

The Proposed Rule will also have the most profound effect on vulnerable workers, such as immigrants and workers of color in low-wage industries, where wage theft is rampant and collections on Fair Labor Standards Act judgments is already difficult.[21] Misclassification of workers as "independent contractors" and the use of outsourcing and subcontractors to shield employers from liability is rife in industries such as construction, where workers' compensation insurance premiums are high, and in industries where work is performed in scattered worksites such as housecleaning and in-home care, among other industries.[22] Already, workers placed through staffing agencies earn far less than counterparts with a traditional employment relationship.[23] Such employment arrangements drive standards down, as agencies and subcontractors are forced to compete with one another on price, and make it more likely that workers will experience workplace abuses. [24]

In New York City, and even nationally, these industries are staffed in large part by immigrants and workers of color.[25] Such populations are already struggling economically. Foreign-born New Yorkers

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[20] See, e.g., *Ocampo v. 455 Hospitality LLC*, 2016 WL 4926294 at *8 (S.D.N.Y. 2016) (denying summary judgment for franchisor in a FLSA suit, finding that "based on a 'review of the totality of the circumstances,' the Court finds that Plaintiffs have pled sufficient facts to plausibly suggest functional control.")

[21] See, e.g. Annette Bernhardt, Ruth Milkman, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 2009, *at* https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.

[22] Francoise Carre, Economic Policy Institute, *(In)dependent Contractor Misclassification*, June 8, 2015, *at* https://www.epi.org/publication/independent-contractor-misclassification/.

[23] *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S., National Employment Law Project*, June 7, 2018, at https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/.

[24] Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue Collar Jobs Harms America's Workers*, 2014, *at* https://www.nelp.org/publication/temped-out-how-domestic-outsourcing-of-blue-collar-jobs-harms-americas-workers/.

[25] United States Department of Labor, Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey," *at* https://www.bls.gov/cps/cpsaat18.htm (last modified January 18, 2019.) For example, workers in the construction industry,

participate in the labor force at the same or greater rates than U.S.-born New Yorkers but have significantly lower median earnings and higher rates of poverty.[26] Such disparities may be attributed to several factors, among them disproportionate work in low-wage occupations where labor and employment standards are often disregarded. For many foreign-born workers, concerns about insecure immigration status can also pose a challenge to the enforcement of their workplace rights.[27] The Proposed Rule would compound such challenges by making it harder for victims of wage theft who do come forward to hold entities responsible and collect wages owed.

Conclusion

The USDOL's impulse to make joint employer standards more uniform is meritorious; but the standard should continue to be evaluated using comprehensive factors, such as those articulated in *Zheng v. Liberty Apparel*, or a broader standard that is consistent with the remedial purpose of the Fair Labor Standards Act and the realities of the modern economy.

Sincerely,

Lorelei Salas
Commissioner

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which relies heavily on subcontractor relationships, are over 30% Latino; employment in private households, often arranged through staffing agencies or via electronic applications, is over 50% Latino, Asian, or Black.

[26] NYC Mayor's Office of Immigrant Affairs, "State of Our Immigrant City: MOIA Annual Report for 2018," at 20-21, available at https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

[27] "The State of Workers' Rights in New York City," New York City Department of Consumer Affairs (2017). https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2017.pdf. See also Michael Felsen & M. Patricia Smith, *Wage Theft is a Real National Emergency*, The American Prospect, March 5, 2019, at https://prospect.org/article/wage-theft-real-national-emergency.