**WASHINGTON LAWYERS' COMMITTEE**
**FOR CIVIL RIGHTS AND URBAN AFFAIRS**

June 25, 2019

Amy DeBisschop, Branch Chief
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
FP Building
Washington, DC 20210
Via https://www.regulations.gov/

Re: Proposed Rulemaking, Docket ID: WHD-2019-0003;
Joint Employer Status under the Fair Labor Standards Act ("FLSA")

Dear Ms. DeBisschop:

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers' Committee") opposes the proposed rulemaking by the Department of Labor ("Department" or "DOL") to redefine the applicability of the Fair Labor Standards Act ("FLSA" or "Act") to joint employer arrangements. As discussed below, the proposed rule is contrary to the FLSA's definition of statutory employees and employers, will disproportionately impact people of color and is bad public policy. Low-wage workers, including those who work in restaurants and construction and are most vulnerable to wage theft and most likely to need the protection of the law. These workers are disproportionately people of color, immigrants and women. They also have the least capacity to seek legal recourse when exploited. There is no justification to change the long-standing regulatory and decisional law governing the joint employer doctrine.[1]

**I. The Fair Labor Standards Act, through its purpose and statutory definitions, provides protection for workers that continues to be necessary today.**

Congress promulgated the Fair Labor Standards Act of 1938 to protect workers, especially those in low wage industries. It established the 40-hour workweek, minimum wage,

[1] The Washington Lawyers' Committee has been on the front line of civil rights work for more than 50 years. We work to create legal, economic and social equity through litigation, client and public education, and public policy advocacy. While we fight discrimination against all people, we recognize the central role that race discrimination plays in sustaining inequity, and recognize the critical importance of identifying, exposing, and combating systems that sustain racial injustice. Our employment justice practice works to uphold and expand worker protection laws, including FLSA. The clients we serve are often the most marginalized groups in the District of Columbia metropolitan area, specifically immigrant populations, other people of color, and low-wage workers across various industries.

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and overtime pay guidelines. The Supreme Court has recognized "the remedial nature of the statute and the great public policy which it embodies."[2] To achieve its remedial purpose, the Act defines the parties who are subject to the Act broadly. Most notably, "employer" is "any person acting *directly or indirectly* in the interest of an employer in relation to an employee," employ is defined as "to suffer or permit to work," and "employee" is "any individual employed by an employer." 29 U.S.C. §§ 203(d),(g), and (e)(1)(emphasis added). The Supreme Court noted that Congress intended that FLSA "stretch [ ] the meaning of employee to cover some parties who might not qualify as . . .[employees] under strict agency law principles". *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992).

Although the Act does not expressly define "joint employment," DOL's regulations, which were promulgated a year after the Act and remain in force today, take into account that "[a] single individual may stand in relation of an employee to two or more employers under [FSLA]." To encompass the multi-entity nature of employment relationships in many industries, DOL regulations provide that "joint employment" exists when "the facts establish…that employment by one employer is *not completely disassociated* from employment by the other employer." 29 C.F.R. § 791.2(a) (emphasis added). The regulation also states that a joint employment relationship "will be considered to exist in situations such as: (1) Where there is an arrangement between the employers to share the employee's services. . . or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee. 29 C.F.R. § 791.2(b)(1)-(2).

As described in DOL's "Fact Sheet: Notice of Proposed Rulemaking on Joint Employer Status under the FLSA," DOL's proposed rule would "eliminat[e] the 'not completely disassociated' standard for situations when an employee works one set of hours for an employer that simultaneously benefit another person, and replacing it with a four-factor test" to determine joint employer status under FLSA: whether a potential joint employer actually exercises the power to (1) hire or fire the employee, (2) supervise and control the employee's work schedule or conditions of employment, (3) determine the employee's rate and method of employment, and (4) maintain the employee's employment records.[3]

DOL's proposed change, which would require a direct and actually exercised relationship between a wage-earner and the employer, ignores Congress's expressed intent that FSLA is designed to provide broad remedies to unpaid or underpaid wage earners. It is contrary to FLSA's definition of "employer"—"any person who works *directly or indirectly* in the interest of an employer in relation to an employee" —and "employ"—"to suffer or permit to work."[4] The

[2] *See*, Anderson v. Mt. Clemons Pottery Co., 328 U.S. 680, 687 (1946); A.H. Phillips, Inc. v Walling, 324 U.S. 490, 493 (1945).
[3] U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet: Notice of Proposed Rulemaking on Joint Employer Status under the FLSA (2019)(*citing Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983).
[4] 29 U.S.C. §§ 203(d), (g), and (e)(1)(emphasis added).

Administrative Procedures Act requires that regulations that purport to implement a statute but are inconsistent with that statute are improper and will not withstand judicial scrutiny.[5]

DOL's proposed rulemaking is not only improper as a matter of law but, if implemented, it would have a devastating effect on both the low-wage earners and their communities. Incidents of employees being denied wages and/or benefits to which they are entitled are widespread across the country and across industries, costing workers and local economies billions of dollars annually.[6] In 2009, The National Employment Law Project (NELP) surveyed over 4,000 workers and found that 26 percent were paid less than the required minimum wage in the previous workweek, and nearly two thirds experienced at least one pay-related violation, such as failure to pay overtime, not being paid for all hours worked, and stolen tips.[7] These violations are magnified for communities of color. The rate of minimum wage violations for African American workers was three times higher than that of white workers.[8] The Economic Policy Institute (EPI) has found that "young workers, women, people of color, and immigrant workers" experience higher rates of minimum wage violations than other workers "primarily because they are also more likely than other workers to be in low-wage jobs." [9] With significant portions of the workforce employed by temporary staffing agencies (3.1 million wage-earners), and companies increasingly outsourcing their labor, the ability of low wage workers to seek unpaid wages from *all statutory employers* is essential.

The following are examples of cases in which we have represented workers where employees would likely have had no remedy for the wage theft had DOL's proposed regulations on joint employment been in effect:

- A drywall subcontractor hired six Latino workers to hang drywall in new luxury apartments. When the workers tried to collect their wages after three weeks of working, the subcontractor was nowhere to be found. The general contractor, who was on site daily

[5] Courts will "set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right or otherwise "not in accordance with law." 5 U.S.C. § 706(2)(A), (C); *See also, Chevron U.S.A., One v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984)(Courts must enforce the "unambiguously expressed intent of Congress."); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) invalidating a Department of Veterans Affairs regulation for violating the clear meaning of a statute.

[6] Brady Meixell & Ross Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year, Econ.Pol'y Inst., (Sept. 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/.

[7] *See* Meixell & Eisenbrey, *supra* note 5 at 2.

[8] Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, NAT'L EMP. LAW PROJECT 5 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf. Within foreign-born workers, Latina workers experienced minimum wage violations at a rate of 40 percent, while the minimum wage violation rate for male Latino counterparts was 24 percent. Id. at 43.

[9] David Cooper & Teresa Kroeger, Employers steal billions from workers' paychecks each year 2–3, ECON. POL'Y INST. 2-3 (May 10, 2017), https://www.epi.org/files/pdf/125116.pdf.

and helped supervise the workers, claimed it had no responsibility to pay the workers because it had not directly hired them.

- Thirty Latino workers performed electrical work renovating and constructing a public hospital. They were hired by a labor broker, but worked with and performed the same tasks as the individuals hired directly by the electrical contractor. They were paid less than half the wage of the other electrical workers and did not receive overtime premiums. When they sought the wages owed, the labor broker had disappeared, and the electrical contractor disclaimed responsibility.

- A labor broker hired seven Latina workers to clean the hallways, kitchen and bathrooms of an upscale hotel. They wore the uniform of the hotel, and they vacuumed and scrubbed toilets according to the procedures written by the hotel. After weeks of work when they did not get paid by the labor broker, the women sought their unpaid wages from the hotel. The hotel disclaimed responsibility, saying it was not their employer.

These examples illustrate practices that pervade a wide variety of industries. A recent NELP study of business outsourcing found that the restricting of employment arrangements through multi-layered contracting, the use of staffing or temp firms, franchising, and other means of disaggregating employer responsibilities among persons or entities that all benefit from the labor can result in poor working conditions and a lack of corporate responsibility.[10] As demonstrated by the above examples, the impact of the proposed rule will reach across industries but always harm the same people, the low-wage workers who make every sector run and function from day-to-day.

**II. The reliance of the proposed rulemaking on a 1983 Ninth Circuit decision is misplaced.**

The Department cites a 36-year old 9th Circuit decision, *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), as the basis of proposed four-factor test. For several reasons, DOL's attempt to justify its proposed rule by citing *Bonnette* is misplaced. First, even the *Bonnette* court recognized that the four factors it laid out were not exclusive, and that the "ultimate determination must be based "'upon the circumstances of the whole activity.'" 704 F.2d at 1469-70 (citing *Rutherford Food Corp v. McComb*, 331 U.S. 722 (1947)). Second, DOL's suggestion that *Bonnette* is widely accepted and settled law is simply wrong. Many Circuits, including the 9th Circuit in which *Bonnette* was decided, often citing the Supreme Court's recognition in *Nationwide,* 503 U.S. 318, 326, that Congress intended the FLSA to "stretch[] the meaning of 'employee' to cover some parties who might not qualify as such under

[10] Catherine Ruckelshaus et al., Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work, NAT'L EMP. L. PROJECT at Executive Summary, (May, 2014), http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

strict agency law principles," have either rejected or liberalized the *Bonnette* test by adding additional factors. *See, e.g., Torres-Lopez v. May*, 111F.3d 633, 639-40 (9th Cir. 1997)(added eight additional factors, citing FLSA's definition of "employ"—"to suffer or permit work"); *Zheng v. Liberty Apparel Co.*, 355 F.3d. 61, 69, 70 (2d Cir. 2003) (the four-factor test cannot be reconciled with the "suffer or permit" language in [FLSA], which necessarily reaches beyond traditional agency law); *In re Enterprise Rent-A-Car Wage & Hour Emp't Litig.*, 683 F.3d 462, 468-70 (3d. Cir. 2012); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176-77 (11th Cir. 2012); and recently, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017)("We agree that *Bonnette's* reliance on common-law agency principles does not square with Congress's intent that the FLSA's definition of "employee" encompasses a broader swath of workers than would constitute employees as common law.").[11]

DOL's reliance on an old 9th Circuit decision, *Bonnette*, that is no longer accepted by most Circuits, including the 9th , highlights a critical legal flaw in DOl's proposed rule—it ignores that Congress defined "employ" to include "to suffer or permit work", "employer" to include "any person acting directly *or indirectly* in the interest of an employer in relation to an employee" (emphasis added), and "employee" as "any individual employed by an employer," with the purpose that FLSA cover a very wide swath of wage-earners and employers. DOL's attempt to rewrite FLSA through this rulemaking is improper as a matter of law and threatens the rights of the wage-earners for whom FLSA was enacted.[12]

**III. The Rule Retreats from a Commitment to Enforce Workers' Rights Without Regard to Race**

When the FLSA was enacted, it created separate workers' rights protections for white and Black workers. Measures were taken to exclude many African American workers from its protections. Although the Act is written in race-neutral language, the intentional exclusion of agricultural and domestic workers were proxies for excluding Black Americans from FLSA protections.[13]

During the New Deal era, Southern congressmen campaigned to exclude Black employees from the FLSA to preserve the quasi-plantation style of agriculture that pervaded the

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[11] In *Salinas,* the court analyzed the relationship between a construction contractor and its subcontractor, which essentially existed solely to provide the general contractor with labor. Consistent with prior statutory interpretation, the court looked at the relationship between the general and subcontractor – the two putative employers – to analyze whether each constituted a joint employer for purposes of statutory enforcement.

[12] *See also* Home Care Ass'n of Am. V. Weil, 799 F.3d 1084, 1090 (D.C. Cir. 2015)(citing Chevron 467 U.S. 842-43 (xx): (If "Congress has directly spoken to the precise question at issue," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

[13] *See* e.g., Juan Perea, The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act, (2010). By way of example, Black men comprised 42.5 percent of agriculture, forestry and fishery workers in 1939. Nancy MacLean, Freedom is Not Enough: The Opening of the American Workplace, 17 (2006).

still segregated Jim Crow South through sharecropping structures.[14] "While they supported reforms that would bring more prosperity to their relatively poor region, they rejected those that might upset the existing system of racial segregation and exploitation of blacks."[15] The agricultural exclusion targeted Black men, while Black women were equally excluded through the domestic worker and home health care exclusions.[16] During the floor debates on the FLSA, J. Mark Wilcox, a Democrat from Florida stated: "You cannot put the Negro and the white man on the same basis and get away with it . . .[I]t just will not work in the South."[17]

Congress has since amended the law to reduce the impact of the racially biased elements of the statute. In 1966, Congress amended the FLSA to extend minimum wage and record keeping protections to agricultural workers. [18] Additional protections were added in 1983, although agricultural workers are still not entitled to overtime.[19] These amendments gave agricultural workers the protections of the joint employer regulations, which enable farmworkers to cut through the layers of persons or entities that often control their employment when they are denied wages and other employment protections due them under FLSA. In 1974, Congress again expanded FLSA's ambit to cover domestic workers.[20] In 2015, the D.C. Circuit confirmed that FLSA protections apply to home health care workers in Home Care Ass'n of America v. Weil[21], affording protection in a growing industry in which 87% of all workers are women, 60% are people of color, and 29% are immigrants.[22] The proposed rule would undo Congress's deliberate efforts to overcome the racist elements of the original law.

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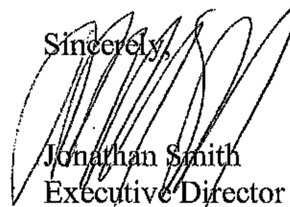
[14] Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal,* 19 Stud. Amer. Pol. Dev. 1, 6, 12-13 (Spring 2005); Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 Pol. Sc. Q. 285, 290, 292-93 (1993).
[15] Perea, *supra* note 13 at 4.
[16] Ariela Migdal, *Home Health Care Workers Aren't Guaranteed Minimum Wage or Overtime, and the Legacies of Slavery and Jim Crow Are the Reason Why*, ACLU WOMEN'S RIGHTS PROJECT, May 6, 2015, https://www.aclu.org/blog/womens-rights/womens-rights-workplace/home-health-care-workers-arent-guaranteed-minimum-wage-or. (90 percent of home health care workers are women and most are women of color. . . 23% of home health care workers live below the poverty line.).
[17] Id. ("Members of Congress stood up during the debates over the Fair Labor Standards Act to argue that 'you cannot prescribe the same wages for the black man as for the white man,' as Democratic Rep. Martin Dies of Texas put it. )
[18] U.S. DEPT. OF LABOR, WAGE & HOUR DIV., HISTORY OF CHANGES TO THE MINIMUM WAGE; Arnulfo De La Cruz, *Cesar Chavez: A Leader Who Gave Dignity To All Workers, SEIU (2015)(April 2nd, 2018),* https://www.dol.gov/whd/minwage/coverage.htm; https://www.seiu2015.org/article/cesar-chavez-a-leader-who-gave-dignity-to-all-workers/
[19] See Migrant and Seasonal Workers' Protection Act of 1983, 29 U.S.C. §§ 1801-1872. Legislation to address the exclusion from overtime is pending in Congress. See Fairness to Farmworkers Act of 2019; https://www.congress.gov/bill/116th-congress/house-bill/1080
[20] There was a loophole in the 1974 extension to domestic workers where it excluded "companionship workers".
[21] 799 F.3d 1084 (D.C. Cir. 2015)
[22] Bob Woods, *"America's $103 billion home health-care system is in crisis as worker shortage worsens,* CNBC (April 9, 2019)(report based on statistics from the Paraprofessional Healthcare Institute), https://www.cnbc.com/2019/04/09/us-home-healthcare-system-is-in-crisis-as worker-shortages-worsen.html.

**Conclusion**

- This proposal is a clear departure from the statutory language and statutory intent of the FLSA.
- If adopted, the rule would represent a revolutionary change to federal labor regulations, setting a bar for companies to be deemed joint employers that far exceeds that which Congress and volumes of case law have established. It will therefore likely be struck down as a result of legal challenges.
- The rule ignores the complexity of how employer responsibilities and control of conditions of employment are disaggregated among different persons and entities in many industries.
- The results will be particularly harmful to low-wage workers across the country and industries.
- The proposed rule will reverse the progress of the FLSA over many decades to reduce inequities specifically aimed at workers of color by turning the joint employment doctrine into a tool for employers to skirt liability.
- The new rule will have a disparate impact on people of color, immigrants and women and reverse decades of efforts to reduce race disparities in employment.
- We urge the Department not to adopt the proposed rule, but rather continue to uphold the broad interpretation of joint employer liability as elaborated in the decisional law of joint employment so that workers across the country have the protections they need in the current economy.

Sincerely,



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