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April 12, 2020

Via Federal eRulemaking Portal

Secretary Martin J. Walsh
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Director Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
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RE: Comment Supporting Notice of Proposed Rulemaking, *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 14,038 (Mar. 12, 2021) RIN 1235-AA37.

Dear Secretary Walsh and Director DeBisschop:

The undersigned Attorneys General of New York, Pennsylvania, California, Colorado, Delaware, the District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Virginia, along with the Washington State Department of Labor & Industries (collectively, "States") write in strong support of the proposed rulemaking by the U.S. Department of Labor ("DOL" or "Department") to rescind the 2020 Joint Employer Rule. *See Rescission of Joint Employer Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 14,038 (Mar. 12, 2021) ("NPRM"). We thank the agency for this opportunity to comment.

As you know, many of the States challenged the 2020 Joint Employer Rule in the Southern District of New York, asserting that the Rule violated the Administrative Procedure Act. *See New York v. Scalia*, No. 20 Civ. 1689. Judge Woods granted the States' summary judgment motion in part on September 8, 2020, vacating the Rule's test for vertical joint employer liability. 490 F. Supp. 3d 748 (S.D.N.Y. 2020). As the Court held, the 2020 Joint Employer Rule, 85 Fed. Reg. 2820 (Jan. 16, 2020) (the "2020 Rule" or "Rule") conflicts with the

Federal Labor Standards Act ("FLSA"), the Department's prior guidance, and numerous court rulings. The Rule did not adequately consider the effects on workers, especially low-wage workers of color, and its rescission will benefit workers and the States with no costly disruptions.

I. The Vertical Joint Employment Test Was Unduly Narrow Because It Conflicted with the FLSA.

The now-vacated vertical joint employment standard of the 2020 Rule conflicted with the statutory text of the FLSA. The Rule's narrow interpretation of the term "employer" and its assertion that the definition of "employer" is the sole textual basis to determine joint employment were not faithful to the Act's definitions and Congress' intent in enacting them. Congress defined "employ," "employee," and "employer" to cover a broad swath of workers within the statute's protection. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017). And the "Supreme Court has emphasized the 'expansiveness' of the FLSA's definition of employer," *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (quoting *Falk v. Brennan*, 414 U.S. 190, 195 (1973)), which "*includes* any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d) (emphasis added). The FLSA defines "employee" as "any individual employed by an employer," *id.* at 203(e), and "employ" "includes to suffer or permit to work," *id.* at 203(g). The 2020 Rule, however, impermissibly allowed an individual or entity that suffers or permits an employee to work to avoid FLSA liability. The Rule limited vertical joint employer status to those that met its four-factor test, unlawfully narrowing the meaning of employer where a business outsources certain employment responsibilities to third parties.

The Rule's vertical joint employment test conflicted with the history and purpose of the "suffer or permit" language of the FLSA. *See, e.g.*, *Scalia*, 490 F. Supp. 3d at 778–81. The meaning of "to suffer or permit to work" was well defined at the time Congress transplanted the phrase to the FLSA. Congress imported the phrase from state child labor statutes, which "imposed liability not only on businesses that directly employed children but also on businesses that used middlemen to illegally hire and supervise children." *Salinas*, 848 F.3d at 133 (internal quotation marks omitted). And as Judge Woods recognized in his decision, Congress also adopted the "suffer or permit" language to "disrupt the nation's sweating system" and extend liability to the manufacturers that contracted with sweatshops. *Scalia*, 490 F. Supp. 3d at 779 (internal quotation marks omitted). Therefore, Congress specifically intended to expand joint employer liability with section 203(g); the Rule's sole focus on section 203(d) to analyze joint employment was improper. *Id.*

Moreover, the Rule's vertical joint employment standard adopted a "control-based test" that is contrary to the FLSA's text and case law. Under the Rule's test, the "potential joint employer must actually exercise—directly or indirectly—one or more of [the four] indicia of control." 85 Fed. Reg. at 2859. Requiring "some actual exercise of control," *id.*, is inconsistent with the "suffer or permit" language in the statute. Indeed, "courts interpreting the FLSA definition of employ have rejected the traditional common law right to control test." *Scalia*, 490 F. Supp. 3d at 759 (internal quotation marks omitted).

The States believe that the Department's "further legal analysis," 86 Fed. Reg. at 14,042, will confirm that the 2020 Joint Employer Rule cannot be reconciled with the FLSA, and its vertical joint employment standard was unduly narrow. The States strongly support its rescission.

II. The Vertical Joint Employment Test Conflicted with Decades of Prior DOL Interpretation of Joint Employer Analysis.

The 2020 Rule also departed from decades of agency interpretation of and guidance on joint employment analysis. The vertical joint employment standard conflicted with DOL's 1997 interpretation of joint employment under the Migrant and Seasonal Agricultural Workers Protection Act ("MSPA"), Administrator's Interpretation No. 2014–2 ("Home Care AI"),[1] and Administrator's Interpretation No. 2016–1 ("Joint Employment AI").[2] When Congress enacted the MSPA it used the same definition of "employ" as the FLSA. *Scalia*, 490 F. Supp. 3d at 759. DOL issued guidance in 1997 regarding the definition of "joint employer" under the MSPA, noting that the "'test of an employment relationship under the FLSA is "economic dependence," which requires' a court to examine the 'relationships among the employee(s) and the putative employer(s) to determine upon whom the employee is economically dependent.'" *Id.* (quoting 62 Fed. Reg. 11,734, 11,734 (Mar. 12, 1997) ("1997 Guidance")). DOL also rejected a "control-based test" like the one adopted by the Rule in the Home Care AI and "concluded that a test that addresses only control conflicts with the breadth of employment under the FLSA." *Id.* at 760 (internal quotation marks omitted). And in the Joint Employment AI, DOL again explained that an economic realities analysis, not a control-based test, is used to determine whether an employment relationship exists under the FLSA. *Id.* at 760–61.

In discarding the well-settled joint employment analysis, the Department did not acknowledge, let alone adequately explain, why it departed from its prior interpretations. As Judge Woods held, DOL failed to provide any reasoned explanation for taking this unfounded departure, asserting only that it "hopes to encourage greater consistency for stakeholders." 85 Fed. Reg. at 2831. The 2020 Rule is inconsistent with the interpretation of "joint employer" in the 1997 Guidance, the Home Care AI, and the Joint Employment AI, but the Department provided no explanation for these inconsistencies. *Scalia*, 490 F. Supp. 3d at 792–93.

The 2020 Rule also conflicted with MSPA regulations which utilize the proper economic realities analysis to determine joint employer liability. The MSPA regulations employ the same joint employer definition as the FLSA, but the 2020 Rule would require DOL to "appl[y] different standards for joint employer liability under the FLSA and the MSPA." *Id*. at 793. The differing standards "could lead to increased costs for employers subject to both standards," and

[1] Administrator's Interpretation No. 2014–2, "Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act" (Jun. 19, 2014), *available at* 2014 WL 2816951.

[2] Administrator's Interpretation No. 2016–1, "Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" (Jan. 20, 2016), *available at* 2016 WL 284582.

the DOL failed to "acknowledge those costs or explain why the other benefits of the Final Rule outweigh them." *Id.*

The States agree that "the Rule did not adequately account for inconsistencies with its previous guidance," 86 Fed. Reg. at 14,044, and submit that the 1997 Guidance, Home Care AI, and Joint Employment AI properly reject a control-based test and instead, emphasize that the joint employment analysis must focus on economic realities.

III. The Vertical Joint Employment Test Conflicts with Supreme Court and Court of Appeals Decisions.

DOL notes that since the 2020 Rule's promulgation, only two courts have adopted its vertical joint employment analysis. That is not surprising. As the States argued in our challenge to the Rule—and as Judge Woods subsequently held—the vertical joint employment standard runs counter to Supreme Court precedent. *See, e.g.*, *Scalia*, 490 F. Supp. 3d at 781–84. It also conflicts with numerous court of appeals decisions interpreting joint employment. Indeed, no court of appeals has ever applied a test as narrow as the one adopted in the Rule. *See id.* at 786 ("If the Department's interpretation were 'clear' (or even permissible), some court would have probably adopted its rationale. But the Department has found not a one. Over eighty years later, this dog has yet to bark." (citing A. Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 335 (1927)); *see also id.* at 788–90 (explaining how the circuit precedent cited in the 2020 Rule did not support its narrow test).

The States agree that based on the judicial landscape, withdrawing the Rule would not be disruptive, and we support the Department's plan to consider further legal and policy issues relating to FLSA joint employment. *See* 86 Fed. Reg. at 14,045.[3]

[3] Even a cursory review of decisions regarding vertical joint employer liability since promulgation of the 2020 Rule belies the clarity rationale DOL invoked. *See, e.g.*, 85 Fed. Reg. at 2830 (stating that the "Department believes" that the new test's four factors "afford stakeholders greatly needed clarity and uniformity"). For example, between the Rule's effective date and the date of the Judge Woods decision, some courts analyzed vertical joint employment solely by applying Circuit case law without any citation of the Rule or regulations. *See, e.g.*, *Williams v. Bob Evans Restaurants, LLC*, No. 2:18-CV-01353, 2020 WL 4692504 (W.D. Pa. Aug. 13, 2020); *see also Tombros v. Cycloware, LLC*, No. 8:19-CV-03548-PX, 2020 WL 4748458 (D. Md. Aug. 17, 2020). Other courts cited the challenged regulation but did not mention its four-factor test and instead, applied Circuit precedent regarding vertical joint employment. *See, e.g.*, *Sarikaputar v. Veratip Corp.*, No. 17-CV-814 (ALC), 2020 WL 4572677 (S.D.N.Y. Aug. 7, 2020); *see also Kimbrough v. Khan*, No. 2:18-CV-82-Z-BR, 2020 WL 4783509 (N.D. Tex. Aug. 18, 2020). Even a district court that quoted the Rule's four factors did not strictly apply them—holding that an allegation that defendants had "authority to hire, fire, and discipline employees" was, *inter alia*, sufficient to survive a motion to dismiss. *Knerr v. Boulder BJ, LLC*, No. 19-CV-00799-JKL-MEH, 2020 WL 5126138, at *4–5 (D. Colo. Apr. 7, 2020). The Sixth Circuit quoted the Rule's vertical joint employment test in a footnote in an unpublished opinion, indicating that a defendant task force was not the plaintiff-officer's joint employer for the same reasons it was not the officer's employer under the FLSA. *Rhea v. W. Tennessee Violent Crime & Drug Task Force*, 825 F. App'x 272, 277 n.4 (6th Cir. 2020). And at

IV. Retaining the Horizontal Joint Employment Test Provisions Would Be Confusing.

The States agree with DOL that the 2020 Rule provisions relating to the horizontal joint employment test should be rescinded because they are inextricably intertwined with the now-vacated vertical joint employment provisions. *See* 86 Fed. Reg. at 14,045–46. Rescinding the provisions relating to horizontal joint employment makes practical sense. Plus, the horizontal joint employment standard has long been established. Therefore, stakeholders can easily refer to DOL's earlier interpretations and relevant case law to understand their obligations.

V. Rescinding the 2020 Joint Employer Rule in Full Will Have Benefits for Workers and the States and Will Not Negatively Affect Employers.

We share the Department's concerns regarding the Rule's potential effects on employees and support DOL's decision to weigh the documented risks of the Rule, which were not adequately assessed in 2020. Properly considering the record reveals that rescission carries critical benefits for the workers whom the FLSA was designed to protect. As many of the original commenters to the 2020 Rule explained, the Rule encourages employers to minimize liability by outsourcing certain competencies to contractors, staffing agencies, or franchisers rather than hire their own employees—a phenomenon known as "workplace fissuring."[4] Fissured workplaces result in lower wages, greater wage theft, and less job security, especially for immigrants or people of color who make up a disproportionate share of low-wage workers in nonstandard work arrangements. For example, one study found that Black workers made up 12.1 percent of the overall workforce, but more than double that number in the temp workforce—25.9 percent.[5] Similarly, Latinx workers made up 16.6 percent overall, but 25.4 percent of temp labor.[6] The only State that requires reporting of demographic data in the temporary staffing industry, Illinois, found in 2020 that non-white workers staffed 85 percent of blue-collar temp assignments even though they accounted for just 35 percent of the state's

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least one district court discussed the Joint Employment AI that had been withdrawn on June 7, 2017 as part of its vertical joint employer analysis. *See Amos v. Classic Dining Grp.*, LLC, No. 119CV03193JRSDLP, 2020 WL 5077067, at *1 (S.D. Ind. Aug. 27, 2020).

[4] *See generally* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard Univ. Press 2014).

[5] Jenny R. Yang et al., *Reimagining Workplace Protections: A Policy Agenda to Meet Independent Contractors' and Temporary Workers' Needs*, Urban Inst. (Dec. 2020), https://www.urban.org/sites/default/files/publication/103331/reimagining-workplace-protections_0.pdf.

[6] *Id.*

workforce.[7] In fact, blue-collar temp workers were nearly three times more likely to be Black or Latinx.[8]

As the National Employment Law Project ("NELP") has found, workers employed through staffing agencies "earn 41 percent less than do workers in standard work arrangements."[9] In fact, in its comment on the Rule, the Economic Policy Institute ("EPI") estimated that the Rule would cost workers nearly $1 billion in wages per year due to increased outsourcing, subcontracting, and use of staffing agencies.[10] Specifically, workers would lose an estimated $954.4 million due to lower wages and $138.6 million due to wage theft each year. To this day, the agency has not rebutted EPI's estimates. Indeed, at the Rule's adoption, the Department "acknowledge[d] that there may be transfers from employees to employers." 85 Fed. Reg. at 2821.

As NELP,[11] the National Women's Law Center,[12] the Urban Institute,[13] and others have explained, however, wage suppression is just the tip of iceberg. By allowing employers to control outsourced workers like employees without ensuring them the same benefits and protections, fissuring promotes unsafe work conditions, workplace discrimination and harassment, and makes it more difficult to enforce the FLSA, federal antidiscrimination law, and other employment laws. Greater fissuring under the Rule also undermines job security, especially during the current COVID-19 crisis. More than 30 percent of temp workers lost their jobs within three months of the pandemic's onset.[14] The Rule's incentive to hire more outsourced workers will encourage economic instability within the workforce.

Beyond workers, rescinding the Rule will benefit the States. Rescission will allow the collection of back wages even if one of the employers is insolvent or fails to comply with the FLSA. Without the Rule's major incentive to outsource low-wage labor and perpetuate cycles of workplace fissuring—i.e., when the first company outsources to a second to reduce liability, who then outsources to a third, who outsources to a fourth—rescission will also increase wages. As a result, the States will receive increased tax revenue. In fact, an analysis of many of the States

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[7] Dave DeSario & Jannelle White, *Race, to the Bottom: The Demographics of Blue-Collar Temporary Staffing*, Temp Worker Justice (Dec. 2020), https://www.tempworkerjustice.org/post/race-to-the-bottom.

[8] *Id.*

[9] National Employment Law Project Comment re: Joint Employer NPRM (June 25, 2019) at 21, https://www.regulations.gov/comment/WHD-2019-0003-12728.

[10] Economic Policy Institute Comment re: Joint Employer NPRM (June 25, 2019) at 10, https://www.regulations.gov/comment/WHD-2019-0003-12772.

[11] *See generally* National Employment Law Project Comment, *supra* note 9.

[12] *See generally* National Women's Law Center Comment re: Joint Employer NPRM (June 25, 2019), https://www.regulations.gov/comment/WHD-2019-0003-12825.

[13] *See generally* Yang et al., *supra* note 5.

[14] Yang et al., at 25, *supra* note 5.

here found that the Rule would cause those States, collectively, to lose annually more than $20 million in tax revenue and more than $8 million in workers' compensation premiums and unemployment insurance taxes.[15] Rescinding the Rule would prevent that harm.

Rescission lowers administrative and enforcement costs for the States as well. Given the Rule's disruption of decades of FLSA precedent, it conflicts with longstanding state law and guidance that incorporated prior FLSA jurisprudence into discussions of state law standards for determining joint employment. Without the incompatible Rule, however, States will no longer need to undertake rulemaking processes, hold administrative hearings, conduct public education campaigns, or run employer trainings to clarify newly distinct state and federal standards. Enabling workers to collect back wages even if one of their employers fails to pay will also result in less enforcement costs for state agencies.

Employers will also benefit from rescission. The Rule was premised on the assumption that employers fulfill their legal obligations under the FLSA, *see* 85 Fed. Reg. 2853, but, if that were the case, there would be no need for the concept of joint employer *liability* in the first place. Rescinding the Rule will reward employers who play by the rules, thereby fostering a more honest marketplace where all businesses can transact on a fairer playing ground. Sharing liability will also promote a more equitable distribution of risk between employers and their contractors or subcontractors when entering into an agreement, which will assist small businesses who would otherwise be at a permanent competitive disadvantage. Reverting to the longstanding joint employer standard will also help resolve regulatory irregularity for businesses, who will not have to spend time, money, or effort navigating between the Rule and conflicting Supreme Court and circuit court precedents.

These benefits to workers, States, and employers far outweigh any costs, which are *de minimus*. The Rule is not currently in effect and, as such, rescission would not affect the status quo. Moreover, as explained above, the Rule was vacated by a court in early September 2020, *see Scalia*, 490 F. Supp. 3d 748, less than six months after it took effect. Unlike the Rule itself, then, rescission will not upend decades of precedent or reliance interests on well-settled principles. Rather, ensuring that the Department's regulations conform to the current state of affairs will not require anything beyond the rulemaking process already under way. Considering the Rule's significant harms to workers and the States, the balance of advantages and disadvantages strongly favors rescission.

VI. Conclusion

We greatly appreciate the opportunity to comment on the Department's proposal, and we wholeheartedly support rescission of the unlawful and harmful 2020 Joint Employer Rule in its entirety.

[15] Declaration of Heidi Shierholz, ¶¶ 18–19, 23, 27, ECF No. 68-1, *Scalia*, No. 20 Civ. 1689.

Sincerely,

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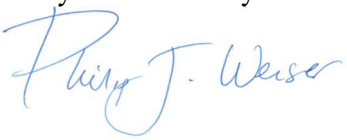

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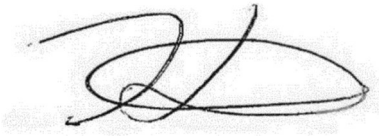

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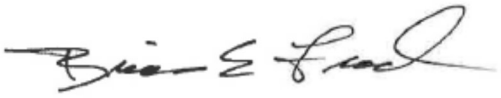

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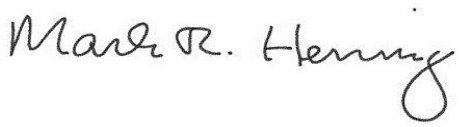

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