



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
28 LIBERTY  
NEW YORK, NY 10005

LETITIA JAMES  
ATTORNEY GENERAL

WWW.AG.NY.GOV

March 30, 2020

Secretary Eugene Scalia  
United States Department of Labor  
200 Constitution Ave. N.W.  
Washington, D.C. 20210

RE: Request to Suspend Implementation and Enforcement of *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (Jan. 16, 2020) in light of Coronavirus (COVID-19) pandemic and OMB Directive M-20-16.

Dear Secretary Scalia:

We, the undersigned Attorneys General, urge the Department of Labor (“DOL” or the “Department”) to immediately stop implementation of the *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (Jan. 16, 2020) (the “Final Rule”), in the wake of the COVID-19 virus and its dire effects on the economy and the American job market. It is unclear how long the coronavirus pandemic will last, and the full extent of its economic effects remains to be seen. Now is not the time to implement a new joint employer rule—which DOL has characterized as the first “meaningful[] revis[ion]” of the rule “since its promulgation over 60 years ago.”<sup>1</sup>

Implementation of the Final Rule during this public health and economic crisis is irresponsible and harmful to the residents of our states and the rest of the country. Workers earning hourly wages who would be most adversely affected by the Final Rule are also those most likely to suffer from the effects that the coronavirus is having on the economy, including in the form of layoffs and reduction of hours. Unemployment insurance claims increased 33% the week ending March 14, which the Department acknowledged was “clearly attributable to impacts from the COVID-19 virus.”<sup>2</sup> And the number skyrocketed last week “due to the impacts

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<sup>1</sup> 85 Fed. Reg. at 2820.

<sup>2</sup> *Unemployment Insurance Weekly Claims*, Department of Labor (Mar. 19, 2020), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200480.pdf>; see also Patricia Cohen, *A Torrent of Job Losses Threatens to Overwhelm the U.S. Economy*, N.Y. Times (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/business/economy/coronavirus-employers-unemployment.html>.

of the COVID-19 virus,” with an unprecedented 3.28 million Americans filing for their first week of unemployment insurance benefits.<sup>3</sup> Moreover, hourly workers or their family members may contract COVID-19; while the Families First Coronavirus Response Act (FFCRA) expanded paid leave provisions, those provisions only apply to employers with fewer than 500 employees and contain exemptions for employers with fewer than 50 employees and caps on the number of hours. Therefore, many hourly workers may feel compelled to work even when feeling unwell, notwithstanding the FFCRA.

Under current circumstances, the costs that the Final Rule will impose on workers are unacceptable. The Department has conceded that changes to the joint employment analysis will result in transfers from employees to employers because “employees will have the legal right to collect wages due under the Act from fewer employers.”<sup>4</sup> DOL acknowledges in particular that the Final Rule “may reduce the amount of back wages that employees are able to collect when their employer does not comply with the Act and, for example, their employer is or becomes insolvent.”<sup>5</sup> Given the current economic crisis, it is even more likely that businesses will become insolvent, making it nearly impossible for their employees to collect back wages.

During the notice-and-comment period, the Economic Policy Institute estimated that the Final Rule could decrease workers’ earnings by \$1 billion, and that calculation obviously did not account for the current recession.<sup>6</sup> DOL claims, however, that it “lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses,”<sup>7</sup> and it “lacks the data needed to calculate the potential amount or frequency of [] transfers [from employees to employers].”<sup>8</sup> The Department failed to consider the evidence in the record before it and failed to engage in its own calculation of the potential effects of the Final Rule. To move forward with implementation would be reckless and amplify the economic devastation already underway.

In addition, any effort by the Department to implement the Final Rule would be inconsistent with the Office of Management and Budget’s Directive M-20-16, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19*, issued on March 17, 2020. Directive M-20-16 instructs agency heads to focus on mission-critical work and “prioritize all resources to slow the transmission of COVID-19.”<sup>9</sup> There is no plausible argument that implementation or enforcement of the Final Rule would slow the transmission of COVID-19; nor can implementation of the first meaningful revision of the joint employer standard in six decades plausibly be considered mission-critical. Far from protecting public

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<sup>3</sup> *Unemployment Insurance Weekly Claims*, Department of Labor (Mar. 26, 2020), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200510.pdf>.

<sup>4</sup> 85 Fed. Reg. at 2821.

<sup>5</sup> *Id.* at 2853.

<sup>6</sup> Economic Policy Institute, Comment Letter on Proposed Rule: Joint Employer Standards Under the Fair Labor Standards Act, 10 (June 25, 2019), <https://www.regulations.gov/contentStreamer?documentId=WHD-2019-0003-12772&attachmentNumber=1&contentType=pdf>.

<sup>7</sup> 85 Fed. Reg. at 2853.

<sup>8</sup> *Id.* at 2821.

<sup>9</sup> Memorandum from Russell T. Vought, Acting OMB Director, to Heads of Departments and Agencies, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (March 17, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

health and safety, the Final Rule is unlawful and harmful, as the undersigned States have asserted in pending litigation.<sup>10</sup> Even worse, the Final Rule directs affected employers and workers to contact their local Wage & Hour Division office with any questions regarding interpretation or enforcement,<sup>11</sup> but calling on the public to visit their WHD district office at this time is inconsistent with the instruction in OMB Directive M-20-16 that the “Government must immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.”<sup>12</sup> In keeping with the OMB Directive, the Department should immediately focus all resources on the critical issues employers and workers face in responding to the coronavirus—rather than expending any resources on interpreting and implementing the Final Rule.

The coronavirus pandemic will dramatically exacerbate the harms to workers under the Final Rule. We urge that you immediately stay implementation of the Final Rule pending successful containment of COVID-19 and economic recovery.

Sincerely,



Letitia James  
New York Attorney General



Josh Shapiro  
Pennsylvania Attorney General



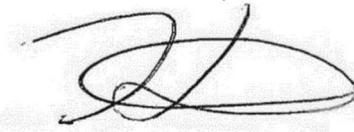
Xavier Becerra  
California Attorney General



Philip J. Weiser  
Colorado Attorney General



Kathleen Jennings  
Delaware Attorney General



Karl A. Racine  
Attorney General for the District of Columbia

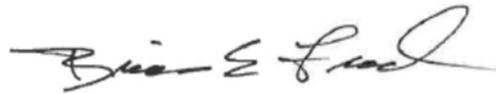
<sup>10</sup> *State of New York, et al. v. Scalia, et al.*, Case No. 1:20-cv-1689-GHW (S.D.N.Y. filed Feb. 26, 2020).

<sup>11</sup> 85 Fed. Reg. at 2820.

<sup>12</sup> Memorandum from Russell T. Vought, *supra* n.10.



Kwame Raoul  
Illinois Attorney General



Brian E. Frosh  
Maryland Attorney General



Maura Healy  
Massachusetts Attorney General



Dana Nessel  
Michigan Attorney General



Keith Ellison  
Minnesota Attorney General



Gurbir S. Grewal  
New Jersey Attorney General



Hector Balderas  
New Mexico Attorney General



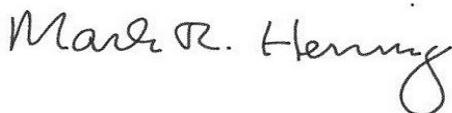
Ellen F. Rosenblum  
Oregon Attorney General



Peter F. Neronha  
Rhode Island Attorney General



Thomas J. Donovan, Jr.  
Vermont Attorney General



Mark R. Herring  
Virginia Attorney General



Bob Ferguson  
Washington State Attorney General

CC: Natasha W. Teleanu