Pennsylvania
Department of
Labor & Industry

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Via Federal eRulemaking Portal (http://www.regulations.gov)

Keith Sonderling
Acting Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Daniel Navarrete
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
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Re: Notice of Proposed Rulemaking, *Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, 91 Fed. Reg. 21878 (Apr. 23, 2026), RIN 1235-AA48

Dear Acting Secretary Sonderling and Director Navarrete:

We write on behalf of Commonwealth of Pennsylvania's Department of Labor & Industry and the States of Arizona (Attorney General), California (Attorney General), Colorado (Attorney General), Connecticut (Attorney General), District of Columbia (Attorney General), Delaware (Attorney General), Illinois (Attorney General, Dep't of Labor), Massachusetts (Attorney General), Maryland (Attorney General), Maine (Dep't of Labor), Michigan (Attorney General), Minnesota (Attorney General, Dep't of Labor and Industry), North Carolina (Attorney General), New Jersey (Attorney General), New York (Attorney General), Oregon (Attorney General, Bureau of Labor and Industries), Rhode Island (Attorney General), Virginia (Attorney General, Secretary of Labor), Vermont (Attorney General), Washington (Attorney General, Department of Labor & Industries), and Wisconsin (Attorney General), (collectively, States) to oppose the U.S. Department of Labor's ("USDOL" or "Department") Notice of Proposed Rulemaking ("NPRM") entitled *Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, 91 Fed. Reg. 21878 (Apr. 23, 2026) ("proposed rule" or "proposal"). This proposed rule narrows the longstanding joint

employment standard under the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), and Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), creating confusion for the regulated community and limiting workers' ability to recover for violations of minimum wage, overtime pay, and other essential worker protections. The States strongly oppose this proposal to revert to a modified version of the now-vacated 2020 joint employment rule. The Department's proposed analysis contradicts the plain language of these statutes, their legislative histories, and decades of judicial precedent.

According to the Department's proposal, the joint employment inquiry would largely be confined to analysis of four partial factors, with limited consideration permitted as to any other factor in the employment relationship, including an employer's reserved control.[1] The experiences of many of the undersigned state Attorneys General and state labor departments in enforcing labor laws make clear that adopting this proposal would leave millions of workers more vulnerable to violations of the FLSA, FMLA, and MSPA. The proposed rule would thereby shift the burden of protecting workers' rights onto state and municipal agencies who enforce worker protections under state law. It would result in conflicting joint employer tests, unduly complicating labor law enforcement in our States. It would require state and municipal agencies to promulgate or update guidance on differences between state and federal law. And it would hurt law-abiding employers.

The proposed rule does not adequately reflect today's workplace relationships, in which growing numbers of businesses are increasingly outsourcing employment functions to third-party management companies, staffing agencies, or labor providers, often enabled by rapid advances in technology. These practices already lead to decreased accountability for employers, and this proposal would only exacerbate the problem by encouraging employers to avoid liability by simply asserting that, although they had the *ability* to exercise control, they did not in fact *exercise* that control. By de-emphasizing an employer's reserved control from the joint employer analysis, this proposal unreasonably narrows the scope of joint employment under the FLSA, FMLA, and MSPA.

Additionally, the proposal, if finalized, fails 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."[2] First, the proposed rule defies the statutory texts and purposes of the FLSA, FMLA, and MSPA, along with established court precedent interpreting joint employment under those statutes. Second, USDOL fails to provide a reasoned explanation for its proposed return to a refurbished version of its now-vacated 2020 rule. Instead, USDOL sets forth unsupported assertions that the modified version of its 2020 rule will promote certainty for stakeholders, when in reality, it would do the opposite, creating conflict with federal and longstanding Departmental practice, and likely leading to the relitigation of the issues that resulted in the rule's abrogation the first time around. Finally, the Department has again failed to address the harm to workers that

[1] *See* 91 Fed. Reg. 21919.

[2] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quotation omitted).

would result from its proposal—one of the reasons the 2020 joint employment rule was vacated. For these reasons, USDOL should not finalize this rule as proposed.

I. The States Oppose the Department's Proposal to Narrow the Scope of Joint Employment

A. The States are interested parties with expertise in labor and employment issues.

Many of the undersigned States enforce laws that protect workers against wage theft, unfair treatment, exploitation, and retaliation. State enforcement of wage and hour laws under a joint employment doctrine has often been informed by the federal standards for joint employment. *See*, *e.g.*, *Yu v. Mask Pot, Inc*., 241 N.Y.S.3d 323, 328 (N.Y. App. Div. 2025) ("Because the Labor Law 'uses a nearly identical definition of the term employer' as the FLSA, this Court will 'interpret[ ] the definition of employer under the [New York Labor Law] coextensively with the definition used by the FLSA'"); *Jinks v. Credico (USA) LLC*, 177 N.E.3d 509, 513 (Mass. 2021) (". . . we borrow the test applied to determine joint employer status under the Fair Labor Standards Act (FLSA), from which the Massachusetts wage laws derive"); *Becerra v. Expert Janitorial, LLC*, 332 P.3d 415, 420-21 (Wash. 2014) (announcing the Ninth Circuit's 13-factor test for joint employment under the FLSA is the appropriate test to determine whether joint employment exists under WA minimum wage statute).

Joint employer liability is critical to maintaining employer accountability with worker protection laws and making workers whole when their rights have been violated. Holding upstream companies accountable as joint employers can have pronounced compliance effects that reverberate throughout entire industries and often are critical to ensuring that workers receive wages owed to them. Accordingly, many State Attorneys General and labor departments routinely bring joint employer enforcement actions across sectors—such as construction, agricultural, and janitorial—and on behalf of diverse types of workers, including subcontractors, franchise workers, and temporary workers.[3] For example, in the *Bay State Linen* and *Country Temp* matters,

[3] *See*, *e.g.*, Press Release, Office of the Attorney General for the District of Columbia, *Attorney General Schwalb Secures Money Back for Dozens of DC Janitors Exploited in Wage Theft Scheme* (Apr. 17, 2026) (announcing Jan-Pro Franchising International and Jan-Pro of Washington, DC's agreement to pay $279,000 to janitorial workers and the District as joint employers of janitorial employees), available at https://oag.dc.gov/release/attorney-general-schwalb-secures-money-back-dozens; Press Release, The Office of the Minnesota Attorney General, *Attorney General Ellison prevails at Supreme Court and may litigate its wage theft allegations against Madison Equities* (Jan. 14, 2026) (referring to AG's suit against real estate company and subsidiaries for overtime evasion scheme), available at https://www.ag.state.mn.us/Office/Communications/2026/01/14_MadisonEquities.asp; Press Release, Commonwealth of Massachusetts Office of the Attorney General, *AG Campbell Issues Over $1.3 Million In Citations Against Boston-Based Quick Temp And Owner For Wage, Sick Time, And Records Violations* (Nov. 21, 2023), available at https://www.mass.gov/news/ag-campbell-issues-over-13-million-in-citations-against-boston-based-quick-temp-and-owner-for-wage-sick-time-and-records-violations (issuing citations against temporary worker company for violations of minimum wage and overtime protections, among other things).

Massachusetts investigated a commercial laundry factory, Bay State Linen, and its staffing agency, Country Temp, in connection with state minimum wage and overtime violations. As a result of the investigation, the Fair Labor Division reached a civil settlement with Bay State Linen, through which the company and its owner agreed to pay up to $900,000 in back wages impacting at least 177 employees.[4]

B. Shifting workplace relationships create barriers to wage and hour enforcement.

Being able to hold all employers liable—i.e. bring joint employment actions—is particularly critical given the evolving nature of the labor market. Though the Department acknowledged this dynamic in its 2020 rule,[5] the current proposal ignores it, even though recent technological developments have further contributed to the rapid pace of change in workplace relationships since 2020.

As both the States[6] and other organizations[7] informed the Department in response to its proposed joint employment rule in 2019, changing economic realities and workplace relationships—particularly the fissuring of the workplace—make labor enforcement more difficult today than ever before. The "fissuring of the workplace" refers to the profound business restructuring in which workers are no longer directly employed by "lead companies." Instead, businesses facing pressure to outsource both core and non-core work increasingly contract with other entities—such as labor contractors, subcontractors, staffing agencies, and franchisees—for the performance of labor or production of services.[8] As a result, for more and more workers, two or more companies may control the terms and conditions of employment. Even as lead companies

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[4] Press Release, Massachusetts Attorney General's Office (March 24, 2017), https://www.mass.gov/news/owners-of-temp-company-criminally-charged-for-wage-theft-intimidation-and-retaliation-against.

[5] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2853 (Jan. 16, 2020) ("The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships.").

[6] *See* State Officials, Comment Letter on USDOL Proposed Rule on Joint Employer Status under the Fair Labor Standards Act, (June 25, 2019), available at https://www.regulations.gov/comment/WHD-2019-0003-12749.

[7] *See*, *e.g.*, Econ. Pol'y Inst., Comment Letter on USDOL Proposed Rule on Joint Employer Status under the Fair Labor Standards Act, (June 25, 2019), available at https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/.

[8] *See generally*, David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RUSSELL SAGE FOUND. J. OF THE SOC. SCIENCES 147 (Dec. 2019), available at https://muse.jhu.edu/article/742469; 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).

maintain control of subsidiary organizations through standard-setting and monitoring, however, this fissuring empowers lead companies to limit their legal and monetary liabilities.

Research clearly supports the existence of the fissured workplace, demonstrating that alternative work arrangements, including temporary staffing and subcontracting, account for a significant amount of employment growth, and that the number of temporary and contracted workers will likely continue to increase. For example, the International Franchise Association predicts that the number of total franchise establishments will increase by 1.5% in 2026, from 832,521 to 845,000 units.[9] Total employment by franchise businesses is expected to grow by 1.8% in 2026, totaling 8.9 million employees.[10] Similarly, workforce shortages in critical industries have produced an increase in the use of staffing agencies, especially in healthcare and nursing homes.[11] As of May 2026, 2.49 million workers were employed in the temporary help services industry.[12]

The use of alternative work arrangements will continue to grow as technology increasingly enables worker surveillance and monitoring, contributing to lead businesses' ability to maintain standards for their subsidiaries from a distance. Algorithmic management systems, such as scheduling optimization systems, make it easier for lead companies to remotely monitor and manage workers, further increasing employers' ability to outsource work to subcontractors,

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[9] Int'l Franchise Ass'n, 2026 Franchising Economic Outlook, at 19, available at https://indd.adobe.com/view/c09364f3-8c80-4b2f-bbcc-56414924ae67.

[10] *Id.* at 20.

[11] For example, one survey suggests that 57% of Pennsylvania nursing homes had to increase their use of contracted temporary agency staff in 2024. Hospital and Healthsystem Ass'n of Pennsylvania et al., *Care Across the Continuum: How Health Care Workforce Shortages Affect Pennsylvanians' Access to Care*, at 5 (Apr. 2025), available at https://haponlinecontent.azureedge.net/resourcelibrary/workforce-survey-2025.pdf. *See also*, Lina Stepick et al., *The Increase in Contract CNA Staffing in U.S. Nursing Homes and Associated Care Quality Outcomes*, UCSF HEALTH WORKFORCE RSCH. CTR. ON LONG-TERM CARE (Jan. 2024), available at https://healthworkforce.ucsf.edu/file/increasecontractcnastaffingreport1pdf; John Bowblis et al., *Nursing Homes Increasingly Rely On Staffing Agencies For Direct Care Nursing*, 43 HEALTHAFFAIRS 327, 334 (Mar. 2024) ("From 2018 to 2022, this study found that the share of nursing homes using any agency nursing staff to provide direct care to residents increased from 22 percent to roughly half of all nursing homes."), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC10955789/.

[12] U.S. Dep't of Labor, Bureau of Labor Statistics, *Employment Situation News Release* (June 5, 2026), available at https://www.bls.gov/news.release/empsit.htm. Workers for temporary staffing agencies make up a significant portion of many of the States' workforces. For example, in Illinois alone, around 200,000 workers were employed by temporary staffing agencies per year. *See* University of Illinois Chicago, *Protecting Temporary Staffing Workers in Illinois: A Policy Analysis* (Dec. 20, 2022), available at https://healthywork.uic.edu/wp-content/uploads/sites/452/2022/12/Protecting-Temporary-Staffing-Workers-in-IL-A-Policy-Analysis.pdf.

staffing agencies, or platform-based firms without compromising quality.[13] These technologies include passive data collection tools, such as sensors that collect data on worker location, activities, and interactions; computer vision systems equipped with facial analysis and object recognition; and algorithm-empowered productivity score systems that evaluate workers' performance.[14] These developments are not merely abstract or theoretical, but are already in use across the fissured workplace: in 2025, 28% of franchisors already reported incorporating artificial intelligence to address labor shortages and workforce management.[15]

Workers in the fissured workplace—including temp workers, franchise employees, and subcontractors—are particularly vulnerable to violations of employment laws, highlighting the need for a protective joint employment standard, especially as technological developments increasingly disadvantage this vulnerable population of workers. The fissuring of the workplace and outsourcing of work lead to depressed wages, increased wage theft, and other violations of worker protection laws.[16] Temp workers, for example, often receive lower wages than their direct-hire counterparts for performing the same work, and almost one in four temp workers has experienced wage theft.[17] Franchise employees are also vulnerable to minimum wage violations: a recent report found that one in four fast food workers in Los Angeles were paid below the minimum wage in 2024.[18] Finally, subcontractors, especially in industries like construction and agriculture, are more likely to experience violations of worker protection laws, as general

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[13] Annette Bernhardt et al., *The Data-Driven Workplace and the Case for Worker Technology Rights*, 76 ILR REV. 3 (Oct. 14, 2022), available at https://journals.sagepub.com/doi/full/10.1177/00197939221131558 (describing types of data-driven workplace management technologies and the corresponding potential harms to workers).

[14] Annette Bernhardt et al., *Data and Algorithms at Work: The Case for Worker Technology Rights*, UC BERKELEY LAB. CTR. (Nov. 2021), available at https://laborcenter.berkeley.edu/data-algorithms-at-work/.

[15] Meme Moy, *Franchisors Are Doubling Down on Technology Investment in 2025*, FRANDATA (Mar. 17, 2025), available at https://frandata.com/franchisors_are_doubling_down_on_technology/.

[16] The Department itself lists the temporary help and staffing industry as among the fifteen industries on the list of "Low Wage, High Violation Industries" for FY 2025. *See* USDOL Wage and Hour Division, Low Wage, High Violation Industries, available at https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

[17] Nat'l Emp. L. Project, *Temp Workers Demand Good Jobs*, at 9 (Feb. 2022), available at https://www.nelp.org/app/uploads/2022/02/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf.

[18] Daniel J. Galvin & Jake Barnes, *Wage Theft in the Fast Food Industry: Minimum Wage Violations in Los Angeles*, at 2 (Feb. 2025), available at https://bpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/0/8117/files/2025/02/wjl-ff-la.pdf.

contractors facing competition for contracts push subcontractors to reduce project costs at the expense of workers' rights.[19]

The unique vulnerabilities of workers in the fissured workplace highlight the need for a broad rather than narrow joint employer standard. In view of abundant evidence of today's fissured workplace economy and the way that these shifting employment relations cause significant harms to workers, the enforcement of wage and hour violations must adapt and focus on both the subsidiaries that set wages and cut paychecks, *as well as* the lead businesses that set the scope of work and terms of payment.

C. The Department's narrowed test for joint employment, and the opportunities it provides for employers to escape liability, would make labor law enforcement more difficult in today's fissured workplace.

Rather than adapt the joint liability standard to the modern workforce, the Department's proposal does the opposite—dragging the joint employment standard back in time to a largely-vacated standard from 2020 that ignores the nature of modern workplace relationships. The Department's proposal acknowledges that its standard "might narrow the scope of vertical joint employment for some workers" and "could reduce, in some cases, the number of persons who are responsible for ensuring that employee rights under those statutes are fulfilled, including the payment of owed wages."[20] The Department states that this could in turn "reduce the amount of wages that some employees collect under the FLSA and MSPA if their employer is unwilling or unable to comply with the law, such as where an employer is or becomes insolvent," but writes off the magnitude of this effect as "unlikely to be significant."[21] Instead, the NPRM asserts without support that its narrowed standard may actually result in transfers from employers to workers "to the extent that the proposed rule improves the Department's ability to bring enforcement actions or raises employee awareness about the possibility of joint employment." [22]The Department's failure to engage meaningfully with the impact of the rule change likely violates the Administrative Procedure Act ("APA").

The experiences of many of the undersigned States make clear that a narrowed joint employment standard would only weaken enforcement agencies' abilities to collect wages owed

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[19] *See generally* Catherine Ruckelshaus et al., NAT'L EMP. L. PROJECT, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work* (May 2014) (explaining how outsourcing in janitorial, fast-food, home care, and agricultural industries has worsened conditions for workers) available at https://www.nelp.org/app/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[20] 91 Fed. Reg. 21910.

[21] *Id*.

[22] *Id*.

to employees of more than one entity. If the joint employment standard fails to encompass lead businesses, unscrupulous employers will be encouraged to exploit gaps to avoid legal compliance. Even good faith, law-abiding businesses will be more likely to structure their labor arrangements to avoid liability under wage and hour laws in order to reduce costs. In either case, it will be increasingly difficult to make workers whole for any such violations. A broad interpretation of joint employment under these statutes holds all parties violating labor standards accountable—both subsidiary businesses, and lead businesses that control or have the ability to control working conditions and pay. Moreover, broad potential joint liability increases the deterrent effect against potential wage theft, reducing litigation and the need for enforcement without compromising the rights of workers.

II. The Proposed Rule Is Contrary to Law

A. The proposed rule's test for joint employment under the FLSA violates its text and judicial precedent, including the vacatur of the 2020 rule.

As the Department has previously recognized, no circuit has adopted the four-factor test for joint employment that this NPRM sets forth.[23] Instead, the circuits have adopted a joint employer framework consistent with the FLSA's text and purpose, which this proposal and its adoption of a modified *Bonnette* test inappropriately narrow. The Department purports to adopt the four-factor test for joint employment from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).[24] According to this NPRM, the question of whether an entity is a joint employer 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 to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.[25] The Department states that these four factors are not exhaustive, and that its proposal does not "limit the consideration of additional factors beyond the four factors . . . to those that relate to control."[26] At the same time, the NPRM discourages consideration of any other factors, stating that "additional factors often will not be either material to the question of joint employment or need to be considered" and its four factors "are more

[23] Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 14038, 14044-45 (proposed Mar. 12, 2021).

[24] 91 Fed. Reg. 21890 ("Not only do the proposed factors epitomize the substantial control standard in *Falk,* they also derive from, and align with, *Bonnette,* the seminal appellate court decision addressing FLSA joint employment.").

[25] 91 Fed. Reg. 21889.

[26] 91 Fed. Reg. 21895.

relevant and carry greater weight in the analysis than any additional factors" and thus "must be considered in every case."[27]

The Department also specifically lists several factors that are either less relevant than its four factors or altogether irrelevant to the inquiry. For example, the NPRM states that economic dependence on the employer for work, and factors indicative of economic dependence, have "less relevance in determining whether multiple businesses jointly employ the same economically dependent workers."[28] The proposal also explains that a putative "joint employer's actual exercise of control is more relevant than such ability, power, or right."[29] Finally, the NPRM readopts guidance from its 2020 joint employer rule dictating that "certain general common business models and business practices," standing alone, do not make joint employer status more or less likely, including: operating as a franchisor, entering into a brand and supply agreement, or using a similar business model; contractual provisions addressing and requiring compliance with general legal obligations or health and safety standards; requiring, monitoring, or enforcing another business' adherence to quality control standards; and other "common basic business practices—such as providing another employer with a sample employee handbook."[30]

The Department misapplies judicial precedent to justify this four-factor test, first by inappropriately relying on the Supreme Court's decision in *Falk* v. *Brennan*, 414 U.S. 190 (1973). The Department claims that the Court in *Falk* established "substantial control" as the standard for joint employment, and that its proposed four factors align with that standard.[31] This misunderstands *Falk.* While the Court in *Falk* pointed to the employer's control over the employees as the basis for finding joint employment in that situation, nothing in *Falk* or any case interpreting it stands for the idea that an employer must exercise "substantial control" for a joint employment relationship to exist.[32] Indeed, the Department acknowledged in its 2021 rescission

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[27] 91 Fed. Reg. 21896.

[28] 91 Fed. Reg. 21895. These specifically enumerated irrelevant indicia of economic dependence include: "(1) whether the employee is in a job that requires special skill, initiative, judgment, or foresight; (2) whether the employee has the opportunity for profit or loss based on his or her managerial skill; and (3) whether the employee invests in equipment or materials required for work or the employment of helpers." 91 Fed. Reg. 21896.

[29] 91 Fed. Reg. 21893.

[30] 91 Fed. Reg. 21898-21901.

[31] 91 Fed. Reg. 21890.

[32] The *New York v. Scalia* court addressed the Department's similar prior reliance on *Falk* in its 2020 joint employer rule as one of several grounds for that rule's vacatur. *See Scalia*, 490 F. Supp. 3d at 788 n.22 ("No one disputes that substantial control may be *sufficient* to support joint employer liability, as it was in *Falk*. But *Falk* does not suggest that control is *necessary* for joint employer status, as it is under the [2020] Final Rule.") (emphasis in original).

rule that relying on control as the touchstone of joint employer liability is unduly narrow and contradicts the FLSA and judicial precedent.[33] In doing so, the Department recognized that "while the Court did address a joint employment situation in *Falk v. Brennan*," that case's utility is "limited."[34] The Department fails to explain why its interpretation of *Falk* has changed since its 2021 rescission rule, and its reliance on that case to support its current proposal is untenable.

Second, just as it did in its 2020 joint employer rule, when justifying the contents of its current proposal, the Department presents a misleading characterization of *Bonnette* and misconstrues how courts have treated the relative importance of the *Bonnette* factors. The Department has again unduly narrowed the *Bonnette* test itself. The NPRM admits that it has again modified the *Bonnette* four-factor test, acknowledging that its first factor "asks whether the potential joint employer hires or fires employees, whereas the first *Bonnette* factor is whether the potential joint employer has the 'power' to hire and fire the employee."[35] The purposeful removal of language from *Bonnette* referring to an employer's power cabins the focus inappropriately to the putative employer's actual exercise, rather than potential exercise of power, narrowing the *Bonnette* test—one of the reasons for which the *New York v. Scalia* court found that the 2020 rule was contrary to the FLSA.[36] Additionally, this narrowing of the first *Bonnette* factor creates a regulatory inconsistency, contradicting the Department's simultaneous assertion that a putative joint employer's "reserved control nevertheless may be considered with respect to any of the factors (although the potential joint employer's actual exercise of control is more relevant), so the potential joint employer's 'power' to hire and fire may be considered."[37] Removing this language from the *Bonnette* test is thus both internally inconsistent, and contradictory to precedent and the

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[33] 86 Fed. Reg. 40946-47.

[34] 86 Fed. Reg. 40945-46.

[35] 91 Fed. Reg. 21891. The Department's attempt to exclude consideration of a putative employer's power to fire employees is particularly problematic because in fissured or tiered workplaces, lead companies often tell intermediaries like temp agencies not to return workers, which has the practical impact of a termination, but may not be considered actual termination. *See, e.g.*, Nat'l Emp. L. Project, *Lasting Solutions for America's Temporary Workers*, at 6 (Aug. 2019), available at https://www.nelp.org/app/uploads/2019/08/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf ("A common industry practice is for host companies to write 'DNR'—short for 'Do Not Return'—on the back of a temporary worker's work slip at the end of the day, which instructs the temporary staffing agency not to assign the worker to this jobsite again.").

[36] *New York v. Scalia*, 490 F. Supp. 3d 748, 787-88 (S.D.N.Y. 2020).

[37] 91 Fed. Reg. 21891-92.

purpose of the FLSA. Creating this unworkable set of factors defies the stated purpose of this rule to provide clarity and ease of enforcement.

The proposed rule also misconstrues *Bonnette* by ignoring that the *Bonnette* court acknowledged that inquiry should not be limited to its four factors, and should instead be based "upon the circumstances of the whole activity."[38] As the district court reminded in *New York v. Scalia*, the *Bonnette* court "did not purport to announce an exhaustive test."[39] By framing the abbreviated *Bonnette* factors as the central inquiry for any potential joint employment situation,[40] the Department has again misconstrued the central judicial precedent on which it relies in support for its rule.

Additionally, the Department inappropriately excludes whole categories of relevant factors, labeling them as "less relevant" or "not relevant" compared to its four factors, even though this is contrary to the FLSA and interpreting precedent. Indeed, the *New York v. Scalia* court vacated the 2020 rule precisely because, among other things, the Department identified those same factors as irrelevant to the joint employment inquiry. As in its 2020 joint employment rule, the Department's current proposal excludes economic dependence from consideration—which the *New York v. Scalia* court recognized contradicts both caselaw and Departmental practice.[41] The Department also again deems other factors to be irrelevant, contradicting Supreme Court precedent. In *Rutherford Food Corp. v. McComb*, the Supreme Court directed that an assessment of whether multiple entities are employers liable under the FLSA must examine "the circumstances of the whole activity," explicitly evaluating in that case whether the workers performed a specialty job, whether the workers had the opportunity for profit or loss based on their skills, and whether the slaughterhouse supplied the equipment necessary for the work.[42] The Department's proposed

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[38] *Bonnette*, 704 F.2d at 1470 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) ("More important, these four factors are relevant to this particular situation.")).

[39] *Scalia*, 490 F. Supp. 3d at 788.

[40] 91 Fed. Reg. 21891 (identifying the Department's four-factor test as "a framework that distills the central questions, critical factors, and relevant determinations from these tests into a structure that reliably produces the outcomes of the judicial tests, but that workers, and employers, and the Department's investigators may readily and reasonably apply.").

[41] *Scalia*, 490 F. Supp. 3d at 790 (citing *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1178 (11th Cir. 2012) ("[I]n considering a joint employment relationship, we must not allow common-law concepts of employment to distract our focus from economic dependency.")); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) ("[T]o determine whether an employment relationship exists for the purposes of federal welfare legislation, courts look not to the common law conceptions of that relationship, but rather to the 'economic reality' of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer.") (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994)).

[42] 331 U.S. 722, 730 (1947).

Section 791.115(f), which would prohibit consideration of several of those economic dependence-related considerations,[43] directly contravenes the Supreme Court in *Rutherford* and the circuit courts that have followed it.[44]

Even if *Bonnette* supported the Department's proposal, a final way in which the Department's proposal contradicts or misunderstands precedent is in its reliance on *Bonnette* as the definitive precedent regarding joint employment status. The NPRM acknowledges divergence among the circuits but describes the *Bonnette* factors as "by far the closest thing to a common denominator applied by courts when determining FLSA vertical joint employment."[45] This assessment of the caselaw misstates the importance of *Bonnette* among the circuits—including in the Ninth Circuit where it originated.

Virtually every circuit to consider the *Bonnette* factors has either 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 its factors); *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 based on employee responsibilities); *Moldenhauer v. Tazewell-Pekin Consol. Communications Center*, 536

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[43] In its 2020 rule, the Department also deemed irrelevant the economic dependence factor of whether the employee "is in a specialty job." *See* 85 Fed. Reg. 2823. The *New York v. Scalia* court listed the exclusion of this economic dependence factor as one of the reasons for which the 2020 rule contradicted Supreme Court precedent. *Scalia*, 490 F. Supp. 3d at 791 ("For example, the Final Rule prohibits courts from considering 'whether the employee is in a specialty job' in the joint employer inquiry. But *Rutherford* held that it was relevant that the workers 'did a specialty job on the production line.'") (internal citations omitted). The Department addressed this language from *New York v. Scalia* in its current proposal and explained that it has not repeated this exclusion of the "specialty job" economic dependence factor. 91 Fed. Reg. 21897. The Department nonetheless again excludes other economic dependence factors that the *New York v. Scalia* court did not use as a specific example of divergence from *Rutherford*, misconstruing both *New York v. Scalia* and *Rutherford*.

[44] *See*, *e.g.*, *Zheng v. Liberty Apparel Co. Inc*., 355 F.3d 61, 71 (2d Cir. 2003) (quoting *Rutherford*, 331 U.S. at 730 and *Goldberg v. Whitaker House Co-op., Inc*., 366 U.S. 28, 33 (1961)).

[45] 91 Fed. Reg. 21891.

F.3d 640, 644 (7th Cir. 2008) (considering joint employment under the FMLA, 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")(emphasis in original); *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 n.21 (10th Cir. 1995) (noting 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).

The Department itself recognizes that circuits "apply a wider range of factors" than its proposed four factors.[46] In setting forth these alternative tests to *Bonnette*, these courts have recognized 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, 766 (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"). The Department's repeated attempt to narrow the inquiry misconstrues Supreme Court and circuit court precedent and repeats the interpretive errors of its 2020 rule as identified by the *New York v. Scalia* court. For these reasons, the Department's proposal must not be finalized.

B. The proposed rule's novel extension to the MSPA and FMLA defies those statutes' purposes and existing regulations, without justification.

1. MSPA

In contrast to its 2020 rule, in which the Department declined to apply its proposed test for joint employment under the FLSA to the MSPA, the Department's current proposal would drastically alter existing regulations under the MSPA and severely narrow the inquiry. In 1997, USDOL promulgated legislative regulations defining joint employment under the MSPA, a statute that incorporates the FLSA's definitions of "employ," "employee," and "employer" into the framework for agricultural employment.[47] The current standard for joint employer liability under the MSPA is whether, as a matter of "economic reality," "the worker . . . economically depend[s]" on the putative joint employer.[48] Thus, current MSPA regulations set forth seven non-exhaustive factors to determine economic dependence, including, for example, "the degree of permanency and duration of the relationship of the parties," "the extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training," and "whether the activities performed by the worker(s) are an integral part of the overall

[46] *Id*.

[47] 29 U.S.C. § 1802(5). *See also*, 29 C.F.R. § 500.20(h).

[48] 29 C.F.R. § 500.20(h)(iii).

business operation of the agricultural employer/association."[49] This broad regulatory test for joint employment aligns with MSPA's remedial purpose "to reverse the historical pattern of abuse, and exploitation of migrant and seasonal farm workers."[50]

Rather than addressing MSPA's specific purpose, the Department cites an unsupported demand for clarity and uniformity to justify its current proposal to apply the same four-factor test for joint employment under the FLSA to the MSPA, replacing the seven factors and the existing regulations' references to economic dependence, in defiance of the MSPA's clear legislative intent. As the Department previously recognized,[51] Congress specifically cited with approval the joint employment analysis utilized by the Court of Appeals in *Hodgson v. Griffin & Brand of McAllen, Inc.,* 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973), as the benchmark for the joint employment analysis for the MSPA.[52] Thus, current MSPA regulations incorporate *Griffin & Brand* and its emphasis on "the total work arrangement."[53] The Department's proposal seeks, for the first time, to remove references to *Griffin & Brand* without any rationale or evidentiary support, eliminating the MSPA's distinct seven-factor analysis. The Department cannot circumvent legislative intent in this way, especially not by relying on mere passing references to "the simplicity and certainty of having a single uniform standard for assessing joint employer status under all three laws."[54] To do so would violate the MSPA and the APA.

2. FMLA

The Department's 2026 proposal would similarly extend its four-factor test for joint employment to the FMLA, which also incorporates the FLSA's definition of "employ,"

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[49] 29 C.F.R. § 500.20(h)(5)(iv).

[50] House Report No. 97-885, 97th Cong. 2d sess. p. 3 (Sept. 28, 1982).

[51] 62 Fed. Reg. 11746 ("Congress intended the joint employer doctrine to serve as a vehicle for protecting agricultural employees 'by fixing the responsibility on those who ultimately benefit from their labors—the agricultural employer.' In declaring this purpose, Congress cited with approval the joint employment analysis utilized by the court of appeals in *Griffin & Brand*; thus, that decision should be the benchmark for the analysis in the agricultural setting.").

[52] House Report No. 97–885, 97th Cong. 2d sess. pp. 6-7 (". . . it is the intent of the Committee that the formulation of as set forth in *Hodgson v Griffin and Brand of McAllen Inc.*, 471 F. 2d. 235 (1973) be controlling . . . The *Griffin and Brand* decision summarizes the proper approach and the appropriate criteria to be used in making these determinations and it is the Committee's intent that such construction be applied for 'joint employer' determinations made under this Act.").

[53] 29 C.F.R. § 500.20(h)(5)(ii).

[54] 91 Fed. Reg. 21903.

"employee," and "employer."[55] As with the existing MSPA regulations, the Department cites the need for uniformity to justify its proposed erasure of the existing FMLA non-exhaustive factors used to determine joint employment status under that law.[56] Under existing FMLA regulations, a joint employment relationship generally is considered to exist in situations: "(1) Where there is an arrangement between employers to share an employee's services or to interchange employees; (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or, (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer."[57] FMLA regulations additionally recognize that joint employment "turns on the economic realities of the situations and must be based upon all the facts and circumstances," including the right to hire, fire, or control the employee's work.[58]

The Department justifies replacing the FMLA factors by newly claiming "that the analysis for determining joint employer status should be the same under those statutes as it is under the FLSA."[59] However, there is no requirement that the same criteria be applied and weighed in precisely the same manner across all three statutes as evidenced by the Department's decision to address only the FLSA in its 2020 rule.[60] Indeed, both the FMLA and the MSPA have unique structures and provisions that require reasoned consideration before the Department mandates a uniform approach. For example, the Department explains it will retain 29 C.F.R. § 825.106(c), which sets forth the concept of a primary and secondary employer under the FMLA.[61] However, the Department does not explain how its new four-factor test will align with this distinction between types of joint employers, nor does it acknowledge that the FMLA includes other structural differences that may justify divergence from the FLSA, including the fact that the FMLA institutes requirements beyond the economic reality criteria to determine employee eligibility, such as

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[55] 29 U.S.C. § 2611(3).

[56] *See* 29 C.F.R. § 825.106.

[57] 29 C.F.R. § 825.106(a)(1)-(3).

[58] 29 § CFR 825.106(b)(2).

[59] 91 Fed. Reg. 21903.

[60] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2829 n. 55 (Jan. 16, 2020) ("This final rule provides the standards for determining joint employer status under the FLSA. The Department will continue to use the standards in its MSPA joint employer regulation, 29 C.F.R. § 500.20(h)(5), to determine joint employer status under MSPA, and will continue to use the standards in its FMLA joint employer regulations, 29 C.F.R. § 825.106, to determine joint employer status under the FMLA.").

[61] 91 Fed. Reg. 21903.

employment by the applicable employer for at least twelve months and having worked 1,250 hours during that period.[62] These existing regulatory and legislative provisions, and their impact on any proposed changes to the definition of "employ," should be considered as part of a reasoned rulemaking process.

III. The Department Has Not Provided Adequate Justification for its Proposed Rule

USDOL's proposal arbitrarily narrows the scope of joint employment, without providing evidence supporting the need for its drastic changes, or any evidence or estimates of its purported benefits. The Department offers no explanation for how its proposal accounts for the evolving landscape of employment. Further, DOL's proffered reasons for the proposal fail to justify this narrowed standard, especially in light of the well-settled statutory purpose of these statutes to protect workers. Finally, the Department repeats its failure to consider or acknowledge any harm to workers that would result from the implementation of its proposal, a failing identified by the *New York v. Scalia* court when it vacated the Department's similar 2020 joint employment rule. For these reasons, the Department's proposal is likely arbitrary and capricious.

A. The NPRM acknowledges that USDOL lacks evidence to analyze the potential impact of its proposed rule.

First, the Department's proposal fails to justify its divergence from prior departmental practice, including its rescission of the similar 2020 rule in 2021.[63] While the Department acknowledges that it rescinded its 2020 joint employment rule containing the same four-factor analysis it proposes now, the Department justifies returning to that standard by claiming that, since the rescission, "the absence of any direction has created uncertainty for businesses, workers, and courts."[64] The Department cites no cases or public comments demonstrating these entities have experienced uncertainty regarding the joint employment standard—in part because, as described above, the circuits have long provided guidance on this topic.

Instead of offering certainty to stakeholders, the Department's proposal will subject employers to conflicting joint employment standards and create confusion as to which entities may be held liable for compliance with FLSA, MSPA, and FMLA.. The Department's proposal cannot erase or ignore the decades of controlling authority in the courts of appeals that set forth contradictory joint employment standards to its narrow proposal here. While an agency "need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one," an

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[62] 29 U.S.C. § 2611(2)(A).

[63] *Scalia*, 490 F. Supp. 3d at 793 (explaining that in publishing its 2020 final joint employment rule, the Department failed to explain its departure from its 1997 MSPA guidance and 2014 and 2016 Administrator's Interpretations.). *See also*, 86 Fed. Reg. 14044 ("WHD tentatively shares the concern that the Rule did not adequately account for inconsistencies with its previous guidance.").

[64] 91 Fed. Reg. 21884.

agency seeking to alter an existing rule "must show that there are good reasons for the new policy."[65] The Department has failed to do so.

In the same vein, the Department lacks sufficient data to support its proposal—namely, it declines to even estimate the number of businesses or workers who may be affected by the proposal. Under *State Farm*, the Supreme Court requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action."[66] The *State Farm* Court rejected an agency's explanation as arbitrary where "there [was] no direct evidence in support of the agency's finding."[67] 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.[68] Courts have found that "a complete failure to . . . grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking."[69]

Here, the NPRM baldly asserts that "nothing in the proposed rule would reduce the wages owed to employees under the FLSA or MSPA."[70] 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, USDOL acknowledges that it "does not currently have data on the number of businesses that are or might be in joint employment relationships," and as such, "requests comments, studies, and data on the prevalence of joint employment, how this proposed rule might affect the businesses and workers involved in such relationships, and how to quantify those impacts, if such quantification is possible."[71] Thus, DOL admits it lacks the empirical data needed to assess how the narrowed joint employment standard would impact both businesses and workers.

It is noteworthy that USDOL made the same claim about the unavailability of relevant data when it proposed its 2020 joint employment rule.[72] In response to that NPRM, the Department

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[65] *F.C.C. v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009) (italics omitted).

[66] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[67] *Id*. at 52.

[68] *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).

[69] *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

[70] 91 Fed. Reg. 21909.

[71] 91 Fed. Reg. 21906.

[72] 84 Fed. Reg. 14055.

received comments demonstrating the likely costs to workers, including the Economic Policy Institute ("EPI")'s estimation that the 2020 rule would cost workers $1 billion in wages per year due to increased outsourcing, subcontracting, and use of staffing agencies.[73] The 2020 final rule acknowledged that EPI submitted this quantitative analysis of transfers from workers that would result from its proposal, but in response, the Department merely restated that it "does not believe there are data to accurately quantify the impact of this rule."[74] The *New York v. Scalia* court held that the 2020 final rule was arbitrary and capricious in part because of its failure to consider EPI's data or any other methodology to account for the rule's effects on workers.[75] In this 2026 NPRM, the Department repeats the same failure to estimate the cost of its narrowed test on workers—a failure even more unreasonable in light of the *New York v. Scalia* vacatur on this basis, by the Department's rescission rule acknowledging such costs to workers,[76] and by the fact that prior responses to earlier requests for data on this subject were available to the Department from prior similar rulemakings.[77]

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[73] Econ. Pol'y Inst., Comment Letter on USDOL Proposed Rule on Joint Employer Status under the Fair Labor Standards Act, (June 25, 2019), available at https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/.

[74] 85 Fed. Reg. 2853.

[75] *Scalia*, 490 F. Supp. 3d at 794 ("The Final Rule concedes that it might reduce employees' ability to collect back wages owed to them. But the Department did not account for that effect because it was 'unable to estimate the magnitude of' the decrease in joint employers under the Final Rule. In doing so, the Department almost 'entirely failed to consider' the cost to workers, an 'important aspect of the problem.'") (internal citations omitted).

[76] 86 Fed. Reg. 14045 ("WHD believes that these potential negative effects on employees, which may make it more difficult for workers to collect back wages owed and incentivize workplace fissuring, are serious concerns that may have a disproportionate impact on low-wage and vulnerable workers. These concerns are an additional reason for proposing to rescind the Joint Employer Rule.").

[77] For example, the Department's own Bureau of Labor Statistics ("BLS") produced the employment data underlying EPI's 2019 estimate of the number of workers in the fissured workplace, data which was available to the public, is updated regularly, and which indicates the number of workers possibly implicated by this rule. *See*, *e.g.*, *Table A. Employed people with contingent and alternative work arrangements,* July 2023, available at https://www.bls.gov/news.release/conemp.ta.htm (indicating that in July 2023, there were 945,000 workers for temporary help agencies and 862,000 workers for contract firms in the US); BLS Data Viewer, *Series Title: All employees, thousands, temporary help services, seasonally adjusted* (Apr. 2026), available at https://data.bls.gov/dataViewer/view/timeseries/CES6056132001 (indicating that there were 2.48 million workers for temporary help services in April 2026, according to BLS's Current Employment Statistics survey).

Indeed, there is significant 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. Actual evidence of workers' experiences in today's economy shows that the proposed rule will harm the very workers these statutes are meant to protect. By ignoring this data, the Department has once again assumed that its proposal "would cost workers nothing—an obviously unreasonable assumption."[78]

This assumption is especially problematic in light of the changes in the modern workforce described above, including the ways in which modern technology has made workers in the fissured workplace more vulnerable to monitoring and surveillance. These increasingly available means of employers' reserved control, especially workplace surveillance tools, negatively affect workers' health, privacy, and ability to exercise their workplace rights.[79] Rather than addressing these changes in technology and the resulting harms and chilling effects on workers, the Department's proposed rule attempts to remove consideration of these technologies by de-emphasizing an employer's reserved control.[80] Limiting the consideration of an employer's reserved control over a worker in favor of the employer's exercised control unjustifiably ignores lead businesses' increased ability to consolidate sources of reserved control over a worker.

The proposed rule will have a negative impact on some of the most vulnerable workers in the country, including farmworkers and people working in construction. Both industries rely heavily on labor brokers, staffing agencies, and subcontractors to meet the demand for workers. Both industries can be seasonal in nature and, therefore, rely on workers who move from job to job based on the season and demand. These workers constitute a large portion of many States' workforces.[81] For example, farm labor contractors account for 14% of agricultural employment

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[78] *Scalia*, 490 F. Supp. 3d at 794.

[79] *See generally* U.S. Gov't Accountability Off., GAO-25-107126, *Digital Surveillance: Potential Effects on Workers and Roles of Federal Agencies* (Sept. 2, 2025), available at https://www.gao.gov/assets/gao-25-107126.pdf; Irene Tung et al., NAT'L EMP. L. PROJECT, *When 'Bossware' Manages Workers: A Policy Agenda to Stop Digital Surveillance and Automated-Decision-System Abuses* (July 2025), available at https://www.nelp.org/app/uploads/2025/07/When-Bossware-Manages-Workers-Policy-Agenda-July-2025.pdf; Data & Society Research Institute, *Response to the White House Office of Science and Technology Policy's Request for Information on Automated Worker Surveillance and Management* (June 21, 2023), available at https://datasociety.net/wp-content/uploads/2023/06/OSTP_Comment_June2023_Final.pdf.

[80] 91 Fed. Reg. 21893.

[81] For example, the Maine Department of Labor estimates that over 90% of the nearly 7,000 H-2A and H-2B workers in Maine each year work for employers who use an agent or other third-party representative.

nationwide.[82] USDOL itself collects information about migrant workers and their employment relationships through its National Agricultural Workers Survey, estimating that in 2021-2022, 22 percent of U.S. crop workers were employed by farm labor contractors.[83] Data indicates that farm labor contractors may commit labor law violations at higher rates than direct employers and tend to operate with minimal invested capital, allowing them to more easily evade enforcement actions.[84] By making it more difficult to hold all employers jointly and severally liable for a farm labor contractors' violations, the proposed rule will reduce the ability to obtain wages owed to workers and deter future violations through enforcement efforts. USDOL's failure to quantify or estimate the effects of its changes, including its overhaul of longstanding MSPA legislative rules, on these significant and vulnerable populations is unreasonable.

B. USDOL's stated bases for the changes to its interpretation under these statutes are contradictory and without support.

Like in 2020, as identified by the *New York v. Scalia* court, the Department's failure to quantify or address harms to workers is also "especially unpersuasive" in light of the Department's repeated failure to quantify the supposed benefits of its proposal.[85] The stated purpose of this NPRM is to "promote clarity and uniformity in the Department's application of joint employer standards in its enforcement under the FLSA, FMLA, [and] MSPA."[86] The Department has quantified none of these purported benefits. USDOL's claims that the proposed rule will result in greater predictability by reducing litigation and creating more uniformity in court decisions are

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[82] Daniel Costa, Philip Martin, & Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture*, Econ. Pol'y Inst. (Dec. 15, 2020), available at https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/.

[83] JBS International, Inc., *Findings from the National Agricultural Workers Survey (NAWS) 2021–2022: A Demographic and Employment Profile of United States Crop Workers*, at 25 (Sept. 2023), available at https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf.

[84] Daniel Costa, Philip Martin, & Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture*, Econ. Pol'y Inst. (Dec. 15, 2020), available at https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/ (finding farm labor contractors account for 24% of all federal wage and hour violations detected in agriculture and 14% of all agricultural employment nationwide); Skyler Simnitt & Marcelo Castillo, *Labor Contractors in U.S. Agriculture: Recent Trends and H-2A Program Usage*, 47(4) Applied Economic Perspectives and Policy 1298, 1303 (2025).

[85] *Scalia*, 490 F. Supp. 3d at 794.

[86] 91 Fed. Reg. 21908.

unsupported by the terms of the proposed regulations. The proposed rule incorporates a four-factor test that no court has articulated or implemented,[87] that is rife with internal inconsistencies, and that is more restrictive than current joint employment standards. The proposed rule would leave future adjudications without a principled and developed body of law to 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 any court will raise additional legal and factual questions regarding which employers qualify as joint employers, and which are shielded from obligations under labor laws, generating more uncertainty about legal obligations. This is especially true in the MSPA context, where agricultural workers, advocates, and employers have relied on MSPA's comprehensive legislative rules for decades without changes.[88]

The NPRM also asserts that the proposed rule will bring innovation by encouraging employers to more freely contract with secondary businesses, and to take certain actions in that relationship without fear of incurring liability.[89] However, the Department 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, as described above, studies and surveys show that employers have increased their use of temporary and contract workers and expect to increase this use in the future. The Department fails to reflect upon evidence contrary to its bases for its proposal—that employers are not, in fact, hesitant to enter business relationships for labor even with the existing, broader joint employment standard.

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[87] 86 Fed. Reg. 14044 ("Since promulgation of the [2020] Joint Employer Rule, courts (including the Southern District of New York's decision vacating the analysis in *New York* v. *Scalia*) have declined to adopt the Rule's vertical joint employment analysis.").

[88] For example, the proposed rule conflicts with the analysis of joint employment in agriculture in Maine and the rest of the First Circuit, which has, for 40 years, relied on *Maldonado v. Lucca*, 629 F. Supp. 483 (1986) ("In the agricultural context, farm owners and crew leaders have been held to be joint employers of migrant workers within the meaning of the FLSA. *Griffin and Brand, supra*. In *Griffin and Brand*, the Court of Appeals for the Fifth Circuit identified several factors which the court can consider in looking at the 'economic reality' of a particular employment arrangement. Those factors have been specifically endorsed by Congress in determining joint employment of farmworkers for FLSA and MSPA purposes. *See* H.R.Rep. No. 97-885, 97th Cong., 2d Sess., page 7 (1982) reprinted in 1982 U.S.Code Cong. & Ad. News 4547, 4553 ('House Report').").

[89] 91 Fed. Reg. 21908 ("For example, entities could rely on the guidance in proposed § 791.125 to more confidently engage in various beneficial business practices, such as: using or establishing an association health plan or association retirement plan with other businesses; providing a sample employee handbook, or other forms, to another business; jointly participating with another business in an apprenticeship program; or negotiating certain contractual provisions with other businesses, such as requiring workplace safety practices, anti-harassment policies, or other measures intended to encourage compliance with the law or to promote other desired business practices.").

In addition to this NPRM's failure to address or quantify the costs or benefits of this rule on workers and employers, the Department has once again failed to address the effects that these drastic changes would impose on the States and their abilities to enforce labor protections. Many states have relied on or looked to the FLSA's joint employment standard in developing and interpreting their own joint employment standard under state laws. The proposed rule may interject unnecessary confusion into decades of settled state law interpretations and require state law enforcement agencies, state courts, and federal courts interpreting state laws to expend considerable resources in future litigation of joint employment under state labor laws. States that have enacted protections commensurate with the FLSA and MSPA, and state enforcement agencies that look to FLSA and MSPA for guidance when enforcing state labor standards, will have to navigate conflicting standards if the proposed rule is adopted. This will necessitate extensive education and technical assistance for the regulated community to prevent and mitigate violations, at substantial cost to state enforcement agencies. Workers currently protected and afforded remedies against joint employers under FLSA and MSPA will have to rely on more protective state labor standards, increasing complaints and caseloads for state enforcement agencies. Where the federal government may no longer assist state enforcement agencies in the investigation and resolution of joint employment cases because of this new difference in standards, this rule would permit more employers to avoid responsibility for wage theft in the fissuring workplace, in violation of both state and federal law. USDOL's sudden departure from decades of court precedent, and its return to a legally questionable joint employment standard, will thus upend serious reliance interests and make state law enforcement more difficult.

IV. Conclusion

For the foregoing reasons, the proposed rule is contrary to law and likely arbitrary and capricious under the Administrative Procedure Act. USDOL's proposal is inconsistent with the FLSA, FMLA, and MSPA, contradicts court precedent, lacks evidentiary support, and relies on insufficient and unsupported rationales. Although the Department purports to have modified its problematic 2020 rule, it repeats several of the legal deficiencies that led to that rule's vacatur, including failing to justify the proposed rule's departure from precedent and past departmental policy, and most importantly, failing to consider the harm to workers that would result from these changes across statutes.

To ensure compliance with wage and hour laws, legal standards should adapt to the nature of control and dependence in 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, labor enforcement agencies will be better able to compel contractors, franchisees, and suppliers to meet labor standards. Instead, however, the proposed rule would substantially impair the enforcement of wage and hour laws by enabling employers who benefit from wage theft to escape liability under federal law. For these reasons, the States urge the Department to withdraw this proposed rule.

Sincerely,

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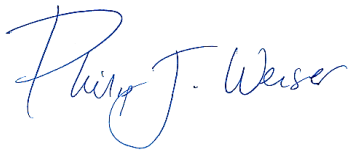

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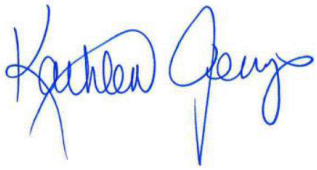
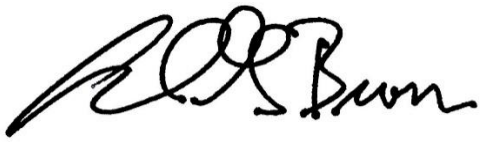


KATHLEEN JENNINGS
Attorney General of the State of Delaware

KWAME RAOUL
Attorney General
State of Illinois

JANE R. FLANAGAN
Director
Illinois Department of Labor

ANDREA JOY CAMPBELL
Massachusetts Attorney General



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KEITH ELLISON
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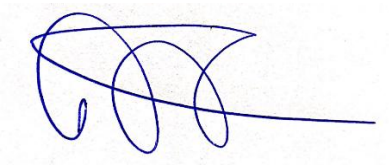
Minnesota Department of Labor and Industry

JEFF JACKSON
North Carolina Attorney General

JENNIFER DAVENPORT
Attorney General of New Jersey

LETITIA JAMES
New York Attorney General



CHRISTINA E. STEPHENSON
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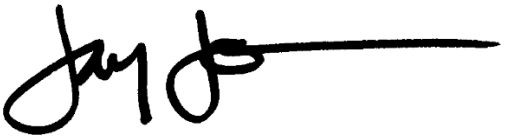
DAN RAYFIELD
Attorney General of Oregon

PETER F. NERONHA
Attorney General
State of Rhode Island



JAY JONES
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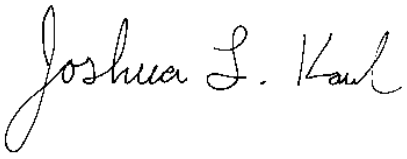
JESSICA LOOMAN
Secretary of Labor
Commonwealth of Virginia

CHARITY R. CLARK
Vermont Attorney General

JOEL SACKS
Director
Washington Department of Labor & Industries

NICK BROWN
Washington Attorney General



JOSHUA L. KAUL
Wisconsin Attorney General