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RE: RIN 1235-AA26; Joint Employer Status Under the Fair Labor Standards Act; Notice of Proposed Rulemaking

The U.S. Chamber of Commerce ("the Chamber") is pleased to submit these comments to the Department of Labor ("the Department" or "DOL"), pursuant to its Notice of Proposed Rulemaking and Request for Comments regarding Joint Employer Status under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 14043 (April 9, 2019) ("Proposed Rule"). The Chamber believes the Proposed Rule provides needed clarity and national consistency in determining joint employer status under the FLSA, and supports its implementation with some minor adjustments.

The Department's proposal provides welcome consistency to employers with multistate or national business operations. Despite the goal of the FLSA to create a uniform national system of pay rules, the case law surrounding joint employer liability fails to accomplish that end. Instead, the patchwork of tests applied by federal courts in this area creates uncertainty regarding what kinds of actions or relationships may create joint liability. This uncertainty creates disincentives for businesses to cooperate with one another, which harms both employers and employees.

The substance of the Proposed Rule adopts a fair, easy-to-apply test that courts and employers can understand, relying on the test articulated in the leading case, *Bonnette v. California Health & Welfare Agency*. The *Bonnette* test considers four key factors that indicate which entity actually controls the terms and conditions of an employee's work. Although the test relies on consideration of the totality of the relationship between employees and their putative joint employers, its simplicity would allow businesses to know the types of control they can exercise while still retaining their independence.

The Chamber encourages the Department to adopt the Proposed Rule for the benefit of employers, employees, and the economy as a whole.

1) Uncertainty Regarding Joint Employment Liability Discourages Employer Cooperation and Hinders Business Activity.

Under the current FLSA enforcement landscape, uncertainty regarding joint employer liability proliferates because different courts apply different joint employer tests depending on the jurisdiction.[1] In some cases, these tests are vastly different and can result in different findings under the same facts with the only distinction being the location of the case. As a result, the current state of the joint employer rule encourages businesses to take the safest possible route and avoid business-to-business partnerships that could give rise to potential liability under the broadest of the currently applicable tests.

The effects of employer uncertainty regarding joint employer liability have significant economic consequences. The Chamber and other business groups recently conducted studies on this issue in relation to the National Labor Relations Board's notice of proposed rulemaking regarding joint employer status under the National Labor Relations Act. As a part of that process, Chamber economist Ron Bird interviewed more than 75 franchise brand managers and owners to determine the impact of a broad, uncertain joint employer standard. The Chamber's study determined that concerns about joint employer liability (related to both NLRA and FLSA issues) resulted in significant cost-shifting to franchise business owners because franchisors provided fewer resources and less assistance to avoid potential joint liability. It further determined that these rising costs caused a significant reduction in franchise-related job opportunities because the franchise owners had to spend their limited money in other areas.

The most obvious detrimental result of uncertainty regarding joint employer liability involves protective "distancing" behaviors that larger businesses, including franchisors, general contractors, or others use to separate themselves from the work of their small business partners. For example, franchisors may refuse to provide model handbooks to their franchisees, or larger companies may reduce training resources available to their contractors, because of fears that such cooperation may result in joint employer findings. The Proposed Rule addresses some of these issues head-on, and will encourage businesses to engage in these efficient forms of cooperation.

The consequences of joint employer liability are potentially even greater in the FLSA context than the NLRA. Collective actions under the FLSA are expensive, time- and resource-consuming endeavors that can take years to resolve. If an employee or plaintiff's attorney can simply name a large business in a complaint and survive a motion to dismiss based on a vague or uncertain joint employer test, an entity may be tied up in litigation even when it is clearly not a joint employer under a test like *Bonnette*. The Proposed Rule's simplicity and clarity will reduce this risk and ensure that employers will not suffer liability merely because of they use one of the myriad productive, arms-length business relationships that make the American economy thrive.

[1] *See, e.g., Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2nd Cir. 2003) (applying a ten-factor test to determine joint employer status); *In re Enter. Rent-A-Car. Wage & Emp't Practices Litig.*, 683 F.3d 462 (3d. Cir. 2012) (partially adopting *Bonnette*, but emphasizing that *Bonnette* factors are not exhaustive); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178 (11th Cir. 2012) (applying eight-part economic realities test).

2) The Proposed Rule Would Further the Goals of the FLSA and Leave Employees with a Proper Remedy for Wage Violations.

The Proposed Rule furthers the legislative aim of the FLSA by codifying a single test for joint employer liability. Congress enacted the FLSA to create a uniform, national standard for fair rates of pay and to protect employees from sham arrangements that deprived them of their rights.[2] Joint employer liability developed precisely to prevent those types of sham arrangements, not to create an opportunity for employees to allege wage violations from persons other than their statutory employer.[3] The Proposed Rule's focus on the actual exercise of control over the key elements of the employment relationship will ensure that joint employer liability only arises when an employer meaningfully and directly affects the terms and conditions of employment.

The Proposed Rule properly reconciles the FLSA's intentionally broad scope within the unique context of joint employment. It properly relies on the definition of "employer" contained in the statute to craft its test, rather than the broader "employ" definition.[4] As the Proposed Rule and courts that apply the *Bonnette* test recognize, the definition of "employ" used in the statute is broad and intended to identify employees from those who would otherwise be independent contractors under common law. Thus, there was Congressional intent to make sure that workers would have a remedy for wage violations when the economic realities of their working arrangements showed they were dependent upon an employer. But that context is markedly different from the joint employer question, where it is not a question of whether the worker is in the employ of some entity, but rather whether a different, additional entity should also face liability as that worker's "employer." Unlike the broad definition of "employ", the definition of "employer" contains an active requirement that an entity be "*acting* directly or indirectly in the interest of an employer in relation to an employee."[5] Thus, the Proposed Rule is correct to conclude that "only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under the contract" should be relevant to the inquiry.

By properly capturing the key elements of the joint employer inquiry, the Proposed Rule also furthers the purpose of the FLSA by attempting to bring more uniformity to the statute's enforcement scheme. Congress enacted the FLSA in part to respond to the Great Depression and sought to create a uniform, national wage floor to limit the ability of employers to use labor-cutting strategies to gain unfair advantages in the increasingly national American product markets.[6] Thus, uniformity and consistency were touchstones of the statute – the FLSA could not accomplish its legislative goals if employers in one part of the country benefitted from a different enforcement scheme than employers in another location.

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[2] Interpretive Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938" (1940).

[3] *Id.*

[4] *See* 29 U.S.C. 203(d); (g).

[5] Compare with 29 U.S.C. 203(g) (using "suffer or permit to work" standard).

[6] Seth D. Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 Hofstra Lab. & Emp. L.J. 19, 22 (2000).

The disparate judicially created tests used to assess joint employment currently fail to meet this goal. As recently as 2017, circuit courts continued to develop completely new tests out-of-step with the rest of the country. For example, the Fourth Circuit's joint employer test, established in *Salinas v. Commercials Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), announced a six-part test under the "completely disassociated" theory that creates excessively broad potential joint employer liability. In *Salinas*, the Court applied principles related to horizontal joint employment – where two entities employee the same worker at different times – to the context of vertical joint employment – where the employee has a single primary employer, but that employer maintains a business partnership with another, separate employer. As a result, the Court improperly focused on the relationship between the two alleged employers, rather than the relationship between the employee and the putative employer. The Proposed Rule would have the potential to remedy this problem and rein in courts that have judicially expanded the scope of joint employer liability beyond Congress's intent.

The Fourth Circuit is not alone. Several other circuit courts rely on joint employer tests that focus on the relationship between business entities rather than the relationships between an employee and his putative employer.[7] There is simply no valid explanation for circuit courts using such vastly different analyses to apply the same law. The Proposed Rule selects a straightforward test that focuses on the relationship between the employer and the employee. Having courts apply a common test to employers across the country is consistent with the FLSA's statutory scheme.

The modified *Bonnette* test proposed by the Department represents a reasonable way to return a standardized approach to the joint employer question. In *Bonnette*, the Ninth Circuit focused on four clear indicators of control over the employment relationship: (i) the power to hire and fire; (ii) supervision and control over the employee's schedule; (iii) determination of the rate and method of payment; and (iv) the maintenance of employment records.[8] These are four of the core aspects of an employer-employee relationship. Still, if consideration of these four elements did not provide a clear answer to whether an employer exercised sufficient control over the relationship to qualify for statutory liability, the Court allowed for the consideration of additional factors and examination of the context of the whole relationship.[9] Thus, while the test focuses on certain fundamental aspects of the employment relationship, it also allows for flexibility but always with the focus on evidence of control.

The Proposed Rule's modification of the first element of the test – changing the consideration from a putative employer's *power* to hire and fire to consideration of whether the employer *actually* hires or fires – reflects its recognition that actual control, rather than reserved control, must exist for a joint employee-employer relationship to arise. It is also consistent with the Rule's statement that the facts of the relationship between the employee and employer, rather than the structure of the relationship between cooperating businesses, should govern. It is routine for businesses to include clauses in their contracts that require contractors or business partners to meet certain goals and enforce certain criteria regarding their employees, with contingencies for removal of those employees by the primary contractor or complete termination

[7] See footnote 1, *supra*.
[8] *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).
[9] *Id.*

of the contract under certain circumstances. But these contractual reservations of control are not probative of the relationship between the employer and the putative employee – the touchstone of the joint employer analysis – if the putative employer never exercises such control.

The Proposed Rule furthers the legislative aims of the FLSA for two reasons. First, it returns much-need uniformity to the Act's enforcement scheme, which Congress intended when it passed the legislation. Second, it focuses on the FLSA's definition of "employer" to determine potential joint employer status, rather than the broader "employ." This properly reconciles the limited role of joint employer liability within the greater legislative scheme.

3) The Proposed Rule Can Create Tangible Benefits for Businesses.

The Chamber further supports the Proposed Rule because it can result in tangible benefits for businesses. Just as the present inconsistency surrounding joint employer law hinders business-to-business cooperation, the Proposed Rule can encourage efficient, effective coordination between business partners. The Rule will benefit both large businesses, which can continue to rely on outsourcing and contractor business models that allow for cost-effective specialization along the supply chain, and small businesses, which rely on resources from larger business partners to help them grow.

The Proposed Rule includes several explicit exceptions to business-to-business interactions that will not trigger joint employer status that the Chamber welcomes. In particular, the Chamber supports Sections d(3) and d(4) of the Proposed Rule because they recognize common forms of cooperation that do not affect the joint employer analysis. Section d(3) lists several common aspects or terms of business-to-business contracts that provide for items like wage floors or sexual harassment policies. These are fundamental aspects of contracts that allow a business to ensure its partnership with another will not erode its core values or endanger its brand. These broad, baseline expectations allow businesses to contract with one another with confidence that their company's core principles will not be violated. As the rule recognizes, even though these rules may arguably represent some type of attenuated, reserved, and unexercised control vis-à-vis another employer's employees, such reserved control should not be sufficient to affect the joint employer analysis.

Section d(4) is also particularly helpful because it explains types of assistance a larger business may provide its small business partners without risking joint employer exposure. As discussed above, under the current patchwork of joint employer tests, franchisors and similar larger businesses regularly engage in strategic distancing behaviors to reduce joint employer risk. Under the Proposed Rule, at least in several discrete areas, these employers will not have to handicap themselves. For example, it is extremely common for franchisors to provide franchisees with sample documents or handbooks, which the franchisees may use as they see fit. These sample documents provide a repository of information for franchisees, many of whom may be new business owners in need of some help to establish themselves. The Proposed Rule's categorical exclusion of considering this type of cooperation in the joint employer analysis ensures franchisors that they can render such assistance without shouldering unwanted liability. Similarly, allowing association health plans and encouraging joint apprenticeship programs allows employers to provide employees or potential employees with resources they may not have without multi-employer cooperation. These types of program provide tangible benefits to both

employees and employers – providing employees with benefits they would not otherwise have access to and allowing employers to be more competitive for skilled workers. The Proposed Rule recognizes that it can create a meaningful and effective joint employer test to stop wage law abusers without unnecessarily sweeping in employers engaged in worthwhile cooperation efforts.

The Proposed Rule's "significant control" requirement also encourages businesses to engage in limited oversight duties without fear of intervening in appropriate circumstances. For example, if a prime contractor makes a small correction to help the work of a subcontractor's employee in a single incident, then he has, to a degree, exercised actual control over that employee's work. But, so long as the interaction is limited in scope, it benefits all parties for the prime contractor to take such action without fear of incurring liability for that employee. Such small interactions will increase the likelihood of successful partnerships and will not change the economic reality of the worker's employment. By including the "significant" modifier in its Proposed Rule, the Department will again properly capture the true substance of the relationship in its application of the rule, rather than expanding it too broadly.

4. Minor Changes Would Strengthen the Proposed Rule.

The Chamber supports the current draft of the Proposed Rule, but believes the Department can strengthen it with some minor changes. First, while the Proposed Rule lists common forms of reserved contractual control and business-to-business cooperation that do not affect the joint employer analysis, the Department should add broader descriptions of these common practices so the rule can evolve with changing business practices. Second, the Proposed Rule contains some internal inconsistency regarding control over "conditions of employment" that may confuse factfinders in its application.

a. Use broader language to describe the types of contractual control or business-to-business cooperation that are not relevant to the joint employer analysis.

Part (d)(3) of the Proposed Rule lists several common contractual terms between separate employers that should not factor in the joint employer analysis. As discussed *supra*, the Chamber supports the inclusion of these exceptions because they reflect the recognition that reserved, contractual control does not result in actual, direct control of the employees of another employer. The problem with the list included in the Proposed Rule is that it cannot possibly include every type of attenuated contractual control that businesses use. Thus, the Chamber proposes breaking down types of reserved contractual control that are not relevant to the joint employer analysis into three broad categories: (1) contract language requiring compliance with law or a minimum standard for working conditions; (2) contract language requiring maintenance of brand standards and brand consistency; and (3) contract language aimed at controlling the scope, timing and outcome of contracted services.

The Proposed Rule could be modified so that these general categories of attenuated contractual control are included before the list of particular examples not relevant to the joint employer analysis. So, for instance, Part (d)(3) might read:

> ***The potential joint employer's use of contractual terms that (i) require compliance with law or minimum working conditions; (ii) require***

maintenance of brand standards or brand consistency; or (iii) allow the potential joint employer to dictate the scope, timing or outcome of contracted for services, do not make joint employer status more or less likely under the Act. Examples of these types of contractual agreements or terms include requirements to set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, meet project deadlines, or monitor quality control.

The addition of these three general categories to the Proposed Rule will allow it to evolve with modern business practices. For example, requiring morality clauses in business-to-business contracts is a relatively new development, and is certainly more prominent in modern business relationships than it was many years ago. Similar practices will likely develop over the coming years. If those practices fall into the three broad categories suggested above, then they will fit into the Proposed Rule's exceptions, even if they are new.

Part (d)(4) of the Proposed Rule could also benefit from a similar, broad statement of the types of business-to-business cooperation that are not relevant to the joint employer analysis. This section of the Proposed Rule attempts to capture more general categories of cooperation by using the phrase "or any other similar business practice," as a catch-all at the end of the subpart, but the Department should describe what qualifies as "similar business practices." The types of cooperation listed in the Proposed Rule are all optional, arms-length forms of cooperation that do not involve control or direct interaction with the employees of another business. Thus, a restatement of the Proposed Rule could read:

The potential joint employer's practice of offering optional business resources to another employer that do not result in actual control by the potential joint employer over the other employer's employees, does not make joint employer status more or less likely under the Act. Examples of such optional business resources include providing sample employee handbooks or other forms to an employer; allowing an employer to operate on its premises (include "store within a store" arrangements); offering an association health plan or association retirement plan to the employer or participating in such plan with the employer; jointly participating in an apprenticeship program with the employer; participating in multi-employer job fairs or recruitment events; or any other similar business practice.

Again, the use of broader language at the beginning of the exception, followed by a list of examples, would add to the rule's usefulness by providing more clarity to employers and employees about which practices will not lead to a joint employment relationship.

b. Remove "conditions of employment" from Part (a)(1)(ii) of the Proposed Rule because it is overbroad.

Section (a)(1)(ii) of the Proposed Rule currently considers whether the potential joint employer "supervises or controls the employee's work schedule or conditions of employment."

This subpart contains an internal inconsistency – control over an employee's work schedule is an extremely specific factor, but control over "conditions of employment" is extremely broad. These two factors do not fit together as written. A closer analysis of the *Bonnette* case reveals the Court applied a narrow definition of "conditions of employment," in relation to this element, and only considered control over the number of hours the employee worked and the tasks the employee performed. The Department should clarify the text of the rule to reflect this reality and remove the general reference to "conditions of employment" from Section (a)(1)(ii).

Moreover, the inclusion of "conditions of employment" in Section (a)(1)(ii) is confusing because a similar term is used later on in the Proposed Rule. Section (b)(1)'s "additional factors" language analyzes whether a putative joint employer exercises "significant control over the terms and conditions of the employee's work." Thus, as currently written, the Proposed Rule considers control over conditions of work in both Section (a)(1)(ii) and Section (b)(1). This repetition is unnecessary. It is clear that the first four primary factors of the modified *Bonnette* test are intended to consider specific, core aspects of the employment relationship. If the answer to the joint employer question is not clear from consideration of those four factors, then factfinders can move to Section (b)(1) to consider more general indicia of control. A broad consideration of control over "conditions of employment," is clearly better suited for the second step of the analysis, and its inclusion in Section (b)(1) is sufficient. Thus, the Department should remove the term "conditions of employment" from (a)(1)(ii).

5) The Department Should Adopt the Proposed Rule.

For the foregoing reasons, the Chamber urges the Department to adopt its Proposed Rule with the minor adjustments noted to provide national consistency to the FLSA's enforcement scheme. The Proposed Rule is necessary to maintain a fair playing field for employers across the country and helpful because it is easy for businesses to understand and apply. The Proposed Rule will benefit employers, employees, consumers and the economy on the whole, and the Department should act quickly to finalize it.

Respectfully submitted,

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