CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
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April 12, 2021

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

By electronic submission: www.regulations.gov

RE: Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, RIN 1235–AA37, 86 Fed. Reg. 14038 (March 12, 2021)

Dear Ms. Looman:

The U.S. Chamber of Commerce strongly opposes the Wage and Hour Division's (WHD) proposed rescission of the regulation on Joint Employer Status under the Fair Labor Standards Act (the regulation, the joint employer regulation, the rule). The regulation was promulgated and finalized in the previous administration and brought needed clarity and consistency to a key issue that had long vexed employers and the WHD. We urge the Department to withdraw the proposed rescission and keep the regulation in place.

The key issue in dispute in the joint employer regulation is the regulation's treatment of "vertical" joint employment relationships—those where one employer contracts with another employer to handle certain activities such as janitorial services, IT, food service, or payroll processing. In these relationships, whether one employer controls another employer's employees can sometimes be unclear. This question of which employer is in control of the employee is central to determining whether a joint employer relationship exists. The joint employer regulation sought to provide an analytical structure so that all parties—employers and employees—would be able to determine with more certainty when there is a joint employment relationship.

If a joint employer relationship is found, the employer who engages the second employer can be liable for FLSA violations committed by the second employer. Without clarity and consistency, employers are vulnerable to WHD enforcement actions and civil litigation, although they were taking steps to protect against joint employment. Just as importantly, the lack of clarity, or the risk that a joint employer relationship may be found, can lead to chilling communications between the employers, or even avoiding engaging another employer altogether so as to not risk a possible joint employer relationship.

As the Chamber said in our comments on the proposed rule, with respect to vertical joint employment, it "adopt[ed] 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." (Comments of the U.S. Chamber of Commerce, June 24, 2019, p.1) The Chamber's comments to the proposed rule are attached for your convenience.

Our comments make clear why the *Bonnette* test provides the proper framework and why the WHD's modification to it is appropriate:

> 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. 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. 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.
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> 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 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. (Comments of the U.S. Chamber of Commerce, pp. 4-5, citations omitted, emphasis in the original)

The key shift in the regulation from the test articulated in *Bonnette* to focus on factors indicating *actual* control by the employer rather than *reserved* control of another employer's employee is why the regulation is such an improvement over the various judicial decisions and

DOL guidance that existed before the regulation. The regulation explicitly rejected the broader, and less precise, economic realities test as the basis for finding a vertical joint employment relationship that had been the basis of WHD guidance previous to the joint employer regulation.

The regulation also covers "horizontal" joint employment relationships where an employee splits time with multiple employers and the time worked is totaled for FLSA purposes. These relationships do not create the same level of uncertainty, or present the same level of exposure, as vertical joint employment relationships, and the provisions in the regulation addressing horizontal joint employment relationships have not been questioned.

The final joint employer regulation was issued in January 2020. A month later, a challenge to it was filed by 17 states and the District of Columbia in federal district court in the Southern District of New York, *New York, et al. v. Scalia*. The Chamber and other associations representing affected employers were granted intervenor status as defendants on June 29, 2020. On September 8, 2020 the court issued a decision vacating the rule's vertical joint employer provision, but leaving the horizontal joint employer provision in place. That decision is currently on appeal in the Second Circuit. The DOL has moved to have the litigation suspended in light of this proposal to rescind the regulation on the basis that once finalized, rescission of the joint employer regulation will render the case moot. By filing this motion, the WHD removes any doubt about the outcome of this rulemaking.

The WHD relies heavily on the reasoning of the district court's decision to support its proposal to rescind the regulation. The court based its decision essentially on three reasons: "The Rule's reliance on the FLSA's definition of ''employer'' in section 3(d) as the sole textual basis for joint employment liability; its adoption of a control-based test for determining vertical joint employer liability; and its prohibition against considering additional factors beyond control, such as economic dependence." (86 Fed. Reg. 14042)

In our comments to the proposed rule, and as an intervenor defending the regulation, the Chamber has made clear that the joint employer rule is consistent with the FLSA, well supported by common law, and good policy that will provide needed simplicity and precision to the question of when joint employment relationships and particularly vertical joint employment relationships, exist. Accordingly, the Chamber urges the WHD to withdraw this proposed rescission of the joint employer rule.

Sincerely,

Marc Freedman
Vice President, Workplace Policy
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