Docket No. RIN-1235-AA26

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Concerning

JOINT EMPLOYER STATUS UNDER THE FAIR LABOR STANDARDS ACT

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 84 *FED. REG.* 14043 (April 9, 2019)

Richard A. Samp
Joshua Logsdon
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

June 25, 2019

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302

June 25, 2019

Submitted Electronically (http://www.regulations.gov)
Melissa Smith
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1235-AA26; Joint Employer Status Under the Fair Labor Standards Act
Notice of Proposed Rulemaking and Request for Comments
84 Fed. Reg. 14043 (April 9, 2019)

Dear Ms. Smith:

The Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Department of Labor's (DOL) proposed rule that would establish standards for determining whether a business qualifies under the Fair Labor Standards Act (FLSA) as the "joint employer" of workers who nominally are employed by a separate company.

WLF strongly supports DOL's decision to undertake a rulemaking proceeding regarding joint-employer standards, rather than continuing to rely on regulations issued in 1958 and not revised since then. Rulemaking is particularly warranted in light of the increased uncertainty in this area, precipitated in no small part by turmoil surrounding the NLRB's ever-changing rules governing who is a joint employer under the National Labor Relations Act (NLRA). The business community needs clear standards so that it can know in advance the potential economic consequences of arranging its business affairs in a given manner. It is highly unfair to a company to be held retroactively liable for FLSA violations by virtue of a determination that it is

a "joint employer," in the absence of clear advance warning that its business practices would warrant such a determination. Providing guidance solely via future case-by-case adjudication is unsatisfactory because it would take far too long.

WLF also generally supports the standards set out in proposed Part 791 (the "Proposed Rule"). WLF particularly applauds Proposed § 791.2(g)'s use of "Examples" to illustrate when Company A will be deemed to be acting directly or indirectly in the interests of Company B with respect to employees of Company B—and thus will be determined to be a "joint employer" of those employees. WLF urges DOL provide even more, similar illustrations.

DOL's and the NLRB's efforts over the past several decades to adjudicate joint-employer claims demonstrate, however, that it simply is not possible to adopt a verbal formula that will fully explicate the joint-employer standards. In particular, WLF believes that far too much emphasis has been placed on the word "direct"—that is, whether the actions of Company A with respect to the employees of Company B can be characterized as "direct" control. For one thing, all stakeholders appear to agree that evidence of "indirect" control can (at least in some circumstances) be relevant in determining joint-employer status. More importantly, the word "direct" is subject to widely varying interpretations. For example, the D.C. Circuit's *Browning-Ferris* decision—in the course of suggesting that "indirect" control may, in some instances, by itself be sufficient under the NLRA to justify a joint-employer finding—cited (as examples of "indirect" control) conduct that WLF would characterize as "direct" control. WLF thus applauds DOL for stating explicitly in Proposed § 791.2(a)(1) that both direct and indirect actions by

Company A are relevant to the joint-employer determination. Much more important than how different types of control are characterized is how extensive the control actually is.

The four factors identified by DOL as relevant to the determination all properly focus on the extent of Company A's control over the employees of Company B. Control of the terms and conditions of employment that is "limited and routine," or control whose impact does not focus on the essential terms and conditions of employment, never suffices to justify a joint-employer determination, regardless whether that control is deemed "direct" or "indirect." But the number of potential factual permutations is too large for DOL to rely solely or even primarily on rulemaking to provide adequate guidance. DOL can best assist employers by providing them with as many examples as possible regarding how it intends to exercise its statutory authority, and then relying on adjudication to flesh out its standards.

WLF agrees with DOL that some of the language in the current regulation is confusing and has led some courts to issue unwarranted "joint employer" rulings. In particular, 29 C.F.R. § 791.2's reference to employment by one employer that "is not completely disassociated from employment by the other employer(s)" has been misinterpreted by a number of courts. WLF thus applauds DOL's decision to propose deletion of that language. WLF also applauds DOL's determination that additional factors (other than the four specifically identified by DOL) "may be relevant for determining joint employer status," if they demonstrate that Company A is "exercising *significant* control over the terms and conditions of the employee's work." Proposed § 791.2(b)(1). WLF recommends deletion of Proposed § 791.2(b)(2), which sets out an

alternative basis for relying on additional factors. There is no justification for that alternative basis; if the additional factors do not indicate that Company A is exercising significant control over the terms and conditions of the work of Company B's employees, then it is not relevant to the joint-employer determination.

Interests of WLF

The Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF promotes economic liberty, free enterprise, a limited and accountable government, and the rule of law. WLF regularly appears in federal court in cases raising important labor-law issues. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

WLF filed a brief in the D.C. Circuit to urge the appeals court not to enforce the NLRB's *Browning-Ferris* decision (a decision that upended the NLRB's long-standing joint-employer standard under the NLRA). *See Browning Ferris Industries of California, Inc. v. NLRB*, 911 F. F.3d 1195 (D.C. Cir. 2018). WLF was concerned that the NLRB's now-inoperative *Browning-Ferris* decision threatened to impose new, unanticipated liability on large portions of the regulated community. WLF was also concerned that the standard adopted by that decision was inherently vague and deprived companies of the ability to accurately predict the circumstances under which their activities would subject them to liability.

I. *DOL Statutory Authority*

WLF believes that DOL's rulemaking proceeding is both statutorily authorized and

appropriate. Congress has authorized DOL to issue regulations to assist in its enforcement of the FLSA. *See, e.g.*, 29 U.S.C. § 211. DOL has not revised its FLSA regulations governing "joint employers" since 1958. New regulations are warranted to provide employers with guidance in an area that has been subject to considerable confusion in recent years.

II. *Six Decades of Joint-Employer Decisions*

DOL has long recognized that a business may qualify as the "joint employer" of a worker who is nominally employed by a separate company, if the business plays a significant role in determining the worker's essential terms and conditions of employment. The FLSA does not define the term "joint employer." Its only reference to the meaning of "employer" is as follows: "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee." FLSA § 3(d), 29 U.S.C. 203(d). The Supreme Court has explained that Congress, in adopting federal labor laws, "mean[t] to incorporate the established meaning" of the term "employer," and "intended to describe conventional master-servant relationships understood by common-law agency doctrine." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995).

The sole U.S. Supreme Court decision that addressed whether an employee may have more than one "employer" for FLSA purposes is *Falk v. Brennan*, 414 U.S. 190 (1973). *Falk* involved FLSA claims by maintenance workers nominally employed by the owners of the apartment complexes at which they worked. The workers claimed that they were also employed by a property management company retained by the apartment complexes, in light of evidence

that the management company: (1) hired the maintenance workers; (2) directly supervised their daily activities; and (3) directly paid the workers from apartment-complex rents it collected. Based on that evidence, the Court agreed that the workers were "employees" of *both* the building owners *and* the management company. It held that the management company was an "employer" under FLSA § 3(d) because the company possessed "substantial control of the terms and conditions of the work of these employees." *Falk*, 414 U.S. at 195.

The Supreme Court has provided no further guidance on what constitutes "substantial control" of the terms and conditions of work, nor do DOL's current regulations address that issue. The result has been wildly inconsistent FLSA joint-employment standards adopted by the various federal appeals courts. Some of those courts have inappropriately looked for guidance to *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), a Supreme Court case that addressed the distinction between employees and independent contractors and had nothing to say about joint employers.[1]

The focus on *Rutherford* has led some appeals courts astray in their consideration of whether a company should be considered the joint employer of another company's employees. They have incorporated into that consideration factors that *Rutherford* deemed relevant to the

[1] *Rutherford* involved workers at a slaughterhouse in Missouri. Among the "interdependent steps" performed simultaneously at the slaughterhouse was the "boning" of meat. A discrete group of workers performed the boning. The issue in *Rutherford* was whether the meat boners should be classified as employees of the defendants (the slaughterhouse operators) or as independent contractors (as the defendants asserted). The Court concluded that they were employees and thus subject to the FLSA. 331 U.S. at 729. The Court never discussed whether the meat boners might have a second employer.

employee-versus-independent-contractor issue (*e.g.*, whether a worker is economically dependent on the putative employer) but that have no bearing on the "substantial control of the terms and conditions of work" issue that (per *Falk*) is the proper focus of a joint-employer inquiry. *See, e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70-76 (2d Cir. 2003). The Fourth Circuit has rightly criticized the tendency of other appeals courts to incorporate into their joint-employer analysis factors that are properly confined to independent-contractor cases:

> [Other courts'] focus on whether 'as a matter of economic reality, the individual is dependent' on a putative joint employer ... reflects a failure to distinguish the joint employment inquiry from the separate, employee-independent contractor inquiry. Courts' focus on economic dependency derive from the Supreme Court's decisions in *Rutherford Food* and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). ... Yet neither case supports the use of economic dependence to guide the entire joint employment analysis.

Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 138 (4th Cir. 2017).

III. *DOL's Proposed Approach is Consistent Both with Falk and the FLSA's Definition of "Employer"*

The FLSA explicitly defines the terms "employer" (§ 3(d)), "employee" (§ 3(e)), and "employ" (§ 3(g)). Because the Proposed Rule addresses joint *employer* status, DOL has correctly focused its attention on § 3(d).

Some courts have focused much of their attention in joint-employer cases on the FLSA's definition of "employ." That focus is inappropriate. They note that the definition of "employ" ("'Employ' includes to suffer or permit to work") is extremely broad and conclude that that definition requires a similarly expansive definition of "joint employer." But quite clearly, not everyone who "suffer(s) or permits [another] to work" is an "employer"; otherwise, independent-

contractor relationships would cease to exist.

The correctness of DOL's decision to focus on the statutory definition of "employer" is confirmed by *Falk*, which also focused on § 3(d) in arriving at its definition of a "joint employer." 414 U.S. at 195. An FLSA "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." That definition anticipates the possibility of joint employers by positing that: (1) an employer-employee relationship is known to exist; and (2) some other "person" acting "in the interest" of the employer may also be an employer.

Proposed § 791.2(a)(1) captures the statutory definition accurately by providing that if Company A benefits from work performed by an employee of Company B, Company A "is the employee's joint employer if [Company A] is acting directly or indirectly in the interest of [Company B] in relation to the employee." The proposed regulation is also consistent with *Falk*, which held that a company is a "joint employer" when it possesses "substantial control of the terms and conditions of the work of" another company's employees. 414 U.S. at 195.

So what factors are relevant in determining whether the putative joint employer possesses the requisite substantial control? DOL's Proposed Rule lists four relevant factors—whether the company:

(I) Hires or fires the employee;

(ii) Supervises and controls the employee's work schedule and conditions of employment;

(iii) Determines the employee's rate and method of payment; and

(iv) Maintains the employee's employment records.

Proposed § 791.2(a)(1). Those factors closely parallel the facts in *Falk*. The Supreme Court's conclusion that the defendant property manager possessed "substantial control of the terms and conditions of the work of the employees" was based on evidence that the defendant satisfied each of the four factors cited by DOL

The Proposed Rule says that DOL has set out a non-exclusive list of factors. It states, "Additional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer is: (1) Exercising significant control over the terms and conditions of the employee's work." Proposed § 791.2(b)(2). Accordingly, the Proposed Rule cannot be challenged for refusing to take into account arguably relevant factors not included among the four listed ones.

WLF's one criticism is that DOL has defined the list of "additional factors" somewhat too broadly. The Proposed Rule permits consideration of factors that do *not* indicate that the potential joint employer is exercising the requisite "significant control," if those factors indicate that Company A is "otherwise acting directly or indirectly in the interest of [Company B] in relation to the employee." But authorizing a "joint employer" finding based on evidence that Company A has done *anything* (no matter how inconsequential) for the benefit of Company B with respect Company B's employees is inconsistent with *Falk*'s admonition that Company A's control over terms and conditions of employment must be "substantial."

IV. *The Relevance of Indirect Control*

The Proposed Rule states that Company A may be determined to be the joint employer of Company B's employees based on evidence that Company A is acting in the interest of Company B in relation to those employees—regardless whether it acts "directly or indirectly." WLF applauds the Proposed Rule's recognition that Company A can be a joint employer even if it never takes any *direct* actions with respect to Company B's employees. Indeed, § 3(d)'s definition of "employer" ("any person acting directly or indirectly in the interest of an employer in relation to an employee") requires that recognition. If Company A exercises complete control over the terms and conditions of work for Company B's employees, it should make no difference whether Company A does so directly or indirectly (by, for example, strongly suggesting to Company B officials that they carry out its policies).

Indeed, no bright-line distinction exists between what constitutes "direct" and "indirect" control of the terms and conditions of employment. WLF notes, for example, that the D.C. Circuit's *Browning-Ferris* decision, in the course of suggesting that "indirect control" of an independent contractor's employees may suffice to justify a joint-employer finding, cited (as examples of "indirect" control) conduct that WLF would characterize as "direct" control. The Court stated:

> A categorical rule against even considering indirect control—no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of a worker's working conditions—would allow manipulated form to flout reality. If, for example, a company entered into a contract with Leadpoint [an independent contractor] under which that company made all the decisions about work and working conditions, day in and day out, with Leadpoint

> supervisors reduced to ferrying orders from the company's supervisors to the workers, the [NLRB] could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercises direct authority any time the company's indirect mandates are not followed.

Browning-Ferris, 911 F.3d at 1219. WLF agrees with the D.C. Circuit that evidence of control of the sort it describes would sensibly lead to a "joint employer" determination. But WLF would categorize that type of control as "direct"; that is, Company A is *directly* dictating to the independent contractor the terms and conditions of employment. The fact that Company A is not actually announcing to the employees whether they are to be fired or disciplined does not, in WLF's view, make the control over disciplinary matters any less direct.

The crucial determinant is not whether Company A is acting directly or indirectly, but whether Company A is wielding substantial control over the terms and conditions of the work of Company B's employees. If not, then Company A is not a joint employer—even if, as DOL correctly recognizes—Company A possesses unexercised authority to wield that control. Basing a "joint employer" determination on unexercised authority would lead to a massive number of such determinations, given that many companies that hire independent contractors or enter into franchise relationships have sufficient economic power over their contracting partners that they could (if they desired) force those partners to cede authority over the terms and conditions of employees' work.

WLF urges DOL to provide a blueprint for what counts as "indirect" control. As noted above, evidence of indirect control should include Company A directing Company B to establish specific policies for Company B's employees regarding terms and conditions of work, or perhaps

subtly conveying the message that Company B might lose its contracts if it does not adopt those policies. But indirect control should not encompass contract terms routinely found in independent-contractor or franchise agreements. As the D.C. Circuit noted, in rejecting the NLRB's overly broad conception of indirect control:

> [R]outine contract terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis. ... The [NLRB]'s employment of the indirect-control factor, in other words, requires it to erect some legal scaffolding that keeps the inquiry within traditional common-law bounds and recognizes that some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. After all, global oversight is a routine feature of independent contracts.

Browning-Ferris, 911 F.3d at 1220.

V. *More Illustrations Would Be Beneficial*

Of course, it will never be possible to draw a precise line between instances in which Company A is "[e]xercising significant control over the terms and conditions of [a Company B] employee's work" and instances in which the control is merely limited and routine. For that reason, WLF applauds DOL's proposal to use "Examples" to illustrate when Company A will be deemed to possess "substantial control of the terms and conditions of the work of [Company B's] employees." *Falk*, 414 U.S. at 195. WLF urges DOL to provide even more, similar illustrations.

WLF provides several illustrations that we believe would help to illuminate the meaning of "limited and routine control" and the types of evidence that would either support or undercut a joint-employer determination:

- Business contract between Company and a Contractor grants Company the right to terminate the contract at will. On four occasions over the course of several years, supervisors employed by Company observe employees of Contractor engaging in what they conclude is on-the-job misconduct. Company requests that the employees be pulled off the job. Contractor looks into the matter and discharges two of the employees but simply provides a warning to the other two. This evidence is relevant and tends to demonstrate that Company is not a joint employer because it tends to demonstrate that Company does not "control" disciplinary matters but rather simply makes recommendations.

- Business contract between Company and a Contractor grants Company the right to terminate the contract at will. At least twice a month over the course of several years, Company requests that Contractor pull off the job employees that the Company believes have engaged in on-the-job misconduct. On every occasion, Contractor fired the employee without conducting its own investigation of the alleged misconduct. This evidence is relevant and tends to demonstrate that the Company is a joint employer because it tends to demonstrate that the Company controls disciplinary matters.

- Business contract between Company and a Contractor spells out in detail how work is to be performed (*e.g.*, the numbers of "lines" that Contractor must operate and the types of employees to be included on each line). Supervisors employed by Company routinely observe Contractor's work performance. On most occasions when those supervisors observe that work is being performed improperly, they will bring the matter to Contractor's management and ask Contractor to address the issue as it deems appropriate. But occasionally the supervisors will approach Contractor's employees directly and instruct them on the proper method of performing their work. Company has not exercised direct and immediate control over the terms and conditions of employment in a manner that is not limited and routine.

- Business contract between Company and a Contractor spells out in detail how work is to be performed (*e.g.*, the numbers of "lines" that Contractor must operate and the types of employees to be included on each line). Supervisors employed by Company routinely observe Contractor's work performance. In a significant percentage of the occasions when those supervisors observe that work is being performed improperly, they approach Contractor's employees directly and instruct the employees on the proper method of performing their work. This is evidence that Company exercises direct and immediate control over terms and conditions of employment and thus may be acting as an employer for the workers they approach.

WLF recognizes that even a very large number of Examples included in the final rule

would not suffice to provide guidance covering every case in which joint-employer status is alleged. There are simply too many potential factual permutations to permit DOL to adopt a rule that would supply an answer for all future joint-employer controversies. But given the considerable confusion on this issue in recent years, this rulemaking proceeding is invaluable to the regulated community, in terms both of the guidance provided and of the stability inherent in the creation of a rule that will be binding in future adjudicative proceedings.

Conclusion

WLF applauds DOL for initiating a rulemaking proceeding designed to clarify joint-employer status under the FLSA and urges it to adopt reforms along the lines outlined above.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

/s/ Joshua Logsdon
Joshua Logsdon
Judge K.K. Leggett Fellow