**Docket No. WHD-2021-0003**

COMMENTS

of

# WASHINGTON LEGAL FOUNDATION

to the

# WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Concerning

# RESCISSION OF JOINT EMPLOYER STATUS UNDER THE FAIR LABOR STANDARDS ACT RULE

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 86 FED. REG. 14,038 (MARCH 12, 2021)

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April 7, 2021

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**Submitted Electronically** (http://www.regulations.gov)
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Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave. NW
Room S-3502
Washington, DC 20210

**Re: Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Docket No. WHD-2021-0003**

Ms. DeBisschop:

On behalf of Washington Legal Foundation, please consider this comment responding to the invitation for comments at 86 Fed. Reg. 14,038 (Mar. 12, 2021). WLF appreciates the opportunity to weigh in on whether the Department of Labor should rescind the Final Rule, *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2,820 (Jan. 16, 2020). As explained below, DOL should not rescind the Final Rule.

In 1958, DOL adopted regulations saying that an employee can have multiple employers for Fair Labor Standards Act purposes. *Joint Employment Relationship Under Fair Labor Standards Act of 1938*, 23 Fed. Reg. 5,905, 5,906 (Aug. 5, 1958). Fifteen years later, the Supreme Court recognized that the FLSA permits joint employment. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973). Over the next several decades, presidential administrations often issued administrative guidance about FLSA joint employment. *See, e.g.*, Department of Labor, *Interp. No. 2016-1, Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act*, 2016 WL 284582 (Jan. 20, 2016); Department of Labor, *Interp. No. 2014-2, Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act*, 2014 WL 2816951 (June 19, 2014); Department of Labor, *Migrant and Seasonal Agricultural Worker Protection Act*, 62 Fed. Reg. 11,734 (Mar. 12, 1997).

The Administrative Procedure Act, however, allows executive agencies to amend previously issued regulations. So DOL proposed revisions to the joint-employer regulation. *Joint Employer Status Under the Fair Labor Standards Act*, 84 Fed. Reg. 14,043 (Apr. 9, 2019). After considering 57,173 comments, DOL promulgated the Final Rule. It took effect thirteen months ago. As recently as January, DOL defended the Final Rule in federal court. *See New York v. Scalia*, No. 20-3806 (2d Cir.).

Last month, DOL yielded to political pressure and proposed rescinding the Final Rule. There is no plan for a replacement rule. Rather, DOL wants to avoid public scrutiny of its joint-employer decisions. It plans to use guidance documents to accomplish its goals while causing uncertainty for the regulated community. This it should not do.

## I. WLF's Interest

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal tribunals supporting economy-boosting employment rules. *See, e.g.*, *In re Velox Express, Inc.*, 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

WLF also regularly submits comments to federal regulatory agencies, including DOL, on proposed rulemaking. *See, e.g.*, WLF Comment, *In Re Standards For Determining Joint-Employer Status* (June 25, 2019); WLF Comment, *In Re FTC Study Of Digital Technology Market Merger Review*, (Nov. 19, 2018).

WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on legal issues related to DOL regulations. *See, e.g.*, Nathaniel M. Glasser *et al.*, *Joint Employment Liability: What Administrative Agencies' Rule Revisions Mean For Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Stephen T. Melnick, *Courts Deliver Mixed Bag On Federal Law's Preemption Of State Independent Contractor Standards*, WLF LEGAL OPINION LETTER (Mar. 1, 2019); Michael J. Lotito, *Predictable, Uniform Standard Needed For Who Is A Joint Employer*, WLF LEGAL BACKGROUNDER (May 19, 2017).

## II. The Standards For Joint-Employer Status Should Be Promulgated Through Notice-And-Comment Rulemaking Rather Than Malleable Guidance Documents.

WLF strongly supports defining joint-employer status through notice-and-comment rulemaking rather than guidance documents. Rulemaking is important on this issue because DOL's past guidance conflicts with federal courts decisions and the FLSA's plain language. Rulemaking is particularly warranted given the upheaval in this area over the past four years.

If DOL rescinds the Final Rule, the situation will become muddled and lead to confusion for employers. They should receive near-term guidance on joint-employer standards, not be forced to rely on administrative guidance that does not carry the force of law.

As DOL recognizes, the Final Rule just codified long-standing DOL policy on horizontal joint employment. *See* 86 Fed. Reg. at 14,045. A federal court also agreed that "the Final Rule makes only non-substantive revisions to existing law for horizontal joint employer liability." *New York v. Scalia*, 2020 WL 5370871, *34 (S.D.N.Y. Sept. 8, 2020) (cleaned up). But it was still important to issue the Final Rule about horizontal joint employment. DOL provided regulatory certainty by codifying long-standing practices. If it rescinds the Final Rule, DOL will inject uncertainty. In these trying times the regulated community needs certainty. Experts say that regulatory certainty is important to economic growth.

The then-Chairman of the Federal Reserve testified before Congress that regulatory uncertainty hurts economic growth. *See* Senate Budget Committee, *Testimony of Chairman Ben Bernanke*, YouTube (Feb. 7, 2012), https://bit.ly/380rMXv (starting at 4:30). The IMF's chief economist has echoed those sentiments. KR Srivats, *Policy certainty, structural reforms are key to growth: IMF's Gita Gopinath*, The Hindu Business Line (Dec. 20, 2019), https://bit.ly/3n0eM8x. Others agree. *See* Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence-the Changing CMRS Roadmap*, 56 Fed. Comm. L.J. 489, 547 (2004); *Administrative Law—Judicial Review of Treasury Regulations—Federal Circuit Invalidates A Treasury Regulation Under State Farm for Lack of Contemporaneous Statement of Justification—Dominion Resources, Inc. v. United States,* 681 F.3d 1313 (Fed. Cir. 2012), 126 Harv. L. Rev. 1747, 1754 n.46 (2013).

## III. The Final Rule Provides Real Benefits All Stakeholders.

The Final Rule benefits all stakeholders by encouraging the rooting out of the scourges of human trafficking and sexual harassment. It allows companies to train others' employees to detect human trafficking without fear of being found a joint employer. *See* Lisa Nagele-Piazza*, Labor Department Releases Final Joint-Employer Rule*, Society for Human Resource Management (Jan. 13, 2020), https://bit.ly/34XhCot. Without the Final Rule's clear guidance, companies could stop providing human-trafficking training. So unless DOL thinks more human trafficking is beneficial, the Final Rule helps—not hurts—the community.

The same is true of sexual harassment training. Many franchisors train franchisees' employees to avoid sexual harassment. Nagele-Piazza, *supra*. By rescinding the Final Rule, DOL would discourage companies from providing sexual harassment training to others' employees. This hurts the goal of recognizing that men must treat women with respect in the workplace. The notice proposing rescinding the Final Rule does not address these concerns. This alone is reason to reconsider whether rescission is proper.

The Final Rule also benefits workers in another way: It bolsters economic growth. As Dr. Ronald Bird, former DOL chief economist, explained "the Final Rule" will likely "foster job growth, and thus increase jobs" Ronald Bird Decl. ¶ 8, *New York v. Scalia*, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020) (No. 20-cv-1689), ECF 110-7. This increase in jobs will lead to neither decreased wages nor increased wage theft. *See id.* ¶ 7.

This job creation makes sense. Some companies—particularly small ones—hesitate to hire employees on their own. Other companies—normally larger companies—are afraid to assist these smaller companies if they may be considered a joint employer for FLSA purposes. Without this assistance from the larger companies, smaller companies would hire fewer employees. But with the Final Rule in place, this barrier to hiring disappears.

Increased salaries and no wage theft are also logical results; it is simple economics. When the demand curve shifts to the right, the intersection with the labor supply moves up. This means higher wages for workers. Similarly, when there is more demand for workers, companies are disincentivized from stealing wages. If they steal wages, employees will leave for the other opportunities in the market.

More jobs also help States and localities. As Dr. Bird said, more jobs increases the "taxable wage base in states." Bird Decl., *supra* ¶ 8. Multiple tax streams benefit from the Final Rule. First, with more employment, there is higher payroll-tax collection. Second, it leads to increased personal-tax revenue from employees. Third, it leads to increased business-tax revenues. Finally, the trickle-down effect means more sales-tax collections.

The other side of the same coin is that governments need not spend as much on governmental programs. Rather than cutting unemployment checks, governments can collect unemployment taxes from those same people. And other social service expenditures will decrease because companies provide those services to their employees. In short, under the Final Rule governments see more revenues and spend less money.

* * *

Rescinding the Final Rule would hurt businesses, workers, and state-and-local governments. The resulting increased regulatory uncertainty would mean fewer jobs for workers, more human tracking and sexual harassment of workers, and less tax revenue for governments. The only winners are plaintiffs' attorneys who will leverage the uncertainty to extort unjust settlements from businesses. DOL should not invite these negative consequences. Rather, it should hold the line and keep the Final Rule.

Respectfully submitted,

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