

UNITED STATES DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 791

RIN 1235-AA26

Joint Employer Status under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, United States Department of Labor.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: This proposed rulemaking is intended to update and clarify the Department of Labor's (Department) interpretation of joint employer status under the Fair Labor Standards Act (FLSA or Act), which has not been significantly revised in over 60 years. The proposed changes are designed to promote certainty for employers and employees, reduce litigation, and encourage innovation in the economy. The FLSA generally requires employers to pay their employees at least the federal minimum wage for all hours worked and overtime for hours worked over 40 in a workweek. The Act contemplates the existence of joint employers who are jointly and severally liable for an employee's wages due under the Act. Part 791 of Title 29, Code of Federal Regulations (CFR), provides the Department's official interpretations for determining joint employer status under the Act. The Department has not meaningfully revised part 791 since its promulgation in 1958, and the Department is concerned that the current regulation does not adequately address one of the joint employer scenarios under the Act—where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another person. Accordingly, in this Notice of Proposed Rulemaking (NPRM) the Department proposes to revise part 791 to adopt a four-factor balancing test derived from Bonnette v. California Health & Welfare Agency for determining joint employer status in this

scenario; explain what additional factors should and should not be considered; provide guidance on how to apply this multi-factor test; and clarify that a particular business model, certain business practices, and certain contractual agreements do not make joint employer status more or less likely. Regarding part 791's guidance for the other joint employer scenario under the Act—where the employee works separate sets of hours for multiple employers in the same workweek—the Department is proposing only non-substantive revisions that better reflect the Department's longstanding practice.

DATES: Submit written comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION]

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA26, by either of the following methods: Electronic Comments: Submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Mail: Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. Docket: For access to the docket to read

background documents or comments, go to the Federal eRulemaking Portal at

<http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this NPRM may be obtained in alternative formats (Large Print, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA requires covered employers to pay nonexempt employees at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek.¹ Although the FLSA does not use the term "joint employer," the Act contemplates situations where additional persons² are jointly and severally liable with the employer for the employee's wages due under the Act.

¹ See 29 U.S.C. 206(a), 207(a).

² Under the Act, "person" means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a).

Over 60 years ago, in 1958, the Department promulgated a regulation, codified at 29 CFR part 791, interpreting joint employer status under the Act.³ The Department has not meaningfully revised this regulation since its promulgation. Under part 791, multiple persons can be joint employers of an employee if they are “not completely disassociated” with respect to the employment of the employee.⁴ Part 791 does not adequately explain what it means to be “not completely disassociated” in one of the joint employer scenarios—where the employer suffers, permits, or otherwise employs the employee to work one set of hours in a workweek, and that work simultaneously benefits another person. In that scenario, the employer and the other person are almost never “completely disassociated,” and the real question is not whether they are associated but whether the other person’s actions in relation to the employee merit joint and several liability under the Act. Additional guidance could therefore be helpful. Accordingly, the Department proposes to revise part 791 to provide additional guidance for determining whether the other person is a joint employer in that scenario.⁵

The Department proposes that if an employee has an employer who suffers, permits, or otherwise employs the employee to work and another person simultaneously benefits from that work, the other person is the employee’s joint employer under the Act for those hours worked only if that person is acting directly or indirectly in the interest of the employer in relation to the employee.⁶ To make that determination simpler and more consistent, the Department proposes to

³ See 23 FR 5905 (Aug. 5, 1958).

⁴ 29 CFR 791.2(a).

⁵ The Department’s current regulation identifies two distinct joint employer scenarios, which is consistent with its enforcement experience. See 29 CFR 791.2(b) (one scenario is “[w]here the employee performs work which simultaneously benefits two or more employers”; the other is where the employee “works for two or more employers at different times during the workweek”).

⁶ See 29 U.S.C. 203(d) (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee”).

adopt a four-factor balancing test derived (with one modification) from Bonnette v. California Health & Welfare Agency.⁷ A plurality of circuit courts use or incorporate Bonnette's factors in their joint-employer test. The Department's proposed test would assess whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

These factors are consistent with section 3(d) of the FLSA, which defines an "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and with Supreme Court precedent. They are clear and easy to understand. They can be used across a wide variety of contexts. And they are highly probative of the ultimate inquiry in determining joint employer status: whether a potential joint employer, as a matter of economic reality, actually exercises sufficient control over an employee to qualify as a joint employer under the Act.

As mentioned above, the Department proposes to modify the first Bonnette factor to explain that a person's ability, power, or reserved contractual right to act with respect to the employee's terms and conditions of employment would not be relevant to that person's joint employer status under the Act. Only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act. Requiring the actual exercise of power ensures

⁷ 704 F.2d 1465 (9th Cir. 1983), abrogated on other grounds, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

that the four-factor test is consistent with the provision of 3(d) that determines joint employer status, which requires an employer to be “acting . . . in relation to an employee.”⁸

The Department also proposes to explain that additional factors may be relevant to this joint employer analysis, but only if they are indicia of whether the potential joint employer is:

- exercising significant control over the terms and conditions of the employee’s work;
or
- otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The Department further proposes to explain that, in determining the economic reality of the potential joint employer’s status under the Act, whether an employee is economically dependent on the potential joint employer is not relevant.⁹ As such, the Department proposes to identify certain “economic dependence” factors that are not relevant to the joint employer analysis. Those factors would include, but would not be limited to, whether the employee:

- is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
- has the opportunity for profit or loss based on his or her managerial skill; and
- invests in equipment or materials required for work or for the employment of helpers.

In addition, the Department’s proposal would note that a joint employer may be any “person” as defined by the Act, which includes “any organized group of persons.”¹⁰ It would also explain that a person’s business model (such as a franchise model), certain business

⁸ 29 U.S.C. 203(d).

⁹ As explained below, economic dependence only measures whether a worker is an employee under the Act or an independent contractor.

¹⁰ 29 U.S.C. 203(a).

practices (such as allowing an employer to operate a store on the person's premises or participating in an association health or retirement plan), and certain business agreements (such as requiring an employer in a business contract to institute sexual harassment policies), do not make joint employer status more or less likely under the Act.

In the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ the employee to work separate sets of hours in the same workweek—the Department is proposing only non-substantive revisions that better reflect the Department's longstanding practice. Part 791's current focus on the association between the potential joint employers is useful for determining joint employer status in this scenario. If the multiple employers are joint employers in this scenario, then the employee's separate hours worked for them in the workweek are aggregated for purposes of complying with the Act's overtime pay requirement.

Finally, the Department's proposed rule would include several other provisions. First, it would reiterate that a person who is a joint employer is jointly and severally liable with the employer and any other joint employers for all wages due to the employee under the Act.¹¹ Second, it would provide a number of illustrative examples that apply the Department's proposed joint employer rule. Third, it would contain a severability provision.

Employee earnings and overtime pay under the Act would not be affected by the proposed rule. Employers would remain obligated to comply with the FLSA in all respects, including its minimum-wage and overtime provisions.

¹¹ This means that for every workweek that they are joint employers, the employer and all joint employers are each fully responsible for the entire amount of minimum wages and overtime pay due to the employee in that workweek. If one of them is unable or unwilling to pay, the others are responsible for the full amount owed.

The Department believes that all of the above proposals would be consistent with the text of the Act and supported by judicial precedent. The Department further believes that these proposals would clarify the scope of joint employer status under the Act, thereby reducing litigation and compliance costs, easing administration of the law, and offering guidance to courts, which may result in greater uniformity among court decisions.

This proposed rule is expected to be an Executive Order (E.O.) 13771 deregulatory action. Discussion of the estimated reduced burdens and cost savings of this proposed rule can be found in the NPRM's economic analysis. The Department welcomes comments from the public on any aspect of this NPRM.

II. Background

The FLSA requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek.¹² The FLSA defines the term “employee” in section 3(e)(1) to mean “any individual employed by an employer,”¹³ and defines the term “employ” to include “to suffer or permit to work.”¹⁴ “Employer” is defined in section 3(d) to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁵

One year after the FLSA's enactment, in July 1939, WHD issued Interpretative Bulletin No. 13 addressing, among other topics, whether two or more companies could be jointly and severally liable for a single employee's hours worked under the Act.¹⁶ The Bulletin

¹² See 29 U.S.C. 206(a), 207(a).

¹³ 29 U.S.C. 203(e)(1).

¹⁴ 29 U.S.C. 203(g).

¹⁵ 29 U.S.C. 203(d).

¹⁶ See Interpretative Bulletin No. 13, “Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938,” ¶¶ 16–

acknowledged the possibility of joint employer liability and provided an example where two companies arranged “to employ a common watchman” who had “the duty of watching the property of both companies concurrently for a specified number of hours each night.”¹⁷ The Bulletin concluded that the companies “are not each required to pay the minimum rate required under the statute for all hours worked by the watchman ... but ... should be considered as a joint employer for purposes of the [A]ct.”¹⁸

The Bulletin also set forth a second example where an employee works 40 hours for company A and 15 hours for company B during the same workweek.¹⁹ The Bulletin explained that if A and B are “acting entirely independently of each other with respect to the employment of the particular employee,” they are not joint employers and may “disregard all work performed by the employee for the other company” in determining their obligations to the employee under the Act for that workweek.²⁰ On the other hand, if “the employment by A is not completely disassociated from the employment by B,” they are joint employers and must consider the hours worked for both as a whole to determine their obligations to the employee under the Act for that workweek.²¹ Relying on section 3(d), the Bulletin concluded by saying that, “at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of

17. In October 1939 and October 1940, the Department revised other portions of the Bulletin that are not pertinent here.

¹⁷ Id. ¶ 16.

¹⁸ Id.

¹⁹ See id. ¶ 17.

²⁰ Id.

²¹ Id.

employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.”²²

In 1958, the Department published a regulation, codified in 29 CFR part 791, that expounded on Interpretative Bulletin No. 13.²³ Section 791.2(a) reiterated that joint employer status depends on whether multiple persons are “not completely disassociated” or “acting entirely independently of each other” with respect to the employee’s employment.²⁴ Section 791.2(b) explained, “Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek,” they are generally considered joint employers:

- (1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.²⁵

In 1961, the Department amended a footnote in the regulation to clarify that a joint employer is also jointly liable for overtime pay.²⁶ Since this 1961 update, the Department has not published any other updates to part 791.

²² Id.

²³ See 23 FR 5905 (Aug. 5, 1958).

²⁴ 29 CFR 791.2(a).

²⁵ 29 CFR 791.2(b) (footnotes omitted).

²⁶ See 26 FR 7732 (Aug. 18, 1961).

In 1973, the Supreme Court decided a joint employer case in Falk v. Brennan.²⁷ Falk did not cite or rely on part 791, but instead used section 3(d) to determine whether an apartment management company was a joint employer of the employees of the apartment buildings that it managed.²⁸ The Court held that, because the management company exercised “substantial control [over] the terms and conditions of the [employees’] work,” the management company was an employer under 3(d), and was therefore jointly liable with the building owners for any wages due to the employees under the FLSA.²⁹

In 1983, the Ninth Circuit issued a seminal joint employer decision, Bonnette v. California Health & Welfare Agency.³⁰ In Bonnette, seniors and individuals with disabilities receiving state welfare assistance (the “recipients”) employed home care workers as part of a state welfare program.³¹ Taking an approach similar to Falk, the court addressed whether California and several of its counties (the “counties”) were joint employers of the workers under section 3(d).³² In determining whether the counties were jointly liable for the home care workers under 3(d), the court found “four factors [to be] relevant”: “whether the alleged [joint] employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”³³ The court noted that these four factors “are not etched in stone and will not be blindly applied” and that the determination of joint employer status

²⁷ See 414 U.S. 190.

²⁸ See id. at 195.

²⁹ Id.

³⁰ See 704 F.2d 1465. Although the Ninth Circuit later adopted a thirteen-factor test in Torres-Lopez v. May, 111 F.3d 633, 639–41 (9th Cir. 1997), Bonnette remains relevant because many courts have treated it as the baseline for their own joint employer tests.

³¹ See 704 F.2d at 1467–68.

³² See id. at 1469–70.

³³ Id. at 1470.

depends on the circumstances of the whole activity.³⁴ Applying the four factors, the court concluded that the counties “exercised considerable control” and “had complete economic control” over “the nature and structure of the employment relationship” between the recipients and home care workers, and were therefore “employers” under 3(d), jointly and severally liable with the recipients to the home care workers.³⁵

In 2014, the Department issued Administrator’s Interpretation No. 2014-2, concerning joint employer status in the context of home care workers.³⁶ The Home Care AI described, consistent with § 791.2, a joint employer as an additional employer who is “not completely disassociated” from the other employer(s) with respect to a common employee, and further explained that section 3(g) determines the scope of joint employer status.³⁷ The Home Care AI opined that “the focus of the joint employer regulation is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers.”³⁸ The Home Care AI opined that “a set of [joint employer] factors that addresses only control is not consistent with the breadth of [joint] employment under the FLSA” because section 3(g)’s “suffer or permit” language governs FLSA joint employer status.³⁹ However, the Home Care AI applied the four Bonnette factors as

³⁴ Id.

³⁵ Id.

³⁶ WHD Administrator’s Interpretation No. 2014-2, “Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act” [hereinafter Home Care AI], available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf.

³⁷ Id.

³⁸ Id.

³⁹ Id.

part of a larger multi-factor analysis that provided specific guidance about joint employer status in the home care industry.⁴⁰

In 2016, the Department issued Administrator’s Interpretation No. 2016-1 concerning joint employer status under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which the Department intended to be “harmonious” and “read in conjunction with” the Home Care AI’s discussion of joint employer status.⁴¹ The Joint Employer AI also described section 3(g) as determining the scope of joint employer status.⁴² The Joint Employer AI opined that “joint employment, like employment generally, ‘should be defined expansively.’”⁴³ It further opined that, “joint employment under the FLSA and MSPA [is] notably broader than the common law ... which look[s] to the amount of control that an employer exercises over an employee.”⁴⁴ The Joint Employer AI concluded that, because “the expansive definition of ‘employ’” in both the FLSA and MSPA “rejected the common law control standard,” “the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.”⁴⁵ The Department rescinded the Joint Employer AI effective June 7, 2017.⁴⁶

Need for Rulemaking

As noted, the Department has not meaningfully revised its joint employer regulation, 29 CFR part 791, since its promulgation in 1958. The current regulation provides some helpful

⁴⁰ See id.

⁴¹ WHD Administrator’s Interpretation No. 2016-1, “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” [hereinafter Joint Employer AI].

⁴² See id.

⁴³ Id. (quoting Torres-Lopez, 111 F.3d at 639).

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ See U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance, (2017), available at <https://www.dol.gov/newsroom/releases/opa/opa20170607>.

guidance for determining joint employer status, but as explained below, the Department believes that it is helpful to offer additional guidance on how to determine joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work.

Part 791 currently determines joint employer status by asking whether multiple persons are “not completely disassociated” with respect to the employment of a particular employee.⁴⁷ This standard, however, does not provide adequate guidance for resolving the situation where an employee’s work for an employer simultaneously benefits another person (for example, where the employer is a subcontractor or staffing agency, and the other person is a general contractor or staffing agency client). In this scenario, the employer and the other person are almost never “completely disassociated.” The “not completely disassociated” standard may therefore suggest—contrary to the Department’s longstanding position—that these situations always result in joint employer status. Moreover, courts have generally not focused on the degree of association between the employer and potential joint employer in this scenario. Therefore, it would be helpful to clarify the standard for joint employer status in order to give the public more meaningful guidance and proper notice of what the regulation actually requires.

It would also be helpful to revise part 791 given the current judicial landscape. Circuit courts currently use a variety of multi-factor tests to determine joint employer status, and as a result, organizations operating in multiple jurisdictions may be subject to joint employer liability in one jurisdiction, but not in another, for the same business practices. The Department’s proposed four-factor test, if adopted, would provide guidance to courts that may promote greater

⁴⁷ See 29 CFR 791.2(a).

uniformity among court decisions. This would promote fairness and predictability for organizations and employees.

Additionally, revising the Department's regulation could promote innovation and certainty in business relationships. The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships. When an employer contemplates a business relationship with another person, the other person may not be able to assess what degree of association with the employer will result in joint and several liability for the employer's employees. Indeed, the other person may be concerned by such liability despite having insignificant control over the employer's employees. This uncertainty could impact the other person's willingness to engage in any number of business practices vis-à-vis the employer—such as providing a sample employee handbook, or other forms, to the employer as part of a franchise arrangement; allowing the employer to operate a facility on its premises; using or establishing an association health plan or association retirement plan that is also used by the employer; or jointly participating with the employer in an apprenticeship program. Uncertainty regarding joint liability could also impact that person's willingness to bargain for certain contractual provisions with the employer—such as requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices. To provide more certainty when organizations are considering these and other business practices, it would be helpful for the Department to provide more clarity about what kinds of activities could result in joint employer status.

It would also be helpful for the Department to clarify that a person's business model does not make joint employer status more or less likely under the Act. Part 791 is currently silent on

this point, and that silence may cause unnecessary confusion and uncertainty. For example, a business that contracts with a staffing agency to receive labor services is “not completely disassociated” from the staffing agency, but that business is not more or less likely to be a joint employer simply because it uses a staffing agency. Similarly, a franchisor and franchisee are “not completely disassociated.” However, when the Department investigates a typical franchisee for potential FLSA violations, the Department does not seek recovery from the franchisor as a joint employer simply because it has a franchise arrangement. It is therefore helpful for the Department to explain its longstanding position that a business model—such as the franchise model—does not itself indicate joint employer status under the FLSA. Under the FLSA, a person is a joint employer if it is “acting ... in relation to” an employee of an employer—not simply because it has a certain business model.⁴⁸

It would also be helpful to revise the current regulation to explain the statutory basis for joint employer status under the Act. It is axiomatic that any Department interpretation of the FLSA must begin with the text of the statute, following well-settled principles of statutory construction by “reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”⁴⁹ There are three terms defined in the Act (“employee,” “employ,” and “employer”⁵⁰) that could potentially be relevant to the joint employer analysis, but the current part 791 does not clearly identify the textual basis for the scope of joint employer status under the Act. Clarifying the textual basis for joint employer status would help ensure that the Department’s guidance on this subject is fully consistent with the text of the Act.

⁴⁸ 29 U.S.C. 203(d).

⁴⁹ See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7 (2011) (interpreting the FLSA) (internal quotation marks and citation omitted).

⁵⁰ See 29 U.S.C. 203(d), (e)(1), (g).

Finally, it would be helpful for the Department to update its guidance regarding joint employer status given public interest in the issue. Recently, the National Labor Relations Board (NLRB) issued decisions that altered its analysis for determining joint employer status under the National Labor Relations Act (NLRA) (a separate statute from the FLSA).⁵¹ The NLRB is engaging in rulemaking regarding the joint employer standard under the NLRA.⁵² In recent years, Congress has held hearings and considered legislation on joint employer status.⁵³ In addition, 84 U.S. Representatives and 26 Senators have expressed their concern and have urged the Department to update part 791.⁵⁴ These and other developments have generated a tremendous amount of attention, concern, and debate about joint employer status in every context, including the FLSA. Rulemaking would help bring clarity to this discussion.

III. Proposed Regulatory Revisions

The Department proposes to revise its existing joint employer regulation in part 791 to address these issues. In relevant part, and as discussed in greater detail below, the Department proposes:

- to make non-substantive revisions to the introductory provision in section 791.1;

⁵¹ See Browning-Ferris Indus. of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015).

⁵² See The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681, 46,686 (Sept. 14, 2018).

⁵³ See House Cmte. on Educ. & the Workforce, Hearing: “Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship” (July 12, 2017), <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=106218>; Senate Cmte. on Health, Educ., Labor, & Pensions, Hearing: “Who’s the Boss? The ‘Joint Employer’ Standard and Business Ownership (Feb. 5, 2015), <https://www.govinfo.gov/content/pkg/CHRG-114shrg93358/pdf/CHRG-114shrg93358.pdf>; H.R. 3441, 115th Congress (2017–2018), Save Local Business Act.

⁵⁴ See Byrne Leads Bipartisan Letter Asking Acosta to Act on Joint Employer, (2018), <https://byrne.house.gov/media-center/press-releases/byrne-leads-bipartisan-letter-asking-acosta-to-act-on-joint-employer>. On September 28, 2018, Senator Isakson sent a similar letter to the Department, signed by 25 other Senators.

- to replace the language of “not completely disassociated” as the standard in one of the joint employer scenarios—where an employer suffers, permits, or otherwise employs an employee to work one set of hours in a workweek, and that work simultaneously benefits another person—with a four-factor balancing test assessing whether the other person:
 - hires or fires the employee;
 - supervises and controls the employee’s work schedules or conditions of employment;
 - determines the employee’s rate and method of payment; and
 - maintains the employee’s employment records;
- to explain that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is:
 - exercising significant control over the terms and conditions of the employee’s work; or
 - otherwise acting directly or indirectly in the interest of the employer in relation to the employee;
- to explain that the employee’s “economic dependence” on the potential joint employer does not determine the potential joint employer’s liability under the Act;
- to identify three examples of “economic dependence” factors that are not relevant for determining joint employer status under the Act—including, but not limited to, whether the employee:
 - is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
 - has the opportunity for profit or loss based on his or her managerial skill; and

- invests in equipment or materials required for work or the employment of helpers;
- to explain that the potential joint employer's ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining the potential joint employer's liability under the Act;
- to clarify that indirect action in relation to an employee may establish joint employer status under the Act;
- to explain that FLSA section 3(d) only, not section 3(e)(1) or 3(g), determines joint employer status under the Act;
- to clarify that a person's business model—for example, operating as a franchisor—does not make joint employer status more or less likely under the Act;
- to explain that certain business practices—for example, providing a sample employee handbook to a franchisee; participating in or sponsoring an association health or retirement plan; allowing an employer to operate a facility on one's premises; or jointly participating with an employer in an apprenticeship program—do not make joint employer status more or less likely under the Act;
- to explain that certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, sexual harassment policies, morality clauses, or requirements to comply with the law or promote other desired business practices—do not make joint employer status more or less likely under the Act;
- to make non-substantive clarifications to the joint employer standard for the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek; and

- to provide illustrative examples demonstrating how the Department’s proposed joint employer regulation would apply.

These proposed revisions to part 791 would significantly clarify how to determine joint employer status under the Act.

The Department welcomes comment on all aspects of its proposal.

A. Proposal to replace the “not completely disassociated” standard with a four-factor balancing test for one of the joint employer scenarios under the Act (one set of hours)

Part 791 currently determines joint employer status by asking whether two or more persons are “not completely disassociated with respect to the employment of a particular employee.”⁵⁵ This standard is not as helpful for determining joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work one set of hours in a workweek, and that work simultaneously benefits another person.⁵⁶ The Department therefore proposes to replace the “not completely disassociated” standard in this scenario with a four-factor balancing test derived (with one modification) from Bonnette v. California Health & Welfare Agency. The proposed test would assess whether the other person:

- hires or fires the employee;
- supervises and controls the employee’s work schedules or conditions of employment;
- determines the employee’s rate and method of payment; and

⁵⁵ See 29 CFR 791.2. The regulation similarly advises that joint employer liability does not exist where “two or more employers are acting entirely independently of each other.” Id.

⁵⁶ Under the Act, “person” means “any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.” 29 U.S.C. 203(a).

- maintains the employee’s employment records.⁵⁷

These proposed factors focus on the economic realities of the potential joint employer’s exercise of control over the terms and conditions of the employee’s work.⁵⁸ They closely track the language of Bonnette, with a modification to the first factor.⁵⁹ Whereas Bonnette describes the first factor as the “power” to hire and fire, the Department proposes rephrasing this factor to require actual exercise of power to ensure that its four-factor test is fully consistent with the text of section 3(d), which requires a person be “acting ... in relation to an employee.”⁶⁰ The Department’s proposal would also clarify that, under 3(d), the potential joint employer’s actions in relation to the employee may be “indirect.”⁶¹ The Department believes that its four proposed factors—which weigh the economic reality of the potential joint employer’s active control, direct or indirect, over the employee—would be most relevant to the joint employer analysis for several reasons.

First, these four factors are fully consistent with the text of the section 3(d). When another person exercises control over the terms and conditions of the employee’s work, that person is “acting ... in the interest of” the employer “in relation to” the employee.⁶² Recognizing

⁵⁷ Cf. 704 F.2d at 1470 (considering “whether the alleged [joint] employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records” (quotation marks omitted)).

⁵⁸ Cf. id. (“The appellants exercised considerable control over the nature and structure of the employment relationship.”).

⁵⁹ See id. (considering whether the potential joint employer “had the power to hire and fire the employees,” rather than whether the potential joint employer actually hired or fired them).

⁶⁰ See 29 U.S.C. 203(d).

⁶¹ See id. (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee”).

⁶² Id.

this provision, Bonnette adopted an almost identical four-factor test to determine whether a potential joint employer is liable under 3(d).⁶³

Second, these factors are consistent with Supreme Court precedent. The Supreme Court held in Falk v. Brennan that under 3(d) another person is jointly liable for an employee if that person exercises “substantial control” over the terms and conditions of the employee’s work.⁶⁴ The Department’s proposed four-factor balancing test, which weighs the potential joint employer’s exercise of control over the terms and conditions of the employee’s work, uses the same reasoning as Falk to determine joint employer status under 3(d).

Third, these factors are highly probative of joint employer status under the Act. Each factor weighs the potential joint employer’s exercise of control over the more essential terms and conditions of employment. The potential joint employer’s exercise of this control therefore has a direct relation to the employee’s work. And this direct relation makes it reasonable to hold the potential joint employer liable for the employee’s work. Accordingly, the Department’s proposed test focuses on those facts that strongly indicate joint and several liability under the Act.

Fourth, these factors are simple, clear-cut, and easy to apply. The greater the number of factors in a multi-factor test, the more complex and difficult the analysis may be in any given case, and the greater the likelihood of inconsistent results in other similar cases. By using these factors that focus on the exercise of control over the more essential terms and conditions of employment, the Department believes its proposed test would determine FLSA joint employer

⁶³ See 704 F.2d at 1469–70 (“We conclude that, under the FLSA’s liberal definition of ‘employer’ [in section 3(d)], the appellants were employers of the chore workers.”).

⁶⁴ See 414 U.S. at 195 (“In view of the expansiveness of the Act’s definition of ‘employer’ [in section 3(d)] and the extent of D & F’s managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition [in 3(d)], an ‘employer’ of the maintenance workers.”).

status with greater ease and consistency. This simplicity would also provide greater certainty to the public, helping workers and organizations to determine more accurately who is and is not a joint employer under the Act before any investigation or litigation begins.

Fifth, these factors are generally applicable and are almost always present in the scenario where an employee's work for an employer simultaneously benefits another person. Therefore they should be helpful for determining joint employer status in a wide variety of contexts.

Sixth, the Department's proposed four-factor test finds considerable support in the plurality of circuit courts that already apply similar multi-factor, economic realities tests. The First and Fifth Circuits apply the Bonnette test, which is nearly identical to the Department's proposed test.⁶⁵

The Seventh Circuit uses this same test as a baseline to determine joint employer status under the FMLA,⁶⁶ and district courts in the Seventh Circuit apply it in FLSA cases.⁶⁷ Moreover, the Third Circuit applies a similar four-factor test that considers whether the potential joint employer:

⁶⁵ Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675–76 (1st Cir. 1998); see Gray v. Powers, 673 F.3d 352, 355–57 (5th Cir. 2012). Although Gray involved whether an individual owner of the employer was jointly liable under the FLSA, the court noted that it “must apply the economic realities test to each individual or entity alleged to be an employer and each must satisfy the four part test.” 673 F.3d at 355 (quotation marks and citation omitted)). Two older Fifth Circuit decisions applied a different test to determine whether an entity was a joint employer under the Act, and the Fifth Circuit has not yet overruled those decisions—creating some uncertainty about what joint employer test applies in the Fifth Circuit. See Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237–38 (5th Cir. 1973); Wirtz v. Lone Star Steel Co., 405 F.2d 668, 669–670 (5th Cir. 1968).

⁶⁶ See Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr., 536 F.3d 640, 641–42 (7th Cir. 2008) (“[W]e hold generally that ... each alleged [joint] employer must exercise control over the working conditions of the employee ...” (citing Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 408 (7th Cir. 2007))). While the Seventh Circuit's FLSA decision in Reyes did not use the Bonnette factors, the court in Moldenhauer stated that Reyes “held that both the farm that employed migrant workers and the recruiter who placed the workers at the farm ... controlled the workers' daily activities and working conditions.” Moldenhauer, 536 F.3d at 644 (citing Reyes, 495 F.3d at 404–08).

⁶⁷ See, e.g., In re Jimmy John's Overtime Litig., Nos. 14 C 5509, 15 C 1681, & 15 C 6010, 2018 WL 3231273, at *13–14 (N.D. Ill. 2018); Babych v. Psychiatric Solutions, Inc., No. 09 C 8000, 2011 WL 5507374, at *6–8 (N.D. Ill. Nov. 9, 2011).

- has authority to hire and fire employees;
- has authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours;
- exercises day-to-day supervision, including employee discipline; and
- controls employee records, including payroll, insurance, taxes, and the like.⁶⁸

According to the Third Circuit, “[t]hese factors are not materially different from” the Bonnette factors.⁶⁹ Finally, additional precedent supports the Department’s proposed factors.⁷⁰

Although four other circuit courts apply different joint employer tests, each of them applies at least one factor that resembles one of the Department’s proposed factors derived from the Bonnette test.⁷¹ The Second and Fourth Circuits rejected the Bonnette test because they did not believe it could “be reconciled with the ‘suffer or permit’ language in [FLSA section 3(g)], which necessarily reaches beyond traditional agency law.”⁷² But the Department believes that section 3(d), not section 3(g), is the touchstone for joint employer status and that its proposed four-factor balancing test is preferable and consistent with the text of that section.

⁶⁸ In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig., 683 F.3d 462, 469–71 (3d Cir. 2012).

⁶⁹ Id. at 469.

⁷⁰ See Bacon v. Subway Sandwiches & Salads LLC, 2015 WL 729632, at *4 (E.D. Tenn. Feb. 19, 2015) (applying in an FLSA case three factors similar to the Bonnette factors); Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 961 (8th Cir. 2015) (suggesting in an FLSA case that three factors similar to the Bonnette factors would apply to determine joint employer status).

⁷¹ See Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 141–42 (4th Cir. 2017) (of the six factors comprising the first step of its joint employer analysis, applying three factors resembling the Bonnette factors); Layton v. DHL Exp. (USA), Inc., 686 F.3d 1172, 1176 (11th Cir. 2012) (applying an eight-factor test with five factors resembling the Bonnette factors); Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 72 (2d Cir. 2003) (applying a six-factor test with one factor resembling one of the Bonnette factors); Torres-Lopez, 111 F.3d at 639–41 (applying a thirteen-factor test with five factors resembling the Bonnette factors).

⁷² Salinas, 848 F.3d at 136 (quotation marks omitted); Zheng, 355 F.3d at 69.

B. Proposal to explain what additional joint employer factors could be relevant

The Department proposes to revise part 791 to address whether any additional factors may be relevant for determining joint employer status. Because joint employer status is determined by 3(d), the Department proposes to explain that any additional factors must be consistent with the text of 3(d). Thus, any additional factors indicating “significant control”⁷³ are relevant because the potential joint employer’s exercise of significant control over the employee’s work establishes its joint liability under 3(d).⁷⁴ Finally, the Department proposes to explain that any factors that do not fit within these parameters—as indicative of significant control or otherwise consistent with the text of 3(d)—are not relevant to the joint employer analysis.

These proposals would not take away from the dynamic and fact-bound nature of the joint employer inquiry, but they would recognize that the text of 3(d) determines the scope of—and therefore places limitations on—joint liability. The Department believes that these proposals would provide workers and organizations with more certainty regarding joint employer status under the Act.

C. Proposal to explain that joint employer status under the Act is not determined by the employee’s “economic dependence” and to identify three examples of “economic dependence” factors that are not relevant

⁷³ Enterprise, 683 F.3d at 470 (holding that additional joint employer factors should be “indicia of ‘significant control’” (citing Moldenhauer, 536 F.3d at 645 (“In Reyes and Grace, the primary employer placed workers with the alleged secondary employer, but both employers maintained significant control over the employee and were thus found to be joint employers.” (citations omitted)))).

⁷⁴ See, e.g., Falk, 414 U.S. at 195 (finding joint employer liability under 3(d) where the potential joint employer exercised “substantial control [over] the terms and conditions of the [employees’] work”); Bonnette, 704 F.2d at 1470 (finding joint employer liability under 3(d) where the potential joint employer “exercised considerable control” and “had complete economic control” “over the nature and structure of the employment relationship”).

The Department proposes to explain that joint employer status is not determined by the employee’s “economic dependence” on the potential joint employer and to identify three examples of “economic dependence” factors that are not relevant to the Department’s proposed multi-factor test and section 3(d). Identifying specific factors that are not relevant will help the public to have more certainty over what factors to apply when determining whether a person qualifies as a joint employer under the Act.

Because section 3(d) establishes joint liability for “any person acting directly or indirectly in the interest of an employer in relation to an employee,”⁷⁵ joint employer status is determined by the actions of the potential joint employer—not by the actions of the employee or his or her employer.⁷⁶ As such, any factors that focus on the actions of the employee or his or her employer are not relevant to the joint employer inquiry, including those focusing on the employee’s “economic dependence.” The Department therefore proposes to explain that joint employer status is determined by the actions of the potential joint employer—not by the employee’s economic dependence—and to identify three examples of economic dependence factors that are not relevant.

Specifically, the Department proposes to identify as not relevant whether the employee: (1) is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (2) has the opportunity for profit or loss based on his or her managerial skill; and (3) invests in equipment or materials required for work or the employment of helpers. These three factors focus on whether the employee is correctly classified as such under the Act—and not on whether the potential joint employer is acting in the interest of the employer in relation to the

⁷⁵ 29 U.S.C. 203(d).

⁷⁶ See *id.* (“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee ...” (emphasis added)).

employee. While courts have used these factors for determining whether a worker is an employee or independent contractor, they are not relevant for determining whether additional persons are jointly liable under the Act to a worker whose classification as an employee has already been established.

Finally, there is judicial precedent for specifically identifying factors that are not relevant to the joint employer inquiry. Notably, the Eleventh Circuit identified three factors—including the skill required and the opportunity for profit and loss—as not relevant to the joint employer inquiry.⁷⁷ The Eleventh Circuit explained that these factors “only distinguished whether [a worker] was an employee or an independent contractor,” not whether an additional person was a joint employer of the worker.⁷⁸ Similarly, the courts have found that the “usefulness” of the traditional employment relationship test—which includes factors such as the skill required, opportunity for profit or loss, and investment in the business—is “significantly limited” in a joint employer case where the employee already has an employer and the question is whether an additional person is jointly liable with the employer for the employee.⁷⁹

D. Proposal to explain that joint employer status is determined by FLSA section 3(d) only, not by section 3(e)(1) or 3(g)

The Department proposes to explain that the textual basis for FLSA joint employer status is section 3(d), not section 3(e)(1) or 3(g). While the FLSA does not use the term “joint employer,” the FLSA contemplates joint liability in section 3(d). First, the FLSA defines the term “employee” in section 3(e)(1) to mean “any individual employed by an employer.”⁸⁰ The

⁷⁷ See Layton, 686 F.3d at 1176.

⁷⁸ Id.

⁷⁹ E.g., Baystate, 163 F.3d at 675 n.9.

⁸⁰ 29 U.S.C. 203(e)(1) (emphasis added).

FLSA, in turn, defines the term “employ” in section 3(g): “[e]mploy’ includes to suffer or permit to work.”⁸¹ Reading 3(e)(1) and 3(g) together, an employer is a person who suffers, permits, or otherwise employs an individual to work, and an employee is an individual whom another person suffers, permits, or otherwise employs to work. The FLSA further defines “employer” in section 3(d) to “include[]” joint employers—“any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁸²

Sections 3(d), 3(e)(1), and 3(g) therefore work in harmony. If an employer suffers, permits, or otherwise employs an employee to work under 3(e)(1) and 3(g), and another person is acting directly or indirectly in the interest of the employer in relation to the employee under 3(d), then the employer and the other person are jointly and severally liable for the employee’s hours worked. During that period, the employer is liable for the hours that it suffers, permits, or otherwise employs the employee to work, and the other person is a joint employer under 3(d), jointly and severally liable for those same hours worked.

Accordingly, 3(e)(1) and 3(g) determine whether there is an employment relationship between the potential employer and the worker for a specific set of hours worked, and 3(d) alone determines another person’s joint liability for those hours worked. This delineation is confirmed by the structure of the text. A person who is, under 3(d), acting “in the interest of an employer in relation to an employee” is, by definition, a second employer.⁸³ Another person can become a joint employer of an employee under 3(d) only if an employer is already suffering, permitting, or otherwise employing that employee to work under sections 3(e)(1) and 3(g).⁸⁴ By contrast,

⁸¹ 29 U.S.C. 203(g).

⁸² 29 U.S.C. 203(d).

⁸³ Id.

⁸⁴ Id. (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee” (emphasis added)).

sections 3(e)(1) and 3(g) do not expressly address the possibility of a second employment relationship. In fact, 3(e)(1) defines an “employee” as “any individual employed by an employer”—singular.⁸⁵ But 3(d)’s inclusion of “any person acting directly or indirectly in the interest of an employer in relation to an employee” encompasses any additional persons that may be held jointly liable for the employee’s hours worked in a workweek. The Department’s interpretation of sections 3(d), (e)(1), and (g) is therefore consistent with the text of the Act which expands employer liability beyond the initial employment relationship to additional persons.

This clear textual delineation is consistent with judicial precedent. In Rutherford Food, the Supreme Court identified the FLSA’s definition of “employ” in section 3(g) in particular when determining whether the workers at issue were employees or independent contractors.⁸⁶ The Court cited section 3(d) only in passing in a footnote.⁸⁷ By contrast, in Falk the Supreme Court relied on the FLSA’s definition of “employer” in section 3(d) to determine joint employer status.⁸⁸ The Court in Falk found joint employer status under 3(d) because of the potential joint employer’s exercise of control over the terms and conditions of the employee’s work.⁸⁹ Falk did

⁸⁵ In contrast, the definition of “employee” in the NLRA expressly contemplates the existence of multiple employers. See 29 U.S.C. 152(3) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer ...”).

⁸⁶ Rutherford Food Corp. v. McComb, 331 U.S. 722, 727–29 (1947) (“We pass ... upon the question whether the [workers] were employees of the operator of the Kansas plant under the Fair Labor Standards Act.... We conclude ... that these [workers] are not independent contractors.”).

⁸⁷ See id. at 728 n.6. In addition to Rutherford, the Court has consistently defined employment relationships under the FLSA by reference to sections 3(e)(1) and 3(g), not section 3(d). See, e.g., Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 31–33 (1961) (finding an employment relationship under sections 3(e) and 3(g)); United States v. Rosenwasser, 323 U.S. 360, 362–64 (1945) (relying on sections 3(e) and (g) and finding an employment relationship without citation to 3(d)).

⁸⁸ See 414 U.S. at 195.

⁸⁹ See id.

not cite 3(g).⁹⁰ In the same way, Bonnette determined joint employer status according to the text of 3(d) alone, without citing 3(g).⁹¹

Accordingly, the Department proposes to revise part 791 to better account for section 3(d), Falk, and Bonnette by explaining that joint employer status is determined by 3(d) alone—whether the potential joint employer is acting in the interest of an employer in relation to an employee. Explicitly tethering the joint employer standard in part 791 to section 3(d) will provide clearer guidance on how to determine joint employer status consistent with the text of the Act.

E. Proposal to clarify that a person’s business model, certain business practices, and certain contractual provisions do not make joint employer status more or less likely

The Department proposes to clarify that a potential joint employer’s business model does not make joint employer status more or less likely under the Act. Under the FLSA, a person is a joint employer if it is “acting ... in relation to” an employee of an employer—not simply because it has a certain business model.⁹² Accordingly, the mere fact that a potential joint employer enters into a franchise arrangement with an employer does not itself make that person jointly liable for the employer’s employees. The potential joint employer must be acting, directly or indirectly, “in relation to” those employees to be jointly liable for them.⁹³

The Department also proposes to clarify that certain business practices that the Department has encountered—such as providing a sample employee handbook or other forms to an employer as part of a franchise arrangement; allowing an employer to operate a facility on its

⁹⁰ See id. Falk mentioned 3(e)(1), but only in passing. See id.

⁹¹ See 704 F.2d at 1469–70 (“We conclude that, under the FLSA’s liberal definition of ‘employer’ [in 3(d)], the appellants were [joint] employers of the chore workers.”).

⁹² 29 U.S.C. 203(d).

⁹³ Id.

premises; offering or participating in an association health or retirement plan;⁹⁴ or jointly participating with an employer in an apprenticeship program—do not make joint employer liability more or less likely under the Act. Of course, if a potential joint employer enforced the terms of a franchise handbook against a franchisee’s employee, or directed an employer’s employee to participate in a joint apprenticeship program, or exercised control over an employer’s employee who worked on its premises, those actions “in relation to” the employee could indicate joint employer status. The mere business practices themselves—participating in the apprenticeship program, health plan, or retirement plan; sharing the premises; or providing the handbook—do not necessarily involve the potential joint employer “acting ... in relation to” the employer’s employee.

The Department also proposes to clarify that certain contractual provisions between an employer and another person—such as requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses,⁹⁵ or other measures to encourage compliance with the law or to promote desired business practices—do not make joint employer status more or less likely under the Act. Of course, if a potential joint employer enforced the terms of these provisions—for example, by directly firing one of the employer’s employees for violating a sexual harassment policy—those actions “in relation to” the employee could indicate joint employer status. However, the provisions themselves merely require the

⁹⁴ Proposing to clarify that offering or participating in an association health or retirement plan does not make joint employer status more or less likely under the FLSA does not impact the interpretation of “employer” under the Employee Retirement Income Security Act (ERISA) because ERISA defines “employer” differently than the FLSA. *See* 29 U.S.C. 1002(5) (defining “employer” under ERISA to mean “any person acting ... in relation to an employee benefit plan” and to include “a group or association of employers acting for an employer in such capacity”).

⁹⁵ Morality clauses require employees to maintain standards of behavior to protect the reputation of their employer. *See, e.g., Galaviz v. Post-Newsweek Stations*, 380 F. App’x 457, 459 (5th Cir. 2010), and *Bernsen v. Innovative Legal Marketing, LLC*, No. 2:11CV546, 2012 WL 3525612 (E.D. Va. Jun. 20, 2012), for examples of morality clauses.

employer to institute generic policies. They do not show control over any actual employment decisions. They do not involve the potential joint employer “acting ... in relation to” any of the employer’s employees.

F. Proposal to replace the phrase “joint employment”

The Department also proposes to replace the phrase “joint employment” with “joint employer status” throughout part 791. This change will help to focus the inquiry on whether the potential joint employer has taken sufficient action to be held jointly and severally liable under 3(d).

G. Proposal to reiterate that a joint employer can be any legal person under the Act

Because section 3(d) “includes any person acting directly or indirectly in the interest of an employer in relation to an employee,”⁹⁶ the Department proposes to add the Act’s definition of “person” to part 791.⁹⁷ This addition would ensure that a joint employer under 3(d) broadly encompasses every kind of person contemplated by the Act.

H. Proposal to make non-substantive revisions to the Department’s current joint employer standard in the other joint employer scenario (separate sets of hours)

The Department believes that part 791’s “not completely disassociated” standard provides clear and useful guidance in the other joint employer scenario, where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. In this scenario, employer A suffers or permits the employee to work one set of hours in a workweek—for example, 30 hours Monday through Wednesday—and employer B suffers or permits the employee to work a second set of hours in the same workweek—for example, 20 hours Thursday and Friday. If employers A and B are “not completely

⁹⁶ 29 U.S.C. 203(d) (emphasis added).

⁹⁷ 29 U.S.C. 203(a).

disassociated” with respect to the employee’s employment, then the employee’s hours worked for them in the workweek are aggregated and A and B are jointly and severally liable to the employee for 40 hours plus 10 overtime hours.

Under part 791, employers A and B will generally be considered to be sufficiently associated if: (1) there is an arrangement between them to share the employee’s services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. The second of these three situations is simply a restatement of the statutory basis for joint liability in section 3(d), and the first and third situations—sharing an employee and exercising common control over that employee—involve the employers acting in each other’s interest in relation to an employee in specific ways (establishing joint liability under 3(d)). The Department believes that this standard provides adequate clarity to determine joint employer status in this scenario, and to identify the statutory basis for that joint liability. Indeed, courts have applied the Department’s current regulation in this scenario and have found it useful.⁹⁸ Additionally, the Department has issued opinion letters applying its current regulation to

⁹⁸ See, e.g., Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 917–18 (9th Cir. 2003) (relying on § 791.2 to find two home health care providers that shared staff, had common management, and were operated under common control of the same person to be joint employers); Murphy v. Heartshare Human Servs. of New York, 254 F.Supp.3d 392, 399–404 (E.D.N.Y. 2017) (relying on § 791.2 to hold that former employees pled with sufficient particularity that a school and a residence house were joint employers for separate hours worked because they coordinated the employees’ work assignments, some of the employees’ duties benefitted both, and they had overlapping management and human resources functions); Li v. A Perfect Day Franchise, Inc., 281 F.R.D. 373, 400–01 (N.D. Cal. 2012) (relying on the “common control” provision in § 791.2 to find joint employer status); Chao v. Barbeque Ventures, LLC, No. 8:06CV676, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007) (relying on section 3(d), § 791.2, and Falk to find that separate restaurants that shared owners and had the same managers controlling both restaurants were joint employers).

determine whether certain facts satisfy this joint employer scenario.⁹⁹ The Department accordingly proposes only non-substantive revisions to the current regulation with respect to this scenario.

I. Joint Employer Examples

The Department proposes to include several illustrative examples applying the Department's proposed analysis to determine joint employer status. The Department's proposed conclusions following each example are, like all illustrative examples, limited to substantially similar factual situations.

J. Severability

Finally, the Department proposes to include a severability provision in part 791 so that, if one or more of the provisions of part 791 is held invalid or stayed pending further agency action, the remaining provisions would remain effective and operative. The Department proposes to add this provision as § 791.3.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed

⁹⁹ See, e.g., Wage & Hour Div., Opinion Letter FLSA 2005-17NA, 2005 WL 6219105 (June 14, 2005) (applying § 791.2 to determine that separate health care facilities were joint employers and employees' hours worked for different facilities must be aggregated in a workweek to calculate whether overtime pay is due); Wage & Hour Division Opinion Letter 1998 WL 1147714 (Jul. 13, 1998) (applying § 791.2 to determine that separate health care entities were joint employers and employees' hours worked for different entities must be aggregated in a workweek for purposes of calculating any overtime pay due under the Act).

collection of information contained in a proposed rule. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. This NPRM does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act. The Department welcomes comments on this determination.

V. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is a "significant regulatory action," which includes an action that has an annual effect of \$100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this proposed rule is economically significant. Therefore, the Department has prepared a preliminary Regulatory Impact Analysis (RIA) in connection with this NPRM as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule.

By simplifying the standard for determining joint employer status, this proposed rule would reduce the burden on the public. This proposed rule is accordingly expected to be an Executive Order 13771 deregulatory action.¹⁰⁰

A. Introduction

¹⁰⁰ 82 FR 9339 (Feb. 3, 2017).

1. Background

The Fair Labor Standards Act (FLSA) requires a covered employer to pay its nonexempt employees at least the federal minimum wage for every hour worked and overtime premium pay of at least 1.5-times their regular rate of pay for all hours worked in excess of 40 in a workweek. The FLSA defines an “employer” to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee.” These persons are “joint” employers who are jointly and severally liable with the employer for every hour worked by the employee in a workweek. 29 CFR part 791 contains the Department’s official interpretation of joint employer status under the FLSA. In this NPRM, the Department proposes to revise part 791 to adopt a four-factor balancing test to determine joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work. This proposed rule would explain what additional factors should and should not be considered, and provide guidance on how to apply this multi-factor test. The Department proposes no substantive changes to part 791’s guidance in the other joint employer scenario—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. The Department believes that its proposals would make it easier to determine whether a person is or is not a joint employer under the Act, thereby promoting compliance with the FLSA.

2. Need for Rulemaking

For the reasons explained above, the Department has determined that its interpretation of joint employer status requires revision as it applies to the first joint employer scenario identified above (one set of hours worked in a workweek). The Department is concerned that the current

regulation does not adequately address this scenario, and believes that its proposed revisions would provide needed clarity in this scenario. The Department also believes a proposed rule:

- Could help bring clarity to the current judicial landscape, where different courts are applying different joint employer tests that have resulted in inconsistent treatment of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs;
- Would reduce the chill on organizations who may be hesitant to enter into certain relationships or engage in certain kinds of business practices for fear of being held liable for counterparty employees over which they have insignificant control;
- Would better ground the Department’s interpretation of joint employer status in the text of the FLSA; and
- Would be responsive to the current public and Congressional interest in the joint employer issue.

The Department believes that the current regulation provides clear and useful guidance to determine joint employer status in the second scenario, but that non-substantive revisions to better reflect the Department’s longstanding practice would be desirable.

B. Economic Impacts

The Department estimated the number of affected firms and quantified the costs associated with this proposed rule. The Department expects that all businesses and state and local government entities would need to review the text of this rule, and therefore would incur regulatory familiarization costs. However, on a per-entity basis, these costs would be small (see Section V.2 for detailed analysis of regulatory familiarization costs). Because this rule does not alter the standard for determining joint employer status in the second joint employer scenario

where the employee works separate sets of hours for multiple employers in the same workweek, the Department believes that there would be no change in the aggregation of workers' hours to determine overtime hours worked.¹⁰¹ Therefore, there would be no impact on workers in the form of lost overtime, and no transfers between employers and employees. Although this rule would alter the standard for determining joint employer status where the employee works one set of hours in a workweek that simultaneously benefits another person, the Department believes that there would still be no impact on workers' wages due under the FLSA. This proposed standard would not change the amount of wages the employee is due under the FLSA, but could reduce, in some cases, the number of persons who are liable for payment of those wages. To the extent this proposal provides a clearer standard for determining joint employer status where the employee works one set of hours for his or her employer that simultaneously benefits another person, this rule may make it easier to determine who is liable for earned wages.

1. Costs

Updating the rules interpreting joint employer status will impose direct costs on private businesses and state and local government entities by requiring them to review the new regulation. To estimate these regulatory familiarization costs, the Department must determine: (1) the number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the regulation, and (3) the amount of time required to review the regulation.

¹⁰¹ In this scenario, the employee's separate sets of hours are aggregated so that both employers are jointly and severally liable for the total hours the employee works in the workweek. As such, a finding of joint liability in this situation can result in some hours qualifying for an overtime premium. For example, if the employee works for employer A for 40 hours in the workweek, and for employer B for 10 hours in the same workweek, and those employers are found to be joint employers, A and B are jointly and severally liable to the employee for 50 hours worked—which includes 10 overtime hours.

It is uncertain whether private entities will incur regulatory familiarization costs at the firm or the establishment level. For example, in smaller businesses there might be just one specialist reviewing the regulation. Larger businesses might review the rule at corporate headquarters and determine policy for all establishments owned by the business, while more decentralized businesses might assign a separate specialist to the task in each of their establishments. To avoid underestimating the costs of this rule, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the regulation, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 6.1 million private firms and 7.8 million private establishments with paid employees.¹⁰² Additionally, the Department estimates 90,106 state and local governments (2012 Census of Governments) might incur costs under the proposal.¹⁰³

The Department believes that even entities that do not currently have workers with one or more joint employers will incur regulatory familiarization costs, because they will need to confirm whether this proposed rule includes any provisions that may affect them or their employees.

The Department judges one hour per entity, on average, to be an appropriate review time for the rule. The relevant statutory definitions have been in the FLSA since its enactment in

¹⁰² Statistics of U.S. Businesses 2016, <https://www.census.gov/programs-surveys/susb.html>.

¹⁰³ 2012 Census of Governments: Government Organization Summary Report, http://www2.census.gov/govs/cog/g12_org.pdf.

1938, the Department has recognized the concept of joint employer status since at least 1939, and the Department already issued a rule interpreting joint employer status in 1958. Therefore, the Department expects that the standards applied by this proposed rule should be at least partially familiar to the specialists tasked with reviewing it. Additionally, the Department believes many entities are not joint employers and thus would spend significantly less than one hour reviewing the rule. Therefore, the one-hour review time represents an average of less than one hour per entity for the majority of entities that are not joint employers, and more than one hour for review by entities that might be joint employers. The Department welcomes comments on the estimate of one hour of review time per entity, and data on the amount of time typically spent by small businesses in regulatory review.

The Department’s analysis assumes that the proposed rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The mean hourly wage for these workers is \$32.29 per hour.¹⁰⁴ In addition, the Department also assumes that benefits are paid at a rate of 46 percent¹⁰⁵ and overhead costs are paid at a rate of 17 percent of the base wage, resulting in an hourly rate of \$52.63.

Table 1: Total Regulatory Familiarization Costs, Calculation by Number of Firms and Establishments (\$1000s)

NAICS Sector	By Firm		By Establishment	
	Firms	Cost [a]	Estab- lishments	Cost [a]
Agriculture, Forestry, Fishing and Hunting	21,830	\$1,149	22,594	\$1,189
Mining, Quarrying, and Oil/Gas Extraction	20,309	\$1,069	27,234	\$1,433

¹⁰⁴ Occupational Employment and Wages, May 2017, <https://www.bls.gov/oes/2017/may/oes131141.htm>.

¹⁰⁵ The benefits-earnings ratio is derived from the Bureau of Labor Statistics’ Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

Utilities	5,893	\$310	18,159	\$956
Construction	683,352	\$35,967	696,733	\$36,671
Manufacturing	249,962	\$13,156	291,543	\$15,345
Wholesale Trade	303,155	\$15,956	412,526	\$21,712
Retail Trade	650,997	\$34,264	1,069,096	\$56,269
Transportation and Warehousing	181,459	\$9,551	230,994	\$12,158
Information	75,766	\$3,988	146,407	\$7,706
Finance and Insurance	237,973	\$12,525	476,985	\$25,105
Real Estate and Rental and Leasing	300,058	\$15,793	390,500	\$20,553
Professional, Scientific, and Technical Serv.	805,745	\$42,409	903,534	\$47,555
Management of Companies and Enterprises	27,184	\$1,431	55,384	\$2,915
Administrative and Support Services	340,893	\$17,942	409,518	\$21,554
Educational Services	91,774	\$4,830	103,364	\$5,440
Health Care and Social Assistance	661,643	\$34,824	890,519	\$46,870
Arts, Entertainment, and Recreation	126,247	\$6,645	137,210	\$7,222
Accommodation and Food Services	527,632	\$27,771	703,528	\$37,029
Other Services (except Public Admin.)	690,329	\$36,334	754,229	\$39,697
State and Local Governments	90,106	\$4,743	90,106	\$4,743
All Industries	6,092,307	\$320,655	7,830,163	\$412,123
Average annualized costs, 7 percent discount rate				
Over 10 years		\$42,667		\$54,838
In perpetuity		\$20,977		\$26,961
Average annualized costs, 3 percent discount rate				
Over 10 years		\$36,496		\$46,906
In perpetuity		\$9,339		\$12,004

[a] Each entity is expected to allocate one hour of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The unloaded hourly rate for this occupation is \$32.29, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is \$52.63.

The Department estimates that the lower bound of regulatory familiarization cost range would be \$320.7 million, and the upper bound, \$412.1 million. Additionally, the Department estimates that the Retail Trade industry would have the highest upper bound (\$56.3 million), while the Professional, Scientific and Technical Services industry would have the highest lower bound (\$42.4 million). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this rule over 10 years and in perpetuity. Over 10 years, this rule would have an average annual cost of \$42.7 million to \$54.8 million, calculated at a 7 percent discount rate (\$36.5 million to \$46.9 million calculated at a 3 percent discount rate). In perpetuity, this rule would have an average annual cost of \$21.0 million to \$27.0 million, calculated at a 7 percent discount rate (\$9.3 million to \$12.0 million calculated at a 3 percent discount rate).

2. Potential Transfers

There are two joint employer scenarios under the FLSA: (1) employees work one set of hours that simultaneously benefit the employer and another person, and (2) employees work separate sets of hours for multiple employers. The Department does not expect this rule to generate transfers to or from workers that currently have one or more joint employers under either of these scenarios.

Employees who work one set of hours for an employer that simultaneously benefit another person are not likely to see a change in the wages owed them under the FLSA as a result of this rule. In this scenario, the employee's employer is liable to the employee for all wages due under the Act for the hours worked. If a joint employer exists, then that person is jointly and severally liable with the employer for all wages due under the Act for those hours worked. To the extent that the proposed standard for determining joint employer status reduces the number of persons who are joint employers in this scenario, neither the wages due the employee under the Act nor the employer's liability for the entire wages due would change. If the person is no longer a joint employer as a result of the proposal, the employee would no longer have a legal right to collect the wages due under the Act from that person but would still be able to collect the entire wages due from the employer. In sum, changing the standard for determining whether a person is

a joint employer in this scenario would not impact the wages due the employee under the Act, and assuming that all employers always fulfill their legal obligations under the Act, would not result in any reduction in wages received by the employee because the employer would pay the wages in full. The Department recognizes that there could be a transfer between the employer and any joint employers, but lacks information about how many individuals or entities would be affected and to what degree.

Employees who work separate sets of hours for multiple employers are not affected because the Department is not proposing any substantive revisions to the standard for determining joint employer status in this scenario. Therefore, no joint liability (or lack thereof) in this scenario will be altered by the promulgation of this rule.

3. Other Potential Impacts

To the extent revising the Department's regulation provides more clarity, the revision could promote innovation and certainty in business relationships, which also benefits employees. The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships. When an employer contemplates a business relationship with another person, the other person may not be able to assess what degree of association with the employer will result in joint and several liability for the employer's employees. Indeed, the other person may be concerned with such liability despite having insignificant control over the employer's employee. This uncertainty could impact the other person's willingness to engage in any number of business practices vis-à-vis the employer—such as providing a sample employee handbook, or other forms, to the employer as part of a franchise arrangement; allowing the employer to operate a facility on its premises; using or establishing an association health plan or association retirement plan used by the employer; or jointly

participating with an employer in an apprenticeship program—even though these business practices could benefit the employer’s employees. Similarly, uncertainty regarding joint liability could also impact that person’s willingness to bargain for certain contractual provisions with the employer, such as requiring workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices. The Department’s proposal may provide additional certainty as businesses consider whether to adopt such business practices.

The Department expects that this proposed rule would reduce burdens on organizations. After initial rule familiarization, this proposal may reduce the time spent by organizations to determine whether they are joint employers. Likewise, clarity may reduce FLSA-related litigation regarding joint employer status, and reduce litigation among organizations regarding allocation of FLSA-related liability and damages. The rule may also promote greater uniformity among court decisions, providing clarity for organizations operating in multiple jurisdictions. This uniformity could reduce organizations’ costs because they would not have to consider multiple, jurisdiction-specific legal standards before entering into economic relationships.

Because the Department does not have data on the number of joint employers, and the number of joint employer situations that could be affected, cost-savings attributable to this proposed rule have not been quantified. The Department requests comments, studies, and data on the prevalence of joint employers, how this proposed rule would affect members of the public, and how to quantify those impacts, if such quantification is possible. The Department also requests comments and data on any additional potential benefits of this proposed rule.

VII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM. The Chief Counsel for Advocacy of the Small Business Administration was notified of this proposed rule upon submission of the rule to OMB under Executive Order 12866. The Department invites commenters to provide input on data analysis and/or methodology used throughout this IRFA.

A. Reasons Why Action by the Agency is Being Considered

The Department has determined that its interpretation of joint employer status requires revision as it applies to one of the joint employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person). The Department is concerned that the current regulation does not adequately address this scenario, and the Department believes that its proposed revisions would provide needed clarity and ensure consistency with the Act's text.

B. Statement of Objectives and Legal Basis for the Proposed Rule

29 CFR part 791 contains the Department's official interpretations for determining joint employer status under the FLSA. It is intended to serve as a practical guide to employers and employees as to how the Department will look to apply it. However, the Department has not meaningfully revised this part since its promulgation in 1958, over 60 years ago.

The Department's objective is to update its joint employer rule in 29 CFR part 791 to provide guidance for determining joint employer status in one of the joint employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person) in a manner that is clear and consistent with section 3(d) of the Act.

C. Description of the Number of Small Entities to Which the Proposed Rule Will Apply

The RFA defines a "small entity" as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of October 1, 2017, to classify entities as small. SBA establishes separate standards for 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than \$7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than \$550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.

The Department obtained data from several sources to determine the number of small entities. However, the Statistics of U.S. Businesses (SUSB, 2012) was used for most industries (the 2012 data is the most recent SUSB data that includes information on receipts). Industries for

which the Department used alternative sources include credit unions,¹⁰⁶ commercial banks and savings institutions,¹⁰⁷ agriculture,¹⁰⁸ and public administration.¹⁰⁹ The Department used the latest available data in each case, so data years differ between sources.

For each industry, the SUSB data tabulates total establishment and firm counts by both enterprise employment size (e.g., 0–4 employees, 5–9 employees) and receipt size (e.g., less than \$100,000, \$100,000–\$499,999).¹¹⁰ The Department combined these categories with the SBA size standards to estimate the proportion of establishments and firms in each industry that are considered small. The general methodological approach was to classify all establishments or firms in categories below the SBA cutoff as a “small entity.” If a cutoff fell in the middle of a defined category, the Department assumed a uniform distribution of employees across that bracket to determine what proportion should be classified as small. The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions.

¹⁰⁶ Nat’l Credit Union Ass’n. (2012). 2012 Year End Statistics for Federally Insured Credit Unions, <https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf>.

¹⁰⁷ Fed. Depository Ins. Corp. (2018). Statistics on Depository Institutions - Compare Banks. Available at: <https://www5.fdic.gov/SDI/index.asp>. Data are from 3/31/18. Data is from 3/11/2018 for employment, and data is from 6/30/2017 for the share of firms and establishments that are “small”.

¹⁰⁸ U.S. Dep’t of Agric. (2014). 2012 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

¹⁰⁹ Hogue, C. (2012). Government Organization Summary Report: 2012. Available at: http://www2.census.gov/govs/cog/g12_org.pdf.

¹¹⁰ The SUSB defines employment as of the week of March 12th of the particular year for which it is published.

D. Costs for Small Entities Affected by the Proposed Rule

Table 2 presents the estimated number of small entities affected by the proposed rule.

Based on the methodology described above, the Department found that 5.9 million of the 6.1 million firms (99 percent) and 6.3 million of the 7.8 million establishments (81 percent) qualify as small by SBA standards. As discussed in Section V.B, these do not exclude entities that currently do not have joint employees, as those will still need to familiarize themselves with the text of the new rule. Moreover, we assume that the cost structure of regulatory familiarization will not differ between small and large entities (i.e., small entities will need the same amount of time for review and will assign the same type of specialist to the task).

Table 2: Regulatory Familiarization Costs for Small Entities, Average by Firm and Establishment (\$1000s)

NAICS Sector	By Firm			By Establishment		
	Firms	Perc. of Total	Cost per Firm [a]	Estab-lishments	Perc. of Total	Cost per Estab [a]
Agric./Forestry/Fishing/Hunting	18,307	83.9%	\$53	18,930	83.8%	\$53
Mining/Quarrying/Oil & Gas Extraction	19,625	96.6%	\$53	21,974	80.7%	\$53
Utilities	5,487	93.1%	\$53	7,762	42.7%	\$53
Construction	673,521	98.6%	\$53	676,913	97.2%	\$53
Manufacturing	241,932	96.8%	\$53	264,112	90.6%	\$53
Wholesale Trade	292,615	96.5%	\$53	328,327	79.6%	\$53
Retail Trade	636,069	97.7%	\$53	688,835	64.4%	\$53
Transportation & Warehousing	174,523	96.2%	\$53	183,810	79.6%	\$53
Information	73,288	96.7%	\$53	83,559	57.1%	\$53
Finance and Insurance	229,002	96.2%	\$53	269,991	56.6%	\$53
Real Estate & Rental & Leasing	293,693	97.9%	\$53	310,740	79.6%	\$53
Prof., Scientific, & Technical Services	790,834	98.1%	\$53	819,115	90.7%	\$53
Management of Companies & Ent.	18,004	66.2%	\$53	34,124	61.6%	\$53
Administrative & Support Services	332,072	97.4%	\$53	347,167	84.8%	\$53
Educational Services	87,566	95.4%	\$53	90,559	87.6%	\$53

Health Care & Social Assistance	638,699	96.5%	\$53	726,524	81.6%	\$53
Arts, Entertainment, & Recreation	123,530	97.8%	\$53	126,281	92.0%	\$53
Accommodation & Food Services	520,690	98.7%	\$53	556,588	79.1%	\$53
Other Services	681,696	98.7%	\$53	700,496	92.9%	\$53
State & Local Governments [b]	72,844	80.8%	\$53	72,844	80.8%	\$53
All Industries	5,923,996	97.2%	\$53	6,328,653	80.8%	\$53
Average annualized costs, 7 percent discount rate						
Over 10 years			\$7			\$7
In perpetuity			\$3			\$3
Average annualized costs, 3 percent discount rate						
Over 10 years			\$6			\$6
In perpetuity			\$2			\$2

[a] Each entity is expected to allocate one hour of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The unloaded hourly rate for this occupation is \$32.29, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is \$52.63.

[b] Government entities are not classified as firms or establishments; therefore, we use the total number of entities for both calculations.

The Department estimates that in Year 1, small entities will incur a minimum of approximately \$312 million in total regulatory familiarization costs, and a maximum of approximately \$333 million. Professional, Scientific, and Technical Services is the industry that will incur the highest total costs (\$41.6 million to \$43.1 million).

Additionally, the Department estimated average annualized costs to small entities of this rule over 10 years and in perpetuity. Over 10 years, this rule will have an average annual cost of \$41.5 million to \$44.3 million, calculated at a 7 percent discount rate (\$35.5 million to \$37.9 million calculated at a 3 percent discount rate). In perpetuity, this rule will have an average annual cost of \$20.4 million to \$21.8 million, calculated at a 7 percent discount rate (\$9.1 million to \$9.7 million calculated at a 3 percent discount rate).

Based on the analysis above, the Department does not expect that small entities will incur large individual costs as a result of this rule. Even though all entities will incur familiarization costs, these costs will be relatively small on a per-entity basis (an average of \$52.63 per entity). Furthermore, no costs will be incurred past the first year of the promulgation of this rule. As a share of revenues, costs do not exceed 0.003 percent on average for all industries (Table 3). The industry where costs are the highest percent of revenues is Management of Companies and Enterprises where costs range from a lower bound of 0.015 percent to an upper bound of 0.028 percent of revenues. Additionally, the Department calculated the revenue per firm/establishment for entities with 0 to 4 employees, as per SUSB data. The industry that has had the smallest revenue per entity is Accommodation and Food Services (NAICS 72)—\$221,600 per firm and \$221,100 per establishment, in 2017 dollars. In both cases, the per-entity cost (\$53) is approximately 0.024% of revenue. Accordingly, the Department does not expect that the proposed rule would have a significant economic cost impact on a substantial number of small entities.

Table 3: Total Regulatory Familiarization Costs for Small Entities, As Share of Revenues

NAICS Sector	Total Revenue for Small Entities (Millions) [a]	Cost as Percent of Revenue [c]	
		By Firms	By Establishments
Agriculture, Forestry, Fishing & Hunting	\$21,978	0.004%	0.005%
Mining, Quarrying, & Oil/Gas Extraction	\$183,236	0.001%	0.001%
Utilities	\$124,928	0.000%	0.000%
Construction	\$754,055	0.005%	0.005%
Manufacturing	\$1,836,516	0.001%	0.001%
Wholesale Trade	\$2,584,835	0.001%	0.001%
Retail Trade	\$1,419,180	0.002%	0.003%
Transportation & Warehousing	\$235,647	0.004%	0.004%
Information	\$198,347	0.002%	0.002%
Finance & Insurance	\$260,753	0.005%	0.005%

Real Estate & Rental & Leasing	\$195,889	0.008%	0.008%
Professional, Scientific, & Technical Services	\$636,424	0.007%	0.007%
Management of Companies & Enterprises	\$6,492	0.015%	0.028%
Administrative & Support Services	\$259,794	0.007%	0.007%
Educational Services	\$79,796	0.006%	0.006%
Health Care & Social Assistance	\$628,701	0.005%	0.006%
Arts, Entertainment, & Recreation	\$92,957	0.007%	0.007%
Accommodation & Food Services	\$367,996	0.007%	0.008%
Other Services (except Public Administration)	\$368,806	0.010%	0.010%
State & Local Governments	[b]	[b]	[b]
All Industries	\$10,256,328	0.003%	0.003%

[a] Inflated to 2017 dollars using the GDP deflator.

[b] Government entities are considered small if the relevant population is less than 50,000.

Government revenue data are not readily available by size of government entity.

[c] Calculated by dividing total revenues per industry by total costs per industry, by firm and by establishment, as shown in Table 2.

E. Analysis of Regulatory Alternatives

In developing this NPRM, the Department considered proposing alternative tests for the first joint employer scenario—where an employee works one set of hours that simultaneously benefits another person. Those alternative tests, such as the Second and Fourth Circuits’ joint employer tests, have more factors than the Department’s proposed test, may have a second step, and rely substantially on the “suffer or permit” language in FLSA section 3(g).¹¹¹ The Department, however, believes that section 3(d), not section 3(g), is the touchstone for joint employer status and that its proposed four-factor balancing test is preferable, in part because it is consistent with section 3(d). The Department’s proposed test is simpler and easier to apply because it has fewer factors and only one step, whereas the alternative tests involve a consideration of additional factors and are therefore more complex and indeterminate.

The Department also considered applying the four-factor balancing test in Bonnette without modification. The Department instead proposes a four-factor test that closely tracks the

¹¹¹ See Zheng, 355 F.3d at 69; Salinas, 848 F.3d at 136.

language of Bonnette with a modification to the first factor. Whereas the Bonnette test considers whether the potential joint employer had the “power” to hire and fire, the Department proposes a test that considers whether the employer actually exercised the power to hire and fire. The Department believes that this modification will help ensure that its joint employer test is fully consistent with the text of section 3(d), which requires a potential joint employer to be “acting ... in relation to an employee.”¹¹² By rooting the joint employer standard in the text of the statute, the Department believes that its proposal could provide workers and organizations with more clarity in determining who is a joint employer under the Act, thereby promoting innovation and certainty in businesses relationships.

VIII. Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (UMRA)¹¹³ requires agencies to prepare a written statement for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$161 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least one year. This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

¹¹² 29 U.S.C. 203(d).

¹¹³ See 2 U.S.C. 1501.

A. Authorizing Legislation

This proposed rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, et seq.

B. Assessment of Quantified¹¹⁴ Costs and Benefits

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than \$161 million in at least one year, but the rule will not result in increased expenditures by state, local, and tribal governments, in the aggregate, of \$161 million or more in any one year.

Based on the cost analysis from this proposed rule, the Department determined that the proposed rule will result in Year 1 total costs for state and local governments totaling \$4.7 million, all of them incurred for regulatory familiarization (see Table 1). There will be no additional costs incurred in subsequent years.

The Department determined that the proposed rule will result in Year 1 total costs for the private sector between \$315.9 million and \$407.4 million, all of them incurred for regulatory familiarization. There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.¹¹⁵ However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of \$48.5 billion to \$97.0 billion (using 2017 GDP). A regulation with smaller aggregate effect is not likely to have a

¹¹⁴ Only the rule familiarization cost is quantified, but the Department believes that there are potential cost savings that it could not quantify due to lack of data at this time.

¹¹⁵ See 2 U.S.C. 1532(a)(4).

measurable effect in macroeconomic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's PRIA estimates that the total costs of the proposed rule will be between \$320.7 million and \$412.1 million (see Table 1). All costs will occur in the first year of the promulgation of this rule, and there will be no additional costs in subsequent years. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

C. Least Burdensome Option Explained

This Department believes that it has chosen the least burdensome but still cost-effective methodology to revise its rule for determining joint employer status under the FLSA consistent with the Department's statutory obligation. Although the proposed regulation would impose costs for regulatory familiarization, the Department believes that its proposal would reduce the overall burden on organizations by simplifying the standard for determining joint employer status. The Department believes that, after familiarization, this rule may reduce the time spent by organizations to determine whether they are joint employers. Additionally, revising the Department's guidance to provide more clarity could promote innovation and certainty in business relationships.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

XI. Proposed Regulatory Changes

For the reasons set forth in the preamble, the Department proposes to amend part 791 of Title 29 of the Code of Federal Regulations as follows:

1. Revise the title of part 791 to read as follows:

Part 791—Joint Employer Status under the Fair Labor Standards Act

2. Revise the Authority section for part 791 to read as follows:

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201–219; Reorganization Plan No. 6 of 1950; Secretary’s Order 01-2014 (Dec. 19, 2014), 79 FR 77527.

3. Revise § 791.1 to read as follows:

§ 791.1 Introductory Statement.

This part contains the Department of Labor’s general interpretations of the text governing joint employer status under the Fair Labor Standards Act.¹¹⁶ The Administrator of the Wage and Hour Division intends that these interpretations will serve as “a practical guide to employers and employees as to how [the Wage and Hour Division] will seek to apply [the Act].” Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944). The Administrator believes that they are correct interpretations of the law and will accordingly use them to guide the performance of his or her duties under the Act until he or she concludes upon reexamination that they are incorrect or is otherwise directed by an authoritative judicial decision. To the extent that prior administrative

¹¹⁶ 29 U.S.C. 201–219.

rulings, interpretations, practices, or enforcement policies relating to joint employer status under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. These interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, so long as the Department does not modify, amend, or rescind them, and judicial authority does not determine that they are incorrect.

4. Amend § 791.2 to revise its title, add an introductory sentence, replace subsections (a) and (b), and add subsections (c), (d), (e), (f), and (g) so that it reads as follows:

§ 791.2 Determining Joint Employer Status under the FLSA.

There are two joint employer scenarios under the FLSA.

(a) In the first joint employer scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, see 29 U.S.C. 203(e)(1), (g), but another person simultaneously benefits from that work. The other person is the employee’s joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. See 29 U.S.C. 203(d). In this situation, the following four factors are relevant to the determination. Those four factors are whether the other person:

- (1) hires or fires the employee;
- (2) supervises and controls the employee’s work schedule or conditions of employment;
- (3) determines the employee’s rate and method of payment; and
- (4) maintains the employee’s employment records.

The potential joint employer must actually exercise—directly or indirectly—one or more of these indicia of control to be jointly liable under the Act. See 29 U.S.C. 203(d). The potential joint employer’s ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status. No single factor is dispositive in determining the

economic reality of the potential joint employer's status under the Act. Whether a person is a joint employer under the Act will depend on all the facts in a particular case, and the appropriate weight to give each factor will vary depending on the circumstances.

(b) 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; or
- (2) otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

(c) Whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the Act. Accordingly, to determine joint employer status, no factors should be used to assess economic dependence. Examples of factors that are not relevant because they assess economic dependence include, but are not limited to, whether the employee:

(1) is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

(2) has the opportunity for profit or loss based on his or her managerial skill; and

(3) invests in equipment or materials required for work or the employment of helpers.

(d) (1) A joint employer may be an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.¹¹⁷

(2) The potential joint employer's business model—for example, operating as a franchisor—does not make joint employer status more or less likely under the Act.

¹¹⁷ See 29 U.S.C. 203(a), (d).

(3) The potential joint employer's contractual agreements with the employer requiring the employer to, for example, set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, or otherwise comply with the law, do not make joint employer status more or less likely under the Act.

(4) The potential joint employer's practice of providing a sample employee handbook, or other forms, to the employer; allowing the employer to operate a business on its premises (including "store within a store" arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer; jointly participating in an apprenticeship program with the employer; or any other similar business practice, does not make joint employer status more or less likely under the Act.

(e) In the second joint employer scenario, one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek. The jobs and the hours worked for each employer are separate, but if the employers are joint employers, both employers are jointly and severally liable for all of the hours the employee worked for them in the workweek.

In this second scenario, if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its own responsibilities under the Act. However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act. The employers will generally be sufficiently associated if: (1) there is an arrangement between them to share the employee's

services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. Such a determination depends on all of the facts and circumstances. Certain business relationships, for example, which have little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers.

(f) For each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the Act, including the overtime provisions, for all of the hours worked by the employee in that workweek. In discharging this joint obligation in a particular workweek, the employer and joint employers may take credit toward minimum wage and overtime requirements for all payments made to the employee by the employer and any joint employers.

(g) The following illustrative examples demonstrate the application of the principles described in part 791.2(a)–(f) under the facts presented and are limited to substantially similar factual situations:

(1) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

Application: Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

Application: Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3) **Example:** An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement with the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or

individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

Application: Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment does not demonstrate that it is a joint employer.

(4) **Example:** A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions. Is the country club a joint employer of the landscaping employees?

Application: Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

(5) **Example:** A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

Application: Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

(6) **Example:** An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

Application: Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly,

to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7) **Example:** Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

Application: Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(8) **Example:** Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and

method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

Application: Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

(9) **Example:** A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

Application: Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the

repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

5. Add the following as a new § 791.3:

§ 791.3 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from part 791 and shall not affect the remainder thereof.

List of Subjects in 29 CFR Part 791

Wages

Signed at Washington, D.C. this 29th day of March, 2019

Keith E. Sonderling,

Acting Administrator, Wage and Hour Division